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Understanding bail decision-making: an observation and interview study

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AIM

To determine which factors of the *Bail Act 2013* (NSW), are influential in first court bail decisions in NSW Local Courts, and the reasons why courts release adult defendants who have already been refused bail by police.

METHOD

We descriptively and thematically analysed a dataset combining observations of 252 first court bail hearings in the NSW Local Court between February and May 2023, and administrative data from the BOCSAR Re-offending Database (ROD) and the New South Wales (NSW) Police Force's Computerised Operational Policing System. We supplemented these data with thematic analysis of 40 interviews with criminal justice stakeholders involved in adult bail proceedings in NSW Local Courts.

RESULTS

Of the 252 observations where police had refused bail, 110 defendants (44%) were released on bail by the court, with six released unconditionally, 12% were finalised at first appearance or had their bail dispensed with, and 44% had their bail refused by the court. Similar to prosecutors and police, magistrates were most concerned with a defendant's criminal history and the nature and seriousness of the offence, and to a lesser extent defendant vulnerabilities and needs, when determining bail. There was also general agreement between police/prosecutors and the courts regarding bail concerns, with both parties most frequently identifying reoffending and endangering the safety of victims/community as their primary concerns. Two main differences between police and court decisions emerged from the analysis. Firstly, while magistrates identified bail concerns in the majority of matters observed, they were often satisfied that these risks could be mitigated by bail conditions. The bail conditions most commonly imposed were accommodation (82%), reporting (60%), non-contact orders (47%), and place restrictions (34%). Secondly, police rarely grant bail to people charged with show cause offences, whereas 55% of defendants charged with a show cause offence, who were refused bail by police, were able to successfully demonstrate to the court why their detention was not justified. Stakeholders reported that this occurred because police prioritise community and victim safety, have limited access to information from defendants and legal representatives, and do not apply discretion when applying the show cause requirement.

CONCLUSION

Legal factors, such as criminal history and seriousness of offences, are the most influential factors in both the police and courts' bail decisions. However, magistrates who are legally trained, less subject to time pressures, and can be informed by legal practitioners, are more able to thoroughly assess show cause requirements and the suitability of bail conditions at the first court bail hearing. In the absence of these factors, police are more risk averse.

KEYWORDS Bail/remand | Adult | Court | Police | Risk assessment

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INTRODUCTION

The remand population in NSW has grown significantly over the last decade. In March 2024, 5,452 adults were in remanded custody in NSW. This was up from 3,651 adults in March 2013, an increase of 49%. A consequence of this growth is that remandees now comprise a large proportion of the overall prison population, with 44% of all adults in custody on remand (compared to 29% in March 2013) (NSW Bureau of Crime Statistics and Research (BOCSAR), 2024). This is consistent with the wider Australian prison population; nearly 40% of prisoners are on remand (Australian Bureau of Statistics, 2024). The cost of remand to government is substantial. At an estimated daily cost of $286.89 per day (Corrective Services NSW, 2023), and with an approximate average of 5,400 remand prisoners in the state at a time (BOCSAR, 2024), NSW taxpayers pay more than $1.6m daily. Remand is also likely to lead to longer sentences and a higher likelihood of conviction in the short term (Rahman, 2021), and poorer recidivism and employment outcomes in the longer term (Anwar et al., 2023).

Furthermore, Aboriginal defendants make up a significant and increasing proportion of those on remand (BOCSAR, 2024). In March 2024, 1,763 Aboriginal adults were in remanded custody. This represents 32% of the total remand population and is an increase of 131% compared to March 2013 (BOCSAR, 2024). Addressing the escalating remand population would therefore not only result in savings to government but would also contribute to the NSW Government's Closing the Gap commitment to reduce the rate of Aboriginal and Torres Strait Islander adults incarcerated by at least 15% by 2031 (Department of the Prime Minister and Cabinet, 2024).

Bail legislation aims to strike an appropriate balance between "future risk on the one hand and the presumption of innocence and the right of an accused person to be at liberty on the other" (Brignell & Jamieson, 2020, p. 3). In NSW,[1] the *Bail Act 2013* (NSW)[2] provides legislative guidance for structured decision-making by bail authorities (a police officer, an authorised justice, or a court), to decide whether an accused person remains in the community until their matter is heard in court or whether they are detained. The legislative framework establishes a risk-management approach to prioritise three purposes of the criminal justice system: protecting the community; protecting the victim; and protecting trial integrity (NSW Law Reform Commission, 2012). The statutory provisions in the Bail Act are complex, and thus require bail authorities to exercise some "discretionary evaluative judgement" (Brignell & Jamieson, 2020, p.3).

Currently, the bail process in NSW local courts (for offences conducted in NSW) is as follows. Division 1 describes the processes of 'police bail'. After a person has been arrested and charged with an offence, a police officer at or above the rank of sergeant (hereafter referred to as a custody manager) decides in accordance with s. 43(2), whether to: (a) release the person without bail; (b) grant bail (with or without the imposition of bail conditions); or (c) refuse bail. If the custody manager refuses bail, the defendant is remanded in custody until they are brought before the Local Court for their first court bail appearance.[3] This must occur as soon as possible and no later than 24 hours after police bail has been refused. During the first court bail hearing, the defendant elects whether or not they will apply for bail. If no application is made for bail, a subsequent bail hearing may be conducted. If they apply for bail, the court bail authority (i.e., a magistrate or registrar), in accordance with s. 8(1), must decide whether to: (a) release the person without bail; (b) dispense with bail; (c) grant bail (with or without conditions); or (d) refuse bail and remand the defendant in custody until their next court appearance. Alternatively, if the defendant does not apply for bail, the bail authority immediately refuses bail. Appeals and variations can be made after the bail decision has been made; both extend beyond the scope of the study.

1 The *Crimes Act 1914* (Cth) includes bail provisions specific to commonwealth offences that are dealt with in the NSW Local Court (such as ss 15AA, 15AAA). We do not describe these provisions here as our study does not include Commonwealth offences.
2 This paper will refer to the *Bail Act 2013* (NSW) as the 'Bail Act'.
3 First court bail hearings includes where a new offence has been committed, breach of community-based order offences, and breach of violence order offences. It does not include bail appearances for a warrant for arrest, or breach of bail, or where the defendant requests a bail variation or appeal.

For a specified subset of offences outlined under s. 16B of the Bail Act, bail must be refused unless the defendant can 'show cause' as to why their detention is not justified. These include offences punishable by life imprisonment, certain serious indictable offences such as child sex offences, serious personal violence, commercial drug offences and firearm offences, as well as any serious indictable offence[4] committed whilst on bail, parole, a supervision order, or subject to an arrest warrant. The Bail Act does not specify and offers little guidance on what constitutes 'showing cause'. However, the Judicial Commission of NSW report, Navigating the Bail Act 2013 (Brignell & Jamieson, 2020), offers caselaw guidance. The report lists several factors that may be relevant in determining whether a defendant's detention is not justified, including the strength of the prosecution's case, the likely length of time spent in remanded custody, and likelihood of a custodial sentence (a predictive exercise which may be informed by an absence of prior offending and having committed a relatively minor offence). The delay in time to sentence may carry more weight when the person experiences some type of vulnerability that may be exacerbated in custody or that cannot be managed in a custodial setting such as a terminal illness, or where a family member's care would be hindered. If a defendant is able to show cause as to why their detention is not justified, the 'unacceptable risk test' (explained next) is then applied in the usual way to determine whether the defendant should be granted bail (see Figure 1).

If a person is charged with an offence that is not a show cause offence, or a person charged with a show cause offence successfully shows cause, the bail authority must determine bail in accordance with Flow Chart 2, s. 16, the 'unacceptable risk test' (Judicial Commission of NSW, 2022).

The 'unacceptable risk test' prescribed in Division 2 of the Bail Act applies to all offences (see Figure 2). Under this test, bail authorities must first assess whether there are any bail concerns and, based on this assessment, determine whether there is an unacceptable risk that the defendant, if released on bail, would: (a) fail to appear at any proceedings for the offence; (b) commit a serious offence; (c) endanger the safety of victims, individuals, or the community; or (d) interfere with witnesses or evidence. S. 18 of the Bail Act specifies a broad and exhaustive set of matters that must be considered in assessing the presence of bail concerns including: the nature and seriousness of the offence, the accused's criminal history and community ties, their pattern of compliance with previous bail conditions and other orders, whether they have any need to be free to prepare for their court appearance or obtain legal advice, and whether they have any special vulnerability or needs, including because they are young, Aboriginal, or have a psychological disorder or cognitive impairment. If an unacceptable risk(s) exists but can be mitigated by bail conditions, then the accused is to be granted conditional bail. If any identified risks cannot be mitigated by bail conditions, bail is to be refused.

4 A serious indictable offence is defined in s. 4 of the *Crimes Act 1900* (NSW) as an indictable offence punishable by a term of five years or more, and in practice including offences such as shoplifting (captured by the offence of larceny pursuant to s. 117 *Crimes Act 1900*) and property damage (s. 195 *Crimes Act 1900*).

Figure 1. The show cause requirement in the Bail Act

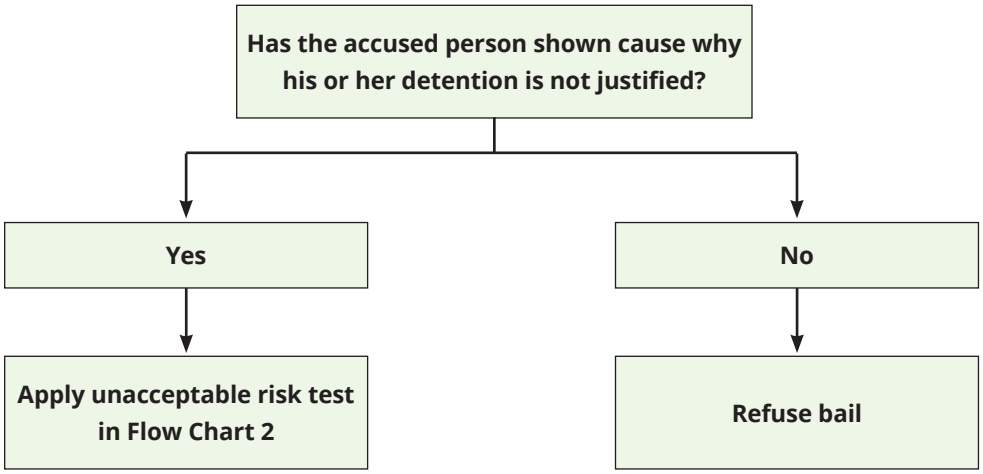
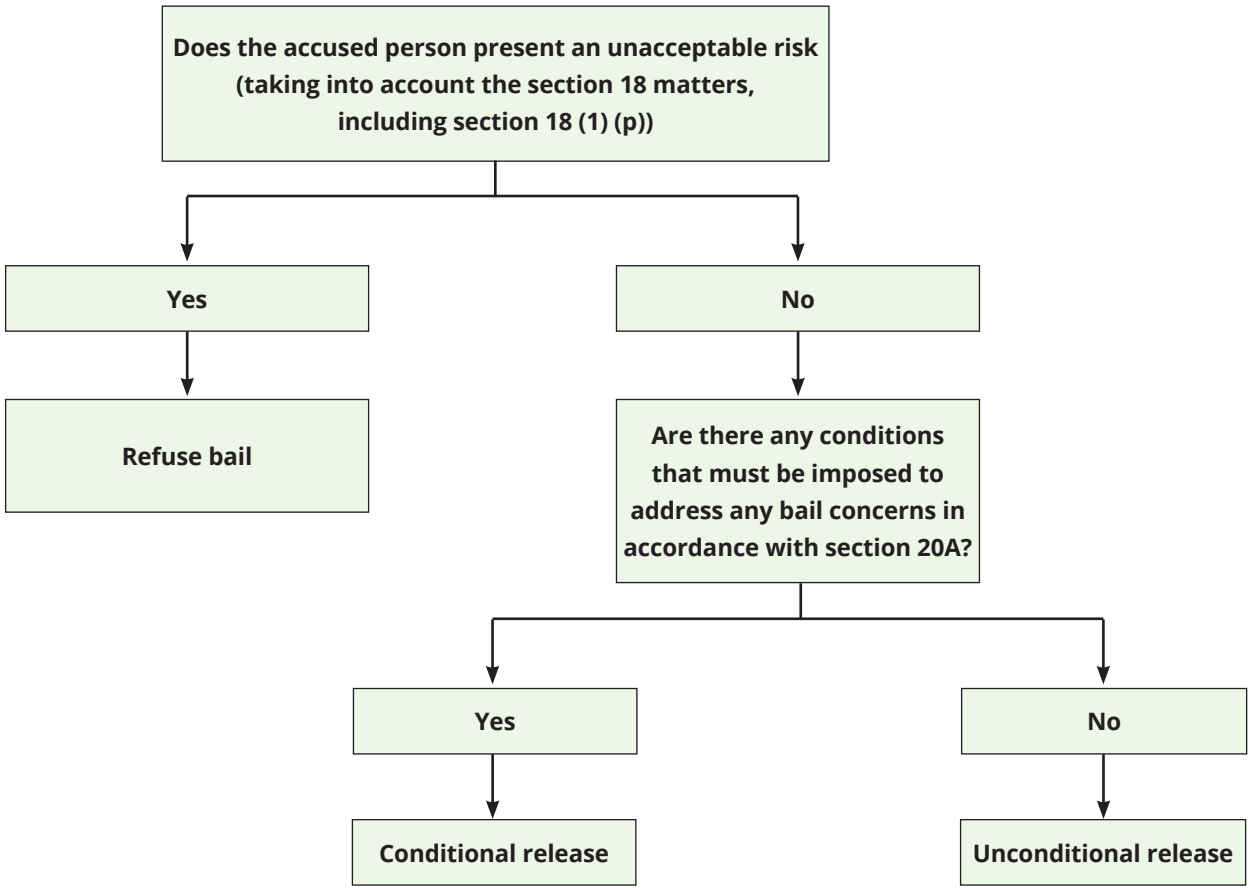


