Rethinking Bail

Court Reform or Business as Usual?

Max Travers · Emma Colvin
Isabelle Bartkowiak-Théron
Rick Sarre · Andrew Day
Christine Bond

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"In recent years much research on bail has focused upon methods of risk analysis. However, this project takes a more personal and humane approach, based on therapeutic jurisprudence perspectives, by focusing upon people who come before the courts with problems of mental illness, substance abuse, unemployment and homelessness, often in combination. This approach provides an important and useful counter-point to the growing use of algorithms in decision-making which may have the effect of de-personalising the process."

—Arie Freiberg

"Travers et al.'s new book, *Rethinking Bail: Court Reform or Business as Usual?* provides a rich narrative account of bail decision-making in Australia. Their observations of 150 bail applications in four states are complemented by 'shadowing' of legal practitioners, analysis of court transcripts, and interviews and focus groups with key participants in the bail process, including magistrates, prosecutors, defence lawyers and bail service providers. This ethnographic approach reveals important insights into the operation of bail processes, such as the practitioners' apparent lack of interest and engagement with reform issues, the sheer volume of materials processed and the resultant acceptance of 'the possibility of mistakes in a fairly chaotic environment', and the pressures inherent in a chronically under-resourced system. In addition to reporting on 'business as usual', Travers et al. also show the path toward reform, involving the expansion and improved delivery of pretrial services and adoption of a therapeutic jurisprudence approach. This book will be invaluable for researchers, policy-makers and justice practitioners involved in seeking, opposing, granting, administering, reviewing and understanding bail in Australia and beyond."

—Lorana Bartels, *Professor and Program Leader of Criminology, Australian National University, Australia*

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Max Travers
School of Social Sciences
University of Tasmania
Hobart, TAS, Australia

Isabelle Bartkowiak-Théron
Tasmanian Inst Law Enforcement Studies
University of Tasmania
Hobart, Tasmania, Australia

Andrew Day
School of Social and Political Sciences
University of Melbourne
Melbourne, VIC, Australia

Emma Colvin
Centre for Law and Justice
Charles Sturt University
Bathurst, NSW, Australia

Rick Sarre
School of Law
University of South Australia
Adelaide, SA, Australia

Christine Bond
School of Criminology & Criminal Justice
Griffith University
Mt Gravatt, QLD, Australia

ISBN 978-3-030-44880-6 ISBN 978-3-030-44881-3 (eBook)
https://doi.org/10.1007/978-3-030-44881-3

This Palgrave Macmillan imprint is published by the registered company Springer Nature Switzerland AG.
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

Acknowledgements

In 2013, the Tasmanian Institute of Law Enforcement Studies at the University of Tasmania arranged a workshop for practitioners and academics interested in bail reform. This was hardly a national movement in Australia at the time, and nothing substantially has changed today. Nevertheless, it was significant that some senior practitioners, with considerable experience of working in the criminal justice system, felt the issue should receive some attention. The workshop raised issues on why remand rates had increased since the 1980s and how social services could address the needs of defendants with vulnerabilities such as being homeless or having a mental illness. Beyond what was said, there was perhaps a more important underlying message. Although no one had a clear view on what might be the underlying problem or potential solutions, there was something wrong with how the lower courts responded to low-level offending at the pretrial stage.

Six years later, we have written this book. We hope that it will interest practitioners and academics in Australia and in other countries interested in bail reform. With the help of supporters in government bureaucracies and practitioners across a variety of agencies, we have been able to pursue an empirical project based on observing bail applications and interviewing practitioners. Like previous researchers, we draw on this evidence to promote initiatives that make it easier to obtain bail, while recognizing that any evidence may never allay concerns about offences committed on bail.

We have developed and conducted this project as a research group. Although we have similar views about criminal justice policy, we come from different academic disciplines and, in some cases, have a philosophical commitment to particular research methods. One of the strengths and weaknesses of criminology as an applied subject is that all this gets mixed together, although at times we will be approaching the same topic or problem from different theoretical perspectives.

