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Looking Behind the Increase in Custodial Remand Populations

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Abstract

Numbers, rates and proportions of those remanded in custody have increased significantly in recent decades across a range of jurisdictions. In Australia they have doubled since the early 1980s, such that close to one in four prisoners is currently unconvicted. Taking NSW as a case study and drawing on the recent New South Wales Law Reform Commission Report on Bail (2012), this article will identify the key drivers of this increase in NSW, predominantly a form of legislative hyperactivity involving constant changes to the *Bail Act 1978* (NSW), changes which remove or restrict the presumption in favour of bail for a wide range of offences. The article will then examine some of the conceptual, cultural and practice shifts underlying the increase. These include: a shift away from a conception of bail as a procedural issue predominantly concerned with securing the attendance of the accused at trial and the integrity of the trial, to the use of bail for crime prevention purposes; the diminishing force of the presumption of innocence; the framing of a false opposition between an individual interest in liberty and a public interest in safety; a shift from determination of the individual case by reference to its own particular circumstances to determination by its classification within pre-set legislative categories of offence types and previous convictions; a double jeopardy effect arising in relation to people with previous convictions for which they have already been punished; and an unacknowledged preventive detention effect arising from the increased emphasis on risk. Many of these conceptual shifts are apparent in the explosion in bail conditions and the KPI-driven policing of bail conditions and consequent rise in revocations, especially in relation to juveniles.

The paper will conclude with a note on the NSW Government's response to the NSW LRC Report in the form of a Bail Bill (2013) and brief speculation as to its likely effects.

Keywords

Bail, remand, presumptions, risk, conditions, compliance, KPIs, revocations.

Introduction

Imprisonment rates across Australian States and Territories have increased significantly, albeit variably, over the last two to three decades, with the lift-off point occurring roughly in the mid 1980s. From 1984 to 2008 the national imprisonment rate rose from 86 per 100,000 population

to 175, an increase of 206% (ABS 2011; Cunneen et al. 2013 forthcoming: ch. 3). This has since fallen to 168 per 100,000 adult population (ABS 2012: 8). Imprisonment rates vary considerably across the jurisdictions, from 825.5 per 100,000 in the Northern Territory (NT) followed by 267.3 in Western Australia (WA), 171.2 in New South Wales (NSW), 158.9 in Queensland (Qld) and 111.7 in Victoria (Vic) (ABS 2012: Table 3.3).

A significant component of the increase in imprisonment rates has been the rise in people remanded in custody. Nationally, as at 30 June 2012, 23.4% of prisoners (6,871 out of 29,381) were remanded in custody: that is, were unconvicted. (ABS 2012: Table 3.1) This figure significantly understates the position as it is based on the traditional snapshot style, 'on one day' prison census figures. If the proportion of remand prisoners was calculated as a percentage of prison receptions (a figure not provided in ABS or other national statistics), then the figure would be far higher. In NSW in 2010, for example, remand prisoners made up 10,342 out of 14,288 prison receptions, or 72.4% of the total (NSW LRC 2012: para. 4.6).

Nationally, the remand rate of unsentenced prisoners per 100,000 of population has doubled from 18.9 in 1998 to 38.8 in 2011 (NSW LRC 2012: Table F.2, 338). There have been increases in remand in custody rates in all jurisdictions over that period as follows: NSW, 22.2 to 49.1; Vic, 12.9 to 19.6; Qld, 18.4 to 33.4; South Australia (SA), 22.8 to 52.1; WA, 21.3 to 46.8; Tasmania (Tas), 8.8 to 21.5; NT, 59.5 to 169 (NSW LRC 2012). Remand imprisonment has increased faster than the sentenced imprisonment rate. In 2012 unsentenced prisoners as a proportion of the total prison population ranged between roughly one fifth and one third across the Australian jurisdictions as follows: NSW, 25.7%; Vic, 20.4%; Qld, 22.3%; SA, 31.3%; WA, 19.6%; Tas, 17.8%; NT, 24.7%; Australian Capital Territory (ACT), 29.1 (ABS 2012: para. 3.1). Juvenile remand rates have also been increasing in recent years, by 17% nationally between 2006-7 and 2009-10 and by 25% in NSW between 2006-7 and 2009-10 (NSW LRC 2012: para. 4.27; see also Richards and Lyneham 2010).

As NSW is the most populous State and has the largest prison population, around one-third the national total, NSW trends have the most significant impact on national figures. In 1970 in NSW, unsentenced prisoners as a proportion of the total prison population comprised 11.5%, increasing to 22.7% by 2010 (NSW LRC 2012: para. 4.3). NSW remand in custody numbers increased from 711 in 1995 to 2502 in 2010 (NSW LRC 2012: Table 4.1). NSW remand rates increased from around 16 to 45 per 100,000 of population between 1994 and 2010 (NSW LRC 2012: Figure 4.3). The percentage of adult Indigenous remandees in NSW increased from 11.5% in 1994 to 26.4% in 2011 and, between 2001 and 2008, the proportion of Indigenous remandees rose 72% (Fitzgerald 2009).

Drivers of remand rates

The above figures show a general but variable increase in unsentenced remand numbers and rates across Australian jurisdictions. Other jurisdictions such as New Zealand and Canada have shown similar increases. In New Zealand the remand population is currently around 20% of the prison population, increasing from 700 persons in 1998 to over 1800 in 2011 (NZ Department of Corrections 2011: 22) In Canada the remand population increased as a rate from 12.6 per 100,000 to 39.1 in 2007 (Webster, Doob and Myers 2009: 80), with half of all provincial prisoners on remand, while the imprisonment rate generally remained stable or decreased. In 2009-2010 adults on remand constituted 58% of the total prison population (Porter and Calverley 2011: 2). Youth on remand also outnumbered those in sentenced custody in 2010 for the third year in a row (Porter and Calverley 2011: 11). By way of contrast, in England and Wales the prison remand population rose in the 1980s, dipped in the early 1990s and has stabilised in the 2000s (Hucklesby 2009: 4-6). Between 1993 and 2011 the remand population was 'relatively stable at around 12-13,000' but began to fall from early 2012 (Ministry of Justice 2013: 19). This is despite the fact that between June 1993 and June 2012 the prison population

in England and Wales 'increased by 41,800 prisoners to over 86,000' (Ministry of Justice 2013: 1).