Figure 2. The unacceptable risk test in the Bail Act



There have been recent amendments to the Bail Act. Most notably, in June 2024, under the Bail and Other Legislation Amendment (Domestic Violence) Bill 2024 a series of provisions around domestic violence were added to the Bail Act, making it harder for a perpetrator of domestic violence to receive bail. In addition, registrars, who previously made bail decisions in weekend court in rural areas, were excluded from making bail decisions. As these amendments were made after this bail study was conducted, they have no impact upon our data.

Prior research on bail decision-making

Yeong and Poynton (2018) estimated the causal effects of the introduction of the Bail Act 2013 (NSW) on the likelihood of being bail refused by NSW bail authorities. They found that the amendments increased the probability of both police and courts refusing bail, especially for serious offending. Regarding minor offences, however, they found that immediately after implementation, "the mean rate of bail refusal by police appeared to be lower and less volatile, suggesting that police were less likely to refuse bail and were more consistent in bail decisions" (p. 9). The authors concluded that the new legislation's risk assessment approach is more consistent with routine policing practice and therefore potentially simpler for police to apply.

More recent research has shown that despite the NSW Bail Act's structured framework, there is substantial variation in bail decisions by police and courts within NSW. Like Yeong and Poynton (2018), Klauzner and Yeong (2021) found that observable legal factors, such as offence type, concurrent offences, the severity of the index offence, and prior criminal history, were strongly associated with both police and court decisions to refuse bail, in particular whether the defendant was charged with an offence where there is a presumption against bail (i.e., a show cause offence). They also found that other extra-legal factors such as age and gender were significantly associated with bail outcomes. These results are largely consistent with those from other Australian and international research (see for example Allan et al., 2005; Cadoff et al., 2021; Hughes et al., 2022; Sarre et al., 2006). However, while factors influencing police and court decisions were largely the same, Klauzner and Yeong noted significant differences for decisions involving Aboriginal defendants and defendants accused of domestic violence-related offences. Variation in refusal rates across Police Area Commands (PACs) and individual magistrates was also observed, but was most apparent amongst magistrates.

Although police were more consistent in their bail decisions than the courts, the analysis by Klauzner and Yeong (2021) revealed that police have a much greater tendency to refuse bail, with courts granting bail in 54.7% of matters where police had initially refused bail to the defendant. It is difficult to determine which factors may account for this disparity in bail decisions. However, by combining research on police and court bail decision-making, we can deduce at least four possible reasons for these differences. The first is that the information available to the police differs to that available to the courts at the time of their respective bail decisions. Police bail decisions are typically made shortly after the commission of the offence at which time they may have limited access to legal advice to advocate for the defendant's release.[5] The defendant may also be distressed or confused during this time or may appear more of a "risk" due to violent behaviour or substance use (Allan et al., 2005, p. 321). The second is that police and courts may consider different factors (including those not explicitly referred to in ss. 17-18 of the Bail Act[6]) in determining each risk, leading to different risk assessments. The third, is that both groups consider the same factors, but police and courts weight these factors differently when making their decisions. Klauzner and Yeong (2021) found evidence to suggest that this may occur for matters involving domestic violence. A fourth possibility is that other contextual factors differentially affect police and court bail decisions,

5 A number of factors contribute to the unlikeliness of obtaining legal advice during police bail. Neither the Aboriginal Legal Service (ALS) nor Legal Aid are generally resourced to conduct bail advocacy for persons in police custody following charge. There is also a 'special caution' provision within the *Evidence Act 1995* (NSW) (s. 89A) which states that an accused person risks waiving an important protection in defended court proceedings against their decision to exercise their right to silence in the presence of a legal representative during official questioning. Accordingly, even if the accused person can afford legal representation, it is often prudent that the lawyer does not attend the police station to preserve the client's rights to silence and against self-incrimination.

6 While bail decisions must only consider the exhaustive list of risk factors outlined in s. 18, it is possible that non-legal factors influence the assessment of ss. 17-18 risk considerations. If factors outside of legislation are being considered in decision making this is indicative that the Bail Act is not being applied correctly.

such as the presence of other persons in the court, the mode of the defendant's appearance, the quality (tone and style of speech, emotions, body language, management of court room decorum) of interactions between persons in the courtroom or in the police station, and/or the duration of hearings (Lens, 2016, p. 707; Roach Anleu et al., 2015, p. 147; Sarre et al., 2006, p. 4).

Contributing to our lack of understanding of bail decision-making is the limitation of existing administrative bail data. Unlike police bail decisions, the basis for court bail decisions (e.g., whether bail was refused because of show cause or the unmitigable presence of unacceptable risks) are not recorded in administrative data. These legal reasons and the underlying persuasive factors (such as the availability of housing, connection to culture and community, engagement with services in the community) are only recorded in the form of court proceeding audio recordings. Under special circumstances and subject to approval, transcripts of these audio recordings could be accessed for research purposes, however this is rare. Administrative data also excludes any information made available to custody managers and magistrates to inform their bail decision such as police facts, or supporting materials obtained by lawyers. This significantly limits our ability to assess how and why bail decisions are formed. Recognising this limitation, researchers have conducted observational research to complement analyses relying on administrative data. We describe these studies below.

In one such study, Allan et al. (2005) explored the factors that significantly influence first court bail decision-making in Western Australia. Three observers attended 648 (adult and juvenile) first court bail hearings, over 138 days, in seven of Perth's metropolitan lower courts. Applying chi-square tests and logistic regression, Allan et al. found that legal factors (those prescribed by the *Bail Act 1982* (WA)), particularly previous charges, were more influential than extra-legal factors such as gender and race. They also found that legal representation during the bail application improved the chance of release. The positive influence of legal representation on bail outcomes has been observed in other studies. Anwar et al. (2023) for example, conducted a randomised control trial in Allegheny County (United States of America) to explore the impact of providing defendants with a public defender during their bail hearing. They found that having public defenders at the bail hearing reduced both the use of monetary bail and pre-trial detention.

In a similar study, Travers et al. (2020) explored the influence of defendant vulnerabilities (e.g., drug use, mental illness), risk factors and pre-trial services on bail decisions in four Australian states (Tasmania, South Australia, New South Wales, and Victoria). They analysed administrative court data, data from court observations, and practitioner perceptions gathered from interviews. Over a two-year period, a team of researchers from five universities engaged in 40 days of field research, resulting in 150 bail observations and 26 practitioner interviews. Consistent with Allan et al. (2005) and Klauzner and Yeong (2021), they found that "magistrates followed strictly legal criteria in their bail decision-making. Where magistrates did show an interest in a defendant's vulnerabilities as they might affect bail risk, and occasionally beyond bail risk, they were restrained by the limited support resources available and accessible" (Travers et al., 2020, p. 6).

Taking a different perspective, Torres and Williams (2022) explored the impact of judicial fatigue as well as other hearing characteristics upon bail decision-making. Over a one-year period, seven fieldworkers observed bail hearings within two bail courts in New Jersey. To understand the effect of judicial fatigue they considered the importance of case order and session durations (proxies for judicial fatigue) on judges' displayed levels of engagement with defendants during proceedings, deviation from prosecutors' recommended bail amount (dollar value for surety), and bail amount set. They found decision fatigue leads to less favourable outcomes, including increasing the likelihood of being refused bail and higher bail sureties. Case order was found to have a greater influence than session duration; although these factors were most influential when considered in tandem. Other factors were also identified as influential in bail decisions, including case complexity, volume of hearings, bail recommendations from the prosecution, and the mode of appearance for the defendant (i.e., audio-visual link (AVL) versus in person). Their research emphasised the continued need to understand how court proceedings are conducted and the influence of participant engagement, particularly in the context of a larger, more representative sample (Torres & Williams, 2022).

The current study

The current study attempts to address the limitations of prior research by recording all the factors considered in court bail decisions through bail observations. In other words, our study aims to capture a broader range of bail considerations to improve our understanding of how bail authorities apply the 'unacceptable risk test' prescribed by the Bail Act, and the reasons why a substantial proportion of defendants initially refused bail by the police are subsequently released by the court. Specifically, the study aims to answer the following research questions:

1. What factors are considered in court bail decisions?
    a. What factors are typically raised in first court bail hearings, and by whom? What evidence is used to substantiate these bail submissions?
    b. What bail conditions are proposed to the court to mitigate unacceptable risk and by whom?
    c. What factors do magistrates consider most important in their assessment of risk? What bail conditions do they typically impose to mitigate risks?
2. Why do magistrates grant bail to adult defendants who are initially refused bail by police?
    a. What are the reasons recorded by police for opposing bail?
    b. In what proportion of matters do the concerns of the court align with those initially recorded by police?
    c. In matters where assessments of risk align, what are the reasons given by the court for granting bail?

METHOD

As noted earlier, a major challenge in understanding the factors that influence bail decisions and any variability in outcomes is the lack of data available in administrative datasets. To address this challenge, we observed a large sample of court bail hearings in the NSW Local Courts to collect additional information on various aspects of court bail decision-making. These observational data were then linked to data on the initial police bail decision to compare factors considered in the bail process for the same cases and individuals. To account for the possibility that our sample does not reflect general experiences across the state, we supplemented this data with interviews with a variety of legal practitioners, court staff and court support officers across NSW. This enabled us to understand broader practitioner experiences of bail in NSW, opinions on why police and court decision-making differs, and how bail decision-making in NSW can be made more consistent.