We are particularly grateful to senior magistrates in Tasmania, South Australia, Victoria and New South Wales for facilitating this project in their own courts. This does not mean that these practitioners necessarily approve or endorse the findings, or have always been able to help. Nevertheless, it is pleasing that they are open to considering reform. The ability of universities to make constructive criticisms of government agencies through independent research has arguably been reduced in recent years, simply because there is less funding from research councils. It remains important in a democracy that institutions such as the courts are willing to reflect on practices such as bail decision-making, and that the public should participate in these discussions. We would also like to thank a variety of agencies, including police organizations in the four states. Any help is greatly appreciated and has made possible this study.

We would also like to thank our universities and the Criminology Research Council for supporting this project. We would like to acknowledge that the transcripts for applications 1, 6, 7 and 8 were previously published in "Business as usual? Bail decision making and 'micro politics' in an Australian magistrates court". *Law and Social Inquiry*. Vol. 42, No. 2, pp. 325–346 (2017), and the transcripts for applications 4 and 5b in "Craft skills and legal rules: How Australian magistrates make decisions". *Ethnographic Studies*, pp. 147–166 (2019). We hope that this book results in discussion and reflection about bail decision-making and court reform.

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Introduction

A number of tragic events in Australia have transformed bail from a rather dry and technical subject only of interest to criminal lawyers to a matter for public concern and even debate. There were three events that received a high level of media reporting. The first in 2012 was the murder in Melbourne of Jill Meagher by Adrian Bayley, a convicted rapist released from prison on parole (Ford 2017). This is technically bail in the Australian criminal justice system. Even though there are significant differences from pretrial bail, there are similar considerations in determining if a person with a history of offending poses a risk to the public.

The second in 2014 was the Lindt café siege in Sydney. Man Haron Monis, who is now often described as a "deranged mad man", took hostages and when the police eventually stormed the building killed the manager Tori Johnson. A customer Katrina Dawson was killed by a ricochet from a police bullet (Australian Asssociated Press 2017). Mons Monis was on bail, even though he was charged with a serious offence. This resulted in a great deal of media interest and commentary. The third event involved a person with a history of mental illness, Dimitrious Gargasoulas, who ran down people in the main shopping street of Melbourne, injuring thirty people and killing six, including a baby (McKay and Zervos 2017). Gargasoulas had been granted bail, even though he had a record of violent offending.

M. Travers et al., *Rethinking Bail*, https://doi.org/10.1007/978-3-030-44881-3_1

Although each of these events was newsworthy, the murder of Jill Meagher probably only became widely known because she worked in ABC radio. There have been other cases in which bail decisions have led to murders in Victoria and New South Wales that have received less attention, or were only local news. In Tasmania, there have been recent cases that were not seen as newsworthy outside this small island state. Jodi Eaton was killed by her partner while on bail. He had been charged with an offence of domestic violence (Burgess 2015).

Each of these events resulted in calls to strengthen the bail laws, and in some cases they resulted in legislation and procedural changes. In response to Jill Meagher's death, an inquiry by former High Court Justice Ian Callinan (2013) recommended higher penalties for breaching parole, and asked parole boards to take greater care. This has resulted in more prisoners being refused parole. The State Coroner in New South Wales (2017) made recommendations on bail decisions and procedures in the Monis case. Following the Bourke Street deaths, Justice Paul Coghlan (2017) was asked to conduct a review about bail practices in Victoria. In Tasmania, there have been proposals to make it more difficult to obtain bail for certain offences, by adapting legislation that already exists in other states.

Although these tragic events understandably receive a lot of attention, at least for a limited period, it would be a mistake to see the problem of bail entirely in terms of soft laws or errors in decision-making. Two other issues are important that are rarely reported or discussed in the media, or acknowledged in legislation. The first is that there has been a dramatic increase in the remand population, as well as the prison population more generally, in the last ten years. In New South Wales, the proportion of unsentenced prisoners in relation to the overall prison population in 2008 was 23.4%, and today it is 33.5%. In Victoria, the proportion of unsentenced prisoners in relation to the overall prison population in 2008 was 19.2%, and today it is 36.3%.[1] Victoria has experienced a

