

The Contribution of Correctional Services to the Bail Process

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With ever increasing crime rates the continuing search for alternative sentencing options represents both an economic and humanitarian response to the problems of prison overcrowding. This search has, during the 1980s, seen the introduction in South Australia of community service and home detention. Upon proclamation of the South Australian *Criminal Law (Sentencing) Act 1988*, on 1 January 1989, imprisonment became formally regarded as a sentence of last resort.

The South Australian *Bail Act 1985*, by virtue of its presumption in favour of bail, similarly regards a remand in custody as a remand of last resort.

Prior to the proclamation of the South Australian Bail Act the Department of Correctional Services, other than accepting those offenders who had been remanded into custody, played no part in the bail process. Since its proclamation, however, two specific options, both now administered by the Department of Correctional Services, have been introduced. The first was the option of supervision by a probation officer which marked the Department's involvement for the first time with persons as yet unconvicted. The second, following amendments to the Act in 1987, saw the introduction of home detention whereby the person on bail is obliged to remain at a specified address for the period of bail. The condition is monitored by Correctional Officers and involves intensive 24-hour surveillance.

The introduction of these options has caused the South Australian Department of Correctional Services to become much more active and interested in the bail process and it has the potential to make a further valuable contribution to the bail process particularly at the decision making stage.

In July 1986 the Department of Correctional Services established the Courts Unit, now comprising two probation officers, who are permanently located in the Adelaide Magistrates Court.

The Unit provides a range of on-the-spot assessments, principally oral pre-sentence reports and Community service assessments. Until recently requests for information in bail matters have been comparatively few. In recent months, however, the number of requests has increased significantly. A bail program modelled on the New South Wales Bail Assessment Service and Supervision program commenced in the Adelaide Magistrate's Court on 14 November 1988 following consultation with each of the magistrates in that court, police prosecutors and Legal Services Commission solicitors. The program received the unanimous support of the magistrates and both Legal Services Commission solicitors and police prosecutors indicated their support.

The History of Bail Reform

Historically, calls have been made around the world since the 1920s for courts to be more informed about bail applicants' current circumstances and community ties and for there to be less reliance on the nature of the criminal charge when considering a bail application.

In the United States as early as 1927, Beeley recommended that bail decision making would be improved significantly if a defendant's social background was considered more often during bail hearings.

In 1954, Foote's influential study of pre-trial decision making called for bail reform to address bail policy and judicial bail decision making. That pioneering work served to mobilise the Vera Institute in New York to develop the Manhattan Bail Project in the 1960s. This decade saw a plethora of similar programs evolve across the United States providing what Goldkamp (1979) described as 'fact finding mechanisms' whereby courts were provided with information about defendants which was considered relevant to the bail decision.

The aim behind the Manhattan Bail Project was to influence bail practice in such a way that Judges would release more defendants on non-financial pre-trial release, known as release on recognizance (ROR). The Manhattan Bail Project developed an instrument which summarised a defendant's social background into specified dimensions and accorded each of these a rating. The ratings, obtained on dimensions such as family contacts, employment and residential stability, all formed the basis for a recommendation for release on recognizance.

The outcome of the Manhattan Bail Project was far reaching and a study by Thomas (1976) showed an increase in the use by courts of release on recognizance agreements. Further studies by Ares, Rankin and Sturz (1963) and Schaeffer (1970) found the failure to appear rates and re-arrest rates for defendants had not increased with the more widespread use of the release on recognizance option.

In 1983 the New South Wales Department of Corrective Services established the Bail Assessment Service and Supervision Program (BASS) and among its objectives was the provision of verified information to courts on bail applicants' social backgrounds and current circumstances.

Whilst the South Australian Bail Act has been as significant as many other similar pieces of legislation in its presumption in favour of bail, it is not as explicit as others in listing the criteria to be considered by the court.

In recognition of the many bail reforms which have taken place in some countries, the United Kingdom, Queensland and New South Wales Acts for instance, require the courts to be fully informed and to consider such matters as the character, background, employment and associations of the applicant. Chatterton (1986) in commenting on the British 1976 Bail Act (United Kingdom) stated:

Statutory guidance is given to the courts in considering the factors to be taken into account when deciding whether bail should be granted or refused. In essence consideration should be given to the gravity of the offence, the strength of the evidence, the accused's character, antecedence, community ties, record of compliance or non-compliance with any previous granted bail and any other relevant matters (Chatterton 1986, p. 42).

