Factors that Influence Remand in Custody

Final Report

to the Criminology Research Council

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i) Acknowledgements

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ii) Executive Summary

The issue of custodial remand in Australia remains acute. More than a fifth of Australian prisoners are unsentenced ('remandees') at any one time. A decade ago it was an eighth. The total number of prisoners across Australia has increased by around 20% since 1995, but remandee numbers have increased by between 50% and 270% depending upon the jurisdiction. Moreover, remandees appear to be getting older at a faster rate than the sentenced prison population and, indeed, the Australian population generally.

Australian States and Territories remand people in custody at significantly differing rates too. Figures from South Australia and Victoria reveal that South Australia's remand rate (prisoners in custody on remand per 100,000 population) is almost three times that of Victoria. South Australia also has a much higher percentage of remand prisoners as a proportion of all prisoners than Victoria (over a third of all prisoners in SA, compared to less than a fifth of all prisoners in Victoria).

These issues demand academic attention. This study reports qualitative and quantitative research that was undertaken over three years in two Australian jurisdictions, Victoria and South Australia.

The report opens with an overview of remand populations and rates. The resulting picture (a divergent and inconsistent blend of trends) shows that remand in custody emerges from a complex array of legal and social dynamics that vary between jurisdictions and over time. The researchers' detailed exploration of these data in the two participating jurisdictions encountered many problems as a result of the very different histories of data collection and analysis in so far as police and court records are concerned. Further analysis was thus undertaken using correctional (remand) statistics from Victoria and South Australia (2000-2003). Over this period Victorian remand receptions continued to increase whereas in South Australia it marked the beginning of the end of a period of significant increases. Finally, the report records our qualitative research into policies and practices of key actors in the custodial remand processes, such as police, court staff and bail authorities.

The report specifically addresses the CRC nominated research questions:

1. which factors are critical to remand processes, and how do these contribute to remand rate differences between Victoria and South Australia?

2. what is the effect of custodial remand on key outcomes,

3. what constitutes 'good practice' in remand decision-making, and

4. what are the policy implications of the study's findings.

1. What factors are critical to remand rates and to differences in remand rates between jurisdictions?

Critical factors were explored using a statistical analysis of defendants remanded into custody over a three year period in Victoria and South Australia and qualitative research into policy and practice.

Remand rates, like imprisonment rates generally, are a product of the numbers of defendants entering custodial remand (remandees) and the length of time spent on remand. The statistical analysis showed that the remand system was being impacted by factors separate to those applying to the general prison population. Time on

remand, whilst critical in determining overall remand rates, was excluded as an explanation of the differences between South Australia and Victoria, as South Australian remandees had significant lower mean times on remand.

Changes in remand receptions held the key to changes in remand rates in the periods studied. In both Victoria and South Australia, changes in remand rates are associated with a relatively small range of offences. The rates at which these offences have been reported do not reflect the changes in remand rates, excluding crime rates or criminal behaviour.

This analysis strongly suggests that for the jurisdictions and time periods studied, changes in the numbers of people remanded in custody result from changes in the characteristics of defendants and changes in practices and policies of remand decision-makers. Our research indicates that it is the interaction of these factors that shapes changes in remand rates.

Victorian data indicate that over the three years studied, remandees demonstrated statistically significant declines in seriousness of criminal history. At the same time, there were indications of increasingly severe drug and alcohol abuse and mental health problems amongst remandees.

What factors, then, are critical to the differences between Victoria and South Australia? If policy-makers want to isolate the key factors that influence custodial outcomes, their attention should be on the processes that draw certain individuals into the criminal justice system as well as the decision-making processes once those individuals arrive there. That is, the policies and practices of police, police custody sergeants and court bail authorities in relation to bail (and the formal and informal rules that empower and constrain them) are crucial to the determination of remand trends. We have isolated four factors:

a) *Differences in bail legislation.* Bail decision-makers rely on the bail legislation to guide their decisions. The Victorian *Bail Act* has a number of significant differences to the South Australian legislation. The Victorian Act distinguishes between grounds for remand in custody and the information to be used in determining whether those grounds exist. The South Australian Act is less constraining, with grounds merged with information to be used. As a result it may facilitate the use of remand for non –traditional reasons. The Victorian Act also contains reverse onus provisions that require defendants in certain circumstances to overcome a presumption against bail. It also provides for immediate review of police bail decisions, either by a court or if out of court hours, by a bail justice. Yet the approach taken to the reverse onus provisions and the extensive use of bail justices displays policies and practices that promote the granting of bail.

b) *The accountability of bail authorities and review of remand decisions.* There is significantly greater review of remand decisions in Victoria, with greater accountability for those seeking custodial remand. The opportunity for review of police remand decisions is more available in Victoria with its bail justice process, compared to the telephone review process in South Australia. Those seeking the custodial remand in Victoria (i.e. operational police) are required to attend the bail justice and any subsequent court hearing to give sworn evidence. The information upon which a court assesses the risk of a defendant not complying with bail is more closely scrutinised. There is an increased level of scrutiny of contested bail applications in Victoria. While the

percentage of contested matters is about the same in both jurisdictions (40%), the median time taken for a contested hearing in SA is 5 minutes, while in Victoria it is 18 minutes.

c) *Agency operational procedures.* Bail decision-making occurs in a time-pressured context, where bail decision-makers operate in isolation from other bail decision-makers. However bail decision-makers do operate within the policy and cultural constraints of their own agencies, particularly within the police. These differ between SA and Victoria. In South Australia we found custodial remand was more closely linked to operational policing objectives and strategies e.g. operational policies such as encouraging arrest even where a summons might be appropriate, and using custodial remand as a crime reduction strategy under the rubric of 'intelligence-led policing'.

d) '*Therapeutic' justice and court resources.* The research identified a trend in Victorian courts that suggested changed perceptions of judicial roles that were not identified in South Australia. Some Victorian magistrates have adopted what has been described as the 'therapeutic justice' model. This appears to be in part a response to the changing characteristics of the defendants appearing in the remand system, and their needs. As a consequence of this view, the Victorian courts appear to have attracted a greater and broader range of resources to assist defendants who would have, but for these alternatives to custody, found themselves incarcerated awaiting trial.

2. *What are the effects of custodial remand on key outcomes?*

The identification of the key outcomes to be achieved by the remand strategy is a complex task. Although they are rarely discussed, the remand strategy is used to achieve multiple goals that can be seen to be conflicting with one another. The report explores the effect of custodial remand first in terms of goals of the Bail Acts, then the contribution of remand to other outcomes of the justice system and finally the question of perceived equity in outcomes of custodial remand is considered.

There are, arguably, three broad goals to be achieved in bail decision-making. Bail authorities will make their decisions with the following aims in mind:

- to ensure the integrity and credibility of the justice system
- to protect the community, and
- to assist in the care and protection of the rights of the defendant.

There is a clear tension between these goals. The last forty years has seen a move away from making the integrity and credibility of the justice system (for example, ensuring the defendant will attend court) the predominant outcome. Both legislative and operational policy changes have elevated the importance of the second goal above the others.

There are limited data collected by agencies that allow the measurement of the extent to which current bail and remand practices achieve these respective aims. The availability of data on issues such as failure to appear, the reasons for failure to appear, offending on bail, interference with witnesses and victims is so poor that the effectiveness of the remand in custody system cannot be analysed with any degree of accuracy.

The data that were collected indicated that a significant number of defendants do fail to attend court as required each year. Explanations from the qualitative research suggest that this is due as much to defendant forgetfulness as defendant absconding, both of which technically attract the same outcome.

The effect of remand in custody on final determination of sentence poses significant methodological issues and was beyond the scope of this research. However, the question of remanding defendants who are not subsequently convicted or not subsequently imprisoned was examined. If remandees typically receive sentences of imprisonment, this may indicate that the decision to remand anticipates (or perhaps influences) subsequent sentencing decisions. Conversely, a low remand-to-sentence rate might suggest that remand is being used inappropriately, or that remand is serving as a substitute for sentenced imprisonment. In South Australia only about 30% of those remanded in custody serve additional time in prison following sentencing whereas in Victoria, with its lower remand rate, about 60% of remandees spend additional time in custody.

The effect of custodial remand on Indigenous Australians has been highlighted in this report. It is impossible to ignore that fact that in South Australia over the three years 2000–2003, there were 1,782 remand receptions of Indigenous Australians from an indigenous population of 23,425[1], whereas in Victoria there were only 450 remand receptions in the same period from a very similar size indigenous population (25,078).[2]

3. What are the attributes of 'good practice' in bail and remand

Our research reveals that there are desirable 'good practice' characteristics of a remand system. A preferred system will establish, develop and maintain:

- statements of principles, objectives and criteria guiding bail decision-making;
- clear definitions of the roles of bail authorities and their responsibilities;
- adequate resourcing
- quality assurance mechanisms.

The question of resourcing is crucial to good practice. Bail decision-making takes time and reliable information and good support services. Resources are required to ensure that support services that have been established are maintained. The research identified the importance of programs designed to assist accused persons while on bail, along with communications between the courts and police and victims to ensure that appropriate information is made available in a timely fashion.

To facilitate quality assurance, reliable data must be collected and made available. To understand the contribution of each set of decision-makers to the remand rates requires systematic, comparable and accessible data on remand hearings and remand outcomes. The lack of data currently, especially in Victoria, may explain the significant number of key interviewees who had little or no idea of whether remand rates were changing and, if so, in what direction. Better statistical services are required within and between jurisdictions, using common terms and collection and collation processes that can allow data to be compared and trends determined.

[1] Australian Bureau of Statistics (2002a).

[2] Australian Bureau of Statistics (2002b).

4. Policy implications

The summary of the policy implications of the research findings is focused around the three central issues of

- accountability
- effectiveness
- efficiency.

The study identifies that lower remand rates are 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.

In the current political environment, the high level of interest in law and order policy has made remand decision-making, like decisions at every other point in the justice process, a matter of public interest and comment. Whilst community interest in justice process is an important element of sustained legitimacy of the system, positioning remand decision-making as an indicator of the strength of policy on punishment and retribution, is enhancing the movement of remand from its original purpose as a tool to ensure effective court administration.

The research also suggests that many defendants' failure to attend court as required are not attempts to abscond but are the result of disorganised, dysfunctional lives. Alternatives to custody for this group of defendants range from increased social support and case worker intervention to the use of new communication technologies. Corrections practices, too, can allow effectiveness and flexibility. For example, greater electronic monitoring of home detention defendants under curfew creates the possibility of secure bail without disruption to defendants' lives and the cost to the state of custodial remand. Taking maximum advantage of this strategy will require increasing the numbers of available electronic bracelets. This report also identifies a number of specific examples where efficiency could be improved. Delays in forensic analysis and court delays were amongst the most commonly offered opportunities for improvement.

This research indicates that remand rates, resulting from the interaction of characteristics of defendants and policy and practices of decision-makers, can be influenced over time by strategic provision of resources and emphasis on a particular philosophical approach to remand. There are differences between South Australia and Victoria in terms of scrutiny of bail decision-making, legislative and practical disincentives for police and courts to deny bail, and resourcing of support services for those who should, but for the want of these resources, be granted bail. Moreover, the therapeutic model of justice prevalent in the Victorian magistracy also informs bail strategies, and this difference has clearly impacted the identified differential rates of remand in custody between the two jurisdictions.

1 Introduction

The question of custodial remand is drawing the attention of justice agencies and of policy makers in a number of jurisdictions at the start of the 21st Century. The number of people in prison because they have been refused bail has turned attention to questions about remand processes, about the purposes served by remand, and about good practice in remand within justice systems.

This research study has been developed in response to a Criminology Research Council (CRC) consultancy on Factors Influencing Remand in Custody. To develop a better understanding of the factors influencing rates of remand, the CRC tendered for a national consultancy to be conducted in two stages. Stage One was completed and reported in Bamford, King and Sarre (1999). Stage Two of the project is the subject of this report.

The research questions listed below formed the basis of the Criminology Research Council brief for the Stage 2 research, which was explicitly focused on the court stage of the remand process.

- Which factors are critical to the remand process?
- How do these factors contribute to the process and to the observed differences in remand rates between the three States?
- What is the effect of custodial remand on key outcomes in the criminal justice system?
- What constitutes 'good practice' for remand decision-making (including what are the criteria for a 'good' remand system)?
- What are the policy implications of the study's findings?

It was expected that the States of South Australia, Western Australia and Victoria would be the focus of this study. During the contracting phase, Western Australia withdrew from the project and the CRC determined that the project should proceed focused on just two States. The research proposal was a partnership one, with South Australia and Victoria undertaking to support the research through the resourcing of local data collection to feed into the national project and for liaising with the researchers.

The research demanded a complex methodology using both quantitative and qualitative research strategies. Six studies – a literature review, a quantitative analysis of remand data, qualitative and quantitative analyses of the effect of custodial remand on justice outcomes, a courtroom observation, case file studies of changes in bail status and a qualitative review with key decision makers of policy implications – were designed to contribute to addressing the key research questions.

This consultancy extended well beyond the original intentions of either the Criminology Research Council or the researchers. This was a result of a number of challenges in attaining access to data in forms that would allow some meaningful comparison between jurisdictions.

Research history

The Stage One report[3] identified that the decision to remand an alleged offender in custody is taken in the context of the justice system and the broader society within which it operates. The research in Stage One identified that from the point of apprehension of an alleged offender to the moment when the court refuses bail, a number of actors are involved in the processes and decision-making that shape the final decision.

The Stage One report mapped the processes leading to the decision to remand an alleged offender in custody in the three jurisdictions of Victoria, South Australia and Western Australia. We drew attention to a number of differences in the contexts in which remand in custody decision-making occurs and in the practice between the jurisdictions. In so doing, we identified the components of a remand system.

A consideration of the Stage One report led the Criminology Research Council to call for researchers to undertake Stage Two of this research focused on the five key research questions described above.

Structure of this report

This report opens the exploration of factors critical to the remand process with an overview of custodial remand, a consideration of relevant literature and legislation and a description of the remand process in Chapter 2. The research methodology is discussed in Chapter 3. Chapter 4 utilises a statistical analysis of remand populations to explore critical factors to the remand process and how these contribute to the observed differences in remand rates between South Australia and Victoria. In Chapter 5 these questions are further explored using an analysis of qualitative research undertaken with remand decision makers in Victoria and South Australia. Chapter 6 considers the effect of custodial remand on key outcomes in the justice system. Chapter 7 discuses what constitutes 'best practice' (now usually termed 'good practice') for remand decision-making, and Chapter 8 discusses the policy implications of our research findings.

[3] Bamford et al (1999).

2 Remand in custody: the issue

2.1 An overview of custodial remand

2.1.1 The numbers of prisoners who are on remand in Australia

There has been a gradual but steady increase in the numbers of persons remanded in custody in Australia in the last decade and, in recent years, they have matched, proportionately, the rising numbers of sentenced prisoners. Of the 22,492 persons in custody at 30 June 2002, 18,078 had been sentenced and 4,414 had been remanded in custody awaiting trial or sentence. Of the 23,555 persons in custody at June 2003, 18,738 had been sentenced and 4,817 had been remanded in custody awaiting trial or sentence. Of the 24,171 persons in custody at June 2004, 19,231 had been sentenced and 4,935 had been remanded in custody awaiting trial or sentence. The proportion of remandees is consistently around 20 per cent. Remandees, however, do not enter the prison system in a way that is consistent across jurisdictions. Numbers continue to rise substantially in some jurisdictions (NSW and Queensland) but in South Australia, Western Australia, Tasmania, the Northern Territory and the ACT, the numbers appear to have remained relatively steady for the last four years. In Victoria, after a sharp rise (2001-2003), they now appear to be falling. These trends are illustrated in ***Figure 1.***

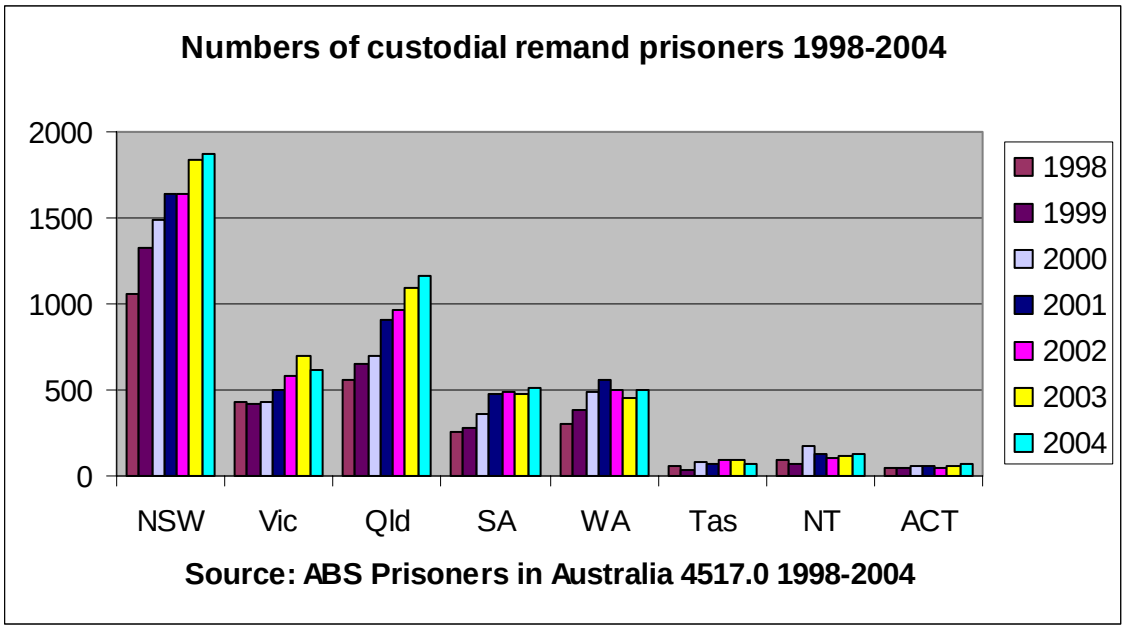

Figure 1

2.1.2 The proportion of total prisoners who are on remand

As indicated above, the proportion of prisoners who are on remand has remained the same in Australia over the last three years, that is, around 20 per cent. This demonstrates a significant increase over the figure in 1998, when only 15 per cent of all prisoners had been remanded in custody awaiting trial or sentence.[4] In 1992, the proportion was smaller still, at 12 per cent. The proportion of prisoners currently

4 ABS Corrective Services 4512.0, March Quarter 1998, p. 4.

held in custody on remand in Australia is roughly equal to rates in comparable countries like New Zealand (18.3 per cent), Canada (21.1 per cent), the USA (20.0 per cent), England and Wales (16.9 per cent), and Germany (21.2 per cent).[5]

Figure 2 sets out the proportions for all jurisdictions.[6] Notice the startling graph for South Australia, especially from 1999-2001.

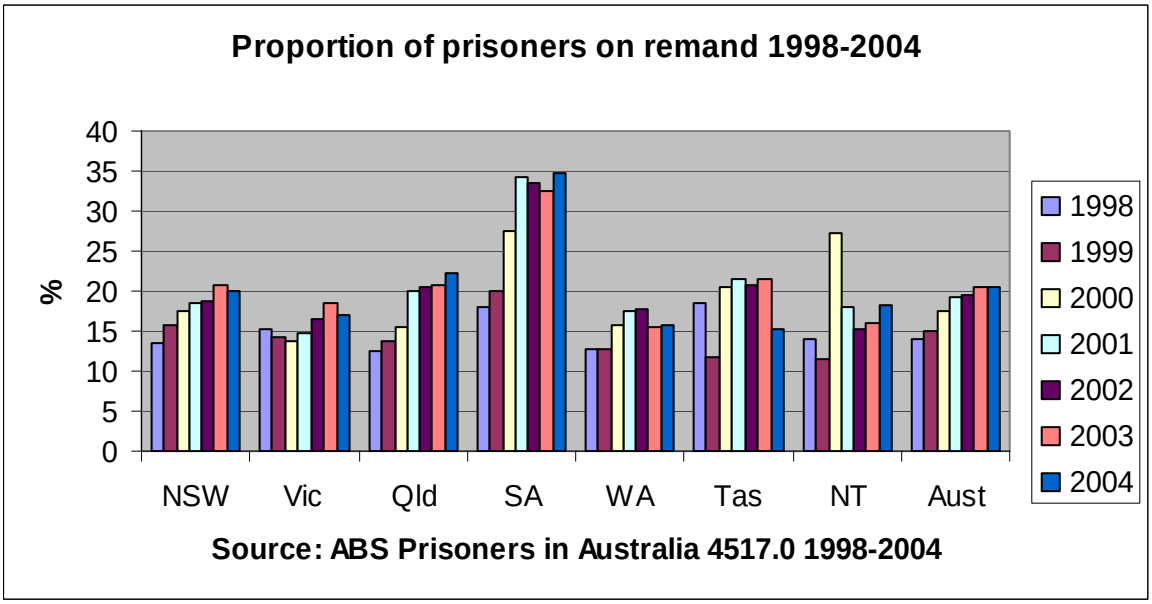

Figure 2

For the purpose of our research, the data for SA and Victoria require closer attention. ***Figure 3*** highlights the fact that, in the last six years, the Victorian proportion has changed little (around 15 per cent and up to 18 per cent), while the South Australian proportion has grown from 18 per cent to almost 35 per cent.

In fact, the Victorian proportion was 14 per cent in 1995, when the SA proportion was only 16 per cent.[7] South Australia hovered between 16 per cent and 20 per cent until 2000 when it jumped to 27 per cent. While there have been increases in Victoria, and Australia as a whole, the increases in South Australia are out of all proportion with these other trends.

5 International remand statistics from the International Centre for Prison Studies at: http://www.kcl.ac.uk/depsta/rel/icps/home.html

6 With the exception of the ACT where the figures are too small to make valid comparisons.

7 ABS Prisoners in Australia 4517.0, 30 June 2002, companion data.

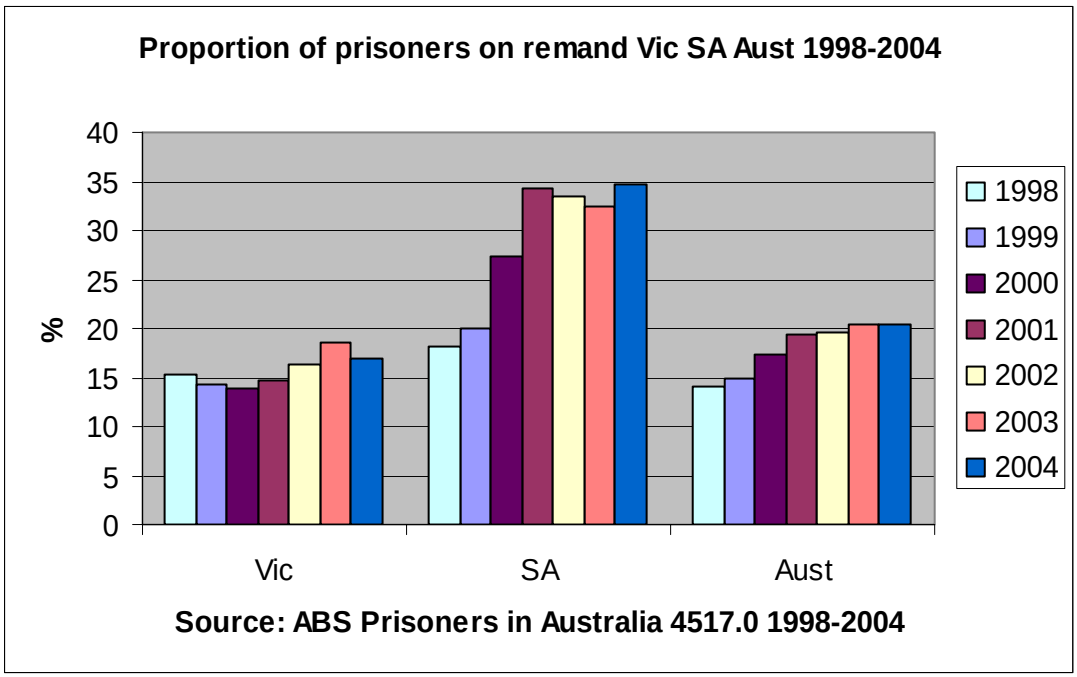

Figure 3

To what extent might these shifts simply be a result of shifts in prison numbers? To get some help in answering that question, and other questions, it is useful to look at imprisonment trends generally, and it is to those figures we now turn.

2.1.3 Imprisonment in Australia 1998–2004

On 30 June 1993, there were 15,866 persons in Australian prisons. By 1 March 1998, this had jumped to 18,425 prisoners. By 30 June 2002, this figure had increased again to 22,492, a leap of 22 per cent in a little over four years. At 30 June 2003, there were 23,555 prisoners, or a further 5 per cent increase since 2002, with a smaller increase to 24,171 at June 30 2004. That is, the prison population has increased over 50 per cent in the last eleven years, while the population of Australia generally has grown only about 15 per cent. A decade ago, the Australian imprisonment rate was around 118 per 100,000 adult[8] population. In 1998, it was just under 140. By 2002, the rate was 148 per 100,000 population[9] and in June 2003, 153 per 100,000 population.[10] At June 30 2004, it was 157.1 per 100,000. The Northern Territory has the highest rate of imprisonment, with 513 prisoners per 100,000 adult population. South Australia's rate in 2002 was 122 per 100,000, while Victoria's rate was 93 per 100,000.[11] The rates in 2004 were 125 and 94 respectively.[12]

8 In our 1999 report (Bamford et al 1999), we pointed out that, while standardised "counting rules" are designed to apply in the statistical units across the nation, it is not clear that each jurisdiction is counting remand data in the same way. For example, the age of an "adult" differs (18 in NSW, SA, WA, yet 17 in Victoria, Queensland, Tasmania, Northern Territory, and the Australian Capital Territory). For the purpose of determining remand rates, we have used the adult population numbers provided by the ABS as appendices to the 4517.0 Prisoners in Australia reports.

9 ABS Prisoners in Australia 4517.0, 20 February 2003, p. 3.

10 ABS Corrective Services Australia, June Quarter 2003, 4512.0. This is an increase of 2 per cent from the rate recorded in the June quarter 2001.

11 ABS Prisoners in Australia 4517.0, 20 February 2003, p. 12.

12 ABS Prisoners in Australia 4517.0, 23 December 2004.

Figure 4 shows the 1999–2004 imprisonment rate picture in Australia per jurisdiction. Generally speaking, the rates have remained fairly steady for the last six years. Interestingly, South Australia's rate, while below the Victorian rate, remains well below the rates found in NSW, Queensland and WA and, not surprisingly therefore, below the overall Australian rates.

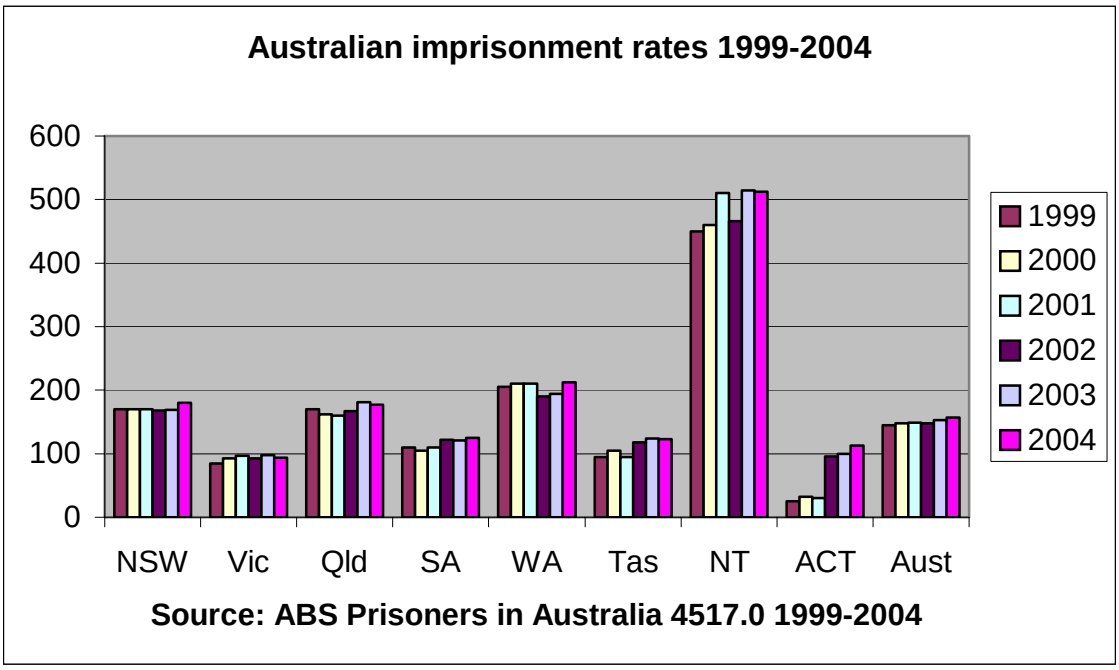

Figure 4

Hence, remand in custody increases are occurring in an environment of increasing imprisonment numbers and rates in Australia generally. Is the rise in remand simply a reflection of the forces driving up imprisonment overall?

One way to look at the changes in the remand population and general prisoner population is to plot changes relative to a point in time. ***Figure 5*** shows the change in the indices of remand and sentenced imprisonment for Victoria, where the number of prisoners in each group in January 1995 represents an index of 100. An index of 110 represents an increase of 10 per cent relative to January 1995, and index of 150 represents an increase of 50 per cent, and so forth. ***Figure 6*** shows the same indexed change in remand and sentenced imprisonment for South Australia.

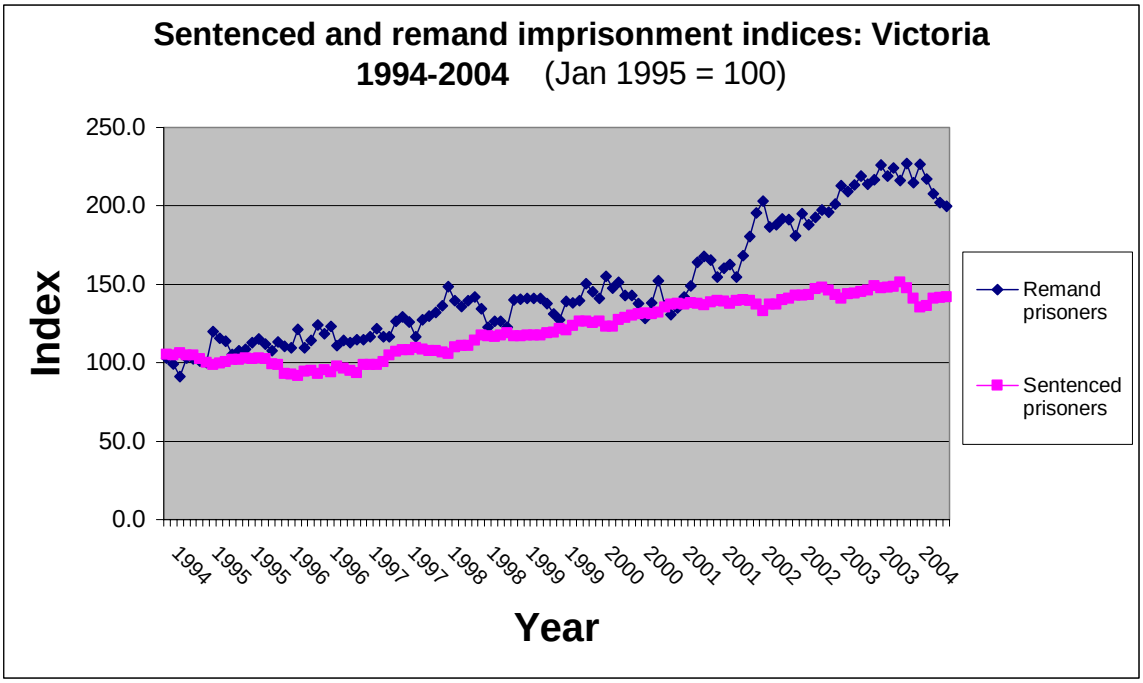

Figure 5

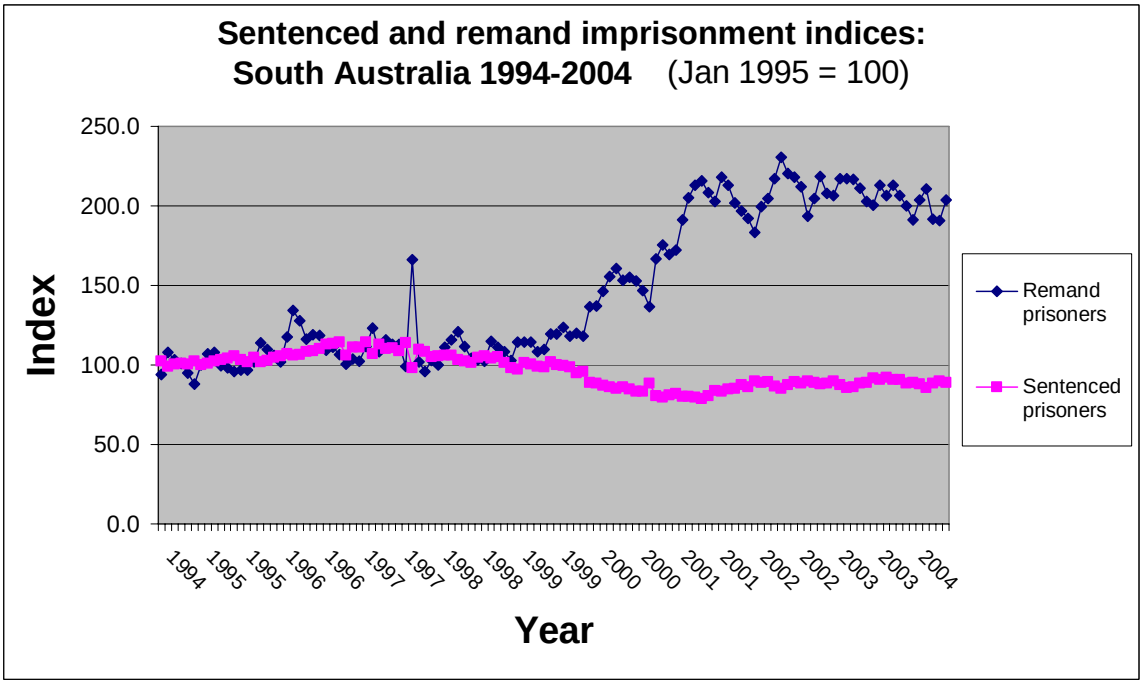

Figure 6

These figures show what appear to be profoundly different patterns of change in remand and sentenced prisoner populations. In Victoria, both remand and sentenced numbers increased up to the end of 2003 then decreased for the first part of 2004. While it is evident that Victorian remand numbers increased at a faster rate than sentenced numbers, especially in 2003 and 2004, both series appear to change in the same direction at more or less the same time. For the first eight years of the period

(that is, from mid 1994 to the beginning of 2001), the rate of increase in Victorian remand numbers was roughly the same as that of sentenced prisoners. In January 2001, the number of remandees had increased by 35 per cent over the January 1995 number, and the number of sentenced prisoners had increased by 38 per cent over the January 1995 number. However, after January 2001, Victorian remand numbers increased much faster than sentenced prisoner numbers. The fastest increase was during 2001, and by the beginning of 2002 remand numbers were nearly double their 1995 level, and, by the end of 2003, had risen to 225 per cent of their level in January 1995. In contrast, sentenced numbers in 2002 were only 40 per cent above, and at the end of 2003 50 per cent above, their 1995 level.

In contrast, South Australian remand numbers doubled while sentenced prisoner numbers *decreased*, with virtually all this change taking place after January 2000. For the first five years of the period (from July 1994 to July 1999) South Australian prisoner numbers (both remand and sentenced) were virtually unchanged. The rate of sentenced imprisonment in July 1999 was exactly the same as it had been five years earlier, and the rate of remand imprisonment rose by around 20 per cent higher in the five years. The next two years saw a dramatic departure from this stability. In the two years from July 1999 to July 2001, the South Australian remand numbers nearly doubled, while the number of sentenced prisoners fell by around ten per cent. The period since mid-2001 has seen South Australian prisoner numbers return to relative stability, albeit at new levels.

2.1.4 Remand rates

The remand rate is defined as the number of prisoners on remand per 100,000 adult population. There are significantly different rates of custodial remand across all jurisdictions in Australia.

The rates per jurisdiction are identified below in ***Figure 7***. The graph shows that the Northern Territory has had the highest remand in custody rate in the country for all of the years since the ABS began counting, although it has dropped dramatically since 2000.[13]

Leaving the Northern Territory to one side, SA and Victoria represent the highest and the lowest rates. The rate in South Australia in 1998 was 22.7, with the Victorian rate at 12.2. In 2002, the SA rate was 42.2; Victoria was 16.5. In 2003 these rates had converged slightly, with SA coming down to 39.4 and Victoria rising to 18.2.[14] By 2004, this had shifted again, with the South Australian rate rising to 43.5 and the Victorian rate dropping to 15.9.[15]

13 ABS Corrective Services 4512, 2003

14 The figures for 2003 were prepared from preliminary statistics from the Australian Demographic Statistics June 2003, ABS cat. 3101.0.

15 ABS Prisoners in Australia 4517.0 2004.

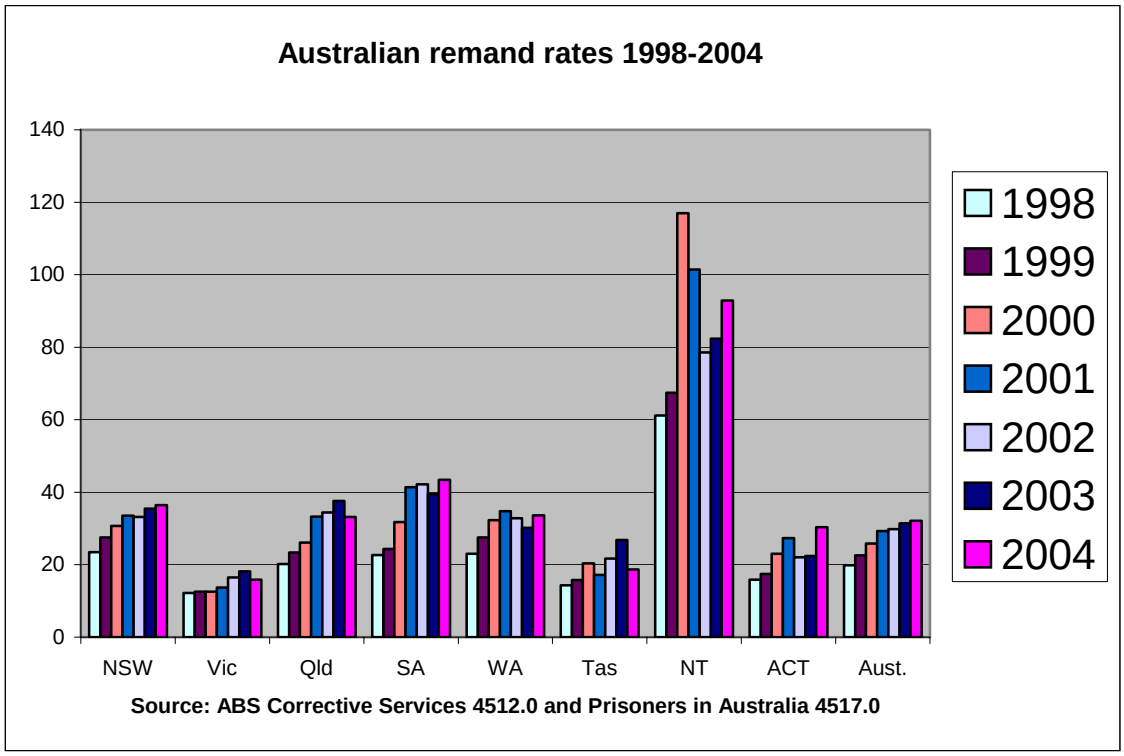

Figure 7

Figure 8 highlights these stark differences between Victoria and South Australia. In the period 1998-2000, the rate in SA was roughly two times that found in Victoria, and in 2001-2002 almost three times. In 2003, the SA rates were back to about twice those in Victoria. In 2004 the rate in SA was almost back to three times.