[1] There are different ways of recording the remand rate, including the number per 100,000 population remanded and the mean amount of time remanded in custody in each state. This book uses the proportion of remand prisoners as a proportion of the adult prison population as a measure. This is the main measure employed by the Australian Bureau of Statistics, and is adequate for most purposes.

particularly dramatic rise in the last year: there was a 22% increase in the proportion of unsentenced prisoners in relation to the overall prison population. This is concerning since offending has neither increased nor fallen during the last ten years.[2] Although it is hard to estimate given the statistical information available, a significant proportion of this increase has come from more defendants being refused bail.[3] We will be arguing that this explosion in incarceration should not be underestimated by governments that are seeking to reduce expenditure, and should not be taken lightly by practitioners and the public, or seen as someone else's problem.

The second is that there are debates within the criminal justice system about the extent to which offenders should be helped with welfare services at the pretrial stage. A series of initiatives inside courts have, at the very least, demonstrated that there are alternatives to "business as usual" even if they largely remain pilot schemes or cannot secure funding to operate at scale to influence the remand rate. These movements challenge the intellectual justification for existing practices. They have also resulted in a different role for the magistrate, in providing social support to defendants in different ways, even though traditionalists remain sceptical or hostile. One policy initiative, influenced by these ideas, is being implemented in the State of Victoria through the Court Integrated Services Program (CISP). A substantial number of defendants are being given social support and supervision, and asked or even mandated to attend rehabilitative programs, instead of being remanded to prison. In this introductory chapter, we will supply more substance to these observations and arguments. We also explain how we came to write this book, and outline the objectives and content of each chapter.

[2] Crime statistics collected by police organizations in each State are collated by the Australian Bureau of Statistics. According to the 2018 report, the number of robberies fell by 58% between 2000 and 2017.

[3] The extent to which a rise in imprisonment is caused by bail decisions is difficult to calculate. It is possible that most defendants remanded in custody receive sentences of imprisonment, and that these are reduced by time spent on remand. Studies in the USA that have looked at this issue closely have estimated that bail refusals lead to a 10% increase in the overall prison population (e.g., Oleson et al. 2016). In Australia, there has been a steady rise in the remand rate for twenty years, and a rapid rise in the last ten years. It seems fair to conclude that this has contributed to a "significant" proportion of an increase in imprisonment.

Bail Controversies

In Australia, and in other countries, public debate and discussion on bail tends to revolve around whether bail laws are sufficiently restrictive in managing the risks from potentially dangerous or disruptive defendants. In fact, the inquiries following tragic public events often conclude that the laws are already tough enough, and that there was some organizational problem that resulted in a poor decision, or even that this could not have been avoided (Callinan 2013; Coghlan 2017). This will make sense to lawyers who know that such "mistakes" happen all the time (just as patients regularly die through mistakes in hospitals or human services fail to protect vulnerable children). To come to an assessment, it is however important to understand the practical circumstances of the work. In the case of bail tragedies, this is possible to some extent because there is normally a public inquiry that describes what took place, drawing on the testimony of practitioners, and makes recommendations.

In the Jill Meagher case, the offender, Bayley, was given parole after serving a sentence of eight years for sexually assaulting five sex workers. Bayley's parole had continued even though he had breached the conditions in a violent attack seven months previously on a man outside a pub. Although the full information on how the decision was made is not available, reporters commented on "prison psychologists' failure to detect that Bayley was … conning them that he had reformed" (Dowsley et al. 2015). A forensic psychologist commented that serious sexual offenders, such as Bayley, learn the correct answers in tests, so more weight should be placed on the "matrix" of circumstances (Marshall and Moulden 2001). In this case, serious sex offences had also been committed while he was supervised on parole but he was not identified as the offender through DNA evidence until after the publicity following the Meagher murder (this is described in the inquiry as one instance of "communication difficulties"). It is not clear how strengthening the law would in itself have prevented Bayley from obtaining parole. One result was that the Victorian government invested greater resources in establishing a full-time parole board with greater resources to improve decision-making.