Researchers tend to emphasise complexity, variation, insufficient research, poor data collection and the difficulty in identifying uniform drivers when attempting to explain increases (or stability) in remand rates. In Canada, Webster et al. (2009) note the significant differences in remand rates across different provinces; the fact that the bail process is taking longer than it did, in part through increased adjournments; the larger proportion of defendants appearing in court from custody; and increasing length of time on remand. While rejecting an 'increased punitiveness' thesis, on the basis that imprisonment rates had remained stable, they argued that 'Canada's growing remand population is largely the product of an increasing culture of risk aversion which is permeating the entire criminal justice system' so that 'decisions are either being continually passed along to someone else or simply delayed by those responsible for them' (Webster et al. 2009: 99).

The leading Australian research on factors influencing bail decision-making noted that the legislative framework in the two jurisdictions in the study (South Australia and Victoria) was broadly similar. The research identified lower remand rates in Victoria as 'associated with enhanced police accountability for bail refusal, improved feedback loops between courts and police, higher transaction costs for custodial remand, and longer bail hearings' (Sarre, King and Bamford 2006: 5). The authors suggested that: 'the key to isolating the critical factors affecting remand in custody trends' lay in 'a focus on, and analyses of, the decisions made by the non-judicial participants in the process, especially the police decision-making and information they bring to the courts' (Sarre, King and Bamford 2006: 6). Later work identified the key to understanding the different patterns as 'recognising the way that the discretion of remand decision-makers is shaped by the legislative, social and organisational contexts in which they operate' (King, Bamford and Sarre 2008: 24-5; 2009 see also Bamford, King and Sarre 1999a, 1999b). The authors suggested 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 the remand decision-makers about their roles, and the processes of remand decision-making, specifically the speed and limited review of bail decisions. (King, Bamford and Sarre 2008: 25).

They noted that 'in South Australia the median time for contested bail hearings was five minutes whereas in Victoria it was 18 minutes' (King, Bamford and Sarre 2008: 26; Sarre, King and Bamford 2006: 4) and that the influence of therapeutic concerns in bail decisions was much stronger in Victoria.

Using NSW as a case study, this article will look behind the remand in custody increase for some of the key drivers; will posit some suggested conceptual, cultural and practice shifts, and examine some of their effects. The article will draw heavily on the NSW Law Reform Commission Report 133, *Bail* (2012).¹

Immediate drivers in NSW

The NSW LRC identified the immediate drivers of increasing remand rates as:

- increasing rates of bail refusal in both Local (5% in 1995 to 9% in 2009) and Higher Courts (24.5% in 1994 to 33.4% in 2010);
- an increase in the average (mean) time spent on remand;
- a decrease in the extent to which bail is 'dispensed with' (Ringland and Weatherburn 2010); and

- an increase in the frequency of bail revocations (NSW LRC 2012: paras 4.8-4.24).

There is one important feature which is missing from this picture, strongly emphasised in the NSW LRC Report, and that is the high proportion of short term remandees, many of whom are in fact released to bail in a short time. The Commission noted that:

... of the 10,342 people on remand in 2010 in NSW, 5,218 or 55% were released as 'unconvicted' or not subject to further custodial sentence, that is, they were either released to bail, received a non-custodial sentence, had already served their full sentence while on remand, had all charges dismissed or were acquitted. (NSW LRC 2012: para. 4.13)

Nearly two-thirds of the 5,218 people released to custody as unconvicted in 2010 spent less than one month in custody; 29.5% spent one day in prison and 40.3% 2-7 days. As the Commission noted: 'the large number of remand prisoners having to be processed for very short stays is time consuming and costly' (NSW LRC 2012: para. 4.14). Reform proposals directed at this substantial group of people charged with less serious offences, who spend short periods of time before release on bail or who are discharged upon conviction, have the potential to substantially reduce the prison reception rate; reduce the overall imprisonment rate; take the pressure off Corrective Services thus enabling them to concentrate on effective programs for convicted offenders; and substantially reduce costs.

The NSW political context: legislative hyperactivity

While the Bamford, King and Sarre study noted above found little difference in the legislative provisions governing bail in South Australia and Victoria, the frequency of amendments to the NSW legislation since 1979 when the reform-oriented *Bail Act 1978* came into force constitutes a form of legislative hyperactivity which is exceptional. The constant amendments have contributed directly to the increased remand rates and to the shifting culture around bail decision-making. The NSW LRC noted that between 1979 and 2011 there had been 85 separate amending Acts, some of which contained multiple amendments. The LRC classified the amendments into four categories. Firstly there were 'terminological or technical' changes which included updating of references to offences and changes in criminal procedure, comprising some 41 amending Acts (NSW LRC 2012: para. 3.35). Secondly 'machinery or procedural' changes, of which there were 19, dealt with issues such as appeal procedures, the most significant of which were the restrictions on repeat bail applications (NSW LRC 2012: para. 3.36). Thirdly 'therapeutic concerns' comprising three amending Acts, involved schemes such as the Magistrates Early Referral into Treatment (MERIT) (NSW LRC 2012: para. 3.38). The fourth and most significant category was of 28 Acts amending the presumptions and considerations originally set out in the 1978 *Bail Act* (NSW LRC 2012: para. 3.39). Included in these amendments was exclusion of certain offences from the presumption in favour of bail and the introduction of a presumption against bail and a category of 'only in exceptional circumstances'.

It is this fourth category, amendments to the presumptions and considerations, that was identified by the NSW LRC as having most effect and is therefore of most interest. The NSW LRC Report *Bail* embarked on a detailed listing and analysis of all the amending Acts, which does not need to be repeated here. The LRC noted that:

... some of these changes, such as provisions in relation to domestic violence offences, followed research and detailed consideration, consultation and debate. Others were made after individual cases attracted media attention without evidence of the incidence of offences of the particular kind. (2012: 3.39; see also Booth and Townsley 2009: 41; Brown et al. 2011: 177-191; Stubbs 2010: 485).