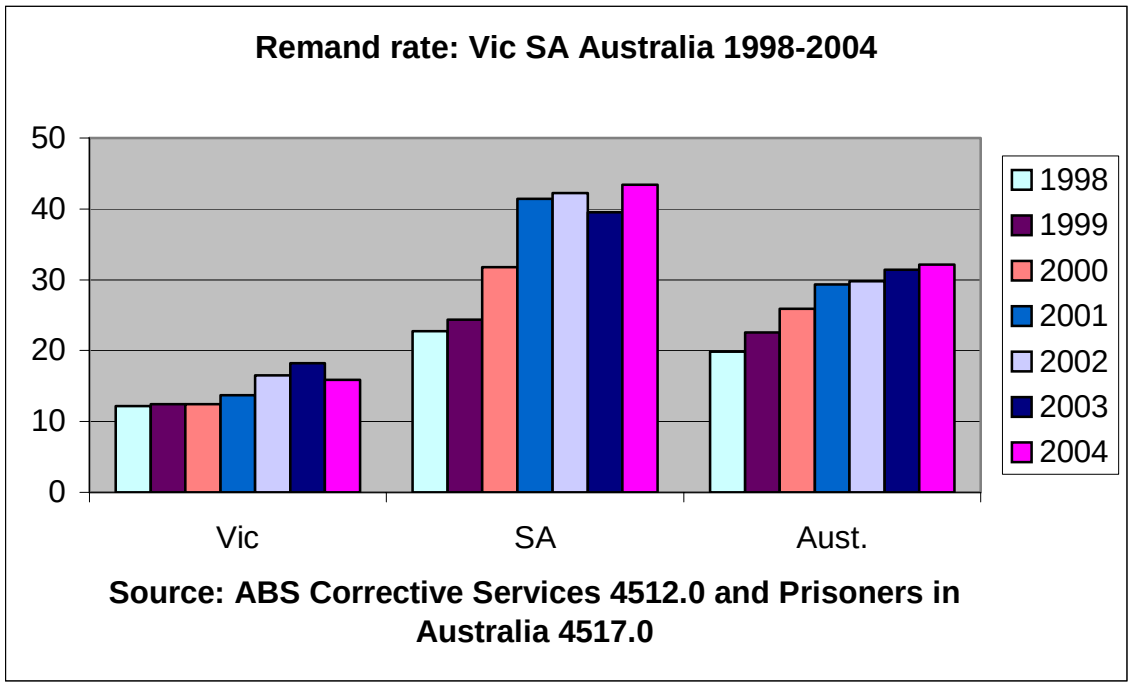

Figure 8

2.1.5 Remandee characteristics

Who is being remanded? Remandees have some distinctive characteristics. Remandees are overwhelmingly young males, and the distribution of charge types for which they are remanded is generally similar to the distribution of offences in the sentenced prisoner population. Remandees are more likely than other prisoners to be homeless, unemployed or have some form of mental disorder (Morgan and Henderson 1998; 2001). A higher proportion of women prisoners are remandees than men, and a higher proportion of Indigenous prisoners are remandees than non-Indigenous prisoners (Australian Bureau of Statistics 2004).[16]

Summary

What can we make of all of this? In sum, a rather confusing picture emerges. Anyone hoping for a consistent pattern will be sorely disappointed. South Australia has a lower imprisonment rate than the Australian average, the highest remand rate of the States, and a wildly disproportionate percentage of its prisoners in custody awaiting trial. For two years (1999-2001) the remand and sentenced prisoner indices graphs went in opposite directions. Victoria has the lowest imprisonment rate in Australia, a very low remand rate and a below average percentage of its prisoners in custody awaiting trial. Its remand and sentenced prisoner indices have roughly mirrored each other's patterns. In contrast, Western Australia has an imprisonment rate double that of SA and Victoria, and a remand rate roughly mid-point between the two. It has a proportion of prisoners in custody awaiting trial that is virtually the same as that found in Victoria while being half of the South Australian percentage.

Are these jurisdictional differences in remand rates determined by variations in the criminal justice environment (for example, crime rates, police tactics, available legal representation or court delays) or offender characteristics (demographics, social disadvantage and criminal history) or a combination of the two? In order to answer these questions and begin to understand these complex remand dynamics, we need to describe the nature of the changes in remand more precisely than just counting the total number of unsentenced persons in custody. To begin with, it is important to review the literature before we pursue the qualitative and quantitative analyses.

2.2 Literature review

Both the United States and the United Kingdom began significant bail law reform in the 1960s leading to legislative amendments, namely the *Bail Reform Acts* 1966 and 1984 in the United States and the *Criminal Justice Act* 1967 and the *Bail Act* 1976 in the UK. Significant research literature flowed from those reforms. The pattern has been similar in Australia, with inquiries into the state of the law of bail in the 1970s and 1980s[17] leading to legislative reform (principally codification of criteria and procedural protection for those held in custody awaiting disposition of their matters).[18] Subsequent to these reforms came another wave of governmental inquiries reviewing the effect of the earlier reforms. A range of government-sponsored studies aimed at investigating custodial remand processes emerged. These, along with a number of inquiries driven by concern at the growing number of

[16] Discussed further, below, at 4.3.2 and at 6.2.2.

[17] Australian Law Reform Commission 1975, New South Wales Bureau of Crime Statistics and Research 1977, Victoria Statute Law Revision Committee 1975, Western Australia 1979; South Australia 1986.

[18] New South Wales: *Bail Act* 1978; Victoria: *Bail Act* 1977; South Australia: *Bail Act* 1985, Queensland: *Bail Act* 1980, Western Australia: *Bail Act* 1982 (proclaimed 1989). Tasmania enacted a *Bail Act* in 1994.

defendants remanded in custody over the last ten years, have produced another rich vein of literature on the remand in custody process.[19] This literature was referred to in our 1999 report. The literature then and since concentrates on two key areas: the process of the granting bail by police and courts, and the outcomes of a bail decision.

2.2.1 The process of granting of bail

The literature is consistent in recognising that the bulk of decisions relating to bail are made by judicial officers about defendants who are already on bail. In South Australia, it was estimated that 90 per cent of those arrested were released on police bail in 1998.[20] While the literature does not contain much statistical data on the numbers and proportions granted police bail, the most recent research on police arrests from the United Kingdom indicates that rates of police bail in individual police stations vary from 48 per cent to 95 per cent, with an overall average of 72 per cent of those charged after arrest being granted police bail.[21]

The great proportion of defendants obtaining police bail results in a smaller proportion of contested applications. Contested applications most commonly arise when a person refused police bail applies for court bail, but the literature reveals a significant number of cases where persons kept in custody by police do not apply for court bail.

Hucklesby observed that the prosecution did not oppose bail in 85 per cent of cases and, in the 15 per cent of cases where bail was opposed, the defendants did not challenge the prosecution position in almost half the cases. "This means that in only 9 per cent of all cases observed was the outcome of the remand hearing contested in court".[22] These figures show a significant increase in the proportion not contesting remand in custody discussed in the earlier Cobden Trust research. This research revealed that for approximately 25 per cent of those remanded in custody, imprisonment had occurred "without any discussion about bail having taken place in court".[23] This is roughly consistent with Zander's study[24] of London magistrates' courts which found bail was unopposed by prosecution in 75 per cent of cases and with Doherty and East's finding of 82 per cent.[25] The latter study also found that there was only a contest between prosecution and defence in 15 per cent of the hearings.

The significant number of defendants not objecting to being remanded in custody has been the subject of some discussion. This was an unexpected finding by the Vera Foundation in England in the mid-1980s arising from research into pilot bail information schemes. Across five English courts, the percentages of defendants in custody not asking for bail at first appearance ranged from 51 per cent to 76 per

[19] Queensland Law Reform Commission 1993a, 1993b, Law Reform Commission of Victoria 1992, South Australia 1997, Western Australia 1997.

[20] McAvaney 1991, p. 74. This figure is somewhat confirmed by research conducted for the Law Reform Commission of Victoria (1992, p. 45), which found that 92 per cent of those arrested obtained bail from police or a bail justice.

[21] Phillips and Brown 1998, pp. 115–18. This is consistent with the findings of the Bail Process Project, which found police bail granted in 58 per cent of cases where a bail decision required. Both these surveys were carried out before 1994 when English police were given power to place conditions on bail. Prior to 1994, the police had to either grant unconditional bail or remand in custody.

[22] Hucklesby 1997b, p. 271.

[23] King 1971, p. 71.

[24] Zander 1979.

[25] 1985, p. 262.

cent.[26] Comparative figures for Australia do not appear in the literature although one might anticipate that they would be lower. For the period in which these studies were carried out, English magistrates' courts regarded themselves bound by the English Court of Appeal decision in *R v. Nottingham Justices, ex parte Davies*.[27] This case appeared to support the practice of only allowing a defendant one application for bail, which meant that defence lawyers were not willing to make bail applications until they fully prepared, and the application enjoyed the best prospects of success. The timing and arrangement of court business meant that defendants in police custody were brought in at the first opportunity and often the defence solicitor or duty solicitor (from legal aid) would not be in a position to obtain proper instructions. The practice of restricting defendants to one bail application is not a common feature of Australian courts; thus, there is not such a disincentive to bring on applications for bail at the first opportunity.

Studies of bail hearings in magistrates' courts in both Australia and the United Kingdom consistently report that the bail hearings are usually of short duration. In Australia, Armstrong's study reported that the majority of bail hearings took less than two minutes.[28] The Cobden Trust's observations of over 1,000 bail decisions in 1970 found the average duration of bail hearings was three minutes, with 80 per cent being less than five minutes.[29] Zander's study of London Magistrates' Court found that 86 per cent of bail hearings lasted less than five minutes.[30] A study of Cardiff's Magistrates' Court in 1981-82 revealed 62 per cent of hearings taking less than two minutes and 96 per cent within ten minutes. These figures may be partially explained by the large proportion of bail decisions that are uncontested. Doherty and East then analysed the length of hearings where bail hearings resulted in a remand in custody and still found the time taken in the judicial process was still very short—38 per cent were dealt with in less than two minutes and 87 per cent in less than ten minutes.[31] The implication arising out of the brevity of bail hearings is that the bail decision is not based on what happens in court, but was has happened prior to the hearing.

The research demonstrates a consistency between judicial decisions on bail and the decisions of police with respect to police bail. Furthermore, there is a significant correlation between police and court bail decisions at the immediate stage—between the attitude of the prosecution and the outcome of the court bail decision. In Australia, empirical work based on observation and recording of judicial processes has been infrequent, with most of the work being conducted in the 1970s and 1980s. The study by David and Ward[32] reported that:

> ... there is evidence that a substantial proportion of those remanded in custody are held in custody because magistrates tend not to release accused who have been refused bail by police when first apprehended. If the police are willing to grant bail to an accused, a magistrate is more likely not to remand the accused to custody.

In the United Kingdom, a consistent conclusion reached in studies from the 1970s, with perhaps one exception, has been that police decisions play an important role in

[26] Brink and Stone 1988. Also Morgan 1989, p. 488.
[27] [1980] 2 All ER 775.
[28] Armstrong 1977.
[29] King 1971, p. 17.
[30] 1979, p. 108.
[31] Doherty and East 1985, p. 262.
[32] 1987, pp. 326, 333-334; David and Ward's observations were made in 1984 and reported in 1987.

the judicial process.[33] The Cobden Trust concluded "magistrates, particularly lay magistrates, still rely heavily on the police's opinion as to whether or not bail ought to be given." [34] As mentioned above, Zander found that police did not oppose bail in 75 per cent of cases and that bail almost invariably followed. For the 25 per cent of cases where bail was opposed, 58 per cent resulted in bail in being refused. The cases where the outcome was contrary to the prosecution position were found to be where relatively minor crimes were involved.

Doherty and East's study referred to above also found a strong relationship between police attitude and court outcomes. With respect to those granted police bail, the court allowed bail in every case. For those whom the police had held in custody, 71 per cent were released on bail by the court.[35] However, for those whom police maintained their objection to bail, over 75 per cent were remanded in custody. The more recent work by Hucklesby[36] and the Home Office[37] reflects a high level of consistency between police decision on bail, prosecution attitude, and judicial outcome. Hucklesby reported that while the Crown Prosecutor Service (CPS) sought either conditional bail or remand in custody in 15 per cent of the bail hearings, there was a "high concordance rate between CPS remand request and the magistrate's remand decision with the magistrates almost always agreeing with the CPS assessment".[38] The Home Office studies found that for defendants refused police bail, about one-third were remanded in custody by the court. For those defendants granted police bail, the courts continued their bail status in 92 per cent of cases. High consistency was also found between prosecution recommendation and bail outcome—if bail was recommended by the CPS, then 90 per cent of those defendants obtained bail. If CPS sought a remand in custody then 76 per cent of those defendants were remanded in custody.[39]

Some commentators have argued that court culture should play a crucial role in explaining variations in the use of bail. "Court culture" has been defined as "a set of informal norms that are mediated through the working relationships of the various participants". Researchers have characterised participants in the court process as a "courtroom work group" who have a common goal of getting the work done. This is often done co-operatively and the "informal norms of work groups permit predictable routines to develop which reduce risk and uncertainty and provides for the efficient disposal of cases".[40] It is the differences in local court cultures that are said to explain why some cases which seem objectively similar often have different results. Whilst used to investigate and explain other court phenomena, for example, delays[41] and sentencing disparities,[42] it may be a useful tool in explaining some bail variations.

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[33] Doherty and East 1985, p. 255.

[34] King 1971, p. 45

[35] This high figure includes those for whom police no longer objected to bail at the court hearing. The low number obtaining police bail may be partly explained by the inability of police at that time to release defendants on conditional bail.

[36] 1994, 1996, 1997a, 1997b.

[37] 1997a, 1997b, 1997c, 1998.

[38] Hucklesby 1997a, p. 134. The courts agreed with CPS request for remand on bail in 99 per cent of cases and 86 per cent with requests for remand in custody.

[39] Morgan and Henderson 1998, p. 37.

[40] Hucklesby 1997a, pp. 130–31.

[41] Church 1982.

[42] Rumgay 1995

Finally, counsels' relationships in the remand process are clearly complementary and iterative. Both the prosecutors and the defence counsel are likely to adopt positions that are going to maintain their credibility with magistrates.[43] Yet, magistrates indicate that they are also influenced by the positions adopted by the parties appearing before them. If the parties are agreed as to the appropriate outcome, then it appears to require exceptional reasons for the magistrate to challenge that position. It is this set of informal norms along with the administrative and internal decision-making processes, and by each of the participants in the process, that appear to be the key to understanding the remand in custody process.[44]

2.2.2 Bail outcomes and offending on bail

There has been significant literature produced on bail outcomes, albeit this work has largely been in the area of offending on bail. Reflecting public and political concerns, governments have commissioned a number of studies over the last twenty years that have attempted to ascertain levels of offending on bail. As these studies are based on analyses of police and court records, these studies have to rely on solved crimes – the number of offences that go unreported or unsolved means that the studies are not able to provide an accurate picture of the real level of offending. Furthermore, some studies look at those *charged* with offences whereas other look at those *convicted* of offences. Even this latter category is not always comparable, as some studies look at those convicted whilst on bail which does not include those charged and convicted after the time on bail has come to an end. Other complications arise in studies over the inclusion of defendants charged and convicted whilst on bail but for offences committed prior to them entering a bail agreement. Some studies looked at the number of persons committing crime while on bail; others look at the number of offences that were committed while on bail.

Brown, in his study of offending on bail in 1998, found that of those on police bail 7 per cent failed to attend their first appearance. For those on court bail, 9 per cent failed to attend court at least once.[45]

Table 1 provides a summary of findings from a number of studies across four jurisdictions.

[43] McConville et al. 1994, p. 181 and Hucklesby 1996, p. 229.

[44] Hucklesby (1996, pp. 140–41) found that within the three courts sitting in the same area, there were significant differences between two courts when compared to the third. As they appeared to have the same sort of defendants, the variation in remand in custody rates was explained by the different court cultures between the anomalous court and the other two.

[45] Brown (1998), p. 4.

Jurisdiction	Arrested while on bail	Convicted
Ireland		
Law Reform Commission (1992–1993)	9% of offences committed by person on bail	
UK		
Home Office study 1978		9–12% of persons on bail committed offences
Home Office 1988		10% of persons on bail committed offences
Metropolitan Police 1988	16% defendants were on bail	12%
Northumbria Police 1991	23% defendants were on bail	17% of defendants on bail convicted of an offence committed whilst on bail
Avon & Somerset Police 1991	23–34% defendants were on bail	
Home Office 1992 (Morgan)	23–29% on bail when charged with an offence committed whilst on bail	10–12% of those on bail convicted of another offence while on bail
Home Office 1998 (Morgan & Henderson)	32% on bail when charged	26% of those on bail convicted of another offence while on bail
Scottish Executive (2004)		22% of those on bail convicted of another offence while on bail (2001)
New Zealand		
Lash & Luketina 1990		14% defendants on bail offended while on bail (1986)
Ministry of Justice 1998 (Lash)		19% defendants on bail offended while on bail (1994)
Ministry of Justice (1999) Spier		20–21% defendants on bail offended while on bail (1993–96)
Australia		
Tasmania Law Reform Institute (2004)	26% of charges committed by those on bail (2001–02)	
Western Australia Allan et al (2003)		24% of those on bail re-offended while on bail (2001)

Table 1

What the research shows is that the rate of offending increases as the age of the offender decreases, with the highest offending occurring in the younger age cohorts. Henderson and Morgan found that 29 per cent of defendants under the age of 18 committed offences whilst on bail compared to 13 per cent of those aged over 21.[46]

Similar results were found by Lash in the study of offending on bail in New Zealand in 1994. She found the age cohorts with the highest rate of offending on bail were the 17 to 19-year-olds, of whom over 27 per cent offended whilst on bail. By comparison approximately 16 per cent of the offenders aged between 30 and 34 offended whilst on bail.[47]

Following amendments to Scottish bail legislation aimed at reducing offending on bail, Brown, Leverick and Duff investigated the effect of those changes. While they found the amendments had not significantly altered the position with respect to remand, the research provided data on the profile of defendants. Their research showed that defendants aged between 16 and 20 had an offending on bail rate of 35 per cent. For those aged between 41 and 60 the equivalent rate was 6 per cent.[48]

2.2.3 Failure to appear

The original purpose of remand in custody was to ensure that the defendant attended court as required. Very little research has been conducted into the rates at which defendants on bail abscond or fail to attend court as required. The most recent Australian research is that carried out by the New South Wales Bureau of Crime Statistics and Research.[49] Looking at defendants who have failed to appear while on bail, the researchers found that over 1999 and 2000 between 12.6 per cent and 14.6 per cent of persons on bail had not attended court as required and a warrant for their arrest had been issued.

Chilvers *et al* also found a significant difference between defendants appearing in local courts and those appearing in higher courts. The percentage of defendants failing to appear in higher courts over that period fell from 6.2 per cent to 5.3 per cent. Looking at the profile of defendants that failed to appear, the research showed that those with prior convictions were three to four times more likely to fail to appear. Similarly the rate at which defendants failed to appear increased as the number of charges against a defendant increased. Defendants charged with theft, break and enter, burglary and receiving were more likely to fail to appear in court.

2.2.4 Protection of victims

There is very little published research on risk to victims as a result of bail decisions. While this may have been subsumed more generally under the rubric of "re-offending on bail", or protection of the community in more recent times, there has been increasing recognition of the special position of victims in the criminal justice system. The changes to bail legislation to make special provision for victims have already been identified but there is no published data on the level to which victims have suffered as a result of defendants being granted bail.

The only literature located relevant to this is in the context of witness protection programs but here the recognition is not for the victim as victim *per se* but as a witness.

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[46] Cited in Hucklesby and Marshall (2000) at 154.

[47] Lash (1998) table 4.2.

[48] Brown *et al* (2004).

[49] Chilvers *et al* (2002).

2.2.5 Final disposition of matters for which defendants are remanded in custody

One of the aspects of remand in custody that has attracted comment has been the proportion of defendants not receiving custodial sentences when their matters were eventually finalised. Jones notes that the 2000 UK prison statistics show that "more than half of the male defendants remanded in custody were either acquitted or, on conviction, were not sentenced to imprisonment".[50]

In 2001 the New South Wales Department of Corrective Services examined the judicial outcome for a cohort of defendants remanded in custody in March 1999.[51] The results revealed that 3 per cent were still in custody some 12 months later. A further 41 per cent were given custodial sentences and 56 per cent were discharged without a custodial sentence. This latter group included those granted bail as well as those discharged for other reasons. Looking at the 76 remand prisoners who served more than 30 days on remand but were discharged without a custodial sentence: 59 left on bail; two had a custodial sentence for which the time already served meant they were discharged on conviction; eight were given non-custodial sentences; five were sent to divergent programs, and two were found not guilty.

Looking at those cases finalised in March 1999, Thompson found that of the 416 prisoners on remand at finalisation 355 were given custodial sentences, four were fined, eight were not convicted, and the remainder were given bonds, community service orders or periodic detention.

What appears to be missing from the literature, however, is investigation and analysis of processes outside of judicial determinations. There is little analysis of police decisions to arrest, and whilst limited attention has been given to the importance of police decisions on police bail in the bail process, little is known about that process.[52] Police decision-making is also recognised as important at the judicial stage of the process, particularly in terms of recommendations to prosecutors, but that is not a well understood process. Moreover, whilst many of the government inquiries have considered issues relating to bail procedures (for example, who can grant bail, when can it be granted, the forms of bail, the consequences of not complying with bail agreements, and what defendants must be told about bail), little attention has been paid to decision-making processes. The work that has been done has tended to focus simply on the actual judicial decisions relating to bail.

Overall, the literature suggests that the key to understanding the remand in custody process is to move outside of the judicial realm and focus on issues that arise prior to the judicial hearing. Thus, this study focuses on and analyses the decisions made by the *non*-judicial participants in the process, especially the important role police decision-making plays in the process, and the importance of prosecutorial information provision.

[50] Jones (2003), p. 416.

[51] Thompson (2001).

[52] Of particular importance is Home Office research in England investigating entry into the criminal justice—see Phillips, S. C. & Brown, D. 1998. In Australia, the Royal Commission into Aboriginal Deaths in Custody investigated police arrest and bail decisions in a large number of cases. See *Royal Commission into Aboriginal Deaths in Custody*, 1991.

2.3 Legislative analysis

2.3.1 Principles underpinning bail

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

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

> What the nature of bail is, hath been shown in the preceding book; *viz.* a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance he being supposed to continue in their friendly custody, instead of going to gaol.[53]

The early works do not appear to justify remand in custody on preventative grounds, that is, to prevent further offending. As Metzmeier shows, the notion of bail being refused to prevent possible further offending only developed in the United Kingdom in the 1950s following *R v Phillips* when the Court of Criminal Appeal held that a persistent offender could be refused bail on the grounds he or she might commit other offences.[54] While this was initially resisted in some jurisdictions, 'preventative detention' had been adopted in New Zealand in the 1950s and in Canada in 1960s. Metzmeier also notes that the New South Wales decision of *R v Appleby* in 1966 adopted the *R v Phillips* approach. In Ireland, the Supreme Court continued to hold that preventative detention was not grounds for refusing bail at common law, this in 1966:

> In bail applications generally it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by a reasonable amount of bail. The object of bail is neither punitive not preventative. From the earliest times it was appreciated that detention in custody pending trial could be a cause of great hardship and it is as true now as it was in ancient times that it is desirable to release on bail as large a number of accused persons as possible who may safely be released pending trial. From time to time necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases "necessity" is the operative test. The presumption of innocence until conviction is a very real thing and is not simply a procedural rule taking effect only at the trial.[55]

and more recently in 1989:

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[53] Blackstone (1979, 293).

[54] Metzmeier (1996).

[55] *People (Attorney-General) v O'Callaghan* [1966] IR 501 per Walsh J at 513.

> The criminalising of mere intention has been usually a badge of an oppressive or unjust system. The proper methods of preventing crime are long-established combination of police surveillance, speedy trial and deterrent sentences. Section 11 of the *Criminal Justice Act, 1984*, which provides mandatory consecutive sentences for offences committed while on bail, constitutes a good example of such a deterrent.[56]

Preventing re-offending whilst on bail only became a ground for refusing bail following a constitutional amendment passed by referendum in 1996 and even then it only permits refusal of bail for defendants charged with committing serious offences who on reasonable grounds were thought to be likely to commit further serious offences.[57]

Leaving aside the grounds for remanding in custody, the decision to grant bail or remand in custody has several unusual characteristics from a court's perspective. The first is that the bail decision is not a final order; not only can it be revoked but a defendant refused bail can reapply for bail.[58] Secondly while the decision can be characterised as administrative, it is clearly, at least in so far as Supreme Court decisions are concerned, a judicial act done in the exercise of judicial power.[59] Yet, just as it was a power initially exercised by the sheriffs in medieval England, it is also a power exercised by police. Thirdly, contrary to traditional Anglo-Australian judicial functions, bail applications have an 'inquisitorial' element. Bail authorities may make inquiries, on oath (if in court) or otherwise, to ascertain relevant information.

2.3.2 The bail legislation

The law with respect to bail and remand in custody is to be found in the bail Acts of the two jurisdictions. Prior to the Acts the Supreme Court exercised an inherent common law jurisdiction relating to bail.[60] With the passage of the bail Acts, this common law jurisdiction has been replaced by a statutory jurisdiction that has been held to constitute a complete code.[61] Being a code means that the Act

> governs exclusively the topic or subject that it regulates, and relevantly that the only remedies to be permitted in relation to that matter are the remedies provided by the Act…. The [Bail] Act is a code on the topic of the power to grant bail, and the procedure to be followed in connection with the grant of bail, on the terms on which bail is to be granted and on enforcement and termination of bail.[62]

The *Bail Act 1977 (Vic)* and *Bail Act 1985 (SA)* have remained relatively unchanged since their enactment and there have been no major amendments since 1999. To

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[56] *Ryan v DPP* [1989] IR 399 per Finlay CJ at 407.
[57] Sixteenth Amendment of the Irish Constitution, 1996.
[58] *Webster v South Australia* [2003] SASC 347 per Debelle J at para 95.
[59] Ibid per Doyle CJ at para 23.
[60] *Tobin v Minister of Correctional Services* (1980) 24 SASR 389. There is some suggestion that the power may have been derived from early *habeas corpus* Acts: see *Beljajev v DPP (Victoria),* Unreported, Supreme Court of Victoria (8 August 1991).
[61] See *Panagiotidis v Jakacic* (1986) 41 SASR 591, confirmed in *Webster v South Australia* (2003) SASC 347. See also *Beljajev v DPP (Victoria)* Unreported, Supreme Court of Victoria (8 August 1991), considered in *Fernandez v DPP* [2002] VSCA 115, which overturned *Beljajev* on the question of appeal rights to the Supreme Court of Victoria.
[62] *Webster v South Australia* (2003) SASC 347 per Doyle CJ at paras 49 and 51.

provide the legislative context in which remand in custody operates a brief outline of the significant features of the Acts is outlined.

2.3.3 What do the Acts reveal about the purposes of remanding in custody and what do they say about the information used to make this assessment?

The purpose for remanding defendants in custody is to be found in the bail Acts along with some indication of the factors that courts should take into account when deciding to remand a defendant in custody. If, as has been argued earlier, bail is essentially a risk assessment exercise, the questions become what risks remand in custody is intended to minimise and what sorts of information the bail authority should use in making that risk assessment.

In this regard the Victorian Act is better structured than the South Australian Act. Section (4)(2)(d) sets out what behaviour or outcomes the Act is seeking to avoid and section 4(3) lists some of the factors or information the bail authority might take into account in reaching its decision. By contrast, the South Australia Act merges these two things together. To illustrate this, the relevant provisions of the two Acts are discussed below.

In Victoria s4 (2) (d) of the *Bail Act 1977* provides that bail will be refused if a court is satisfied

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

To assist bail authorities when they are considering whether to remand a defendant in custody, the *Bail Act 1977* provides further guidance on those factors that bail authority should have regard to. While the list is not exhaustive and the bail authority is given the power to take into account all "matters appearing to be relevant", s4 (3) lists the following considerations:

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

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

> having regard to –

(a) the gravity of the offence in respect of which the applicant has been taken into custody;

(b) the likelihood (if any) that the applicant would, if released–

(i) abscond;

(ii) offend again;

(iii) interfere with evidence, intimidate or suborn witnesses, or hinder police inquiries; …

(d) any need that the applicant may have for physical protection;

(e) any medical or other care that the applicant may require;

(f) any previous occasions on which the applicant may have contravened or failed to comply with a term or condition of a bail agreement;

(g) any other relevant matter,

the bail authority considers the applicant should not be released.

Furthermore s10 (4) provides

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

Strictly speaking, the matters listed in paragraphs (b), (d) and (e) of s10(1) should be the outcomes the *Bail Act* is seeking to address and those matters in paragraphs (a) and (f) the factors or information relevant to assessing the level of risk. For example, it is difficult to see how the gravity of offence should be, of itself, the reason for remanding a defendant in custody. It may however be relevant information to determine the risk of absconding or interfering with police investigations on the basis that the more serious the offence, the greater the incentive to abscond or pervert the course of justice.

What is unusual about the South Australian Act is the primacy given to the need to protect the victim in s10 (4). This appears to be not only the actual need but the victim's perception of the need for physical protection. The subsection was inserted into the Act in 1994 at the same time as the enactment of the *Domestic Violence Act 1994*. Previously s10 (1) (c) "stipulated that one of the matters upon which a refusal of bail could be based was 'any need that the victim may have, or perceive, for physical protection from the applicant'".[63] Duggan J went to note the effect of s10 (4) was to increase

> the significance of the need for physical protection of a victim as a factor to be taken into account in bail applications and, although the new subsection is general in its terms, it is not without significance that it was enacted as part of an Act which focuses on domestic violence.[64]

Apart from Duggan J's remarks, there appears to have been little judicial consideration of s10 (4). It may be argued that the effect of s10 (4) is to give primacy to the victim's perceptions of the need for physical safety irrespective of whether those perceptions are soundly based. This argument, which would only come from those opposing a grant of bail, does not appear to have been raised. Indeed, the

[63] *Van Leeuwen v South Australia* [1997] SASC 6141 per Duggan J at para 5.

[64] Ibid, para 8.

survey of judicial decisions on the *Bail Act* conducted for this report reveals that protection of the victim appears to be relatively infrequent given as a reason for remanding a defendant in custody.

Comparing the Acts, we see the Victorian Act as more constrained when it comes to general goals or outcomes sought to be achieved by remanding a defendant in custody. They are largely limited to the five grounds listed in s4 (2) (d). By contrast, the South Australian Act in s10 involves an intermingling of the information upon which assessments of risk should rely, with the grounds for making a decision to remand in custody. Furthermore the grounds appear to be unlimited by virtue of paragraph (g) that enables a defendant to be remanded in custody on the ground of 'any other relevant matter'.

2.3.4 The presumption of bail

The starting point of both Acts is a presumption that a defendant is entitled to bail.[65] However, the Victorian Act contains significant exceptions to the presumption in specified circumstances whereas in South Australia the presumption is continued for all offences until conviction. In South Australia post conviction, the presumption no longer applies but the bail authority has "an unfettered discretion as to whether the applicant should be released on bail".[66]

Section 4(2) of the *Bail Act 1977* (Vic) sets out a number of exceptions to the presumption that a defendant is entitled to bail. These are complex. The first exception requires defendants charged with certain offences to establish 'exceptional circumstances' to justify the grant of bail. The first category of offences is treason and murder.[67] A further point of difference with South Australia is that the power to grant bail in Victoria for these offences is restricted to the Supreme Court although for murder the magistrate who commits the defendant for trial is also given power to grant bail.

The second category of offences for which 'exceptional circumstances' must be established covers a variety of drug offences.[68] These are generally offences of commercial cultivating or trafficking. While the need to demonstrate exceptional circumstances is recognised as setting a high hurdle, it must not be set so high to preclude defendants from ever obtaining bail.[69] As to what amounts to 'exceptional circumstances' the Victorian courts have held these cover a range of factors including the personal circumstances of the defendant, the circumstances of the offending, the strength of the prosecution case and excessive delay in getting to trial. As Vincent J noted

> A number of decisions which have been handed down by judges in this court, however, make it clear that such circumstances may exist as a result of variety of factors which of themselves might not be regarded as exceptional. What is ultimately of significance is that, viewed as a whole, the circumstances can be regarded as exceptional to the extent that, taking into account the very serious nature of the charge to which they are applicable , the making of an order admitting a person to bail would be justified.[70]

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[65] S4 *Bail Act 1977* (Vic); s10 *Bail Act 1985* (SA).

[66] S10(2) *Bail Act 1985* (SA). See *R v Blayney* [2002] SASC 184, *R v McKelliff* [2003] SASC 357.

[67] S13 *Bail Act 1977* (Vic)

[68] S4(2)(aa) *Bail Act 1977* (Vic).

[69] *Application for bail by John Whiteside* [1999] VSC 413.

[70] *In Application for Bail by Dennis Moloney* Unreported, Victorian Supreme Court, 31 October 1990.

If the court does find exceptional circumstances, that court still has to consider whether the normal disqualifying criteria of not answering bail, offending or perverting the course of justice exist, although the onus here lies on the prosecution.[71]

For a broader range of offences a defendant is required to "show cause why his detention in custody is not justified".[72] These include:

- committing an indictable offence whilst awaiting trial on another indictable offence;
- certain stalking and domestic violence offences in specified circumstances;
- aggravated burglary;
- committing indictable offences involving the use of weapons or explosives;
- arson causing death;
- a range of drug offences; and
- offences against the *Bail Act 1977*.[73]

The factors considered by bail authorities when deciding a 'show cause' application for bail appear to be similar to those used when considering 'exceptional circumstances'. They include the history of offending, the strength of the police case, age and other personal circumstances, previous bail history, and risk of imprisonment on conviction. As Gillard J noted in *DPP v Harika* these factors overlap with those used to assess whether there is an unacceptable risk the defendant will engage in the behaviour that remand in custody is intended to prevent.[74]

As with exceptional circumstances, a two-stage process is envisaged. The first stage requires the defendant to show cause why remand in custody is not justified. Having established that, the court has to consider whether there is an unacceptable risk that the defendant will fail to answer bail, commit further offences or engage in the other conduct mentioned in s4 (3). The burden of proving this falls on the prosecution.

2.3.5 The process of applying for bail

Both the South Australian and Victorian Acts contain few provisions governing the bail application process. In South Australia section 8 of the *Bail Act* provides for a written application for bail but this can be dispensed in circumstances of language, intellectual or other difficulties. A person who has custody of a defendant must provide such assistance as is reasonably required to complete the application for bail and transmit it as soon as practicable to the relevant bail authority.

Almost no statutory requirements are made of the bail authority when considering an application for bail. The bail authority may make enquiries and (apart from police acting as bail authorities) may take evidence on oath from any person able to provide relevant information. However, should bail be refused, the bail authority is required to record its reasons in writing.[75]

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[71] See *Beljajev v DPP* Unreported, Supreme Court of Victoria (8 August 1991), and *Beljajev v DPP* Unreported, Supreme Court of Victoria, Kellam J, 8 May 1998.
[72] S4(4) *Bail Act 1977* (Vic).
[73] Ibid.
[74] [2001] VSC 237.
[75] SS9 & 12 *Bail Act 1985* (SA).

The Victorian Act contains even fewer requirements but they may be more onerous. Nothing is said about the form of the application for bail, but the court may make inquiries including taking sworn evidence about the defendant, and the prosecution, if they wish to submit information on a range of relevant matters (e.g. criminal history, bail history, the circumstances of the offence and likelihood of conviction), must do so in evidentiary form.[76]

Although not strictly a matter of the process of applying bail the Victorian *Bail Act* has another significant difference to the South Australian Act. Police bail only arises if the Victorian police are not able to bring a defendant before a court forthwith and if the police decide to refuse bail in those circumstances they must inform the defendant of their right to apply to a bail justice for bail. If the defendant wishes to make such an application the police must arrange for the defendant to be brought before a bail justice as soon as practicable.[77] The bail justice, an office created under the *Magistrates Court Act*, is usually a local Justice of the Peace who acts in a voluntary capacity.

2.3.6 Challenging bail decisions

Differences exist between South Australia and Victoria with respect to the right to challenge bail decisions. The first difference relates to the ability of a defendant to renew an application for bail after they have been refused and the second difference relates to appeal rights.

Renewing applications for bail

In South Australia a defendant can make a fresh application for bail at any time. Whilst generally new circumstances are required to support a fresh application for bail, "there is nothing to prevent a fresh application even in the absence of a change in circumstances".[78] Without new circumstances the likelihood of a successful application would seem quite limited.

By contrast s18 (4) of the *Bail Act 1977* (Vic) permits a new application where the defendant has not been legally represented at the earlier application or when "new facts or circumstances" have arisen.[79]

Appeals

At common law there was no mechanism for appealing bail decisions but the need to do so was obviated by the ability to make a fresh application. Following passage of the bail Acts both jurisdictions regarded the appeal rights as governed by those Acts. In South Australia a statutory process of review enabled a higher bail authority to review the bail decisions made by lower bail authorities. This does not apply to bail decisions of the Supreme Court, which remain unreviewable.[80] Attempts to use more generally available appeal rights failed in *Panagiotidis v Jakacic*,[81] upheld (3 judges to 2) in 2003 in *Webster v South Australia*.[82]

[76] S8 *Bail Act 1977* (Vic).
[77] S10 *Bail Act 1977* (Vic).
[78] *Webster v South Australia* [2003] SASC 347 per Debelle J at para 95.
[79] See *Mokbel v DPP* [2002] VSC 127 at para 11.
[80] S14 *Bail Act 1985* (SA).
[81] (1986) 41 SASR 591.
[82] [2003] SASC 347.

On a review the reviewing authority is to reconsider the decision and make "any decision that should, in the opinion of the reviewing authority, have been made in the first instance".[83]

Until recently in Victoria appeal rights were thought to be exclusively contained in the *Bail Act 1977*.[84] However, this was overturned in *Fernandez v DPP*,[85] which upheld the ability to appeal under the more general appeal provisions of the *Supreme Court Act 1986* (Vic). Thus in Victoria, defendants have more extensive appeal rights than are available in South Australia.

The grounds upon which an appeal will be allowed in Victoria were set out in *Beljajev v DPP* and have been adopted and applied in subsequent cases:

> It is not essential that the Director should be able to show an error of law in the narrow sense, although of course if error of law were demonstrated this court would be obliged to substitute its own view of the order which should have been made. It is also open to the Director to show that in all the circumstances of the case the order was manifestly the wrong order to make even though it is not possible to point to any other identifiable error in the process by which the authority granting bail arrived at the order made. In other words, the Director is not in our opinion confined to relying upon an error of law as a ground of appeal but may succeed if he shows that on any ground, whether of fact or law, the discretion of the primary judge has miscarried and can persuade the Supreme Court that a different order should have been made.[86]

2.4. Descriptions of the remand in custody process

The starting point in the remand in custody process in both jurisdictions follows the arrival of an arrested person at a police station and a decision to charge them. If police have decided not to proceed by way of summons, the specified police officer must decide whether to hold the defendant in custody.

