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Abstract

Pretrial detention of defendants has important legal, human rights and practical implications for defendants, their families, and society and therefore the area justifies research scrutiny. However, there is a dearth of empirical studies of bail decision-making and most of them have been retrospective studies. Prior studies have nevertheless identified a number of purported shortcomings in bail legislation and decision-making. The rarely used observational methodology employed in this study provided data that is not normally available from official records. The first appearances of 648 defendants were observed in the lower courts in metropolitan Perth (Western Australia) to identify factors that play a significant role in bail decision-making and to collect baseline data for a longitudinal study. Legal factors made a significant contribution to the bail decision, while extra-legal factors did not.

An observational study of bail decision-making

Legal (Friedland, 1965) and human rights (Law Commission, 1999) principles dictate that defendants should not be detained before their trial without a just cause. In some jurisdictions there is a presumption in favour of bail[1], even a right to bail (Dhami & Ayton, 2001; Roden, 1981). However, such a presumption or right is not universally accepted[2] and in some jurisdictions there is a presumption against bail in certain situations (see Bamford, King, & Sarre, 1999) and pretrial detention has effectively become preventative detention (Goldkamp & Gottfredson, 1993). Even where there is a right to bail it is never an absolute right and in all jurisdictions bail may be refused when considered necessary to ensure the effective operation of the criminal justice system. Bail will, for example, be curtailed where there is a risk that the defendant will fail to appear at later court proceedings, will commit crimes, will interfere with the proceedings or poses a risk to victims or the safety of the public (Hannaford, 1991; Kellough & Wortley, 2002).

For some defendants who expect to serve a custodial sentence the refusal of bail may be of little consequence as they may prefer to serve as much time as possible on remand (where they have more privileges and circumstances are sometimes more comfortable than when serving a sentence). In some jurisdictions the time defendants are in remand custody may also be subtracted from their subsequent sentence (Fitzgerald & Marshall, 1999). However, for most defendants and their families refusal of bail has far reaching legal, financial, physical and emotional consequences (King, 1973). Firstly, research findings suggest that there is, if all other things are equal, a relationship between pretrial detention and the outcome of a case. For example, all other things being equal, defendants on remand in custody are more likely to plead guilty (Bottomley, 1970), more likely to be found guilty (Clifford, 1979; Ebbesen & Konecni, 1975; Foote, Markle, & Wolley, 1954; Friedland, 1965; Kellough & Wortley, 2002; Myers & Reid, 1995; Robertshaw, 1991), and more likely to be given a custodial sentence (Clifford & Wilkins, 1976; Ebbesen & Konecni, 1975; Friedland, 1965; Kellough & Wortley, 2002.

Secondly, defendants who are not granted bail at their first appearance may lose their employment and accommodation and this may have major implications for them at various

[1] Though often viewed as a choice between remand in custody or on bail, the bail-decision is not a dichotomous choice, but is essentially a three-tiered process (Nagel, 1983). The first question is whether the defendants should be released, and if the answer is affirmative, the next question is whether to set conditions. If the answer to that question is affirmative, the final question is what form the bail conditions should take.

[2] In Western Australia (WA) defendants do not have such a right, but subclause 2(2) of Part C of Schedule I of the Bail Act (1982) provides that children have a qualified right to bail.

levels. For example, it may weaken the likelihood of obtaining bail later during the process, or of paying the bail or surety amount if bail is later granted later. Unemployed remandees are also less likely to be able to pay a fine if one is imposed. On discharge from prison their reintegration in society will also be much more difficult if they do not have employment or accommodation to return to.

Thirdly, being in custody reduces the likelihood that defendants will be able to afford legal representation, but even those defendants on remand in custody who can afford legal representation will be disadvantaged. The fees of a lawyer will likely be higher when the defendant is in prison as additional time and costs are involved in, for example, travelling to prison to consult the defendant. The lawyer will often also have to undertake tasks, such as finding witnesses, that a remandee on bail could see to personally (Friedland, 1965). It is also likely that lawyers will spend less time with a defendant on remand in custody than they would with one who is not in custody.

Fourthly, detained remandees are more at risk of physical and sexual assaults and of contracting communicable diseases (Barry, 1997). For example, people who are remanded in custody for the first time, display a higher prevalence of self-harm and suicide (Backett, 1988; Dear, Thomson, Hall, & Howells, 1998; Liebling, 1992, 1994).

Finally, detention is stigmatising and can erode remandees' family and community ties. The impact is likely greater for Indigenous people who may be "remanded in custody far from home, community, and even Language and Skin group" (Fitzgerald & Marshall, 1999, p. 5). The family of a person in detention also suffers emotionally and financially (King, 1973) and at a practical level may find visiting the defendants in prison upsetting, inconvenient and expensive.

Society is also affected by the refusal to grant bail, especially at a financial level. Defendants awaiting trial in detention contribute to the size of the populations in adult prisons (Bamford et al., 1999; Carcach & Huntley, 2002) and juvenile remand centres (Jones, 1999). In Barry's study in Western Australia (WA) adult remandees were found to stay in custody for an average of about 16 days, with some staying as long as 165 days (Barry, 1997), and sometimes for minor offences. This places a financial burden on taxpayers (Barry, 1997) which is aggravated by the fact that most defendants do not earn taxable income while on remand in custody. In addition, the State must often provide services and support to the defendants' family (Fitzgerald & Marshall, 1999). From a societal perspective, there is also the concern that remand prisons serve as *schools of crime* by exposing innocent people and petty criminals who later receive non-custodial sentences, to hardened criminals (Fitzgerald, 1997; O'Malley, Coventry, & Walters, 1993). Remand prisoners are likely to be more prone

to negative influences than they may otherwise be, as they are in most jurisdictions excluded from offending behaviour programs or other constructive activities and complain of boredom (Bottomley, 1970; Dear et al., 1998; King, 1973).