The key changes that had the most significant effects, the LRC said, were the *Bail Amendment (Repeat Offenders) Act 2002 (NSW)* and the *Bail Amendment (Firearms and Property Offenders) Act 2003 (NSW)*. The former Act created three exceptions to the presumption in favour of bail: anyone accused of an offence whilst on bail or parole; anyone previously convicted of failure to appear; and anyone accused of an indictable offence who has previously been convicted of one or more indictable offences. The stated intention of the legislation was to reduce the rate of absconding on bail following a NSW BOCSAR study (Chilvers, Allen and Doak 2002) which showed higher absconding rates among persons with prior convictions and multiple concurrent offences. A BOCSAR evaluation of these changes showed that they had the effect of increasing the rate of bail refusal by 10.3% for those with prior convictions, 7.3% for those appearing with an indictable offence with a prior indictable conviction; 15.5% for defendants who had previously failed to appear; and 14.4% for Indigenous adults (Fitzgerald and Weatherburn 2004: 1). The later Act targeting repeat property offenders extended the presumption against bail to include firearms related offences and people charged with serious firearm offences (s 8B); and people charged with two or more serious property offences who had previously been convicted of similar offences within the previous two years (s 8C). Serious property offences are defined to include robbery, breaking and entering, and car theft.

The 'exceptional' nature of NSW developments was noted by Steel (2009) who compiled the following table of what he called 'punitive' changes to bail legislation across the Australian jurisdictions.

Table 1: Number of 'punitive' changes to bail legislation, 1992-2008

<i>State jurisdiction</i>	<i>Number</i>
Tasmania	1
Queensland	3
South Australia	4
Victoria	6
Western Australia	7
Northern Territory	7
Australian Capital Territory	9
New South Wales	25

Source: Steel (2009)

The cumulative effects of the many changes to the *Bail Act 1978 (NSW)* were summarised by the then NSW Australian Labor Party Attorney General, John Hatzistergos, in 2007 in the course of introducing yet another amendment bill.

New South Wales now has the toughest bail laws in Australia. Over the last few years we have cracked down on repeat offenders – people who habitually come before our courts time and again. Part of those changes includes removing the presumption in favour of bail for a large number of crimes. We have also introduced presumptions against bail for crimes including drug importation, firearm offences, repeat property offences and riots, and an even more demanding exceptional circumstances test for murder and serious personal violence, including sexual assault.

Those types of offenders now have a much tougher time being granted bail under our rigorous system. These extensive changes have delivered results. There is no doubt that the inmate population, particularly those on remand, has risen considerably as a result of the changes. In fact, the number of remand prisoners

has increased by 20 per cent in the last three years alone and new jails are being opened to accommodate the increase. The latest figures from New South Wales re-offending database on bail decisions have shown that from 1995 to 2005 bail refusals in the District Court and Supreme Courts have almost doubled, with an increase from 25.8 per cent to 46.4 per cent. (Hatzistergos 2007: 2670; quoted in NSW LRC 2012: para. 3.68)

Shifting conceptions of bail: From ensuring attendance and integrity, to crime prevention

The previous section outlined the legislative hyperactivity in NSW, evident in the sheer scale of amendments to the *Bail Act 1978* (NSW). While similar trends were apparent in other states and Territories, NSW was exceptional, particularly in relation to what Steel (2009) calls 'punitive' amendments. The effects of these amendments were spelt out in unapologetic terms by the NSW Attorney General in 2007, quoted above. These effects have not come about by accident or as a side effect; they have largely been intended consequences of the desire to restrict access to bail in relation to a wide range of alleged offences and alleged offenders, in particular those with a record of previous offences.

While the political drivers and the effects of legislative hyperactivity are clear, less clear are the accompanying shifts in conceptual understandings of the purposes of bail. This section will offer a brief overview of some suggested shifts. It will be argued that conceptions of bail have shifted from that of a basically procedural mechanism to ensure the attendance of the accused at trial and protect the integrity of the trial process against interference with witnesses or the destruction of evidence, to a substantive, independent forum in which crime prevention aims are pursued. While often not explicit, crime prevention is pursued through the rise of risk-based mentalities, manifested for example in the increased legislative emphasis on categories of offence and on previous convictions, as grounds for bail refusal. These categories of offence and prior convictions stand in as very general markers of risk in a number of senses. First there is the actual risk of absconding, interfering with witnesses or evidence, or reoffending/threatening community safety; second the risk to broad notions of community fears and anxieties; and third the *political* risk to governments of serious offences committed whilst on bail. While the first of these forms of risk is ostensibly focused on the individual accused, the elaborate legislative schema of presumptions based on offence type serves to deflect that focus onto the accused's membership of pre-set, legislatively defined categories or populations. The second and third forms of risk are not specifically within the realm of legitimate legal considerations in a court room setting. Nevertheless they conceivably operate at a more nebulous contextual level in relation to the mentalities and practices of bail decision-makers such as police, magistrates and judges, tending to produce more cautious, risk averse and pre-emptive decision-making. (The increasingly theoretically sophisticated research literature on risk, both within criminal justice (for example Zedner 2007, 2009, 2011) and more broadly (for example Baker and Simon 2002; Beck 1992; O'Malley 2000, 2004, 2013) has been little deployed in the bail field (but see Hannah-Moffat and Maurutto 2013) and is not entered into here).

The complex NSW bail scheme based on specific categories of offence and previous convictions which has emerged from a process of constant legislative amendment involves five significant reconceptualisations of bail:

1. A shift of focus from the individual case to the category of offence;
2. An erosion of the presumption of innocence;
3. The framing of a false opposition between individual liberty and the public interest;
4. The creation of double jeopardy effect through the focus on previous convictions;
5. The development of an unacknowledged scheme of pre-trial preventive detention.

1. *From individual case to category of offence*

Firstly, the scheme involves a shift from assessment of the individual before the court, and the specific circumstances of the accused and of the case alleged against them, to assessment based on prior legislatively determined categories of offence and offender. In short it is a shift from approaching the accused as a specific individual before the court (what we might call individual justice) to treating the individual as a member of a legislatively determined *category* or *population*. The alleged offender is judged or assessed, not against their individual circumstances, but as a member of a population or category that is legislatively, rather than judicially, assumed to present a higher risk of non-attendance and of reoffending whilst on bail. In a fundamental sense, this approach is a departure from the basic rule of law principle that justice must be done in the individual case. It is not strictly a form of actuarial risk assessment as the offence categories attracting a restriction or removal in the presumption in favour of bail are broadly framed and their selection reflects a concern with all three forms of risk highlighted above, namely risk of reoffending, risk to community fears and anxieties, and political risk.

