Bail Justices in Victoria: Perceptions and Experiences

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Abstract

On 20 January 2017 a man drove his car into a crowded pedestrian mall in Bourke St, Melbourne, Victoria, killing six people and injuring dozens more. The alleged perpetrator had been granted bail by a bail justice only hours earlier. In the wake of this violent event the state government announced a review of the bail justice role. Historically, bail justices have been criticised for being reluctant to grant bail, yet there is relatively little written or researched on bail justices from their perspective. This article is derived from empirical research conducted on the bail support system in Victoria from 2010–14, which included interviews with bail justices. The research provided bail justices with an opportunity to discuss their experiences and respond to criticisms of their role and raised issues in relation to diversity, training, decision-making, integrity and specific procedural issues. It concludes that continuing with the role has benefit to Victorians, particularly vulnerable defendants by offering a therapeutic, pastoral care approach, although issues raised in this article need addressing to maintain the integrity of the role.

Keywords: bail – bail justice – decision-making – Victoria – Australia

Introduction

A bail justice, a role exclusive to Victoria, involves a volunteer lay person who is empowered to grant or refuse bail. The role has been criticised by key players in the criminal justice system, such as police, defence lawyers, and community organisations (Victorian Law Reform Commission ('VLRC') 2007). Key criticisms include doubts about their capacity and suitability to make decisions, a reputation for refusing bail, concerns over integrity and independence of decision-making, inconsistent procedural issues and a lack of diversity (VLRC 2007). Some critics had gone as far as to seek the removal of the bail justice role from the bail decision-making process, arguing the role is superfluous and bail justices are merely 'rubberstamping' police decisions (VLRC 2007). Recently, bail justices have come under intense public scrutiny following the grant of bail on non-related matters to a person subsequently charged with causing multiple deaths in Melbourne's Bourke Street Mall in January 2017 (Schipp 2017; Willingham & Mills 2017). Following the events in Bourke Street and the subsequent proposed overhaul of the bail system, the role of bail justices is under

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review (Andrews 2017). Converse to prior criticism, bail justices' leniency in decision-making is now a query of this review.

In April and May 2017, the Hon Paul Coghlan QC delivered advice in two parts from his government-commissioned review of bail in Victoria (Coghlan 2017a, 2017b). The State Government accepted all the recommendations made in the first advice and is conducting a more extensive review prior to responding to the second advice. Notably, Coghlan (2017a) advised that Victoria already had an onerous bail system, that bail justice decisions were uncontroversial and conservative, and recommended that the bail justice role remain, although in a more restricted manner. Subsequently, new legislation was passed in June 2017 with the *Bail Amendment (Stage One) Act 2017* (Vic). From June 2018, both police and bail justices will be restricted from making decisions relating to offences that fall into the 'exceptional circumstances' category, which comprise more serious offences, and specifically murder and treason. The State Government intends to introduce a second raft of changes later in 2017. At the time of writing no further legislative amendments had been introduced.

There is relatively little research on bail justices generally, and minimal qualitative data on their role and decision-making processes. This article presents the findings of research conducted with bail justices prior to the Bourke Street incident. Considering the significance of recent events and the current ongoing review, this article seeks to provide a measured assessment of the role and an understanding of the contribution that bail justices have played in Victoria's bail justice system. The article draws on the experiences and reflections of bail justices themselves, and observations of a small number of a bail justice's decisions. It concludes by presenting some of the benefits and limitations of bail justices that should be considered when reviewing the role.

Who is a bail justice?

The position of bail justice is unique to Victoria (VLRC 2005, p. 37). The bail justice role emerged from the powers allocated to Justices of the Peace, which include the ability to grant bail with or without conditions and remand a person until the next available court date under s 12 of the *Bail Act 1977* (Vic) ('*Bail Act*'). The role is legislated through the *Honorary Justices Act 2014* (Vic) ('*Honorary Justices Act*'). It creates an out-of-sessions court and essentially adds another step in the decision-making process between police and the courts (Sarre, King & Bamford 2006). Bail justices have the power to remand a person into custody until the next working day from the application (*Bail Act* s 12). In the event a person is arrested on a weekend or public holiday, the person can appear before an out-of-sessions court for a hearing, rather than waiting until the court is in session again. In a climate where remand rates have been increasing (Australian Bureau of Statistics 2016; Sentencing Advisory Council of Victoria 2016) alongside the imperative to uphold the principle of remand as a last resort, this additional step in the bail process is designed to reduce short-term remand imprisonment while awaiting a court decision. It may potentially reduce pressure on courts by enabling some people to be bailed rather than needing a court bail hearing (VLRC 2005).

