

A series of Research Briefs designed to bring research findings to policy makers

The growth in remand and its impact on Indigenous over-representation in the criminal justice system

Professor Lorana Bartels

Written for the Indigenous Justice Clearinghouse

Research Brief 24, May 2019

Introduction

In recent years, there has been a shift in relation to the purpose and use of bail, from an emphasis on the presumption of innocence to a focus on risk and community safety, and bail increasingly being used as a crime prevention tool. These changes have been observed in Australia (Bartels et al 2018; Brown 2013; Weatherburn 2014), New Zealand (Gluckman 2018; Johnstone 2016; JustSpeak 2017) and beyond (eg Myers 2017).

Research by the Australian Institute of Criminology (AIC) (Willis 2018) suggests that changes to bail laws and conditions have made it harder for people to qualify for bail. Some defendants may not seek bail because they anticipate that they will not qualify and/or weigh up the fact that they will not need to worry about meeting bail requirements if held in prison on remand (ie, unsentenced). Other factors include the lack of accommodation or bail support programs, while some women indicate that time in prison provides respite from family violence, drug use and being caught up in their

partner's criminal behaviours (Willis 2018).

This paper provides an overview of Australian data on changes to prisoner numbers and imprisonment rates for unsentenced and sentenced Indigenous adults in recent years. It also examines the factors leading to the growth in remand and the impact of this on Indigenous over-representation in the criminal justice system. The paper then considers strategies that aim to address these issues.

Data on Indigenous remand

The numbers of both sentenced and unsentenced Indigenous prisoners have been increasing, but the growth in unsentenced prisoners has been more rapid (Willis 2018). Data from the Australian Bureau of Statistics (ABS) (2018) indicate that there were 4107 unsentenced Indigenous prisoners in the June 2018 quarter, accounting for 34% of Indigenous prisoners, 29% of all unsentenced prisoners and nearly 10% of all prisoners in Australia. As set out in Table 1, the number of unsentenced Indigenous prisoners increased

Table 1: Indigenous prisoner numbers and imprisonment rates, by legal status, 2012-June 2018 quarter

	Prisoners - unsentenced (N)	Prisoners – sentenced (N)	Imprisonment rate (per 100,000) – unsentenced	Imprisonment rate (per 100,000) – sentenced
2012	1917	6031	479	1507
2013	2164	6420	524	1557
2014	2422	6904	569	1621
2015	2718	7198	619	1640
2016	3251	7366	720	1631
2017	3658	7640	787	1644
June 2018 quarter	4107	7866	860	1647
% change	114%	30%	80%	9%

Source: ABS 2015: Tables 15 and 16; ABS 2018: Tables 8, 13 and 14

by 114% between 2012 and the June 2018 quarter, compared with a 30% increase in sentenced Indigenous prisoners. The ratio between unsentenced and sentenced prisoners also increased, from 24% of the prison population to 33%. The imprisonment rates per 100,000 population, which take into account population growth, reveal an increase of 80% over this period, while the sentenced Indigenous imprisonment rate only increased by 9%. Accordingly, the growth in unsentenced prisoners is only partly accounted for by general population growth (Willis 2018).

Nationally, there were 860 unsentenced Indigenous prisoners per 100,000 head of population, compared with a general rate of 74 per 100,000 non-Indigenous population (ie, an over-representation of 11.6 times; this was slightly higher than for sentenced prisoners (11.2 times)). In 2012, the rates of over-representation were 11.9 and 11.7 respectively, indicating a slight improvement in this regard.

Table 2 sets out data on the number and imprisonment

in South Australia (49%) and lowest in Queensland (29%). In the Northern Territory, Indigenous remandees comprised 85% of all remandees, while they represented only 11% of remandees in Victoria; this distribution likely reflects both overall imprisonment trends and jurisdictional population makeup. By way of comparison, in New Zealand, Māori people accounted for 55% of the remandee population and 58% of the sentenced population in 2016-17, while Pasifika prisoners represented 10% and 15% respectively of these populations (NZ Stat 2018a; 2018b).