The shift from judicial adjudication to legislative categorisation is most obviously demonstrated in forms of mandatory or grid sentencing, but is also apparent in lesser forms of legislative prescription of the type seen in the constant legislative amendments to bail legislation outlined above. In a robust early chapter of the *Bail* report, *Bail and the criminal justice system*, the NSW LRC outlined a set of principles ‘that protect liberty and fairness in the criminal justice system’ (NSW LRC 2012: paras 2.9-2.35), arguing that ‘bail legislation, being part of the criminal justice system, should be constrained by the same principles’ (NSW LRC 2012: para. 2.11). One of these principles is ‘individualised justice and consistency in decision-making’ (NSW LRC 2012: para. 2.10). The Commission noted that to achieve a decision appropriate ‘in all the circumstances of the case’ involves the exercise of ‘a broad discretion. An overly prescriptive approach to bail creates complexity and inflexibility for decision-makers’ (NSW LRC 2012: para. 2.28). The Commission agreed with an earlier Victorian Law Reform Commission Report (VLRC 2007) that ‘a simpler Bail Act based on fundamental principles would best accommodate the important values of individual individualised justice and consistent decision making’ (VLRC 2007: para. 2.32).

2. *Eroding the presumption of innocence*

Secondly, the scheme involves a significant downplaying of the importance of the presumption of innocence. The more bail is approached, not as a *procedural* stage in the criminal process or a mechanism for assuring the integrity of the forthcoming trial at which culpability will be determined but as a platform of adjudication in its own right, where crime prevention and other sentencing, control and therapeutic aims can be pursued, the more the presumption of innocence is undermined. This diminution in awareness of and commitment to the presumption of innocence is exemplified in the NSW Attorney General’s parliamentary speech quoted above where he states ‘those types of offenders now have a much tougher time being granted bail’. These comments concern persons who are yet to stand trial but who are confidently asserted to be ‘types of offenders’, on the basis of the types of offence they have been charged with. Such comments contribute to the erosion of the presumption of innocence. Nor is this effect peculiar to NSW. In a study of policing bail conditions in Victoria, police persistently referred to the accused as the ‘offender’ (Colvin 2009: 51) These examples of the erosion of the presumption of innocence in daily practice and language underscores the important discussion in the NSW LRC’s *Bail* report of the fundamental principles underlying the criminal justice system. These were seen as including: the right to personal liberty; the presumption of innocence; no detention without legal cause; no punishment without due process; a fair trial; individualised justice and consistency in decision-making; and special provision for young people (NSW LRC 2012: 9).

3. *Framing a false opposition: individual liberty v public interest*

Thirdly, the rise in risk analysis has contributed to a common framing of bail in terms of, on the one hand, 'balancing' the personal interests of the accused person against, on the other, the collective, public or societal interest in safety or protection from crime. This is a serious misconception which has significant effects on public, media, political and legal debate and the potential outcomes of reform processes. Following the lead of Judge Cross in *R v Wakefield* (1969: 300) who noted that 'such an approach will inevitably lead to error' (*R v Wakefield* 1969: 325) the NSW LRC Report usefully highlighted this conceptual mistake.

The error lies in seeing the interest in liberty, and indeed in the other fundamental principles of the law such as the presumption of innocence and the right to a fair trial, as interests of the individual and in particular the individual defendant. Conceiving them in this way, within the familiar metaphor of balance, renders one far more likely to see them as of less weight than social, community or public interests. [But] the interest in liberty and fundamental principles is correctly seen as a collective, social, *public* interest. The issue then is one of reconciling or evaluating the strength of competing public interests. (NSW LRC 2012: para. 3.12)

4. *Focus on previous offences creates a double jeopardy effect*

Fourthly, an element of double jeopardy arises in that people are being denied bail on the basis of previous offences for which they have already been punished. The double jeopardy effect is even more marked in the light of bail research which follows from Feeley (1979) onwards, to the effect that 'the process is the punishment'. Certainly it is clear that there is a range of adverse consequences that flow from being remanded in custody as distinct from being granted bail, the most severe of which is death in custody (see generally Brown et al. 2011: 166-191) along with a range of effects on health, physical and mental (Indig et al. 2010, 2011). While it might be argued that punishment is not the aim or intention of remand in custody, it is likely that the accused, who is yet to be found or to plead guilty, may well experience remand custody as a form of punishment, particularly those 5,218 remandees (55%) who are subsequently found not guilty, discharged, or found guilty and sentenced to a non-custodial penalty (NSW LRC 2012: para. 4.16). The NSW LRC Report listed the effects of custodial remand as: no opportunity to prepare for prison; a higher rate of assaults than sentenced prisoners; deleterious effects on the ability to secure a fair trial; increasing the likelihood of guilty pleas, conviction and a sentence of imprisonment; the criminogenic effect of mixing with sentenced prisoners and high risk remandees; and the unavailability of rehabilitation programs to remandees (Grunseit, Forell and McCarron 2008; NSW LRC 2012: paras 5.35-5.50). These were in addition to a substantial list of hardships of imprisonment more generally, such as physical and psychological hardships and effects on family and children, which are not specific to remand prisoners (NSW LRC 2012: paras 65-69). In addition there are the significant financial costs to the community of high remand rates given the average daily cost of imprisonment of \$276 per day for adults and \$589 per day for juveniles (NSW LRC 2012: para. 5.51).