Criticism of bail legislation and decision-making

Given these legal, human rights and practical implications it is not surprising that bail legislation and decision-making have been subject to critical review for about the last half century.

Psychologists contend that bail legislation is vague, constructs are ill-defined and silent on exactly what information magistrates[3] should use and how that information should be weighted and integrated (Dhami & Ayton, 2001; Goldkamp & Gottfredson, 1979). While magistrates do not necessarily follow the legislation strictly (see Nagel, 1983), researchers have found that they generally apply the relevant provisions (Hucklesby, 1996; Konecni & Ebbesen, 1984; Morgan & Henderson, 1998). Nevertheless, inconsistencies found among magistrates that cannot be fully explained by the differences in the relevant cases, suggest that extra-legal factors (i.e. factors not specifically prescribed in the relevant statutory law, Nagel, 1983) may play a role (see for example Gordon, Bindrim, McNicholas, & Walden, 1988; Myers & Reid, 1995). At one level this is inevitable because bail decision-making involves the exercise of discretion and subjective factors will therefore play a role (Clifford & Wilkins, 1976). This can be due to what Nagel (1983) calls *bench bias*, that is the tendency of particular magistrates "to prefer some kinds of outcomes to others regardless of case characteristics" (p. 506). However, inconsistencies between magistrates could also be due to social bias that involves the systematic discrimination against a specific group or groups of people. It is the latter that is of the greatest concern. In the case of bail, personal characteristics such as age (Morgan & Henderson, 1998), gender (Bernat, 1984; Bottoms & McClean, 1976; Hucklesby, 1996; Kruttschnitt, 1984; Steury & Frank, 1990), demeanor (Petee, 1994) and race of defendants (Barry, 1997; Bernat, 1984; Morgan & Henderson, 1998; Petee, 1994) have been identified as factors that may play a role. Other factors that may influence bail decision-making include social status (Unnever, 1982), community ties (VanNostrand, 2000), familial relationship (Herzberger & Channels, 1991), and geographical location, such as whether the relevant court is situated in an urban or rural area (Bottomley, 1970). However, the findings in respect of some of these factors are not consistent (Brown, 1998; Nagel, 1983; Spohn, 1995).

[3] The term magistrate will be consistently used to refer to bail decision-makers because this study took place in the lower courts, but the literature deals with an array of bail decision-makers.

From a social psychological perspective it would not be surprising if magistrates whose large case loads force them to make fast decisions[4], make biased decisions (Saks & Hastie, 1986). Under such conditions people tend to use mental short cuts (Davis & Davis, 1996; Tversky & Kahneman, 1971; 1974) and focus on a minimum of information, usually one or two factors (Rieskamp & Hoffrage, 1999). While these shortcuts are usually effective (Gigerenzer & Todd, 1999), they could introduce bias in the decision-making process, e.g. the representativeness heuristic (Tversky & Kahneman, 1971; 1974). The use of *fast and frugal heuristics* may, at least partly, explain why the opinion of the prosecutor[5] has, independent from other factors, consistently been shown to be strongly predictive of judicial bail decisions (Bamford et al., 1999; Bottomley, 1970; Friedland, 1965; Hucklesby, 1996; King, 1973; Konecni & Ebbesen, 1984; Morgan & Henderson, 1998; Petee, 1994). Another possible explanation for the strong relationship between magistrates' bail decisions and the opinions of police and prosecutors, is that the bulk of bail decisions are made at a very early stage of the judicial process when most of the available information will be coming from the police. Especially when defendants are unrepresented[6] they are often so confused, distressed or ignorant that they fail to provide information that could influence the decision the magistrate makes (Astor, 1986; Bottoms & McClean, 1976; Dell, 1971; Friedland, 1965; King, 1973). Dhami and Ayton (2001) further believe that the sequence in which information is presented in a typical bail application may not be conducive to effective decision-making.

Nor do magistrates have much opportunity to learn from experience because they receive no formal, and little informal, feedback about the appropriateness of their bail decisions (Dhami & Ayton, 2001). The informal feedback that they receive will often be in the form of biased and negative media coverage when something went wrong, such as when a remandee on bail offends (see Hucklesby & Marshall, 2000). Consequently it is possible that magistrates may be overly cautious when considering bail (Davies cited by King, 1973) because of the visibility, and potential grave consequences for society, if defendants offend while on bail (Brown, 1998; Fitzgerald & Marshall, 1999; Hucklesby & Marshall, 2000; Morgan & Henderson, 1998), fail to appear (Auditor General of Western Australia, 1997;

[4] Dhami and Ayton found the duration of bail hearings can range from 50 seconds to 62 minutes, with an average of six minutes (2001; also see Bamford et al., 1999; King 1973).

[5] Most bail legislation provides that magistrates must have regard to the grounds put forward by the prosecution, however, this is only one of a number of factors they should take into account.

[6] Not surprisingly the literature suggests that legal representation at the bail hearings may be of considerable importance and that unrepresented defendants may be disadvantaged (Barry, 1997; Bernat, 1984; Hucklesby, 1996; King, 1973).