The ABS (2018) recently released information on the people received into prison (prison receptions) for the first time. This information is important, as it provides insights into the 'flow' of people into prison, as opposed to the 'stock' of people held in prison, which informs understanding about the composition of the population of people sent to prison and the population of people in prison respectively. These data reveal that 4030 Indigenous people entered Australian prisons as remandees in the June 2018 quarter,

Table 2: Indigenous remandees, by jurisdiction, June 2018 quarter

	Number	% change since 2015	Rate per 100,000 Indigenous population	% change since 2015	Indigenous remandees as % of Indigenous prisoners	Indigenous remandees as % of all remandees
NSW	1185	40%	820	29%	35%	25%
VIC	276	116%	806	97%	42%	11%
QLD	818	65%	600	51%	29%	29%
SA	336	28%	1263	18%	49%	28%
WA	910	70%	1430	56%	34%	46%
TAS	40	33%	236	25%	35%	21%
NT	493	25%	984	17%	33%	85%
ACT	48	71%	961	52%	43%	27%
AUS	4107	51%	860	39%	34%	29%

Source: ABS 2015: Tables 15 and 16; ABS 2018: Tables 8, 13 and 14

rate of unsentenced Indigenous prisoners (remandees) by jurisdiction, including changes between 2015 and the June 2018 quarter. Nationally, the number of Indigenous remandees increased by 51% between 2015 and June 2018, with Victoria showing the highest increase (116%), followed by the Australian Capital Territory (ACT) and Western Australia (71% and 70% respectively). The unsentenced Indigenous imprisonment rate ranged from 236 in Tasmania to 1430 in Western Australia. Comparison with the rate from 2015 indicated a 39% increase nationally; the Northern Territory had the smallest increase (17%), while the rate increased by 97% in Victoria. Remandees accounted for the highest proportion of Indigenous prisoners

approximately the same number of people as were held on remand at that time. As set out in Table 3, comparison data from the June 2016 quarter (the earliest data available) indicate that the number of Indigenous remandee receptions increased by 11% nationally over two years, although South Australia in fact decreased its reception numbers by 18%. The largest increase was in Victoria (33%), followed by Queensland (27%). Three-quarters of all Indigenous people who entered prison in the June 2018 quarter were unsentenced; this ranged from 52% in Queensland to 95% in South Australia. The data on South Australia are particularly noteworthy; although this was the only jurisdiction with a drop in the number of Indigenous remandee receptions

Table 3: Indigenous remandee receptions, by jurisdiction, June 2018 quarter

	Number	% change since June 2016 qtr	% of Indigenous receptions
NSW	1075	19%	76%
VIC	314	33%	90%
QLD	583	27%	52%
SA	322	-18%	95%
WA	901	7%	84%
TAS	69	17%	82%
NT	726	3%	79%
ACT	40	18%	89%
AUS	4030	11%	75%

Source: ABS 2018: Table 21

(with a decrease of 18%), nearly all (95%) Indigenous people recently received into prison in South Australia were unsentenced. Indigenous remandees accounted for 32% of remandee prison receptions, but this ranged from 12% in Victoria (even though 90% of Indigenous receptions were remandees and this was the jurisdiction with the fastest growth in the number of Indigenous remandee receptions) to 88% in the Northern Territory.

Factors relevant to the growth in remand and its impact on Indigenous over-representation in the criminal justice system

There are a number of gaps in the data. For example, data are not collected on front-end bail decisions, such as the number of people who apply for bail. However, it is clear that the over-representation of Indigenous people in the criminal justice system and especially in prison is partly due to issues relating to bail and remand, with Indigenous status relevant in multiple and cumulative ways. Some of the factors identified by the Australian Law Reform Commission (ALRC) (2017) as driving Indigenous over-representation on remand include housing and employment issues, mental illness, language barriers, cultural obligations and transport issues.

The four main factors that have contributed to a growing remand population in NSW are: bail being harder to get; bail breaches; an increase in people being charged; and prior convictions, which influence whether bail is granted (Fitzgerald 2018). Data from NSW indicate that, although 'there is little evidence of racial bias in the granting and refusal of bail... [i]t is possible that Indigenous status plays a much larger role in shaping bail decisions by police than by courts' (Weatherburn & Snowball 2012: 51). Indigenous

people are more likely to be refused bail or arrested for breach of bail than non-Indigenous defendants (ALRC 2017; Snowball, Roth & Weatherburn 2010). Sanderson et al (2011) found that, in Queensland, Indigenous remandees were more likely than non-Indigenous remandees to have been remanded multiple times and to be unemployed, were younger on admission to custody and had committed fewer offences. For court-ordered remand, Indigenous people were at greater risk of custody, regardless of their current and former offending.