There is a chapter on bail in the State coroner's report on the Lindt Café siege. This attempts to explain why Monis, who was on bail for sending threatening letters to soldiers, was subsequently given bail when accused of sex offences against different women, and conspiracy in the murder of his ex-partner. The forensic reconstruction by the coroner should be read in full, since any summary will miss important details. It is still, however, worth giving a simplified summary here. The coroner felt that the submissions of a solicitor working for the Director of Public Prosecutions (DPP) on a bail application in November 2013 (when charged with being an accessory to murder) were inadequate. This was partly because there was only an oral argument, whereas the defence had provided full written submissions. Another error was that the prosecutor did not mention that Monis was on bail for the postal offences, as he did not have access to this prior history. A third error was that the court employed the wrong legal test, but this was not challenged by the prosecutor.

The next error happened when junior police officers raised concerns about the outcome within the police, but did not supply sufficient detail on an administrative form to enable a senior officer to recommend an appeal. A fifth error took place in a bail application made in April 2014 when Monis was charged with sexual assault charges on women who came to him for "spiritual healing". He was able to show that he had been on bail for four years on the postal charges, although no one noticed that the alleged offence of conspiracy to murder had taken place while on bail. A sixth error occurred in October 2014 when the police had obtained evidence to charge Monis with more sex offences. There was a decision by the police to issue a summons rather than making an arrest (a choice that might have changed the subsequent decision to continue the bail). The prosecutor took the view that the increased number of charges did not lead to a greater risk of not meeting bail. He agreed that there was an "unacceptable risk" but this could be mitigated by conditions such as reporting to a police station. On 15 December, while still on bail, Monis entered the café with a shot gun.

Although the bail law in New South Wales, already subject to political debate, was subsequently strengthened, the coroner's report did not suggest that the law, at that time, was responsible for Monis obtaining bail despite being charged with three serious offences. Instead the report

identified a series of minor human errors. Some could be described as correct or defensible decisions that look different in hindsight. Reading between the lines, others appear to result from overworked prosecutors or system failures in transferring information:

> there is no evidence that any of the prosecutors or police officers involved recklessly disregarded their onerous responsibilities. Indeed all of the evidence supports the opposite conclusion. It indicates that they were hard-working, committed professionals who were extremely busy and took their difficult jobs seriously. In some cases they erred or should have done better. Such shortcomings are regrettable but none of us performs to the highest standard every day and at all times, and none of the police or prosecutors could have foreseen how Monis would abuse the liberty he was granted. (State Coroner of New South Wales 2017, paragraph 199)

The recommendations by the Coghlan review following the Bourke Street deaths are quite complex, and can be viewed as having different consequences depending on whether you prioritize the rights of defendants or public safety. Although Coghlan approved the existing tests, and sometimes suggested that his objective was to clarify rather than alter the existing law, it would be fair to say that some changes made it more difficult for defendants to obtain bail. In Recommendation 10, he suggested that a list of offences should be added to Schedule 2 of the Bail Act "requiring good reasons why bail should be granted". These include "threats to kill", "rape" and "armed robbery". In fact, the onus of proof was already reversed for these offences, although this would not immediately be clear to a member of the public or politician trying to make sense of the technical provisions in the Bail Act. What might appear to be an attempt to strengthen the law is really an exercise in clarification. To complicate matters, the review also made suggestions for diverting minor offenders from the system. We consider this proposal further later in this book.

The key issue is whether this review claimed that any of the changes to legislation proposed would have prevented the Bourke Street massacre. While intended to restore public confidence in the bail system through recommending changes in law and procedures, the review appeared to be

silent on this issue. The mass killings took place on 21 January 2017. According to one journalist:

> Charge sheets released by the court on Monday reveal Mr Gargasoulas was last year charged by police with reckless conduct endangering life and failing to stop when directed by police, related to an alleged incident in St Kilda on November 19. He also faces unrelated charges including car theft, intentionally causing injury and possessing the drug ice, related to alleged incidents that took place between January 20 last year and January 10 this year. (Cooper 2017)

It appears that this defendant was refused bail by the police on 19 November, but then obtained bail from a Bail Justice.[4] This led to criticism that people who were not magistrates were making the decisions. Gargasoulas may have received bail from the police on previous occasions in connection with other charges. There is, however, no reason to conclude that a magistrate in applying the law would have refused bail. The review had no power to compel the police to provide details of a particular bail application.