Fitzgerald & Marshall, 1999) or interfere with witnesses (Fitzgerald & Marshall, 1999). It is therefore hardly surprising that the information used by magistrates may predict which offenders are most likely to offend while on bail, rather than which offenders will fail to attend their hearing (see for example Morgan and Henderson, 1998).

More controversial is the allegation that the police, prosecution and judiciary deliberately use bail for ulterior purposes. The first allegation is that authorities engage in what King (1973) aptly called *bail bargaining*, in order to obtain guilty pleas, confessions or information in return for bail (Astor, 1986; Bottoms & McClean, 1976; Friedland, 1965; Kellough & Wortley, 2002). It has been suggested that because defendants are typically bewildered in the early stages of the judicial process and ignorant of their rights they, especially those who believe they have a reasonable chance of being given a non-custodial sentence, are likely to plead guilty to get out of prison, regardless of the strength of their case or whether they are, in fact, innocent (Kraszlan & Thomson, 1998a; 1998b). It is secondly alleged that bail may be refused to give defendants, especially younger people, a *taster* of a custodial sentence (King, 1973) or to punish them in lieu of a short custodial sentence where they would not be imprisoned due to sentencing legislation (Barry, 1997). However, King concedes it is difficult to prove or disprove that this actually takes place.

Finally, authors have identified a number of specific instances where the lack of legal representation may affect whether bail is granted (Barry, 1997; Bernat, 1984; Hucklesby, 1996; King, 1973). For example, King (1973) reported that there is a statistical difference between the number of represented and unrepresented defendants' cases that are remanded for a sentencing report, and that defendants who had legal representation were less likely to be remanded in custody. In King's study the same proportion of unrepresented as represented defendants received bail, but when he considered only those cases where the police opposed bail (generally the more serious offences) slightly more represented than unrepresented defendants received bail. He believed that this finding would have been more pronounced if it was not that there are factors that sometimes restrict lawyers from making bail applications at the first appearance of a defendant. These include that they may not know the reasons why bail is refused until the hearing and may therefore not be prepared to proceed with the application. After taking into account a number of other factors King concluded that "representation at the bail hearings may be of considerable importance" (p. 31). In Dietrich v. The Queen (1992) the High Court of Australia acknowledged that there is a risk that unrepresented defendants charged with serious criminal offences will not receive a fair trial. Implicit in this, although not stated explicitly, is that unrepresented defendants may be disadvantaged because of the imbalance of power, resources and legal knowledge as they face the whole might of the State. In the case of defendants in custody on remand the problem is

compounded as they have less access to free legal and paralegal services available from community organisations, libraries or friends and relatives than those to whom bail was granted.

Research in bail decision-making

Despite the criticism directed at bail decision-making since the 1960s it has not attracted much empirical research (Bamford et al., 1999; Fitzgerald & Marshall, 1999). Moreover, from an Australian perspective, it is important to note that much of the relevant research was undertaken in the United States (US) and the United Kingdom (UK). Given the differences in, for example, legal rules, procedures, cultural and geographical factors between different jurisdictions it is not always appropriate to generalise the findings of bail research in one jurisdiction to other jurisdictions (Dhami & Ayton, 2001).

There has also been a dearth of empirical research in WA with the exception of research by Barry (1997) and Bamford and his colleagues (1999). Barry did a retrospective study of offenders who were given non-custodial sentences by magistrates over a 6 month charge period and found that 53% (221) of offenders on remand in custody received a non-custodial sentence. She investigated this group of 221 and a random sample (n = 273) of those who were at liberty in the community prior to receiving a non-custodial sentence. A larger proportion of Indigenous offenders spent time in remand custody (37%) than at liberty in the community (13%), while a larger proportion of non-Indigenous offenders spent time at liberty in the community (87%) than in remand custody (63%). (These differences were statistically significant.) For more than half of the 221 remanded in custody, it was the first time they had been in prison, in fact 14% had no previous criminal history. The majority (68%) were remanded without bail, while the rest were granted bail but were unable to meet the conditions

Bamford and his colleagues (1999) set out to identify the factors that may influence the processes and rates of adult remand in custody which may contribute to variation in remand rates in jurisdictions. They compared Victoria, South Australia and WA and found that there were significant differences between these jurisdictions. They were, however, not able to isolate any single factor that explains this difference.

Neither of these studies examined the position of young defendants. There is in fact a lack of prospective, especially longitudinal, bail studies that focus on young defendants internationally (Varma, 2002). The lack of bail studies that examine younger defendants as a separate group is striking considering that in 1999-2000, for example, “the offending rate for persons aged 15-19 years was six times the offender rate for the remainder of the population” (Australian Institute of Criminology, 2002, p. 55). While the bail

decision-making process is broadly similar for both juvenile and adult defendants, and many of the decision-makers and other stakeholders are the same people, there are very important differences as well. Varma points out that juveniles require special protection within the legal system because of their immaturity and dependency. For example, they are usually dependent on other people to ensure that they attend their trial and desist from committing further offences if released. They may, furthermore, be less able to understand the criminal proceedings, the justice process and their rights (Scott & Grisso, 1998)[7].

The aim of the project that forms the subject of this paper was to identify factors that predict the granting or refusal of bail in the Magistrates' Courts, Courts of Petty Sessions and the Children's Court in metropolitan Perth[8] at defendants' first appearances and to collect baseline data for a longitudinal study. To provide a context we also give a *snapshot* of these first appearances.