Weatherburn and Ramsey found that the number of Indigenous prisoners on remand in NSW grew by 238% between 2001 and 2015 and observed that 'trends in bail refusal are clearly relevant to an understanding of the growth in the Indigenous prison population' (2016: 8). They noted that the growth in the number of Indigenous prisoners in NSW was due in part to the increasing number of Indigenous defendants on remand, a consequence of increases in the number of Indigenous defendants appearing before the courts, and the proportion of Indigenous defendants refused bail (see also Fitzgerald 2018). Weatherburn and Ramsey found that the growth in numbers (and proportion) of defendants refused bail was particularly large for defendants in the categories of justice procedure offences (up by 194% between 2001 and 2015) and acts intended to cause injury (up by 71%), but there were also significant increases for other offences.

In a follow-up paper, Weatherburn and Holmes (2017) found that the growth in Indigenous imprisonment in NSW since 2012 was a result of four main factors, including increases in the proportion of Indigenous defendants refused bail (although the reasons for this are not entirely clear) and the length of time being spent on remand by Indigenous defendants refused bail. The latter was considered to be largely due to a growth in court delay in the NSW District Criminal Court, although the ABS data above suggest that

Indigenous defendants generally spend less time on remand than their non-Indigenous counterparts (see also Sanderson et al 2011).

Strategies to address the growth in remand and Indigenous over-representation

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) made a number of recommendations in relation to bail, including that:

- arrest be employed as a sanction of last resort (Rec 87(a)). found that only four jurisdictions (NSW, Vic, ACT and Commonwealth (Cth)) had implemented this recommendation in full;
- the operation of bail legislation be closely monitored by each government to ensure that the entitlement to bail, as set out in the legislation, is being recognised in practice (Rec 89);
- where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service (ALS) or their nominee be notified of that fact (Rec 90(a));
- governments, in conjunction with ALS and police services, give consideration to amending bail legislation to revise any criteria which inappropriately restrict Aboriginal people being granted bail (Rec 91(b)); and
- proceedings for breaches of non-custodial orders should ordinarily be commenced by summons or attendance notice (Rec 102).

Many of these recommendations are as relevant today as they were in 1991. According to Stone (2016: 2), however, governments have not only ignored these recommendations, but have implemented laws exacerbating the number of Aboriginal people held on remand. A recent review by Deloitte Access Economics (2018) on behalf of the Department of Prime Minister and Cabinet examined governments' implementation of the RCIADIC recommendations. Overall, Deloitte's review found that less than two-thirds (64%) of the 339 recommendations had been implemented in full. The recommendations on non-custodial options, including those set out above, showed the lowest implementation rate, at only 55% (Deloitte 2018). In spite of this, the review has been critiqued by 32 academics, on the basis that it was 'misleadingly positive', 'largely worthless' and 'has the potential to misinform policy' (Wahlquist 2018). It is therefore timely for governments to review the ongoing relevance of the RCIADIC recommendations and the responses to them.

Weatherburn (2014) has suggested that the number of Indigenous remandees may be reduced through better use

of risk assessment tools and minimising court delays (see also Sanderson et al 2011), while Sarre (2016) has pointed to the potential of specialist courts, such as Indigenous, drug and family violence courts, to promote higher rates of court attendance and divert people from custody. The following strategies also show promise in addressing the growth in remand and its impact on Indigenous over-representation in the criminal justice system.

Shifting the burden of proof for granting bail

The expansion of offence categories for which there is a presumption against bail and the introduction of reverse onus provisions, which shift the burden onto the accused to prove that bail should be granted (commonly known as 'show cause' provisions), contribute to increased remand populations (see ALRC 2017; Bartels et al 2018; Myers 2017). Myers has suggested that the 'growing practice of criminalizing behaviour has significant consequences for accused... the state is extending its power to monitor and sanction the population without first having to convict the person of an offence' (2017: 681). Although this observation was made in the United Kingdom context, it appears to be equally relevant here. In the Northern Territory context, Pyne suggested that removing the presumption against bail for serious violent offences would reduce Indigenous prison over-representation. He reiterated that the 'question should be about the minimum restrictions necessary to get the person to court and protect society, not the "privilege" of bail' (2012: 5). As Weatherburn (2014: 94) has noted, defendants who have not been convicted should not be imprisoned for crime prevention purposes.