The pool of bail justices is comprised of citizen volunteers who have completed the Bail Justice Training Program (State Government of Victoria 2016). Bail justices have no formal legal qualifications yet are expected to understand and implement complex legislation (VLRC 2007, p. 24). Volunteers must undertake regular refresher courses and extracurricular training to keep updated with any changes in legislation or practice (Department of Justice 2014; State Government of Victoria 2016). The position is voluntary and each bail justice is given on-call shift work, where he or she must be available to attend police stations outside court hours

(Fox & Deltondo 2015; VLRC 2007). Demographically, bail justices are likely to be older males (Coghlan 2017a; VLRC 2005). As of 2017, there were 220 registered bail justices, with more than 80 per cent over the age of 50 and more than three-quarters male (Coghlan 2017a, pp. 81–2). It is not known how many of these 220 are active. A second reading speech from the Honorary Justices Bill indicated that there were approximately 7000 decisions made by bail justices each year (State of Victoria 2014, p. 373).

The bail justice position creates a level of accountability for police bail decision-making and provides a review of decisions before they advance to a court hearing (King, Bamford & Sarre 2009). If a defendant is remanded, or if there is a dispute over the bail conditions imposed, the matter is then brought before a court at the earliest opportunity. At court, the defendant has the opportunity make a new application for bail and the bail justice's decision is reviewed by a magistrate (*Bail Act* s 12). Once the application has been made, the magistrate may find the bail justice decision to remand into custody was appropriate or may release the defendant on bail. The magistrate may apply or alter bail conditions in these instances.

Research overview on bail and bail justices

Despite offering a unique perspective, there has been relatively little research conducted specifically with bail justices. The Criminology Research Council funded a significant study of bail in several Australian states, which canvassed the role of bail justices (Bamford, King & Sarre 1999; King et al. 2009; Sarre et al. 2006) and in the mid-2000s a comprehensive review of the *Bail Act* was undertaken by the VLRC (VLRC 2005, 2007). As part of this process the bail justice role was examined and bail justices participated in qualitative research. Outside of this, the voices of bail justices have remained quiet, despite significant criticism and speculation on the importance of their role (VLRC 2007).

King et al. (2009, p. 30) were positive about the bail justice system in that they saw it added another level of accountability in the process and provided more opportunities to grant bail and more accountability of police decisions. They saw it as promoting a system that 'reflects a culture' of granting bail (Sarre et al. 2006, p. 4). King et al.'s (2009, p. 31) research demonstrated that a bail justice can be useful in questioning police decisions and ensuring police have followed legislative guidelines correctly. Despite these positive findings, the bail justice system has been criticised for many reasons. The VLRC consultation paper (2005) and final report (2007) into the review of the *Bail Act* covered these criticisms and made recommendations.

A key criticism rested with the lack of diversity of bail justices (VLRC 2005). Indeed, the data provided by the VLRC (2005) consultation paper demonstrates that bail justices are overwhelmingly older, white men. In 2005, the Victorian Aboriginal Legal Service called for specific training relating to Indigenous defendants, but at the consultation stage of the 2007 bail review this subject matter was only dealt with in a general context (VLRC 2005, p. 44). Indigenous people are significantly over-represented in remand custody (Australian Bureau of Statistics 2016); therefore, it is particularly important that there are mechanisms in place to address the intersection of disadvantage and bail refusal. There has been an introduction of an Aboriginal Bail Justices training program as part of the Aboriginal Justice Agreement (Auty & Briggs 2004, p. 6). Prior to this there had been no Aboriginal bail justices. Twenty-one Indigenous people undertook the training in the first two intakes. However, the VLRC consultation paper (2005, p. 42) noted that, because of Victoria's small Indigenous community, an Indigenous bail justice's impartiality might be compromised.