Data

Court observations

We developed an initial observation protocol that aimed to capture key information in court bail decisions, particularly the show cause assessment and key provisions relating to the unacceptable risk test as set out in ss. 16-18 of the Bail Act. This protocol was further refined based on a review of the bail forms used by Local Court magistrates, a review of protocols used in previous court observation studies and testing of the protocol's usability and reliability in bail hearings in the NSW Local Court. In early testing, observers found it difficult to record the full range of considerations mentioned in s. 18 and bail conditions in ss. 25-30 of the Bail Act in the relatively short period over which bail hearings are typically conducted. Thus, we combined some of these factors into broader categories to enable accurate recording of the most pertinent factors (see Tables 1 and 2). We also developed a coding dictionary to assist observers in recording information under relevant categories. To test the inter-rater reliability of our final instrument, we compared data collected by two observers from bail hearings over three days at Downing Centre and Parramatta Local Courts, finding an agreement rate of 88%.

Table 1. Unacceptable risk factor groupings and criteria included in observation protocol

Unacceptable risk factor groupings	Unacceptable risk criteria in the Bail Act
Personal background	• Personal background (s. 18(1)(a)) • Community ties (s. 18(1)(a)) • Criminal associations (s. 18(1)(g)) • Terrorism associations or support (ss. 18(1)(q), 18(1)(r), 18(1)(s))
Accommodation	• Accommodation (s. 18(1)(a))
Vulnerabilities/needs	• Cognitive Impairment, learning difficulties, mental illness, alcohol/drug use, difficulty understanding English, Aboriginality, poverty (s. 18(1)(k))
Criminal history	• Criminal history (s. 18(1)(a)) • History of violence (s. 18(1)(d)) • Previous serious offence(s) while on bail (s. 18(1)(e)) • Previous compliance with bail/orders (s. 18(1)(f)) • Failure to comply with conditions/warnings (s. 18(a)(f1))
Nature/seriousness of current offence	• Sexual offence, violent offence, involving weapon, number of offences (s. 18(2))
Effect on community/victim/families	• Conduct towards victim/victim family after offence (s. 18(1)(n)) • Victim/victim family concerns for endangering theirs or the communities safety (s. 18(1)(o))
Strength of prosecution's case (prospect of conviction)	• Strength of prosecutor's case (s. 18(1)(c)); Prospect of success for appeal against conviction/sentence (s. 18(1)(j))
Likely remand/custody and length	• Likely remand length if bail refused (s. 18(1)(h)) • Likelihood of custodial sentence if convicted (s. 18(1)(i)) • Likelihood of custodial sentence if convicted but not sentenced (s. 18(1)(i1))
Bail conditions	• Proposed bail conditions (s. 18(1)(p))
Need to be free	• Accused's need to be free to prepare court appearance/obtain legal advice (s. 18(1)(l)); Accused's need to be free for any other lawful reason (s. 18(1)(m))
Risk of failure to appear	• Fail to appear (s. 17(2))[7]

7 While fail to appear is one of the four bail concerns and not a risk consideration under s. 18 of the Bail Act, our preliminary court observations identified that the risk of failure to appear featured in both defence and prosecutions submission on risk considerations, and thus needed to be included in our observation protocol in the assessment of both bail concerns and risks.

Table 2. Conditions included in observation protocol

Condition (section of the Bail Act)	Definition
Accommodation/residence (s. 25)	Conduct requirement for the accused to reside at a nominated appropriate address for the duration of their bail.[8]
Reporting (s. 25)	Conduct requirement to attend police station or other place/authority at specified time.
Curfew (ss. 25, 30)	Conduct requirement, with or without an accompanying enforcement, to comply with curfew (time and place to be present, and persons to be in the company of, can be listed).
Treatment/Rehabilitation/Diversion (s. 25)	Conduct requirement to undergo an intervention or diversion program. This may include the successful completion of the program. This is likely dependent upon a vacant spot being secured, and the location start date and duration being specified.
Drug/alcohol restrictions (s. 25)	Conduct requirement to not be intoxicated or under the influence of drugs, unless a licit drug is prescribed by a doctor.
Drug/alcohol testing (s. 30)	Enforcement condition to undertake drug/alcohol testing to prove compliance.
AVO (existing) (s. 25)	Conduct requirement to apply strictly with the terms of an Apprehended Violence Order (AVO) in force.
Non-contact (s. 25)	Conduct requirement to not (including through a third party) approach, contact or associate with the victim, the victim's family, and witnesses, or their place of residence or work.
Non-association (s. 25)	Conduct requirement to not associate with people or groups. Often people with criminal associations. Does not include victims/witnesses.
Place restrictions (s. 25)	Conduct requirement to not enter or loiter around specified locations. Or not to come within a certain distance of agreed places.
Travel restrictions (s. 25)	Conduct requirement to not leave a certain area, or Australia more broadly. Domestic/international travel restriction. Includes passport surrender.
Technology restrictions (s. 25)	Conduct requirement restricting the possession and use of phones or other devices, encrypted apps. Restricted access and use of the internet.
Character acknowledgment (s. 27)	An acknowledgment given by an acceptable person to the effect that they are acquainted with the accused and regard the accused as a responsible person who is likely to comply with their bail acknowledgment.
Security agreement (incl. cash forfeiture) (s. 26)	An agreement to forfeit a sum of money if the accused fails to appear. May require a deposit.

8 This is a conduct requirement and is different to accommodation required before release condition in s. 28, which applies to young persons.

The final protocol (see Appendix) included the following items:

1. Characteristics of the bail hearing,[9] including:
    a. The defendant's name, police charge number, and JusticeLink number;[10]
    b. The defendant's mode of appearance (in person or AVL) and status (in police custody, in corrective services custody or other);
    c. Parties present, including the defendant's, family members, support persons, and translators;
    d. Whether there was legal representation, and if so, the type; and
    e. Whether it was a first bail application and type of application[11] (release or detention application, bail not applied, finalisation of matter without bail application[12]);
2. Reasons for police bail refusal (where mentioned in the court appearance);
3. A typology of the criteria in s. 18 mentioned by the prosecution and defence during the bail hearing as part of the unacceptable risk test (as outlined in Table 1);
4. The magistrate's reason for accepting/rejecting these risks/vulnerabilities (recorded as free text);
5. The conditions submitted by the defence and prosecution to mitigate risk and the magistrate's reasoning for accepting/rejecting these conditions;
6. Whether the offence was 'show cause';
7. The prosecutor's bail submission; and
8. The bail decision, and the magistrate's reasoning for granting/refusing bail, including any bail concerns submitted.

Our aim was to collect a minimum of 150 observations of 'first' bail hearings in NSW Local Courts.[13] First court bail hearings are conducted as soon as possible, and no later than 24 hours after police have refused bail for a criminal offence. First court bail hearings include where a new offence has been committed, breach of community-based order offences, and breach of violence order offences. It does not include bail appearances for an arrest warrant or breach of bail, subsequent applications where new evidence supports bail, or where the defendant requests a bail variation or appeal. Factors affecting these excluded types of bail decisions are likely to differ to first court bail hearings, thereby requiring different analytical considerations which expand beyond the scope of this study.

We sampled 12 high volume NSW Local Courts[14] using a purposive sampling strategy. We sampled at least one 'hub' court within each court region and supplemented these with a satellite court where possible. Sampled courts included Parramatta, Bankstown, Fairfield, Liverpool, Newcastle, Wyong, Wollongong, Sutherland, Campbelltown, Downing Centre (formerly Central), Burwood, and Dubbo. Weekend observations were only conducted in hub courts, specifically Parramatta, Newcastle, Wollongong, and Dubbo.[15] Sampling high-volume courts in each court region, expedited data collection while obtaining broad representation of matters across the state.

9 This information was used to determine if a matter was eligible as a first court bail hearing, and to explore and compare sample variations.
10 This information was supplied by registrars at the end of each court day.
11 Types exclude those that are a secondary bail hearing such as an application to vary bail, an application for bail where one was not made in the first appearance, or where new supporting materials are, or where the defendant is appealing the decision to refuse bail.
12 In some minor matters which may be fine only offences for example, legal representatives would opt for a finalisation at that appearance instead of making a bail request. This was seen to improve the efficiency of court processes.
13 This allows us to report descriptive statistics with a margin of error of 7.8%.
14 High volume courts were identified using a BOCSAR bail dataset on the number of first court bail appearances for adults appearing in NSW Local Courts. The dataset showed volume by court location and day of week, for the periods of January 2019 to December 2019, and January 2022 to August 2022 (latest available data at the time). Weekdays and weekends vary in workload with around one quarter of matters heard on the weekend. Our preliminary sample of courts included those with >500 bail hearings on weekdays, or >100 hearings on weekends, for either of the two years. The list of courts was refined to only 12, through efficiency considerations. (BOCSAR reference: dg2221905).
15 These are the only courts which hold weekend bail. Those courts which fall within the respective region are referred to the respective weekend court, except for the metro region which, on weekends, also falls within the greater metro region.

Registrars in each court advised the research team of suitable dates for observation. Over four months (66 days), a team of two researchers observed 374 bail hearings in these courts, recording information using a digital version of the protocol in Qualtrics.[16] Table 3 shows the total number of observation days, total number of observed bail hearings, and the number of first bail hearings that were observed in each court. The number of observations varied across courthouses due to differences in the volume of bail hearings occurring in each court. It was not always possible for observers to discern whether the bail hearings they were observing were 'first' bail hearings. Hence, we used data from JusticeLink to identify first court bail hearings within the group of 374 hearings observed, resulting in a final sample of 252 bail hearings.

Table 3. Observation sample by region, hub, courthouse (satellite), and observation days

Region	Hub	Courthouse	Total number of observation days	Total number of bail hearings observed	Number of bail hearings included in sample	Per cent of bail hearings included in sample
Metro	CBD	Downing Centre (formerly Central)	4	37	19	8%
Greater Metropolitan	Parramatta	Parramatta	5	66	51	20%
	Liverpool	Bankstown	6	24	13	5%
		Fairfield	6	27	22	9%
		Liverpool	6	35	23	9%
Illawarra/South	Wollongong	Wollongong	5	39	22	9%
	Sutherland	Sutherland	6	32	22	9%
	Campbelltown	Campbelltown	6	21	14	6%
	Burwood	Burwood	7	22	15	6%
Hunter/North	Newcastle	Newcastle	5	29	20	8%
	Gosford	Wyong	5	19	14	6%
West/South West	Dubbo	Dubbo	5	23	17	7%

It is worthwhile noting five limitations of our observation data. First, while we aimed to capture critical information about bail decisions (at least as specified by the legislation), it was necessary to limit the number of items recorded to ensure observers could accurately record information within each bail hearing. As such we may not have captured all the complexities of the legal process, particularly related to contextual information. Second, we did not measure the weight attached to different bail considerations, focusing our analysis on frequency and reason for mention. Third, it is possible that our observers may not have accurately recorded every factor considered in the bail decision as some issues were only briefly referred to in the hearing or were presented in written facts (which were unavailable to researchers). Fourth, for efficiency reasons, more metropolitan courts were sampled than regional courts. This limited our ability to examine geographical differences in decision-making.[17] Fifth, the Aboriginal Legal Services (NSW/ACT) (ALS) only service half of the sampled courts including Liverpool, Newcastle, Wollongong, Campbelltown, Downing Centre and Dubbo. This may reflect reduced demand in other courts areas, or resourcing issues. Having a small sample of Aboriginal and Torres Strait Islander defendants and ALS representatives can limit our understandings of the vulnerabilities and unique needs Aboriginal defendants experience in custody, and how this is managed by both ALS and Legal Aid.

16 A paper version was available to the observers for instances such as internet connectivity issues.
17 Metro courts included Paramatta, Bankstown, Fairfield, Liverpool, Wollongong, Sutherland, Campbeltown, Downing Centre, and Burwood. Rural courts included Newcastle, Wyong, and Dubbo.