Requiring explicit consideration of Indigenous status in bail decisions

The ALRC has recommended that bail laws be amended to require bail authorities 'to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations', although this would not supersede considerations of community safety (Rec 5-1). This provision is already in place in Victoria (see Bail Act 1977 (Vic) s 3A). Hunt (2018: 27) has suggested it 'doesn't mean an Aboriginal accused is more likely to get bail'; Aboriginality is just one of many factors bail decision-makers are required to consider under the Act. Nevertheless, the ALRC argued that this approach would facilitate release on bail with effective conditions especially for Indigenous people accused of low-level offending.

The ALRC also recommended that governments work with relevant Indigenous organisations and peak legal bodies to develop guidelines on such provisions (2017: Rec 5-2). Following recent reforms, bail justices in Victoria, 'will have mandated cultural awareness training and as a result will be more aware of section 3A' (Hunt 2018: 28); this is in line with previous discussion of the need for more extensive cultural awareness training for court officers (see Bartels 2015).

Ensuring bail conditions are appropriate

No Defendants are in a vulnerable position; in order to remain in or return to the community, they must agree to comply with all conditions imposed by the court (Myers 2017). However, the imposition of unduly restrictive and onerous conditions makes it nearly impossible for successful completion (see Brown 2013); defendants are often 'set up to fail' (Myers 2017; Sanderson et al 2011), especially where they do not understand the conditions. People may as a result become further entrenched in the justice system (Myers 2017; Stone 2016; Weatherburn 2014).

If released on bail, Indigenous defendants may be more likely to be placed on stringent bail conditions and/or subject to over-policing of these conditions (Weatherburn & Snowball 2012). The importance of ensuring conditions are appropriate is highlighted by Donnelly and Trimboli's (2018) finding that bail refusal following a breach was higher for Indigenous defendants (38% vs 31%). Stone (2016) has suggested that residence or banning conditions (eg, which may ban an accused from spitting, drinking alcohol, associating with their partner or close friends, speaking to the media or visiting certain towns or areas) are often not culturally appropriate, because of Aboriginal people's connection to country and/or kinship ties (see also ALRC 2017). The Law Council of Australia recently called on state and territory governments reform bail laws which are unnecessarily contributing to high Indigenous incarceration rates, including bail conditions with which many Indigenous people are unable to comply (2018: 22).

As a positive step, culturally appropriate 'in-country' supervision should be incorporated, such as attendance at an Aboriginal Medical Centre's men's or women's group. In Brown, the NSW Court of Criminal Appeal stated:

In the cases of Aboriginal accused...alternative culturally appropriate supervision, where appropriate (with an emphasis on cultural awareness and overcoming the renowned antisocial effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol ([2013] NSWCCA 178: [35]).

Removing breach of bail as an offence

No Breach of bail is an offence in all jurisdictions except NSW and the ACT (ALRC 2017). This approach 'perpetuat[es] the revolving door of criminal justice' (Myers 2017: 679). Crawford and Josey (2018: 16) have recognised that breach of bail 'is a key driver of Aboriginal overrepresentation'. The Queensland Sentencing Advisory Council (2017) recently found that although Indigenous people made up less than 4% of Queensland's population aged 10 and over, they accounted for 26% of all offenders sentenced for breach of bail as their most serious offence, compared with 16% of offenders across all offence types. Indigenous women were especially over-represented, accounting for 32% of women sentenced for breach of bail, compared with Indigenous men, who accounted for 25% of their cohort. Removing breach

of bail as an offence would inevitably reduce Indigenous imprisonment rates (see Pyne 2012).

Adopting alternative measures for dealing with breach of bail

Failure to comply even with technical bail conditions (which account for the majority of breaches by Indigenous defendants: ALRC 2017) may result in prison time (Sanderson et al 2011; Weatherburn 2014). Stone (2016) has suggested that alternatives for dealing with an accused in breach of their conditions, for example, a warning or caution, referral, penalty notice or field court attendance notice, are often under-utilised, although there is a paucity of data to confirm this. Nevertheless, police and courts should be required to consider such alternatives (Sanderson et al 2011). It follows from Weatherburn and Ramsey's (2016) findings above that Indigenous over-representation would be further reduced if fewer defendants were remanded for other justice offences (eg, breach of community-based orders).