Methodology

Sample

The first appearance of 648 defendants in seven different courts in metropolitan Perth was observed on 138 court days[9]. Most of the defendants (579) appeared in adult courts, and 69 in the Children's Court. The ages of the defendants involved ranged from 11 to 72 years, with about two thirds aged between 18 and 32 years. As expected the vast majority of defendants were male (80.6%), but a noticeably smaller percentage of the juveniles were male (69.6%). Another notable difference between the juvenile and adults samples was that only 23.8% of adult defendants were Indigenous compared to 47.8% of juvenile defendants.

Materials

A data collection instrument was developed that was based on information collected during the literature review, statutory factors in the Bail Act (1982) and Regulations (1988), and input from various stakeholders within the WA Department of Justice and a preliminary

[7] The WA Bail Act (1982) appropriately does distinguish between adults and juveniles.

[8] WA is a sparsely populated state that is about the size of Western Europe, but has a population of about 2 million people of whom roughly two thirds live in the Perth metropolitan area. Like the rest of Australia its courts are arranged in a three tier hierarchy. The courts of summary jurisdiction, i.e. the Courts of Petty Sessions, Magistrates' Courts and the Children's Courts are at the lowest tier. The presiding officers in these courts are called magistrates and the prosecutors are generally members of the police service.

[9] Courtroom observational studies are not amenable to random sampling.

investigation by members of the research team. The initial instrument was amended after it had been used during pilot testing and the training of the observers.

The bail decision (the dependant variable) was recorded as well as a range of independent variables. These included socio-demographic variables, legal representation (i.e. any assistance of a legal nature that the defendant received), arguments by defendants[10] and prosecutors (i.e. any comment in respect of a factor relevant to bail made by prosecutors, defendants or on behalf of defendants by legal representatives), magistrate reasons (i.e. any verbal reason offered, or comment made, by a magistrate in court to justify or explain the bail decision) and other court and offence variables.

Procedure

The three observers were trained and independently rated the same bail applications during the training period to enhance inter-observer reliability. The observers attended specific courts on predetermined days and remained in court for the duration of proceedings for that day. They observed all the first appearances that took place on the specific day.

Courtroom observation was used despite it being a time consuming method of collecting information because it is such a rich source of data to work with in terms of understanding the qualitative factors thought to be involved in decision-making (Varma, 2002). Moreover, the information recorded in this fashion approximates the information that presiding magistrates have when making a bail decision.

Charge numbers[11] were recorded in order to be able to verify the data recorded on the survey instruments and obtain missing data (e.g. date of birth of the defendants), from court private lists. No names were encoded in the database.

As first appearances of defendants in WA are as a rule in person, none of the first appearances observed by the research team used closed circuit television.

Statistical analysis

Preliminary chi-square tests of significance and analysis of variance techniques were used to determine the association between the bail decision and a number of variables. Logistic regression (logit) techniques were used to determine which variables make a significant independent contribution to granting or refusal of bail. A dichotomous variable for the bail

[10] Section 23 of the Bail Act provides that defendants are not bound to give any information on a bail application and evidence given by defendants are not admissible against them on the trial of the offence (section 25).

[11] The charge numbers will also be useful should a follow up study be undertaken.

decision (granted/not granted) was used as the dependent variable. Unless otherwise stated, an alpha level of .05 was used for all statistical tests.

Results

While 5.6% of the defendants attended court on a summons or notice, most were in custody when they first appeared (91.4%) and 31.6% had been arrested on a bench warrant[12]. Defendants were charged with offences ranging from murder to non-compliance with an order to report to the Juvenile Justice Team, and 50.6% of the offences were either property or violent offences. The maximum number of charges was 65, but 27.2% of the defendants had only one charge against them. Almost half (45.1%) were charged for at least one serious (as defined in Schedule 2[13] of the Bail Act, 1982) offence. In 51.5% of cases there were also other orders such as a prior bail, parole and conditional orders that may have influenced the bail decision (see Table 1). In respect of Children's Court cases, the presence of a responsible person was recorded for 52.2% of the defendants.

Table 1 about here

All the juveniles and 92.7% of the adults in this study had some form of legal representation (See Table 1). Bail was mostly considered after an application by or on behalf of the defendants (61.3%), but in some cases after it was mentioned by the prosecutor (1.2%) or magistrate (9.3%). In total 374 defendants were granted bail, that is for 72.3% of juvenile and 57.8% of adult defendants.

Prosecutor arguments, defence arguments and magistrate reasons included many different arguments and reasons. Tables 2, 3 and 4 show the chi-square results of those arguments and reasons significantly associated with the bail decision, and/or with a frequency of 10 or more. Many of the argument and reason variables had low frequencies and the results are less robust and more susceptible to the influence of outliers in those cases.

Table 2 about here

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[12] A warrant issued under the Justices Act (1902) for the apprehension of a defendant who failed to appear at the time and place mentioned in the recognizance.

[13] Schedule 2 offences generally involve physical harm, burglary or theft of valuable items.

In cases where the prosecutor did not oppose bail, 90.1% of defendants were granted bail, compared to 59.3% of all defendants. The prosecutor was opposed to bail in 60% of cases, and submitted arguments in 54% of cases. There were 25 prosecutor argument variables, including no argument, but as Table 2 shows, the bail decision is likely to be affected by only 5 of them. The percentage of defendants refused bail was significantly higher than the average of 40.7% for bail refused, when the prosecutor submitted *no argument* (45.7%) or when the prosecutor's arguments included the following: *an existing order* (64.5%); a *likelihood of reoffending* (64.7%); *outstanding offences being serious or numerous* (63.2%); or *poor character* (80%).