The final report of the VLRC (2007) presents heavy criticism of the role of bail justices and states they have a reputation for refusing bail at a higher rate than magistrates. There was a perception, particularly among defence counsel, that they do not grant bail (VLRC 2005, p. 39). Data provided in the VLRC consultation paper (2005, p. 40) indicates that bail justices refuse bail in more than 80 per cent of adult cases and almost 70 per cent of Children's Court cases. The VLRC (2007) report also noted a drop in the granting of bail on the first application by bail justices during this time, from 41.6 per cent to 16.13 per cent. In interviews with bail justices it was found that many erred on the side of refusing bail in the knowledge that the applicant would be brought before the court (VLRC 2005, p. 40). This risk-averse approach was corroborated by Richards & Renshaw's research on young people, bail and remand (2013, p. 72). Data collated by the VLRC over five years indicated that in almost 35 per cent of adult applications, and 45 per cent of Children's Court bail applications, magistrates make alternate decisions to bail justices (VLRC 2005, pp. 47–8). More recently, the Coghlan (2017a, p. 21) review found that bail justices granted bail in less than 15 per cent of cases.

Bail justice decision-making was further criticised by Richards and Renshaw (2013, pp. 33, 58, 70), whose Australia-wide study found that bail justices were influenced by 'punitive community views', and that there was disparity in decisions made by bail justices and those made by magistrates. This is an interesting finding and may be understood in conjunction with Booth and Townsley's (2009) finding that there is concern from victims of crime that applicants may be released on bail. This may lead to populist opinions that are negative towards the release of applicants on bail (Quilter & Brown 2014).

Participants in the bail review also voiced concerns over procedural issues (VLRC 2005, p. 46). There is no set process for bail justices and in effect they can make up their own way of running an application. Guidelines at the time of consultation did not include prompts to check on the welfare of the applicant, e.g. the presence of suicide risk factors, evidence of drug or alcohol intoxication (VLRC 2007, p. 95). It was recommended that bail justices have access to the Magistrates' Court's custody management check list. The recommendations also note that there should be guidelines in place for bail justices to report potential police mistreatment of an applicant.

The VLRC consultation also revealed that submissions from community organisations, community consultations and defence lawyers raised concerns that bail justices' decision-making may be swayed by police, highlighting that integrity and independence is an issue (VLRC 2005). The issue of open justice was also addressed by the VLRC report (2007, p. 97), which favoured access to out-of-sessions hearings but recognised that it might not always be possible due to the applicant's demeanour or the layout of the police station. This was not considered a significant issue by the VLRC (2007) because remanded applicants are seen in court within a relatively short timeframe.

The 2011 amendments to the *Bail Act* addressed some of these criticisms, including further clarification on the role of bail justices. This was a result of concerns highlighted by the VLRC that 95 per cent of bail decisions were made by lay people and police rather than trained legal practitioners (Bamford et al. 1999; VLRC 2007). McDonnell and Farrell (2012) advised that the new 'framework for bail justice system' was updated on 1 January 2011 by amendments to the legislation. Changes stemmed from the VLRC (2007) report to ensure better efficiency and accountability of the bail justice system (VLRC 2007, p. 8). The VLRC (2007) recommendations addressed many of the above criticisms and suggested additional training and access to further support should be provided to strengthen confidence in bail justice decision-making. Indeed, bail justices themselves revealed during the VLRC consultation

process that they felt they needed more training, particularly in relation to issues of drug and alcohol use, homelessness and cultural diversity (2007, p. 88).

Therapeutic additions to the range of conditions applied to bail in Victoria have changed the landscape of magistrates' bail decision-making in the last two decades. These therapeutic bail conditions are recognised as part of the wave of therapeutic initiatives implemented in justice systems globally under the banner of therapeutic jurisprudence (Freiberg 2003; Wexler 2013).

The therapeutic conditions include the implementation of bail support programs in the Magistrates' Court of Victoria. These programs, such as the Court Integrated Services Programme ('CISP') operating in Melbourne, Sunshine and Morwell and the CREDIT Bail Support Programme established at eight other locations (Magistrates Court of Victoria 2015), provide referral and a case management support pre-trial to mitigate a defendant's risk, such as drug or alcohol use, that may otherwise have resulted in the defendant being remanded. Therapeutic bail conditions may be set by the police or magistrates to address perceived needs of the defendant, in addition to the traditional collection of conditions, such as surrendering a passport or regular reporting to a police station. These conditions range from ordering a defendant to see a doctor or counsellor to arranging long-term intensive rehabilitation programs. The 2013 changes to the *Bail Act* included the addition of 'attendance and participation in a bail support service' (s 5(2A)(g)) that formalised this process in legislation. While police and magistrates use these therapeutic conditions, it is not known if bail justices are aware of these services, or if they consider them when deciding bail applications. This research explores this, as well as the experiences of bail justices.