2.4.1. Police bail

At this stage in the remand in custody process differences arise between Victoria and South Australia. In South Australia, if police refuse to release a defendant on bail, the defendant is held in police custody until they can be brought before a court. In Victoria the police will, if they refuse bail, either take the defendant before a court or, if a court is not sitting, before a bail justice.

Bail justices (Victoria only)

The bail justice programme involves specially trained members of the community (equivalent to Justices of the Peace) attending police stations to determine whether a defendant refused bail by police should be granted bail. In some areas the Royal Victorian Association of Honorary Justices (to which many but not all bail justices belong) organises a roster which is made available to police stations. The police will telephone a bail justice when a bail justice is needed but there has been concern that certain bail justices are used more than others. In some areas the police have been given a mobile number and the mobile phone is then circulated between bail justices

[83] S14(3) *Bail Act 1985* (SA).

[84] *Beljajev v DPP (Victoria)* Unreported, Supreme Court of Victoria (8 August 1991).

[85] [2002] VSC 115.

[86] Unreported, Supreme Court of Victoria (8 August 1991); see *DPP v Tong* [2000] VSC 45.1

with the consequence that the police do not know the identity of the bail justice they are calling.

The defendant is taken from the cells, unless security otherwise requires, and the hearing takes place in a room with as much formality as possible. The defendant is normally unrepresented. The bail justice will inform the defendant as to his rights under the bail Act and the procedure to be followed at the hearing. He or she will then hear the reasons of the police for refusing bail and will often require the informant (the arresting officer or officer in charge of the investigation) to give sworn evidence on the reasons why releasing the defendant poses an unacceptable risk.

The defendant is given the opportunity to respond to the information provided by the police on the question of bail and the bail justice then determines whether the defendant is to be remanded in custody until the defendant can be brought before a court. While the length of hearing varies, estimates of the average length of hearing range from 20 to 30 minutes. The bail justices complete a form recording the outcome, which is handed to police to pass onto the court to become part of the court file. Bail justices report that reasons advanced for remanding defendants in custody are the risk of re-offending and the risk of the defendant not appearing at court when required. The safety of victims and witnesses is given as a reason much less frequently and remand in the interests of the defendant's own safety is even less common.

Telephone review (SA only)

Police are required to inform defendants of their right to apply for bail as soon as practicable after arrival at the police station and to provide them with a Section 13 statement setting out their rights. This statement includes information on the right to seek telephone review. If a person is not going before a court before 4pm of the following day, and the person has made written application for such a telephone review by a magistrate, one must be provided.

2.4.2. Magistrates Court

While within each state the structure of the process is similar, variations occur between courts. Regional and country courts may have different practices reflecting the availability of lawyers, legal aid, and other services. The following summary is based on the practices at the major metropolitan courts.

However there also exist significant differences in the process between Victorian and South Australian Magistrates Courts. Different participants are involved in the process and the way hearings of bail applications are conducted is different.

South Australia

Before a defendant remanded in custody by police is brought before a magistrate in open court, he or she will usually be visited by the duty solicitor from the Legal Services Commission unless the defendant has organised their own lawyer. The duty solicitor will attempt to ascertain police attitude toward bail and negotiate the basis for a successful bail application.

When the case is called on in court, the charges are normally read and if the defendant is seeking bail, the prosecutor (usually a police prosecutor) will make submissions as to why the defendant should be remanded in custody. The defendant, or his or her lawyer (if represented) will be asked to respond and the magistrate will make a decision based upon the information provided by the

prosecutor and defence. The magistrate can request a Bail Assessment Report from the Courts Unit of the Department of Correctional Services or, if considering home detention, an assessment from the Home Detention Unit of the same department. Estimates of the average length of time for bail applications are in the order of 5 minutes although the hearings vary greatly depending on the circumstances of the case.

Victoria

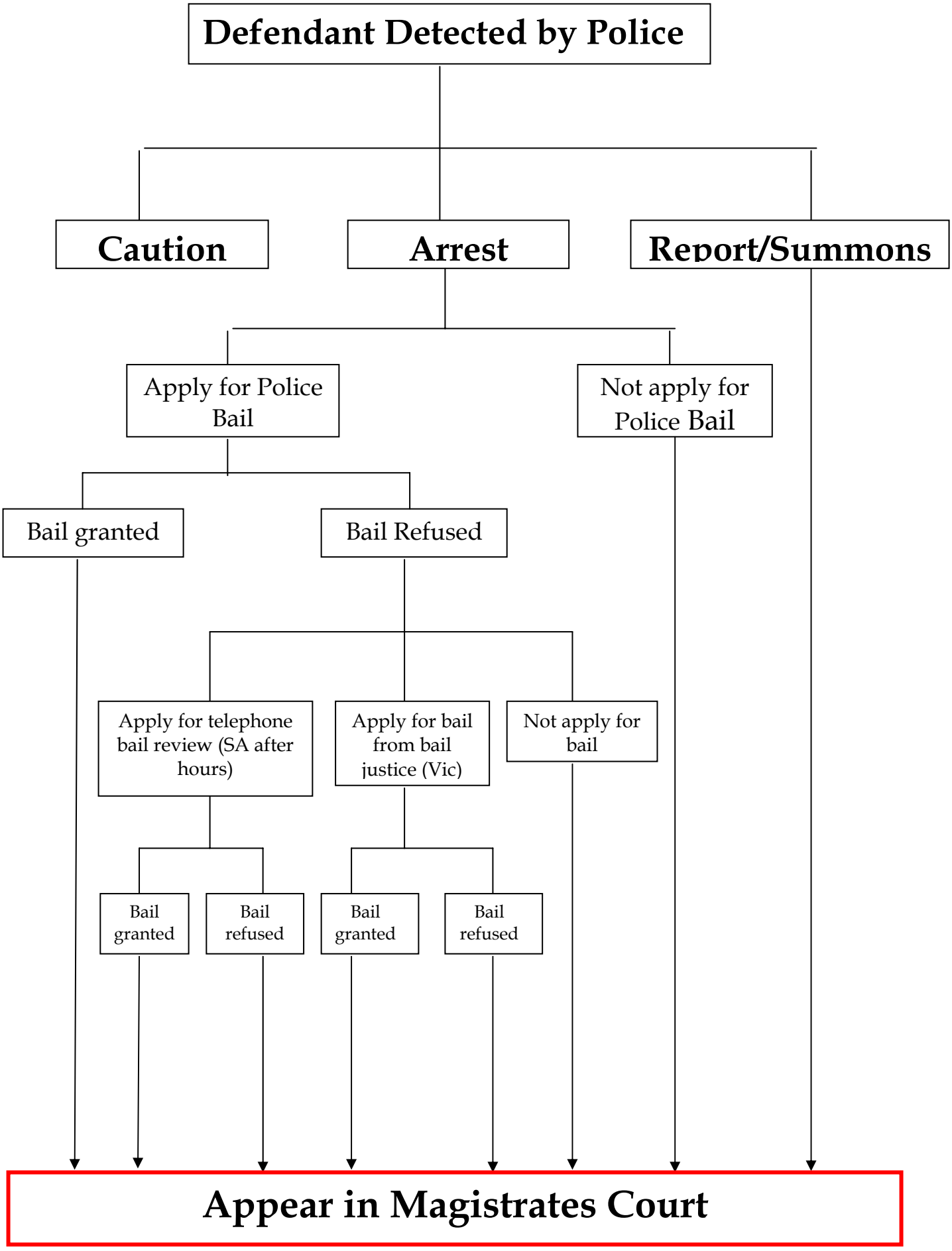
In Victoria the process between remand in custody by a bail justice or a decision by police to refuse bail varies significantly depending whether the court is served by the Bail Advocacy and Support Programme (BASP). This program commenced in 2001 and is intended to play a key role in diverting defendants from the correctional services system and to a degree the broader criminal justice system. Different models of service delivery have been funded by Corrections Victoria with services being provided by court-based bail support workers employed by the court at the Melbourne Magistrates Court and through community-based organisations at Dandenong Magistrates Court.

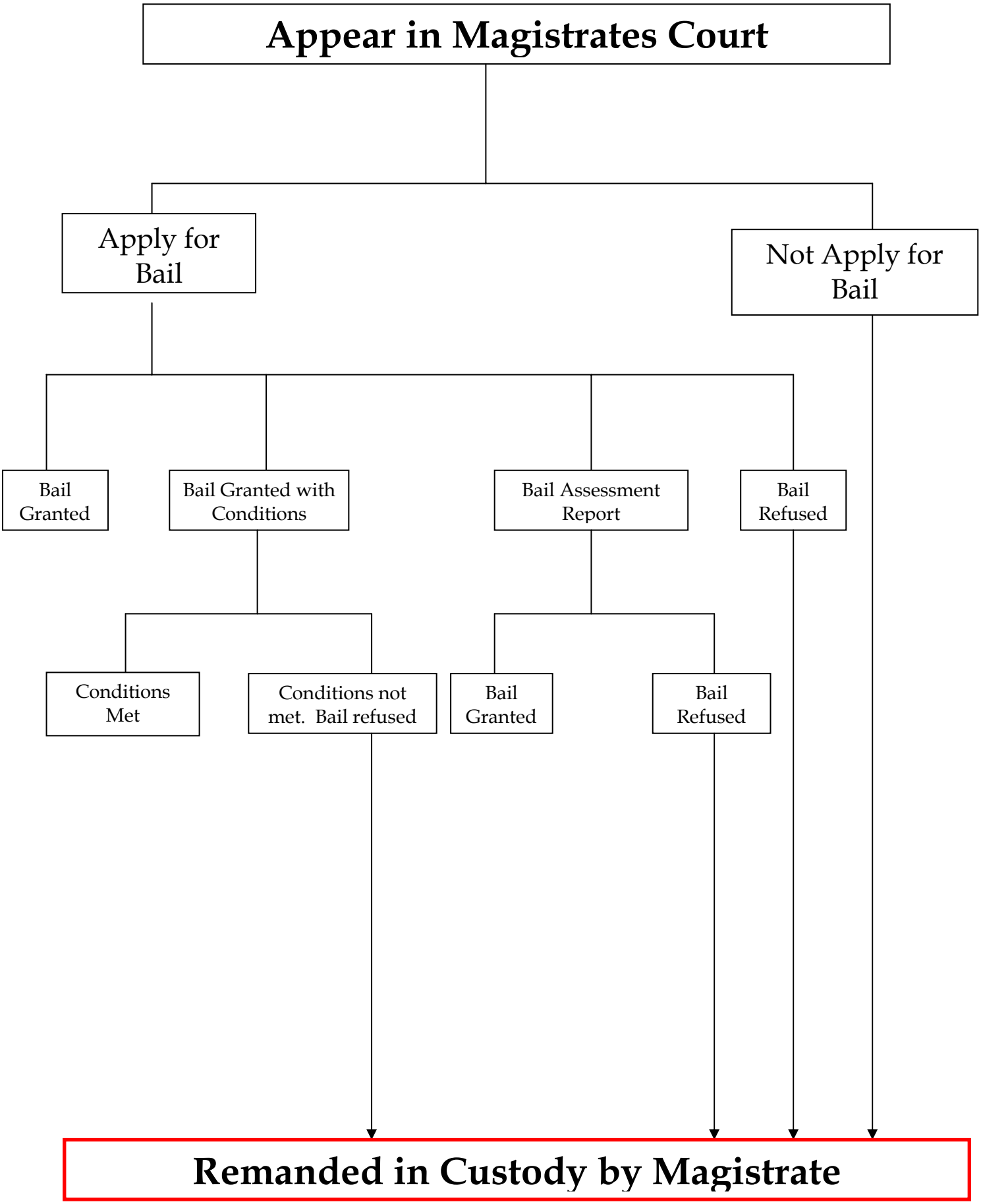
The bail support workers will interview selected defendants before the bail application and attempt to address those factors that may prevent bail being granted. Examples of these matters include organising accommodation, referrals to drug, alcohol, medical and mental health services and provision of information to the court to assist the court in its decision on the bail application. BASP continues to work with defendants after a defendant is granted bail, providing support to ensure bail conditions are observed. The Victorian Legal Aid Commission appointed a duty lawyer to work with BASP, providing screening and referral functions from other courts. In addition to BASP, Corrections Victoria is working in partnership with public housing authorities to support the provision of accommodation for persons awaiting their trial.

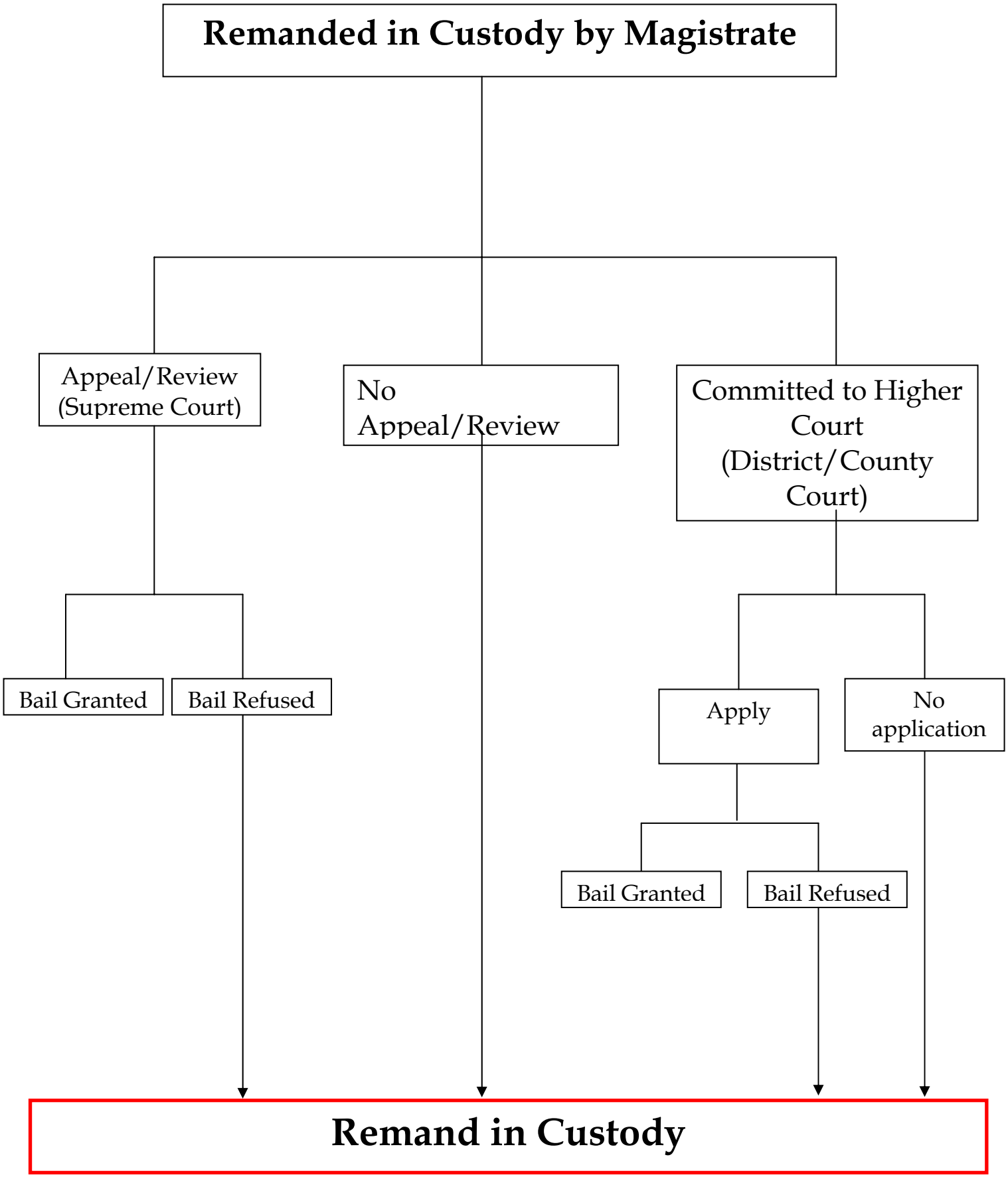
When the matter is called on, if the prosecution is seeking a remand in custody, the prosecutor will outline the basis of the prosecution to bail and the informant will be called to give sworn evidence. Following examination-in-chief and cross-examination, the defendant is invited to respond. This may or may not involve sworn evidence by the defendant or witnesses on matters relating to family ties, character, and so on.

When a defendant applies for bail at the first appearance, the practice in Melbourne Magistrates Court is to hold the matter over until later in the day when parties are ready to proceed. Where defendants have already been remanded in custody by a court, fresh applications for bail will be listed in a separate court. Court administrators advise that when listing bail applications they normally allow an hour for the application. Estimates of the average length of bail applications range from 20 to 40 minutes. The most common reasons for refusing bail are said to be risk of non-appearance and the risk of offending on bail.

The process maps that follow map the remand in custody process from when the defendant enters the criminal justice system to when a final decision is made to remand the defendant in custody.


Defendant Detected by Police
Caution
Arrest
Report/Summons
Apply for Police Bail
Not apply for Police Bail
Bail granted
Bail Refused
Apply for telephone bail review (SA after hours)
Apply for bail from bail justice (Vic)
Not apply for bail
Bail granted
Bail refused
Bail granted
Bail refused
Appear in Magistrates Court


Appear in Magistrates Court
Apply for Bail
Not Apply for Bail
Bail Granted
Bail Granted with Conditions
Bail Assessment Report
Bail Refused
Conditions Met
Conditions not met. Bail refused
Bail Granted
Bail Refused
Remanded in Custody by Magistrate


Remanded in Custody by Magistrate
Appeal/Review (Supreme Court)
No Appeal/Review
Committed to Higher Court (District/County Court)
Bail Granted
Bail Refused
Apply
No application
Bail Granted
Bail Refused
Remand in Custody

3 Methodology

The research aim and questions had three distinct but interconnected foci – the factors that influence the number of people remanded in custody, the effect of custodial remand on key justice indicators and an identification of good practice in custodial remand. Underpinning these research foci was a desire to identify policy levers that would enable decision-makers to manage remand numbers.

The focus of the research was narrowed by its location within two Australian jurisdictions. The processes resulting in custodial remand are complex. Any exploration of critical factors must be located in a particular period of time and in specific locations (jurisdictional and geographic). In the context of what is known about justice processes and remand decision-making, this research was designed to explore the factors influencing custodial remand in Victoria and South Australia.

A research design including two jurisdictions provided an opportunity to examine data and processes using two different analytic approaches. The first analytic approach was that of inter-jurisdictional comparison. This approach placed each jurisdiction as a site in which remand decision-making was occurring, identified the very different outputs of that decision-making, and took a correlational approach to identifying which of the inter-jurisdictional differences could be seen to account for the different outputs.

The second analytic approach was an intra-jurisdictional exploration. In this approach, the changing remand outputs over time were identified and a correlational exploration was utilised to explore the factors that contributed to this change over time. This analytic approach assumed greater importance in the research design as the difficulties of obtaining comparable data for an inter-jurisdictional comparison were identified.

In each of these analytic approaches the data used to explore the critical factors was both qualitative and quantitative. The analytic tools for exploring the relationship between factors and outputs differed for these two data collection methods. In addition to the tools for statistical analysis, the qualitative data was analysed using NUD*IST.

3.1. Partnership research

This research consultancy was designed by the Criminology Research Council (CRC) as partnership research. The call for tenders committed the (initially three but following the withdrawal of Western Australia) two participating jurisdictions of South Australia and Victoria to an active partnership with the national researchers.

The partnership concept was articulated in the original CRC brief as a working partnership. The national consultants were to be funded by the CRC and responsible for the overall design and management of the research project and the final reports to the CRC. The states would be responsible for liaising with the consultants and for local data collection using standardised methods. Our understanding, articulated in the tender documents, was that this would involve the researchers and representatives of the jurisdictions working in close cooperation on issues of data collection. The research team was to provide strategic oversight and co-ordination to

the justice system agencies in the relevant jurisdictions on matters relating to the collecting of much of the quantitative data.

South Australia was represented in this partnership by the Office of Crime Statistics (to become the Office of Crime Statistics And Research or OCSAR part way through the partnership), led by Ms Joy Wundersitz. Victoria was represented in the partnership by Mr John Walker and Ms Eng Chee of the Justice Research and Statistical Analysis Portfolio Planning, Ministry of Justice. The role of these jurisdictional representatives was to work with the national researchers to facilitate the identification and collection of the needed data for the research project. Their capacities to undertake this role were in part shaped by the histories of justice collection within their jurisdictions. South Australia has a long history of collection of data from courts, police, juvenile justice and corrections. This data collection is coordinated through the OCSAR and staff of that office are familiar with the intricacies of agency data collection. In Victoria the history of data collection is very different, and agencies appear to be very focused on the boundaries that surround their data collection and its analysis. This difference presented many difficulties in undertaking this research.

The jurisdictional representatives worked with the researchers in designing the research instruments, in accessing research data and data collection opportunities. In addition, they met together with the researchers on several occasions to provide advice on the development of the research and its focus. These meetings provided significant assistance to the researchers and also enabled the workshopping of alternative research designs when major methodological hurdles were encountered. It is regrettable that as the difficulties of accessing data dragged out over a much longer period than had originally been anticipated, these meetings fell into abeyance through no fault of the agencies concerned.

3.2. Multi-method research design

The research questions posed for this consultancy were broad ranging and focused both on the details of the remand process under study and the practice and policy implications of the findings. The questions thus could not be answered using a single research method. The research design utilised six (interconnected, but relatively independent) studies to generate the data required to tackle the research questions.

Research Study 1 was a review of literature and legislation. It was designed to build on our previous work[87] by identifying any new studies, reports and changes in legislation. In addition this study was to explore the documentation of remand practice including any practice directions and prosecutorial guidelines relating to decision-making about remand. A result of this study was to be the adaptation of process maps developed in Stage 1 to reflect any changes since 1998.

Research Study 2 was the major quantitative study for this research. It involved the creation of sampling frames for the collection of data from jurisdictional sources. Although the process of data collection was to be carried out by

[87] Bamford et al 1999.

jurisdictions, the study required a coordination of data collection to enable comparison between jurisdictions. The focus of data collection was to be the analysis of data about defendants remanded in custody and defendants granted bail in terms of personal characteristics, previous conduct in the justice system and current alleged offence. In addition, the study involved an analysis of data about jurisdictional offence rates, court processing times and other factors influencing remand in custody rates, as determined in consultation with jurisdictions.

Research Study 3 involved both quantitative and qualitative research collections methods focused on the link between custodial remand and other key justice outcomes. The first step in this research study involved drawing on Research Study 1 to identify the key justice outcomes that could be derived from bail legislation. In conjunction with the jurisdictions, indicators for these outcomes were developed from which data could be developed. A later phase of this study was to build into the qualitative research for Research Study 6 a collection of the views of key actors in the justice system about the effect of custodial remand on justice outcomes.

Research Study 4 involved the observation of court room activities in relation to remand decision-making. This study was developed to gain an indication of the level of contestation about bail decisions and those factors that are seen as being influential in decision-making in contested bail applications. The study explored the level of consistency between prosecution attitudes and remand decisions.

Research Study 5 focused on the history of remand/bail decision-making in relation to individual offenders. It was designed to explore the applicability of findings from other studies that indicated that remand status changed for some defendants over the time from arrest to final disposition of the case. The research design did not involve exploration of decision-makers motivation, but focused merely on documenting the changes over time. This research involved a study of court files and was significantly limited by our inability to access court files in Victoria.

Research Study 6 was the major qualitative study for the research. It involved the development of a research instrument that would address a number of the research questions. These interviews assumed increased significance when the quantitative data analysis became problematic. The interviewees were identified with assistance from key informants in each jurisdiction. The study was not randomized, but sought to ensure that we interviewed representatives of all relevant contributors in the two jurisdictions.

Each research study was developed to make a contribution to several of the research questions. The anticipated contribution of the six studies to addressing the key research questions is described below in Table 2.

Research question	Research activities to contribute to findings
Which factors are critical to the remand process?	Research Study 1: Literature and legislation review, interviews and document analysis Research Study 2: Quantitative identification of critical factors Research Study 4: Remand decision making in the courtroom, observation study Research Study 5: Case studies of changes in bail status after entering court processes, file analysis. Research Study 6: Qualitative exploration of remand systems and practices
How do these factors contribute to the process and to the observed differences in remand rates between the participating states?	Research Study 1: Literature and legislation review, interviews and document analysis Research Study 2: Quantitative identification of critical factors Research Study 4: Remand decision making in the courtroom, observation study Research Study 6: Qualitative exploration of remand systems and practices
What is the effect of custodial remand on key outcomes in the criminal justice system?	Research Study 1: Literature and legislation review, interviews and document analysis Research Study 3: The effect of custodial remand on key outcomes in the criminal justice system, quantitative and qualitative analysis. Research Study 5: Case studies of changes in bail status after entering court processes, file analysis.
What constitutes 'best practice' for remand decision making (including what are the criteria for a 'good' remand system)?	Research Study 1: Literature and legislation review, interviews and document analysis Research Study 3: The effect of custodial remand on key outcomes in the criminal justice system, quantitative and qualitative analysis. Research Study 4: Remand decision making in the courtroom, observation study Research Study 5: Case studies of changes in bail status after entering court processes, file analysis. Research Study 6: Qualitative exploration of remand systems and practices
What are the policy implications of the study's findings?	Research Study 3: The effect of custodial remand on key outcomes in the criminal justice system, quantitative and qualitative analysis Research Study 6: Qualitative exploration of remand systems and practices

Table 2

In the original design, Research Study 2 was the pivotal quantitative study which was to provide the data for an exploration of the later policy and practice questions.

As discussed below, there were significant problems in undertaking this Research Study and its goals and processes needed to be revised on several occasions.

As a consequence, it was necessary both to adjust the timings of the studies and the relationships between them to rebalance the methodology and to rely upon the qualitative studies to carry the analysis in a way that was not originally envisaged. In the revised research design, Research Study 6 became the pivotal study to enable an exploration of difference in systems and practice between the two jurisdictions in a way that would enable the addressing of the research questions. The multi-study methodology thus provided us with a flexible research structure that has enabled us to strengthen our focus on some studies where others proved barren or less fruitful than we had anticipated.

3.3. Research ethics

The quest for ethics approval for this research was long and oft revisited. The Criminology Research Council contract required that the research be approved by the Criminology Research Council's own Ethics Committee before any payment of funds for this project could be made. However, following the submission of our Ethics Submission and research protocols, the CRC was unable to convene an ethics committee and requested that ethics approval be obtained from an appropriate university ethics Committee.

The researchers chose to use the University of South Australia's Human Research Ethics Committee for consideration of its research. However, the timing issues made this an awkward process. The researchers needed an Ethics Committee clearance to obtain the funds needed to undertake the research that would enable the development of the research instruments that were required for Ethics Committee approval. This dilemma was resolved by the use of a two stage approval process. In the first stage, approval was sought for the broad methodologies to be used in the Studies and the protocols that would apply in the use and storage of data and a later research proposal sought approval for the specific instruments – interview schedules, consent forms and other details of the research.

Notwithstanding the University of South Australia research approvals thus obtained, it was necessary to obtain separate ethics committee clearance from two further Victorian committees before data could be collected in that jurisdiction. The Victorian Department of Justice and the Victorian Police each required separate submissions in their own formats to cover those aspects of the research that related to their agencies.

The need to produce multiple (5) different ethics submissions was time-wasting and cumbersome. It indicates a lack of coordination in research management that is a very real barrier to the conduct of effective research.

3.4. Detailed methodology for each study

Although each of the studies was designed to contribute to data that would be used in shaping the responses to several of the research questions, each study had a separate methodology, required access to different data sets and was found to present its own unique set of challenges.

3.4.1. **Research Study 1: Literature and legislation review and document analysis**

This study was designed to update the work undertaken for Stage 1 of the Consultancy. It focused on new developments in the literature and legislative and practice developments within the jurisdictions. The Literature Review, which was focused on Australian jurisdictions and the comparable jurisdictions of United Kingdom, United States and Canada, was undertaken early in our research process. Electronic databases were utilised to identify new publications which were subsequently obtained using the library services of the Flinders University, School of Law library and the University of South Australia library. The legislation review was carried out using AustLii and parliamentary websites. The review focused on Bail Acts and related legislation in Victoria and South Australia. The document analysis allowed us to fine tune the process maps and to identify relevant policy documents such as practice directions and prosecutorial guidelines relating to remand decisions. The undertaking of these tasks became entwined with the qualitative research undertaken for Studies 3, 5, and 6 and was pursued through the interviews of staff within the justice agencies of both jurisdictions. The information required to add the alternatives to custodial remand in each of the jurisdictions to the Process Maps was also collected through these interviews.

3.4.2. **Research Study 2: Quantitative Identification**

This was the major quantitative study in our research design. Assisting the team for this research was Dr Stuart Ross, Consultancy Project Manager for the Melbourne Criminology Research and Evaluation Unit.[88] There are two major sources of statistical data about custodial remand in Australia. The first is the Australian Bureau of Statistics' National Centre for Crime and Justice Statistics (NCCJS) which was established in 1996 and produces statistics on crime, corrective services and criminal courts. The NCCJS has responsibility for co-ordination of national statistical activity in crime and criminal justice. Within the NCCJS is the National Corrective Services Statistics Unit and the National Courts Statistics Unit. The ABS data on remand and prison populations is derived from the National Prisoner Census which collects snapshot data on persons held in Australian prisons on the night of 30 June each year. The National Prisoner Census covers all prisoners in adult corrective services, including periodic detainees in New South Wales and the Australian Capital Territory, but it excludes persons held in juvenile institutions, psychiatric custody and police custody.

These data do not describe the flow of prisoners during the year. The majority of prisoners in the Prisoner Census are serving long-term sentences for serious offences, whereas the flow of offenders in and out of prisons consists primarily of persons serving short sentences for lesser offences. While the ABS data provided a vast array of useful information, they need to be supplemented by other data. Hence, we

[88] Prior to taking up his current role at the beginning of 2001, Dr Ross was the Director of the National Centre for Crime and Justice Statistics in the Australian Bureau of Statistics where he was responsible for the ABS national statistics on crime, criminal courts and corrective services as well as ABS survey activity in the crime and justice field.

sought a second major source of data: those collected through the jurisdictional agencies.

As we commenced the design of this study, in April 2002, OCSAR produced a remand statistics analysis that was to influence significantly our research design. As described in the Introduction, OCSAR had undertaken its work at the request of the Remand Issues Working Group, convened by the Justice Strategy Unit of the Justice Portfolio which included representatives from Courts, Correctional Services, SAPOL and the Office of Crime Statistics. The Remand Issues Working Group sought to determine possible reasons for the recent substantial increases in the number of adults remanded in custody in South Australia. OCSAR was asked to focus its analysis in particular on adult males being held in custody on remand.

When it concluded its work, OCSAR had amassed data on defendants remanded in custody and defendants granted bail in terms of personal characteristics, previous conduct in the justice system and current alleged offence. Its results included jurisdictional offence rates, court processing times and other factors that may have influenced remand in custody rates. We were given access to these extensive data for our comparative analysis. We had hoped to collect comparative data about all defendants (in both of the jurisdictions) who appeared in the magistrates courts for the first time and for final disposition and appeared in District Courts and County Courts for the first time and for final disposition, comparing

- personal characteristics, e.g., age, gender, race, employment status of defendant
- previous conduct in the justice system, e.g. prior offending, breaches of bail conditions
- characteristics of alleged offence, e.g. seriousness, violence etc
- where plea of guilty or finding of guilt, the final sentence.

We also hoped to analyse data about jurisdictional offence rates to see if this these are a critical factor, along with court processing times to see if these are affecting remand in custody outcomes in some way. But the comparative analysis between SA and Victoria turned out to be a far more difficult exercise than we had imagined. We began with the OCSAR data from which we constructed a range of questions for the Victorian equivalents. Over 30 questions were prepared (in November 2002),[89] and these were discussed with the agencies concerned. Unfortunately, the limited amount of data and information readily available in Victoria (where there had not been an ongoing study like the one conducted by OCSAR) meant that few, if any, of the questions could be answered to any degree of satisfaction. This was very disappointing.

Our disappointment was assuaged somewhat through our gaining access to corrections data assembled by Stuart Ross (Victorian data) and Mike Reynolds (SA

[89] These questions are listed in the appendix, for the purpose of reporting the intellectual development that went into the exercise, namely, articulating the questions the answers to which we believed were essential to an understanding of the reasons why one jurisdictions remand rate may differ dramatically from that of another.

data) and collated by Stuart into a very useful report. Stuart's analysis was based upon the data he was able to assemble for all persons who completed a 'remand episode' between 1 July 2000 and 30 June 2003, plus all those who were still in remand custody on 30 June 2003. The Victorian data excluded a small number of cases where a person entered prison under sentence but reverted to remand status on the expiry of that sentence. The data were extracted from the prisoner databases operated by Corrections Victoria and the South Australian Department for Correctional Services, and included the following data items: the start and end dates of the remand episode; the nature of the charges (including total number of charges) for which the person was remanded; the way the remand episode ended, and details of any prison terms that were imposed arising out of the charges for which the defendant was remanded; personal characteristics of the remandee, including sex, age and Indigenous status; social characteristics of the remandee, including employment and marital status, and location of last address (Victorian data only); other characteristics relating to risk of re-offending, including drug or alcohol abuse, mental disorder, escape and breach history (Victorian data only).

3.4.3. Research Study 3: The effect of custodial remand on key outcomes in the criminal justice system

The key outcomes in the criminal justice system were left unspecified in the question, and thus it was left to us to define what the relevant key outcomes were in the criminal justice system. The process of exploration of this question was an important strand of our research, and resulted in insights about criminal justice philosophy and remand and legislative structures that guided our work.

The approach that we adopted to the determination of the relevant key justice system outcomes was to focus primarily on the legally defined goals of remand decision-making whilst acknowledging the possibility of other justice outcomes in our qualitative research method. Our legislative review established that three broad goals of the remand in custody could be derived. These are to

- ensure the integrity and credibility of the justice system
- protect the community
- have appropriate regard for the care and protection of the defendant.

In this study we used a legislative analysis to examine the way these goals have been approached in each jurisdiction and the legal precedent which has shaped judicial approaches to these goals. Qualitative research methods to explore with key actors the possible indicators of these goals, the data available to explore the extent to which these have been achieved and the priority given to these goals in remand decision-making were all considered.

Some limited quantitative exploration of the contribution of custodial remand to the achievement of these goals was achieved by the collection of data indicating the extent to which defendants are present in court when required. This qualitative research connected with our exploration of the question focused on good ('best') practice, as the consideration of the contribution of custodial remand to the achievement of these goals led to an exploration of the alternatives that existed.

3.4.4. **Research Study 4: Remand decision-making in the court room**

This study extended Research Study 2 by focusing on those aspects of remand in custody decision-making that occur within the court room. In particular, this study was developed to gain an indication of the level of contestation about bail decisions and those factors that are seen as being influential in decision-making in contested bail applications. The study explored the level of consistency between prosecution attitudes and remand decisions and is found in Appendix D.

Court observation studies were designed to confirm research findings about the court hearing component of the remand in custody process from other jurisdictions and from earlier studies. Court observation studies conducted in England in the 1990s had downplayed the court hearing and judicial role in decisions on court bail or remands in custody. In our Report Stage 1 of this consultancy we outline this research.[90] This research was based on the lower numbers of contested hearings, the short duration of bail hearings, the level of consistency between prosecution attitudes and outcomes.

A court observation study was piloted in September and October 2002 in the South Australian District Court and the Adelaide Magistrates Court. Following analysis of those results and a review of the process, observations were conducted in South Australia and Victoria between November 2002, February, September and October 2003. While the focus of our study was bail applications, data was collected on those hearings where bail was not an issue. Data on these hearings, simple adjournments, were collected on a simplified observation instrument. A total of four observers were used. The data was coded (using ABS descriptors where appropriate) and analysed using SPSS.

Some time prior to observation, the courts were informed of the study but not the precise dates of the observations. On the day, the observers introduced themselves to the court staff, and observed from the body of the court. They recorded such matters as whether the defendants was appearing ex custody, already bail, whether an application for bail was made, whether evidence was ordered, tendered or given, whether the defendant was legally represented, the most serious charge, the number of charges, the attitudes of the prosecution or defence to the question of bail; the outcome and the duration of hearings. The observers also assessed ethnicity and gender.

The courts observed were selected after consultation with the court staff and included:

South Australia

- District Court (Adelaide)
- Adelaide Magistrates Court
- Holden Hill Magistrates Court
- Port Adelaide Magistrates Court

[90] Bamford et al 1999, pp 13-19.

Victoria

- County Court (Melbourne)
- Melbourne Magistrates Court
- Ringwood Magistrates Court
- Frankston Magistrates Court

Although approximately the same amount of time was spend in equivalent courts, the differences in court processes meant significant variation in the numbers of hearings observed. In South Australia 177 hearings were observed, in Victoria 182.

	Bail applied for	**Bail not applied for**	**Total**
South Australia			
District Court	2	61	63
Adelaide MC	35	42	77
Holden Hill	3	6	9
Port Adelaide	12	22	34
Not coded			4
Victoria			
County Court	4	10	14
Melbourne MC	42	66	108
Dandenong	1	30	31
Frankston	4	10	14

Table 3

As Table 3 indicates, bail hearings only make a small proportion of the daily work of the criminal courts. The very small number of hearings where bail was applied for in both of the higher courts (the District Court and County Court) meant that these cases have been not been further analysed. The Magistrates Court hearings where bail was sought were analysed for duration, whether evidence was produced or

called for, attitudes of prosecution to bail; existence of legal representation, level of consistency between prosecution position and outcomes of hearings.

In terms of demographic profile of defendants, a very similar pattern emerged for South Australia and Victoria. Even with the large limitations created when trying to assess demographic characteristics by observation, the results (Tables 4 and 5) showed no major differences between the two States. The exception to this is the figure for defendants from Non-English Speaking Backgrounds (NESB) making bail applications in South Australia.

Non-bail hearings

	South Australia	**Victoria**
Male	87%	80%
Female	13%	20%
Indigenous*	8%	5%
NESB*	13%	8%
Percentage of defendants charged with 1 offence	47%	31%
Percentage of defendants charged with 2 offences	20%	19%
Most common MSO	Drive unregistered 14%	Aggravated SCT 12%

Table 4

Bail hearings

	South Australia	**Victoria**
Male	80%	89%
Female	20%	11%
Indigenous*	4%	5%
NESB*	2%	19%
Percentage of defendants charged with 1 offence	20%	38%
Percentage of defendants charged with 2 offences	20%	14%
Most common MSO	Larceny 19%	Armed robbery 26%

Table 5

In Victoria, 78% of the bail hearings involved defendants who were in custody; in South Australia 70% of the defendants were appearing ex custody.

The limitations of this study are acknowledged. The small number of observations did not cover sufficient number of bail of applications to enable a good understanding of the process at the higher court level. The demographic data on ethnicity or indigenousness were based on observation, not self-identification.

