INDIGENOUS JUSTICE CLEARINGHOUSE

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International perspectives on using bail to improve Indigenous criminal justice outcomes

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Introduction

This Research Brief examines the impact of bail on Indigenous criminal justice outcomes in Australia and New Zealand. It adopts an international comparative perspective both to diversify the policy discourse and so as to explore available international literature and data on bail for Indigenous and minority populations. It begins with a consideration of the international law foundations for bail and an examination of forms of bail available worldwide. It then assesses the impact of bail on Indigenous people through its corollary – remand – and then through bail itself.

Bail in international perspective

Relevant international law

In 2007, the United Nations Declaration on the Rights of Indigenous Peoples unequivocally confirmed that 'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in … international human rights law' (Article 1). From a criminal procedure perspective, while international law generally defers to States to define domestic criminal procedural rules, bail is a rare exception. As a corollary of the core international human rights to be free from arbitrary detention and to enjoy a presumption of innocence guaranteed under the International Covenant on Civil and Political Rights (ICCPR), international law has established that there is always a presumption in favour of liberty. Accordingly, it follows that bail should be granted in all but exceptional circumstances (UN OHCHR 2003: 86). Furthermore, 'detention in custody of persons awaiting trial shall be the exception rather than the rule' (UN HRC 2014: 12).

Both Australia and New Zealand are parties to the ICCPR from which the presumption of liberty derives. Thus, they are obliged under international law to adopt and respect such a presumption. Moreover, the extent to which they do so is monitored by the UN Human Rights Committee and the UN Working Group on Arbitrary Detention (UNGA 1966; UN OHCHR 2019).

Through such monitoring of countries' compliance with the ICCPR and adjudicating of complaints regarding possible ICCPR violations, the UN's human rights experts have developed detailed, authoritative jurisprudence regarding bail and the use of pre-trial detention (UN HRC 2014). This jurisprudence has established principles that reiterate the presumption of liberty and exceptionalism of custodial detention at the pretrial stage, and that are applicable to Australia and New Zealand as ICCPR parties. As set out in the UN Human Rights Committee's recent General Comment 35, these principles include that:

- Pretrial release may depend on guarantees of future court appearances;
- Pretrial detention must be decided individually based on each case's circumstances;
- Pretrial detention should not depend on the charge or potential sentence, but on individualised need;
- Whenever viable, alternatives to pretrial detention – such as bail – must be considered;
- Even if pretrial detention is ordered, its continued need must be periodically assessed; and
- For youth, pretrial detention should be a last resort.

Consistent with this, both Australian and New Zealand's criminal justice legislation start from the basis that pretrial detention is exceptional, with a presumption of liberty and thus the theoretic awarding of bail in most cases (Willis 2017; Bail Act 2000 (NZ)). However, this appears to be eroding in practice. Over the past decade, both countries have seen increases in the use of pretrial detention and imposition of restrictions on bail (ABS 2019; Bartels 2019; NZ MOJ 2018; Walters 2019) – a trend that has coincided with a shift since the 1970s from a 'process-oriented' to 'performance-oriented' bail system (e.g. completing therapeutic programs) (Radke 2018: 60).

Indeed, seemingly anticipating this trend in Indigenous bail outcomes, the Royal Commission into Aboriginal Deaths in Custody recommended that Commonwealth, State and Territory governments monitor compliance with the presumption in favour of bail (RCIADC 1991). A recent review evaluating the implementation of all RCIADC recommendations found that "further action across most jurisdictions is required [to ensure that] people are not being held in custody due to problems with bail legislation" (Deloitte 2018: xix).

Another example of the erosion of the presumption of liberty is 'show cause' provisions (ALRC 2018). Introduced in Canada, New South Wales, Queensland and Victoria for example, these provisions trigger the application of a 'reverse onus' for certain charged crimes (Coady 2018: np). This places the onus on the accused person to demonstrate why they should be released pretrial. It is therefore based on a presumption of pretrial detention, challenging the international law right to a presumption of innocence (Coady 2018: np).

Forms of bail granted worldwide

In examining bail, it is important to clarify the scope of the term. The Macquarie Dictionary's primary definition of bail is 'the release of a prisoner from legal custody into the custody of persons acting as sureties, undertaking to produce the prisoner to the court at a later date or forfeit the security deposited as a condition of the release'. However, bail options in fact vary widely worldwide. In the US, financial security has been predominant, with 72 percent of felony defendants between 1990 and 2009 in the US's 75 largest urban counties being required to meet financial requirements (Liu, Nunn & Shambaugh 2018: 7-11). These include cash bail, which involves an accused securing pretrial release by depositing a sum of money which will be forfeited if they fail to appear at subsequent hearings (Justice Policy Institute 2011: 1-3). On the other hand, in countries such as Italy, Finland and Sweden, the concept of bail as financial security does not exist whatsoever (Fair Trials International 2011; Finland 2020).