Methodology

This article is derived from data collected as part of a three-year study into bail support programs in Victoria. Data was collected during 2011–12. The research involved observation of 117 bail hearings, including observations of out-of-sessions hearings with a bail justice (n=4) and interviews with key players in the bail/remand process (n=34). The interview participants (n=34) consisted of defence lawyers, magistrates and judiciary, and bail justices (n=4). Three of the bail justices participated in a group interview. Ethics approval was obtained through Monash University Human Research Ethics Committee. The scope of the research was limited to Victorian bail support programs. To ensure the privacy and confidentiality of the research participants, each person was assigned a pseudonym. Pseudonyms were assigned based on the role the person played in the bail support process followed by a number representing the order in which they were interviewed: for example, 'Bail Justice 1'. The data was analysed through Nvivo software and coded by thematic analysis (Sandelowski 2000).

This article is based on a subset of the data collected through the wider study: the four interviews with bail justices and the four out-of-sessions hearings. Although data collection occurred in 2011–14, the findings are of use given the current review of bail justices and recommendations made by the Coghlan review to the State Government (Coghlan 2017a, 2017b). The small sample size is noted and the study does not claim to make general representations on the role of bail justices. However, the input from these interview participants coupled with the out-of-sessions observations still provides a valuable perspective from the inside (Crouch & McKenzie 2006).

Analysis

Prior to the Bourke Street incident, one of the more significant criticisms made against bail justices was their reputation for denying bail (VLRC 2007). Although this argument was

turned around after the Bourke Street incident, with implications that leniency was a concern, the Coghlan (2017a) review supports prior evidence that indicates bail justices are conservative in their decision-making. Other criticisms detailed above essentially relate back to this overarching criticism of bail justices' decision-making, bringing into question whether their role is necessary or relevant. First, this analysis will discuss the way the bail justices addressed their decision-making. Next it will examine some of the issues raised by the bail justices that address these criticisms, including diversity, training, therapeutic bail conditions, integrity and independence. This discussion demonstrates that a deeper understanding of the bail justice role may alleviate some concerns and shows pathways for improvement of the existing system, rather than abolishing the system altogether.

Bail justices reflect on decision-making

The VLRC consultation (2005) revealed that bail justices are criticised for being conservative in their decision-making and as such have a reputation for denying bail. Bail Justice 3 indicated that not only are they aware of this reputation but they are made accountable for their decision-making and feel pressure to do so, 'mind you we get beaten over the head if it is seen that we are remanding too much'. As bail justices are making decisions where police have already refused bail (VLRC 2005, p. 39), it is arguable that they are only seeing applications that are high risk. The applications for which police have denied bail naturally involve applicants who will have less chance of being granting bail. Bail Justice 3 corroborated this, saying, 'The police have bailed the easy ones.' Bail Justice 4 was surprised by how many applications he saw where he was not able to grant bail:

> I was under the impression when I first started that there would be an equal amount (of) bails and remands. And I found increasingly in the last 12 months that 90% of them are remands. There is only a small percentage of bail, I looked at every bail option possible under the sun to grant on bail.

There was a sense of gravity for their role and their comments did not indicate an inappropriate desire to remand applicants. Bail Justice 2 commented, 'The reality of it is it doesn't matter whether it is one minute or one day or 100 years, taking someone's liberty away is the most serious thing that you can do in our society,' He went on to acknowledge his awareness of the potential for bias in decision-making, stressing the importance of knowledge and training to be able to overcome bias, saying 'until you understand the police and the various agencies it is too easy to have a one-sided view of the system'. Here, the context of the situation is important, implying that this bail justice may have been harsher in his decision making until he became aware of the facts. This contextual decision-making is redolent of prior research that demonstrated that context does impact judicial decision-making (Doerner & Demuth 2012; Kim, Cano, Kim &Spohn 2014; Leiber & Jamieson 1995).

Bail Justice 1 demonstrated his vested interest in applicants to whom he has denied bail by attending court to see the person to whom he had denied bail appear before the magistrate. The following comment indicates he also believes that magistrates appear to value the bail justice stage in the process, as he has seen them draw on the notes he made during the out of session hearing at the court hearing: 'Sometimes I even go into court the next day out of concern for that person and their family. And I listen to how the magistrate deals with it and every time I have done that, the magistrate had taken my notes and dealt with it in a very clever way.'