3.4.5. **Research Study 5: Case studies of changes in bail status after entering court processes.**

This study complements Study 4 and is described in more detail in Appendix D. It focused on the history of remand/bail decision-making in relation to individual offenders. It was designed to confirm that bail status might change for a defendant, and to identify, where possible, the reasons for these changes in bail status. Progress of this study was limited by the fact that it was not possible to undertake this study in Victoria. The Department of Justice was unable to negotiate access to court files for a researcher – either one of the research team or a researcher selected by the responsible court officials. This issue was pursued by the researchers at great length. The failure to negotiate this access most clearly illustrates the difficulties experienced in this research project as a result of the lack of coordination or in deed cooperation between justice agencies. The analysis of the South Australian data is included in this report in order to share this information with the research community. There is a limit to the extent to which this could contribute to our research findings without comparable data from Victoria.

Changes in bail or remand status of an individual offender can be used to illustrate different aspects of the bail/remand process. The case studies were undertaken on a set of cases in which the most serious offence was the same for each case. The charge of Serious Criminal Trespass (and its Victorian equivalent) was selected, following discussions in both jurisdictions and analysis of the results of the observation study, as being one of the offences most frequently linked to remand.

The case selection criterion was all cases finalised in July and August 2003. It was determined that a minimum case number of 30 cases in each of the two jurisdictions of the Magistrates Court and the District Court would be explored for the study. In South Australia, the case studies were undertaken by a researcher from the South Australian Office of Crime Statistics and Research. This researcher was able to combine data from the computerised system with a direct search of the court file to develop a profile of the defendants' bail status from the point of arrest to final determination of the case and to collect information about the reason for changes in bail status.

3.4.6. **Research Study 6: Policy review and implications**

The study employed a qualitative research methodology in which a small but significant sample of key actors in Victoria and in South Australia – judges, magistrates, police and prosecutors – and others who influence or closely observe the remand decision-making process were interviewed by one of the researchers. Interviewees were identified from within the system either because of their depth of experience or because they were known to have taken a particular interest in some aspect of the workings of the remand system. Those interviewed were selected by the relevant agencies and in Victoria in consultation with the Ministry of Justice. In the course of this study we undertook 37 interviews in the two jurisdictions:

- Magistrates (5) – 3 in Victoria and 2 in South Australia
- Police prosecutors (6) – 3 in Victoria and 3 in South Australia

- Custody sergeants (4) – 2 in Victoria and 2 in South Australia
- OPP/DPP (3) – 2 in Victoria, 1 in South Australia
- Victims' representatives (2) – 2 in Victoria
- Offender advocate (1) – 1 in Victoria
- Court administrators (4)– 3 in Victoria and 1 in South Australia
- Bail justice (2) and training staff (1) (Victoria)
- Bail advocates (2) – 1 in Victoria and 1 in South Australia
- Legal aid lawyers (4) – 2 in Victoria and 2 in South Australia
- Operational police – 3 in Victoria.

No attempt was made to match interviewees across jurisdictions. The choice of interviewees was shaped by the advice of people active within remand decision-making. In South Australia we benefited from the experience of the researchers themselves in working within and alongside the system, In Victoria more exploratory interviews were required to ensure that our description of the system and of the key decision-making points was an accurate reflection of that system. Not all interviews were equally useful, and this study and the other studies that have drawn on the data from the interviews, all draw on the interviews selectively. In addition, the additional level of bail decision-makers in Victoria, the bail justices, contributed to more interviews being conducted in Victoria. Operational police were interviewed in Victoria because of their considerable involvement in the remand in custody process, having to give evidence at bail hearings before bail justices and magistrates. As has been discussed earlier, in South Australia operational police play almost no part in the remand in custody process once police bail has been refused by a 'custody sergeant'.

Fortunately, the interviews produced a richness of data, as interviewees drew from their many years of experience and their observation of the changes in the remand system over recent years.

4 Seeking critical factors in the remand population

Custodial remand processes occur in a complex justice and social environment. They involve a range of decision-makers, a range of defendants and their supporters, and they occur in a judicial context that has developed precedent and practice over time. Critical factors in the remand process, defined for this research as those factors that have most power to influence remand rates, cannot be assumed to be constant or indeed consistent between jurisdictions. Our research focused on identifying factors that have shaped changes in remand rates over a particular time period in specific jurisdictions.

Critical factors may be explored through a study of the statistical description of remand populations. We have used statistical analysis to address the central questions

- How are the observed changes in remand rates related to changes in other justice system activity and criminal behaviours?
- What is the effect of changes in the numbers of people remanded in custody and the time people are held in custody on remand rates?

Three key issues are identified from this analysis

1. In recent years, remand rates in both Victoria and South Australia have behaved differently to imprisonment rates which suggests that there are critical factors that are specific to remand rates.
2. Although length of time remandees are held in custody is critical to the determination of remand rates, it is not a factor that explains recent changes in remand rates in Victoria and South Australia.
3. Changes in remand receptions hold the key to changes in remand rates. In both Victoria and South Australia changes in remand rates are associated with a relatively small range of offences and these changes do not reflect changes in recognised methods of recording the incidence of these crimes in the community.

This analysis strongly suggests that for the jurisdictions and time periods studied, changes in the numbers of people remanded in custody result from

- Changes in the characteristics of defendants that influence remand decision-making.
- Changes in practices and policies of remand decision-makers.

This chapter reports our statistical exploration of remand populations. In the following chapter, critical factors in the practices and policies of remand decision-makers are explored utilising qualitative research.

Our analysis aims to explore simultaneously critical factors in the remand process and to identify how these contribute to the differential remand rates between Victoria and South Australia.

4.1. Remand rates and imprisonment rates

In general, the jurisdictional patterns of sentenced imprisonment are broadly reflected in remand patterns. Remandees are overwhelmingly young males, and the distribution of charge types for which they are remanded is generally similar to the distribution of offences in the sentenced prisoner population.

However, these broad similarities should not obscure the distinctive features of remand imprisonment, nor should they lead us to see remand as simply a small-scale reflection of the overall patterns and characteristics of imprisonment. Remandees have some distinctive characteristics. They are more likely than other prisoners to be homeless, unemployed or have some form of mental disorder.[91] A higher proportion of women prisoners are remandees than men, and a higher proportion of Indigenous prisoners are remandees than non-Indigenous prisoners. [92]

In general, States and Territories with high rates of sentenced imprisonment also tend to have high rates of remand imprisonment. However, there are some notable exceptions to this. As discussed above, South Australia has a total imprisonment rate that is substantially lower than the national average and only marginally higher than the Victorian imprisonment rate. However, it has a remand in custody rate that is well over twice the Victorian remand imprisonment rate, and about 30% higher than the national rate.

The remand population also exhibits different patterns of change over time. In particular, over the past decade remandee numbers in Australia have increased at a faster rate than sentenced prisoner numbers. The total number of prisoners across Australia has increased by around 20% in the period since 1995, but remandee numbers have increased by between 50% and 270%. However, rising remand rates are not universal. In the UK, the reforms introduced following the Narey review[93] resulted in a fall in remand numbers between 1999 and 2002, with further falls predicted.[94]

If we want to understand the factors that give rise to these complex remand dynamics, we need to describe the nature of the changes in remand more precisely than just counting the total number of unsentenced persons in custody. We need to know whether the courts are remanding more people, or whether the changes are simply the result of longer stays on remand. We also need to know whether these changes affected everyone equally: men and women, Indigenous and non-Indigenous, and persons charged with different kinds of offence.

The next level of questions is about the proximate causes of these changes. We know that the key issues in bail decision making are charge seriousness, the risks posed by defendants (and in particular, a history of previously breaching bail conditions), the social connectedness of defendants (family support, accommodation, employment), and the need to deal with issues such as mental disorder or intellectual disability prior to a court hearing. Were the changes in remanding patterns the product of changes in the attributes of the offender population that courts consider when they make a decision about bail? Were there changes in offence seriousness, or the risks posed by persons seeking bail? Was there a general diminution in offenders' social

[91] Morgan and Henderson 1998; 2001.

[92] Australian Bureau of Statistics 2004.

[93] Narey 1997.

[94] Gray and Elkins 2001.

connectedness? The third level of questions concerns ultimate causes. If there were changes in offence seriousness, or social connectedness, what were the changes in the population or society or the economy that caused these changes?

4.2. The drivers of remand

In both South Australia and Victoria, remand numbers have behaved in more or less the same way as sentenced prisoner numbers for extended periods, but more recently have behaved in dramatically different ways.

What causes the populations to change? Changes in remand are usually explained as the result of one or more of the following factors:

- changes in the volume of persons appearing before the courts, either as the result of changes in crime rates or apprehension and charging practices;
- changes in the probability of bail being granted;[95]
- changes in court delays leading to changes in the average period spent on remand.

Research on remand patterns in Australia has been mainly concerned with mechanisms that fall into the first category of explanations. For example, Fitzgerald's research[96] indicated that the principal cause of the increase in the New South Wales remand population between 1994 and 2000 was the rise in the number of persons charged with offences that have high bail refusal rates, such as robbery and break and enter. Similarly, the South Australian Office of Crime Statistics (2002) found that the increase in remand numbers after 1999 was the result of increased apprehensions of offenders for crimes of burglary, motor vehicle theft and major drug offences. In Victoria, it has been shown that the rise in sentenced prisoner numbers was the result of shifts in criminal justice policy that increased the number of persons imprisoned much faster than the rate of increase in the population[97], and this study suggested that the rise in the Victorian remand rate proceeded from the same cause.

Our research also considers the possibility that other critical factors are influencing remand rates. One possibility is that there have been changes in the characteristics of offender populations or in bail policy that make bail less likely. Given that time served on remand is usually deducted from the period of a sentence, we might ask whether remand can become a 'substitute' for sentenced imprisonment. Changes in prosecution or court delays might also give rise to changes in the remand rate without having any follow-on impact on sentenced imprisonment.

Our exploration of the extent to which these are critical factors in the remand process is reported in the following sections.

4.2.1. Drivers of the remand population: numbers of remandees

Let us begin by quantifying remand populations. The size of any custodial population is determined by two factors: the number of persons who enter the population, and the time that they stay there.[98] This is often referred to as the 'stock

[95] Specifically addressed in 4.3 below.

[96] 2000.

[97] Freiberg and Ross 1999.

[98] In some jurisdictions, modelling the flow of remandees is complicated by the practice of keeping those on short-term remands in police jails where they do not appear in correctional statistics.

and flow'.[99] We begin our discussion with a comparison of receptions, types of offences and numbers of charges in our exploration of critical factors.

According to ABS data, at 30 June 2002, of all unsentenced prisoners across Australia, the most serious charges for which those trials would be held ('MSO')[100] were acts intended to cause injury (21 per cent), unlawful entry with intent (14 per cent) and robbery/extortion (11 per cent). At June 2003, these figures had altered a little; acts intended to cause injury were up slightly to 22 percent, unlawful entry up slightly to 16 per cent,[101] while robbery remained the same. At June 2004, these figures had altered slightly again; acts intended to cause injury were up slightly to 23 percent, unlawful entry down to 15 per cent,[102] while robbery went down to 9 percent.[103]

While these data are interesting, it is far more useful to review data for the two jurisdictions under consideration.

Victoria

Figure 9 shows the number of persons received into Victorian prisons on remand warrants each month between 1 July 2000 and 30 June 2003.

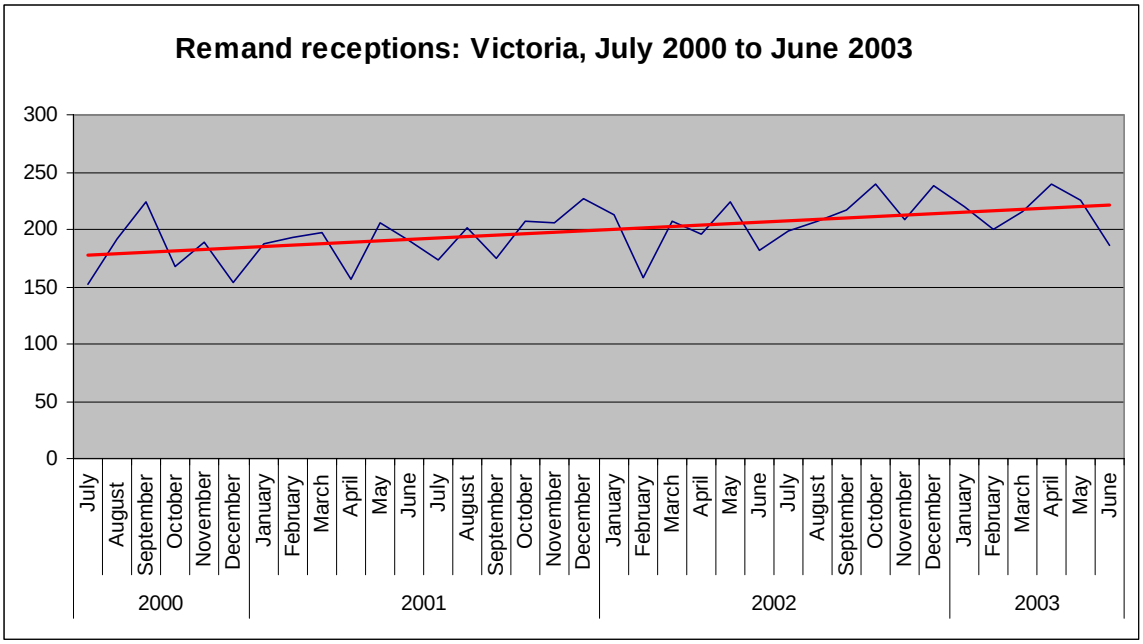


Figure 9: Number of persons received on remand by month:

Victoria, July 2000 to June 2003

The long-term trend for remand receptions (the red line) shows a significant increase,[104] from around 175 persons per month in mid-2000, to around 220 persons per month in mid-2003. On an annual basis, this represents a 17 per cent increase in receptions from 2208 in 2000/01 to 2594 in 2002/03 (Table A3, Appendix A).

[99] Weatherburn 1986.

[100] MSO is referred to in Victoria as Most Serious Charge (MSC).

[101] ABS Prisoners in Australia 4517.0, February 2003, p. 9; February 2004 p. 30. Also 30 June 2002 companion data.

[102] ABS Prisoners in Australia 4517.0, February 2003, p. 9; February 2004 p. 30. Also 30 June 2002 companion data.

[103] ABS Prisoners in Australia 4517.0, 23 December 2004

[104] Kendall tau-b = 0.431, p<0.01.

Remand receptions by type of charge: Victoria

The change in the flow of remandees into prison was not uniformly distributed across all categories of remandees. A key aspect of variability is the nature of the charges (type and number of charges) against which people are remanded in custody. The largest charge category for remandees is property offences, followed by offences against the person, robbery and extortion, and drug offences **(Figure 10).**

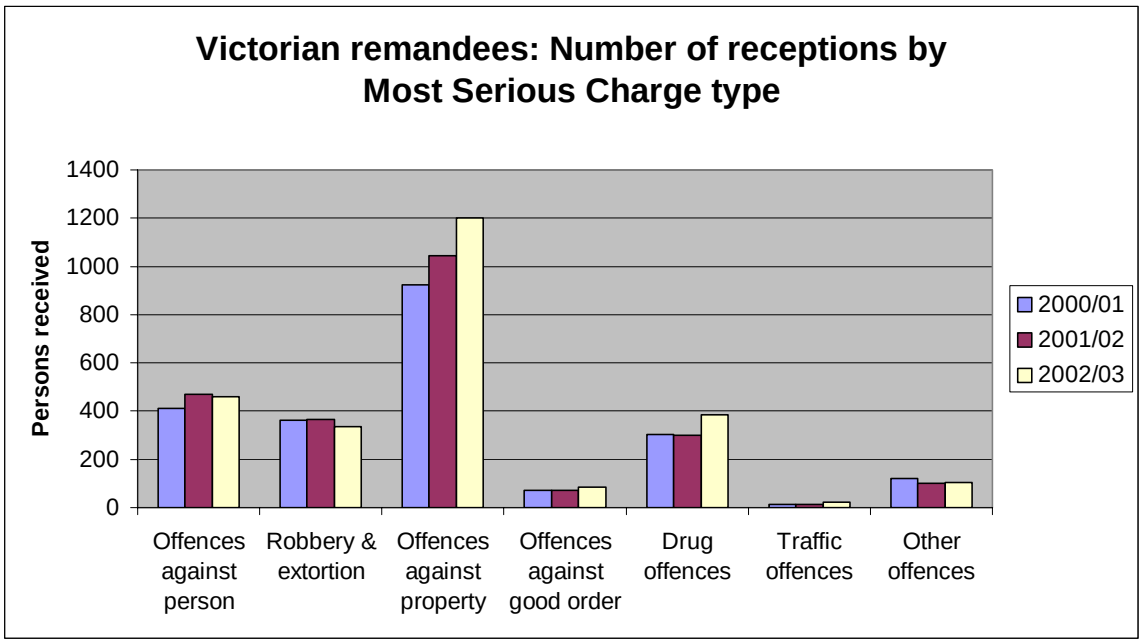


Figure 10: Number of persons received by most serious charge and year: Vic, 2000/01 to 2002/03

Persons charged with property offences accounted for almost all of the increase in remand receptions. The number of receptions in this category increased by 30 per cent between 2000/01 and 2002/03, from 924 persons to 1200 persons (Table 6). The only other charge category to show any significant increase[105] was drug offences, which increased by 27 per cent from 304 in 2000/01 to 385 persons received in 2002/03 (Table 7).

The category of property offences is the largest group of crimes recorded by police, and it is useful to break this down into specific offences. The rise in property offences was apparent in all offence codes except fraud, deception and arson. The largest numerical increases were in burglary (+77) and aggravated burglary (+55), and motor vehicle theft (+52). Between them, these three offences accounted for nearly half the total increase in remand receptions between 2000/01 and 2002/03.

[105] One-way ANOVA tests show that year-to-year changes in all other charge types were not significant.

MSC Code	Reception Period			Increase (00/01 to 02/03)
	2000/01	2001/02	2002/03	
Burglary	370	392	447	77
Aggravated. burglary	131	137	186	55
Other Fraud	6	2	5	-1
Deception	42	49	40	-2
Possess stolen goods	13	16	33	20
Handle stolen goods	32	52	37	5
Motor vehicle theft	64	110	116	52
Shopstealing	21	34	42	21
Other theft	220	212	243	23
Arson	15	16	17	2
Criminal damage	10	25	34	24

Table 6: Persons remanded for property offences by year received (Victoria)

Nearly ninety per cent of persons remanded for drug offences were charged with drug trafficking, and the rise in remand receptions was mainly associated with an increase in the number of trafficking charges.

MSC Code	Reception Period			Increase
	2000/01	2001/02	2002/03	
Possess/use drug	12	27	29	17
Traffic drug	275	265	341	66
Manufacture drug	17	7	10	-7
Other drug offences	0	0	5	5

Table 7: Persons remanded for drug offences by year received (Victoria)

Remand receptions by number of charges: Victoria

The mean number of charges for which persons were remanded increased from 10.25 charges per reception in 2000/01 to 10.77 in 2002/03 (Table 8). However, this did not represent a statistically significant increase.[106]

Reception Period	Mean	N	Std. Deviation
2000/01	10.25	2208	35.85
2001/02	9.81	2368	16.29
2002/03	10.77	2594	35.13
Total	10.29	7170	30.49

Table 8: Mean number of charges at remand by year received: Victoria

South Australia

Remand numbers in South Australia went through a period of rapid increase between the beginning of 1999 and the end of 2002, but were then fairly stable during 2003 and the first part of 2004. The remand reception data in this study therefore cover only the second half of this period when remandee numbers were increasing most rapidly.

[106] F=0.612, df=2, p=0.54

Figure 11 shows that the number of persons received into South Australian prisons on remand was essentially stable over the period between July 2000 and June 2003, at around 250 persons per month.[107] We also know from the Office of Crime Statistics study[108] that from 1994 until October 1999 the monthly number of remand receptions averaged around 150 persons per month, and that remand receptions increased sharply in the ten months between October 1999 and August 2000. Notably, SA receptions in raw numbers are higher than those of Victoria notwithstanding the far greater general population of the latter jurisdiction.

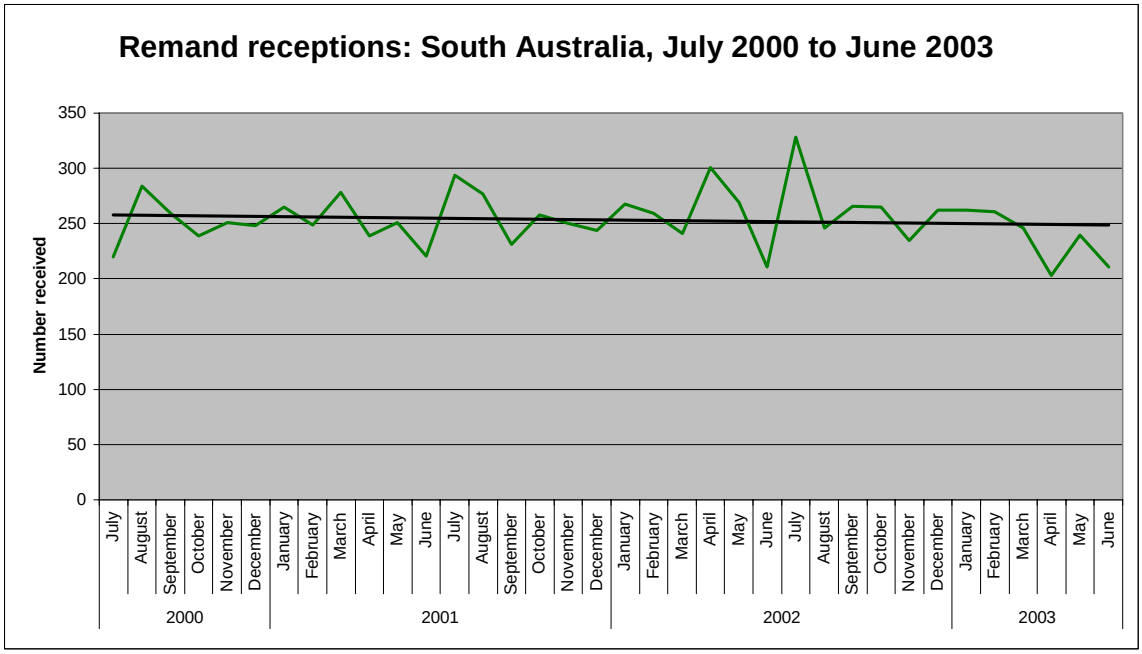


Figure 11: Number of persons received on remand by month:

South Australia, July 2000 to June 2003

Remand receptions by type of charge: South Australia

While there was no significant change in the rate at which remandees were received into South Australian prisons, there were changes in their charge profile **(Figure 12***;* see also Table A4, Appendix A). In common with Victoria, the largest group of remandee receptions is those charged with property offences (mainly fraud and burglary),[109] and the second largest those charged with offences against the person (around three quarters of which were assaults). However, unlike Victoria, the number of remandees received for property offences fell by around ten per cent over the three years, from 1,348 in 2000/01 to 1,209 in 2002/03, while those charged with offences against the person and good order offences rose.

[107] While the linear trend line shows a slight downward trend, this is entirely attributable to the relatively low number of receptions in April to June 2003.

[108] Office of Crime Statistics 2002.

[109] In South Australia, burglary/break and enter offences are classified as "serious criminal trespass".

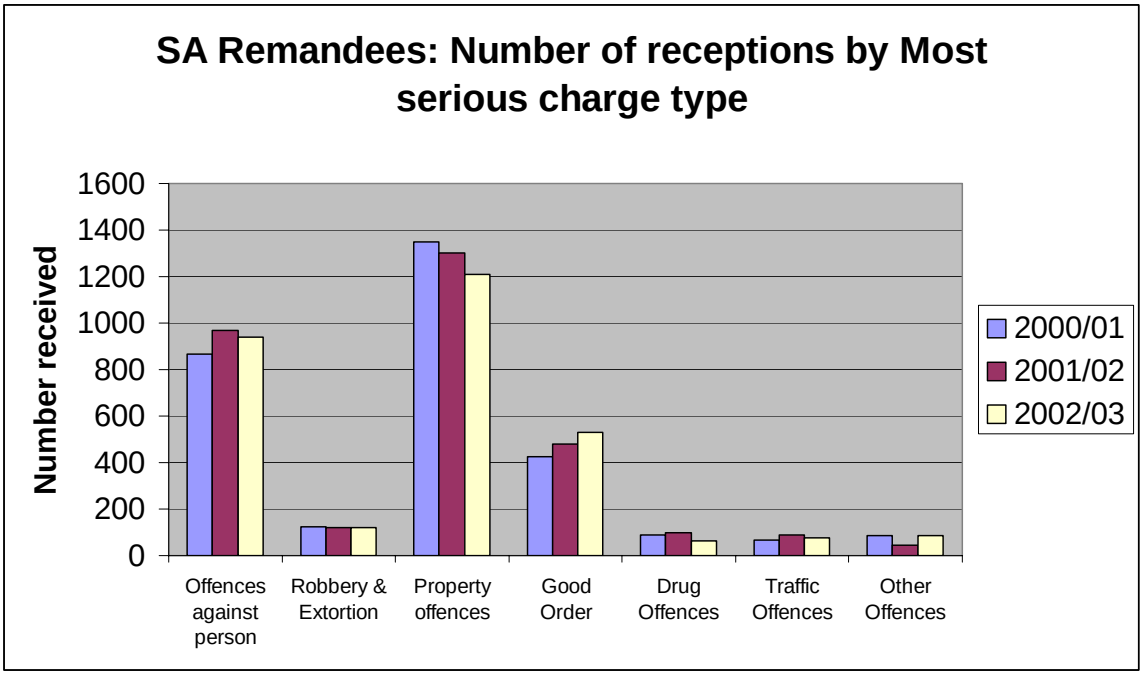


Figure 12: Number of persons received by most serious charge and year:

South Australia, 2000/01 to 2002/03

These changes in the charge profile of South Australian remandees need to be seen in the context of the changes in the period prior to July 2000. From July 1993 to July 1999, approximately 30 persons per month were remanded with a most serious charge of assault, but this had increased to around 60 persons per month by July 2001.[110] The increase in receptions for offences against the person in this data represents the final stage of this rise in assault. Conversely, the period before July 2001 saw a substantial rise in receptions of persons charged with burglary and fraud, and the reduction observed in this study represents a partial reversion to the situation that had prevailed prior to July 1999.

[110] Office of Crime Statistics 2002.

Remand receptions by number of charges: South Australia

The mean number of charges for which persons were remanded in South Australia increased from 3.18 charges per reception in 2000/01 to 3.54 in 2001/02, and then remained more or less at this level in 2002/03 (Table 9). The change in the first two years represented a statistically significant increase.[111]

Reception period	Mean	N	Std. Deviation
2000/01	3.18	3004	3.07
2001/02	3.54	3103	3.56
2002/03	3.44	3025	3.45
Total	3.39	9132	3.37

Table 9: Mean number of charges at remand by year received: South Australia

These data show that changes in remand receptions are not uniformly distributed across all offence possibilities. Our analysis of remand receptions complements the work of the South Australia Office of Crime Statistics (2002) which identified that increases in remand admissions in the period studied (1993-2001) were for particular offences.

In both South Australia and Victoria remand receptions are dominated by defendants charged with property offences and offences against the person. However the pattern of change in relation to those offences differed in the two jurisdictions.

The number of charges for which persons were remanded increased across the studied period in both jurisdictions, although this increase was not statistically significant in Victoria and in South Australia the increase occurred early and then stabilised. The significance of this finding will be explored when the practice and policy context of remand decision-makers is considered in Chapter 5 hereinafter.

This analysis leads to an articulation of the next two research questions.

1. Do remand rate changes in these jurisdictions only reflect changes in remand admissions or does time on remand also contribute to these changes?
2. Do changes in remand admissions reflect changes in offending behaviour?

4.2.2. Drivers of the remand population: length of time on remand

The length of time that a defendant is remanded in custody is important to the remand process and to the rates of remand in custody for any jurisdiction. The importance of this factor in influencing rates of remand in custody was underplayed in our first report, as it did not appear to be a crucial factor in explaining the differences in rates of remand between South Australia and Victoria. However, our analysis of the trends in custodial remand for this consultancy has convinced us that time on remand is a lever that can be managed by policy makers to manipulate remand rates.

[111] F=8.992, df=2, p<0.001

There are two different ways that length of time on remand can be calculated. The first is a snapshot method. Each year, on June 30, the ABS reviews everyone in custody and determines the length of time that those people have been held. Median and mean lengths of time are calculated. The alternative is to calculate the mean and median times of all persons taken into custody over a certain period of time, not at one point in time. We have reviewed the results of both such methods.

It is useful to look at a snapshot of national figures regarding time spent in custody. According to the ABS, as at June 30 2002, the average period on remand in custody across Australia was 5 months, overall an increase of 11 per cent over the previous year. A person charged with murder could expect 12 months on remand, drug trafficking 6.6 months, a sexual assault 5.5 months, and theft including motor vehicle theft 2 months.[112] On 30 June 2003 the average period of remand was a little lower; 4.7 months, a decrease of six per cent over the previous year. One in ten Australian prisoners on remand at 30 June 2002 had spent more than 11.4 months in custody awaiting trial. One in ten Australian prisoners on remand at 30 June 2004 had spent more than 12.5 months in custody awaiting trial. [113]

Figure 13 presents the comparison of length of time served on remand in each jurisdiction, based upon the average (mean) time served by the snapshot of prisoners who were in custody on remand on June 30 of each year.

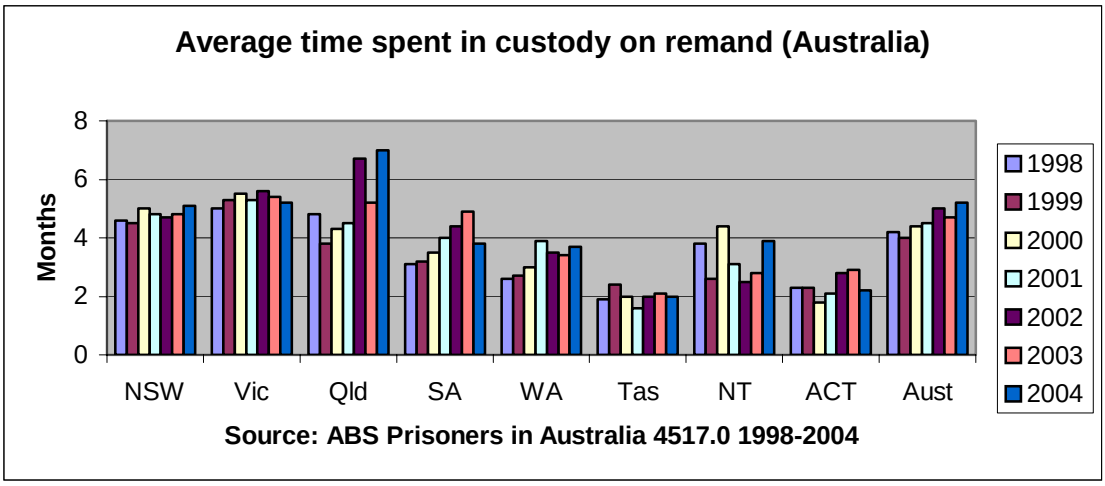


Figure 13

Note that the length of time on remand in SA is significantly less than in Victoria. Whilst the difference between the two jurisdictions in average time on remand is counterintuitive (since Victoria has a lower remand rate and time on remand is a lever in determining rates), an understanding of remand decision-making processes indicates a possible explanation. If a jurisdiction remands a small number of its defendants in custody, one would expect these to be defendants charged with more serious offences. In this circumstance, longer times for the scheduling and preparation of the trial and the actual hearings are not at all surprising.

Another difference could be that while most remand periods are very short (less than two months), a small proportion of individuals can be remanded for very long periods, sometimes exceeding two years. While these cases are unusual, these long periods exert a disproportionate influence on the calculations of averages. Moreover,

[112] ABS Prisoners in Australia 4517.0 2002, p. 30.

[113] ABS Prisoners in Australia 4517.0 2002-4.

the closer to the present one looks, the more individuals will be present who are serving long remand periods that have not yet ended.[114] In statistical terms, these data are *censored*, in that, while we know the remand period will end, we cannot know exactly how long it will be when it does end. This is why it is useful to compare the results of the second method of analysis: median times. But when reviewing prisoners by comparing median times, the data tell the same story. For the three years 2000–2003, the median time on remand in South Australia was 21 or 22 days and in Victoria was 38–42 days.[115]

Regardless of the analysis one uses, Victoria has consistently had longer average remand periods than South Australia, and continues to do so. Although length of time on remand is a lever that can determine remand rates, it does not appear to be a factor that explains either the differences in remand rates between South Australia and Victoria.

4.3. Factors that influence the numbers of remandees entering the system

The foregoing discussion leads us to the conclusion that if we want to understand why remand rates have increased, we need to look for factors that would increase the number of persons appearing before courts. In the discussion that follows three sets of factors that would result in increases are explored

- Changed crime patterns
- Increases in custodial remand as a result of
    - Changes in characteristics of defendants
    - Increased risk posed by defendants
- Increases in custodial remand decisions as a result of changes in the policy and practice contexts of the remand decision-makers

The final sections of this chapter consider the first two of these points. The policy and practice context of remand decision-makers is explored through qualitative research and discussed in Chapter 5.

4.3.1. Changes in crime patterns

As we discussed in the preceding section, the increase in remand receptions in both Victoria and South Australia were restricted to a small number of offence types. In Victoria, four offence types accounted for almost all the increase in remand: burglary, aggravated burglary, motor vehicle theft and drug trafficking. In South Australia, changes in remand were driven by changes in burglary, fraud and assault crimes. The most obvious question to ask is whether these changes were simply a reflection of changes in the level of these crimes. That is, were there more people committing assaults, burglaries, frauds, stealing cars or trafficking drugs and then being charged and remanded in custody?

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[114] The remandees in the Victorian extract were followed up until 21 April 2004. At that point, the numbers who had not been sentenced or discharged to court were nil (of those received in 2000/01), 9 (of those received in 2001/02) and 38 (of those received in 2002/03).

[115] These data are 50th percentile value for time on remand. Data from ABS Prisoners in Australia 4517.0 2004 indicate that 2004 median periods of custodial remand were 2.6 months (Victoria) and 1.8 months (South Australia), which are comparable.

Police crime statistics provide one perspective on the level of crime. Table 10 shows the number of offences recorded by Victoria Police in the four crime categories of interest: aggravated and non-aggravated burglary, motor vehicle theft and drug trafficking. It is clear that in all four crime categories, the number of offences recorded by police fell over the period of interest. The number of aggravated and non-aggravated burglaries fell by about a quarter, motor vehicle thefts by 40 per cent, and drug trafficking by about 10 per cent.

Offence type	2000/01	2001/02	2002/03
Aggravated burglary	2,515	2,243	1,878
Burglary	81,510	74,806	64,296
Theft of MV	42,276	37,677	29,067
Drug trafficking[116]	5,179	4,359	4,581

Table 10: Offences recorded by Victoria Police 2000/2001 to 2002/2003

Office of Crime Statistics (OCSAR) research noted that there had been increases in a range of crime types in South Australia in the period prior to 2001, particularly in burglary and motor vehicle theft. However, the OCSAR researchers also noted that there had been no change in the proportion of arrest apprehensions.

Police crime statistics are subject to variation arising from a variety of administrative and procedural sources[117] and most of the matters recorded by police do not ultimately find their way to court. Another perspective on changes in the volume of crime is the number of cases dealt with by the courts. Table 11 shows the number of burglary and drug trafficking cases[118] sentenced by the higher (County and Supreme) and lower (Magistrates) courts in Victoria over the period of interest. The court statistics do not allow aggravated and non-aggravated burglaries to be counted separately, and motor vehicle offences are included in a general category of theft.

	1999/2000		2000/01		2001/02		2002/03	
Offence type	*County, Supreme*	*Magistrates'*	*County, Supreme*	*Magistrates'*	*County, Supreme*	*Magistrates'*	*County, Supreme*	*Magistrates'*
Burglary	127	2449	126	2507	155	2225	201	2,345
Drug trafficking	201	2305	173	1918	171	1619	208	1,771

Table 11: Defendants sentenced by Victorian courts 1999/2000 to 2002/2003

Table 11 confirms that the number of burglaries dealt with by Victorian courts was stable and the number of drug trafficking offences fell in the same period when the number of remand receptions in these offence groups was observed to rise. Clearly, we cannot account for the rise in Victorian remand receptions in terms of rises in crime rates or the number of persons proceeded against for property and serious

[116] Both the police and the courts count drug trafficking, manufacture and importation offences in this category.

[117] Carcach and Makkai 2002.

[118] Defendant count based on the principal proven offence in the case.

drug crimes. The rise in remand receptions must have been the result of a rise in the proportion of charged persons who were refused bail or who did not apply for bail.

The OCS research on remand in South Australia in 2002 also reported a range of indicators of changing transition rates from arrest to remand. The corrections data on which this report is based do not allow these findings to be updated. However, since the OCS report covered the period when South Australian remand rates rose most quickly, it is useful to review the main OCS findings about changes in bail rates. These included:

- an increase in the proportion of arrest apprehensions in those categories of offences where rises in remand rates were most apparent;
- an increase in the proportion of arrestees not granted bail by police;
- an increase in the proportion of first court hearings where bail was refused or not applied for;
- an increase in the number of bail applications that were refused.

Thus, both the Victorian and South Australian data suggest that it is not criminal behaviour that is the primary driver of the increase in remand rates. Let us explore whether there is a connection between remand and the characteristics of defendants or the increased risk posed by defendants.

4.3.2. General characteristics of the remand population

One possible basis for changes in bail outcomes is that the characteristics of the people being remanded have altered in ways that made it more likely that, once arrested, they would be remanded. Let us look at some of the possible characteristics.

Gender of remandees

Research into gender and crime has consistently shown that for almost all offences females offend at much lower rates than men. One consequence of this is that there are far fewer women imprisoned, either sentenced or remanded, than men. However, over the last two decades the number of women in custody in Australia has grown at a faster rate than the number of men,[119] and it is appropriate to ask whether the changes in remand have affected women to a greater or lesser extent than men.

Nationally, approximately a quarter of women prisoners are remandees, compared with 19 per cent of men prisoners.[120] Women also serve slight shorter periods on remand,[121] so the difference in remand reception rates is even greater. While women account for around 6 to 7 per cent of the total prisoner population in both Victoria and South Australia, the proportion of remandees received is substantially higher: nearly 13 per cent in Victoria and 10 per cent in South Australia (Tables 12 & 13).

[119] Freiberg and Ross 1999.

[120] ABS 2003.

[121] In the period 2000/01 to 2002/03, SA women remandees were in custody for an average of 45 days, compared with 59 days for men remandees. In Victoria, women remandees were in custody for an average of 69 days, compared with 102 days for men remandees.

Reception Period					Total
Sex		**2000/01**	**2001/02**	**2002/03**	
Female	Count	244	359	323	926
	per cent	11.1 per cent	15.2 per cent	12.5 per cent	12.9 per cent
Male	Count	1964	2009	2271	6244
	per cent	88.9 per cent	84.8 per cent	87.5 per cent	87.1 per cent
Total	Count	2208	2368	2594	7170
	per cent	100.0 per cent	100.0 per cent	100.0 per cent	100.0 per cent

Table 12: Remandees by sex and reception period: Victoria

Reception Period					Total
Sex		**2000/01**	**2001/02**	**2002/03**	
Female	Count	283	332	269	884
	per cent	9.4 per cent	10.7 per cent	8.9 per cent	9.7 per cent
Male	Count	2720	2771	2756	8247
	per cent	90.6 per cent	89.3 per cent	91.1 per cent	90.3 per cent
Total	Count	3003	3103	3025	9131
	per cent	100.0 per cent	100.0 per cent	100.0 per cent	100.0 per cent

Table 13: Remandees by sex and reception period: South Australia

In both Victoria and South Australia there was considerable year-to-year variation in the number of female remandee receptions. However these remain a very small proportion of the overall remand population in both jurisdictions and hence the influence on rates is small.