That that information gathering can take some time is reflected in Section 16 (1) of the Queensland *Bail Act 1980* which states:

Where it has not been practical to obtain sufficient information for the purpose of making a decision in connection with any matter specified in this sub section due to lack of time since the institution of proceedings against a defendant the court before which the defendant appears or is brought shall remand him in custody with a view to having further information obtained for that purpose.

Further section 16 (2) of that Act requires the court:

In assessing whether there is an unacceptable risk with respect to any event specified in sub section (1)(a) [risk of re-offending, absconding etc.] the court or member shall have regard . . . to such of the following considerations as appear to be relevant.

Included in the list of considerations are ' the character, antecedents, associations, home environment, employment, background and place of residence of the defendant'.

The 1978 New South Wales *Bail Act*, also requires the courts to consider specified matters (as far as they can be reasonably ascertained) and appears to be a much better balanced Act in terms of the criteria to be considered.

Broadly these are:

■ **The probability of whether or not the person will appear in court in respect of the offence for which bail is being considered having regard to:**

The persons background and community ties as indicated by the history and details of residence, employment and family situations and his prior criminal record (if known). (four other sub sections)

■ **The interests of the person having regard only to:**

The period that the person may be obliged to spend in custody if bail is refused and the conditions under which he/she would be held in prison. (three other sub sections)

■ **The protection and welfare of the community having regard to:**

Whether or not the person has failed, or has been arrested for anticipated failure to observe a reasonable bail condition previously imposed in respect of the offence. (two other sub sections)

One commentary on these provisions of the NSW Act reads:

The requirement to look at the three head criteria or the twelve sub criteria, whichever is the correct view, is binding on the court (subject to their being reasonably ascertained) even where bail is consented to by the prosecution. The Act may, therefore, demand of the court a more searching and independent enquiry into bail than was required under the previous law (Donovan 1981, p. 36).

The Prosecution and Defence Roles

It is important to recognise the respective adversarial and opposing roles of the police prosecutor and the defence lawyer, with respect to bail decisions. Police prosecutors regard their roles in very much the same way as their colleagues who perform other police

duties, that is, they are concerned first and foremost with the protection of life and property and the prevention of crime.

The prosecutors' priority is clearly the protection of the community and particularly victims of crime. There is no requirement for prosecutors to consider the interests of the defendant and they are not required to look beyond the criteria set out in Section 10(1) of the 1985 South Australian Bail Act. In opposing bail the prosecutor can refer to:

- the gravity of the offence;
- the likelihood of the applicant absconding;
- the likelihood of the applicant re-offending;
- other relevant reasons for refusing bail (for example interfere with evidence, intimidate or suborn witnesses, hinder police enquiries, physical protection).

Consequently the prosecutor is interested only in information which would indicate the applicant should not be released on bail (even though in the majority of cases there is no opposition to bail).

The information presented to the court by a prosecutor is invariably that which they have obtained from the arresting officers by endorsement of the prosecution file. The information is not always updated and questions have been raised from time to time as to the reliability and the lack of the information presented. In a letter to the *Adelaide Advertiser* dated 9 July 1988 the Chief Magistrate stated that the lack of information provided to Police Prosecutors was 'one of the many matters making bail applications difficult to resolve'.

The defence, on the other hand, is principally concerned with the interests of the applicant and acts largely on instructions. Counsel rarely have the opportunity to verify the substance of those instructions nor do they have the time to seek out other information which might be relevant.

Given that there seem to be more reasons in the Bail Act for not granting bail than there are for granting it, the task of showing cause why bail should be granted is often a difficult one, despite the presumption in favour of bail.

The presiding magistrate has the responsibility of deciding on the application, sometimes without the benefit of a balanced picture. On a number of occasions in recent months local magistrates have commented on the difficulty they have in determining some bail applications. They cite the lack of objective and reliable information as the main cause of this.

The Purpose of a Bail Report

A bail report, prepared by a probation officer can, to a large extent, overcome many of the problems sometimes encountered by the courts and can be instrumental in providing the magistrate with as complete a picture as can be reasonably obtained.

Such a report will contain objective, reliable and verified information in accordance with the specific request of the court and, where appropriate, will include comments about the feasibility of supervision by a probation officer and/or home detention in the event of bail being granted.

The Philosophy of the Department of Correctional Services in the Provision of Information and Reports to The Court

The credibility of every report prepared by a probation officer, be it a pre-sentence report or a bail report, will depend largely on the impartiality and objectivity of the content of the report and the realistic nature of its conclusions.

While an impartial position is necessary in the preparation of such reports, they will nevertheless promote Department of Correctional Services programs such as probation and community service, and bail supervision. This is in keeping with the Department's philosophy that imprisonment is a sentence of last resort.