Providing accommodation support

Housing pressures are recognised as a key driver of remand rates in Australia (ALRC 2017) and New Zealand (JustSpeak 2017). The ALRC (2017) has recognised that a lack of secure accommodation can disadvantage some accused Indigenous people when applying for bail (see also Radke 2018; Sanderson et al 2011) and suggested that governments consult with Indigenous organisations to 'identify local solutions for bail accommodation and best-practice elements of bail accommodation models employed elsewhere' (2017: 182). The Law Council of Australia also recently called for investment in bail accommodation and bail support programs for remandees (2018: Rec 5.8). Weatherburn (2014) has suggested that bail hostels provide a means of keeping defendants who lack appropriate accommodation in the community and can assist in providing supervision, treatment and assessment, which may increase bail compliance (see also Willis 2017). It can also facilitate individuals' privacy, increase their likelihood of gaining employment and decrease associated stigma to allow for successful (re)integration in the community (Presneill 2018).

Case study

The Bail Accommodation Support Program in South Australia commenced operation in May 2017 and seeks to address accommodation issues for defendants who would not necessarily be on remand if they had appropriate accommodation. The program is a partnership between the South Australian Government and Anglicare SA, which helps to find accommodation solutions for defendants. Participants are supported to maintain links with family, employment and other services while transitioning to long-term accommodation. They are also reminded of court dates and bail conditions and assisted in claiming Centrelink and housing benefits. Residents are expected to pay rent from their private income (contributions range from \$13 to \$20 per night), but access is not denied on the basis of income. The program is designed to replicate

community living, although friends or family are not allowed to stay. Approximately one-third of the program's participants are Indigenous and the program includes a visiting Aboriginal Liaison Officer service and partnerships between Anglicare and local Indigenous organisations. Recidivism data are not yet available, although early indications suggest that the short-term nature of the support (10-28 days) may not be adequate for defendants with complex needs (Presneill 2018; Rowlands 2018).

Introducing other practical measures to support bail compliance

Donnelly and Trimboli's (2018) research reveals that Indigenous defendants in NSW are more likely than non-Indigenous defendants to breach their curfew or residence condition. They were also significantly more likely to commit further offences while on bail and to have multiple breaches/further offences.

Best practice in bail support programs indicates that they should be voluntary, timely, individualised, holistic, prioritise support over supervision, localised and closely connected with courts (see Willis 2017). There are a number of practical measures to support bail compliance, from sending SMS and/or Facebook messages to defendants and their family members to remind them of upcoming court appearances (Stone 2016), through to more comprehensive programs such as Magistrates' Early Referral into Treatment (NSW) and Court Referral and Evaluation for Drug Intervention and Treatment (Victoria and Northern Territory). Transport to and from court is 'also useful, particularly as financial disadvantage or tyranny of distance is one of the main problems in court attendance' (Stone 2016: 7; see also ALRC 2017).

Indigenous-led support programs, such as the Koori Intensive Support Program in Victoria or Community Justice Groups (CJGs), can also play a significant role in supporting bail compliance (ALRC 2017; Bartels 2015; Sanderson et al 2011), although their reach is limited. For example, CJGs in Queensland only service 25% of Indigenous defendants and offenders (ALRC 2017). The ALRC also acknowledged gaps in service provision in relation to defendants with cognitive or mental impairment, as well as men's behavioural change and rehabilitation programs. It recommended that state and territory governments work with relevant Indigenous organisations to identify gaps in the provision of culturally appropriate bail support programs and diversion options and develop and implement relevant initiatives (2017: Rec 5-2; see also Sanderson et al 2011).

Case studies

The Dubbo Aboriginal Bail Pilot Project commenced in October 2017. It is designed to reduce breaches of apprehended domestic violence orders (ADVOs), especially technical breaches. It is a partnership between Aboriginal Client and Community Support Officers (ACCSOs), police, NSW Legal Aid, the ALS, the Local Court and the Dubbo Aboriginal CJG. The project seeks to

work with the Aboriginal community to create more realistic and accountable conditions and help defendants better understand their conditions, how to comply with them and seek variations where required, instead of breaching their conditions (Crawford & Josey 2018).

The *Ngurrumbai Bail Support Program* is a two-year program in the ACT launched in December 2017. It seeks to address Indigenous over-representation by supporting individuals applying for or granted bail. Indigenous ALS staff will work with them to develop a personal bail plan, including setting goals that support their immediate needs and compliance with their bail conditions (ACT Government 2017).