Although there are some variances between Australian states and territories, the range of bail options in Australia and New Zealand include:

- Sureties, which can be the same as cash bail, or a promise to pay a sum of money or forfeit property should the accused fail to appear;
- Personal undertakings from the accused person that they will appear at subsequent court hearings;
- Conduct requirements, such as reporting to police, avoiding certain locations or people, following a curfew, or undergoing a form of treatment;
- Enforceable conditions, such as answering the door for police checks or submitting to random breath tests; and
- Character referees, where persons of good character states that they believe an accused person will obey bail conditions (Legal Aid NSW 2015; Willis 2017).

Additionally, other forms of bail are imposed worldwide. For instance, some US states and the Philippines 'commercialise' cash bail by permitting it to be posted by third party bail bondsmen, with the accused person paying the bondsman a non-refundable premium (Justice Policy Institute 2011; Liu, Nunn & Shambaugh 2018). Moreover, accused can also be detained due to their inability to afford cash bail or the premium (Liu, Nunn & Shambaugh 2018: 7-8).

Finally, in some jurisdictions, bail is determined solely by courts. In others, such as Australia and New Zealand, police and courts share responsibility for determining bail, occasionally resulting in the terminology 'police bail' and 'court bail'. In Australia and New Zealand, bail is typically imposed by the police for minor offences while courts determine bail for persons initially remanded – usually those charged with more serious offences (Bail Act 2000 (NZ)); Legal Aid NSW 2015; Willis 2017). Courts also determine requests to alter bail conditions.

Impact of remand

While the costs and benefits of bail and remand are difficult to directly compare (Liu, Nunn & Shambaugh 2018: 14), they are nonetheless interrelated and mutually relevant considerations. Accordingly, this brief examines the impact of bail on criminal justice outcomes for Indigenous Australians and New Zealanders by first considering the impact of its corollary, remand.

Australia and New Zealand

Significant data substantiates that Indigenous people are over-represented in Australia and New Zealand among remand populations. As detailed in a recent IJC Research Brief, for example, in the June 2018 quarter, Indigenous Australians were over-represented in remand populations by a rate of 11.6 times compared to non-Indigenous Australians, while Māori and Pasifika persons comprised 55 percent and 10 percent of New Zealand's remand population in 2016-17 (Bartels 2019: 2). However, it is difficult to definitively confirm whether remand increases the likelihood of recidivism and thus could be considered criminogenic. This is because neither country's recidivism statistics indicates if a repeat offender was previously remanded or only detained upon sentencing (see eg Nadesu 2008; Payne 2007).

Nevertheless, there are indications that remand may have a criminogenic impact. A Corrective Services NSW paper noted that limited support is available during remand and has a short-term focus (eg suicide watch), as opposed to longer-term treatment options that could have a greater impact on criminogenic factors (Galouzis & Corben 2016: 13).

Moreover, data from both Australia and New Zealand suggests it is possible that detention, and therefore remand, may have a criminogenic effect, at least on Indigenous populations. For instance, data from both countries shows that most Indigenous people detained at any stage of the criminal process will be re-imprisoned in the future. In Australia, 76 percent of Indigenous prisoners nationally had a prior record of imprisonment (ALRC 2018: np). In New Zealand, 55 percent of Māori offenders were re-imprisoned within four years (Nadesu 2008: 7).

In addition, Indigenous prisoners in both countries were significantly more likely than non-Indigenous prisoners to have had a prior record of imprisonment of any kind, except for Pasifika prisoners in New Zealand. In Australia, the national difference was 76 percent of Indigenous to 49 percent non-Indigenous (ALRC 2018: np). In New Zealand, the difference in reimprisonment within 48 months was 55 percent Māori to 45 percent 'European' (Nadesu 2008: 7). Pasifika individuals had a lower 36 percent likelihood of being re-imprisoned. However, they were also more likely to have been initially convicted for more serious crimes and thus less likely to be released within the relevant period (Nadesu 2008: 8-9).

Worldwide

The hypothesis that remand is criminogenic finds firmer support internationally. In addition to a longitudinal study of historic US and UK data which found that any kind of detention increased recidivism (Gendreau, Goggin & Cullen 1999: np), recent data has enabled isolating the impact of remand. Notably, several US studies have concluded that remand leads individuals to be more likely to commit crimes in future (see eg Heaton, Mayson & Stevenson 2017; Liu, Nunn & Shambaugh 2018; Lowenkamp, VanNostrand & Holsinger 2013). One reason posited is that remand increases the probability of conviction, which in turn increases the probability of an individual's future economic difficulties by hampering employability, driving them back to crime (Liu, Nunn & Shambaugh 2018: 10-11).