Administrative data

We supplement our observation data by linking each observation, using the JusticeLink case number (a unique number assigned to a particular case), to the BOCSAR Re-offending Database (ROD) and the NSW Police Force's Computerised Operational Policing System (COPS). Specifically, we included the following ROD variables in the analysis: the defendant's age, gender (female, male, unknown), and Aboriginality (ever recorded; coded Aboriginal, non-Aboriginal or unknown); most serious offence for the current charge; number of previous finalised proven court appearances, including prior breaches of bail, custodial orders, community orders, and violent (including Apprehended Domestic Violence Orders (ADVOs)) or non-violent orders; and first court bail decision, inclusive of any imposed conditions.

COPS provided information about the initial police bail decision for matters included in our sample. This data set is formulated from the information that custody managers enter into the Bail Risk Assessment Tool (hereafter referred to as the COPS bail tool). Information recorded includes show cause considerations (yes/no variable), s. 17 bail concerns (whether any of the four bail concerns of fail to appear, commit serious offence, endanger safety, and interfere with witnesses/evidence, were present), s. 18 risk considerations (hereafter referred to as risk factors) for assessing bail concerns (yes/no variables, and free-text fields further describing the matter), and the final police bail decision. We applied the same categorisation of the s. 18 risk factors to the variables in COPS to align with our observation data. This required us to recode the free-text fields recorded against these COPS categories to allow for comparison across the two data sources.

Using Stata 18, we created a single dataset that combined the court observations with the ROD and COPS data using the JusticeLink case number. Some defendants appearing in the matters that we observed had multiple JusticeLink numbers related to a single bail hearing. To construct a single row for each observed matter, we first removed any JusticeLink records where the first court appearance date recorded in ROD did not match the date of the observed bail hearing.[18] We then compared the most serious offence (at the divisional level of principal offence) for each case where a person was police bail refused.

Stakeholder interviews

Our final source of data is 40 semi-structured interviews with legal practitioners, court staff and court support officers on their experiences with adult bail proceedings in NSW. We received nominations from the NSW Police Prosecutions, ALS, Legal Aid NSW, NSW Law Society, NSW Local Courts, and Aboriginal Client & Community Support Officers (ACCSOs) from the Aboriginal Services Unit of the NSW Department of Communities and Justice.

The interviews provided in-depth information on stakeholder experiences with bail processes in NSW and the legal and non-legal considerations which influence bail decisions. This provided a broader view of the bail decision-making process (outside the matters we observed in court). The interviews captured stakeholder perceptions of:

- differences and similarities in how police, prosecutors, and courts assess risk in bail decision-making;
- the reasons why prosecutors may disagree with the initial police decision and support bail;
- purposes of and challenges in collecting evidence to support an application for or against bail; and
- unique challenges faced by Aboriginal defendants in the bail process.

18 This typically occurred because the observed hearing was not actually the first court bail hearing. It may have, for example, been a warrant for arrest or breach of bail with no new offence having been committed, or because the person had not applied for bail on their first court appearance following arrest and was now applying for bail after being remanded in custody for some period of time.

Analysis

Our analysis was conducted in two phases. First, we conducted a descriptive analysis of the linked dataset to report on the characteristics of our observation sample, and the frequency at which bail concerns (i.e., unacceptable risks), risk factors, and bail conditions were identified by the courts (as recorded in the observation protocol) or custody managers (as recorded in the COPS dataset). We present relevant analyses by whether a factor was raised by the police, prosecution, defence, or magistrate, and by the final court bail decision (granted or refused).

Second, we undertook a thematic analysis of the free-text observation data within the linked dataset, as well as the interview transcripts, to identify what factors are influential in court bail determinations. We used NVivo to code the observation data to different categories: risk type and condition type (both coded to the legal party who raised the consideration) and magistrates' main considerations. We then manually coded the data within each category to a range of themes, which included: evidence used by prosecution and defence to demonstrate the aggravating or mitigating circumstances of risks; ways conditions could mitigate identified risks; and factors magistrates considered most important in their assessment of risk and determination of bail. We conducted a similar process for the thematic coding of the interviews, focusing on: the non-legal considerations stakeholders considered relevant in the assessment of risk; challenges faced by legal practitioners in developing a bail application (including setting suitable conditions); and explanations for disparities between police and court bail determinations.

RESULTS

Sample characteristics

Table 4 shows a selection of hearing, defendant, and offending characteristics for the 252 bail hearings that were observed for this study. Most bail hearings (73%) occurred on a weekday, with nearly all defendants (99%) being legally represented, 81% of which were represented by Legal Aid NSW. Approximately two-thirds (67%) of defendants appeared via AVL, while around a quarter (23%) were present in the courtroom. In the minority (10%) of matters, the defendant was not present. The majority of defendants were male (83%) and nearly one-third were aged between 35 and 44 (31%). A minority of defendants (16%) were Aboriginal, with 27% of Aboriginal defendants (or 4% of the total sample) represented by the Aboriginal Legal Service.[19] Looking at the most serious offence for which bail was being sought, we see that one-third of matters related to serious violence offences (33%), and just over one-quarter were breaches of an ADVO (27%). Most defendants had one or more prior court appearances (91%), and more than half (61%) had six or more prior finalised court appearances (ever).

19 The low number of Aboriginal persons receiving representation from the Aboriginal Legal Service is partly a reflection of the fact that the Aboriginal Legal Service is not resourced to service all of the sampled courts, or to appear at weekend bail court.

Table 4. Characteristics of bail hearings in the observation sample

Characteristic	n	%
N	252	
Day of the week		
Weekday	184	73%
Weekend	68	27%
Type of legal representation		
Legal Aid Commission	205	81%
Aboriginal Legal Service	11	4%
Private	29	12%
Represented (type unknown)	3	1%
Not represented	4	2%
Mode of appearance		
In person	59	23%
AVL	170	67%
Not present	23	9%
Support person present		
Family	24	10%
Other support person	3	1%
Translator	5	2%
None or not known	220	87%
Gender		
Male	209	83%
Female	41	16%
Unknown	2	1%
Age		
18-24	29	12%
25-34	76	30%
35-44	79	31%
45-54	49	19%
55+	17	7%
Unknown	2	1%
Aboriginality		
Aboriginal	41	16%
Non-Aboriginal	209	83%
Unknown	2	1%
Most serious offence[20]		
Serious violence	84	33%
Property	48	19%
Drug	20	8%
Breaches of ADVO	67	27%
Other	33	13%
Number of prior finalised court appearances		
0	22	9%
1-2	35	14%
2-5	34	14%
6+	161	64%

20 Divisional level of the principal offence

Bail applications and show cause

Figure 3 presents outcomes at each stage of the court bail process for the 252 matters in our observation sample. We divide this into four stages: the bail application stage, the show cause stage, the assessment of risk and bail conditions stage, and the bail decision stage. Rectangles represent terminal nodes (i.e., bail outcomes). Within these, percentages denote the proportion of the reduced sample (denoted by n) whose bail outcomes occurred via this method.

Of the matters in our sample, the majority (64%) of bail applications were a release application brought by defence. Only 3% were a detention application brought by prosecution[21] and 12% were both a release and detention application. In 15% of the hearings no application for bail was made by defence and the defendant remained on remand in custody. A small proportion (7%, n=18) opted to have the matter finalised as opposed to submitting a bail application. In these matters, the defendant pleaded guilty and was sentenced, resulting in bail being automatically dispensed with. Only one of these matters resulted in the defendant receiving a custodial penalty.

Table 5 shows the number and proportion of matters in the observation sample that included show cause offences. Of the 197 matters for which a release and/or detention application was made, 58 were subjected to the show cause test. In 26 of these 58 matters, defence were unable to successfully demonstrate why the accused's continuing detention was not justified, and bail was refused. However, in more than half of these matters (n=32), the defence was able to successfully show cause as to why the accused's detention was not justified. The reasons submitted to demonstrate why cause was shown included:

- Need to be free for medical, mental health, or drug and alcohol treatment in the community (14 matters);
- Weak prosecution case supporting charges that have triggered show cause (6 matters);
- Carer commitments (6 matters);
- Bail conditions able to manage or mitigate risks (12 matters); and
- Low likelihood of an eventual custodial penalty (4 matters).

The 32 matters where the accused was able to show cause and the 139 matters which did not involve show cause offences proceeded to the unacceptable risk test. This group of 171 matters make up the cohort of defendants who were potentially eligible for bail.

Table 5. Number and proportion of observed matters with a show cause offence

Show cause consideration	n	%
n	197	
Not a show cause offence	139	71%
Show cause offence – Accused has shown cause why detention is not justified	32	16%
Show cause offence – Accused has not shown cause why detention is not justified	26	13%

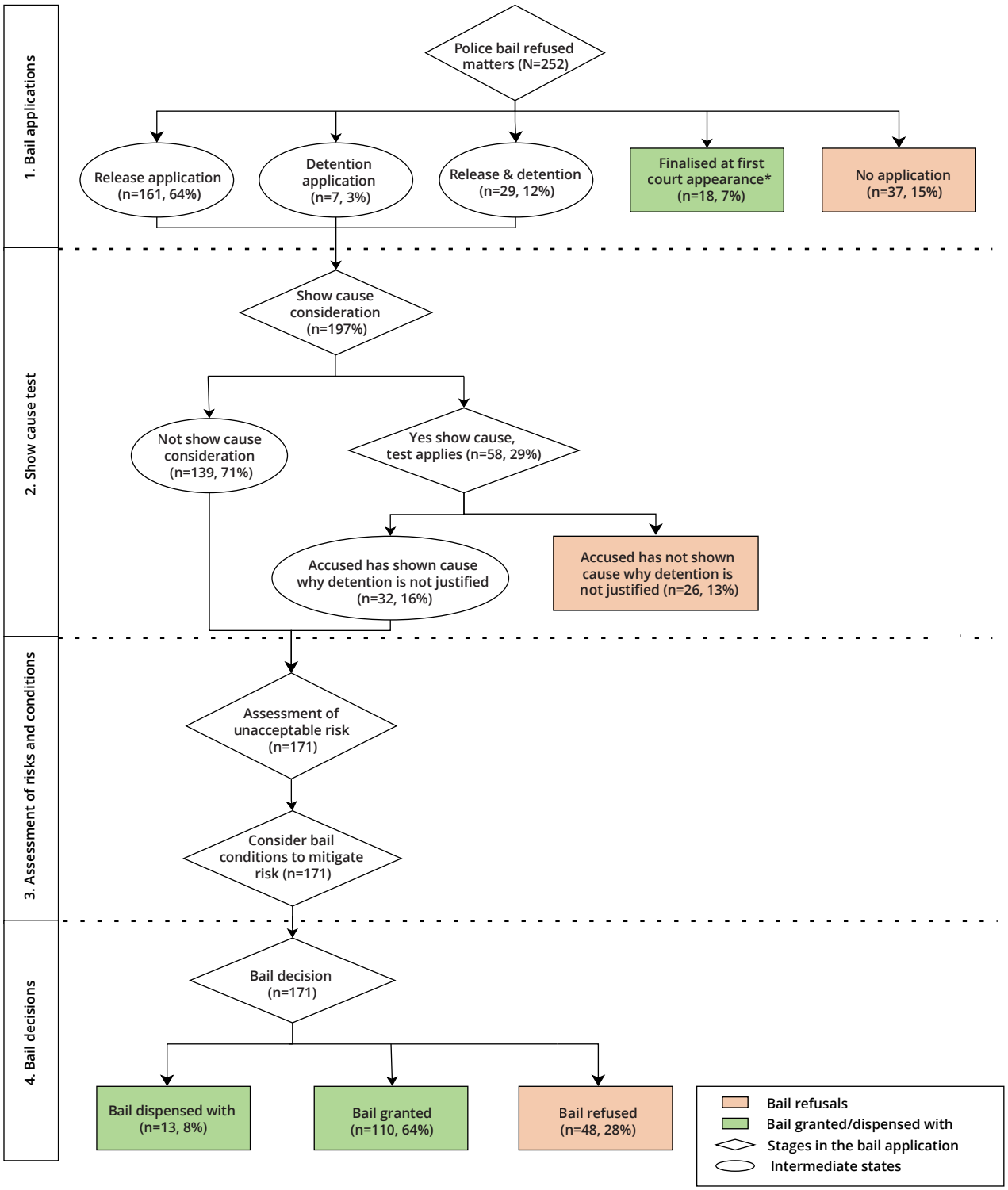
Among the 171 matters that proceeded to the unacceptable risk test, we observed the following results for each of the three possible outcomes: bail dispensed with; bail refused and; bail granted. In 48 matters (28%) the defendant was refused bail. In a small number of matters (13%), after hearing the submissions of defence and prosecution, the magistrate determined that it was more appropriate to release the defendant (s. 10), and 'dispense with' bail.[22] Most of these 'dispensed with' matters were finalised in the

21 Detention applications are submitted prior to the bail court appearance. When the prosecutor appears before the court, their position on bail may have changed. The magistrate at the commencement of the court appearance will therefore ask the prosecution whether they will be pressing the detention application.