The Rise in Remand

Although it does not always receive much attention as a news story, there is more to bail than the question of whether deaths could be prevented if there were tougher conditions. This was recognized in the Coghlan report in some thoughtful paragraphs that drew on statistical evidence to challenge the perception in Victoria that more offences are committed on bail:

> 2.17 These perceptions are not necessarily reflected by the data. The number of people received into adult prison on remand in 2015–16 was 70% higher than in 2010–11 (4,034 additional remand receptions). As of 23

[4] The system of bail justices in Victoria had arisen partly as a way of offering speedy decisions on bail applications. The bail justices did not sit in Melbourne's criminal courts, but travelled to different police stations. They employed the same criteria in the Bail Act as magistrates. After the Bourke Street rampage, this arrangement became politically unacceptable. A new after-hours court was established in the central Melbourne court in which retired magistrates heard applications.

> March 2017, 2,328 adults were on remand in correctional facilities in Victoria, with a further 297 in police cells, almost all of whom are on remand. Traditionally, approximately 18–20% of adults in correctional facilities have been on remand. However, in the three years since 2014, this has increased to 33% (for men) and 44% (for women).
>
> 2.18 The data also shows that bail is refused more often now than five years ago. For example, from 2015/16, Magistrates' Court data shows that 33% of bail applications were refused, compared to 2011/12, when 21% of applications were refused. Bail justices are also remanding a slightly higher percentage of applications before them (85.5% in 2016 compared to 83.7% in 2015).

National statistics indicated that Victoria, at that time, had a lower remand rate, and imprisonment rate, than other Australian States, suggesting there was a distinctively lenient court culture, at least in metropolitan areas. According to the figures obtained by Coghlan, which are not available to researchers, the remand rate had increased. Coghlan suggested that this might be due to magistrates becoming risk averse due to "a number of causes, including increased police numbers and increased risk aversion by police and other decision makers". In an earlier section, he also recognized the central problem that it is impossible to achieve the right balance between protecting the public and giving those who have not been convicted the presumption of innocence. We will return to this central question later in this study.

> 2.13 Ultimately, the question is how to ensure that the right people are on remand. It is untenable from a practical viewpoint, and undesirable from a principled viewpoint, to simply remand more and more people, although mere numbers cannot govern who should be on remand.

The qualification in the last clause is interesting because it suggests that, if crime is increasing, then the courts should imprison greater numbers. This suggests there is some kind of objective test applied by magistrates, whereas as we have already suggested decision-making varies between States. There is not normally enough information to explain these variations. It seems likely that the proportion remanded is caused in

some way by the tests provided in legislation, although no one has systematically investigated the extent to which magistrates are influenced by guidelines or directives (although see Weatherburn and Fitzgerald 2015). Notwithstanding the intuition of an ex-judge, we also cannot confidently say that decision-makers are influenced by public concerns about bail as reported in the media. We do, however, know that principles often explicitly stated in legislation matter to the judiciary, and also the police. This is why, on average, a large proportion of applicants obtain bail.

We also know that governments in Australia are concerned about the rising cost of imprisonment. Those who believe that the courts should become tougher have to persuade not only liberals seeking to protect the rights of defendants, but hard-hearted policy-makers who see imprisonment as an expensive means of combatting crime. From this perspective, sending ever larger numbers to prison before they have been sentenced puts pressure on scarce resources. There are regular newspaper reports in different States about remand prisons becoming full. Some prisons have been forced to "double up" beds by putting two inmates into cells designed for one person. Another consequence is that it becomes difficult to control inmates without keeping them locked in cells all day.[5] It is surprising that there have not been more disturbances, although minor incidents may not be reported.