Indigenous remandees

The continuing over-representation of indigenous persons as offenders in the criminal justice system has long been recognised. Overall in Australia Indigenous prisoners are about 20% of the prison population and about 20% of the remand population. But there are significant regional differences. There is for example a large difference between South Australia and Victoria. In Victoria, around 4.5 per cent of all prisoners are Indigenous (Aboriginal or Torres Strait Islander origin), compared with around 20 per cent of remandees (Table A1 Appendix A). In South Australia, Indigenous prisoners comprise about 17 per cent of the total prisoner population, but between 35 per cent and 40 per cent of remandees (Table A2 Appendix A). The representation of Indigenous people overall is substantially higher in South Australia, but the 'over-representation' of Indigenous people as remandees is less in SA than Victoria where it is roughly 400%.

On average, Indigenous remandees serve slightly shorter periods on remand;[122] however in neither jurisdiction was there evidence of any systematic change in the representation of Indigenous persons (Table 14 & 15).

Reception Period					Total
Indigenous status		**2000/01**	**2001/02**	**2002/03**	
Indigenous	Count	132	146	172	450
	per cent	5.9 per cent	6.2 per cent	6.6 per cent	6.3 per cent
Not indigenous	Count	2075	2199	2411	6685
	per cent	94.1 per cent	92.9 per cent	92.9 per cent	93.2 per cent
Unknown	Count	1	23	11	35
	per cent	0.0 per cent	1.0 per cent	0.4 per cent	0.5 per cent
Total	Count	2208	2368	2594	7170
	per cent	100.0 per cent	100.0 per cent	100.0 per cent	100.0 per cent

Table 14: Remandees by Indigenous status and reception period: Victoria

Reception Period					Total
Indigenous status		**2000/01**	**2001/02**	**2002/03**	
Indigenous	Count	570	611	601	1782
	per cent	19.0 per cent	19.7 per cent	19.9 per cent	19.5 per cent
Not indigenous	Count	2146	2257	2182	6585
	per cent	71.4 per cent	72.7 per cent	72.1 per cent	72.1 per cent
Unknown	Count	288	235	242	765
	per cent	9.6 per cent	7.6 per cent	8.0 per cent	8.4 per cent
Total	Count	3004	3103	3025	9132
	per cent	100.0 per cent	100.0 per cent	100.0 per cent	100.0 per cent

Table 15: Remandees by Indigenous status and reception period: South Australia

[122] Indigenous remandees in South Australia were in custody for an average of 52 days compared with 57 days for non-Indigenous remandees. Victorian Indigenous remandees were in custody for an average of 75 days compared with 87 days for non-Indigenous remandees.

Age of remandees

The youthfulness of the prison population is well recognised. Criminological studies have identified age as one of the two best predictors of future criminal activity. A frequent finding in remand research is that remandees are on average younger than sentenced prisoners, either because they are more socially and economically marginal than older offenders, or because they are more likely to have breached bail conditions in earlier episodes.[123]

This was confirmed in our research. In both jurisdictions, remandees were somewhat younger than their sentenced counterparts. The Victorian remandees in custody on 30 June 2002 were 2.5 years younger than their sentenced counterparts, with a mean age of 32.3 years compared with 34.8 years for all prisoners. The South Australian remandees in custody on 30 June 2002 had a mean age of 31.3 years, compared with 33.4 years for all SA prisoners. However, some of this difference can be accounted for by the longer average time spent in custody by sentenced prisoners compared with remand prisoners. Nationally, the remandees in the 2003 census had spent an average of 4.7 months in custody, compared with an average of 19 months[124] spent in custody by sentenced prisoners. Thus, while remandees are slightly younger than sentenced prisoners, the difference is not substantial.

In common with prisoners generally, the remand population is ageing. The average age of remandees received into custody increased significantly[125] over the three years covered by this research (Tables 16 & 17). In 2000/01, remandees received into custody had an average age of 29.9 years in Victoria and 30.0 years in South Australia, and two years later this had increased to 31.1 years and 30.9 years respectively. Ageing of custodial populations is a feature of all western criminal justice systems[126] and the ageing of the general population is obviously the major driver of this process. However, these two remand populations are ageing at a much faster rate than the general population. The Australian Bureau of Statistics predicts that the median age of the population will rise from 35 years in 1999 to between 44 and 47 years in 2051, that is, an increase of about 1 year in median age for every 5 years of elapsed time.[127] The rate of increase for the remand population is about three times as fast, at around 7 to 8 months increase in average age for each elapsed year.

Reception Period	Mean Age (years)	N	Std. Deviation
2000/01	29.9	2208	9.584
2001/02	30.4	2368	9.513
2002/03	31.1	2594	9.693
Total	30.5	7170	9.613

Table 16: Mean age at reception by year received into prison: Victoria

[123] Morgan and Henderson 1998.

[124] Estimate based on 50 per cent of expected time to serve.

[125] Victoria: One-way ANOVA, F ratio = 10.33, df (2,7167), p<0.001
South Australia: One-way ANOVA, F ratio = 7.51, df (2, 9102), p<0.001

[126] Morgan 1999.

[127] Australian Bureau of Statistics 2003.

Reception Period	Mean Age (years)	N	Std. Deviation
2000/01	30.0	2997	8.55
2001/02	30.4	3098	8.51
2002/03	30.9	3010	8.71
Total	30.5	9105	8.60

Table 17: Mean age at reception by year received into prison: South Australia

The change in the average age of remandees is attributable to falls in the proportion of receptions in all age categories less than 30 years, and increases in the proportion in all older categories. The very rapid rate of change suggests that factors other than simple population ageing are at work. One possibility is that the change in the charge profile of remandees is the underlying cause. While there are significant differences in the mean ages of remandees charged with different groups of offences, these differences do not in themselves account for the rapid ageing of the remand population. All charge types show an increase in mean age over the period 2000/01 to 2002/03, and the underlying cause of this trend must lie in the characteristics of the remandees themselves. It should be noted that this rapid ageing is not restricted to the unsentenced prisoner population. The average age of Victorian prisoners overall increased from 31 years 5 months to 35 years 2 months between 1992 and 2003, and the average age of South Australian prisoners increased from 29.4 years in 1992 to 33.8 years in 2003. In both cases, these changes are equivalent to an increase in average age of four months for every elapsed year **(Figure 14).** Remandees in South Australia and Victoria are slightly younger than their sentenced counterparts, but in both jurisdictions both sentenced and remand prisoners are ageing at a faster rate than the community from which they are drawn.

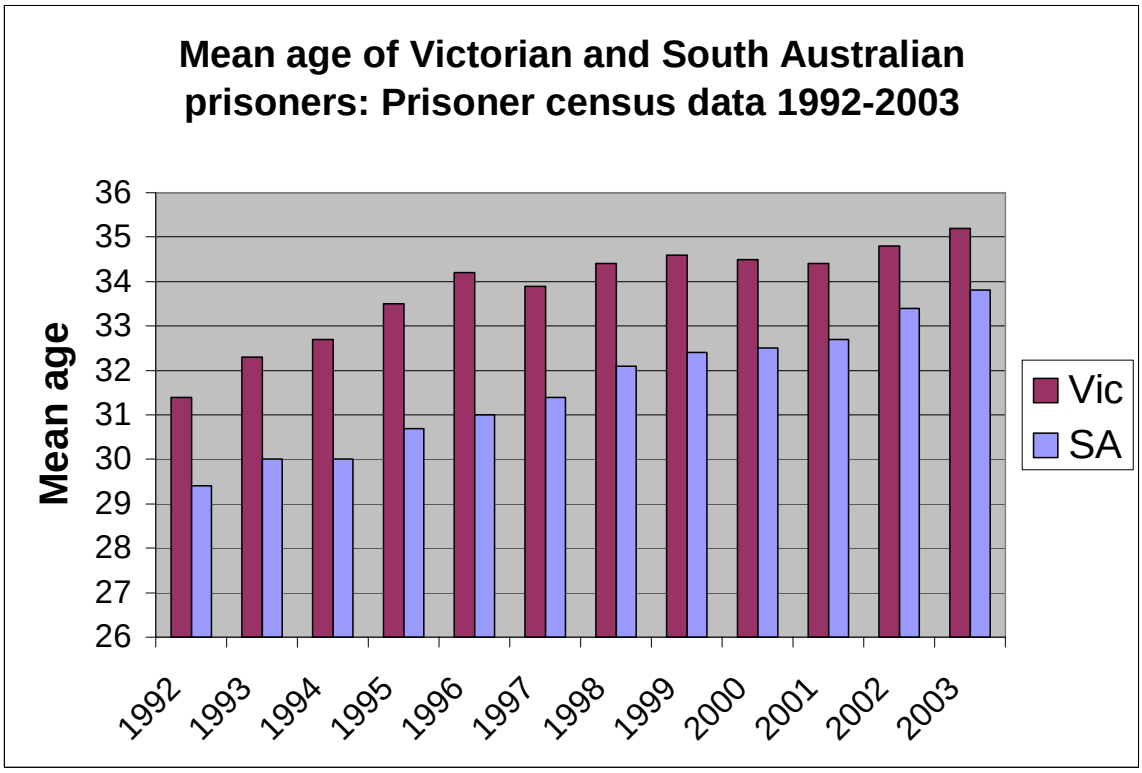

Figure 14: Mean age of Victorian prisoners at annual census

Social integration (employment, marital and housing status)

The strength of a person's social connectedness is an important consideration in a court's decision to bail or remand. Employment, marital and housing status are primary measures of a person's social integration. We know that there have been important structural changes in society over the past two decades, and that these changes have had a profound impact on the stratum of society from which most offenders are drawn. Unfortunately, statistical information about the prevalence of key issues such as homelessness, drug dependence and mental disorder in correctional populations is very limited. Much of what is available comes from census or cross-sectional studies (for example, prison health surveys)[128] that provide little help in understanding how these issues are manifested in remand populations.

The importance of a person's social integration to remand decision-makers, identified from our qualitative research, is discussed in Chapter 5.

Criminal history

The proximate causes of changes in remand patterns may be characteristics that are directly related to the causes of offending. There are a variety of attributes of offenders that that give rise to offending. These include the length and seriousness of the offender's previous offending history, drug and alcohol abuse, and the presence of mental disorder. All of these factors are known to be associated with the decision to remand in custody. For the purposes of this research, we were able to obtain data from Corrections Victoria on four criminogenic attributes of remandees: prior correctional history, drug and alcohol dependence, and mental disorder. These data are collected when a person is received into prison custody. No equivalent data were available on South Australian remandees.

The Victorian corrections data included two variables that were measures of a remandee's prior correctional history: whether he or she had ever served a Community Corrections order, and the number of times he or she had been imprisoned. Both variables show that there was a decline in the seriousness of the criminal histories of remandees over the three years. In 2000/01, 79.2 per cent of persons remanded had previously served a CCS order, but by 2002/03 this had fallen to 74.4 per cent of remandees received (Table 18). A chi-square test shows that this decline was statistically significant.[129] The mean number of prison terms previously served also fell, from 4.4 terms in 2000/01 to 3.9 terms in 2002/03 (Table 19). Again, this fall was statistically significant.[130]

[128] see Butler and Milner 2003.

[129] $\chi 2=16.54$, df=2, $p<0.001$.

[130] One-way ANOVA F=4.997, df=2,4796, p=0.007. Post-hoc Sheffe test shows that mean difference between 2000/01 and 2002/03 is statistically significant.

Any prior CCS episode?		Reception Period			Total
		2000/01	2001/02	2002/03	
No	Count	459	529	664	1652
	per cent	20.8 per cent	22.3 per cent	25.6 per cent	23.0 per cent
Yes	Count	1749	1839	1930	5518
	per cent	79.2 per cent	77.7 per cent	74.4 per cent	77.0 per cent
Total	Count	2208	2368	2594	7170
	per cent	100.0 per cent	100.0 per cent	100.0 per cent	100.0 per cent

Table 18: Percentage of remandees who had previously served a CCS order: Victoria

Reception Period	Mean terms of imprisonment	N	Std. Deviation
2000/01	4.4	1356	4.9
2001/02	4.1	1548	4.4
2002/03	3.9	1895	4.4
Total	4.1	4799	4.5

Table 19: Mean terms of imprisonment served: Victoria

Both of these changes are remarkable given the rise in the average age of remandees. All things being equal, older remandees should have longer criminal histories than younger ones. However, these data show that even though the Victorian remandees placed in custody in 2002/03 were about 15 months older than their counterparts in 2000/01, their criminal histories were generally shorter.

Drug and alcohol abuse

Interpreting information about remandees' drug and alcohol abuse is difficult, as many remandees do not go through a full reception assessment and hence only partial information is available. Around 15 per cent of remandees have no information about their drug or alcohol use recorded on their file. Moreover, this information is updated every time a person is re-assessed.[131] Thus, drug or alcohol information about a person who was received as a remandee in July 2000 may actually relate to an episode of imprisonment they served in June 2003. It is important to understand that the trends reported are not trends relating to the time these persons were received on remand.

Three questions about illicit drug use are asked: whether the person uses illicit drugs, whether the current offences were committed to support a drug habit, and whether the current offences were committed under the influence of drugs. An equivalent set of three questions is asked about alcohol abuse. Responses to these questions can be

[131] Analysis of this social history data is complex because of the time dependency of the data. A more detailed explanation and some alternative analyses are given in Appendix B.

combined into a simple scale from 0 to 3 that indicates the extent of drug and alcohol abuse.

There was a strong relationship between the date of assessment and the person's level of drug involvement. Those assessed between February and September 2001 answered "yes" to an average of 1.5 questions on drug use, while those assessed between December 2003 and April 2004 answered yes to an average of two questions. Statistical analysis shows a significant relationship between these two variables.[132]

There was also a significant relationship between the alcohol scores of assessed remandees and the date of their assessment,[133] although in this case the rise in average scores was substantially smaller.

Although comparable data were not obtained from South Australia, the Drug Use Monitoring in Australia Programme (DUMA) has operated in two sites in South Australia – Adelaide and Elizabeth. The 2004 data revealed 81% of males taken into police custody had tested positive to some form of drug. The perception of remand decision-makers (discussed in Chapter 5) that drug using defendants were at risk of re-offending was supported by the DUMA analysis that, of those tested positive, 62% of the males had been arrested and 23% imprisoned in the previous 12 months.[134]

Mental health of defendant

The social history assessment also shows a significant relationship between the date of assessment and the number of questions about the person's history of treatment for a mental disorder. The person is asked whether they are currently under psychological or psychiatric treatment, whether they have ever been under psychological or psychiatric treatment, and whether they have ever been admitted to a hospital as a psychiatric inpatient. As with the drug and alcohol questions, these questions can be combined into a simple scale from 0 to 3. Remandees who were assessed between February and September 2001 answered yes to an average of 0.6 questions, while those assessed between December 2003 and April 2004 answered yes to an average of 0.9 questions. A one-way ANOVA showed that there was a significant relationship between these two variables.[135]

This analysis is limited in that it does not consider comparable data from the two jurisdictions studied. Nevertheless the comparable data from Victoria and South Australia do point to the significant impact of the imprisonment of Indigenous Australians on remand populations. Whilst this must be considered in the light of the broader problem of indigenous Australians over representation at every point in the justice system its significance for our analysis of critical factors in the remand process should not be discounted.

The Victorian analysis demonstrating that over the period studied, remandees were ageing but their criminal histories were decreasing in seriousness, highlights the significance of remand decision-makers assessment of risk through a range of indicators. In this context the data that suggest that remandees are reporting increasing incidence of drug and alcohol abuse and of mental health problems is important. These data are consistent with qualitative data considered in Chapter 5.

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[132] F=15.17, df=10,6450, p<0.001

[133] F=3.52, df=10,6450, p<0.001

[134] Drug Use Monitoring in Australia Programme, *Annual Report 2004*, pp 39&42.

[135] F=9.96, df=10,6450, p<0.001

Conclusion

In this chapter, an analysis of the remand populations of South Australia and Victoria has been combined with an analysis of national remand data and utilised to explore factors critical to the remand process. Changes in custodial remand numbers reflect changes in remand receptions in a relatively small number of offences. Remand rates in relation to these offences change independently of indicators of the incidence of these offences, suggesting that critical remand factors may be identified either in the characteristics of remandees or in the practices and policies of remand decision-makers.

While the length of time that remandees are held in custody is a significant contributor to the calculation of remand rates, the differences in length of time on remand between Victoria and South Australia cannot be used to explain the differential remand rates in these jurisdictions.

Although our analysis highlighted again the over representation of indigenous people in the remand population, it would seem that it is characteristics relating to the social integration of remandees that are the more critical ones. Remandees' criminal histories over the period studied have lessened in seriousness, whilst there are indications of increased levels of drug abuse and mental health problems amongst defendants.

In the chapter that follows the practices and policies shaping the behaviour of remand decision-makers are explored using a qualitative research methodology. This allows the exploration of the ways in which these changes in defendant characteristics affect numbers of remand receptions.

5. The practice and policy contexts of remand decision-makers

The preceding chapter has examined the contribution of time on remand and numbers to overall remand rates. It suggests numbers are the critical component in the remand contexts under study and has investigated the contribution changing crime rates, and characteristics of defendants may have in this context. While both these contribute to remand rates in the South Australia and Victoria, chapter 4 shows they are not an adequate explanation and that explanation of changes in remand rates also lies in the practice of and the policies guiding remand decision makers.

The practice of and policies influencing numbers of custodial remands are investigated using analysis of organisational materials, the results of interviews with participants in the remand process and court observation studies. In this Chapter we find significant differences between the jurisdictions which appear to contribute towards differences in remand rates between the jurisdictions. These are discussed as four broad themes – the impact of legislative differences; the differences in degree of accountability within each State's remand process; the differences in linkages between and within agencies involved in the remand process; and differences in resources and alternatives to custodial remand.

5.1. Legislation in practice

The Bail Acts provide the foundation upon which the practices and policies have developed. Bail decision makers in both jurisdictions placed great emphasis on the Bail Act and its impact on their decision making. From the qualitative research we identified differences in policy and practice between the jurisdictions that reflect some differences in approach to the legislation. South Australian respondents were generally uncritical of the Act and did not see it as being particularly constraining of decision-making. By contrast, the reverse onus provisions of the Victorian Act were seen to create complexity and, in some cases, confusion and something that might create injustice in some situations. One consequence was that in practice a flexible approach was taken by some bail decision –makers to the reverse onus provisions, indicative of willingness to develop practices in line with the pro-bail philosophy underpinning the Bail Act. Further evidence of the remand systems pro-bail orientation was the almost automatic use of bail justices which appeared to go beyond legislative requirements.

Our investigation of the approaches taken in each jurisdiction to the statutory grounds for custodial remand suggests that they are not an explanation for different practice and policies. Both jurisdictions appeared to use the grounds in similar ways.

5.1.1. South Australia

In South Australia little comment was received about the Bail Act itself. What comments that were received emphasised its clarity and utility.

> No, I think the bail act is a very good bit of legislation. It's easy to use from the police perspective, and it also gives the person who has been arrested rights. I don't know how it compares with other jurisdictions but they have the right to bail reviews. I think it is good. It gives the police a lot of latitude to impose conditions that I think protect the community if they are being released on bail, or if they are being kept in custody. No, I think it's a good piece of legislation. …I think, as I said before, the Bail Act is a very good

> piece of legislation and a very workable piece of legislation. It's not difficult to understand.
>
> (police)
>
> Well, I suppose if you look at the Bail Act it is quite broad as to what our powers are. "For any other reason." That is wide open. If you've got any valid reason at all which you think is detrimental to the particular case, you can probably put that in.
>
> (police)

Certainly from a South Australian police perspective the Bail Act did not appear to hinder them and no changes were recommended.

5.1.2. Victoria

Victorian respondents, by contrast, raised a number of issues about the Act – some suggested significant review of the Act was needed and particular reference was made to the reverse onus provisions.

> ...the Bail Act itself, I think it's 1977, was the last time it was ... well, when it was established. I think that's outmoded and outdated for what our needs are today. I think it still services our current needs but I think that Act needs to be reviewed comprehensively.
>
> And what would you like to change in it? What are the areas you think it would be worthwhile making a change to?
>
> All areas would have be changed but specifically Section 4 which deals with how certain offences are to be categorised when determining bail, such as unacceptable risk, show cause and the third one is… exceptional circumstances.
>
> (court official)
>
> It's a shocking piece of legislation, probably one of the worst written pieces of legislation you come cross, in Victoria anyway. Get them to rewrite it in a user friendly form…..There have been some recent amendments, but just trying ….to read section 4: you jump from there, you go there and there and back here. And that's one section and it's very difficult ……. to understand as well and all the different people who have to deal with it [have difficulties].
>
> For such a relatively small piece of legislation it's a very difficult one to get your head around.
>
> (court official)

Beyond the workability of the Act, significant concerns were expressed about the operation of the reverse onus provisions in practice.

Reverse onus provisions

The implementation of the reverse onus provisions appeared to be a difficult area of practice. In this context it must remembered that the Victorian Act appears more restrictive than the South Australian Act when it comes to granting bail. The Victorian reverse onus provisions reverse the presumption of bail so the defendant has to either demonstrate 'exceptional circumstances' in some situations and, in others, 'show cause' why bail should be granted.

The reverse onus provisions were said to create inappropriate custodial remand in some situations. The example of some repeat minor offences falling within reverse

onus provisions so there was a presumption against bail was said to be one such situation.

One result of the injustices worked by the reverse onus provisions led some of those involved in the remand process to turn a Nelsonian eye to the requirements of the section.

> …and then there's a show cause situation where they're allegedly to have committed further shoplifting whilst on bail. I suppose that's almost a… I think the police actually close a blind eye to the fact that it's show cause anyway in a lot of those cases, and in my experience they don't actually fill in their reasons for granting bail in a show cause situation.
>
> (bail justice)
>
> You tend to go, dare I say it, around the Bail Act a little, for practicality purposes. An example for that would be if you had a shoplifter who does a $10 shop theft, gets caught and some reason gets bailed. If he gets caught that day, the next day, whenever, prior to the court case, and he gets caught shoplifting again, we're talking indictable offences, so he's on bail for an indictable, he's committed an indictable offence whilst on bail. He automatically falls into show cause. Realistically, a bail justice or a court won't remand somebody on that, even though the Bail Act says they are to go before the bail justice.
>
> So it then falls back on us to not so much breach the Bail Act, but to take a practical view of it which in turn may open us up to criticism later on.
>
> (police)
>
> The problem is that the current structure of the Bail Act can, in the hands of a Magistrate who won't apply it at all flexibly, lead to people being remanded in custody who shouldn't be on any sensible analysis, the chocolate bar stealer who steals another chocolate bar whilst on bail for stealing the previous one, has to show why his detention in custody is not justified.
>
> (court official)
>
> The courts generally ignore [the reverse onus provisions] to some extent….Well they play lip service to it.
>
> (prosecutor)

This flexible approach indicates an attitude of limiting the use of custodial remand to circumstances where it would it clearly needed and would not be overturned on review or on fresh application later in the remand process. This approach was not approved by all, with some advocating a stricter application of the reverse onus provisions.

The willingness of some of those involved in the remand process to 'overlook' the provisions of the Bail Act is indicative of a culture that prioritises bail over custodial remand and actively takes step to ensure custodial remand is limited to those for whom it is thought to be absolutely necessary.

Use of Bail Justices

Like the reverse onus provisions, the bail justices are not found in the South Australian remand process. In addition to their review function, which is discussed later in this chapter, the approach taken in Victoria also illustrates a culture that discourages custodial remand. Victorian interviewees, when describing the remand process, reported that police would summons a bail justice once a decision was made

not to grant police bail. At times it appeared that it was thought police had little power to remand in custody but that this was a matter for bail justices and courts.

> ... so if you were to decide not to grant bail, what would normally happen then?
>
> We would ring up a bail justice. That's our procedure.
>
> Unless the court's sitting?
>
> Yes, exactly.
>
> (police)
>
> And because police don't have power to remand a person over an extended period of time, if it's within a few hours of courts opening or something like that the sergeant may step in and say, 'Yep, we'll hold him until the court,' but other than that, we have to get in an independent person, a bail justice, to deal with the situation.
>
> (police)
>
> What do you do then, if you are seeking remand of this person, what's the procedure then?
>
> All right, so if I decided this person should be remanded, going down that path, the procedure would be to contact the bail justice - the bail justice is a voluntary person who comes in representing the community if you like - they come in and they actually make that decision.
>
> (police)

Looking at the *Bail Act 1977,* section 10 demands that the police advise persons in custody of their entitlement to a bail justice and, if one is requested, to make the arrangements to have the bail justice determine the question of bail. Section 10 (2) provides

> Where a member of the police force refuses to discharge a person from custody under subsection (1) or any person held in custody objects to the amount fixed for bail or any condition of bail the member of the police force shall advise the person in custody that he is entitled, should he so desire, to apply to a bail justice for discharge from custody or for variation of the amount of bail or conditions of bail or shall give to the person a statement in writing setting forth the provisions of this sub-section and if the person elects so to apply the member—
>
> (a) shall cause the person to be brought before a bail justice as soon as practicable;
>
> (b) shall cause to be produced before the bail justice the warrant, file or papers referred to in sub-section (3); and
>
> (c) shall abide by the decision of the bail justice in relation to that person.

The current practice effectively adds another disincentive for police to remand a person in custody – it requires significant additional work. It reflects a culture and development of the remand process that actively attempts to ensure custodial remand is targeted only at those defendants for whom it is necessary.

5.1.3. Legislative criteria for remanding in custody

A critical factor in remand decision making is the way in which the statutory criteria for custodial remand is used. The qualitative research explored whether the two jurisdictions differed in their use of the grounds for custodial remand.

Chapter 2 identified the statutory grounds for remanding in custody – unacceptable risk of the defendant not answering bail, of continuing to offend, of interfering with the criminal justice process or to protect victims. In addition to these there are the reverse onus provisions in Victoria which can be viewed as grounds in their own right. It must be remembered that there is no hierarchy of grounds for refusing bail in the Bail Acts. Any ground will suffice if it is made out.

The reality is that some grounds are more frequently used than others and some may have different thresholds before they are used. The numbers of aggregate custodial remands can be affected by the practical effect of such ordering. If, for example, protection of victims is given a privileged position, the threshold at which unacceptable risk is said to exist may be lowered. Even if it is not lowered, in such a context the numbers of remandees will also depend on number of offences involving ongoing personal risk to the victim – family violence being one such situation.

While Chapter 4 provides some statistical analysis of criminal offences and personal characteristics of defendants, the qualitative research revealed the perceptions of the decision makers about this issue. The interviewees were asked which grounds were the most frequent justifications for custodial remand. Prevention of continued offending and the risk of not answering bail were the two grounds most interviewees identified as mostly common used to remand a defendant in custody.

The protection of the community was seen to the primary function of custodial remand

> ...I think that's what the single biggest aim with bail and remand cases are, that the community is secured from those serious offenders,
>
> (court official)
>
> In our court it's the protection of the community, then the likelihood to appear. That's about it.
>
> (court official)
>
> A modern criminal court's primary purpose is to protect the community in my view, and if you don't have to put somebody in jail to protect the community, then you shouldn't, unless there is some overriding factor like the need to demonstrate the unacceptable nature of behaviour in a very public and extreme manner by jail.
>
> (court official)

While the risk of not answering bail is commonly used to justify custodial remand, there was some suggestion that because any breach was less likely to have major consequences, it required a greater threshold of risk before a defendant would be refused bail.

> Failure to appear is not as great a great concern to me as committing further offences. How many people who are granted bail actually then fail to appear, I wouldn't think many.
>
> (police)

There was evidence to suggest that as those involved in the less serious criminal conduct tended to be often coming into contact with the criminal justice system, and some in the remand process thought it most likely that a defendant who failed to appear would be picked up at later stage in the ordinary course of events.

> As far as attending court, I think and whether this is naive of me or not, but I think most people do try and meet their obligations, but there are those who for one reason or another can't, but if we release them on bail, if we are satisfied about who they are, they'll still end up in court sooner or later, whether it be from a warrant or whether they turn up themselves.
>
> (police)

Whilst the need to protect victims as a concept is encompassed within the risk of re-offending, the South Australian Act specifically provides for protection of victims. The Victorian Act refers to the risk of endangering members of the public. Interviewees tended to treat security of victims as separate ground from re-offending

The other grounds for refusing bail – protecting the integrity of the criminal justice system, protecting victims, safety or welfare of the defendant were much more rarely used except in family violence cases.

Our analysis of the use of the statutory criteria for custodial remand failed to show any significant differences either within or between jurisdictions when it came to using the criteria for custodial remand.

The investigation of the impact of bail legislation on policy and practice showed both differences and similarities between the two jurisdictions. While both jurisdictions appear to use the statutory criteria for custodial remand in similar ways there is evidence of 'cultural' differences underpinning practice and policy. The Victorian process appears to be willing to go beyond the legislation in certain areas – to take a pro-bail approach to the reverse onus provisions in some situations and to facilitate review of police decisions to refuse bail.

5.2. Accountability and review of bail decisions

The proper working of the remand system depends in part on the accountability mechanisms that exist within the system. The bail legislation outlines the formal structure for review which is one form of accountability. Chapter 2 discusses the formal review process in each jurisdiction. However the effectiveness of the review mechanisms is influenced by the practices and policies in the two jurisdictions. Here the qualitative research found significant differences consistent with Victoria having a culture that discouraged the use of custodial remand.

In both Victoria and South Australia the decision to seek custodial remand is made by the arresting police officer. While the actual decision is made by the relevant custodial supervisor (usually the custody sergeant) it can be characterised as a review of the arresting officer's decision. As we will see in our discussion of 'intra-agency' interactions within the system, there is considerable consistency between arresting officers and custodial supervisor's views of the need for custodial remand. Significant disagreement appears to be rare.

No interviewees reported many differences of opinion- one interviewee reported that in ten years of service only twice had the arresting officer's recommendations being questioned and that was in relation to the issue of conditions. Another operational officer with many years experience said insofar as disagreements with custody supervisors were concerned

> To tell you the truth, it hasn't been my experience. Generally we'll come to same the conclusion based upon the facts that we've identified in relation to a suspect. It's been my experience you'll ultimately come to the same conclusion.

This raises some questions about the efficacy of the review process at this stage. While a level of consistency is to be expected, in a large agencies a level of difference over the need for custodial remand in individual cases would not be unexpected.

5.2.1. Review of police bail decisions

The differences between the jurisdictions become marked after the police bail decision. The existence of the bail justices in Victoria inserts an additional review process not found in South Australia (except for the limited telephone review service). The value of the bail justice process from a systemic perspective lies not in changing bail decisions – interviewees report very few police bail decisions are changed by bail justices – but in requiring prior decision makers to account for their decision.

> And in terms of outcomes of the bail justice process, what tends to happen by way of outcomes? What proportion of people for whom you seek remand in custody are thus remanded?
>
> I've only ever had one who was released by the bail justice, and that's the bail justice's view, and that's fine, but the person went out and re-offended again and came back an hour and a half later so…
>
> (custody sergeant)

This is not unexpected – the same criteria are being applied and as was pointed out by both police and bail justices, the bail justice hearings took place relatively soon after the police bail decision and the defendants were in a similar state whereas by the time of any court appearance, often many hours later, the defendant presented quite differently.

The bail justice process is significant in two ways. It provides an immediate accountability measure and it has some transaction costs that promote better targeting of custodial remand decisions. The Victorian bail justice is seen as holding an out of court hearing that adopts many of the features of the court bail hearing. It normally takes place in a separate room (some of the larger police stations have a dedicated room) and the arresting informant is required to give sworn evidence to support the grounds for custodial remand decision. As the defendant does not usually have a lawyer present the bail justice undertakes somewhat of an inquisitorial role. The length of these hearings varied with circumstances with estimates of an 'average' hearing ranging from 20 to 30 minutes. This process makes the arresting officers much more accountable for their decisions to seek custodial remand. The use of sworn evidence may also limit the use of assertions that have little or no foundation. A further element of accountability arises for the custody sergeant from the fact that a decision to remand in custody is likely to be scrutinised relatively quickly in the officer's own station. This may encourage a greater sense of ownership for the decision.

This process also increases transaction costs for those seeking custodial remand. For the arresting officer there is the requirement that they attend the bail justice hearing and give evidence. More broadly the police may have to facilitate the attendance of the bail justice.

The bail justices are on an on-call roster which helps address any concerns of bail justice 'shopping' but the police may still need to assist with transport.

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

South Australia has a telephone review process if a person is not going before a court before 4pm of the following day and the person has made written application for such a review. This means for the most part, the provision is a week-end provision. South Australian interviewees differed on the extent to which telephone reviews were used. One interviewee suggested perhaps 20% of the defendants would avail themselves of this opportunity but that in 95% of cases the Magistrate would agree with the custody sergeant's decision. Another informant indicated that telephone reviews were rare.

It is not clear how well defendants are told of this right. Police are required to inform defendants of their right to apply for bail as soon as practicable after arrival at the police station and to provide them with a Section 13 statement setting out their rights and the process for applying for bail. This statement includes information on the rights to seek review including telephone review. However, on the face of it, there is no statutory obligation to inform defendants of the right to seek review after a decision has been made to refuse bail. Indeed there was some evidence to suggest that police preferred to withhold such information.

> I think for the six months I was there I had about four or five [telephone reviews] and I had three in one day. It spread through the [cells] like wildfire, 'Ooh, you can get a magistrate's review!' Because we don't have to tell them. It's not a fact that we advertise. We give them the information. They can seek legal advice but if they don't agree with the decision we're not going to say, 'You really should get a magistrate's review' because that's not my job.
>
> (police)

In summary Victorian police culture, practice and policy appear to be significantly different to their South Australian counterparts.

5.2.2. Court bail process

At the court bail stage again significant differences in practice and policy arise between Victoria and South Australia. In accountability terms, the Victorian process continues to involve the arresting officers requiring them to take some responsibility for their decisions. Victorian police are required to attend court to give sworn evidence in support of any opposition to the grant of bail. This may, if the arrest happens overnight, mean that the arresting officers will have to attend court after the end of their shift for the bail hearing. Aside from the clear personal inconvenience it has resource implications diverting operational police from their normal policing work. As an example of this one interviewee gave a practical illustration of the impact of the arresting officer having to attend court on bail hearings.

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

In South Australia the operational police rarely have any role once police bail has been refused. The matter then becomes a matter for the police prosecutor to handle. This is possible because the South Australian court process does not require police to give sworn evidence. As such operational police have little personal accountability for the custodial remands they have requested and obtained.

This was confirmed by our court observation study. In South Australia three quarters of bail decisions were decided without evidence being produced. By contrast in Victoria over three quarters of bail decisions followed the presentation of evidence.

	South Australia	**Victoria**
No evidence	76 per cent	19 per cent
Evidence presented	18 per cent	78 per cent
Evidence ordered	6 per cent	3 per cent

Table 20: Whether evidence presented

The research observers did not distinguish between the nature of the evidence (documentary or oral evidence) and the source of the evidence. In South Australia, evidence tended to be bail assessment reports. Anecdotally, the observers reported that they did not see a police officer give evidence on an issue related to bail in South Australia.

In addition to making those seeking the custodial remand of a defendant more accountable, the Victorian practice of requiring the informant to give evidence also promotes better scrutiny of the information upon which custodial remand decisions are made. Leaving aside the availability of bail reports the information used in court comes to the court in very different ways and with differing testability. The use of sworn evidence in Victoria enables a closer scrutiny of the information upon which a decision is to be based. The police officers are subject to cross-examination and questions from the Magistrate. In South Australia the court is relying on information from the bar table which is in itself is hearsay contained in brief notes in provided by the arresting officers.

An indirect measure of the difference in scrutiny is shown by the difference in time taken to determine applications for bail in court in our court observation study. The following table 21 shows mean and median times

	SA	**Victoria**
Mean (minutes)	5	23
Median (minutes)	5	18

Table 21. Mean and median times in hearing

The longest bail hearing observed in South Australia took 35 minutes; the longest in Victoria 88 minutes. As might be expected, there is a direct relationship between prosecution opposition and whether evidence is presented and duration of hearing. In South Australia, opposition to bail applications would double the length of the hearing although the increase was relatively small in absolute terms (under 4

minutes to almost 8 minutes). In Victoria the order of the increase was greater: from around 13 minutes to around 34 minutes. What is of interest here is that the amount of time spent on uncontested cases in Victoria is greater than contested cases in South Australia.

The difference in duration was direct related to the giving of evidence. Our court observation study shows the leading of evidence also increases the duration of hearings. In South Australia, the presentation of evidence increased the mean duration from just less than 5 minutes to 8 minutes. By contrast in Victoria presenting evidence increased the duration almost fourfold to around 28 minutes. As discussed in the preceding section it must be noted that in South Australia in all cases the evidence was in documentary form, whereas in Victoria cases often involved sworn testimony.[136]

5.2.3. Supreme Court review

Both jurisdictions provide for review of bail decisions by the Supreme Court. Defendants appearing before the Supreme Courts can apply also apply for bail. In general interviewees involved at the remand process at the higher court levels reported that bail status had usually been settled during the lower court proceedings and that any bail matters tended to relate to applications to vary bail. Occasionally there would be applications for bail due to changed circumstances by a person on custodial remand.

One of the few comments made about the Supreme Court review process in South Australia was that it was relatively little used. In Victoria, some interviewees reported that the Supreme Court had provided clearer guidance in a series of decisions about the approach to be taken to the Victorian reverse onus provisions.

5.3. The role of organisational policy and inter-agency relationships

The systemic perspective underpinning the general research strategy adopted for this project led to a close examination of the interactions between different elements of the remand system. In describing the remand in custody process as forming part of a "system", we recognise it can only be loosely described as a system. There are no formal linkages and reporting mechanisms between the different institutional components of the remand system. Those operating within the system do not necessarily see it as a system. Yet, for analytical purposes, the different institutional components combine through a series of separate decisions to produce an output using the same criteria throughout the process. It is useful to consider the system from both an inter-agency (vertical) and an intra-agency (horizontal) perspective. The inter-agency perspective examines the interactions between institutions and the impact of the activities of an institution whereas the intra-agency perspective examines the processes and decisions within an institution on the output of the remand system (the overall number of defendants remanded in custody).

In both jurisdictions we found significant differences in these interactions that affected policy and practice. These differences were particularly important in the

[136] In recording duration the observers in debriefing noted that as most hearings involved a number of issues, consideration of bail matters was often interspersed through a hearing. The observers recorded the sum of the time spent considering bail

way operational policing policy influenced and impacted upon the South Australian remand process.

5.3.1 Inter-agency linkages

One consequence of the lack of a systemic perspective is that bail decision-makers operate within their own institutional or agency connects and policy frameworks. At the level of the individual defendant, there was a consistent message that the decision was a balancing one between the need to ensure community safety and to ensure that the defendant was present in court when required, and the right of the defendant to receive bail since they were presumed innocent. Interviewees, in answer to a direct question, generally indicated that the policies and needs of other agencies had very limited impact on their decision-making or operations. A number indicated that they had little or no idea how other agencies in the system were handling bail cases and general issues relating to bail. Yet in answering questions on how the remand process worked, the effect of the interrelationships between areas of responsibility in relation to remand decision-making was powerfully illustrated in our interviews.