5. *Unacknowledged pre-trial preventive detention*

Fifthly, the legislative structuring of differential rules for defendants according to offence categories and previous offences, together with the shift from concern about attendance and integrity of the trial process to crime prevention, has arguably produced a system of massive and largely unacknowledged, or backdoor, pre-trial preventive detention, which in numbers dwarfs the formal systems of preventive detention such as those which provide for post-sentence detention or supervision of serious sex offenders. Between 2003 and 2009, across the five Australian States that provided for post-sentence detention or supervision, 165 applications were granted out of 205 made. In NSW the vast bulk of these were supervision rather than detention orders (Baldry et al. 2011: 33). While 25% of the NSW prison population, or roughly

2,500 persons, are unconvicted, as at 2011, only two persons in NSW were serving post-sentence detention orders (Baldry et al. 2011). The differences do not end there. The hearings of applications by the Crown for post-sentence detention orders involve high quality legal representation, the adducing of extensive evidence, including from psychologists and psychiatrists and often involving risk assessment instruments, full forensic argument and detailed judicial consideration by a Supreme Court judge. In contrast, in many bail decisions, accused persons are unrepresented or represented by busy duty solicitors, decisions are made on little evidence, mainly police submissions from the bar table, and are made in hearings lasting a few minutes, largely by magistrates, and indeed in some cases by the police in the first instance. Further, the decisions are, as seen above, often strongly determined by the legislative framework of presumptions, so heavily inflected by recent legislative hyperactivity and framed around categories of offence charged and prior offences, rather than full consideration of the individual circumstances of the individual case.

Illustrations of the conceptual shifts outlined above can be seen in a significant development which has contributed indirectly to the rise in remand populations, namely the explosion in bail conditions and the consequent rise in revocations brought about by more intensive policing of bail conditions.

The explosion in conditional bail

There has also been an explosion in the extent and number of bail conditions imposed by police and courts in recent years. Common conditions include the requirement of reporting to police, curfews, non-association conditions, conditions that specify where the person must reside, where they can go, what reasonable directions they must observe, and not to consume alcohol and drugs. While these are commonly referred to as 'conditions', the NSW LRC sought to distinguish between conditions as a requirement that must be met before release can take place (for example financial conditions, provision of a surety, surrender of passport) and 'conduct requirements' which are conditions embodied in a bail agreement (NSW LRC 2012: paras 12.4-12.5). The attaching of conditions has become something of a pro forma practice, a checklist or 'tick the box' approach, with minimal consideration of the appropriateness of the conditions or their effects, particularly in relation to young people and those with mental health or cognitive impairments. Young people, in particular, are being set up to fail. The current position was succinctly summarised by the Chief Magistrate of the NSW Local Court in a submission to the NSW LRC.

Overly complex or onerous reporting requirements that go beyond those reasonably necessary to secure an accused person's attendance at court are commonly seen in conditions of police bail or are being sought in applications for bail before the court, notwithstanding the requirement of section 37(2) that the conditions imposed on a grant of bail are to be no more onerous than appear to be required. The Court is exposed to constant applications for review of bail conditions and observes that in the majority of cases such applications are wholly or partially successful, in most cases with the consent of the prosecuting agency. (NSW LRC 2012: para. 12.7)

This submission was strongly supported by submissions from a wide range of legal and advocacy services, which provided the LRC with numerous examples, such as the following.

Example 1

LA was charged with resist police and possession of an illicit substance. She was apprehended in Kings Cross. Police released her on bail, with one of her conditions being that she was restricted from going within 1000 metres of Kings Cross railway station.

She was subsequently arrested in Kings Cross again sharing needles, and was taken into custody. An application for bail was made before the court, and bail was granted with the same conditions, namely that she not go within 1000 metres of Kings Cross railway station.

The bail condition presented considerable difficulties for LA as she needed to enter the Kings Cross area to access her doctor and her methadone clinic.

An application for variation of the bail conditions was made, with the conditions being varied. (NSW LRC 2012: Example 12.1)

Example 2

A Legal Aid Children's Legal Service client was charged with committing affray. In the experience of Legal Aid solicitors it is standard practice at Bidura Court for magistrates in such cases to impose a place restriction encompassing a 2 km radius from Sydney Town Hall. The magistrate accordingly imposed this condition, giving no consideration to the fact that the defendant would breach the condition every time she travelled to school, visited the Department of Juvenile Justice in accordance with another bail condition, or visited her sister, who lived in Redfern.

Example 3

Another example involved a case where four co-accused children were charged with entering enclosed lands and put on bail to not associate with each other and to obey a strict curfew. Three of the children were cousins and two lived in the same house. Three were subsequently arrested for breaching their bail less than seven days after police bail was granted. Two out of the four were first time offenders. (NSW LRC 2012: para. 12.21)

The NSW LRC's conclusion was that:

Conduct requirements appear to be imposed routinely and unnecessarily without tailoring to the situation of the individual. Monitoring for compliance by police has become more active and intense in recent times. Arrest for failure to comply has been increasing. We have no statistically significant evidence of a reduction in crime as a result. ... Intensive enforcement of routinely imposed conditions is creating unnecessary public costs and unnecessary hardship, particularly for young people, without apparent benefit to the community. (NSW LRC 2012: paras 12.73, 12.75)

Eat your dinner or have your bail revoked

Many of the examples set out by the NSW LRC or provided by legal services in the field, illustrate the way that bail is being pressed into service as a new form or lever of control which extends far beyond crime or crime prevention. Despite the criticism of Freiberg and Morgan that: 'the concepts of "conviction" and "sentence" have been eroded by the proliferation of dispositions in the form of diversion programs and orders' (2004: 221) and that 'the limits of bail are difficult to determine' (Freiberg and Morgan 2004: 223), the use of bail to anchor a range of semi-coerced therapeutic processes, such as drug and alcohol rehabilitation programs under s 36A of the *Bail Act* 1978 (NSW), has generally been viewed as largely benign (see NSW LRC 2012: paras 13.24-13.34). Such initiatives are linked to notions of therapeutic justice, which seek to shift conceptions of the court, especially Lower Courts, away from crime control to that of casualty ward or triage station, a point of intervention and 'leverage' where a range of social,

medical and welfare services can be deployed. While it is recognised that there is a level of coercion in using bail as a condition of program participation, the issues of problematic consent, lack of 'legal and moral foundations of guilt and conviction' (Freiberg and Morgan 2004: 221), and of 'conceptual confusion' and the 'distortion of legal structures' (Freiberg and Morgan 2004: 234) highlighted by Freiberg and Morgan tend to be skirted over in the interests of managing or governing individuals towards safer and healthier lifestyles and living conditions, which it is hoped will also reduce offending.

The heavy weight that bail is increasingly asked to bear and the significant distance travelled from the principle of no punishment without due process are exemplified in the following example cited by the NSW LRC.