International data also supports the hypothesis that remand may have an especially harmful impact on outcomes for minorities, including Indigenous people. A Canadian study found that denying Indigenous persons bail renders them more likely to plead guilty' (Bressan & Coady 2017: 10). This owed to fear/distrust of the system; a desire to accelerate the legal process; or a desire to leave remand and secure a reduced prison sentence. It also owed to cultural differences between Western judicial processes and Indigenous customs; differing notions of guilt and responsibility; and the desire to minimise individual/community exposure to the justice system (Bressan & Coady 2017: 9-13).

Similarly, a US data analysis found that remand contributed to 19 percent of the Black-White disparity in criminal justice adjudication in Delaware (Donnelly & MacDonald 2018: 808-809). More broadly, that analysis found that 'bail and pretrial detention decisions have serious consequences for later criminal processing decisions and contribute to Black-White inequalities throughout the justice system' (Donnelly & MacDonald 2018: 811). The study also suggested that the underlying socioeconomic disadvantage of Black communities may also contribute to Black-White disparities in criminal justice outcomes.

Impact of bail

Failure to appear and offences against justice

One bail-related challenge is the high likelihood of Indigenous people being imprisoned for offences against justice. For example, in Australia, Indigenous Australians were 7.6 times more likely than non-Indigenous Australians to be sentenced for an offence against justice (Allard 2010), which included, for instance, failure to appear in court, contempt of court and breaching prison conduct guidelines (ABS 2008). In New Zealand, Māori too were overrepresented in terms of convictions for offences against justice. In the fiscal year 2016-2017, Māori comprised 61 percent of all prisoners sentenced to such offences (NZ Statistics 2020a) but 16.5 of New Zealand's overall population (NZ Statistics 2020b).

A common motivation for remanding an accused is the fear that they may otherwise fail to appear at future hearings. Numerous costs are identified as resulting from failure to appear and justifying the use of remand or stringent bail conditions. These include damaging the effectiveness and integrity of the criminal justice system; impacting those who do not flee; and adversely affecting the absconding individual themselves (Gouldin 2018: 725-729).

However, the fear of failure to appear is not always vindicated. One US study showed that 83 percent of accused met all court appearances and that failure to appear was lowest for serious crimes such as murder and highest for less serious crimes such as motor vehicle theft (Gouldin 2018: 689). Moreover, where individuals do fail to appear, this often owes to circumstances outside their control rather than a desire to evade justice. These include difficulty taking leave; childcare; health issues; and difficulties in communicating court dates (Corey & Lo 2019: np). Such conditions are further exacerbated when an individual is already disadvantaged (Corey & Lo 2019: np).

It is unsurprising, therefore, that these challenges have been identified as frequent and significant obstacles for Indigenous individuals facing criminal proceedings in Australia, New Zealand, and Canada (Allard 2010; Bartels 2019; Coady 2018). A study based on 2002 National Aboriginal and Torres Strait Islander Social Survey data found that imprisoned Indigenous Australians were more likely to fulfil the following socioeconomic characteristics:

> 'male, unemployed, have failed to complete year 12, lived in a crowded household, either was, or had a relative who was a member of the 'stolen generation', lived in a remote area, and engaged in high-risk consumption of alcohol and illicit substance abuse' (Weatherburn, Snowball & Hunter 2006: 1).

Pretrial behaviour conditions, such as curfew checks (Brown 2013: 92-93), may also set up some accused to fail (Bartels 2019: 6). Such conditions can be challenging for Indigenous persons to satisfy, and since violating them is often criminalised, the imposition of such conditions can effectively catalyse a cycle of criminality (Allard 2010; ALRC 2018; Bartels 2019; Coady 2018; Corey & Lo 2019). One US study suggests that reducing the number of required mandatory pretrial meetings may help, and that frequent meetings should be avoided especially where an accused may be required to travel great distances to attend them (Doyle, Bains & Hopkins 2019: 23). Initiatives in the US to establish email, text-message or phone call reminder systems about court dates, and to simplify the wording of summons – some of which are in place in Australia (see eg Bartels 2019) – have also been shown to have some positive impact on failure to appear rates (Doyle, Bains & Hopkins 2019; Corey & Lo 2019).

Bail support/treatment programs and 'abstention' conditions

A second bail-related challenge for Indigenous people in Australia and New Zealand is the nature of requirements imposed vis-à-vis participating in bail support or treatment programs, or alternatively, the impact of behavioural 'abstention' conditions. Broad bail support/treatment options are offered in Australia and New Zealand, although demand frequently outstrips available places (Denning-Cotter 2008; Willis 2017). Programs include diversionary programs for those with drug or alcohol dependencies or mental health issues; accommodation support; case officers who provide guardianship support for young people; and Indigenous sentencing court-run programs facilitating contact and support between Indigenous women offenders and Indigenous elders and fellow offenders (Bartels 2019; Denning-Cotter 2008; Radke 2018; Willis 2017).