What's Your Plan? involves Aboriginal Client and Community Support Officers offering Aboriginal defendants a voluntary session at court to go through their ADVO and help them make a plan for how they will comply with their conditions. Participants can also choose to receive text message reminders. The ACCSOs also call participants the week after their court appearance to check in and see how their plan is going and whether they want to update it. The service is available across 46 NSW local courts. Staff have reportedly had positive responses from participants and magistrates are very supportive of it. It is expected to be evaluated by BOCSAR in 2019 (Crawford & Josey 2018).

The *Women's Yarning Circle* in Queensland is a bail support program in the Murri Court which seeks to address the specific needs of Indigenous women. Defendants are required to attend programs (eg, medical health checks, counselling), as well as 'cultural services' arranged by the CJG. It enables participants to build a rapport with Elders of the same gender and share stories and knowledge. The issues discussed may include childcare, welfare, racism, colonisation, religion and the Stolen Generations. Yarning circles also provide the opportunity for defendants to gain support from other defendants participating in the Murri Court process and a space where Elders can encourage defendants to stop offending and better understand their reasons for offending (Radke 2018).

Empowering Indigenous people to make bail decisions

Stone (2016) has called for Aboriginal people to be trained and deployed as bail justices, particularly over weekends, and in locations without courthouses or full-time court staff. This model is already in place in parts of Queensland through the Remote Justice of the Peace Magistrates Court program (see Bartels 2015). Extending this model would ensure that bail determinations, bail conditions and responses to breaches of bail are culturally appropriate. It would also align with the call for 'Indigenous Australians to have greater ownership and control over criminal justice processes to overcome the continuing colonising effects of current criminal justice approaches' (Russell & Baldry 2017: 13).

Prison programs for remandees

In order to reduce the number of Indigenous people on remand, the focus should clearly be on keeping them out of prison, but there is also a place for prison programs that address the specific needs of unsentenced Indigenous people. The ALRC recommended that state and territory corrective services agencies develop prison programs with relevant Indigenous organisations that address offending behaviours and/or prepare people for release, adding that such programs should be available to remandees, as well as women and prisoners serving short sentences (2017: Rec 9-1; see also Law Council of Australia 2018: Rec 5.8). However, the ALRC cautioned that corrections agencies should also take account of the legal and ethical considerations arising from the presumption of innocence in designing and delivering such programs.

Although many prison programs are only available to sentenced prisoners, the ACT delivers most cultural programs and some offence-based programs to remandees (ALRC 2017). The New Zealand Department of Corrections (pers comm, 24 August 2018) has advised that it has over 90 programs and structured programs available to remandees, as well as ‘out of gate’ post-prison services. Program completion rates are reportedly identical for Māori and non-Māori participants, although this was not further disaggregated by remand status. Further research should be undertaken on the availability and impact of prison programs undertaken by, and ideally co-designed with, Indigenous and Māori remandees.

Conclusion

Dr Don Weatherburn, the Director of the New South Wales (NSW) Bureau of Crime Statistics and Research (BOCSAR), has observed that ‘[w]henver the justice system gets tougher... it always has a bigger impact on Aboriginal people’ (cited in NSW Law Reform Commission 2012: 62). This is confirmed by analysis demonstrating that recent changes to bail legislation in NSW had a greater impact on Indigenous people than the general population (Yeong & Poynton 2018). In this context, it is worth noting that the Law Council of Australia recently recommended that governments adopt Aboriginal Justice Impact Assessments to ensure adequate accounting for and consideration of the consequences of law and policy decisions on Indigenous people (2018: Rec 7.5).

According to Stone, ‘[e]very bail decision is important, because it involves deciding whether to deprive a person of their liberty. Changing the way bail and conditions are imposed can decrease the over-representation of Aboriginal people in remand’ (2016: 4). Although there are some gaps in the data on Indigenous people and remand, especially in respect of bail application and revocation processes, the available evidence indicates that it is more difficult for Indigenous defendants to obtain and successfully complete bail, in light of their offending and remand history, as well as social, economic and cultural disadvantage (Sanderson et al 2011). In addition to reiterating the call for governments in implementing the RCIADIC recommendations, this paper has identified some promising strategies to address Indigenous over-representation on remand, namely:

- adopting relevant recommendations made by the RCIADIC;
- shifting the burden of proof for granting bail;
- requiring explicit consideration of Indigenous status in bail decisions;
- ensuring bail conditions are appropriate;
- removing breach of bail as an offence;
- adopting alternative measures for dealing with breach of bail;
- providing accommodation support;
- introducing other practical measures to support bail compliance;
- empowering Indigenous people to make bail decisions; and
- implementing prison programs that address the specific needs of Indigenous remandees.