Carl is twelve years old and has a cognitive impairment that means he often misbehaves and is difficult to control. As a result he lives in supported housing, where those caring for him find him hard to discipline. Carl was arrested for assault and, at the request of his carer, one of the conditions of his bail was that he eat his dinner every night. If Carl fails to do so, he breaches his bail and could be placed on remand. (NSW LRC 2012: para. 12.29)

While having every sympathy for those charged with assisting and managing cognitively impaired and unruly young people, there is a fundamental question about the appropriateness of the threat of remand in custody for not eating your dinner. The LRC described such cases as examples of 'inappropriate, welfare oriented or overly onerous conditions' (NSW LRC 2012: para. 12.29). In this example law is being deployed far beyond its sphere of competence, a move which undermines its legitimacy and credibility. Any link to crime or even crime prevention has been lost here; bail law is being drafted in to assist in the mundane management of social, welfare and medical problems for which it is ill equipped and inappropriate (see generally Barga 2009-2010; Boyle 2009; McFarlane 2010; cf Hannah-Moffat and Maurutto 2013).

Bail revocation: Breaching conditions, policing practices and the role of KPIs

The proliferation of bail conditions coupled with more aggressive monitoring of compliance by the police has produced a significant increase in revocations of bail, particularly in relation to young persons. In NSW in 2001, there were 6% of detentions for breach relative to total detentions of juveniles pending completion of proceedings. That figure had increased to between 20% and 23% from 2007 onwards. Greater levels of police enforcement are also increasing bail revocations for adults. Between 2001 and 2011 there was an average annual percentage change of 16.7% (NSW LRC 2012: para. 12.68).

It is instructive to look behind these breach figures to a largely unacknowledged shift in policing practices which has produced them. The shift in strategies has come about in a rather roundabout way. In NSW in 2006 an ALP State Plan identified reducing recidivism as a major priority and set the target of a reduction in recidivism by 10% by 2016. Other parts of the NSW *State Plan* promote 'widening' of the application of early intervention programs, in addition to reducing court appearances for young people by 'better use of warnings, cautions and Youth Justice Conferencing' (NSW Government 2010: 56).

One mechanism for reducing recidivism was identified as stricter monitoring of bail compliance, on the assumption that those on bail were a group of high risk offenders especially likely to re-offend. This concern was translated into a new set of police Key Performance Indicators (KPIs), which required the police to step up compliance checks, of bail conditions such as curfew, residence, place, non-association, educational, work, alcohol and drug conditions. The conduct of specific compliance checks has become incorporated into daily policing routines in a way that is easily measurable compared to the more generalised, discretion-based, routine police patrol

or community liaison work. The new KPIs are popular with police as they provide a clear cut measure of their work rate which can be counted and thus readily applied to 'productivity rates', local area command assessments, and promotion prospects. In this somewhat backhand way, without explicit amendment to the bail legislation or clear parliamentary debate, *crime prevention* through significantly increased police monitoring of bail conditions has become a new part of the function of bail

The police have taken to this enhanced task and the KPIs by which they themselves are increasingly evaluated, with evident relish. Police Annual Reports refer to 'nightly bail compliance checks, particularly on juveniles' and the allocation of 'Bail Compliance Operations' as a 'key outlook' (NSW Police Force 2008: 15; Young 2010: 8). Specific police targeting operations such as 'Operation Avert', a bi-annual program which targets outstanding arrest warrants and bail compliance, have drawn high police and political praise. For example the results of one weekend state-wide operation which resulted in 89 arrests for breach of bail were described by Deputy Commissioner Owens as demonstrating 'an effective strategy in putting offenders before the courts' (NSW Police Force 2010: 1-2, cited in Young 2010: 8). Then Minister for Police, Michael Daley, expressed similar sentiments about earlier operations declaring, '[p]olice aren't sitting on their hands ... they're well and truly on the front foot, taking known criminals off the street' (Daley 2009: 1). The 'high visibility' Operation Avert in 2013 conducted over three days, included 1903 bail compliance checks which contributed to charges for 940 'offences, including ... breach of bail', and was judged by Assistant Commissioner Alan Clarke as an 'effective strategy' 'to take repeat offenders off the streets' (NSW Police Force 2013).

Such claims are made despite the fact that those on bail are not, at least on the current charge, proven 'repeat offenders'; that breach of a bail condition is not a criminal offence (*Bail Act* 1978 (NSW) ss50, 51); and that police arrest powers regarding breach of bail conditions require the arrested person to be brought before a court so the issue of bail can be re-determined (*Bail Act* 1978 (NSW) s50 (1)(a)). Further there is no evidence that higher remand rates translate into safer communities (Noetic Solutions 2011:78; Vingnaendra et al. 2009: 4). Fishwick and Bolitho note the inconsistency of pursuing the objective of 'keep[ing] the community safe through tightened monitoring of those at high risk of offending' and reducing recidivism, when 'it is widely recognised that putting young people into custody will not reduce recidivism, no matter how it is measured' (Fishwick and Bolitho 2010: 173; see also Stubbs 2009: 253).

Pre-sentence punishment

A recent study conducted by Courtney Young based on in-depth interviews in an unnamed NSW country town revealed widespread disquiet among local lawyers about police bail compliance tactics, especially in relation to Aboriginal children (Young 2010). One judicial officer interviewed referred to a case of a defendant who breached his daily reporting condition because he was bailed to an address 30km out of town, despite having no history of unreliability, saying the police 'were just narking him, that's all they were doing ... it's transparent that they put conditions of bail in place ... to create hardship for people' (Young 2010: 14-15). One local legal practitioner stated that there is an 'awful lot of extra curial punishment in bail conditions' but 'you're not allowed to say that' (Young 2010: 16). Curfews were the most complained about condition with many stories of young people being breached in circumstances where their parents were responsible for taking them out after the curfew (Young 2010: 17). One practitioner asked: what was his client 'Karina', a 13 year old Aboriginal girl to do; 'walk back home ... in the hours of darkness ... placing her on the vulnerable list ... or was she to stay there safe with family and run the gauntlet that the police do not go to her residence' (Young 2010: 17). Another practitioner highlighted the case of 'Sarah', a 13 year old girl who allegedly stole a lipstick from a supermarket. Sarah was bailed subject to a curfew which confined her to her home, except to attend school. In the practitioner's view, 'it's house

arrest. It's punishment pre-sentence' (Young 2010: 18). Night curfews were often imposed in relation to minor offences such as shoplifting which were alleged to have occurred during the day. One practitioner claimed that 10pm and 2am curfew checks are 'all the Night Shift are doing'. Many of the participants recounted incidents of police 'knocking on doors at 3am', 'shining torches through windows' and 'wandering around yards' (Young 2010: 19).