Table 3 about here

Arguments were submitted on behalf of 347 represented defendants (62.2% of all represented defendants) and 15 unrepresented defendants (33.3% of all unrepresented defendants). Of all defendants who submitted an argument, 50% were granted bail while two thirds of those who did not submit an argument were granted bail. There were 28 defence argument variables, including no argument, but as Table 3 shows the bail decision is likely to be affected by only 6 of them. The percentage of defendants granted bail was significantly higher than the average of 59.3% for bail granted when the defendants argued that they were *able to obtain a surety (*66.7 %) and when defendants argued that the present *offence was not serious* (85.7%). The percentage of defendants refused bail was significantly higher than the average of 40.7% for bail refused, when there was *no argument* (50.4%) or when the defendants' arguments included the following: *other comments* sympathetic to the defendants' case such as going through detoxification (52.5%); the defendant was *under the influence of drugs* at the time of the offence (56.8%); or there were *exceptional circumstances* such as the defendants facing financial loss if bail is refused (72.2%).

Table 4 about here

There were 24 magistrate reason variables, including no reason, but Table 4 shows that the bail decision is likely to be affected by only 7 of them. The percentage who were granted bail was significantly higher than the average of 59.3% for bail granted, when the *magistrate did not mention any reason* (63.1%). The percentage of defendants refused bail was significantly higher than the average of 40.7% for bail refused, when magistrate reasons

included the following categories: *any other comments* (66.3%); the *seriousness of the offence(s)* (57.5%); *previous breach of bail* (54.4%); *violation of existing orders* (67.3%); the *likelihood of reoffending* (84.0%); or *drug use* (100%).

A closer analysis of the data reveals that there were 103 instances with no formal application, argument or comments by or on behalf of the defendants, no argument or comments by the prosecution, and where the magistrates provided no reasons for their decisions. Seventy-seven of these defendants, that is 11.9% of the total sample, were not granted bail while bail was granted in 4.5% of first hearings without being mentioned by anybody.

Logistic regression techniques were used to determine which variables make a significant independent contribution to granting or refusal of bail. The results are provided in Table 5 for both the Children's Court and Adult Courts.

Table 5 about here

In the Children's Court model only the variable *number of charges* had a coefficient that was significant. Bail was less likely to be granted, the greater the number of charges. The explanatory power of this model is poor with a Nagelkerke R^2 of 24.2%.

The logistic regression results suggest that bail is significantly related to a number of factors for All Courts. Relative to the benchmark case[14], bail is significantly *less* likely to be granted if any *reasons are given by the magistrate*; *orders apply* (prior bail, parole and other orders); *no formal bail application* is made; the defendant is *attending the bail hearing in custody*; there is a *Schedule 2 offence* and/or there are a *large number of charges*. Bail is significantly *more* likely to be granted if the defendant has *legal representation*; has a *bench warrant in place*; there has been *a breach of bail*; and/or the *prosecutor is unopposed to bail.* The All Courts model explains 63.8% of the variation in the bail decision.

The Adult Courts model explains 68.7% of the variation in the bail decision and is very similar to the All Courts model[15]. However, a *Schedule 2 offence* and *a breach of bail* do not make a significant contribution to the bail decision in the Adult Courts model. Furthermore

[14] In the benchmark case there is no defence or prosecutor argument and no magistrate reason, the defendant is male, non-Indigenous, aged over 47 years, has no prior orders, is not legally represented, makes a formal bail application, did not breach bail, is not accused of a Schedule 2 offence, is not in custody, did not have hearing adjourned for legal advice, has a male magistrate, has only one charge, is not married, does not have a bench warrant and the prosecutor is opposing bail.

[15] The high explanatory power for the All Courts and Adults Courts models reflects some endogeneity. This is not unexpected as the decision should be based on the criteria, many of stipulated in the Bail Act (1982), many of which are included in these models.

the Adult Courts model includes one additional significant factor, namely a *defence argument*, which increases the likelihood of bail being granted.

Discussion

Three trained observers attended seven different courts in Perth to observe the first appearances of 648 defendants. About 5% of these defendants had reoffended while on parole, in comparison to 24% of them who had offended while they were on bail for another alleged offence. This latter figure is comparable to findings in England and Wales of offenders who commit crimes while on court and police bail (Brown, 1998; Morgan & Henderson, 1998).

Given the differential treatment of juveniles and adults in the Bail Act (1982) it came as no surprise that relatively more juveniles (72%) were granted bail than adults (58%), and this is appropriate given their age and lack of maturity (Scott & Grisso, 1998). *Number of charges* was the only variable that had a significant influence on the bail decision in the Children's Court model. However, this model had little explanatory power. A factor that may have contributed to the lack of useful results is the low number of defendants in the Children's Court sample and the consequent lack of rigour in the analysis. It is also possible that the variables investigated in this study, that were selected on the basis of the provisions of the Bail Act (1982) and the literature on bail decision-making in adult cases, do not influence the bail decision in Children's Court cases and that other variables should be considered. Future research about bail decisions in the Children's Court should thus allow the construction of a model based on a larger range of more appropriate variables and employ a larger sample.