22 The Bail Act states that "if bail for an offence is dispensed with, the person accused of the offence is entitled to be at liberty for the offence, in the same way as if bail had been granted." (s.10(2))

same hearing (with no defendants receiving a custodial penalty) but a small number were deferred for a mental health assessment. The majority (110 of the 171; 64%) of the remaining matters subjected to the unacceptable risk test resulted in court bail being granted, typically with bail conditions imposed. It is worth highlighting two subsets within this group of 110 individuals. First, six of the matters involved a defendant released on bail without bail conditions. This suggests that the court considered that these individuals did not pose an unacceptable risk in any of the four bail concerns. Second, 23 of these 110 matters were show cause matters. This demonstrates that in most cases where the accused was able to show cause (23 of the 32 matters), they successfully proceeded through the application process to secure conditional release to bail.

Figure 3. Flow of matters in the observation sample through the court bail process



* Includes one custodial sentence only.

What factors are influential in court bail decisions?

In the remaining sections we restrict our analysis to matters we define as 'eligible for court bail'. In other words, we examine the 171 bail applications which proceeded to the unacceptable risk test either because show cause did not apply, or, where it did, the defendant was able to successfully show cause.[23]

Matters raised in assessment of bail concerns

In NSW court bail hearings, both the prosecution and the accused person (usually represented by a lawyer) provide information to the court[24] and make submissions for or against the release (or detention) of a defendant based on the considerations listed in s. 18 of the Bail Act. Where a defendant has shown cause why their detention is not justified (if they have been accused of a show cause offence) or in proceedings where show cause does not apply, magistrates will then determine, based on the information before the court, which (if any) bail concerns are present, and whether there are suitable bail conditions to mitigate these concerns.

Table 6. Unacceptable risk factors recorded during observations of court bail hearings by party who mentioned the consideration

	Prosecution		Defence	
Unacceptable risk factors	n	%	n	%
n	171		171	
Nature/seriousness of current offence	95	56%	87	51%
Criminal history	118	69%	111	65%
Strength of the prosecution's case	58	34%	95	56%
Effect on community/victim/families	108	63%	34	20%
Bail conditions	55	32%	62	36%
Likely remand/custody and length	41	24%	67	39%
Vulnerabilities/needs	21	12%	87	51%
Risk of failure to appear[a]	49	29%	30	18%
Personal background	3	2%	90	53%
Accommodation	6	4%	77	45%
Need to be free	0	0%	41	24%

a In accordance with footnote 7, risk of failure to appear is considered as a risk criterion here, opposed to a bail concern, of which we assess differently below.

In Table 6 we present the number and percentage of bail hearings in our sample (n=171) where there was at least one mention of a s. 18 consideration and the party who mentioned it.[25] On average, the defence tended to mention between four and six different s. 18 considerations, while the prosecution tended to only mention around three considerations. Prosecution submissions typically revolved around the person's criminal history (69%), the potential impact on the community and victim if an accused is granted bail (63%), and the nature and seriousness of the offence (56%). Prosecutors rarely mentioned other matters listed under s. 18 of the Bail Act, particularly those which may have supported an accused's case for release (background, accommodation, and need to be free, for example). Defence lawyers most frequently raised factors in favour of a defendant's release, including (lack of) strength of the prosecution's case (56%), the defendant's personal background (53%), vulnerabilities/needs (51%), accommodation (45%), and likely remand and custodial length (39%). However, criminal history (65%) and the nature and seriousness of the offence (51%) were also frequently discussed by the defence.

23 As such, we exclude matters where no application was made, where the proceedings were finalised, or where cause was not shown.
24 This includes the police Facts Sheet, the accused person's criminal history, support letters and other material obtained on behalf of the accused.
25 Risks were recorded in the observation protocol with free text responses. If a response was recorded in the appropriate field, it received one count per field per hearing.

Prosecutor submissions

Now we turn to the specific aspects of these considerations mentioned by the prosecution and defence. Table 7 provides examples, from the text recorded by observers, of the types of matters the prosecution typically raised when opposing bail and the types of matters raised when they supported (or did not oppose) bail. As noted above, the prosecution typically focused on legal considerations, particularly any considerations that may be relevant to an accused's risk of reoffending, such as prior criminal history and seriousness of the alleged offending. The top half of Table 7 illustrates themes of prosecutors' arguments in relation to these issues. For example, in relation to the nature and seriousness of the offence, prosecutors typically referred to evidence of threats, actual violence, weapons, or drugs that were part of the alleged incident or offence and whether the offence was committed against a random person, police, family member, or elderly person in submitting against release.

Table 7. Prosecutions submission on risk factors, examples from the observations

Risk factor	Examples of prosecutor submissions made
Against bail	
Serious offence (72 matters)	• Use of violence and/or weapons • Serious quantity of drugs • Offending against vulnerable person or police • Physical injuries sustained by victims • Committed in victim's home • Witnesses (secondary victimisation)
Concerns for the safety of the community/victims and threat to the community (105 matters)	• Victim was a random person, police, family member, child, or elderly • No other indication they will not reoffend • Threatened to harm victim while in police custody • Repeat offender (same or different victim)
Criminal history (105 matters)	• History of similar offending • Offending against a specific victim or other victims • Length of criminal record including the number of convictions and/or sentences previously served, types and length of sentences, and record of non-compliance including breaching community orders, bail orders and AVOs, any current community orders or conduct orders (bail or AVO)
In support of bail	
Minor offences (18 matters)[26]	• Low value stealing • Minor bail order breaches without further offending such as reporting a few hours late or not abstaining from alcohol • Non-violent breaches of AVOs
Criminal history is not lengthy or serious (11 matters)	• Criminal history does not pose a risk to the community or the current victim; the accused criminal history was mostly comprised of minor offending; no previous record of DV or DV against the same victim • The accused is likely to comply with bail conditions – no or limited record of non- compliance with previous court orders (bail, AVO, or community sentences); the accused's record is limited, or they have not reoffended for a reasonable period of time
Custodial sentence unlikely (3 matters)	• Lack of evidence or charges, unlikely to result in a conviction • Offending does not cross the threshold for a custodial sentence; non-custodial sentence would be suitable; prior record does not indicate custodial sentence would be likely

26 In the police bail decision, 3 of these matters were show cause, with none of the four bail concerns identified by the custody manager. 15 of these matters were not show cause but had at least one bail concern.

In 21% of the 171 matters, the prosecution did not oppose bail. The bottom half of Table 7 shows that prosecutors tended to not oppose bail where offending was relatively minor, such as low value stealing or technical breaches of bail or court orders. In a few cases, prosecutors mentioned a less extensive criminal history or that an offence was unlikely to attract a custodial sentence, or cite a defendant's prior compliance with bail, sentencing, or AVO conditions.

Prosecutors interviewed for this study agreed that the considerations in Table 7 often featured in their bail submissions. Offending while on bail or previous non-compliance with court orders was viewed by one prosecutor as particularly relevant when assessing bail concerns as they considered it a reliable indicator of a person's risk of continued offending:

> The criminal history as well, in my view, when you have a demonstrated pattern of behaviour, particularly of committing offences either whilst on bail or whilst subject to court efforts to curb the behaviour, the proposed bail conditions or the things that are being set from the bar table as to promising not to do this and not to do that just can't be accepted because those promises no doubt have been made time and time and time again by the same offender to the same court and shown to have been not reliable. Usually those are my main focus. (Prosecutor).

Prosecutors also stated that there was a general expectation from the community that the courts maintain public safety and hold perpetrators to account. These factors should also influence a court's decision whether to release an accused to bail, particularly where the alleged offending is serious in nature.

> The effect on the community and the victim, well that sort of intertwines into the nature and seriousness of the offences, because I've got to consider the impact that was left behind of their offending… The effect on the community is a big one for the courts, because the community relies on the courts, and they have an expectation of the courts to look after them. (Prosecutor).

Defence submissions

Thematic examples of the risk considerations raised by the defence in the bail hearings observed are presented in Table 8. Where an accused person's legal representative raised the seriousness of the offence or a defendant's criminal history, it was typically to contextualise that incident or portray the allegations or the accused's criminal history as less serious. Defence practitioners also sought to demonstrate that the accused person was likely to comply with bail and would likely receive a non-custodial sentence if they were eventually convicted, typically because of their limited criminal history. Submissions in relation to the accused person's personal background focused on demonstrating an accused's positive connection to the community (such as type and duration of employment, engaged in an education course, connection/responsibilities with family, friends, and culture). Together, these elements of submissions on behalf of the accused supported a decision in favour of release on the basis of likely compliance with any bail conditions and a lower risk the accused would fail to appear at court.

Defence representatives also often focused their submissions on the personal circumstances of the accused, including accommodation stability, family ties and vulnerabilities or needs. Commonly mentioned vulnerabilities or needs included drug and alcohol use, mental health issues, and psychological disorders. Persuasive submissions explained how these vulnerabilities contributed to a defendant's offending, the ways in which the accused's condition and/or treatment would be compromised or exacerbated in custody, and proposals to support the accused's needs if they were released on bail. Less persuasive submissions only made mention of a mental health condition, such as anxiety, depression, and PTSD, or a defendant's cultural identity, without complimentary explanation. Defence representatives addressed concerns for victim safety by indicating how far away from the victim the proposed residence address was, and with whom the accused would be residing with if granted bail. Identifying who the accused would reside with was also persuasive in relation to satisfying a court that the accused would comply with bail. Living with parents, spouse, or partner demonstrated that the accused had someone to hold them to account, or to support them to meet bail conditions (e.g., providing transport to reporting location, work, or medical appointments). This was especially important for vulnerable persons as it balanced their need to remain in the community against any risks to community safety.