It is inevitable that public employees, who, to some extent, benefit from an expansion in the penal system, have a limited incentive in changing their practices. This tension between professionals and the State, especially one subject to financial pressures to become more efficient, will be another theme we will consider later in relation to bail policy.

The Challenge of Pretrial Services

It is possible when focusing on terrible public events to miss significant developments that are taking place in criminal courts, both generally and in relation to bail. Since the birth of modern criminology in the nineteenth century, there has always been an underlying tension between the

[5] Personal communication.

view that offenders should be punished as rational agents, or helped because their offending is caused or shaped by social or psychological forces. David Garland (2018/1985) argued that there was a shift from viewing offenders as rational agents to recognizing social and psychological causes of crime in the late nineteenth century. But he also recognized compromises between judicial officers and new occupations such as probation officers.[6]

Observing hearings in magistrates courts today, it is hard not to see the relevance of these debates. Many defendants are, for example, mentally ill or have a drug or alcohol problem. Others are homeless or unemployed. A non-custodial sentence often involves a defendant attending rehabilitative programs. Other programs such as detoxification from drugs or alcohol addiction are provided in prisons. Although there are practical challenges that we consider in this book, some courts have had some success in offering such assistance and programs at the pretrial stage, often within problem-solving courts, or under such principles as therapeutic justice. This is presented as a means of reducing the prison population while addressing the causes of crime.

There are other practices employed by some magistrates which are even more subversive in relation to the traditional court. These originate in a movement, developed in the USA, known as therapeutic jurisprudence. The premise is that the contact between the defendant and magistrate can and should itself have a therapeutic (and consequently rehabilitative) effect. This requires judicial officers to spend time talking to each defendant, which does not happen in the traditional courtroom (Nolan 2001). It also involves monitoring, and even rewarding progress. The aim is to encourage personal change and a sense of responsibility in a way that does not happen if a defendant is asked to sign in at a police station twice a week.

We will examine the principles behind pretrial services, and what happens in practice later in this study. Although it might seem that these "soft" approaches only work with minor offenders, it should be

[6] One could argue that the authority of judicial officers has never been challenged, and law has absorbed new knowledges. But perhaps its authority is being undermined or reshaped by the emerging welfare-oriented court.

remembered that those who commit violent crimes might also benefit from early intervention. Bayley should arguably not have been released on parole following his sentence. Monis should not have obtained bail. However, a different argument could be made about Gargasoulas who killed six people, including a baby, in the Bourke Street rampage. There was no means of knowing at the time of his bail application that he would commit mass murder. Perhaps he would not have been at large to commit the offences following an assessment, or less likely to commit them if there had been some supervision and support as a bail condition.

Objectives, Assumptions and Research Methods

Most researchers and practitioners in Australia accept the legal system as it is and do not imagine there could be radical changes to business as usual. There have been some innovations as particular magistrates and courts have introduced diversion lists to specialist courts for sentencing. We will review these developments in Chap. 2. These courts are selective in admitting defendants and are only concerned with sentencing after a defendant has pleaded guilty. Although they are well regarded, they only assist a few defendants and do not really challenge practices outside the specialist lists.

In some US courts, welfare agencies have a much larger role in determining risk or allocating defendants to programs. Bail decisions are often made by delegated administrative officers, overseen by judges. No law reform institute that has reviewed bail in Australia has even contemplated suggesting radical changes. Instead reports look in fine detail at legislation, as if changing the provisions will affect the remand rate, without considering how decisions are made, or if there are alternative models in which judicial officers are guided by welfare professionals. While we are not suggesting there should be radical changes through this study, we believe that alternatives should be considered, and that some organizational changes are necessary and possible.

We also noticed that most previous research in Australia and other countries was quantitative. It is not entirely clear why this should be the case since in other areas of government policy, such as health and education, there are large volumes of literature by qualitative researchers. One reason may be that, with some exceptions in the USA, sociology and anthropology have never become established in law schools. This is not to say that these disciplines have no influence, but there is no space in the curriculum for teaching social science research methods. Another reason is that quantitative research is viewed by governments as producing objective and useful knowledge. Qualitative research is often still viewed with suspicion or as supplementing quantitative findings. We will discuss the methodological issues that arise in mixed methods research later in the book as well as the practical challenges in obtaining data.