As the Adult Courts and All Courts models are very similar, the All Courts model will be discussed. The logistic regression results suggest that, relative to the benchmark case, bail is significantly related to a number of factors. The model suggests that bail is significantly *less* likely to be granted if any *reasons are given by the magistrate*; *orders apply* (prior bail, parole and other orders); *no formal bail application* is made; the defendant is *attending the bail hearing in custody*; there is a *Schedule 2 offence*. The log odds of obtaining bail decrease with the *number of charges*. The model further suggests that bail is significantly *more* likely to be granted if the defendant has *legal representation*; there is a *bench warrant in place*; there has been *a breach of bail* and/or the *prosecutor is unopposed to bail.* We cannot explain the fact that those apprehended on *a bench warrant* and after a *breach of bail* were significantly more likely to have bail granted.

The presence of a *prosecutor argument* does not make a significant contribution to the bail decision, but when the *prosecutor opposed bail*, defendants are less likely to be granted

bail. As in other studies (Bamford et al., 1999; Bottomley, 1970; Friedland, 1965; Hucklesby, 1996; King, 1973; Konecni & Ebbesen, 1984; Morgan & Henderson, 1998; Petee, 1994) the opinion of the prosecutors appears to be influential. In WA this may be explained partially by clause 1(c) of part 3 of the Bail Act (1982) that directs the magistrate to have regard to "whether the prosecutor has put forward grounds for opposing the grant of bail". The arguments raised by prosecutors generally addressed legal factors, i.e. factors mentioned in the Bail Act (1982). Frequent prosecutor arguments included the seriousness of the offence and previous breaches of bail. However, the prosecutor arguments that had a significant influence on the decision where not necessarily those argued most frequently. The likelihood of bail is significantly lower when the prosecutor argues that the defendant had *an existing order*, that there is a *risk of reoffending* (clause 1(a)(ii) of Bail Act, 1982) and, or, that the *outstanding offences are serious or numerous* (clause 3(b)). It is also notable that, as in Canada (see Kellough & Wortley, 2002), defendants are significantly less likely to be granted bail when the prosecutor argues that the *defendant's character is poor* (also see clause 3(b)). A possible explanation for the significant association between *no argument* by the prosecutor and the refusal of bail may be that the prosecutor anticipates that the magistrate will not grant bail and therefore does not consider it necessary to submit an argument.

The finding that bail is more likely to be granted if the defendant has *legal representation* is in accordance with the opinions of authors who believe that legal presentation at bail hearings are of considerable importance and that unrepresented defendants may be disadvantaged (Barry, 1997; Bernat, 1984; Hucklesby, 1996; King, 1973). It is encouraging to note that all the juveniles and 93% of the adults in this study had some form of legal representation at their first appearance.

Bail is more likely to be granted in both the Adult Courts and All Courts models if there is any *defence argumen*t, but the contribution of this factor is only significant in the former model. Arguments in respect of bail were raised by, or on behalf, of defendants in 60% of appearances in all courts. Arguments were more likely to be submitted on behalf of represented defendants. Relatively more defendants who did not submit arguments were granted bail than those who did, possibly because defendants and their representatives know bail is routinely given for certain less serious offences and therefore do not consider it necessary to argue the matter. An alternative explanation is that bail was arranged prior to the hearing and that the defendants did not consider it necessary to submit arguments in support of bail. Defendants and their legal representatives often addressed extra-legal factors, i.e. factors not mentioned in the Act, during their arguments. Examples of such arguments included those related to bail, such as assurances that the defendant would be able to obtain a surety and meet bail, but also arguments related to the offending behaviour, such as that the

defendant was under the influence of drugs or alcohol. The likelihood of bail being granted is significantly higher when defendants argue that they will be *able to obtain a surety* and that the *offence is not serious*. These factors are mentioned in clause 3(a) and 3(b) of the Bail Act (1982) respectively. The likelihood of bail being granted is significantly lower when the defence argument includes that the defendants was *under the influence of drugs*, *exceptional circumstances* or *other comments*. The diversity of the arguments in the *exceptional circumstance* (e.g. having sick relatives) and in the *other comments* (e.g. domestic dispute) categories make any discussion of them difficult.

Magistrates provided reasons for their decisions in 43% of cases and they were significantly more likely to give reasons when refusing bail. The likelihood of bail is significantly lower if the reasons magistrates provide for their decisions include any of the following: *seriousness of the offence*; *breach of bail in the past*, *violation of existing orders*; *the likelihood of reoffending*; that the defendants was a *drug user* and *other comments*. The very low frequency for the *drug use* variable (n = 3) warrants a cautious interpretation, however, this result is in line with the significantly lower likelihood of bail when the defence argued that the defendant was under the influence of drugs (n = 37). The *other comments* are so diverse that no inference can be made about them. As can be expected, and is predicted by research in other jurisdictions (see for example Hucklesby, 1996; Konecni & Ebbesen, 1984; Morgan & Henderson, 1998), most of the magistrates' reasons are in accordance with the provisions of the Bail Act (1982).

It is notable that personal characteristics of the defendants identified in the literature as related to bail, such as age (Barry, 1997; Morgan & Henderson, 1998), race of defendants (Bernat, 1984; Morgan & Henderson, 1998; Petee, 1994) and gender (Bernat, 1984; Bottoms & McClean, 1976; Hucklesby, 1996; Kruttschnitt, 1984; Steury & Frank, 1990) were not identified as significant predictors for bail decisions in the All Courts model. In contrast, factors mentioned in the Bail Act (1982), such as a large *number of charges, a Schedule 2 offence*, and *other orders* made a significant contribution to bail decision-making.