Table 8. Defence submissions on risk factors, examples from the observations

Risk factors	Examples of defence lawyers' submissions made
Minor offence (72 matters)	• Non-violent offending • Low value property offences (especially those committed out of necessity e.g., needing to eat when homeless) • Low quantity drug offences • Non-vulnerable victim, circumstances of the incident, technical breach of court order with no further offending, co-offender or other person present • Under the influence of a substance
Criminal history (92 matters)	• Limited criminal record • Whether a long time had elapsed since last proven offence • Non-serious offending • Different victims • Current behaviour is different to specified AVO conditions • Previous offending was for different offence type • Prior sentencing was non-custodial, previous compliance with orders and bail
Effect on community/ victim (33 matters)	• Offence shows they are not a (ongoing) threat to the community (e.g., no violence, victim was known to police, circumstances of the offence/breach) • Can distance themselves from the victim (e.g., reside at alternate place/town) • Facility/care/treatment reduces risk
Weak prosecution case (65 matters)	• Person does not intend to plead guilty or has entered a plea of not guilty based on factors such as: » Lack of evidence » Charges seem inappropriate or are likely to be withdrawn » Details of the offence are challenged » Inappropriate police procedures • Reduced moral culpability
Custodial sentence is unlikely, length of remand is inappropriate (62 matters)	• Criminal history and nature of offence mean a non-custodial sentence would be appropriate • Does not reach the threshold for a custodial sentence • Time served would extend beyond maximum penalty due to expected remand duration • No previous custodial sentence
Vulnerability or needs of the accused (85 matters)	• Suffers from or diagnosed with condition, medical evidence available • Plans to undertake, currently receives treatment or medication for health or mental health condition; is under the care of a physician/facility • Criminal history shows an association between identified health or mental health condition and impact on past offending • Types of vulnerabilities – cognitive disability, psychological disorder, mental health issues, physical disability, or other health condition/impairment; substance abuse (alcohol or drugs); being an Aboriginal or Torres Strait Islander person; English as a second language or does not speak English; age (young or elderly); homelessness
Accommodation (74 matters)	• Who resides with (family, spouse/partner, friend, children) • Has current stable place of residence (government housing, rental, homeowner, lives with another person, care facility) • Has or could find an alternative (even temporary) accommodation option upon release • Unable to find alternative accommodation due to being incarcerated/homeless (exacerbates vulnerability)
Personal background (80 matters)	• Pro-social community ties – affiliated with sporting, religious, cultural groups; undertaking tertiary education course; currently employed (length, type and location of employment); familial support; support from significant persons • Care responsibilities (children, other vulnerable person) (also supports need to be free) • Financial stability (employment or benefit payment) • Residential status or length of time resided in Australia

Interviews with defence lawyers (12) suggested that they place significant weight on securing stable accommodation when seeking bail for their client. Two lawyers indicated that in cases where their client had no or unstable accommodation, they would either not mention accommodation in their submission or, in some cases, would delay the bail application. For example: "I wouldn't be applying for bail unless they had somewhere to live. Unless they were genuinely homeless, and it wasn't a particularly serious offence" (Legal Aid lawyer). Defence representatives face significant constraints and challenges in arranging accommodation for their clients for reasons such as time and resource constraints on public defenders, lack of suitable accommodation (beds full in crisis accommodation, shortage of social housing, criminal offending preventing access), lack of community ties to offer temporary housing, financial insecurity, or the defendant's unwillingness to move. In addition to homelessness, domestic violence offending, transience, and mental health were also noted as significant challenges for securing accommodation, with one lawyer stating, "the people who come before the court with the highest regularity are the people who are the most transient and unstable" (Aboriginal Legal Service lawyer). Defendants accused of DV offences were typically excluded from residing with victims, with a new place of residence suddenly required in order to comply with conduct orders as a bail condition (e.g., remain a nominated distance from the alleged victim, live at an address not excluded by conditions of AVOs) (9 lawyers, 2 prosecutors, 4 magistrates). This can raise challenges for persons who do not have community ties/access to accommodation outside of the area in which the victim resides/works. Likewise, bail conditions requiring an accused person to leave an area with attached community ties (e.g., connection to culture, caring responsibilities, employment) may lead to disconnection from support networks and increase the likelihood of a breaching bail conditions. Furthermore, where accommodation may be available, lawyers are often unable to confirm with a suitable person whether the accused can reside at the proposed address (9 lawyers, 2 prosecutors, 3 magistrates), "because clients don't know phone numbers, or they might not have a specific contact person who can confirm that" (Legal Aid lawyer). ALS lawyers (4) and ACCSOs (5) indicated that each of these difficulties are exacerbated among their Aboriginal clients.

Consistent with observations, stakeholder interviews indicated that defence submissions relating to defendant vulnerabilities or needs typically focused on those which could be supported by objective evidence, such as substance abuse, health conditions, cognitive impairment, and psychological disorders. The importance of a rehabilitative plan, for example, is shown in this comment from a Legal Aid lawyer:

> A rehab application is always a strong application because it addresses the community's risk posed potentially by the applicant for bail, but also the applicant's (maybe) underlying criminogenic factors. It's rare. Local Court is less inclined to grant bail, but the higher up the courts you go, if you've got a really good rehabilitation application and someone with an obvious need for rehabilitation, it's pretty much generally going to be an application that's granted. (Legal Aid Lawyer)

However, lawyers also noted several challenges when attempting to obtain the level of evidence required to demonstrate an individual's vulnerabilities and subsequent needs, particularly for bail applications in the Local Court. These challenges included time constraints, the capacity or willingness of the accused to disclose information (with barriers to communication posed by substance use, illness, disability, or psychological impairment as well as trauma and lack of trust in court-based services, including legal services), access to information (not knowing details of health professional, unable to reach them, unable to obtain supporting materials in the required time), and the availability of services to refer clients to, especially in rural areas (11 lawyers).

Some stakeholders (5 ACCSOs, 6 lawyers) further observed that complex vulnerabilities related to the unique social, historical and cultural circumstances of many Aboriginal and Torres Strait Islander people in contact with the legal system (e.g., deeply rooted intergenerational trauma) were more difficult to demonstrate with supporting materials despite their relevance to a bail application. ALS lawyers and ACCSOs reported that they would attempt to consider their clients' cultural needs or specific vulnerabilities and integrate them into submissions addressing s. 18 risk factors and proposed bail

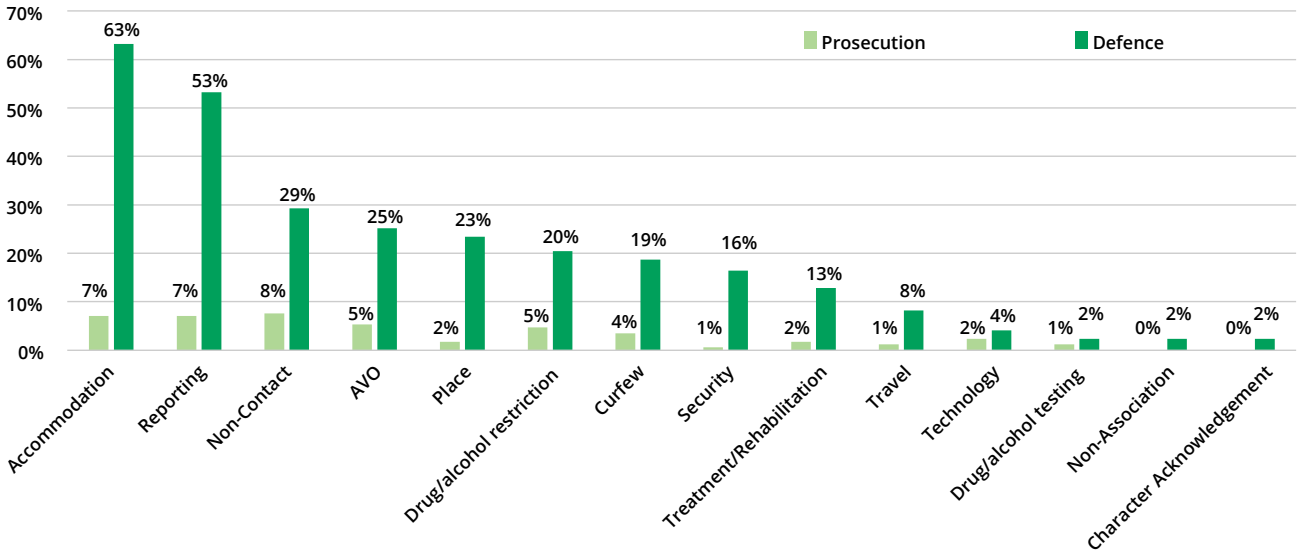
conditions when preparing for a bail application. These include what risk considerations their client is particularly impacted by, what bail conditions may be particularly difficult for them to comply with, or how they can use their community knowledge and connections to find suitable accommodation. However, in the bail hearing, the specific cultural and individual needs of Aboriginal and Torres Strait Islander persons in custody were often absent or given insufficient attention in submissions by defence, with submissions typically only identifying the defendant as 'Aboriginal'. This resulted in magistrates having to rely on their understanding of these issues more broadly. Five lawyers indicated that this problematically leads to magistrates focusing on the perceived commonality of vulnerabilities among Aboriginal offenders and thus assessing this factor as having limited relevance to the bail decision. Stakeholders indicated that a lack of understanding, education, experience, and time were factors which limited how lawyers and magistrates approach the unique needs and vulnerabilities of Aboriginal persons in bail applications, custody, and sentencing.

Bail conditions proposed by the prosecution and defence to mitigate risk

So far, we have shown that in their submission to magistrates, prosecution and defence raise a range of legal considerations outlined under s. 18, as well as various (associated) non-legal considerations relating to bail concerns. Now we examine the types of bail conditions defence and prosecution propose in bail hearings. Figure 4 shows the percentage of matters in which the prosecution and defence proposed each of the 14 conditions we recorded in the 171 observations in our sample.

The prosecution rarely proposed bail conditions. Where they did make a submission, it was typically in response to magistrates' queries or refining proposals already made by the defence; this is reflective of the prosecutors' primary function, to assist the court. In comparison, defence lawyers, who have a duty to act in their clients' best interests and advocate on their behalf, proposed a breadth of conditions to support their conditional release into the community. Defence lawyers most frequently proposed accommodation (63%), reporting (53%), and a range of other conduct requirements, including non-contact orders (29%), comply with existing AVO (25%), place restrictions (23%), and drug and alcohol restrictions (abstinence) (20%).

Figure 4. Bail conditions proposed by defence and prosecution



The magistrate's bail decision

After hearing submissions from the defence and prosecution, a magistrate determines the bail outcome and explains the reasons for this decision.[27] This includes which of the s. 18 risk factors they considered most relevant, any bail concerns identified, whether risks can be addressed by bail conditions, and if so, which conditions are to be imposed. Below, we describe each of these aspects of the magistrates' reasonings for the sample of matters deemed 'eligible for bail'.

Unacceptable risk considerations

Table 9 shows the s. 18 risk factors mentioned by magistrates in the bail hearings we observed. These include criminal history, nature and seriousness of offence, vulnerabilities/needs, strength of the prosecution's case, and likely sentence. These factors are consistent with the risks most frequently raised by legal parties.

Criminal history and the nature and seriousness of the offence were the factors most frequently mentioned by magistrates as being relevant to their bail decision. Criminal history was a consideration in 90% of matters where bail was refused, and the nature and seriousness of the offence was also considered relevant in 33% of these matters. These factors were also mentioned in more than 40% of matters granted bail, but, typically, as evidence against the presence of an unacceptable risk; for example, if the offence was not serious, or the defendant had a limited criminal record. The likelihood of a custodial sentence and the strength of the prosecution's case featured less prominently in magistrates' decisions. Defendant vulnerabilities were identified as relevant in 26 bail matters. Consistent with submissions from the prosecution and defence, the most common vulnerabilities raised in the magistrate's deliberations when determining bail related to mental health, health conditions and drug and alcohol use. There were no mentions of Aboriginality at this point of their deliberations. Of the 26 defendants where vulnerabilities were mentioned, 42% were refused bail; of the 132 where vulnerabilities were not mentioned, 28% were refused bail.

There was consensus among stakeholders that vulnerability presents a double-edged sword in bail considerations, and one that requires a delicate balance between an accused person's right to be at liberty and the need for community protection. While raising vulnerabilities can support a bail decision in favour of release, the majority of stakeholders believed that it is often given insufficient attention by magistrates and/or police (15 lawyers, 3 prosecutors, 9 magistrates). Lawyers maintained that this is because magistrates vary in their attitude toward specific vulnerabilities, while magistrates suggested that the lack of evidence supplied by the defence prompts them to focus more on the risks posed.