This pattern of bail compliance policing was confirmed in numerous submissions made to the NSW Law Reform Commission from a wide range of front line community agencies, from which the following examples are drawn.

Example 4

Despite Ben's lack of criminal record or prior contact with police, he was placed on onerous bail conditions including non-association with 8 of his friends, and a curfew from 8pm to 6am.

Not only was the curfew unwarranted in the circumstances (the alleged offence was committed in the afternoon), it had a particularly harsh impact because of the police practice of 'bail compliance checks'.

For several weeks, police turned up almost every night (sometime between 11.30pm and 3am) at Ben's house to check that he was abiding by his curfew. This caused Ben and his foster family much distress. There is a 4-year-old child in the family home who was awoken each night and who had trouble getting back to sleep. The neighbours were also becoming upset with the voices and police car lights interrupting their sleep almost every night. (NSW LRC 2012: para. 12.22, Example 12.3)

Example 5

A 16-year-old Legal Aid client named Kristy was charged with aggravated robbery and assault occasioning actual bodily harm for an incident where it was alleged that she and a friend robbed the victim of a mobile phone. Prior to these charges, Kristy had had no dealings with police. One of the bail conditions set for her was that she be home between 7pm and 7am. Kristy lived with her father and her 9-year-old sister.

Police conducted bail compliance checks on Kristy over a three month period on average five nights a week. This was despite the fact that during this time Kristy attended all of her court appearances and did not commit any offences. The times the checks were carried out varied: for example, 8.45pm, 3.10am and 6.50am. The bail compliance checks were noticed by other residents of the unit block in which Kristy's family lived and caused significant embarrassment to the family.

Kristy applied to the Supreme Court for a bail variation. The Court removed the curfew condition. (NSW LRC 2012: para. 12.36, Example 12.6)

Example 6

A Legal Aid client who was a young single mother was alleged to have committed a minor offence unlikely to attract a custodial sentence. As a condition of her bail she was required to report daily to the police. On one particular day her one-year-old child was very sick, vomiting so much as to suffer dehydration. As a result, she was unable to report that day. She reported the next day and told police what had happened. Police arrested her and kept her in custody for most of the day until she was granted bail, despite the fact that they did not dispute her

explanation or the fact that the charges were minor and unlikely to attract a custodial sentence. (NSW LRC 2012: para. 12.39, Example 12.7)

Julie Stubbs notes that 'data indicate a 250% increase in arrests for outstanding warrants and/or breach of bail from 2003-04 to 2007-08' across both adults and juveniles (Stubbs 2010: 496-7). The Police submission to the NSW Law Reform Commission inquiry strongly justified this pattern of compliance checking as being 'in line with [NSW Police Force] strategies of predominantly targeting high-risk (being recidivist, serious and violent) offenders' (NSW LRC 2012: para. 12.44) and as securing deterrence from offending, 'building rapport with young people and their families', reinforcing community expectations and preventing victimisation of young people (NSW LRC 2012: para. 12.41). In addition:

Commands also viewed bail compliance checks as an *investigative tool* [emphasis added]. Juveniles on conditional bail known for offences with a similar modus operandi had curfew checks conducted on them as soon as the incident was reported to rule them out as possible suspects.

Targeting is risk based. It considers the juvenile's profile as well as *the crime environment* [emphasis added] in the local area. (NSW LRC 2012: para. 12.40).

The LRC noted that:

The NSW Police Force ... states that the number of bail compliance checks conducted per month on young people has increased approximately 400% from January 2007 to September 2010. (In the 2007/08 financial year, there were 25,712 bail compliance checks on young people recorded in the police computer system. In the 2009/10 financial year, there were more than 40,799 such checks). (NSW LRC 2012: para. 12.43)

Revocations of bail for breaches of conditions is contributing significantly to the rise in remand rates in relation to young people. Briefly, the number of young people remanded for breach of bail conditions only has increased from 193 in 2000-01 to 1142 in 2010-11. The average length of stay for a young person who is bail refused for breach of bail conditions is 14 hours 46 minutes. (NSW LRC 2012: 59, para. 4.47)

Aftermath to the NSW LRC Report

As the discussion above has drawn heavily on the NSW LRC Report *Bail* (2012), it is worth briefly noting its aftermath. Before the final version was settled and the Report released in April 2012, a preemptive attack was made on both the prospective Report and the Attorney General, by prominent talk back radio host Ray Hadley and the *Daily Telegraph* (Clennell 2012, 2012a, 2012b; cf Clennell 2012 ('How DPP Greg Smith went from Rambo to cream puff'), 2012b ('Gays and lesbians will be given a get-out-of-jail-free card under proposals to soften the state's bail laws currently before Attorney General'); MediaWatch 2012). These attacks continued once the Report had been released (Clennell 2012c, 2012d ('Accused murderers and rapists would be allowed out of jail while awaiting trial, under an overhaul of NSW bail laws'); cf Akland 2012; Humphries 2012; Patty 2012, 2012a).

In November 2012 the Attorney General Greg Smith released the NSW Government's response to the Report (NSW Government 2012). The response indicated that a new Bail Act would be introduced in 2013 that will do away with offence-based presumptions and move to a risk-based assessment requiring the bail authority to assess the risk posed by an accused person.

The NSW LRC Report had recommended a uniform presumption in favour of bail for all offences. The response stated that:

The Government anticipates that dispensing with the system of presumptions will not only simplify the bail decision making process, but will also result in fewer amendments to the legislation enabling it to remain simple and clear, as was intended when the original bail laws were codified in 1978 (NSW Government 2012: 7).