Whilst it is true that overcrowding in the prison system did highlight the issue of bail, the overriding concern must be the provision of a service which ultimately leads to the right people being remanded in custody and to the release on bail of those who should be so released. If the remand rate should drop as a result of this then that should be regarded as a bonus and not the objective of the exercise.

Why the Department of Correctional Services is best placed to provide Bail Reports

The South Australian Department of Correctional Services has been providing courts with pre-sentence reports and assessments for over thirty years and has established a state-wide network of district officers to which the courts have access. By virtue of the nature of these reports the probation officers have a well-established network of communication and have ready access to records both within this state and to interstate probation, parole and institutional records.

The Department also administers two programs covered by the Bail Act, namely supervision and home detention and is therefore well placed to comment upon the likely response of the candidate to those options.

A probation officer could also obtain information regarding the applicant's previous response to recognizance in South Australia or interstate. Neither the prosecutor nor the defence solicitor have the time and means to obtain this kind of information.

Offenders from interstate often present with such histories and enquiries of these offenders often reveal facts of particular relevance including details of convictions not known to the local police, the existence of outstanding warrants, pending court cases, and breaches of existing bounds.

It is also apparent that a significant proportion of those who have been subject to a Bail Report have either been previously imprisoned within South Australian institutions or are currently, or have recently been, supervised by a probation officer.

There is a strong possibility that the offender will, in due course, again become subject to the same sentencing options and, in the latter instance, the Department's earlier contact during the bail process could be very useful in any ongoing involvement with the Department.

The officer can comment on the availability of accommodation if the applicant has no fixed address. The Department has well-established links with organisations such as Offenders Aid and Rehabilitation Services who are able to cater specifically for bail applicants when necessary. Perhaps most importantly of all probation officers are located in the Adelaide Magistrate's Court and are able to obtain information virtually on the spot.

Problems With the South Australian Bail Act 1985

Section 11(3) of the South Australian Bail Act requires the consent of the Crown before a court can include in a Bail Agreement conditions of supervision of a probation officer and/or Home Detention. What should arguably be the overriding discretion on the part of the court, is removed by this requirement.

This situation arises occasionally in South Australia where the prosecutor, having opposed bail, will, as a matter of policy, decline to consent to the inclusion of these conditions thus preventing the magistrate from granting bail under those terms. The police prosecutor, in fairness, is merely exercising a discretion provided in the Act; the Act, however, appears to be shooting itself in the foot. It provides options introduced specifically to encourage the courts to consider alternatives to a remand in custody and then gives the final word to the police prosecutor, who having opposed bail from the outset is not likely to consent to those alternatives. This provision of the Act is not in keeping with the intentions of the Act as a whole and requires urgent attention.

To further complicate the situation sub section 11(3a) states that:

a bail authority should not impose a condition under section (2)(ia) [home detention] without first obtaining a report (whether oral or in writing) from the Crown on the appropriateness of such a condition being imposed in the applicant's case.

The report referred to in this section is that which is provided by an officer of the Department of Correctional Services and which addresses the appropriateness of home detention in a particular case. This involves a visit to the nominated address by the home detention officer and obtaining the permission of the occupier of the nominated address before such a condition can be included in the bail agreement. The authority of the Crown in this instance appears to be vested in the Department of Correctional Services. The situation might therefore arise where the Crown representative will report that a condition of home detention is appropriate in the case, whilst another representative will then decline to give consent to the inclusion of that condition.

Conclusions

The Department of Correctional Services has a vested interest in the bail process by virtue not only of its custodial responsibility of those remanded in custody but also by virtue of the options of supervision and home detention for which the Bail Act makes provision. Through its longstanding practice of providing the courts with pre-sentence reports and the like, the Department has the expertise and experience to assist the courts in its determination of bail applications.

The value of such a service lies in the Department's impartiality, its provision of reliable, objective and verified information, and its ready access to relevant sources of information both locally and interstate. Such a service would assist in overcoming some of the shortcomings which appear to emanate from the adversarial roles of the prosecutor and defence solicitor.

In view of the impact which the bail decision is likely to have upon the individual and upon the community it is important that such decisions are made on the basis of relevant information, and that full consideration is given to community-based bail programs whenever possible.

Whilst the remand rate and prison overcrowding are factors which should not be ignored these factors should not in themselves be considered in the final bail decision. The overriding concern must always be that whatever the outcome the decision itself has been a

fully informed decision. Only then will the interests of both the community and the individual have been fully considered.

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