The quantitative research on bail, certainly in the USA, but also in Australia and the UK, has been extensive. In the USA, there is a large body of literature that identifies the factors that influence decision-making. This research has been used over many years to establish and develop pretrial services in several states, as an alternative to the bond system (Baughman 2018). Other studies in the USA, and the UK, have looked at variations between decision-makers (Hucklesby 1997), or bias towards women or ethnic groups (Sanderson et al. 2011; Oleson et al. 2016). In Australia, researchers have demonstrated the punitive character of bail decisions: defendants often spend time as remand prisoners even though they ultimately do not receive a custodial sentence (New South Wales Law Reform Commission 2012). There have also been studies that have sought to determine how many offences are conducted on bail (e.g., Tasmanian Law Reform Institute 2004; Snowball 2011). Other studies have examined the impact of legislation on sentencing practices. There are also evaluative literatures about the effectiveness of programs offered at the pretrial stage, in which there is an emphasis on quantitative methods such as measuring recidivism rates.

One difficulty we found in addressing our own research questions is that the quantitative data was not available, mainly because it is not collected by government agencies. We have filled a gap in the literature by describing occupational work in more detail, and more sensitivity to meaning and situated actions, than previous researchers. However, as

qualitative researchers will know, there is a difference in the understanding you can obtain from conducting a few interviews and spending a considerable amount of time with any occupational group. We discuss these methodological limitations in later chapters, and the strategies we took to overcome these problems. To look at these difficulties more positively, one might argue that the obstacles and practical difficulties come from the nature of the institution being researched. They are also only significant if you have interpretive objectives, for example in seeking to understand and document legal decision-making. Those who make political arguments about statistical data or selective examples are not troubled by these difficulties.

For those interested in theoretical or epistemological questions, we are interested in bail decision-making and services at the local level and do not explain individual actions as resulting from wider structural forces. We will not, for example, make too much of the concept of power in explaining or critiquing bail decisions. We accept that magistrates are employing legitimate authority when they send a defendant to prison (Roach Anleu and Mack 2017). Nevertheless, we also take seriously the arguments of critical theorists who see the criminal justice system as shaped by wider economic and social structures, and how these are changing (Wacquant 2009). However, while there is clearly some truth in these arguments, an overly political argument often makes it harder to see what happens inside institutions or even to understand political processes in great detail. One question we seek to address in this study is how courts change. The fact that courts and other agencies are changing, even in a limited way, is not always recognized by the more political literature.

Our objective in this study was to understand bail decision-making in Australia, and to investigate the extent to which welfare services are offered at the pretrial stage. To answer these questions, we observed bail applications in the four States of Tasmania, South Australia, Victoria and New South Wales. We chose these research sites partly because it would be practically possible to conduct research on a small budget, but also because there are differences in remand rates indicated by national statistics. Victoria and, to a lesser extent, Tasmania had low rates by Australian standards. New South Wales and South Australia imprison a larger proportion of defendants before trial. In addition to observing hearings, we

also sought to interview practitioners, including magistrates, prosecutors, and Legal Aid lawyers. We also interviewed those providing services. We "shadowed" prosecutors in an attempt to answer questions about risk assessment. We also obtained information about the experiences of particular defendants (not available from observing hearings), through obtaining bail histories from lawyers.

One way of understanding our approach is that it seeks to obtain access to institutional processes through multiple avenues. We relied heavily on the public nature of court rooms. Even though a university-based researcher in Australia has to seek permission to report in these public spaces, it is hard for any agency to prevent this type of research taking place. We also drew on the fact that there are many professional groups. There are, for example, a number of occupational groups that can give some insight into the considerations involved in decision-making. Similarly, a variety of organizations and professionals offer services to defendants.

The Structure of This Book

Any book about some aspect of the criminal justice system is an opportunity to explore and revisit the previous literature, and contribute to debates that have been conducted (often for many years) about the nature of law and punishment. It is also an opportunity to contribute to our understanding of methods, present new findings, and to advocate new policies. A study about Australia will contribute to local discussions among policy-makers and criminologists. The findings and arguments may also interest those working in the field of pretrial services internationally.