Interventions need to target bail decision-making and procedures in the criminal justice system, as well as addressing the underlying causes of offending behaviour. Accordingly, the most important, long-term solution to Indigenous over-representation is to address systemic issues, especially low educational attainment, unemployment and substance abuse (Sanderson et al 2011; see also ALRC 2017).

Acknowledgments

The author would like to thank Dr Kate da Costa and an anonymous reviewer for their comments on earlier drafts.

References

- ABS 2015. *Correctives Services, Australia – June 2015 quarter*. Cat No 4512. Canberra.
- ABS 2018. *Correctives Services, Australia – June 2018 quarter*. Cat No 4512. Canberra.
- ACT Government 2017. *Bail support program provides more support to Aboriginal and Torres Strait Islander detainees*. Media release. 7 December.
- ALRC 2017. *Pathways to justice: An inquiry into the incarceration rate of Aboriginal and Torres Strait Islander peoples – Final report*. Report 133. Sydney.
- Bartels L 2015. Indigenous-specific court initiatives to support Indigenous defendants, victims and witnesses. Brief 17. Sydney: IJC.
- Bartels L et al 2018. Bail, risk and law reform: A review of bail legislation across Australia. *Criminal Law Journal*, 42: 91-107.
- Brown D 2013. Looking behind the increase in custodial remand populations. *International Journal for Crime, Justice and Social Democracy*, 2: 80-99.
- Crawford E and Josey P 2018. Improving compliance with ADVO conditions – “What’s your plan?” – NSW, in *2017 Indigenous justice forum: Bail and remand – Forum report*. Sydney: IJC.
- Deloitte Access Economics (2018). *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody prepared for the Department of the Prime Minister and Cabinet*. Canberra: Deloitte Access Economics.