In May 2013 the NSW Attorney General introduced the Bail Bill 2013 into the NSW parliament. As foreshadowed by the Attorney General, the Bill abolishes the system of presumptions and moves to an 'unacceptable risk' test. A bail authority is to consider whether there is any 'unacceptable risk' that an accused person will fail to appear; commit a serious offence, which is not specifically defined but includes sexual or violent offences or offences where there was alleged use of an offensive weapon; endanger the safety of victims; or interfere with witnesses. Bail can only be refused if there is an unacceptable risk that cannot be mitigated by the imposition of bail conditions. Bail conditions can only be imposed for the purpose of mitigating an unacceptable risk. A flow chart outlining the basic 'unacceptable risk' bail decision-making process is included in the Bill.

A bail authority is required to have regard to the presumption of innocence and the general right to be at liberty. There is a right to release for minor offences, including all fine-only offences and most offences under the *Summary Offences Act 1988* (NSW), but conditions can still be imposed. Conditions generally must be 'reasonable, proportionate to the alleged offence and appropriate to address the unacceptable risk in relation to which they are imposed', 'must not be more onerous than is necessary to mitigate that risk' and compliance with the conditions must be 'reasonably practical' (Smith 2013). The types of condition mirror those in the existing Act. The Bill specifies the actions a police officer can take in relation to failure to comply with a bail acknowledgement or bail conditions. The officer may 'decide to take no action, issue a warning, issue an application notice or court attendance notice to the person requiring them to attend court, arrest the person, or apply for an arrest warrant' (Smith 2013). The Bill retains the controversial provision, s 22A, which restricted second or subsequent release applications made to the same court, but exempts juveniles where the previous application was made on their first appearance.

In his second reading speech the Attorney General noted that the Government expects the new Act to commence operation approximately 12 months from the date of its assent. This is because 'its new bail model is a paradigm shift' that will require 'an education campaign for police, legal practitioners and courts regarding the new legislation' and changes in technology information systems and forms (Smith 2013). The proposed Bill drew a mixed response from commentators (see Patty 2013; Taylor 2013).

Conclusion

The aim of this article has been to look behind the increase in remand in custody rates in NSW, although that increase has been common across a number of Australian jurisdictions and is reflected in national figures. The immediate drivers of the NSW increase were identified by the NSW LRC as increasing rates of bail refusal in both Local and Higher Courts; an increase in the average time spent on remand; a decrease in the extent to which bail is 'dispensed with'; and an increase in the frequency of bail revocations (NSW LRC 2012: paras 4.8-4.31). Where NSW is distinctive is that the predominant driver of the increases has been a form of legislative hyperactivity involving constant changes to the *Bail Act 1978* (NSW), changes which have removed or restricted the presumption in favour of bail for a wide range of offences.

As well as charting these developments the article has attempted to delineate some of the underlying processes that have accompanied increasing remand rates. These include a number of conceptual shifts in the way bail is conceived, including the use of bail for crime prevention purposes and an increasing emphasis on risk. These conceptual shifts are observable in the explosion in bail conditions, many of which are onerous and inappropriate, and the KPI-driven policing of bail conditions and consequent rise in revocations, especially in relation to juveniles. The article has drawn on the NSW Law Reform Commission Report to illustrate and support some of these arguments. This raises the issue of the extent to which the NSW Government's proposed Bail Bill 2013, based partly on the NSW LRC Report, will address, alleviate or accelerate the various processes and conceptual shifts argued above.

The simplest answer to that question is: it remains to be seen. It seems likely that such a significant change in the legislative framework, in particular sweeping away the complex system of presumptions in favour of an 'unacceptable risk' model, will have both direct consequences and will feed into more complex and mediated cultural and organisational changes. However the exact relationship between legislative provisions and the social and organisational contexts and cultural dispositions surrounding remand decision-making and trends are difficult to delineate, as the Sarre, King and Bamford (2006) research cited earlier, demonstrates. A study of offending on bail in England found that 'the changes in remand decision making ... seem to reflect broader political and media debate about offending on bail rather than changes in the legislation' (Hucklesby and Marshall, 2000: 167). (For an attempt to elaborate on the notion of penal culture and its relationship to rising imprisonment rates in Australia and elsewhere, see Cunneen et al. 2013.) The NSW Attorney-General's reference to the Bill as constituting a 'paradigm shift' and the delay to enable an education campaign signifies that more than mere cosmetic changes are intended. There is clearly an attempt to address certain of the conceptual shifts identified above; for example, in the requirement that the bail authority have regard to the presumption of innocence and the general right to be at liberty. There is also a clear intention to wind back the explosion in bail conditions and to reduce bail revocations by directing police to consider a range of options short of arrest for breach of conditions. The sweeping away of the complex system of presumptions potentially returns the attention of bail decision-makers away from pre-determined legislative categories based on offence type to facts and circumstances of the individual case, enlarging judicial discretion.

The big unknown is exactly how the simplified 'unacceptable risk' model will operate. Clearly risk will be more central to the new scheme and exactly how that plays out is difficult to predict. A pessimistic reading is that 'unacceptable risk' will license an expansion of what O'Malley calls 'speculative pre-emption' (O'Malley 2013: 187) on the basis of ever more imaginative fears about an accused's propensity to commit future offences and to threaten community safety and fears of the fall out should such cases occur. An optimistic reading is that the new scheme may focus less on speculative fears and more on actual evidence of risk, at the same time as fostering what O'Malley calls greater 'resilience' (O'Malley 2013: 187) in bail decision-making. The task is to distinguish real threats that accused people may abscond (as distinct from failing to turn up for a myriad of reasons), may interfere with witnesses or evidence, and may commit further very serious crimes, from generalised fears of the various repercussions of such occurrences and from the plethora of technical, administrative breaches of bail conditions that are non-threatening. It may be that the debate surrounding the Law Reform Commission Inquiry and Report and the Attorney General's response has already had an effect on bail decision-makers and on the complex organisational and cultural climate, in the direction of a more 'resilient' attitude to the grant of bail. In that regard it is interesting that the average daily number of young people in custody in NSW has dropped from a high point of 434 in 2009-10 to 307 in May 2013 (NSW DJJ 2013) prior to any legislative changes.

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¹ The author was a part-time Law Reform Commissioner on this reference. All the material relied on in the article is publically available in the published Report or in submissions to the LRC by a range of groups and organisations, submissions available on the NSW LRC website. The author wishes to thank two anonymous reviewers for their helpful comments on an earlier draft.

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