27 This occurred at the end of the bail hearing when the magistrate orally provided their deliberation and result.

Table 9. Magistrates' bail considerations by bail outcome

Unacceptable risk criteria	Bail granted			Bail refused			Total
	n	% of n	% of row	n	% of n	% of row	n
n	110			48			158
Criminal history	48	44%	53%	43	90%	47%	91
Previous offences & breaches	42	38%	58%	31	65%	42%	73
Currently subject to court orders or bail	6	5%	33%	12	25%	67%	18
Nature and seriousness of offence	46	42%	74%	16	33%	26%	62
Strength of prosecution's case	9	8%	75%	3	6%	25%	12
Likely sentence and time on remand	4	4%	50%	4	8%	50%	8
Accommodation	11	10%	52%	10	21%	48%	21
Vulnerabilities/needs	15	14%	58%	11	23%	42%	26
Mental health or health	9	8%	60%	6	13%	40%	15
Drugs and alcohol	6	5%	60%	4	8%	40%	10
Type of vulnerability not specified	0	0%	0%	1	2%	100%	1
Risk not demonstrated	3	3%	100%	0	0%	0%	3

Bail concerns and conditions imposed

Based on the risk factors that they consider to be relevant, magistrates must assess whether there is an unacceptable risk that an accused will: fail to appear in court; commit a serious offence; endanger the safety of victims/community; and/or interfere with witnesses or evidence before their matter is finalised. These are known as 'bail concerns'. Table 10 shows the observers' recordings of the four bail concerns mentioned by magistrates in bail hearings, broken down by whether the defendant was granted bail. Note that more than one bail concern can be present in any one matter.

The bail concerns most commonly identified in matters where bail was refused were commit serious offence (90%) and failure to appear (79%). These were also the two most frequent bail concerns identified in matters where bail was granted, though commit serious offence was noted on significantly fewer occasions where bail was granted than where bail was refused. Endangering community safety and interfering with witnesses or victims were less often identified as bail concerns in the sample of matters observed for this study. The most notable feature of Table 10 is that at least one bail concern was established for over 90% of matters observed. In only 13 matters (8%) the magistrate indicated that there were no bail concerns. Since 97 of the remaining matters were granted bail, this suggests that, in many cases, magistrates agree that the identified bail concerns can be adequately addressed through the imposition of appropriate bail conditions.

Table 10. Magistrates' bail concerns by bail outcome

	Bail granted		Bail refused		Total	
Bail concern	n	%	n	%	n	%
n	110		48		158	
Endanger safety	23	21%	16	33%	39	25%
Commit serious offence	64	58%	43	90%	107	68%
Fail to appear	73	66%	38	79%	111	70%
Interfere with witnesses or victim	17	15%	7	15%	24	15%
No bail concerns mentioned[a]	13	12%	0	0%	13	8%

[a] Of these individuals, 6 were released to bail unconditionally. For the remaining 7, bail concerns were likely present but were not mentioned in court.

Table 11 shows the type of bail conditions that were imposed for the 110 matters where the court granted bail. As seen here, magistrates imposed a small range of conditions which were mostly conduct requirements. The majority of defendants granted conditional bail were subject to an accommodation (82%) or reporting (60%) condition. Less commonly, magistrates imposed other conduct requirements, including non-contact orders and requirements to comply with the conditions of AVO's (each 47%), and place restrictions (34%). This is largely consistent with the courts' focus on bail concerns relating to risk of offending on bail and failure to appear rather than interfering with witnesses/evidence, and endangering the safety of victims, individuals or the community. Thematic analysis of stakeholder interviews sheds further light on the ways in which these conditions act to mitigate identified risks.

Table 11. Bail conditions imposed by magistrates for matters where bail was granted

Condition imposed	n	%
n	110	
Accommodation	90	82%
Reporting	66	60%
Non-contact	52	47%
AVO[a]	52	47%
Place	37	34%
Curfew	18	16%
Security	13	12%
Drug/alcohol restriction	4	4%
Travel	4	4%
Drug/alcohol testing[a]	4	4%
Technology[a]	4	4%
Non-association	4	4%
Character acknowledgement[a]	3	3%
Treatment/Rehabilitation/Diversion program[a]	2	2%

[a] BOCSAR does not have data on this condition. We, instead, use the observation data which denotes which condition was mentioned where bail was granted.

Accommodation requirements were seen to serve several purposes: a place where the defendant could be located if they failed to appear in court (3 lawyers, 1 prosecutor, 1 magistrate); assurance that the defendant is suitably located away from the location of the incident or alleged victims; and to reduce the risk that the defendant will breach existing bail or AVO conditions (7 lawyers, 2 prosecutors, 3 magistrates). The relevance of distance is alluded to by this magistrate:

> It may be important in some matters, for example a domestic violence related matter, if ordinarily I'd be considering refusing bail, but he's got property to live at in Broken Hill, so he's so far away that his risk of reoffending or committing a fear of serious offence or putting her in danger or interfering with her evidence, is removed by the tyranny of distance. It may become important, but generally if it's a suburban matter it's not all that important. (Magistrate)

Stable accommodation also demonstrates that a person has ties to the community, and is therefore less likely to abscond, or may reside with a responsible person who can monitor and assist the accused to meet any other bail requirements, particularly if they are a vulnerable person (9 lawyers, 1 prosecutor, 5 magistrates).

> I suppose another matter to be considered in relation to vulnerability is the inherent likelihood of the person complying with bail conditions. For example, they can be supervised in the community … they may have a carer. That carer may be able to supervise them in the community. (Magistrate)

There was disagreement among stakeholders as to whether homelessness excludes a person from bail. While some lawyers (4) felt their clients had been excluded from bail because of a lack of suitable accommodation, others (2 lawyers, 2 magistrates) noted that alternative accommodation options or conditions were often acceptable to the court. In the case of homelessness, three alternatives were commonly identified in both the observations and the interviews: temporary housing; an address frequented by the homeless person; and release with an address to be provided.

Reporting was viewed as an important tool for dealing with absconding and for increasing bail compliance (8 lawyers, 2 prosecutors, 4 magistrates). It allowed police to regularly remind an accused of their conditions and any upcoming court dates, as well as potentially detect and/or respond to issues of non-compliance:

> I've heard magistrates say before, all police stations have cameras, so you'll be all over the camera, what you look like and what you're wearing that day; as pre-evidence, almost like a minority report, future crime evidence capturing type scenario. (Legal Aid Lawyer)

However, some stakeholders suggested that reporting is a traditional bail condition that is not particularly useful in preventing reoffending (1 lawyer, 2 prosecutors, 4 magistrates): "You can go and report at 8 o'clock in the morning and be out of the country a couple of hours later" (Magistrate). It also sometimes presents compliance issues in rural areas where transport infrastructure is limited, and for homeless people who have difficulty reporting at specific times of the day (2 lawyers, 1 magistrate).

Other conduct requirements (including AVO compliance, non-contact orders, place restrictions, and drug and alcohol restrictions or abstinence) were typically imposed to address the risk of offending against a particular victim or in a public space (8 lawyers, 4 prosecutors, 4 magistrates). AVO compliance, non-contact orders, and place restrictions were used in DV and non-DV assault matters to prevent the accused from going near, approaching or contacting alleged victims, their families, complainants, or witnesses.[28] Place restrictions were also used for non-violent offences and behaviour (for example, property damage, drunk, disorderly or misconduct) and thus included an extensive list of places; including locations such as a victim or complainant's place of residency or work, geographical areas (regions, suburbs, streets), specific addresses, shopping centres or stores, restaurants, licensed premises, prisons or correctional centres, places of worship, and schools.

In setting these conduct requirements, magistrates balanced a range of risk considerations including vulnerabilities (e.g., substance abuse and psychological disorders), contextual circumstances of offending, and criminal history inclusive of patterns of behaviour, repeat or violent offending, repeated domestic violence against the same or different victims, and continued disregard for court orders. The majority of stakeholders (13 lawyers, 1 prosecutor, 6 magistrates) indicated that magistrates' confidence in bail compliance is diminished in cases where there is evidence that the accused has previously not complied with conduct orders, there is no evidence of effective engagement with therapeutic supports or services, is not under the care of a treating physician, or is not taking prescribed medication. In this regard, proposed rehabilitative or medical treatment plans prove useful in securing bail but are rarely included in applications due to limited preparation time being available to public defenders and challenges accessing services (e.g., lack of beds in residential facilities, lack of crisis accommodation, or lack of services in rural areas). These difficulties are highlighted by the lawyer's comment below:

28 In the case of DV related offending, a victim included current or previous partner, and a victim's family included new partners, siblings, or children.

> Or a rehab, for example, where there's drug concerns would be perhaps the factor that's most likely going to allow your client to get bail. That also ties into regional areas of being more difficult to do that at times because of transport and people not having licences or travel arrangements outside of limited public transport options… Regional areas where there's no availability of mental health nurses who work at the courts. Being able to get people bailed to have a section 14 for a mental health diversion becomes very difficult because they depend on their doctors in understaffed rural practices or hospitals. (Legal Aid Lawyer)

While conduct requirements are thought to address a range of risks, magistrates (7) expressed concern that their restrictive nature, especially when used in combination, can have a significant impact on the accused's everyday life. In some cases, bail conditions can set the accused up to fail as they can make daily tasks difficult, cut the accused off from their support networks, or set unrealistic expectations. For example, magistrates recognise that while abstinence may reduce drug-related offending, it is unachievable for many defendants. For this reason, some magistrates indicated that they tried to avoid the imposition of overly restrictive, unnecessarily cumbersome or confusing bail conditions (1 lawyer, 4 magistrates). For example, an AVO may already set out suitable conduct restrictions (e.g., "His AVO also sets out he cannot go near victim within 12 hours of drinking" (court observation – Magistrate), "If there's an AVO in place, I try not to replicate them in bail because they're already there. I don't need to replicate them. That just makes it confusing" (Interview – Magistrate). Other magistrates did not share this perspective, suggesting instead that the repetition of AVO conditions within other conduct requirements can serve to increase compliance by aligning paperwork and reinforcing what a person cannot do while on bail (1 lawyer, 1 prosecutor, 5 magistrates). As one magistrate indicates:

> It often just reiterates that all of those conditions attached to the apprehended violence order are also relevant to the bail determination. I like to make sure that all the documents, when a person leaves, are consistent. You don't want to be sort of giving a mixed message by saying on some conditions it's not to associate or it's not to have any contact at all, but then on another set of court documents, it says you're not to go within 200 metres of that person. (Magistrate)

Disparities in risk assessment between police and courts

As noted above, previous research suggests that police have a much greater tendency to refuse bail than the courts (Klauzner & Yeong, 2021). In our sample of bail hearings, there were 197 matters where a bail application was made by a defendant who had been refused bail by police but only 74 defendants (38%) were subsequently refused bail by the court. In this next section we consider some of the reasons for this disparity between police and court bail decisions, including a comparison of how show cause was assessed, types of bail concerns identified, and factors that were considered when assessing risk. To do this, we draw on data from the court observations, COPS, and stakeholder interviews.

Show cause requirement

In the above section on bail applications and show cause (specifically Table 5) we saw that of the 197 matters for which a release and/or detention application was made, 58 were subjected to the show cause test. In more than half of these matters (32 or 55%), the accused was able to successfully demonstrate why their detention was not justified. Further, of these 32 matters where show cause was demonstrated and bail considerations cascaded to the unacceptable risk test, 23 people were subsequently granted bail by the court, one person had their bail dispensed with, and just eight people were bail refused. Police bail data do not include the reasons why a person was unable to show cause. Consequently, we know very little about the reasons police used in their decision-making in these cases.

From our interviews, stakeholders offered two reasons for the disparity between police and the court in decisions involving show cause offences. First, lawyers play an integral role in explaining why the detention of an accused is not justified and, in their absence, police must ask the defendant relevant questions to assess show cause. Stakeholders (6 lawyers, 5 prosecutors, 6 magistrates) noted that this process often results in police having insufficient information to make an informed judgement. This may be because the

officer did not ask the right questions, or because the defendant maintained their right to silence, lacked an understanding of the bail process, or had difficulties communicating (for example, the presence of language barriers, intoxication, or psychological issues).

