Practical Problems with Bail and Remand

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In the first letter received to come to this seminar, we were induced to link the difficulties of bail or remand, to overcrowding in remand centres. Overcrowding by itself does not demonstrate a problem in the bail process. it is not a logical premise since many other conclusions could be drawn. They include the extra vigilance of police, magistrates taking the sentencing process more seriously or, that there are insufficient facilities.

It is doubtful whether any one of these by themselves, or even collectively, reflects the true situation. There are many people in custody who should not be. It is also true that there are many people who have been given bail who proved by absconding that they should not have been given bail. A balance has to be struck. Last September, 115 people did not respond to bail. Fifty-six of those were given police bail. That is a significant figure when you consider police culture and attitude which you might expect to give rise to a cautious approach. The remaining fifty-nine were court bail.

These non-appearance figures might demonstrate that given the 1985 Act, its educational component, and the accompanying media attention, that magistrates have become more cautious than ever before in keeping people in custody.

The old common law position rested on a primary consideration of whether or not that person would appear in court. Section IO of the South Australian Bail Act has many more considerations. Indeed, the presumption of innocence or the presumption to bail tend to be engulfed in other considerations from the gravity of the offence; whether or not the person would abscond or offend again; down to the very broad and encompassing provision, 'any other relevant matte'. Now what that Act does, in effect, is give the magistrate or judge, or bail authorities (including police), much more discretion than they ever had before. And if these provisions are so broad as to allow that wide discretion, what happens thereafter is that you have to have efficient, progressive, enlightened policy within departments. If the statutes are not tight, or the criteria imprecise, you have to rely on the department's themselves to make up for the deficiencies. In effect, you have to rely on the departments policy, but, more importantly, the players in the field, the legal services people who respond to the bail applications, the police prosecutors and the crown prosecutors who make applications for bail. You have to rely on these people and these organisations to make sure that the job is done properly.

Recently, the newspapers carried a story which, if true, reflects my concern. It seems a man who had been charged with a simple offence of larceny (shop-lifting) was granted, quite properly in the circumstances, bail with one surety, because he lived interstate. But what happened thereafter seems unfair because he remained in custody, as he was unable to meet the surety condition. He languished there for some day before it was brought to anyone's attention. The Act itself allows for review. But what the situation there lacked was someone with due sensitivity to pick up the fact.
that there was a man who was, in effect, serving a sentence for a crime that would probably attract a fine or a bond. That is simply not fair.

There is a real need for more sensitivity in systems within departments. There is something about a police culture that provides a perspective that probably no other department has. This becomes significant where police are bail authorities. If you are involved for eight hours of a shift, forty hours a week, chasing law breakers, writers on policing say it is quite natural for police to expect punishment at the end. Otherwise, police from this one dimension would see it as wasting their time. Police attitude, many say, includes a high degree of cynicism and authoritarianism. If that is true, and there is probably a tendency towards this in operational police, how valid are the submissions made by police in relation to bail? This is a critical issue when you consider that one of the bail authorities within the Act is the sergeant of police at a police station, who has the information before him to decide whether or not police bail will be granted. A clue to their attitude is contained in the figures of that one month in Adelaide Magistrate's Court, mentioned before, where fifty-six people were given police bail and they did not turn up. These figures, in fact, suggest quite a liberal approach.

There are two broad checks within the Police Department to try to cure that tendency towards authoritarianism and cynicism. One is the sergeant himself: it would be fair to say that ten years ago, the attitude of the Watch-house was typically one of, 'You're really going to have to prove you deserve bail before you do get it', reversing that common law basis of the presumption of entitlement to bail. What has happened with the enactment of the 1985 Act, and certainly the growing change towards bail generally, is that sergeants of police have become better educated and more amenable to applications for bail. Another very good reason is a further check which takes place. There is entitlement, as there was before, to have a Justice review and even a magistrate in appropriate circumstances.

Another check is internal, at the police prosecutor level. While the field operator might give many different reasons why the person should not be granted bail, the police prosecutors provide that final filter before the matter is put before the court. As in every walk of life, there are some unfair and heavy-handed comments made by field operators as to why a person should not be given bail. I try in my capacity, to sort that out, to present a more objective appraisal to be put before magistrates through the police prosecutors. And you might say again, well police prosecutors are only former operators from the field and while that may be, true, it does not take long for a police prosecutor under the scrutiny of magistrates to be compelled to be candid, frank and open in court, for they will not last there unless they meet these criteria. Bail should definitely not be left to the police alone.

My recent experience is that there are undue delays in the process before the court, sometimes brought about by police prosecution. Forensic evidence is required more and more often in serious cases nowadays and the Forensic Science Centre is unable to meet the demand promptly. There have been cases in the past where a person has spent too long in gaol while the police prosecutors get together a brief, awaiting forensic evidence which can take many months. That, quite simply, is not fair. One of the benefits of inter-departmental liaison is that we will talk about these things. We now intend to give priority to analysis of forensic evidence related to persons remanded in custody.

It is of concern that people, given the presumption of innocence, do remain in prison for long times while waiting for the prosecutor to get his brief together. The problem is compounded by a Full Court decision which says that the police prosecutors must present all the relevant facts before the matter is placed at committal stage. It may well be in this interdepartmental committee that some sort of compromise is reached there where we 'can commit, short of the full evidence,
especially where a person is in custody but only with the undertaking that evidence will be available in due course.

A second main concern lies in the bureaucratisation of the system given the broad and very subjective criteria in Section 10 (and its equivalent in other states). It could appear that once the machine starts, it is impersonal and insensitive, allowing, for example a person to remain in custody for the regulatory time of five days where bail has been given with a surety that cannot be met. Within the Process, it needs someone or some process to be adapted, to give due sensitivity to these people who do not make use of the provisions the Act In some cases, they do not know what provisions are available, even though the Act requires that they are given pamphlets, for example, which explain these matters. I have given my concerns about police attitude: if there is police cynicism, it can arise from the fact that of the people they arrest, 90 per cent plead guilty and of the matters that go to trial, over 90 per cent are found guilty. Now they might argue, perhaps correctly, that it’s not so much cynicism as a hard realisation that people they put before the court tend to be guilty. Consequently, from the hundred or so people who did not answer bail in that month in the Adelaide Magistrate’s Court, there can be a criticism of the bench of naivety.

In conclusion, these are the issues of most concern. There is need for continuing and better education within the police about the principles of bail and the sensitivity that should be afforded individuals within the bail system. There should be an introduction of a system to recognise delays in getting matters before the court—a situation which is known to be chronic in Magistrate's Courts throughout this country. Legal service authorities come there with ten, twelve or twenty cases, and the magistrates believe when they hear the facts, that they’ve heard it all before. The cases do not appear individualised, and the police prosecutors, on the other hand, appear to be repetitive or stereotyped themselves. Bail, it seems needs more room, more time, and consideration. There is also a very real need for prompt revision of cases where conditions have not been met. The inter-departmental committee must consider issues which can be cured through liaison between departments. I join with those magistrates, who express the view that the listings in the Magistrate's Court are too busy. Due consideration needs to be given to that very important issue of whether a person will be given liberty or will remain in custody. Because insufficient time is given to that question, we're not doing it at all well. If it is extra personnel, judiciary or prosecutors who are required, so be it. It has to be addressed.