Chapter 2 considers bail reform in the wider context of the history of criminal courts. It is interesting that many progressive reforms and initiatives are happening in criminal courts at a time when the imprisonment rate is rising. This chapter locates these developments as part of debates that started in the eighteenth century on whether the criminal justice system should be concerned with punishing rational offenders, or assisting those not responsible for their actions. It also locates them as part of

debates about neo-liberalism: the argument that wider structural and cultural forces are responsible for a punitive turn in the last forty years.

The second section of the chapter considers what appear to be contradictory developments that seek to rehabilitate defendants and recognize social causes of offending. Restorative justice involves defendants being diverted to conferences in which they apologize to victims. Therapeutic jurisprudence gives judicial officers a healing role in conducting legal proceedings. A third movement, pretrial services, is less well known but has even greater potential to transform the criminal justice system. The chapter concludes with a critical overview of the welfare-oriented court, considering costs and benefits.

Chapter 3 considers the issue of methodology, an important part of any scientific project. Most research on bail had been conducted by legal scholars, who have focused on legislation, often combining this with quantitative findings. There are also important studies by US quantitative researchers on risk analysis and by psychologists about decision-making. Our project makes more use of qualitative research methods, although we have also obtained some quantitative data. We see it as important to present the views of practitioners and some detail on what they do in their day-to-day work through observing bail applications. Our approach was influenced by our disciplinary training and experiences. In the research group, there are criminologists with backgrounds in interpretive sociology and anthropology, as well as in legal studies and psychology.

Both quantitative and qualitative methods have limitations, and we recognize and discuss the issues. In contrast to many US quantitative studies, we were not able to track bail outcomes: whether the defendants attended the next court date or were charged with new offences while on bail. We could not pursue a "causal" analysis of risk factors. However, we did obtain valuable, descriptive statistical findings from observing 150 applications. In employing qualitative methods, there were also difficulties: for example, it is often hard to understand what happens in court without seeing documents available to practitioners. Nevertheless, a combination of observation and interviewing made it possible to understand how bail decisions are made. We also feel that it is important for social science research to be reflexive about methodological issues. In this

chapter, we explain how we conducted a mixed methods study, and how this methodology contributes to understanding criminal courts.

The next two chapters present our findings on legal decision-making. Chapter 4 draws on interviews with magistrates, prosecutors and defence lawyers. We are interested here in whether there are different perspectives, and possibly differences of opinion within occupational groups. We also try to give a sense of the technical complexity of work that is not always described in existing studies. Chapter 5 goes further in examining work through drawing on observations made of bail applications. It gives a sense of the technical, and procedural, character of getting through the list in a magistrates court. It also examines how magistrates make decisions, and considers the importance of discretion. Magistrates exercise discretion through weighing up the risks, and how they can be managed through conditions such as reporting to a police station or a residence restriction. Informal calculations on the length of time a defendant is likely to be in custody influence bail decisions. Although this level of discretion is often criticized, the current system achieves individualized outcomes.

Chapter 6 describes the response of criminal courts to defendants with vulnerabilities. Vulnerability is an increasingly used but contentious concept employed by legal, law enforcement, public health and welfare practitioners, and in much academic literature, to understand disadvantaged groups. The chapter examines responses in criminal courts to "vulnerable" defendants at the pretrial stage drawing on quantitative and qualitative data obtained from observing 150 bail applications. The quantitative data indicate that in half of the applications a vulnerability was either relevant to the decision or mentioned by a practitioner. Through looking at transcripts from hearings, the chapter teases out some of the complexities in responses to both individual vulnerabilities (such as having a drug problem) and structural inequalities such as youth, poverty and indigeneity.

Chapter 7 looks at the complex issue of risk assessment: is it possible to develop a decision-making tool that will assist magistrates? In the current political climate, it seems unlikely that governments will enact legislation that makes it easier for defendants to obtain bail. There are, however, other policy options that might change business as usual. One