Magistrates in both South Australia and Victoria indicated that they could see the effect of police operational decisions (such as focusing on a particular offence) in the remand hearings that came before them. Whilst their comments did not imply criticism of the operational decisions, they did name the influence of these decisions on the nature of offenders coming into the system and on workflows throughout the system.

Police decision-makers identified that they made decisions cognisant of the factors that they believed would influence those who made the subsequent remand decision in the case. They were sensitive to having their decision not to grant bail overturned by later remand decision-makers whilst at the same time acknowledging that 24 hours in the police cell enabled a defendant to present a more coherent proposal about bail (sometimes with the assistance of a solicitor).

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

Illustrations of how effects flow both ways between police and courts were police reports that at both operational and decision making level that one of the factors influencing police was the concern in some cases that it was not worth pursuing custodial remand at the police bail stage because even if granted it would be set aside by the courts. The disincentive to seek to custodial remand although reported in both jurisdictions could be expected to be greater in Victoria where the obligations on police are far greater than in South Australia.

> My perception would be that [at the end of the process] they all seem to get bail, they don't remanded. Whether that's a good thing or a bad thing, I don't know. The people that they uniformly deal with, they're not your more serious offenders, they always seem to get bail. ….
>
> (police)
>
> And that influences a lot of coppers now, to [not] go through the remand process, because they know.

> Yesterday for example, I was on supervision, a female was 12 weeks pregnant, quite rightly [the arresting officer] could have remanded her but he's thinking, 'I'll just bail her because she'll get bail tomorrow morning,' a) because she is pregnant, and there's a bit of a health issue there, but b) because she'd just get bailed in court.
>
> (police)

In Victoria, police decision-making is reviewed by both the bail justice and the court. If the police officer does not believe it appropriate to grant bail and the defendant wishes to apply for bail from a bail justice, it is the police responsibility to locate the bail justice (usually a Justice of the Peace who undertakes this work in an honorary capacity) and to bring them to the police station to review the decision. Police reported that whilst the review itself may only take 15 to 20 minutes, the process of finding and awaiting the bail justice was often a much longer one.

Further illustration of the impact of other agencies within the remand system, and perhaps the most powerful one, is the Victorian requirement that the police informant who has charge of the case is also required to attend court and to give evidence when the first bail hearing is held. No such requirement exists in South Australia. Certainly in Victoria the disruption to the informant's work as a result of a defendant being remanded in custody was seen as a rationale for granting bail whenever this was not clearly inappropriate.

A variety of perspectives were expressed as to the extent to which police recommendations influence magistrates' decisions. Whilst police were inclined to emphasise the decisions and attitudes of magistrates that were at odds with their own, magistrates acknowledged that in the time allowed for decisions about bail, the assessment of the police was influential. Several magistrates argued that an important future direction in remand decision-making is for magistrates to be more proactive in claiming the time needed to give more detailed consideration to the bail/remand decision and to influence the development of more creative options for achieving the objectives of custodial remand.

Magistrates and bail justices identified that decisions about remand were taken in conscious recognition of issues such as the likely delay before a matter could be finalised by a court. In Victoria, a particular issue that was identified was long delays to get analyses from the forensic laboratory. Magistrates identified that the awareness that these delays would mean that a matter could not be finalised for more than two years had a significant influence on the remand decision. In particular, magistrates identified their concern that a person could be remanded in custody for a longer period than the likely custodial sentence. The risks that this need to release defendants for these reasons posed were highlighted by several remand decision-makers who pointed out that the length of time for which a person was granted bail increased the probability of a breach of bail. A similar, but less extreme, effect was identified by police and bail justices in relation to defendants who needed medical treatment. In some cases, more expeditious treatment could be achieved by remanding the offender in custody; in others, the unavailability of medical services at the police station meant that it was easier to grant bail for a defendant to get injuries treated.

Police, bail justices and magistrates all identified that legal aid services were adversely impacted by the flow of remandees into the system, and that the capacity of legal aid lawyers to respond to the needs of individual clients affected remand

decision-makers. In South Australia two recent pilot programs attempted to increase and improve the interaction between police and defence lawyers. In neither Victoria nor South Australia is it customary to have legal aid lawyers available to defendants when the matter of police bail is being considered. To address this, the South Australian Legal Services Commission trialed an advisory service whereby a legal aid lawyer was rostered to assist defendants seeking police bail. A second program involved the provision of a senior police prosecutor and a senior Legal Services Commission lawyer to deal with custody cases before a first appearance. The impact of these initiatives on remand rates was not thought to be significant and they have been discontinued. An overnight telephone legal advice service is provided by the Legal Services Commission throughout the State to defendants arrested and charged with major indictable offences.[137]

Magistrates and police prosecutors identified to us that the time pressures under which legal aid lawyers are working results in them often representing clients on the scantest of instructions. It was the belief of these remand decision-makers that the process was poorer as a result of this inability for defence counsel to make a proper and appropriately informed contribution to decision-making. Legal aid solicitors also expressed their concerns and frustrations about this issue. Access to their new client and an understanding of the charges and prosecution attitude to bail were all matters for which they depended upon others in the system. Legal aid solicitors also reported that significant aspect of their work involved interactions with agencies outside the remand system or family and friends of the defendant. These were not related to 'legal' issues, but rather were related to the affairs of the defendant to enable mounting a credible argument for the granting of bail (e.g. by locating a house where the defendant could be accommodated and accessing other social services).

Other examples of the effect of institutional interactions, or indeed parts of the same institution, included prisoner movement, listing procedures and the increasingly complexity of criminal trials. In South Australia, with outsourced prisoner movement, it was suggested to us that the listing of custody matters and thus the length of time defendants were remanded in custody were influenced by the operational policies of those responsible for prisoner movement. However, in terms of overall remand output, the effect was relatively minor as it was rare for defendants to be held in police custody beyond the next day. The more likely outcome was that the defendant would be produced in court shortly before the end of the sitting day and thus the bail application might be truncated. Legal aid counsel would generally see defendants only when they arrived in the custody suite of the court precinct, and so their ability to prepare was limited.

It was suggested that time on remand was being affected by the listing practices of the higher courts in South Australia. A problem arises when a trial listed for hearing is not reached; under current procedures there is no "spare" capacity in the courts' lists so the matter has to revert to the bottom of the list, significantly adding to remandee time in custody. A more general observation related to the increasingly complexity of criminal trials with excessive disclosure requirements that could lead to additional delays before a matter was ready for trial.

One of the more commonly cited examples of the adverse effect of operations of other agencies on remand decisions at different levels related to the capacity of the

[137] For a useful comparison with American lawyers in bail-related matters, see Colbert (1998) and Colbert et al (2002).

custodial services to handle remandees. The extent to which the end result of remand decision-making, the number of people held in custody, should be allowed to influence the decision in individual cases is clearly a contentious one. Some remand decision-makers acknowledged that when a decision was 'borderline' they would give consideration to the number of beds available within the system. Others argued that they should not be required to take account of this and that it was the responsibility of the correctional services or custody sergeant to shuffle people to create the capacity required. Police, in particular, argued that it was demoralising to see people granted bail for reasons other than the merits of the case.

5.3.2 Intra-agency linkages

One consequence of the lack of a systemic perspective is that bail decision-makers operate within their own institutional or agency contexts and policy frameworks.

We have seen how police are decision makers at two important points in the remand process – the decision to arrest and the decision to grant police bail. While these are decisions made by separate decision makers, the decision makers operate within the same organisation. The qualitative research showed that the operational requirements and strategies could influence remand decision makers so that custodial remand could be used to serve the broader objectives of the police.

Making the decision to arrest a suspect involves the weighing up of a number of factors by operational police. While the decision to arrest was not specifically investigated in this project, interviews suggested that operational policy could influence this with significant effects on remand outcomes. In South Australia it was suggested that the police were being encouraged to arrest in situations when a summons could have been an appropriate:

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

At the police bail decision stage, operational requirements could also influence decision-making. These could include remand for investigatory reasons, the imposition of conditions to more closely constrain the defendant with the additional benefit that any breach of conditions could lead to the defendant being re-arrested and having a greater prospect of being remanded in custody.

This is not to suggest that the statutory criteria for bail are being ignored or not applied but that these are additional matters that may be taken into account in some decisions.

As a further illustration of the use of bail as part of an incapacitation policing strategy, qualitative research revealed that in South Australia operational patrols were briefed on 'persons of interest' on bail and their bail conditions so that any non-compliance could be acted upon.

> There are likely to be some police officers who have difficulty taking off a police hat and putting on an independent bail authority hat and would be subconsciously, if not unconsciously, influenced by knowledge of the

individual and the method in which we are trying to disrupt a particular pattern of offending.

(prosecutor)

Similarly another interviewee referred to 'targeted offenders' who was person targeted by police intelligence units as a recidivist offender. Often these offenders may have a number of criminal matters proceeding at the same time '… the fact that you have a targeted offender would almost be a justification or an indication to the prosecutor to oppose bail'.[138]

> [Operational police] were given particular tasks to ensure that people were complying with bail, so that would impact on what we'd do for the day. We were given… we would target people who were recidivist offenders and/or who had committed crimes that fitted into our strategic intelligence requirements, for example breaks, and would then make sure that they were complying with their conditions. And the conditions are usually curfew, to be in a particular place at a particular time, and not to be out and about or not to associate with people.
>
> *And so, if you found someone, for example who was outside their curfew hours, they'd been at the pub and were on their way home, that sort of things.*
>
> They would be arrested.
>
> *Arrested, yes.*
>
> And we would, there was an expectation - and rightly so - that we should arrest them and refuse bail because they were not complying with bail conditions. And it was a tool to be used to try and curb people committing a particular crime, and to show that we were taking bail seriously.
>
> *And would they be then charged with a breach of bail offence?*
>
> Yes, a breach of bail. And those sorts of conditions that we were policing, and this is just anecdotally, but they were usually conditions set by police bail as opposed to court bail, though sometimes... it was always better if we could get them for court bail breaches but more often than not.
>
> *And why was it better to get them for court breaches than police breaches?*
>
> Well, I always found... when police set bail, we're closer, I guess, to the arrest process, and we understand, or we've got our agenda, and so the conditions set are usually set in discussion with the arresting officer, and with what the LSA is trying to achieve.
>
> When a court sets bail, that's one step removed, and maybe that agenda isn't communicated to the court, or court doesn't think it is important. The courts have got their agenda, their requirements.
>
> (police)
>
> I do think that with the new LSA system that's been brought in and the establishment of Intel branches, there's a lot more intelligence on crime. We have a lot more auditing procedures over our operations in regards to [unclear] than we've ever had before. In other words, the boss is saying, 'Listen, look at these issues. We want you to really consider not bailing this person because of certain criteria which is there.' And there has been a bit of a tendency to refuse bail more now on people than what that was before. And I think the reason this has been brought about is because of the increase in the crime rate.
>
> *So you mean operational changes to try and address that problem?*

[138] Police Officer.

> Yes, there have been operational changes to try and deal with the increase in the crime rate, by trying to keep more people off the streets to prevent them committing more crime. And I don't think that's wrong. I don't think that's incorrect. I think what is being done there from the intelligence point of view and from the commanders of the LSA point of view is the right way to go. We've got to try to keep these recidivist offenders, these people who are continuing to offend, we've got to do our best to try to build up enough evidence and build up a good case to show that they should not be on the street.
>
> And that's the reason, when we refuse bail we've got to have a reasonably good case there to present to the court. This is the reason why we refused bail.
>
> (police)

The relationship between operational police and police bail decision makers was investigated. The different roles appear to be clearly understood by all involved – the final decision was that of the bail decision maker.

> Normally, as I see it, with [many] years of operational policing experience, the end say is mine and I can't say... I certainly have discussions with people, maybe somebody might want a shortcut the system, and just say, 'We'll go by summons or whatever', and I'll say that I think it's a bit more serious and at the end of the day it's me who makes the decision, so doesn't really end up in dispute anyway.
>
> [Arresting officers] will present you with the reasons why bail should be refused and of course as the bail authority you then make the decision about whether you will give bail or not. You don't always agree with them. You look at the whole issue and then, if you feel as though they are justified in what they say, then you'll refuse bail. But - it doesn't happen very often - but it does happen, often there is discussion.
>
> *Do you get comeback then?*
>
> You do. Sometimes you do because they've probably been told by their bosses, 'When you get this bloke, make sure you refuse bail on him,' and if they've got a solid case you'll do it. But sometimes you find out the case to refuse bail is not as strong as you'd like it to be and you know damn well that if you refuse bail on this guy, that when he goes to court is going to get bail anyway. So it does happen, occasionally. Of course that then creates a bit of conflict between you, the arresting officers, and then the powers that be.
>
> But generally speaking over the years I haven't really had too much hassle with that and I've never really been called to task over that …because of the decisions you make.
>
> (police)

More complex was the issue of the degree to which they would allow themselves to be influenced by operational requirements. In South Australia there were some differences in approach which suggested a changing situation.

> We are influenced by SAPOL policy. I mean, some of the older sergeants who have worked in the watch house for a long period of time, they take their position as the bail authority almost to the extreme where they will not be told how to make a decision. But I mean, and I emphasise extreme, whereas I think as employees of an organisation like SAPOL we've all got be focused on achieving the same goals.
>
> If management are saying these factors should be influencing your decision, well, I see nothing wrong with that, where some people would.

> I'm not saying that they wouldn't comply with those directions but they... they don't take offence, I suppose it's umbrage. They think, 'well, you're telling me what to do.
>
> You have no position to, when I'm the one that makes the decisions,' which is correct at the end of the day, but we're all trying to achieve the same goal.
>
> (police)

We have seen in the above discussion how in South Australia both bail conditions and custodial remand are being used to assist crime reduction strategies. In contrast, none of the interviewees in Victoria discussed bail and custodial remand as a tool of policing strategy. Generally Victorian informants indicated that there had been no change of policing strategies and were either not aware of targeted intelligence led policing strategy or thought it did not affect the remand system.[139]

The other way in which intra-agency linkages can affect the operation of the police is the relationship of prosecutors to operational police. We have seen how a significant difference exists between Victoria and South Australia where in the former the arresting officer, as the informant, remains closely involved in the remand process whereas in South Australia the prosecutor becomes the informant. The prosecutor in South Australia has scope to play a greater role in decision making than in Victoria even if in practice they tend to adopt the arresting officer's recommendations. There has been a change in organisational relationships in South Australia – police prosecutors have become more closely aligned with operational police by bringing them within Local Service Areas

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

Within courts the independent nature of the courts continued to be emphasised and there appeared to be little exchange of information about remand outcomes across the courts. Differences across the court system were said to exist in Victoria. The Melbourne Magistrates Court had a level of support services that did not exist in suburban or regional courts. There was also a suggestion from some police that regional and suburban courts tended to be more conservative in their approach to granting bail than the Melbourne Magistrates Court. However other police either believed there was no difference or, if there was a difference that it was due to differences in the nature of the offences being dealt with and in the sorts of defendants in the different courts.

The use of remand to achieve operational policing goals appears to fit with the more open-ended nature of the South Australian *Bail Act*. As suggested in Chapter 2 the structure of the Victorian bail act with its separation of the grounds for seeking custodial remand from the information used to assess whether a defendant poses an unacceptable risk is an important distinction. The Victorian grounds are limited to

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[139] E.g. *Are you aware of any policing strategies e.g. targeted policing that could affect remand rates?*
No, not all.
No sense that police attitudes toward bail have changed?
I don't think so. No.
(prosecutor)

those spelt out in the Act. It makes a drift in the use of the remand system for purposes other than those specified in the Bail Acts more difficult. The South Australian legislation as we have seen confuses grounds for remand with information to assess risk and has general catch all provision– a person can be remanded in custody 'having regard to any other relevant matter' (section 10). While no evidence was found that this provision was used to justify operational policing strategies, it argued that such provision would support such an approach if challenged.

The exploration of inter-agency and intra-agency relationships shows how the interdependent the remand process is. We have illustrated the ways in which different agencies in the process operate have direct impact on the way other agencies process or decide remand matters. Yet there appear to be few structures to enable formal (or even in some cases informal) consultation and discussion about the operation of the remand system. The differences in relationships can affect overall remand outcomes but the precise effect on remand numbers can not be ascertained.

Intra-agency relationships show some differences between the jurisdictions with evidence of a remand system in South Australia that is more open to 'outside' influences including objectives additional to the traditional reasons for custodial remand. In that context the operational police policy of targeted intelligence led policing appears to play a significant role.

5.4. 'Therapeutic' justice

Decision-makers are influenced by their views of what their roles are. This applies to their decisions in individual cases as well as in the development of practice and policy. The qualitative research identified a trend in Victorian courts that suggested changed perceptions of their role that were not identified in South Australia. Some Victorian magistrates have adopted what has been described as the 'therapeutic justice' model. Under this model the law explores opportunities to act as a therapeutic agent using mental health and related disciplines.[140]

This approach appears to be, in part, a response to the changing nature of the defendants appearing in the remand system. As a consequence of this view of their role the Victorian courts appear to have attracted a greater and broader range of resources to assist them in the remand process. This philosophy along with the use of relevant support services promotes the use of bail in circumstances that would otherwise have led to custodial remand.

Interviews in Victoria suggested that some courts there had adopted a particular view of their role that impacted upon the approach to bail and custodial remand. This perspective was referred to interviews as being part of a 'therapeutic justice' approach.

> I suppose one of the major issues is the Magistrates Court and the way it sees itself and the way it is almost redefining itself at the moment.
>
> *From what to what?*
>
> Therapeutic justice is a phrase that you hear a lot these days. I'm being quite neutral when I speak about that: I'm still thinking about it. There's a real concern, I think these days, and a positive one, of magistrates wanting to get involved in

[140] See Birgden (2004) for a general overview of the 'jurisprudence' of this approach.

> welfare issues in so far as people charged are concerned, which I think, in this state anyway, increases the likelihood particularly in less serious matters, of bail.
>
> (prosecutor)

Akin to a problem-solving philosophy, the essence of the approach is an attempt to use the criminal justice process to deal with some of the underlying causes of that has led to offending. While the primary role of the court was said to be the protection of the community, proponents of this approach argue that bail through use of conditions should be used to address issues of drug dependency and mental health that bedevil the criminal justice system.

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

This is not to suggest that a similar approach does not exist in South Australia. What was apparent from our research was that it went completely unreported in South Australia whereas in Victoria the therapeutic justice approach was raised in several different contexts. Aligned with this approach was the development of a range of support services to support both the court in assessing defendants and helping defendants to both comply with bail requirements and to address some of the underlying causes of their offending.

5.4.1. Changing characteristics of defendants

In Chapter 4 the statistical analysis showed increasing levels of drug and mental health issues in the remand populations of Victoria and South Australia. Similarly across organisations, and at all levels, interviewees nominated changes in defendant characteristics as one of the significant changes in recent years.

Growth in the numbers of drug-dependent defendants

The growth in drug related crime and defendants with drug abuse histories was described by almost all respondents as being a major influence on the remand process.

> … different factors influence different things. Years ago, when people were paid by cash, getting historical here and money was moved around, armed robberies were of a great influence, so there you're talking serious, violent crime, to the process of getting somebody remanded in that circumstance wasn't hard.
>
> Drugs themselves, as such, we didn't have the dealings with heroin and things 25 years ago, and we certainly do now, and now we've moved into the heroin stage. Quite often here we'll deal with a low level heroin trafficker. When I say low level, they're just selling two or three caps on the street, but they're doing it many times, rather than a big situation.
>
> (police)
>
> And, as the years go on, you'll get people who are mentally unstable. You seem to be dealing with more people [unclear]. The same as drugs, you seem to be dealing with a lot more drug affected people now. A sign of the times I think.
>
> (police)

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

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

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

Growth in the numbers of mentally ill defendants

Defendants with mental health problems are identified by remand decision-makers as coming to their attention more frequently. [141]

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

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

[141] The DUMA data only provides national data at this stage. The most data showed some 56% of police detainees scored 'high' or 'very high' levels of psychological distress. A 'very high' score may indicate professional assistance is need and 30% of all detainees fell into this category. (Above note 2, p25.

5.4.2. Resources and support services

Along with the therapeutic justice model in the Victoria courts studied has been the development of range of resources and support services. This has led to significant differences between the two jurisdictions in relation to the support for defendants and the addressing of issues that would be a barrier to the granting of bail. In this section of the report we consider the question of non-legal support. The issue of legal representation and legal aid is considered in the section on liaison between agencies in the system. Although South Australia has a Bail Advocacy Unit staffed by the Department for Correctional Services and physically located within the Adelaide Magistrates Court precinct, this was seldom referred to by South Australian interviewees and bail decision-makers. In Victoria, on the other hand, interviewees referred to an array of resources available during the bail/remand decision-making process and interviewees expressed their familiarity with these services and their own assessment of the relative advantages of using programs such as

- the Bail Advocacy Unit, in addressing immediate problems
- a disability support officer
- forensic medical officer and psychiatric nurse
- CREDIT program
- Salvation Army (Eastcare)
- WISE (employment program)
- interpreter services
- BASIS (Dandenong)

In South Australia, whilst the services to support defendants were more "low profile", there was significant attention given by decision-makers to the alternative court programs being offered or under development. Whilst these programs do not have, as their primary focus, the question of bail or remand, they do regard the particular needs of the individual defendant and, as such, bail or remand decision were seen as being more realistic and thus successful. The evaluations of these programs – the drug court, the Aboriginal Court and the family violence court – are currently underway, but anecdotal reports indicate that these courts are seen as providing an alternative to remanding an individual in custody. In particular, the Aboriginal ('Nunga') court (discussed below) is developing a reputation for high levels of attendance by Indigenous Australians in comparison to attendance levels in non-Nunga courtrooms.

However, bail decision-makers in both jurisdictions identified that there were further services that were required that could reduce the number of people remanded in custody. The possibility for more extensive use of home detention was discussed in Victoria where this possibility was just being introduced. In South Australia home detention is limited by the number of bracelets available for the electronic monitoring (discussed in chapter 8 below). The need for a secure 'detox' unit was identified in Victoria, and the need for more community liaison officers to work with both Indigenous communities and other ethnic communities to provide support for defendants was also seen as a significant issue. Bail justices identified that there was a significant cost to the system if police and other administrators were required to spend some hours waiting for an appropriate translator or community support person to become available.

Of high priority was access to housing for defendants on bail. Although there were a number of temporary supports available in relation to housing, this was described as a point of significant stress within the system that required a more comprehensive, structural response. The need for support for defendants in regional centres was identified by a number of interviewees. Many of the programs available in the city courts and police stations are not available in the country. In addition, there are barriers to attendance in court in regional centres, such as the difficulty of arranging appropriate transport, that do not exist in the cities. In some Victorian centres, local responses to these needs have been developed, and we were informed about the BASIS program in Dandenong.

Conclusion

This chapter has explored the critical factors in the remand process and how they contribute to the differential rates of remand between Victoria and South Australia through a qualitative examination of the practices and policies of remand decision-makers. Central to practice in each jurisdiction is the Bail Act. This legislation describes bail policy and shapes bail practice. However our research indicates that in the jurisdictions the legislation is interpreted through a cultural lens which results in the emphasis of particular values and goals and thus shapes practice.

This chapter identifies four areas where significant differences appear to exist between South Australia and Victoria. All the differences point toward a remand system in Victoria that discourages custodial remand unless clearly necessary.

Whilst the differences in the Bail Acts in the two jurisdictions create practice imperatives that are somewhat contradictory, the research suggests that in Victoria the legislation creates significant incentives for defendants to be granted bail. In some cases even the statutory requirements of a reverse onus of proof are being overlooked where those involved think it harsh or likely to be overturned.

The Victorian remand process involves a greater review of decisions to remand in custody and has increased obligations and accountability for those who most influence the raw numbers entering the system.

Furthermore, in South Australia the linkages within SAPOL appear to promote general operational objectives to a higher degree than in Victoria such that remand processes are seen as useful tools for objectives other than the traditional objectives of custodial remand.

Finally, the research reveals the adoption of the therapeutic justice model in Victoria and the associated development of resources and support services to support defendants on bail.

The combination of these factors suggested a remand system culture in Victoria that privileges bail. It continues the traditional approach of maximising the opportunity for defendants to remain at liberty while awaiting trial. The South Australian culture appears more constrained with such traditional approaches only applying to those individuals not identified by police as targets for close attention and incapacitation.

6. What is the effect of custodial remand on key outcomes in the criminal justice system?

This research question focused attention on the link between custodial remand and key outcomes in the justice system. The identification of the key outcomes to be achieved by the remand strategy is a surprisingly complex task. Although they are rarely discussed, the remand strategy is used to achieve multiple goals that can be seen to be conflicting with one another.

In the exploration that follows of the effect of custodial remand on key outcomes in the criminal justice system, the outcomes are first considered in terms of goals of the Bail Acts, then the contribution of remand to other outcomes of the justice system and finally the question of perceived equity in outcomes of custodial remand is considered.

6.1. Goals of the Bail Acts

Three broad goals of the remand in custody systems can be derived from an examination of the *Bail Act 1977* (Vic) and *Bail Act 1985* (SA) and interviews with actors in the system. They are:

- ensuring the integrity and credibility of the justice system
- the protection of the community, and
- the care and protection of the defendant.

6.1.1. Ensuring the integrity and credibility of the justice system

The integrity and credibility of the justice system has been the traditional goal of remand decision-making. In furtherance of this goal, the two most common objectives are ensuring that the defendant attends court when required to do so, and that the process of investigation and trial is not compromised by improper conduct on the part of the defendant in interfering with witnesses, or destroying evidence.

The Anglo-Australian criminal justice system has been very hesitant to allow criminal trials to proceed in the absence of the defendant. Apart from relatively minor matters in the summary jurisdiction, the absence of the defendant usually means postponement of the hearing. Both the Victorian and South Australian bail Acts provide that a person should be refused bail if there is an unacceptable risk that the person will fail to attend court as required.[142] Ensuring attendance at court was a commonly identified focus of remand/bail decision-making in our interviews with key decision-makers.

While the bail decision-makers in both states identify this objective, the conceptualisation appears to be different. In Victoria, the Act refers to the risk that the defendant will "fail to surrender himself into custody in answer to his bail", while the South Australian *Bail Act* refers to the risk of the defendant "absconding". The concept of failure to surrender appears to recognise a range of possible motives or explanations for non-attendance. The concept of "absconding" infers a deliberate intent on the part of the defendant to avoid the court process. The significance of this difference is that the South Australian provision fails to recognise a number of relatively innocent reasons why a person may fail to appear.

[142] S4(2)(d)(i) *Bail Act 1977* (Vic) and s10(1)(b)(i) *Bail Act 1985* (SA)

Courts in both jurisdictions were not able to provide data measuring the percentage of defendants attending court as required. Data that were available that bear on this issue are presented below, but we note that the data vary both in the nature of what is measured and the time periods for which it has been collected.

In South Australia, the normal action to be taken against a person failing to attend court as required is to issue a warrant. South Australian data from the Courts Administration Authority (CAA) indicate that a large number of warrants for failure to appear are issued by the courts each year. The following table 22 indicates the number of warrants issued from the South Australian Magistrates Courts over the last two financial years. The context for these figures is that the South Australian Magistrates Courts finalised approximately 27,000 cases in 2001 involving different counting processes.

Warrants – failure to appear	**2001/02**	**2002/3**
From summons	1629	1428
From bail	5447	5969

Table 22: Source: Unpublished data: South Australian Courts Administration Authority

Each year bail was granted in relation to over 100,000 criminal charges in the Victorian Magistrates Court. In Victoria, action can be taken against people on bail who have not appeared in court as required. They can be prosecuted under Section 30 of the *Bail Act 1977.* The most recent available data at the time of publication show (Table 23):

Prosecutions for failure to answer bail under Section 30 of *Bail Act 1977*	**1998–99**	**1999–2000**
	4595	5462

Table 23: Source: Unpublished data: Victoria Magistrates Courts

Although these data do not allow a comparison of the extent to which failure to appear in court presents a problem to the jurisdictions, it does indicate that significant numbers of defendants do not appear in court as required each year.

Our qualitative research with decision-makers and court officials indicates that this issue of failure to attend court is two tiered: defendant forgetfulness and defendant absconding, both of which technically attract the same outcome.

Decision-makers at each phase of the remand process can draw upon a range of incentives to increase the likelihood that a defendant granted bail will attend court when required. These incentives include imposing various conditions on bail, requiring a surety from a defendant and asking for a guarantor to ensure that the defendant attends court. Conditions of bail that are commonly utilised to address concerns about attendance in court include residential requirements (that the defendant reside at a specified addresses), that the defendant report to police on a regular basis, and that the defendant surrender a passport. In the court decision-making phase of the remand process a judicial decision-maker is provided with the option of home detention. Although this may be utilised to address one or more

concerns of the decision-maker about granting bail, these limitations on the defendant's movements are often designed to ensure that the defendant is present in court as required. Our interviewees identified that in South Australia (where this option had been available for a much longer period of time) there was perceived to be a severe limitation in the number of available electronic devices to support this option, and Magistrates indicated that if more electronic devices were available Home Detention would be more frequently utilised as a bail alternative.

The safety of witnesses and any other factors relating to the protection of court processes are usually mentioned whenever there is discussion of the objective of court process integrity. That is, custodial remand can be used to ensure that the role of the court as the final arbiter of guilt and sentence cannot be subverted by an alleged offender's tampering with essential elements of a case prior to final determination. This objective can be gleaned from the bail Acts,[143] and may be of emerging significance, but little research is available about the effect of the desire to ensure witness safety on remand decision-making.

Those remand practitioners interviewed for this research had little experience of requirements for custodial remand resulting from a need to protect witnesses. It was acknowledged that staying away from witnesses was certainly a possibility for bail conditions, but as one interviewee argued proving that a witness was threatened was difficult to do and it is important to create incentives that make that unlikely.

6.1.2. The protection of the community

The goal of protecting of the community underlies two of the objectives of the bail Acts. In Victoria, bail decision-makers are required to take into account the risk that the defendant may "endanger the safety or welfare of members of the public".[144] In South Australia, the Act is more narrowly drafted, requiring the decision-maker to consider the risk of the defendant "offending again".[145] The other objective is the protection of the interests of victims, discussed below.

Preventing offending was identified as a high priority by the police interviewed in our study. Not only was bail decision-making influenced by the seriousness of the offence, the assessment of whether the alleged offender was involved in an ongoing pattern of criminal behaviour played a role. This was particularly an issue in situations where offenders who were currently on bail were found to be in breach of conditions of bail or were detected committing another offence.

As reported in Chapter 2 above, the incidence of offending on bail has been examined in several jurisdictions including the United Kingdom (Brown 1998; Hucklesby and Marshall 2000) and New Zealand (Lash 1998). There are methodological questions about how to measure offending whilst on bail, with different studies using each of

- arrest
- charge
- conviction

[143] "[I]nterfere with witnesses or otherwise obstruct the course of justice": s4(2)(d)(i) *Bail Act 1977* (Vic) and similar provision s10(1)(b)(iii) *Bail Act 1985* (SA).
[144] S4(2)(d)(i) *Bail Act 1977* (Vic).
[145] S10(1)(b)(ii) *Bail Act 1985* (SA).

as the indicator that an offence has been committed (Hucklesby and Marshall 2000, 153).

Although there are clearly methodological challenges and political sensitivities in relation to this issue, it is puzzling to us, as outsiders to the system, to explain why this data is not collected. It is clear from our qualitative research that in many individual cases the fact that the defendant was on bail when charged with a subsequent offence has a significant influence on the remand outcome for that individual. However it is not possible to obtain this data in a collated form in order to comment on the achievement of this desired justice outcome.

It would be easy to gather a distorted impression of offending on bail from interviews with police and bail decision-makers. Clearly those defendants who come to the attention of bail decision-makers and whose behaviour creates dilemmas for the decision-makers are the ones who come to mind when asked about bail decision-making.

In both Victoria and South Australia, the relationship between 'intelligence-led' policing and remand in custody rates is a matter of active discussion. There are no data currently available exploring the link between police bail decisions and this relatively new approach to policing. However police and other interviewees identified that intelligence-led policing places a renewed emphasis on identifying likely offenders and making them the target of police investigation. Defendants on bail have been identified as a pool of individuals whose behaviour may well repay investigation when similar offending occurs. The extent to which this results in successful prosecutions has not been evaluated

By way of further example of this point, there are other strategies in place currently that address the protection of the community without the need for a court to remand defendants in custody. These include the home detention bail provisions in South Australia.[146] At the time of our study this idea was being introduced into Victoria. With or without electronic monitoring, home detention requires the defendant to reside at an address and remain on the premises, except by prior permission of the supervising officer. Bail conditions can include the requirement to observe a curfew, and to avoid exclusion zones, that is identified areas of known criminal activity. Other conditions may include the defendant refraining from consorting with specified persons.

The importance of victims of crime in the remand process is specifically recognised. South Australia has, since 1994, required that the bail decision-maker must, where there is a victim, "give primary consideration to the need that the victim may have, or perceive, for physical protection from the [defendant]".[147] The Victorian Act merely ties the needs of victims to their specific protection, although it does provide that the bail decision-maker must take into account "the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail".[148]

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[146] Based upon the information provided in the South Australian Department for Correctional Services Annual Report 2002-2003, the SA program, which began in 1986, has a successful completion rate of 87%. Since 1987, SA courts have been empowered to release a defendant on bail with conditions of home curfew and intensive bail supervision. During 2002-2003 72% of those serving Intensive Bail Supervision Orders successfully completed their order.

[147] S10(4) *Bail Act 1985* (SA).

[148] S4(3)(e) *Bail Act 1977* (Vic).

Although this is a matter that seemed to get very little explicit attention from remand decision-makers in either jurisdiction, placing conditions on bail and the issuing of restraint orders was identified by the police interviewed as being useful to preserve the safety of the victim without the necessity of custodial remand. In other words, there are ways of achieving the outcomes sought without having to invoke the more draconian model of refusing bail. However, overall remand decision-makers identified that the needs of victims do not get very much attention in the bail process, but there were no interviewees who reported to us adverse effects on victims or witnesses of bail decisions.

Victims' advocates whom we interviewed in Victoria indicated that the issue of pre-trial management of defendants' bail or remand had only ever come to their attention when the matter under consideration was domestic violence.

There are significant differences between the South Australian and Victorian *Bail Act* provisions in relation to the attention that is to be given to victims in bail decision-making. However, our interviews did not detect any particular attention being paid to the needs of victims in either jurisdiction. Non-custodial strategies utilised usually include prohibitions on contacting specified persons.

6.1.3. The care and protection of the defendant

The rights of the defendant, as a focus of bail decision-making, is little discussed by actors within the justice system, but rights issues clearly underpin bail practice. It is one of the fundamentals of the criminal justice system that a person is innocent until proven guilty with its corollary, that a person cannot be detained or imprisoned simply on the basis that they *may* commit a crime. These principles are further reinforced by the sentencing principle (found in the *Sentencing Act 1988* (SA), for example) that imprisonment is to be used as a last resort. This applies, presumably, to custodial remand as well as to a sentence of imprisonment.

Paradoxically, while the principle of upholding the rights of the defendant is usually equated with liberty and thus release on bail, this goal may also justify remand in custody in certain situations. The South Australian *Bail Act* recognises the following as relevant factors in determining whether to grant bail:

- any need that the applicant may have for physical protection; or
- any medical or other care that the applicant may require.[149]

The Victorian Act is silent on these matters.

Nevertheless, our interviews revealed that this was an influential factor in at least a small number of remand decisions. The welfare of the defendant influenced the custodial remand decisions relating to defendants who were arrested whilst under the effect of alcohol or drugs, or who were seen to be out of control because of their mental health. It was also possible to identify amongst magistrates as bail decision-makers the ongoing development of the concept of what is known as 'therapeutic remand' (Freiberg 2003, 2004). This concept identifies that one of the goals of the remand process is to enable the defendant to gain access to services or treatment. It is particularly relevant to those practitioners who consider that the courts need to address the underlying issues that may have given rise to the defendant's criminal conduct in the first place. These concerns may also influence the structuring of a bail, with conditions of bail being used to require the defendant to access certain services

[149] S10(1)(d) & (e) *Bail Act 1985* (SA).

or to seek medical treatment. They may also require the defendant to refrain from improperly using controlled substances or to undergo drug testing. While such conditions are not specifically provided for in the *Bail Acts*, s5 (4) of the *Bail Act 1977* (Vic) specifically provides that one of the conditions of bail may be that the defendant undergo a medical examination.

6.2. Effect of custodial remand on other justice policy outcomes

There is a clear tension between the desired justice outcomes to be achieved by custodial remand. Remand decision-makers operate not just within the remand system but also as actors in a range of other operational and policy systems. That is, the bail decision-maker operates within a range of intersecting policy systems, and seeks to achieve a variety of often conflicting goals.

Although these tensions may have always been present within the system, they have become more apparent in recent years. The moves in some jurisdictions to reverse the presumption for bail for certain offences, creating an onus on the defendant to establish why bail should be granted, highlights the way that custodial remand can be used to achieve a variety of goals, in these cases including the political goal of achieving general deterrence and serving to reassure a nervous public that the government is 'doing something' about a problem.

The 'managerialist' influence on the operation of justice agencies, which has resulted in a more explicit identification of desired outcomes in the forms of 'key performance indicators', can also focus attention on the range of goals that can be achieved through custodial remand. An example emerges from police practice. The 'intelligence-led' policing approach (discussed above) is an example of the way in which police have responded to the explicit requirement to contribute to creating safer communities by reducing levels of offending within specific operational areas. Identifying known offenders (including those who might be on bail) is one of the strategies within this approach, and the effect upon levels of custodial remand should immediately become apparent.

For example, police officers make the essential decision whether or not to arrest, caution or report an alleged offender. Police officers, charged with the responsibility for meeting crime reduction objectives and implementing crime prevention strategies will be less likely to grant police bail to a suspect whom they have targeted under an 'intelligence-led' approach.

Judicial decision-makers may also seek to achieve other 'justice' goals that may sit outside of the immediate remand decision. One such goal relates to the impact of justice processes on Indigenous offenders. The establishment of the Aboriginal ('Nunga') Court[150] is one initiative that has sought to address this issue in South Australia.[151] One of the criteria of success of this court is the extent to which it has

[150] Tomaino (2004). There are now such courts in at least two other States. See Marchetti and Daly (2004).
[151] These courts sit on a regular basis for Indigenous offenders only. The only stipulation is that defendants must enter a guilty plea to their charges. The environs of the court are adapted to make them less intimidating for the offender with the emphasis being placed on informality. The offender is seated at the bar table rather than standing in the dock. The magistrate sits at eye level with the offender. Next to the magistrate sits an Aboriginal Elder. The magistrate takes advice from him or her as to sentencing options. The Elder is actively involved throughout the process and will often have some prior knowledge of the offender that might be relevant to the sentencing process. See Sarre and Sparrow, 2002, 62.

been able to address the issue of failure to attend court as required. In other words, the goals derived by bail decision-makers from other parts of their work and their goals as bail decision-makers are not mutually exclusive. A decision to remand a person in custody or to grant bail may achieve a number of goals derived from different responsibilities.

6.2.1. Equity outcomes

The effect of remand in custody on final determination of sentence poses significant methodological issues and is beyond the scope of the initial study brief. However, one area which has attracted attention is the question of remanding defendants who are not subsequently convicted or not subsequently imprisoned.