This comment illustrates his concern for the applicant beyond merely 'rubberstamping' a police decision. While the applicant may be denied bail, this bail justice is still invested in the applicant's wellbeing. This suggests that the bail justice role is more than just deciding on bail but provides evidence for a pastoral care aspect to the role. When looking at this pastoral care

aspect in conjunction with the views of Bail Justice 2 on the gravity of the decisions facing bail justices, and the fact that decisions are made in cases where police bail has already been refused, it is apparent that for these bail justices the decision to remand a person is not taken lightly and therefore their reputation for refusing bail may be oversimplified.

In all four of the out-of-sessions hearings observed as part of this research the applicants were refused bail. In case 114, the bail justice was not able to grant bail because the applicant had an arrest warrant out and only a magistrate could grant bail. However, in the three other cases the bail justice did examine avenues for bail but was not convinced in any of these cases that the risks could be minimised through the granting of bail. In case 115 the application took almost two hours to complete because the applicant was under 18 years of age. The bail justice ensured that a representative from Department of Justice was there to assist and also looked at overnight placement in a youth bail hostel as an option before deciding to deny bail. This indicates that the bail justice did not merely rubberstamp the police decision and actively try to find a means to bail the applicant while addressing the presenting multiple risk factors.

Diversity: Am I the token Sheila?

The issue of gender diversity became immediately apparent during the group interview. The only female bail justice at the interview arrived and immediately said, 'Am I the token Sheila?' (Bail Justice 3). This sparked a conversation about gender diversity, and lack thereof, among bail justices. Bail Justice 2 noted that there has always been significant under-representation of women as bail justices. Bail Justice 3 countered that, although there had been efforts to increase recruitment of women, their ability to make themselves available out of hours was impractical for some: 'The ones with young families tend to find it difficult, which is fair enough.'

The average age of bail justices is much higher than the general population. Many retirees undertake this work; however, the Department of Justice has a mandatory retirement age of 70. Bail Justice 1 felt strongly about this: 'I think it is disappointing that we have lost so many very good bail justices because they have reached retirement age and then some considerable time after a lot of them retired they were asked to come back.' Although a mandatory retirement age exists, because of the large proportion of retirees among the bail justice pool, retirements may lead to short staffing and result in recalling older people, making the 70 retirement age impractical as the Department of Justice appears unable to attract younger people to the role.

Age and life experience was also discussed as an important part of the bail justice role. Bail Justice 1 believed that perhaps younger people might not be appropriate for this sort of decision-making: 'The Department has made the general comment that the demographics of bail justices should be the same as in the public. So in other words, if your average age is 23 or something we should have 23 year old [bail justices]. It's not a kid's game.'

It is apparent from the comments of these bail justices and the existing data that many are older, primarily retired, men. While a lack of diversity may have been signalled as a problem for the bail justice system, the comments presented here indicate that the role itself may be impractical or unappealing to younger people in the workforce or those caring for young families. The call to contribute to the community by being available at antisocial hours, unpaid and highly criticised may not appeal to many people. There may only be a small pool of people who have the availability and inclination to undertake this sort of work. Hence, efforts to increase diversity may be limited by these barriers. In reviewing the continuation of the role, there should be a focus on how a broad range of people can be supported to do this sort of work.

The bail justices demonstrated their awareness of the Aboriginal Bail Justice program and also advised that there were opportunities to hear from Indigenous people on relevant issues as part of the ad hoc training programs run by the Department of Justice:

> We have a number of Aboriginal bail justices who are trained under a push from this association to make the system more representative. Or have someone to address us on some of the major cultural awareness parts that we need to take into consideration when dealing with Aboriginal accused (Bail Justice 2).

However, the scope of the discussion was limited to this brief acknowledgement. Consideration of the outcomes of the Aboriginal Bail Justice training program and cultural competency of bail justices should be a priority given the significant proportion of Indigenous people being refused bail in comparison to non-Indigenous people (Australian Bureau of Statistics 2016; Denning-Cotter 2008).