Finally, the importance of a *formal bail application* is underlined by the fact that the likelihood of bail being granted is significantly less in the absence thereof. It is therefore a concern that at 12% of observed hearings defendants were remanded in custody without bail being debated or discussed in court. This is, nevertheless, comparable with King's (1973) finding that 9% of defendants in his sample were detained without any discussion of bail taking place in court.

Though this project provided valuable information, it does provide a limited perspective of bail practices in WA. First, the study only collected data in metropolitan courts and therefore does not reflect what is happening in respect of police practice in respect of bail nor

what is happening in rural and regional courts[16]. As the percentage of Indigenous people appearing in rural and regional courts are relatively high and as legal representation in these areas could be a problem, the results of this study cannot be generalised to these courts. Second, while studies based on observations provide a wealth of information, the findings based on data collected in this manner must be dealt with cautiously. For example, Friedland (1965) believes that observers may influence magistrates. This is possible, but given that we used different observers and collected information in a number of courts it is possible that the magistrate may in many instances not even have realised that an observer was present. Observations have also been criticised in "that they do not control for the inter-correlations that may exist between variables either at the design or the analysis stage of research. This means that the effect of one variable … cannot be discerned independently of the effect of another variable ..." (Dhami & Ayton, 2001, pp. 145-146). To address this problem we used logistic regression techniques, though we are aware of the argument that human (magistrate) decision-making is unlikely to be the product of a "linear, compensatory integration of multiple cues that are weighted optimally" (Brehmer & Brehmer, 1988, cited in Dhami & Ayton, 2001, p. 147). Thirdly, this study does not reveal whether defendants were able to meet the bail conditions and what the outcomes of their cases were. Finally, as the affirmative frequencies were low for certain arguments put forward by the prosecutor and defence and for some of the reasons offered by magistrates for the bail decision, the chi-square results should be interpreted with caution.

Despite these limitations we believe that the data collected provide insight in current bail practices in metropolitan courts in WA. The multivariate results do not provide much information about bail decision-making for juveniles but the fact that a high percentage of them were granted bail, is in accordance with the Bail Act (1982), that gives children a qualified right to bail.

In conclusion, using observational methodology seldom used in bail research, this study reveals that in WA legal factors (i.e. those mentioned in the Bail Act 1982) that could be expected to be related to the bail decision, for example the number of charges, were significant in the prediction of bail. In contrast none of the extra-legal factors (for example gender and race) made a significant contribution to the bail decision. This suggests that magistrates in WA are generally guided by legal considerations when making bail decisions in respect of adult defendants and that social bias does not play a major role. This study also reinforces the importance of legal representation and formal bail applications on behalf of the defendant to counter the pivotal influence of prosecutors.

[16] The intention was to include these courts, however, a number of unforeseen practical problems necessitated the abandonment of this plan.

We believe that the data collected to date provides a good foundation for a future study to investigate what the respective outcomes were for defendants who were granted and paid bail relative to those who were not granted bail or failed to pay bail.

Table 1
Other Orders and Legal Representation

	Children's Court		Adult Courts		All Courts	
	No.	%	No.	%	No.	%
	Prior Orders[a]					
Bail – prior	15	21.7	139	24.0	154	23.8
Parole	0	0	30	5.2	30	4.6
Community based orders[b]	16	23.2	49	8.5	65	10.0
Restraining orders[c]	1	1.4	31	5.4	32	4.9
Other	8	11.6	45	7.8	53	8.2
No reference	29	42.0	285	49.2	314	48.5
Total	69	100.0	579	100.0	648	100.0
	Legal Representation					
None	0	0	45	7.8	45	6.9
Aboriginal Legal Service	25	36.2	103	17.8	128	19.8
Paralegal/Legal aid/Duty lawyer	8	11.6	304	52.5	312	48.1
Youth Legal Service	23	33.3	1	0.2	24	3.7
Private	13	18.8	124	21.4	137	21.1
Not stated	0	0	2	0.3	2	0.3
Total	69	100.0	579	100.0	648	100.0

Note.
[a]Any orders were listed on the survey instrument. However, only one prior order could be encoded. In cases with more than one prior order, the first prior order was encoded. These groups were compiled from the originally encoded prior orders. The group 'No reference' refers to no prior order being recorded on the survey instrument.

[b]Community based orders include:
CBO: A Community Based Order as defined in part 9 of the Sentencing Act (1995).
CRO: A Conditional Release Order as defined in part 7 of the Sentencing Act (WA) (1995).
ISO: An Intensive Supervision Order as defined in part 10 of the Sentencing Act (WA) (1995).
SRO: A Supervised Release Order as defined in part 8 of the Young Offenders Act (1994).

[c]Restraining orders include:
MRO: A Misconduct Restraining Order as defined in section 36 of the Restraining Orders Act (1997).
VRO: A Violence Restraining Order imposing restraints of the kind referred to in section 13 of the Restraining Orders Act (WA) (1997).

Table 2
Prosecutor Arguments by Bail Decision (N = 631, df = 1)

Prosecutor argument	*n*	χ^2	*p*
No argument	293	5.676	.017*
Any other comment	96	2.423	.120
Seriousness of offence	91	3.351	.067**
Breach of bail	74	0.945	.331
Existing orders	62	16.116	.000*
A likelihood of reoffending	34	8.558	.003*
May fail to appear	28	0.305	.581
Strength of evidence	26	3.232	.072**
Number of offences	20	0.735	.391
Serious outstanding or number of charges	19	4.082	.043*
For safety of complainant	13	0.028	.866
Residence	12	1.254	.263
Poor character of defendant	10	6.491	.011*

Note.
*$p < .05$.
**$p < .10$.