If remandees typically receive sentences of imprisonment, this may indicate that the decision to remand anticipates (or perhaps influences) subsequent sentencing decisions. Conversely, a low remand-to-sentence rate might suggest that remand is being used inappropriately, or that remand is serving as a substitute for sentenced imprisonment. Changes in remand outcomes are also important. If a rise in remand receptions involves a fall in the remand-to-sentence transition rate, this may suggest that there has been 'net-widening' in the use of remand. An analysis of the end of remand episodes in Victoria and South Australia was conducted as part of the statistical research analysis undertaken and is reported in Chapter 3 above.

Remand episode outcomes: Victoria

An episode of remand can be resolved in one of three ways. Either the person is convicted and is returned to corrections to commence a custodial sentence (a 'remand to sentence transition'), or the person is bailed, or receives a non-custodial sentence or a custodial sentence equivalent to the time already served in custody. From the perspective of Corrections Victoria, the later three outcomes are the same in that remandees go to court and there is no further contact with them. These individuals are described below as 'discharged at court'. However, it is important to bear in mind that some of these persons may actually have been convicted and sentenced to a term of imprisonment. In addition, a small number of those who did not receive a custodial sentence were subject to extradition (12 persons) or deportation (7 persons) and may not have been released at the conclusion of their remand period.

Six in every ten persons remanded in custody in Victoria ultimately received a custodial sentence, and the remaining four in ten were discharged at court (Table 24). A small number (less than 2 per cent) of those received in the period July 2000 to June 2003 had not yet ended their period of remand by 21 April 2004. There were no systematic changes in remand outcomes over the three years.

Reception Period		Remand end type			
		Remand to sentence transition	Discharged at court	Still in custody	Total
2000/01	Count	1347	861	0	2208
	per cent	61.0 per cent	39.0 per cent	.0 per cent	100.0 per cent
2001/02	Count	1406	953	9	2368
	per cent	59.4 per cent	40.2 per cent	0.4 per cent	100.0 per cent
2002/03	Count	1485	1031	78	2594
	per cent	57.2 per cent	39.7 per cent	3.0 per cent	100.0 per cent
Total	Count	4238	2845	87	7170
	per cent	59.1 per cent	39.7 per cent	1.2 per cent	100.0 per cent

Table 24: Remand end types by year: Victoria, 2000/01 to 2002/03

Remand episode outcomes: South Australia

The most notable feature of remand outcomes in South Australia is that the proportions of those sentenced to custody and discharged at court are almost exactly the reverse of the outcome patterns for Victoria (Table 25). Nearly 70 per cent of remandees in South Australia are ultimately bailed, or receive a non-custodial sentence or receive a custodial sentence that is equivalent to the time they have already served, compared with about 40 per cent of Victorian remandees who are discharged at court. Conversely, only about 30 per cent of those remanded in South Australia receive a prison term, compared with about 60 per cent of Victorian remandees. As with Victoria, these proportions were very stable across the three years 2000/01 to 2002/03.

Reception Period		Remand end type			
		Remand to sentence transition	Discharged at court	Still in custody	Total
2000/01	Count	910	2094	0	3004
	per cent	30.3 per cent	69.7 per cent	.0 per cent	100.0 per cent
2001/02	Count	933	2167	3	3103
	per cent	30.1 per cent	69.8 per cent	.1 per cent	100.0 per cent
2002/03	Count	914	2104	7	3025
	per cent	30.2 per cent	69.6 per cent	.2 per cent	100.0 per cent
Total	Count	2757	6365	10	9132
	per cent	30.2 per cent	69.7 per cent	.1 per cent	100.0 per cent

Table 25: Remand end types by year: South Australia, 2000/01 to 2002/03

This analysis highlights the differential use of remand between the two jurisdictions. In Victoria, with its low remand rate, only four in every ten persons remanded in custody between 2000 and 2003 ultimately were discharged at court without receiving a further custodial sentence. On the other hand in South Australia, with its higher remand rate, nearly seven in every ten remandees were ultimately bailed, received a non-custodial sentence or receive a custodial sentence that is equivalent to the time they have already served. These figures were stable across the three years under analysis.

The analysis of remand episode endings in Victoria and South Australia suggests that one effect of a higher remand rate is a higher proportion of remandees being released from custody into the community than returning to prison as sentenced prisoners.

6.2.2. Effect of remand decisions on particular population groups

Indigenous Australians

As reported earlier in Chapter 2, Indigenous persons have a higher representation in remand prisoners than they do in the sentenced population. In Victoria, around 4.5 per cent of all prisoners are Indigenous, compared with around 20 per cent of remandees. The representation of Indigenous people overall is substantially higher in South Australia, but the over-representation of Indigenous people as remandees is less than in Victoria. However, it is impossible to ignore that fact that in South Australia over the three years 2000–2003, 1,782 indigenous people were remanded in custody from an indigenous population of 23,425[152], whereas in Victoria only 450 indigenous people were remanded in custody in the same period from a very similar size indigenous population (25,078).[153]

Women

As reported in Chapter 2 above, in most Australian jurisdictions women are somewhat more likely to be remanded in custody than men. Nationally, 24.5 per cent of women prisoners are remandees, compared with 19 per cent of men prisoners. As women also serve slightly shorter periods on remand, the reception rate for women is even higher than that for men.

While women account for around 6 to 7 per cent of the total prisoner population in both Victoria and South Australia, the proportion of remandees received is substantially higher: nearly 13 per cent in Victoria and 10 per cent in South Australia. However this does not seem to have varied in recent years.

Conclusion

The lack of clarity in the legislation about the desired justice outcomes of remand decision-making, the conflict of goals both determined by the legislation and by other justice policy contexts and the creative possibilities developed by remand decision-makers for achieving particular justice outcomes using bail and remand strategies are all important factors influencing the rates of remand in custody.

[152] Australian Bureau of Statistics (2002a).

[153] Australian Bureau of Statistics (2002b).

7. Implications of this study for good practice

What are the criteria for a 'good' remand system? A good remand system is not necessarily a system that has a low rate of remand in custody but rather one that displays good and desirable characteristics, as follows:

1. Statements of principles, objectives and criteria guiding bail or custodial remand decision-making are clearly identifiable
2. The role of each bail decision-maker and their bail and custodial remand responsibilities in relation to individual defendants and to other organisational criteria are clearly defined
3. Resourcing is adequate to ensure appropriate outcomes including support services and minimised time in custody, and that the interests of victims are acknowledged and administrative procedures are in place to ensure that appropriate information is provided to victims.
4. Quality assurance mechanisms are in place.

Each of these criteria is discussed below.

7.1. Statement of principles, objectives and criteria guiding bail/custodial remand

Good practice in remand would ensure that there exist statements of principles, objectives and criteria guiding decision-making. The rights of the defendant as a focus of bail decision-making is little discussed by actors within the justice system, but rights issues clearly underpin bail practice. It is one of the fundamentals of the criminal justice system that a person is innocent until proven guilty. Its corollary is that a person cannot be detained or imprisoned simply on the basis that they may commit a crime. These principles are further reinforced by the sentencing principle (found in the SA *Sentencing Act 1988*, for example) that states that imprisonment is to be used as a last resort. An equivalent principle applies, presumably, to custodial remand as well as to a sentence of imprisonment.

A statement of principles guiding bail/custodial remand would affirm

- the seriousness of the decision to deprive a citizen of liberty
- the presumption of innocence
- the use of custodial remand as a last resort, only to be used when no appropriate alternative is available
- that bail decision-making combines risk assessment with predictions of human behaviour
- that the use of preventative detention should be restricted to situations of serious risk.

It is important that the management of bail/custodial remand decision-making is structured so that at each phase of the remand process symbolic messages about these principles are delivered.

Bail Acts should also contain explicit statements of the objectives of custodial remand/bail to guide decision-makers. These should be separated from the criteria used for assessing risk.

In an effective remand system the criteria for assessing *eligibility* for bail should be clearly articulated and distinguished from the *objectives* of custodial remand. Bail is essentially a risk assessment exercise and, whilst the statement of objectives will indicate the prioritisation of the risks the bail decision-maker is seeking to minimise, it is also important to indicate what criteria are appropriately taken into account in making this risk assessment.[154] This statement of criteria will also allow a more effective review of custodial remand decisions, providing a structure around which evidence can be tested.

7.2. The roles of each bail decision-maker and their bail/remand responsibilities are clearly defined

Good practice in remand requires clearly defined roles of decision-makers. The decision to grant bail or remand in custody has several unusual characteristics. The first is that the bail decision is not a final order; it can be revoked and a defendant refused bail can reapply for bail.[155] Secondly, while the decision can be characterised as administrative, it is clearly, at least in so far as Supreme Court decisions are concerned, a judicial act done in the exercise of judicial power.[156] Yet, just as it was a power initially exercised by the sheriffs in medieval England, it is also a power exercised by police. Thirdly, contrary to other judicial functions, bail applications have an 'inquisitorial' element. Bail authorities may make inquiries, on oath (if in court) or otherwise, to ascertain relevant information.

Our studies indicate that police bail decision-making is influenced by

- the nature of the offence with which the defendant is charged
- the stage of the investigation and the powers needed to conduct further investigations
- the defendant's record and in particular
    - the defendant's history of attending court whilst on bail
    - whether the defendant is seen as likely to commit other crimes whilst on bail
- the defendant's current bail status and in particular
    - whether the defendant has been detected in breach of bail conditions
    - whether the offence for which the defendant has been arrested is similar to that for which s/he is on bail.

Whilst this decision-making process is not inconsistent with the provisions of the Bail Acts, it became clear in our studies that it would be very easy for police to merge their role as bail decision-makers with their role as crime preventers and crime investigators, and that custodial remand could become a tool to achieve other police objectives such as a reduction in crime. Clear definitions would remove these ambiguities.

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[154] The provision in the South Australian legislation that the need and perceived need for physical protection for the victim should be taken into account in assessing bail applications is an example of the use of 'risk' criteria by legislators to re-shape bail/remand decision-making.

[155] *Webster v South Australia* [2003] SASC 347 per Debelle J at para 95.

[156] Ibid per Doyle CJ at para 23.

7.3. Resourcing is adequate to ensure appropriate remand outcomes

Good practice in remand insists that the process is adequately and appropriately resourced. All remand decision-makers operate under significant time pressures, juggling a number of imperatives at any point in time. Custodial remand can seem a safe option if community safety is under consideration. However, our studies demonstrate that many defendants are granted bail at some point in the time between their arrest and the finalisation of their case and are held in custody at other points. This suggests that the bail decision-maker is able to be convinced that this defendant can be granted bail under appropriate circumstances. Time is needed to ensure that these decisions are appropriately considered and not rushed.

Resourcing goes further than simply decision-makers' time. Our research has indicated that it is unhelpful to police and magistrates if other roles such as defence counsel or home detention managers are inadequately resourced and unable to support the decision-making process. A good remand system will provide the range of possible supports to decision-makers in metropolitan and rural locations. It will provide resources to enable the construction of realistic alternatives to custodial remand and to allow decision-makers and others involved to assess the appropriateness of these alternatives for any individual defendant.

In both Victoria and South Australia we saw creative alternatives being developed by the justice system and in particular we recognised the potential of models such as the diversionary courts to create alternative options. In the area of bail/remand decision-making some decision-makers have given leadership in encouraging the development of support services for remandees. The information from the success of these innovations needs to be applied to the development of culturally appropriate processes for ensuring support for indigenous defendants in order to increase the rate at which indigenous Australian defendants can be granted bail.

Good practice in remand takes into account the needs of defendants who have mental health issues, are drug or alcohol dependent, are homeless or living in poverty or have low levels of English or comprehension. In some cases, the needs of these defendants create a risk to the community, and bail decision-makers feel unable to grant bail without a secure facility to provide care for them. In cases where the defendant was homeless some interviewees raised concerns about the likelihood of bail being granted when no contact address could be provided. Of particular concern to all we interviewed was the increasing number of defendants whose criminal behaviour was related to their drug use. The limitations of remanding these defendants in custody were recognised by many bail decision-makers, but the lack of alternative programs with effective monitoring of drug use created few viable alternatives.

Bail decision-makers were unanimous in their appreciation that custodial remand did not address the underlying problems of these defendants and thus did little to create a safer community in the longer term. At the same time, the lack of services which could take some responsibility for these defendants meant that custodial remand was the option selected.

Good practice in remand also involves minimising the length of time for which a person is on bail or in custodial remand. Unnecessary time on bail or remand in custody increases the risk of offending on bail, disruption to remandees' lives, destruction of evidence, and perceived injustice if the defendant is not found guilty.

A good remand system should thus focus on

- ensuring that police investigative tasks and other work that supports this (e.g. forensic laboratories) are appropriately resourced to enable rapid resolution of cases. Consideration could be given to the establishment of Key Performance Indicators (KPIs) in relation to the processing of cases on time.
- ensuring defence services (legal aid or private lawyers) are focused on rapid and efficient preparation for trial
- ensuring that no incentives exist in the system for prolonging this phase.

Furthermore, good practice in remand insists that victims' interests are properly considered and that appropriate protections are legislated. While the safety of victims is explicitly recognised in both jurisdictions as a matter to be given consideration during bail applications, the broader interests of the victims are less well recognised. Interviewees reported to us that victims feel excluded from the process and there appear to be few formal procedures in place to keep victims informed of the defendant's bail status. One of the complications is the significant number of cases where bail status changes, and a defendant who had been remanded in custody later successfully obtains bail. This lack of communication is not restricted to victims. It is apparent that the police are not always informed of changes in bail status and find themselves in the street meeting defendants whom they thought were in custody.

Giving greater attention to resourcing communications with victims may do much to prevent or counter the sense of alienation and frustration that is common in the criminal justice process.

7.4. Quality assurance processes

Good practice in remand is enhanced through quality assurance processes that both monitor and evaluate the outcomes of remand decision-making and support and encourage leadership and innovation in the development of good remand practice.

The individuality of remand decision-making and the very limited number of requests for review of remand decisions results in remand decision-making being hidden. Remand decision-makers identified to us that they did not know what practices similar decision-makers were utilising. Remand decision-makers have no way of being informed about the aggregation of their own decision-making, much less how this compares with others. This isolation and hiding of the remand decision-making process and outcomes prevents the development of priorities for policy innovation and problem-solving between relevant institutions and agencies.

A good remand system will provide for inter and intra organisational liaison between bail decision-makers to encourage the identification and addressing of problems as they arise and the development of innovative practice to meet the changing context of remand decision-making. New decision-makers require appropriate professional development about bail/remand decision-making. There is also a necessity to ensure that experienced decision-makers are informed about changed practices, changes in the context for remand decision-making and any other factors that might influence their decision-making. Data collection that enables the review of remand decisions and their effects on marginalised groups is an essential tool for the development of high quality remand decision-making.

As the remand system is not a discrete entity, issues relating to the management of the process do not fall into the direct responsibility of any one agency or institution. The motivation for appropriate liaison will come from the passion of individuals for an accountable, efficient and effective system. The systemic responses that will be required to implement the innovative responses will arise from processes that need to be driven from the energy of these individuals.

One impact of new communication technologies is the increasing range of options for communicating with large numbers of people. Already video conferencing is an option for some court appearances, and Home Detention monitored by technology is heavily utilized, and our research suggests would be utilized more often if it were more available.

8. What are the policy implications of the study's findings?

This exploration of critical factors in the remand process and the way these factors explain differences in remand rates between Victoria and South Australia has highlighted the complexity of the environment in which remand decisions are made. In this chapter we explore the policy implications that flow from the critical factors identified in our research. These policy implications are derived from our analysis of changes within jurisdictions, from our understanding of the differences between jurisdictions and most importantly from the observations of the many actors in the justice system whom we interviewed. These practitioners, each dealing with a multitude of remand decisions every year, provided a wealth of observations and reflections, which have helped us to interpret the remand processes and to understand the policy implications of our research.

This exploration of policy is designed to identify possible levers that enable the management of remand numbers. It is important to note in relation to possible future trends in remand imprisonment that only a relatively small change in bail hearing outcomes was required in order to produce the changes documented in this research. If we consider bail and remand patterns in Victoria, the police lay charges against over 150,000 persons each year, of whom only about 1 per cent are remanded in custody. The changes in remand described in our statistical analysis in Chapter 4 involve an additional 400 persons being remanded in custody each year, or less than one-quarter of one percent of those charged by police. While the overall remand rate in South Australia is substantially higher, there is also considerable scope for further increases in the number of persons remanded in custody in that jurisdiction as well.

Our summary of the policy implications of our findings is focused around the central issues of

- accountability
- efficiency
- effectiveness

8.1. Accountability

8.1.1. Jurisdictional accountability structures

A key finding of our research is that South Australia and Victoria differ in the culture that surrounds remand decision-making. Victorians are engaged in a remand process in which there are many layers of review of decision-making with a heavy emphasis on minimising levels of custodial remand. In South Australia formal accountability lies with the courts which deal with remand decisions in the context of the finalising of the charges against the defendant. In this process the focus on remand can be obscured. Certainly South Australia lacks the same coherent remand philosophy that can be detected amongst remand decision-makers in Victoria.

A clear statement of principles and objectives to guide remand decision makers should lie at the heart of an equitable and transparent system of remand decision making. Without this clear statement decision makers will be unable to articulate the basis for their decisions and review of decisions will seem arbitrary and unpredictable. Although South Australia and Victoria have legislation that is comparable in many ways, it would seem that South Australia could achieve greater

clarity by a separation within the Act of the objectives of custodial remand/bail and the criteria to be used for assessing risk in bail applications.

The very large number of bail/remand decision makers making decisions in the context of the exercise of other responsibilities creates the potential for practices of remand decision making that lack consistency or drift from the objectives of custodial remand. It is important that decision makers are accountable for their decisions and that this accountability creates a feedback loop that will influence their future behaviour.

Although the bail justice system in Victoria has been criticised in particular questions have been raised about the appropriateness of using Justices of the Peace in this role, it does provide an immediate and well-defined accountability process. The immediate availability of review of a custodial remand decision, the symbolic importance attached to the fact that a dedicated room in the police station is used for these "hearings" and that the operational police involved are usually required to give sworn evidence about the reasons for their opposition to bail, all contribute to creating a culture of accountability within the Victorian remand system. In South Australia the telephone bail system that provides a similar review step in the remand process does not seem to have achieved the same symbolic effect.

The Victorian culture of accountability is further developed by the practice of requiring the "informant" or operational police officer recommending against bail to attend the magistrate's hearing of the bail application and give evidence. The importance of this requirement cannot be overstated. We have identified at least three benefits of this process.

- Enhanced police accountability

The officer recommending against bail is personally and professionally held accountable for their recommendation to the court by the requirement that they attend court, give sworn evidence and answer any questions that arise.

- Creation of a feedback loop in the remand decision-making process

As a result of their presence in court when the magistrate reviews the custodial remand decision, the officer also benefits from having their bail decision making developed by hearing both the defence arguments and the magistrate's decision and any reasons. This information returns to the police station with them and informs both the future practice of this officer and also of others with whom he or she discusses matters.

- Longer contested bail hearings resulting in a closer scrutiny of the decision

The requirement for the "informant" to give evidence results in longer hearings in contested cases before the magistrate. This gives the magistrate an increased opportunity to review the reasoning of both parties and to make an independent assessment of the risks of granting bail. Our research indicates that magistrates in Victoria take significantly longer over contested bail applications and are more likely than their South Australian counterparts to grant bail despite opposition from police.

8.1.2. Public accountability

A relatively recent change in the context in which the remand in custody processes operate has been the perception of increased "public" scrutiny of bail decision-making. Interviewees representing all stages of the process remarked on the public scrutiny that follows highly publicised cases where a defendant on bail has

committed either very serious offences or offences with tragic consequences. Some bail decision-makers suggested that this led to increasingly cautious bail decisions, with some defendants who would otherwise have been granted bail being remanded in custody.

In the current political environment, the high level of interest in law and order policy has made remand decision-making, like decisions at every other point in the justice process, a matter of public interest and comment. Whilst community interest in justice process is an important element of sustained legitimacy of the system, positioning remand decision-making as an indicator of the strength of policy on punishment and retribution, is enhancing the movement of remand from its original purpose as a tool to ensure effective court administration.

8.1.3. The needs of victims

One of the pressures that may be encouraging the public debate about the appropriate use of custodial remand and certainly feeding media discussion of this, is the needs of victims at this early stage of the criminal justice process.

In South Australia, the Bail Act makes specific provision for bail decision-makers to take account of the safety and perceived safety of victims in bail/remand decision-making. The extent to which this is influential was not clear from our research. The fact that this provision was introduced at the same time as amendments to domestic violence legislation seems to have linked the provision to domestic violence cases, and may have isolated the effect of this on bail decision-making in other cases.

Concern about victims of domestic violence was clearly evident in both jurisdictions. Some bail decision-makers indicated they take special care when dealing with bail applications from defendants charged with domestic violence offences. Others indicated their concerns that the risk and consequences of re-offending were particularly significant in this situation.

However in other offence situations, there appears to be very little by way of formalised processes in either jurisdiction that allow victims to either have a voice or receive information. Victims' advocates (Victorian) identified that the victim was often lost in the bail/remand process, especially in more serious matters where there may be many months between arrest and the final resolution of the case. Our research in court files indicated that this period of months might involve several changes of bail status, and victims' representatives reported that their clients were shocked on occasion to come face to face in public with a defendant whom they believed to be in prison

In today's justice policy context, greater sensitivity to the rights and needs of victims are expected by the community and within the justice system itself. Whilst the remand process provides particular challenges, greater attention to the role of the victim in the early stages of an investigation may reduce the fuel that feeds public outrage at individual remand decisions.

8.2. Effectiveness

Custodial remand is not a goal in its own right. It exists as a strategy to achieve the goals of

- ensuring the integrity and credibility of the justice system
- the protection of the community

- the care and protection of the defendant.

In particular the goals of ensuring that the defendant attends court when required and that that further offending is prevented were emphasised to us by remand decision makers as being central to their consideration.

The policy implications of the changes in defendant characteristics that we have reported are significant. The perception of our informants was that remand decision-making in recent years has required the assessment of risk in relation to individual defendants who are increasingly likely to have mental health problems, to abuse drug and alcohol and who are either independently or consequently only marginally socially integrated in terms of housing and other basic needs. This is both consistent with other observations of social changes and with the rudimentary data available in Victoria.

8.2.1. Variations in bail status of individual defendants

Our study of court files in South Australia (Study 5) confirmed that for a significant proportion (approximately 40 per cent) of cases studied the remand decision is not a single event but involves at least one variation during the time taken to finalise the case. Whilst few of the files indicated the reason for change in remand status, our qualitative research has indicated that these reasons can be grouped into two main categories:

- factors relating to the initial bail decision-making, including need for accommodation and guarantors
- factors relating to the behaviour of the individual whilst on bail

Although many defendants had notations on their files indicating that drug or alcohol usage had been brought to the attention of the court, this was less common amongst those who were on bail throughout the case.

Changes in bail status relating to initial bail decision-making, including need to find accommodation and guarantors

The Bail Act criteria shaping bail decision-making require that bail authorities take into account a range of factors which are likely to affect a defendant's returning to court as required. These factors include the availability of suitable accommodation and have been operationalised to include the availability of a guarantor who will take responsibility for the defendant appearing in court. In both of these circumstances the process may result in a defendant being held in custody for some days whilst suitable arrangements are made and verified.

The location of a guarantor who is in a position to provide a financial guarantor for the defendant's return to court can be difficult for many defendants. The responsibilities of a guarantor may seem daunting when the defendant's lifestyle is significantly shaped by drug or alcohol dependency. While a guarantor is being located, or the need for a guarantor renegotiated with the bail authority, a defendant is held in custody.

Interviews in South Australia have indicated that the availability of suitable accommodation for individuals who do not have stable accommodation at the point when they come into the justice system is tightening. The South Australian Courts Unit assists defendants in locating accommodation in SAAP programs and in hostels. Both of these housing arenas have experienced significant pressures over recent years and it can be difficult to locate accommodation. In these circumstances,

although the Bail Authority has discretion, it will often be the case that the defendant is held in custody pending the location of suitable housing. Only some of these forms of accommodation have the facilities necessary for home detention monitoring, so if the bail authority is minded to place significant restrictions on the defendant these forms of housing will not provide an opportunity for monitored bail.

Changes in bail status relating to the behaviour of the individual whilst on bail

Collecting the data that indicate the contribution of the individual's behaviour to changes in bail status is difficult and it may never be possible to be comprehensive. Court files (South Australia) indicate when a defendant fails to appear for a hearing and it is possible to track subsequent bail status and deduce the contribution of this failure to appear. Breach of other conditions relating to bail and brought to the attention of the court are difficult to read from the court file, but may be recorded.

However, independently of this court case, an offender may be apprehended on suspicion of another offence and be remanded in custody. Whilst the cause of this change may not be clear from the court file of the initial case, the change in bail status can be identified.

Attendance at court

Data could not be identified that would enable us to compare the numbers (or percentages) of defendants who attend court as required between the low remand rate jurisdiction, Victoria, and the higher remand rate jurisdiction, South Australia. Interviewees acknowledged to us that a large number of people who fail to attend court as required do so as a result of disorganised lifestyles in which court attendance dates are overlooked or not properly recorded in the first instance. Support services that ensure that defendants know when they are required to be in court and that ensure that this occasion is anticipated and attendance occurs is an alternative method of achieving this same goal. The Victorian Bail Support Program focuses on providing this support in a way that appears to have the confidence of the Magistrates.

Preventing offending

Preventing offending whilst a defendant is on bail is a complex issue. There are methodological questions about how to measure offending whilst on bail, with different studies using each of arrest, charge and conviction as the indicator that an offence has been committed (Hucklesby and Marshall 2000: 153). Research in other jurisdictions suggests an offence rate ranging from 9% to 26%. What is not known is the seriousness of re-offending. If the re-offending is for an offence unlikely to carry a prison sentence then the question is raised about whether remand in custody is an appropriate response.

Other goals, such as the safety of the defendant and protection of victims, arose in our interviews most often in relation to defendants who were arrested significantly affected by drug or alcohol or mental health issues. The inadequacy of custodial remand in achieving these goals was acknowledged by many interviewees, as well as the desirability of support services such as a secure detoxification service that would both achieve these goals and create the possibility of more fundamental change in defendant behaviours.

While the safety of victims is taken into account in current remand processes, the interest of victims in being kept informed of progress and developments even when their safety is not in question receives limited recognition. Whilst this is a matter of

delicacy whilst the defendant remains innocent until proven guilty, a process could be established whereby information can be provided to victims about the management of the case, the timing of hearings and other matters of interest.

8.2.2. The effectiveness of the interactions between the key elements in the remand system

Conceptualising remand processes in terms of a remand system suggests formally articulated links between elements of the system. In fact, our research indicates that there very little information flows between remand decision-makers at different points in the system. Our research identified that this lack of integration within the remand system affects

- feedback loops about individual decisions
- practical exchanges about the management of remand processes
- responses to changes in court or police administration that may impact on remand processing.

Feedback loops about individual decisions

Without clear information about decisions made elsewhere in the system, decision-makers either operate in isolation or are strongly influenced by the intra agency context and rumour about decisions likely to be made elsewhere in the remand system. The Victorian system enhances information flow between police and courts by requiring police to give evidence in court. However, this is still transmitted to others via informal networks.

The management of remand processes

The operations of justice agencies affect one another through their management of defendants and the timing and content of remand decision-making. Police are affected by availability of courts and judicial decision-makers, defence lawyers and support services are affected by the police decision-making and also by court administration. Judicial decision-makers are affected by the availability of support services and alternatives to remand. Correctional services are at the end of this system and affected by changes in most agencies, but in particular by issues of court administration relating to the movement of remandees. However, there is no forum where issues relating to the organisation of the remand process can be discussed. Although our research revealed that many remand decision-makers had ideas about how the operation of the system could be improved both for the benefit of the defendant and improved efficacy of their own or other's performance, there is no process in either jurisdiction that allows the systematic exploration of these issues. Notwithstanding this we were made aware of a number of cross agency or government and non-government organisation initiatives to address remand issues.

Responding to changes in court or police administration that may impact on remand processing.

That remand decision-makers and other actors in the remand system are responsible members of organisations that have operational goals and priorities outside remand has an often unrecognised effect on the remand process. Although changes in police practices are the most often identified changes that impact on the remand process, there is potential for changes in other organisational procedures to also impact on this process. The potential conflict between the role of an actor as a remand decision-

maker and that as a member of the agency is one that requires sensitive, but transparent management.

8.3 Efficiency

If economic analysis has any application to the justice system, it is in the area of procedure. Efficiency in procedure is assisted by transactional costs which focus the bail process on cases where remand in custody is really needed. The Victorian procedure of requiring police to give sworn evidence along with the bail justice process increases transactional costs for those controlling the input into the remand system. The higher transaction costs for courts and the justice system as a whole may be offset to some degree by the reduced total number of cases producing contested applications (and thus fewer remandees).

The cost of achieving the desired outcomes of the remand system through custodial remand is high. Although custodial remand can deliver certainty in terms of ensuring that the defendant does not commit further crimes in the community and is present in court when required, this comes at a high financial and social cost.

A cost effective remand strategy will balance the level of imprisonment with achieving goals in less costly, albeit also less certain ways. Levels of defendant attendance at court can be enhanced through the use of either social or technological incentives or some combination of each. Social support from family, friends or others including dedicated services may create the structure necessary to ensure a defendant attends court. New communication technologies create the possibilities of reminder telephone calls and other prompts to defendants.

Supporting a defendant in meeting their needs for stable housing and for health services is a less financially costly and more socially satisfactory way of creating the conditions for achieving the desired justice goals than custodial remand. For some defendants this housing and health services may need to be secure, at least for some days.

The social cost of a remand system in which outcomes disadvantage some community members (and most noticeably indigenous community members) is high. The presumption of innocence is not a technical matter. There is a cost to the authority and credibility of the justice system if the loss of liberty is treated lightly. The regular imprisonment of individuals who are ultimately found to not deserve imprisonment

The separation between the institutions and agencies involved in the remand system means that different strategies that might be used to ensure the achievement of the desired justice outcomes result in the allocation of costs to different agencies and their budgets. Inevitably this proves a disincentive for the development of innovations in which costs might be reduced for one agency but increased for another. Overcoming this barrier to the development of effective remand strategies requires a whole of government approach and strong leadership from within the justice system.

8.3.1. Resources and services to support defendants and minimise the use of custodial remand

That the two jurisdictions appeared to pay such different styles of provision of resources and services to support defendants and minimise the use of custodial remand reflects the very different cultures we identified in these jurisdictions.

In particular the high profile of welfare services in Victoria and the perceived relevance of these to judicial decision-makers seemed to be a success story for all concerned. Not only did judicial decision-makers know about and indeed actively shape the services provided to them through official channels some decision-makers developed their own links with non-government agencies to ensure that services they felt necessary were provided. In South Australia, whilst welfare services were available and utilised, the attention of decision-makers was on the emerging alternative court structures with the potential that these provided to support defendants in addressing offending behaviour prior to sentencing. A comparative evaluation of the effectiveness of these two approaches would make a significant contribution to the development of policy around remand.

The need for increased levels of supported accommodation for defendants seeking bail was identified as a high priority in both jurisdictions. This is different from oft mention Bail hostels as the need was perceived to be one of support and structure rather than control. The provision of such accommodation must compete with other demands on the state and commonwealth housing budgets and will need active champions from within the remand system to get appropriate attention.

8.3.2. Alternatives to remand in custody

Interviewees at all stages of the remand process raised the need for the development of alternatives to remand in custody.

Home Detention

A number of interviewees suggested that the availability of home detention should be increased. One of the disadvantages of the current process was that a defendant would be remanded in custody to allow an assessment to be made which could take some time. While the process needs closer examination to see where efficiencies could be gained, a more radical suggestion would be to consider managing home detention bail in a manner similar to the way bail conditions relating to residence requirements work. This would involve moving the establishment of the suitability of a home from a social work function to an administrative function. The provision of proof of residence at an address and the signed willingness of others at the accommodation to bear the disruptions of the home detention process are the responsibility of the defendant. The social work assessment and support could then occur within the next week, which would allow the sorting out of any difficulties with the curfew arrangements and the technology. This would allow the immediate release of an eligible defendant into home detention, and thus avoid a number of days in custody whilst awaiting assessment.

The Victorian Bail Advocacy and Support Programme (BASP) plays an important role in co-ordinating resources to maximise the possibility of a supervised alternative to remand. By intervening before a matter is heard in court, considerable savings in court time are achieved. Their involvement decreases the risk of non-compliance with bail and thus increases the probability of bail being granted.

Supervised bail accommodation

Common across the interviews were calls for supervised accommodation. While neither jurisdiction has 'bail hostels', Victoria is providing public housing to accommodate defendants otherwise at risk of being remanded in custody. Some non government agencies are prepared to accept remandees into supported

accommodation, although many are unwilling to accept responsibility for urine sampling (as sometimes required by Victorian bail decision-makers).

The health needs of remandees featured prominently in the discussion of supervised accommodation. There is a particular issue arising from the duty of care owed to defendants once they have been arrested. Several police informants identified that custodial remand resulted from the fact that there were inadequate medical services available to them and the defendants. So a defendant who is dangerously drunk, under the influence of drugs or apparently experiencing a psychotic episode, cannot just be released at the door of the police station and told to come back to court in a week. The need for immediate residential medical services for such defendants was identified by some decision-makers.

Technical developments

The use of video conferencing was discussed by interviewees in both jurisdictions as a means of reducing the costs of managing remand decision-making. In addition to allowing the review of bail for defendants currently in custody at some distance from the court managing the case, the use of video conferencing is seen as providing the possibility for a magistrate to review a police bail decision when the police station is at some distance from the court. This would result in a speedier resolution for rural and regional defendants. The use of video conferencing is supported by the South Australian judiciary, but there are implementation issues that still need resolution, not the least of which is the cost and training.

This issue of electronic monitoring of home detention defendants was one that was seen as creating the possibility of realistic curfews without disruption to defendants' lives and the cost to the state of custodial remand. For this system to be utilised more widely there needed to be more bracelets available. A question remains about the processes surrounding home detention bail and the home assessment that is currently required before a person is granted home detention bail.

Other possibilities created by information technology include the use of the mobile telephone and other telephone technology as a means of contacting defendants. It is possible to collect a contact list of telephone numbers in a database. Similar processes could be used to remind defendants of the need to be in court on the following day, or to follow up missed court appearances.

8.3.3. Quality control and the professional development of remand decision-makers

The importance of like cases getting a like decision about remand, bail and conditions was recognized throughout the system in both jurisdictions. The broad discretion given to decision-makers can lead to considerable variety in approaches to bail decisions. Interviewees at every point in the system identified that the requirement of independent decision-makers at all levels of the remand process makes developing appropriate quality control mechanism difficult.

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

additional external review process with the bail justice interposed between police and court when courts are not sitting.

None of the institutions involved in the remand in custody process included remand process outcomes in their performance indicators. Indeed, as our statistical research for Study 2 revealed, institutions had very little data on remand. While remand decision-makers do record decisions and reasons, this information is not collated. Police, for example, are not able to determine easily the numbers of defendants granted police bail, nor, in aggregate, the reasons why police bail was refused.[157] The courts are in a slightly better position. This lack of data may also explain the significant number of interviewees who had little or no idea of whether remand rates were changing. They all had detailed knowledge of how decisions were made in individual cases and the factors influencing an individual decision, but no broader perspective.

A number of strategies aimed at achieving consistency of decision-making within the legislative framework were identified by Victorians. Bail justices have embarked upon a structured training program in recent years which is expected to improve the quality of decision-making including familiarity with the detail of the "exceptional circumstances" and "show cause" provisions. Associated with this training is an improved data collection process. Magistrates are provided with training opportunities and, when deciding bail applications, they have the benefit of a computer on the bench that provides a checklist of criteria and the relevant statutory form which records the reasons why bail has been refused. This provides magistrates with a tool for the systematic review of the bail decision to be made, and may contribute to a more standardised decision-making process.

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

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

Policy decisions like police directives to use custodial remand to meet crime reduction targets, or to promote arrest over proceeding by way of summons when in

[157] In South Australia the introduction of new information technology systems within SAPOL in 2004 may facilitate the collection of these data.

the ordinary course a summons would have been a possible alternative, do not take into account broader implications for the criminal justice system. While the independence of each of the justice institutions is an essential feature of each institution, there needs to be a structured process to enable discussion and consideration of how an individual institution's actions or policies supports the achievements of the broader goals and objectives of the remand in custody process. By using the term 'accountability' in its broadest sense, better vertical accountability would be a counterbalance to possible tendencies on the part of bail decision-makers to see themselves as more needing to meet the policy and goals of their own institutions than as independent decision-makers.