Training

This research found that once bail justices had completed their initial training, further training was piecemeal and inconsistent. The VLRC (2007) recommended that bail justices be provided with further training and support, echoed in submissions to the Coghlan Review (2017a). The bail justices discussed the training they had gone through to become a bail justice and also the ongoing training they received to ensure they were updated. Bail Justice 1 believed that bail justices were well trained in the core elements of the role: 'They [magistrates and judges conducting training with bail justices] actually admit that their knowledge of the *Bail Act* is minimal compared to many of the bail justices.' In addition to initial training, support is offered to bail justices through an after-hours phone facility. However, this facility was not always helpful: 'There is the after-hours number with the register that it is hit or miss whether they know the answer. It is the second time I had to use it the other night on some technicalities and he didn't know the answer' (Bail Justice 4).

The participants' comments indicated that potentially not all bail justices accessed all the training on offer. Apart from the initial training undertaken prior to commencing as a bail justice, the participants advised further training was voluntary and available on an ad hoc basis, meaning that not all bail justices received the same training and updates. The Royal Victorian Association of Honorary Justices ('RVAHJ') provides ancillary training on special issues, such as young people, Indigenous culture, and new initiatives by the Department of Justice. Yet not all bail justices are members of the RVAHJ, and those who are do not necessarily attend additional training. From the participants' comments it appears there is a core group of bail justices who regularly engaged with the training, and each other, contrary to some who appeared to operate in silos. The bail justices interviewed believed that those who did not engage with these training sessions missed out on informal support networks and that they were not necessarily across the latest developments.

The participants believed that access to other bail justices through training sessions addressed feelings of isolation and invisibility. At times they felt underappreciated and forgotten, citing exclusion from briefings on new policies and programs:

> Bail Justice 3: 'Absolutely, we are often forgotten so, aren't we?'
>
> Bail Justice 4: 'Don't get me started.'
>
> Bail Justice 2: 'We are forgotten because we are the people who turn up.'

Bail Justice 2's comment here illustrates a current of frustration that ran throughout the interviews. The participants felt that being a bail justice requires commitment and dedication

that is not recognised. Being forgotten in briefings on new policies and programs is seen as just another measure of the general underappreciation for the role.

While the bail justices did feel that they were 'operating in vacuum' (Bail Justice 4), they believed more opportunities to undertake training and engage with others in the bail system, such as magistrates and lawyers, would address this feeling of being left out. Bail Justice 2 thought there would be particular benefit to increased opportunities to talk to magistrates as other decision-makers, to see how they would tackle difficult decisions or what conditions they would use to target particular risks: 'So it's just a matter of if you talk to those people you get to know about it and what is proper and what isn't, what does or doesn't work.'

In 2014, the *Honorary Justices Act* legislated the training requirements for bail justices, including some mandatory ongoing training. Given these participants' concerns about training, evaluating the impact of these legislative provisions should be central to review of the role. Given the potential for providing pastoral care, ongoing training should focus on these aspects, including cultural competency and therapeutic initiatives.

Therapeutic bail conditions

The participants were asked about their use of therapeutic conditions such as attendance at bail support services like CREDIT and CISP. They displayed little-to-no knowledge of bail support services and their operation within the bail system. Those who were aware of these services did not believe they were able to consider them in bail decisions.

Bail Justices 2 and 3 expressed a desire to draw upon these services. They believed they were often criticised for making harsher decisions than magistrates and referenced their reputation for never granting bail, which is mirrored in bail literature (Richards & Renshaw 2013; VLRC 2007). Bail refusal was also evident during the four observations of out-of-session court hearings that were conducted for this research. In these cases (114, 115, 116 and 117), the bail justice, while looking at all options available to him to grant bail, did not believe that the risks presented by the applicants could be addressed and thus was reluctant to grant bail. He did not grant bail in any of the cases witnessed. In case 115, where a young person was remanded, the bail justice had tried to find more suitable housing to alleviate his concerns that the applicant might offend on bail, while negating the need to remand him; however, the Central After Hours Assessment and Bail Placement Service ('CAHABPS') was unable to provide a bed for the night and so the applicant was remanded. In cases 116 and 117 the applicants had histories of drug use. In Case 117 the police informant believed the applicant was under the influence of drugs but was not part of a drug program. The bail justice was reluctant to grant bail but in the absence of a means to deal with the intoxication and strength of evidence against the applicant he was denied bail. This may have been a situation where a bail justice could have referred the applicant to a drug program.