- Donnelly N and Trimboli L 2018. *The nature of bail breaches in NSW*. Bureau Brief 133. Sydney: NSW Bureau of Crime Statistics and Research (BOCSAR).
- Fitzgerald J 2018. Drivers of Indigenous overrepresentation on remand – Learnings from NSW, in *2017 Indigenous justice forum: Bail and remand – Forum report*. Sydney: IJC.
- Gluckman P 2018. *Using evidence to build a better justice system: The challenge of rising prison costs*. Auckland: Office of the Prime Minister's Chief Science Advisor.
- Hunt E 2018. Approaches to bail legislation – Victoria, in *2017 Indigenous justice forum: Bail and remand – Forum report*. Sydney: IJC.
- Johnstone A 2016. *Beyond the prison gate: Reoffending and Reintegration in Aotearoa New Zealand*. Auckland: Salvation Army Social Policy & Parliamentary Unit.
- JustSpeak 2017. *Bailing out the justice system: Reopening the window of opportunity*. Wellington.
- Law Council of Australia 2018. *The Justice Project final report: Recommendations and group priorities*. Canberra: Law Council of Australia.
- Myers N 2017. Eroding the presumption of innocence: Pre-trial detention and the use of conditional release on bail. *British Journal of Criminology*, 57: 664-683.
- NSW Law Reform Commission 2012. *Bail*. Report 133. Sydney.
- NZ Stat 2018a. *Corrections: Annual remand prisoner population for the latest fiscal years (ANZSOC)*. <http://nzdotstat.stats.govt.nz/wbos/Index.aspx>.
- NZ Stat 2018b. *Corrections: Annual sentenced prisoner population for the latest fiscal years (ANZSOC)*. <http://nzdotstat.stats.govt.nz/wbos/Index.aspx>.
- Porter A forthcoming. *Custody notification services*. Sydney: Indigenous Justice Clearinghouse.
- Presneill A 2018. *Bail hostels: Report prepared for the ACT Office of the Inspector of Custodial Services*. Canberra: Australian National University.
- Pyne A 2012. Ten proposals to reduce Indigenous overrepresentation in Northern Territory prisons. *Australian Indigenous Law Review*, 16(2): 2-17.
- Queensland Sentencing Advisory Council 2017. *Sentencing spotlight on breach of bail offences*. Brisbane.
- Radke A 2018. Women's yarning circles: A gender-specific bail program in one Southeast Queensland Indigenous sentencing court, Australia. *Australian Journal of Anthropology*, 29: 53-69.
- RCIADIC 1991. *Recommendations*. Vol 5.
- Rowlands J 2018. Bail Accommodation Support Program (BASP) – South Australia, in *2017 Indigenous justice forum: Bail and remand – Forum report*. Sydney: IJC.
- Russell S and Baldry E 2017. *The booming industry continued: Australian prisons: A 2017 update*. Sydney: University of NSW.
- Sanderson J, Mazerolle P and Anderson-Bond T 2011. *Exploring bail and remand experiences for Indigenous Queenslanders*. Brisbane: Griffith University.
- Sarre R 2016. Challenging spiralling remand in custody rates: what legal and procedural changes can address the trend? *Journal of Criminological Research, Policy and Practice*, 2(3): 196-205.
- Snowball L, Roth L and Weatherburn D (2010). Bail presumptions and risk of bail refusal: An analysis of the *NSW Bail Act* (Issue Paper 49, BOCSAR, 2010).
- Stone L 2016. A better approach to bail for Aboriginal and Torres Strait Islander people. *Human Rights Defender*. 25(3): 19-21.
- Wahlquist C 2018. Indigenous deaths in custody report 'largely worthless', academics say. *The Guardian*. 20 December. <https://www.theguardian.com/australia-news/2018/dec/20/indigenous-deaths-in-custody-report-largely-worthless-academics-say>
- Wahlquist C and Allam L 2018. States failing to take up lifesaving phone service for Indigenous prisoners. *The Guardian*. 29 August. <https://www.theguardian.com/australia-news/2018/aug/29/states-failing-to-take-up-lifesaving-phone-service-for-indigenous-prisoners>
- Weatherburn D 2014. *Arresting incarceration: Pathways out of Indigenous imprisonment*. Canberra: Aboriginal Studies Press.
- Weatherburn D and Holmes J 2017. *Indigenous imprisonment in NSW: A closer look at the trend*. Bureau Brief 126. Sydney: BOCSAR.
- Weatherburn D and Ramsey S 2016. *What's causing the growth in Indigenous imprisonment in NSW?* Bureau Brief 118. BOCSAR.
- Weatherburn D and Snowball L 2012. The effect of Indigenous status on the risk of bail refusal. *Criminal Law Journal*, 36, 50-57.
- Willis M 2017. *Bail support: A review of the literature*. Research Report 4. Canberra: AIC.
- Willis M 2018. Key trends in Australia and New Zealand, in *2017 Indigenous justice forum: Bail and remand – Forum report*. Sydney: IJC.
- Yeong S and Poynton S 2018. *Did the 2013 Bail Act increase the risk of bail refusal?: Evidence from a quasi-experiment in New South Wales*. Crime and Justice Bulletin 212. Sydney: BOCSAR.

¹The Commonwealth Government has offered funding to states and territories for a custody notification service. This is currently only in place in NSW, although Western Australia, the Northern Territory and Victoria are currently in the process of establishing similar services (Wahlquist & Allam 2018); other jurisdictions should also adopt this model. It is of course also vital that ALS and legal aid services be adequately funded to represent Indigenous clients (see Bartels 2015; Porter forthcoming; Sanderson et al 2011).

ISSN 1837-6223 (print) © 2018 Indigenous Justice Clearinghouse.

You may copy, distribute, display, download and otherwise freely deal with this work for any purpose, provided that you attribute the Indigenous Justice Clearinghouse as the owner. However, you must obtain permission if you wish to (a) charge others for access to the work (other than at cost), (b) include the work in advertising or a product for sale, or (c) modify the work.

While every effort has been made to ensure that this document is correct at the time of printing, the Indigenous Justice Clearinghouse, its agents and employees, disclaim any and all liability to any person in respect of anything done or omitted to be done in reliance or upon the while or any part of this document.

This information can be provided in alternative formats such as braille, audiotape, large print or computer disk. Please contact the Indigenous Justice Clearinghouse by phone: (02) 8346 1743 (voice) or National Relay Service TTY or Voice call 133 677 or speak and listen 1300 555 727 (for people who are deaf or have a speech impairment) or email ijc@justice.nsw.gov.au