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10 Appendices

Appendix A: Supplementary tables

Table A1: Victorian remand and total prisoner population: number rate and index relative to January 1995

		Remandees	Total prisoners	Remand rate	Total imprisonment rate	Indigenous remandees	Total indigenous prisoners	Remand index Jan 95 = 100	Sentenced pop index Jan 95 = 100
1994	July	333	2505	9.7	73.2			103.1	105.0
1995	January	323	2391	9.4	69.8			100.0	100.0
	July	350	2482	10.2	72.2			108.4	103.1
1996	January	357	2284	10.4	69.5			110.5	93.2
	July	383	2355	11.0	71.5			118.6	95.4
1997	January	370	2410	10.6	68.9			114.6	98.6
	July	417	2654	11.8	75.4			129.1	108.2
1998	January	440	2650	12.4	74.8	22	131	136.2	106.9
	July	434	2861	12.1	80.1	18	127	134.4	117.4
1999	January	454	2878	12.6	80.0			140.6	117.2
	July	411	2929	11.3	80.8	23	126	127.2	121.8
2000	January	456	3066	12.5	84.0	19	126	141.2	126.2
	July	445	3158	12.1	85.9	34	138	137.8	131.2
2001	January	436	3285	11.8	89.0	27	146	135.0	137.8
	July	500	3383	13.4	90.5	31	150	154.8	139.4
2002	January	632	3469	16.8	92.1	40	148	195.7	137.2
	July	585	3539	15.5	93.7	26	161	181.1	142.8
2003	January	650	3614	17.1	95.2	39	155	201.2	143.3
	July	700	3778	18.2	98.4	36	175	216.7	148.8
2004	January	694	3614	18.1	94.0	41	173	214.9	141.2
	June	645	3583	16.7	92.9	38	186	199.7	142.1

Table A2: South Australia remand and total prisoner population: number rate and index relative to January 1995

		Remandees	Total prisoners	Remand rate	Total imprisonment rate	Indigenous remandees	Total indigenous prisoners	Remand index Jan 95 = 100	Sentenced pop index Jan 95 = 100
1994	July	221	1355	19.5	119.7			94.0	102.4
1995	January	235	1342	20.8	118.6			100.0	100.0
	July	227	1370	20.0	120.8			96.6	103.3
1996	January	239	1409	21.1	124.1			101.7	105.7
	July	278	1498	24.4	131.6			118.3	110.2
1997	January	240	1472	21.1	129.5			102.1	111.3
	July	265	1471	23.2	129.0			112.8	108.9
1998	January	235	1403	20.9	124.8	63	234	100.0	105.5
	July	243	1403	21.5	124.2	43	207	103.4	104.8
1999	January	269	1343	23.7	118.6	58	206	114.5	97.0
	July	281	1388	24.7	122.2	52	212	119.6	100.0
2000	January	322	1302	28.3	114.3	50	177	137.0	88.5
	July	359	1284	31.4	112.4	79	215	152.8	83.6
2001	January	405	1314	35.4	114.8	80	210	172.3	82.1
	July	477	1406	41.5	122.2	82	224	203.0	83.9
2002	January	431	1423	37.3	123.3	103	246	183.4	89.6
	July	512	1502	43.9	128.7	99	242	217.9	89.4
2003	January	485	1478	42.9	126.2	96	251	206.4	89.7
	July	471	1486	40.0	126.1	81	243	200.4	91.7
2004	January	449	1434	38.0	121.5	89	264	191.1	89.0
	June	479	1464	38.7	123.7	89	256	203.8	89.0

Table A3: Number of persons received and mean remand period by type of Most Serious Charge: Victorian remandees: 2000/01 to 2002/03

		Days spent on remand	Number received	
	MSC Type	Mean	N	Std. Deviation
2000/01	Offences against person	130.53	411	176.08
	Robbery & extortion	102.95	363	109.48
	Offences against property	55.69	924	68.27
	Offences against good order	53.78	73	89.92
	Drug offences	93.18	304	164.88
	Traffic offences	42.75	12	51.93
	Other offences	93.79	121	147.31
	Total	**84.50**	**2208**	**125.37**
2001/02	Offences against person	146.67	470	198.86
	Robbery & extortion	118.39	367	109.32
	Offences against property	55.62	1044	74.79
	Offences against good order	43.74	73	62.25
	Drug offences	113.17	299	158.39
	Traffic offences	55.08	12	43.75
	Other offences	98.26	102	148.91
	Total	**92.17**	**2367**	**133.45**
2002/03	Offences against person	114.08	460	150.04
	Robbery & extortion	119.75	335	118.58
	Offences against property	54.60	1200	66.25
	Offences against good order	59.96	85	97.68
	Drug offences	104.41	385	136.10
	Traffic offences	28.00	23	23.43
	Other offences	105.49	106	125.29
	Total	**82.97**	**2594**	**111.22**
Total	Offences against person	130.54	1341	176.70
	Robbery & extortion	113.55	1065	112.52
	Offences against property	55.25	3168	69.73
	Offences against good order	52.88	231	85.29
	Drug offences	103.61	988	152.27
	Traffic offences	38.68	47	38.68
	Other offences	98.95	329	140.77
	Total	**86.48**	**7169**	**123.33**

Table A4: Number of persons received and mean remand period by type of Most Serious Charge: South Australian remandees: 2000/01 to 2002/03

		Days spent on remand	Number received	
	MSC Type	Mean	N	Std. Deviation
2000/01	Offences against person	76.01	868	134.586
	Robbery & extortion	108.99	125	128.715
	Offences against property	50.32	1348	68.418
	Offences against good order	29.71	424	45.137
	Drug offences	64.92	88	139.991
	Traffic offences	20.73	66	28.909
	Other offences	21.38	85	68.808
	Total	**56.23**	**3004**	**97.092**
2001/02	Offences against person	76.51	967	120.539
	Robbery & extortion	116.89	121	120.140
	Offences against property	46.88	1303	62.309
	Offences against good order	28.28	478	32.536
	Drug offences	31.80	99	46.132
	Traffic offences	20.35	89	26.945
	Other offences	20.80	46	63.748
	Total	**54.35**	**3103**	**86.730**
2002/03	Offences against person	50.81	939	69.378
	Robbery & extortion	70.51	122	76.444
	Offences against property	43.39	1209	52.332
	Offences against good order	24.79	531	27.048
	Drug offences	44.98	63	77.754
	Traffic offences	21.03	76	27.577
	Other offences	21.89	85	42.844
	Total	**42.39**	**3025**	**57.228**
Total	Offences against person	67.66	2774	111.795
	Robbery & extortion	98.83	368	112.487
	Offences against property	46.99	3860	61.717
	Offences against good order	27.41	1433	35.065
	Drug offences	46.78	250	96.936
	Traffic offences	20.68	231	27.605
	Other offences	21.46	216	58.461
	Total	**51.01**	**9132**	**82.327**

Table A5: Mean drug, alcohol & psych scores by date of social history assessment (All assessments)

Social History Last Update Date (Banded)		Alcohol Score	Drug Score	Psych Score
Jan 97 to 25 Feb 2001	Mean	.5296	1.3621	.5093
	N	591	591	591
	Std. Deviation	.84696	1.30742	.89604
17 Sept 2001	Mean	.5369	1.5317	.6003
	N	583	583	583
	Std. Deviation	.80051	1.27436	.92677
9 March 2002	Mean	.5068	1.6047	.6098
	N	592	592	592
	Std. Deviation	.80394	1.27019	.91506
14 July 2002	Mean	.6438	1.6301	.7089
	N	584	584	584
	Std. Deviation	.94616	1.23285	.97702
8 November 2002	Mean	.6831	1.6388	.7308
	N	587	587	587
	Std. Deviation	.88123	1.17818	.97885
13 February 2003	Mean	.6118	1.7244	.6908
	N	595	595	595
	Std. Deviation	.90762	1.16688	.99924
30 April 2003	Mean	.6633	1.8731	.7073
	N	591	591	591
	Std. Deviation	.89631	1.12708	1.01711
8 July 2003	Mean	.5884	1.6871	.7772
	N	588	588	588
	Std. Deviation	.87010	1.13967	.96957
30 September 2003	Mean	.6661	1.8643	.7165
	N	575	575	575
	Std. Deviation	.90670	1.08956	.91901
29 December 2003	Mean	.7102	1.8827	.9347
	N	597	597	597
	Std. Deviation	.89073	1.07269	1.04308
21 April 2004	Mean	.6055	2.0277	.9187
	N	578	578	578
	Std. Deviation	.83268	1.01595	1.06884
Total	Mean	.6132	1.7110	.7185
	N	6461	6461	6461
	Std. Deviation	.87398	1.18684	.98195

Table A6: Mean drug, alcohol & psych scores by date of social history assessment (Assessments conducted within 100 days of end of remand episode)

Social History Last Update Date (Banded)		Psych Score	Alc Score	Drug Score
Jan 97 to 25 Feb 2001	Mean	.4971	.5222	1.3757
	N	519	519	519
	Std. Deviation	.88504	.83999	1.31353
17 Sept 2001	Mean	.5925	.5242	1.4559
	N	454	454	454
	Std. Deviation	.93452	.78792	1.28381
9 March 2002	Mean	.5707	.5390	1.4610
	N	410	410	410
	Std. Deviation	.89613	.84187	1.28550
14 July 2002	Mean	.6320	.6160	1.4853
	N	375	375	375
	Std. Deviation	.92675	.92601	1.24710
8 November 2002	Mean	.6565	.6870	1.5429
	N	361	361	361
	Std. Deviation	.94488	.87501	1.21516
13 February 2003	Mean	.6017	.5678	1.6582
	N	354	354	354
	Std. Deviation	.95038	.86295	1.20861
30 April 2003	Mean	.5831	.6375	1.6193
	N	331	331	331
	Std. Deviation	.93171	.92195	1.21111
8 July 2003	Mean	.6853	.6364	1.4476
	N	286	286	286
	Std. Deviation	.96551	.90647	1.14664
30 September 2003	Mean	.6181	.6734	1.7638
	N	199	199	199
	Std. Deviation	.87321	.91500	1.17185
29 December 2003	Mean	.6907	.8351	1.4124
	N	97	97	97
	Std. Deviation	1.01408	.97554	1.20548
21 April 2004	Mean	.8511	.7872	1.4043
	N	47	47	47
	Std. Deviation	1.02105	.93102	1.24516
Total	Mean	.6021	.5986	1.5086
	N	3433	3433	3433
	Std. Deviation	.92782	.87487	1.24574

Appendix B: Analysis of Victorian social history data on drug and alcohol abuse and mental disorder

When a prisoner is received into custody, he or she may go through a detailed process of assessment that includes a reception assessment intended to identify issues relating to custody management, a psychiatric assessment, a suicide risk assessment, a risk and need assessment (the Level of Service Inventory – Revised), and a social history assessment. Typically, the first three are done on the day the person is received, while the later two may be done some days later. Where remandees are concerned, the assessment process may only be partial, and the LSI-R and social history may not be done before the person goes to court.

This situation is further complicated because assessment data are over-written every time new data are collected. Each person's prison record thus contains only the most recent assessment data. Thus, a person who was remanded three times in the period covered by the Corrections Victoria data extract would only have a single set of assessment data relating to the last episode of custody. However, this data may not always relate to the current episode of custody. For example, a person who was remanded and then sentenced to imprisonment would have an assessment record relating to that episode. If the same person was subsequently remanded for a short period then discharged to court, his or her assessment data would relate to the original custody term, not the current one.

There were two options available for analysing the social history data. These were:

1. Consider only the date of the social history data.

   This is the approach adopted in the body of the report. It has the advantage that it preserves all of the source data. Table A5 shows the results of this analysis in detail. However this analytic approach suffers from the potential problem that those individuals who were most likely to return to custody (i.e. those that were "high risk") were also those who were likely to have an assessment record that was late in the series rather than early.

2. Only use assessment records that were collected close to the period of remand to which they relate. Table A6 shows the results of analysing only those social history records where the record was created (as measured by the 'last update date') within 100 days of the commencement of the remand episode start date. Nearly half of all remand episodes are lost if this rule is applied (3,028 out of 6,461). The potential problem with this approach is that those records that are lost are most likely to relate to individuals who appeared repeatedly throughout the series (i.e. "high risk" offenders). Note also that most of those remanded late in the series had not had a social history assessment done.

Neither analytic approach is entirely satisfactory. However, both show similar patterns of increasing risk throughout the series. Charts for the data in Table A4 are reproduced below. The final two observation periods in these charts are excluded because the number of observations is very small.

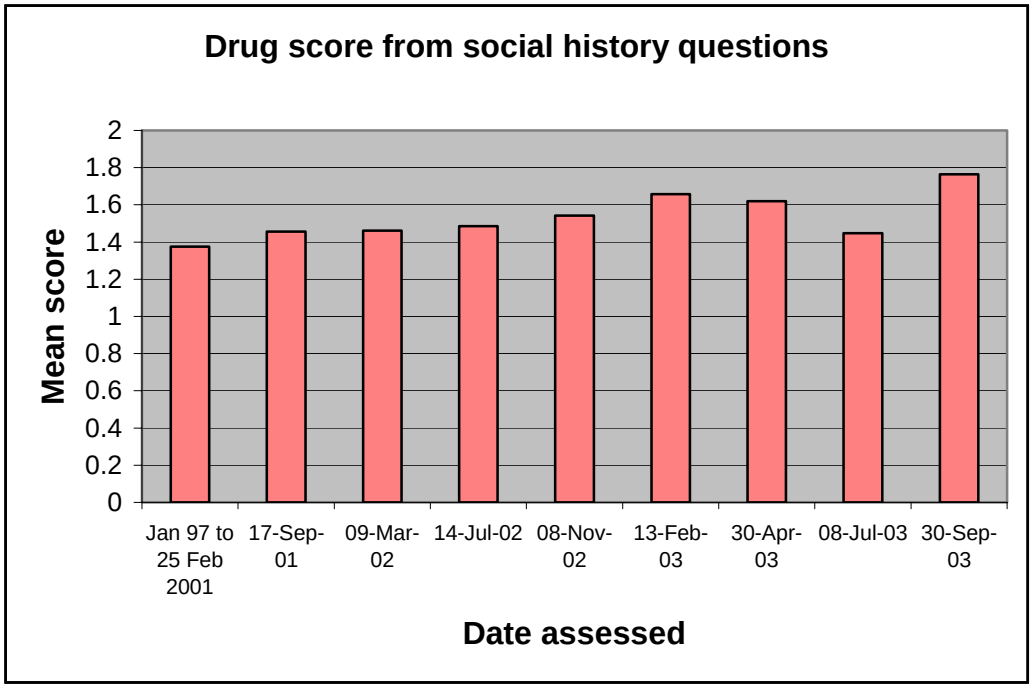

Figure A1.

Figure A2.

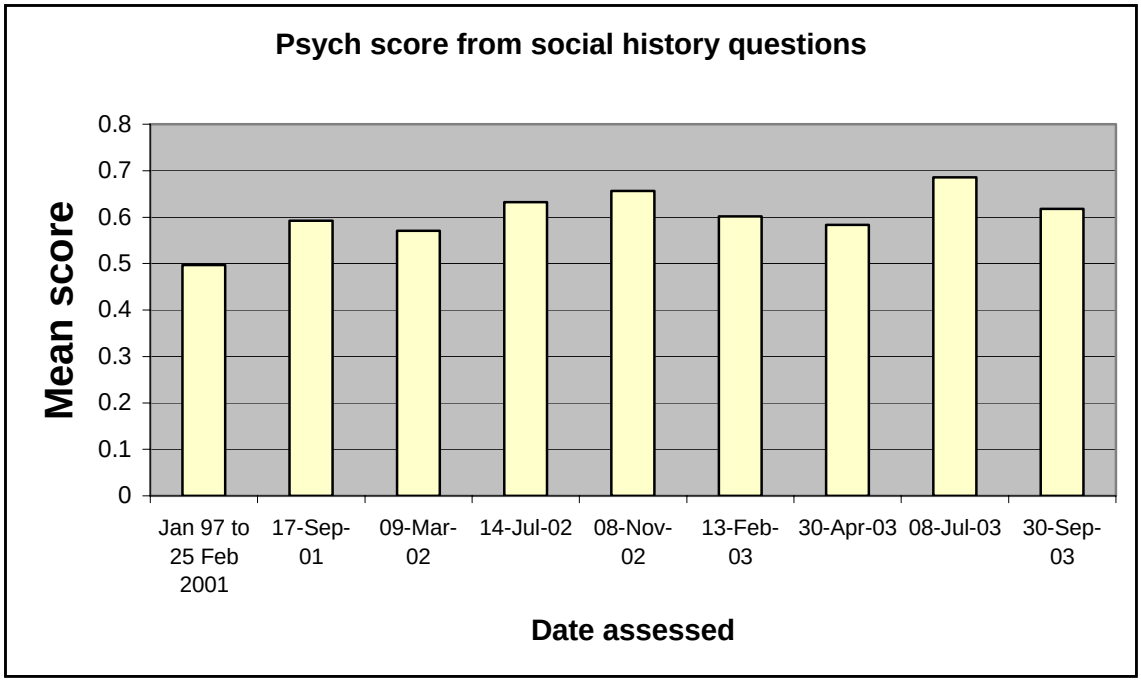
Psych score from social history questions
Mean score
0.8
0.7
0.6
0.5
0.4
0.3
0.2
0.1
0
Jan 97 to 25 Feb 2001
17-Sep-01
09-Mar-02
14-Jul-02
08-Nov-02
13-Feb-03
30-Apr-03
08-Jul-03
30-Sep-03
Date assessed

Figure A3.

Appendix C: Statistical data collection description

Apprehension phase[158]

System description task

This section was designed to be the blueprint that would provide a statistical description of males who are being proceeded against by police and males who are not, from 1995 in South Australia and Victoria. In the end, as explained above, most of the information (especially from Victoria) was not available and hence the study could not be completed with any degree of satisfaction. It is included here as a blue print for data collection that could assist future policy-making.

Police numbers

> **Question:** What increases (or decreases) in police numbers/rates per 100,000 have occurred over time, say 1995 to 2002?
>
> **Task:** Per jurisdiction, show police numbers per 100,000 population.

Apprehension reports

> **Question:** How many adult males are apprehended and proceeded against by police each year, per year 1995-2002?[159]
>
> **Task:** Per jurisdiction, count the number of apprehension reports, and as a rate per 100,000 population.

Characteristics of those apprehended

> **Question:** Looking at apprehension reports, what are the characteristics of those apprehended?
>
> **Task:** Per jurisdiction, per year, look at the data on
>
> 1. age,
> 2. Indigenous,[160]
> 3. MSO,[161]
> 4. area (postcode of place where offence takes place),
> 5. whether the individual is on bail at the time for another offence (if possible).
> 6. previous criminal history (where possible).
>
> For those with a previous criminal history, further breakdowns are possible:
>
> a) No. of prior convictions (available in SA)

---

[158] 1995 to 2002. Data on *adult males*.

[159] The term 'apprehension report' is used here, as these figures are readily available. The term 'arrest' is avoided because not all apprehensions involve an arrest. Apprehensions are those matters where some form of proceedings follow and, for our purposes, will include apprehensions pursuant to a warrant. For the purpose of counting, the numbers of apprehension reports should be broken down in order to list apprehensions without a warrant and apprehensions pursuant to warrant. This latter category should then be divided into warrants generally, then warrants for failing to appear (criminal matters) and warrants for failing to appear (civil matters). Cautions (usually only available for juveniles) and expiable matters are not counted as 'apprehensions'.

[160] Anecdotal reports suggest that this assessment is made by police on 'appearance'.

[161] The MSO data will tell us something about the *reasons* for the arrest. In SA, the MSO can be determined in a number of ways: by the highest level offence code, by 'Major Statutory Penalty' (MSP) or, if finalised, by major penalty handed down. However, penalties for similar offence types may differ between SA and Victoria. Broad level ASOC could be used for a general comparison of offence types.

b) No. of previous apprehension reports (possible in SA)

c) Most serious prior offence.

Proceeding by way of summons

Question: In what per cent of apprehension reports do police proceed by way of summons?

Task: Count the numbers of apprehension reports using a summons, and as a per cent, each year 1995-2002, per year.

Proceeding by way of arrest

Question: In what per cent of apprehension reports do police proceed by way of arrest?

Task: Count the numbers of apprehension reports involving an arrest, and as a per cent, each year 1995-2002, per year.

Police cell numbers

Question: How many arrested persons are then locked up in *police* cells, as opposed to remand cells, thereby potentially distorting the remand data.

Task: Collect and compare data from SA[162] and Victorian police cells, and express as a per cent of remandees in custody, each year, per year 1995-2002.

If possible, differentiate between those who have been granted police bail but who cannot raise a surety (per cent), and those who have been denied police bail and are waiting upon the court to determine their bail status (per cent).

Police Bail Phase

System description task

This section will provide a statistical description by 'inputs', that is, numbers, by summons, warrant or arrest, and characteristics of offenders, and by 'outputs' or outcomes, that is, the characteristics of who is given bail and who is not. Police bail figures are required from police, and since they are not routinely kept other than at each site, these data will need to be extracted manually. Again, as far as possible, these data should be collected for each year, per year, 1995-2002.

Numbers

Question: In what per cent of matters that require bail decisions do police grant bail?

Task: Count, by jurisdiction, police bail *granted* versus bail *refused* as a per cent of all matters that require a bail decision by police.[163]

Characteristics

Question: What are the characteristics of those refused bail/granted bail?[164]

Task: Per jurisdiction, look at the data[165] on

1. age,
2. MSO,[166]

[162] OCSAR does not keep data on this. Searching required of *ad hoc* police data.

[163] Replicating the AIC police custody survey by looking at the Police Charge Books at Holden Hill and looking at the data on those *refused* bail. Reasons for refusal were not usually noted in the charge book, or given cursory reference.

[164] The characteristics of those *granted* bail were not collected, but it could be done.

[165] Country of birth and previous criminal history are not collected.

3. Indigenous[167] (code Y or N),
4. employment status (code Y or N),
5. warrants outstanding (code Y or N),
6. fixed abode (code Y or N),
7. previous criminal history (according to police documentation, where possible)

for those for whom a bail decision has been made, 1995-2002.

Warrant execution

Question: To what extent does the police's execution of a warrant to bring a person into custody militate against the granting of police bail?[168]

Task:

B.2.6.1 Count the number of warrants executed for 2 quarters at a suburban police station.

B.2.6.2 Then count the number of those who, having been arrested on a warrant, are then remanded in custody (as a per cent).[169]

Court Bail Phase

System description task

Provide a statistical description by 'inputs', that is, numbers, by summons, warrant or arrest, and characteristics of offenders, and by 'outputs', or outcomes, that is, the characteristics of who is getting court bail and, significantly, who is not; again, each year, per year 1995 to 2002.

Court workload – numbers:

Question: Is the rise in numbers of bail refusals due simply to an increased number of cases[170] coming before the magistrates and higher courts?

Task: Locate the numbers (*ex* custody by *first* appearances) of defendants who appear[171] in the various courts per year,

1. per higher/lower jurisdiction (magistrates/County/District)
2. for magistrates, distinguish rural-regional/metropolitan/city
3. by MSO for all of the above.

Court decision-making and outcomes

Question: Looking at the matters that require a court bail decision (bail refused/bail granted), what are the outcomes of bail determinations in the courts?

---

[166] Only offence details are available. A subjective assessment about which is the most serious will need to be made.

[167] Unconfirmed anecdotal evidence suggests that this is usually done on 'appearance' by police, although for corrections purposes, it may be self-reported.

[168] Available in the Holden Hill police charge books, but not collected for the OCSAR report.

[169] There are cases where a person is arrested and later it is determined that they are subject to a warrant. Other times police will have a warrant blitz. Also, in some cases, police have no discretion regarding bail. They must refuse it, apparently, where a person has been arrested on a warrant for failure to appear.

[170] The counting unit here is *first court appearances*.

[171] Query what one does with administrative matters not coming before the courts (especially in Victoria) especially expiation notices and infringement notices that do not need an appearance.

Task: Locate the numbers (ex custody by first appearances) of defendants *who leave court in custody* in the various courts per year,

1. per higher/lower jurisdiction (magistrates/County/District)
2. for magistrates, distinguish rural-regional/metropolitan/city
3. by MSO for all of the above.

Court decision-making and characteristics of accused persons

Question: Looking at these appearances, what are the characteristics of those *refused* bail and those *granted* bail?

Task: Per jurisdiction, compare:

1. age,[172]
2. Indigenous,[173]
3. MSO,[174]
4. employment status,[175]
5. Previous criminal history,[176]
6. Previous breach of bail,

of those for whom a bail decision has been made, and the bail decision, each year, per year 1995-2002.

Multiple-charging:

Question: To what extent does 'multiple-charging'[177] of offenders by police militate against a grant of bail or against any legislative presumption of bail?

Task: Look at the numbers of charges listed (on average) for matters requiring a bail decision.

Evidence of previous convictions:

Question: What is the rate of bail refusal where there is evidence of a previous conviction?[178]

Task:

Find the per cent refusals where evidence of a prior conviction, grouped by MSO;

a. Property offences
b. Motor vehicle offences
c. Offences against the person

Compare per cent refusals where no evidence of prior conviction.

Most serious offence and its effect upon remand in custody numbers at magistrates courts

---

[172] Is available.
[173] Is available.
[174] Method to obtain MSO to be determined.
[175] Incomplete and probably not available.
[176] Is available.
[177] This term relates to the time-honoured police practice of detailing every conceivable charge possible against an accused as a way of giving some later flexibility in charge bargaining.
[178] Previous convictions may be grouped according to ASOC Level 1, namely property offences, motor vehicle offences, offences against the person.

Question: What is the rate of bail refusal for males ex custody at first appearance by MSO?[179]

Task: Find the per cent refusals by most serious offence.

Final disposition on sentence:

Question: What per cent of total of those held in custody[180] are ultimately released without further custody?

Task: Determine:

a) per cent Indig/non-Indig

b) higher court/lower court

c) by MSO

and compare

1. those who are found guilty and released without serving any further sentence, and

2. those who are found *not* guilty and thus released without serving any further time in custody.

Other 'qualitative' matters:

Legal representation:

Question: Is there evidence of decreasing legal representation for those requiring a bail determination by a court?[181]

Tracking exercise

1. Count the numbers of bail-related matters coming before the courts, each year per year 1995-2002, where possible, where counsel is listed as appearing for an applicant for bail (compared to those where there is no counsel listed) and,

2. indicate the outcomes for those who are represented as opposed to those who are not, and

3. determine if legal aid figures can tell us anything about the number of matters being dealt with by legal aid lawyers.

Bail status changes:

Question: What is the effect on persons' bail/remand outcomes of their failure to appear?

Tracking exercise. Track, for each year 1995-2002[182]

1. Warrants issued for 'failing to appear' per jurisdiction

2. Warrants executed for 'failing to appear' per jurisdiction

3. When warrants are executed for persons 'failing to appear' per jurisdiction, determine what per cent of those persons are then remanded

[179] If use Major Statutory Penalty, SA may not be comparable with Victoria. Offence types in general could be compared using broad level ASOC codes.

[180] This may be difficult to determine, since bail status may change during the life of the case.

[181] Only a tracking study could follow through legal representation for subsequent hearings within the same case.

[182] Information re warrants issued and bail outcomes is available, but subsequent bail outcomes for persons with warrants requires tracking.

in custody by comparing the bail status of these persons at the end of their first appearance with their bail status at next court appearance and at final appearance.

Previous breach of bail[183]

Question: What is the rate of bail refusal by the courts where there is evidence of a previous breach of bail?

Tracking exercise

1. Find the per cent refusals where previous evidence of breach of bail, then
2. Compare per cent refusals where no previous evidence of breach of bail.
3. Determine each of these matters by the *reason* for breach too, for example the breach of bail might be because of a

   a) Failure to appear

   b) Offending while on bail

   c) Breach of another court order (for example, a suspended sentence is in existence).

Legislative presumption against bail

Question: To what extent is the police determination of bail/remand simply a reflection of the presumption against bail as prescribed in Victorian drug legislation?

Task: A qualitative assessment is required here, concerning whether this presumption impacts police decisions.[184]

Because of the concern over the inability of the above questions to be answered, we decided to re-write the questions, reducing them to the essentials as detailed below. The final questions set for each jurisdiction focus on adult males who are being proceeded against by police and then who appear in court per calendar years 1995-2002.[185] This is for the lower courts only. The higher court figures are not available.

Police data

A.1 For SA and Vic, count the total number of police 'apprehension reports'[186] (n per calendar year 1995-2002).

Where available, can these be counted (broken down into)

1. Apprehensions without a warrant and
2. Apprehensions pursuant to a warrant, further divided into

i. warrants for failing to appear (criminal matters)

ii. warrants for failing to appear (civil matters).

Courts data

B.1. For SA and Vic, count the number of defendants who appear for the *first* time in the magistrates courts per year, *ex custody*, per calendar year 1995-2002.

[183] Form 2s may only include 'standard' reasons for refusing bail, or may not be available.

[184] There will need to be cross checking to determine which MSOs this entails for Victoria and SA (if any).

[185] Unit record data would probably be the most useful, for that can be adapted to suit.

[186] Apprehensions are those matters where some form of proceedings follow and, for our purposes, will include apprehensions pursuant to a warrant.

B.2 For SA and Vic, count the numbers of defendants ex custody by first appearance who *leave* the magistrates court *in custody*, per calendar year 1995-2002.

These figures should be broken down into

1. numbers leaving remanded in custody
2. numbers leaving sentenced in custody

B.3 For SA and Vic, count the numbers of defendants who appear before the magistrates court OR County Court (Vic) OR District Court (SA) for *final* disposition (sentence or trial) *ex custody*, per calendar year 1995-2002.

B.4 For SA and Vic, count the numbers of bench warrants issued per calendar year 1995-2002.

Corrections data

Using correctional data we would like to examine data on offence type, age, ethnicity, length of remand and reasons for release

C.1 Numbers of remandees by MSO 1995-2002

C.2 Numbers of remandees by age 1995- 2002

C.3 Numbers of remandees by ethnicity 1995-2002

C.4 Time distribution of length of remand (one week, 2 weeks,3 weeks, one month, three months, six months, 12 months, greater than 12 months) 1995-2002

C.5 Numbers of remandees by reason for release from custody 1995-2002

C.6 For SA and Vic, count the numbers of deaths in custody of remandees per calendar year 1995-2002.

C.7 For SA and Vic, count the numbers of assaults upon remandees per calendar year 1995-2002.

C.8 For SA and Vic, count the numbers of self-harm incidents involving remandees per calendar year 1995-2002.

Appendix D: Court observation studies and case studies

i) Court observation studies

These were required by the Criminology Research Council brief to confirm research findings about the court hearing component of the remand in custody process from other jurisdictions and from earlier studies.

Court observation studies conducted in England in the 1990s had downplayed the court hearing and judicial role in decisions on court bail or remands in custody. In our report of Stage One of this consultancy we outline this research (Bamford *et al* 1999, pp. 13–19). The research was based on the lower numbers of contested hearings, the short duration of bail hearings, the level of consistency between prosecution attitudes and outcomes and the level of legal representation.

For Stage Two, a court observation study was piloted in September and October 2002 in the South Australian District Court and the Adelaide Magistrates Court. Following analysis of those results and a review of the process, observations were conducted in South Australia and Victoria between November 2002, February, September and October 2003.

Methodology

While the focus of our study was bail applications, data were collected on those hearings where bail was not an issue. Data on these hearings, simple adjournments, were collected on a simplified observation instrument. A total of four observers were used. The data were coded (using ABS descriptors where appropriate) and analysed using SPSS.

Protocols

Sometime prior to observation the courts were informed of the study but not the precise dates of the observations. On the day, the observers introduced themselves to the court staff, and observed from the body of the court. They recorded such matters as whether the defendants was appearing ex custody, already bailed, whether an application for bail was made, whether evidence was ordered, tendered or given, whether the defendant was legally represented, the most serious charge, the number of charges, the attitudes of the prosecution or defence to the question of bail, the outcome and the duration of hearings. The observers also assessed ethnicity and gender.

Which courts?

The courts observed were selected after consultation with the court's staff and included:

South Australia

District Court (Adelaide)

Adelaide Magistrates Court

Holden Hill Magistrates Court

Port Adelaide Magistrates Court

Victoria

County Court (Melbourne)

Melbourne Magistrates Court

Ringwood Magistrates Court

Frankston Magistrates Court

Numbers of observations

Although approximately the same amount of time was spend in equivalent courts, the differences in court processes meant significant variation in the numbers of hearings observed. In South Australia 177 hearings were observed, and in Victoria 182.

	Bail applied for	**Bail not applied for**	**Total**
South Australia			
District Court	2	61	63
Adelaide MC	35	42	77
Holden Hill	3	6	9
Port Adelaide	12	22	34
Not coded			4

Victoria			
County Court	4	10	14
Melbourne MC	42	66	108
Dandenong	1	30	31
Frankston	4	10	14

Table D1

As the above table D1 indicates, bail hearings only make a small proportion of the daily work of the criminal courts. The very small number of hearings where bail was applied for in both of the higher courts (the District Court and County Court) meant that these cases have been not been further analysed. The Magistrates Court hearings where bail was sought were analysed for duration, whether evidence was produced or called for, attitudes of prosecution to bail, existence of legal representation, level of consistency between prosecution position and outcomes of hearings.

Demographics

In terms of demographic profile of defendants, a very similar pattern emerged for South Australia and Victoria. Even with the large limitations created when trying to assess demographic characteristics by observation, the results obtained showed no major differences between the two States. The exception to this is the figure for defendants from non-English speaking backgrounds making bail applications in South Australia.

Non-bail hearings

	South Australia	*Victoria*
Male	87 per cent	80 per cent
Female	13 per cent	20 per cent
Indigenous*	8 per cent	5 per cent
NESB*	13 per cent	8 per cent
Percentage of defendants charged with 1 offence	47 per cent	31 per cent
Percentage of defendants charged with 2 offences	20 per cent	19 per cent
Most common MSO	Drive unreg 14 per cent	Aggravated SCT 12 per cent

Table D2

Bail hearings

	South Australia	*Victoria*
Male	80 per cent	89 per cent
Female	20 per cent	11 per cent
Indigenous*	4 per cent	5 per cent
NESB*	2 per cent	19 per cent
Percentage of defendants charged with 1 offence	20 per cent	38 per cent
Percentage of defendants charged with 2 offences	20 per cent	14 per cent
Most common MSO	Larceny 19 per cent	Armed robbery 26 per cent

Table D3

*No data for significant numbers of defendants

In Victoria, 78 per cent of the bail hearings involved defendants who were in custody; in South Australia 70 per cent of the defendants were appearing *ex custody*.

Levels of contestation

Levels of contestation can measured in a number of ways. We have measured this by numbers of actual bail applications which are opposed by the prosecution.

With respect to level of contestation in bail hearings, both Victoria and South Australia had a similar level at around 40 per cent. This is significantly higher than the level recorded by Hucklesby in Wales.[187]

[187] Hucklesby (1997).

	South Australia	***Victoria***
Bail applications	50	37
Bail application unopposed	30	19
Contested hearings	20	15
No data		3

Table D4

Duration

Based on research conducted for Stage One of this consultancy we expected to find that Victorian bail hearing took longer than those conducted in South Australia. This was confirmed by the observations.

The following table shows mean and median times

	SA	**Victoria**
Mean (minutes)	5	23
Median (minutes)	5	18

Table D5

The longest bail hearing observed in South Australia took 35 minutes; the longest in Victoria 88 minutes. As might be expected, there is a direct relationship between prosecution opposition and whether evidence is presented and duration of hearing. In South Australia, opposition to bail applications would double the length of the hearing although the increase was relatively small in absolute terms (under 4 minutes to almost 8 minutes). In Victoria the order of the increase was greater: from around 13 minutes to around 34 minutes. What is significant here is the amount of time spent on uncontested cases in Victoria is greater than contested cases in South Australia.

The leading of evidence also increases the duration of hearings. In South Australia, the presentation of evidence increased the mean duration from just under 5 minutes to 8 minutes. By contrast in Victoria presenting evidence increased the duration almost fourfold to around 28 minutes. As discussed in the next section it must be noted that in South Australia in all cases the evidence was in documentary form, whereas in Victoria cases often involved sworn testimony.

In recording duration the observers in debriefing noted that as most hearings involved a number of issues, consideration of bail matters was often interspersed through a hearing. The observers recorded the sum of the time spent considering bail.

Evidence

Stage One suggested one of the differences in the remand in custody process was that in Victoria, unlike South Australia, evidence was more likely to be required in the course of hearing considering whether to grant bail.

	South Australia	Victoria
No evidence	76 per cent	19 per cent
Evidence presented	18 per cent	78 per cent
Evidence ordered	6 per cent	3 per cent
Not coded	0	0

Table D6

The research observers did not distinguish between the nature of the evidence (documentary or oral evidence) and the source of the evidence. Anecdotally, the observers report that while they did not see a police officer give evidence on an issue related to bail in South Australia, this was commonly observed in Victoria.

Role of prosecution and defence lawyer

Of those defendants appearing *ex custody* in South Australia, the prosecution opposed the application in 52 per cent of cases whereas in Victoria this figure fell to 44 per cent. For defendants on bail in South Australia the prosecution opposed the application in 14 per cent of cases whereas in Victoria the prosecution did not oppose any of the applications made by defendants on bail.

There was minor variation in the extent to which defendants were legally represented. Some 11 per cent of Victorian defendants were unrepresented at the bail application; in South Australia that figure was 10 per cent.

Bail outcomes

One result has been a lower consistency between prosecution attitude and bail application outcome than expected. The literature review indicates that a high level of consistency has been observed between prosecution attitude and bail application outcome. It is true that for persons on bail, whether or not a formal application for bail is made, bail is usually continued (in these situations the prosecution rarely oppose bail continuing). However for those defendants for whom the prosecution oppose bail being granted, the literature suggests that courts tend to refuse bail and to remand the defendant in custody.

Our data show that, at the highest, magistrates in South Australia only agreed to prosecution requests for remand in custody in half of the contested cases. Magistrates in Victoria were, however, less likely to accede to prosecution requests for remands in custody.

	South Australia	*Victoria*
Prosecution opposed application for bail	20	15
Court remanded in custody	10	3

Table D7

As a proportion of the number of bail applications, 20 per cent of defendants in South Australia are remanded in custody whereas in Victoria is 8 per cent.

Reasons and conditions

The very small number of cases that ended with remands in custody observed in Victoria means that no useful data were obtained on reasons for refusal of bail in Victoria. For those defendants remanded in custody in South Australia (10 defendants), the two most common reasons were either outstanding warrants existed or the risk of re-offending. Again the small sample size prevents any significant analysis.

For those granted bail a variety of conditions were commonly imposed. Frequently a combination of conditions was imposed. The statistical data are clouded by the fact that in Victoria the most common order was 'previous conditions to continue' without specifying what they were, which caused difficulties for an observation study. On a frequency count of new orders made the most common condition in South Australia was to require guarantors (56 per cent of cases) followed by the requirement to reside at a particular address (31 per cent of cases). In Victoria the order was reversed with residential requirements being the most common (39 per cent of cases) followed by guarantors (35 per cent in Victoria). Less common conditions required reporting, being supervised, not contacting victims and, in one South Australian case, being subject to a curfew.

ii) Case studies

This study focuses on the history of remand/bail decision-making in relation to individual offenders. It was designed to confirm that bail status might change for a defendant, and to identify, where possible, the reasons for these changes in bail status. This Study experienced significant difficulties. The type and amount of data kept in court files were very limited and we could obtain useful data from South Australia. The South Australian component of this Study was carried out in 2003. Unfortunately gaining access to the Victorian court files proved more difficult and, when it was obtained, perusal of the files revealed that continuing with the Study would not provide sufficient information to enable us to undertake analysis of any significance. Reported below are the results of the South Australian court file analysis.

Methodology

In order to focus on the operation of the bail or remand process, the case study sought to explore the question of changes of bail status of an individual offender separately from the considerations that arise from the offence with which the offender is charged. The case study was undertaken on a set of cases in which the most serious offence was the same for each case. The charge of Serious Criminal

Trespass (and its Victorian equivalent) was selected, following discussions in both jurisdictions and analysis of the results of the observation study, as being one of the offences most frequently linked to remands in custody.

The case selection criterion was all cases finalised in July and August 2003. It was determined that a minimum case number of 30 cases in each of the two jurisdictions of the Magistrates Court and the District Court would be explored for the study.

In South Australia, the case studies were undertaken by a researcher from the South Australian Office of Crime Statistics and Research. This researcher was able to combine data from the computerised system with a direct search of the court file to develop a profile of the defendants' bail status from the point of arrest to final determination of the case and to collect information about the reason for changes in bail status.

Results

South Australian data

Of the 30 cases identified in the South Australian Magistrates court

12 (40 per cent) remained on bail until their case was finalised

5 (17 per cent) remained in custody until the case was finalised

12 (40 per cent) were both granted bail and held in custody between the time of apprehension and the finalisation of the court.

1 (3 per cent) case was withdrawn without bail being an issue.

Of the 26 cases identified in the South Australian District Court

9 (35 per cent) remained on bail until their case was finalised

7 (27 per cent) remained in custody until the case was finalised

10 (38 per cent) were both granted bail and held in custody between the time of apprehension and the finalisation of the court.

Case outcomes

South Australian Magistrates Court

Final Sentence/Bail Remand status	On Bail throughout	In custody throughout	Both remanded in custody and bailed over the time of the case	Total
Prison	1 (8 per cent)	3 (60 per cent)	6 (50 per cent)	10 (33 per cent)
Suspended sentence	5 (42 per cent)		1 (8 per cent)	6 (20 per cent)
Fine	1 (8 per cent)			1 (3 per cent)
No conviction recorded	1 (8 per cent)			
Case dismissed	3 (25 per cent)	2 (40 per cent)	3 (25 per cent)	7 (23 per cent)
Case withdrawn	1 (8 per cent)		1 (8 per cent)	3 (10 per cent)
Other			1 (8 per cent)	1 (3 per cent)

Table D8

South Australian District Court

Final Sentence/Bail Remand status	On Bail throughout	In custody throughout	Both remanded in custody and bailed over the time of the case	Total
Prison		6 (86 per cent)	7 (70 per cent)	13 (50 per cent)
Suspended sentence	6 (67 per cent)	1 (14 per cent)	2 (20 per cent)	9 (35 per cent)
Bond	2 (22 per cent)			2 (8 per cent)
No conviction recorded				
Case dismissed				
Case withdrawn				
Other	1(11 per cent)		1 (10 per cent)	1 (8 per cent)

Table D9