Initially, during the group discussion, two of the bail justices were dubious about whether they would be able to make decisions about a person's needs and appropriateness of services; however, after discussing what services and referrals were available they did believe that there was potential use for them. Bail Justice 3 believed that enabling them to draw on services would be positive: 'I would think that would make the whole [system], not just the CISP programme there are many others that would benefit to streamline across-the-board.' Bail Justice 4 saw the potential usefulness of bail support service conditions but was cautious about whether it was practical. He believed that it would only work if all bail justices were kept up to date with service information and completed adequate training.

Young people who experience homelessness and inappropriate housing are often refused bail (Boyle 2009; Stubbs 2010). Support services, such as the CAHABPS, may provide advice

to bail justices on bail support for young people making bail applications, including housing assistance (Department of Human Services 2013). The bail justices had mixed opinions as to how useful this service was to them. Bail Justice 2 was negative towards the useful impact of this service, but Bail Justices 3 and 4 remained optimistic about it. In Case 115, mentioned above, CAHABPS were present at the 15-year-old boy's application but were unable to assist with providing appropriate accommodation. When refusing bail, the bail justice asked, 'What is the guarantee that he won't go out tonight and commit further offending?' In his opinion, the ability to draw on CAHABPS was not particularly useful as they often could not provide the assistance needed to remove the need to refuse bail.

This discussion reveals another potential benefit of the bail justice role. The use of therapeutic bail conditions may divert more people away from remand imprisonment by reducing bail refusal rates. However, arguably, only a very small proportion of bail decisions may have been influenced by the availability of support services. Yet if there are some people who may be diverted from remand imprisonment through these therapeutic mechanisms then not only does remand imprisonment reduce, but it also removes the need for that person to attend court. This further alleviates the burden on the courts.

The addition of s 5(2A)(g) to the *Bail Act* in 2013 implies that bail justices are able to draw on bail support services as a bail condition. These interviews took place before this addition; however, given the concerns raised by the participants, coupled with their comments on training, further review of the role should consider whether bail justices have used bail support service attendance conditions since that time and what training they have received relating to these services. The increase in remand rates in recent years and the high bail refusal rates of bail justices indicate that ability to draw on therapeutic conditions may not be diverting people from remand imprisonment.

Integrity and independence

The bail justices made some interesting observations on the issue of their integrity and independence of their decision-making. It was clear from the interviews that the bail justices felt they added a valuable step in the bail process by acting as independent observers of the police treatment of the applicant. Bail Justice 3 said:

> I figure it is a really great system in that, I'm not putting the police down, but it kind of keeps the police honest. And that person in custody has someone other than the police make a decision about their bail. And I think they are often quite happy to see someone other than the police and that you are an independent person.

Bail Justice 2 added: '[T]he system itself has failings but it is actually overall a good system. It works to make sure that the police aren't the accuser and the jailer which is the basis of our society'.

While it is commendable that the bail justices exercised a keen awareness of the importance of integrity and independence in their decision-making, it was important to unpack this further by asking how they managed their independence. Bail Justice 1 exercised care in his dealings with the police and illuminated some more dubious practices that had occurred in the past:

> It was something that we were told to be very careful about. Instructions are that we don't have deep and meaningful conversations with the police before the hearing ... So there are some bail justices that open invitations and they were getting picked up by the police and brought to the court. These days that is regarded as inappropriate. And that is one of the reasons for it. So they don't, if the informant comes and picks you up in a car and takes you to the court then he chews your ear about how bad this person is or whatever. But no-one ever tries that on me. I don't know about anyone else. But I suspect it is not an issue.

This bail justice is keenly aware of the problematic nature of becoming too close to the police and, although he implies these practices are relegated to history, it does not mean that this is not still occurring. It would not be appropriate for police and bail justices to appear to be on the same 'side' and it is important that all parties are aware and reminded of the importance of the independence of the bail justice decision.

During the out-of-sessions observations the bail justice reiterated that he did not like to talk to the police before a hearing a case because he did not want to be influenced by the police case as it has not yet been heard in a court. However, in one of the out-of-sessions hearings the bail justice was reluctant to remand the applicant, but was concerned about the risk he posed to the community. In this case he asked the police for more details on the case and the strength of evidence against the applicant. Based on this he did refuse bail. He did stress that this was not common practice for him and that he only took this action once he had exhausted other avenues.

It is clear the bail justices feel they add integrity and accountability to the process and indeed felt that they had achieved this in many cases. Some of the bail justices, such as Bail Justice 1, demonstrated an acute awareness of the importance of their independence. This does counter criticisms that bail justices just do what the police say to some extent.