Table 3
Defence Arguments by Bail Decision (N = 631, df = 1)

Defence argument	*n*	χ^2	*p*
No argument	252	16.244	.000*
Able to obtain surety	147	4.342	.037*
Any other comment by defendants	101	6.873	.009*
Home environment	86	2.026	.155
Willing to report	79	2.286	.131
Children	73	0.193	.661
Having treatment	55	0.030	.863
Under influence of drugs	37	4.183	.041*
Unemployed	35	1.328	.249
Employed	35	0.070	.792
Drug treatment	32	1.200	.273
Sick	28	1.794	.180
Confused/unaware	25	3.018	.082**
Present offence is not serious	21	6.292	.012*
Exceptional circumstances mentioned	18	7.613	.006*
Under influence of alcohol	17	0.214	.644
Able to meet bail	16	0.611	.434

Note.
*$p < .05$.
**$p < .10$.

Table 4
Magistrate Reasons by Bail Decision (N = 631, df = 1)

Reasons	*n*	χ^2	*p*
No reasons given	358	5.101	.024*
Previous convictions	97	0.616	.433
Any other comment	89	28.048	.000*
Seriousness of offence	87	11.717	.001*
Breach of bail	57	4.841	.028*
Violation of existing orders	55	17.585	.000*
May fail to appear	32	2.146	.143
A likelihood of reoffending	25	20.190	.000*
Number of offences	19	2.391	.122
Serious outstanding or number of charges	17	1.079	.299
Likelihood of imprisonment	12	3.409	.065**
For safety of complainant	11	0.104	.748
Strength of evidence	10	3.606	.058**
Drug use	3	4.387	.036*
For own protection	2	2.920	.088**

Note.
*$p < .05$.
**$p < .10$.

Table 5
Potential Determinants for the Granting of Bail: Multivariate Analysis using Logistic Regression

Variables	Children's Court[a] (*N* = 63)	Adult Courts[b] (*N* = 542)	All Courts[c] (*N* = 593)
Any defence argument	n.a.	0.734*	0.509
Any prosecution argument	n.a.	0.046	0.152
Any magistrate reason	-0.903	-0.921*	-0.849*
Female	n.a.	-0.133	-0.122
Indigenous	n.a.	-0.257	-0.290
11 to 12 years	n.a.	n.a.	-1.702
13 to 17 years	n.a.	n.a.	0.576
18 to 22 years	n.a.	0.475	0.536
23 to 27 years	n.a.	0.659	0.686
28 to 32 years	n.a.	0.701	0.660
33 to 37 years	n.a.	0.652	0.790
38 to 42 years	n.a.	-0.323	-0.233
43 to 47 years	n.a.	0.328	0.409
Prior bail	n.a.	-1.060*	-0.752*
On parole	n.a.	-2.541*	-2.497*
On special orders	n.a.	-0.152	-0.227
On other orders	n.a.	-2.154*	-1.446*
Legally represented	n.a.	2.021*	1.725*
No formal bail application	n.a.	-2.319*	-1.814*
Children's Court	n.a.	n.a.	1.642
Breach of bail	n.a.	0.681	0.735*
Schedule 2 offence	-0.762	-0.434	-0.557*
Attending in custody	n.a.	-5.131*	-4.113*
Hearing adjourned for legal advice	n.a.	0.001	0.191
Female magistrate	n.a.	-0.368	-0.349
Number of charges	-0.089*	n.a.	n.a.
2 charges	n.a.	0.637	0.583
3 to 4 charges	n.a.	-0.426	-0.059
5 to 8 charges	n.a.	-1.264*	-1.017*
9 or more charges	n.a.	-1.948*	-2.065*
Married	n.a.	n.a.	-0.121
Bench warrant in place	n.a.	0.867*	0.727*
Prosecutor unopposed to bail	n.a.	3.110*	2.858*
Constant	2.414*	7.605*	5.961*
Nagelkerke R^2	0.242	0.687	0.638

Note. The coefficients shown in this table give the partial effect on the log odds of bail being granted, holding constant all other factors. A positive coefficient will increase the probability of bail being granted, while a negative coefficient will reduce the probability of bail being granted.

[a] The Children's Court model only included the three variables with significant chi-square results. Number of charges was entered as a continuous variable rather than the grouped variable in the Adult Court Model. We observed 69 first appearances in the Children's Court, but included only the 63 cases without missing values.

[b] The Adult Courts model included socio-demographic variables, legal representation, arguments by the defendants (or lawyer) or the prosecutor, reasons by the magistrate and other court and offence variables as predictors. If the defendants presented any argument then *any defence argument* = 1, else *any defence argument* = 0. If the prosecutor presented any argument then *any prosecution argument* = 1, else *any prosecution argument* = 0. If the magistrate gave reasons then *any magistrate reasons* = 1, else *any magistrate reason* = 0. The benchmark age group is 48 to 77 years. The benchmark group for existing orders was no or unknown orders. The benchmark group for number of charges is one charge only. We observed 579 first appearances in the Adult Courts, but included only the 542 cases without missing values.

[c] The All Courts model included two younger age groups and the court variable extra to variables in the Adult Courts model.

*$p < .05$.

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