Best practice for pretrial treatment programs emphasises that participation should be voluntary and focus on support rather than monitoring behaviour for compliance (Denning-Cotter 2008; Willis 2017). One example is Queensland's Community Justice Groups, which offer cultural services as part of voluntary therapeutic bail conditions focused on rehabilitating offenders (Radke 2018: 57). However, studies from the US indicate mandatory pretrial treatment has not improved pretrial outcomes. For example, one study showed no impact on appearance and recidivism rates for higher risk accused and a negative impact on lower risk accused, while another study showed no impact on any type of accused (VanNostrand & Keebler 2009; see also Doyle, Bains & Hopkins 2019).

Relatedly, research has also shown that imposing pretrial behavioural requirements such as abstention from drug and alcohol use, meeting certain people, and avoiding certain locations may be particularly difficult for Indigenous people to comply with (see eg Bartels 2019). Such conditions 'turn otherwise lawful conduct into crimes, further victimizing people who are still not guilty of any offence' (Shefman 2017, np). Canadian justice systems representatives have observed that First Nations individuals may often plead guilty after being denied bail because they considered pretrial behavioural requirements 'onerous' and 'unrealistic' (Bressan & Coady 2017: 11) or because remand may stretch for several months, particularly in northern communities served by circuit courts that convene only periodically (Bressan & Coady 2017: 11).

For these reasons, it is especially critical that for Indigenous accused, bail support or treatment measures be individualised and their appropriateness assessed holistically (Bartels 2019; Bressan & Coady 2017; Willis 2017). In addition, consideration should be paid to whether conditions should be attached to such measures at all. For instance, bail support/treatment programs and alternative justice programs in Australia, New Zealand, and Canada which are available only to individuals who plead guilty (Bressan & Coady 2017; NZ: Te Kōti Taiohi nd; Radke 2018; Willis 2017) may incentivise pleading guilty to gain access to such services or processes (Bressan & Coady 2017: 10-11). Problematically, this may also have the unintended consequence of triggering a cycle of criminality, since:

> 'an innocent accused person could be criminalized through pre-trial custody, and should they be charged with an offence in the future, they will have even less possibility of accessing bail' (Canada DOJ 2018: np).

Financial bail requirements

Finally, financial requirements for bail may pose a particular challenge to Indigenous criminal justice outcomes in Australia and New Zealand. It has been widely discussed in the literature that imposing financial requirements such as cash bail has a disproportionately adverse effect on marginalised communities such as Indigenous communities (see eg Doyle, Bains & Hopkins 2019; Liu, Nunn & Shambaugh 2018; Ouss & Stevenson 2020). Due to these communities' pre-existing economic disadvantage, such financial requirements may close off access to pretrial release simply due to poverty.

Simultaneously, a core rationale for imposing financial requirements for bail – that is, to ensure an accused's appearance – has been challenged by the data. For instance, in the US, a prosecutorial policy to stop requesting cash bail for several crimes in Philadelphia has not led to a notable increase in either failure to appear or recidivism (Ouss & Stevenson 2020: 18-23).

While the above analyses have focused specifically on cash bail, it stands to reason that these challenges also apply to the broader system of sureties imposed in Australia and New Zealand. Like cash bail, the imposition of sureties requires access to a certain level of financial means. Limited attention has yet been paid to the impact of imposing sureties in Australia and New Zealand. This is therefore an area warranting further consideration, as it could be another factor adversely affecting criminal justice outcomes, especially for Indigenous persons.

Conclusion

Although Australia and New Zealand's international law obligations require them to ensure a presumption of liberty and remand individuals only exceptionally, remand has steadily increased in practice. It is difficult to isolate the impact of remand generally let alone on Indigenous populations in either country. However, remand may have a criminogenic effect, and this is supported by international data: remand has been found to increase the likelihood of future crime, and impact minority populations including Indigenous people especially adversely.

Initiatives to improve court appearance rates without remanding individuals is a possible alternative, as are pretrial support/treatment programs or abstention conditions. However, in each situation, there is a need to avoid imposing conditions so onerous that Indigenous accused struggle to fulfil them and thus commit offences against justice, triggering a cycle of criminality. Furthermore, while significant international literature criticises the disproportionately harmful impact of cash bail on minority populations, this could theoretically apply equally to the system of sureties in use in Australia and New Zealand.

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[i] The term Indigenous is used, respectfully, in this Brief to refer to First Nations peoples of both Australia and New Zealand, recognising the considerable diversity that exists both within and between different groups.

[ii] For example, the Reintegration Puzzle is an annual conference which rotates across Australia and New Zealand to provide opportunities to hear the latest information concerning programs and services which aim to assist people to successfully reintegrate back into the community after prison. See http://www.reintegrationpuzzle.com.au

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