Despite VLRC (2007, p. 96) recommendations that there should be guidelines in place for bail justices to report potential police mistreatment of an applicant, there is not much information about how bail justices might maintain integrity or the problematic nature of the situation of being an independent decision-maker while in the police station environment, surrounded and observed by police. Bail Justice 3 alluded to the difficulty of this when she said, 'Some interesting things happen in the bail hearing, the way the police stand, whether they are holding the capsicum spray behind you…'

Out-of-sessions bail hearings are supposed to be an open court (except in specific cases where the court would ordinarily be closed such as the Children's Court). The VLRC report did flag that this might be an issue because police stations may not be set up in a way that enables observations by the public or media. While architecturally this may still be an issue, the bail justices did not appear to experience any problems with access to observers. Bail Justice 4 said, 'I have taken a law student with me and I didn't see anything wrong with that as an observer.' Bail Justice 2 had also brought observers in to see the process without obstruction of access: 'I've had a friend in the car and I have been called and I've said to come in. As I said it's an open court.'

As a researcher, I could access out-of-sessions hearings easily once I got an introduction to the bail justices. I accompanied the bail justice and my presence was not questioned. We took care to explain up front who I was and why I was there. In each case we asked permission of the police and the applicant and it was given without hesitation. Each of the hearings was held in a restricted access area of the station in an interview room, but this did not pose a problem in terms of giving me access. Perhaps my status as a researcher legitimised my presence or perhaps being accompanied by a bail justice was enough legitimacy that was needed for those involved. It is not clear whether members of public or the media would have such easy access.

Overall it appears that bail justices are keenly aware of the need to be independent and their role may add a level of accountability to the police treatment of bail applicants. However, there have been less acceptable practices in the past, where police may not have respected the independence of the bail justice, and the bail justice has allowed themselves to become partial to the police point of view. While it is not clear if these practices persist, it is imperative that

they do not occur. All parties should be mindful of this and it should be reinforced frequently. While there was no evidence that police exerted pressure on bail justices, the intimidation of the situation, as alluded to by Bail Justice 3, is something for the police to be educated about. Bail justices should be provided with support and training on how to handle these situations.

Conclusion

Contrary to some criticism, this research finds that the bail justice role is more complex than just 'rubber stamping'. This research provided the opportunity to examine criticisms of the bail justice role from the perspective of bail justices and gave them the chance to contextualise their role. Although the role persists, its long-term future is not guaranteed.

This article finds that the bail justice role has the potential to deliver pastoral care to defendants under police arrest and provides an independent observer to those in police custody. As such, bail justices play a therapeutic role. There is benefit to continuing with bail justices in Victoria.

The bail justices who participated in this research, in line with Sarre et al.'s (2006) research, did believe that they performed an important function in the bail system, particularly by adding accountability and scrutiny of the police role. They were aware of the criticism for bail refusal but did not believe they were overly conservative in their decision-making, instead believing they were unfairly judged as they had the 'hard cases'. Once the new legislative provisions are in force and the bail justice role is restricted to exclude more serious offending, bail justice refusal rates may change, as arguably the cases less likely to result in bail will no longer be part of a bail justices' remit. This will provide a renewed opportunity to assess whether bail justices are overly conservative, by excluding these 'hard cases'. Ongoing monitoring and evaluation will be imperative once the *Bail Amendment (Stage One) Act 2017* (Vic) takes effect.

This article demonstrates that there is value in keeping the bail justice role. Bail justices add a pastoral care role to the process and, as such, practice therapeutic jurisprudence. They have the potential to deliver fair and just outcomes to Victorians, particularly to vulnerable defendants. The ongoing inquiry should consider the issues raised in this discussion when assessing the continuation of the role. In particular, if the role is to continue, then addressing issues of diversity, training, use of bail support service attendance conditions, integrity and independence of bail justices is imperative to improving the role and ensuring its benefit is realised to its maximum potential. As such, the findings presented here are of value to the Victorian Government as it considers the recommendations of the Coghlan Review, and also to other jurisdictions who may look to the Victorian experience when considering their own bail systems.

Legislation

Bail Act 1977 (Vic)

Bail Amendment Act (Stage One) Act 2017 (Vic)

Honorary Justices Act 2014 (Vic)

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