> I have seen, and there's one in our [Sydney location] catchment area, a person who was found unfit, cognitive impairment plus mental illness but mainly cognitive impairment. He's been found unfit consistently for about the last 10 years. The police keep charging him, keep refusing him bail, and we go through – everyone in that Local Area Command must know that he's not fit to enter pleas, he doesn't understand anything. He can regurgitate things that he's learnt – I want to go home, I want bail, things like that – but he has – everyone knows he's unfit. (Legal Aid lawyer)

> It's really common when people get bail-refused that they've been arrested right in the middle of an incident. They're heavily intoxicated. They're very frustrated. They're in the middle of a psychotic episode. They're understanding enough that they're unlikely to be scheduled, but they're not understanding enough to be able to calm down and listen. Very angry. (Aboriginal Legal Service lawyer)

Second, multiple stakeholders (7 lawyers, 3 magistrates) we interviewed suggested that in many cases police do not consider the factors that may justify a person's release and, instead, automatically refuse bail to anyone who triggers show cause.[29] This is particularly concerning in cases where show cause is triggered by relatively minor offences committed whilst on bail or parole:

> It's very interesting in relation to show cause matters or warrant matters. Quite often on warrant matters, a first instance warrant will issue, and the police will say, this person is subject to a warrant and no special reasons exist why they need bail. Now that's not even a test. That's just something that they've created in their own head, or this is a show cause matter. I've never seen the police make a decision where someone has shown cause. They say, this is a show cause, they can't show cause and then they have 27 reasons why they can show cause. (Legal Aid lawyer)

> You can be charged with murder or child sexual assault, you trigger show cause. If you shoplift a t-shirt from David Jones and the police give you bail and then you steal a lollipop from a 7-Eleven, you also trigger show cause, and the police will bail-refuse you overnight … The show cause submission is the person is not going to get a jail sentence for the substantive charge, even if they're guilty, so it is inappropriate for them to continue to be kept in custody and that is why cause is shown that further detention is not necessary. Then we move so quickly on to what are the conditions and even the prosecutor says I don't want to be heard about the show cause submission. (Legal Aid lawyer)

Unacceptable risk, bail concerns, and conditions

Earlier we considered which bail concerns magistrates identified for defendants in our observation sample who proceeded to the unacceptable risk test. In Table 12 we compare how police and the courts assessed the bail concerns for the same defendants, and the rate of agreement on each of the four bail concerns (defined as the percentage of the time police and courts agreed whether there was an unacceptable risk). As mentioned previously, the magistrate's assessment of bail concerns was recorded by the observers during the bail hearing, while data on the police assessment comes from fixed fields recorded in COPS. Here, we consider only those matters where police recorded at least one bail concern (127 matters). Excluded from this analysis are the 38 show cause matters and six matters where no bail concerns were recorded in COPS.[30]

29 Within the sample of 252, only one of the 68 people who triggered show cause had a risk assessment. Within the refined sample of 171, none of the 38 people who triggered show cause had a risk assessment.

30 Of the 44 matters, four were not recorded as show cause; however, we attribute this to a police recording error. A further two proceeded to the risk assessment but this appeared to be for a court mental health assessment.

Overall, we find that there is a reasonable rate of agreement between the police and courts on bail concerns. The highest rate of agreement was for endangering the safety of victims or the community, at 76%, with agreement on the remaining three bail concerns ranging between 60% and 65%. Police were most concerned with endangering the safety of victims or community (84%), while magistrates were similarly concerned with both endangering safety (68%) and committing a serious offence while on bail (70%). Police indicated concerns relating to failure to appear (35% versus 22%) and interfering with witnesses and victims (32% versus 12%) at a slightly higher rate than the courts. These data show that police and courts generally agree whether one of the four bail concerns are present.

Table 12. Number and agreement rate between police and courts, by bail concerns (unacceptable risk considerations)

	Police		Courts		Agreement rate	
Bail concerns	n	%	n	%	n	%
n	127		127		127	
Fail to appear at court proceedings	44	35%	28	22%	81	64%
Commit a serious offence	75	59%	86	68%	76	60%
Endanger the safety of victims or the community	106	84%	89	70%	96	76%
Interfere with witnesses or evidence	40	32%	15	12%	82	65%
No bail concerns[a]	-	-	11	9%	-	-

[a] Of these 11 persons with no bail concern recorded, 4 had their bail dispensed with, and one received unconditional bail. Another 6 received conditional bail; these persons likely had some bail concerns, but these were not recorded by the observers (e.g., not hearing a concern being mentioned by the magistrate).

We also see considerable overlap between the courts and police in the types of factors that they consider when assessing unacceptable risk. Table 13 shows the unacceptable risk factors recorded by custody managers in the COPS bail tool for the same sample of 127 matters where at least one bail concern was identified. Consistent with magistrates (see Table 9), custody managers were most concerned with criminal history (90%) and nature and seriousness of offence (82%) when assessing risk and placed less emphasis on other factors such as need to be free (3%) and vulnerability (16%). Custody managers also viewed personal background (55%) and accommodation (46%) as important. In such matters they tended to note whether a person had a fixed place of abode (or not), and whether there were other individuals who live with them. There were, however, two noteworthy points of difference. Firstly, police indicated that the strength of the prosecution's case was a relevant factor in over two-thirds of the cases sampled (70%), but it was mentioned by magistrates in fewer than 10% of matters. Secondly, while bail conditions were flagged in all 127 matters as considerations in the COPS bail tool, this was most often in reference to there being no conditions that could mitigate risk.

Table 13. Unacceptable risk factors recorded in the COPS bail tool

	Police	
Unacceptable risk criteria	n	%
n	127	
Bail conditions	127	100%
Criminal history	114	90%
Nature/seriousness of current offence	104	82%
Strength of prosecution's case	89	70%
Personal background	70	55%
Accommodation	58	46%
Effect on community/victims/families	41	32%
Likely remand/custody and length	31	24%
Vulnerabilities	20	16%
Risk of failure to appear[a]	16	13%
Need to be free	4	3%

[a] Referred to here as a risk criterion; magistrates' response to defence and prosecutions submission on risk.

Stakeholder perspectives

Given that we had limited information available to us on the police bail decision, we gathered stakeholder perspectives on what may be driving the significant disparity between police and court bail decisions. Several stakeholders suggested that one of the reasons is that police tend to prioritise community safety, and therefore focus more narrowly on legal factors relevant to risk of reoffending rather than factors that may justify release to bail such as vulnerabilities or needs of the accused and likely length on remand (8 lawyers, 1 prosecutor, 3 magistrates). One magistrate indicated that this disparity may be exacerbated by the lack of time police have available to gather relevant information on mitigating factors or options for conditional bail, "I'm finding that they're less likely to look at the nuance of the Bail Act and the type of conditions that might be able to be imposed because they've got even less time than I have to deal with them" (Magistrate). In relation to DV offences, all stakeholder groups (10 lawyers, 4 prosecutors, 7 magistrates) indicated that police are more inclined than the courts to refuse bail for domestic violence without considering other factors (such as the nature of the offence, the evidence, or conditions) because they prioritise the protection of the community and victims. In considering risk, they may also place some weight on the conduct of the accused at the time of the incident and at the police station, and use bail refusal as a 'circuit breaker' to prevent immediate reoffending (5 lawyers, 3 prosecutors, 2 magistrates). One interviewee commented on how these factors work in combination:

> Plus they are in a position where they see firsthand the product of the violence that's alleged in terms of the nature and seriousness of the offence. So it's not just reading it on a piece of paper that the court will later do, but rather the custody manager has before them hours and hours of behaviour of the accused with respect to either exhibiting violence or understanding perhaps the evidence that relates to the impact on the victim, which in a legal sense you might say those kind of things, from time to time, are taken away from a jury for example because they might be unfairly prejudicial, the screaming of a child, the photographs depicting the awful injuries, etc. (Prosecutor)

Another perspective raised by stakeholders (6 lawyers, 4 prosecutors, 6 magistrates) was that while both police and courts face public scrutiny in the form of media and political attention, the consequences of a poor decision are potentially greater for custody managers, particularly in cases where more serious offences have been committed and in DV matters. As a result, custody managers are generally more risk averse in their decisions than the courts, and thus apply a narrower interpretation of the Bail Act. As one prosecutor observed:

> The application of the legislation and the political aspect or what you could colloquially refer to as the 'what if' factor, so as a police officer making a bail determination, if you are the sergeant in custody and making that determination, you're trying to appease not only the victim but the community, the Command and the all-important coroner/media factor. The single greatest thing, worst thing, that you could do as a custody manager is give someone bail and then that person go off and reoffend in a serious way which results in either a further set of serious offending or significant harm caused to a person. (Prosecutor)

In contrast, stakeholders (2 lawyers, 1 prosecutor, 2 magistrates) felt that magistrates enjoy more authority and independence which allows them to undertake a more objective assessment of risk through broader application of the Bail Act. This is despite police and courts being bound to the same legislative framework. As a Legal Aid lawyer noted, "A Magistrate, from my experience… must consider all of the factors. They can't be too swayed by external things. They must follow the legislation." Another lawyer maintained that this enables the court to take a more holistic view in bail determinations, noting that:

> Maybe there's some unreasonable expectation that maybe it [bail refusal] will solve the problem. But like they're literally getting out any day now, so this is not the right mechanism and forum to deal with why they're shoplifting. I think the court probably takes a more holistic view. It's like okay, well, they're shoplifting because they might have a drug addiction or they're homeless. There's a reason this is happening. What can we do about it? Can we refer them to the MERIT program? Can we refer them to some service that might help? I guess the court has also got other referral options. The police could probably refer a client to a service, but I don't know that they do that. (Legal Aid Lawyer)

Differences in the legal training police and magistrates receive combined with access to information were also thought to be possible reasons for the disparity in police and court bail decisions. Police have less legal training than magistrates and may therefore apply a narrower interpretation of the Bail Act (9 lawyers, 3 magistrates). The extensive legal training magistrates receive is likely to make them more knowledgeable of the application of the show cause requirement and unacceptable risk test than custody managers and may also have "a better appreciation than police of the concept of the presumption of innocence and the requirements for proof beyond a reasonable doubt" (Prosecutor). Furthermore, the availability of legal advice and assistance, and the presence of a lawyer as the accused's intermediary in court, was thought to enhance the information provided to support the bail decision (12 lawyers, 2 prosecutors, 5 magistrates). Private lawyers in particular are afforded greater time to prepare an application and obtain supporting information prior to making an application. Such time is more limited for public defenders who may have to prepare many bail applications in a day, among the regular court list of defendants. In contrast, for police bail, legal advice is only available in limited circumstances. For example, NSW Police are required by law to contact the Aboriginal Legal Service Custody Notification Service (CNS) whenever they take an accused person who identifies as Aboriginal or Torres Strait Islander into custody.[31] If the accused person wishes to, they may speak to the CNS lawyer and obtain legal support and advice. This can assist police in gathering information that may be relevant to the bail decision and/or helping to identify suitable bail conditions (12 lawyers, 2 prosecutors, 5 magistrates). However, some lawyers (5) and prosecutors (2) were sceptical as to whether the provision of legal advice while a person is in police custody has any impact on custody managers' decisions:

> I don't think a custody manager at the police station is going to be influenced one way or the other by what a lawyer tells them over the front counter. I genuinely believe that most custody managers will say, "I'm going to leave it to the determination of the court. Too hard basket, I'm not going to wear this burden, let the court decide whether you get bail. I'm going to cover my arse, I want my job tomorrow, bail refused, go before the court. If they want to give you bail, mate, be it on their time, not mine." That's how I think most of them think. I know I thought like that, I definitely thought like that. This person is going to be a risk, I'm not going to take that risk. (Prosecutor)

31 The Aboriginal Legal Service CNS is funded by the Commonwealth Government. Young people under 18 years of age also have access to legal advice while in police custody via the Legal Aid Youth hotline between 9am and midnight Monday to Thursday, and 24 hours on Fridays and weekends. subject to police preferences, Legal Aid lawyers in some rural areas arrange suitable accommodation. There is also the CNS, a 24-hour hotline for Aboriginal clients to speak with an ALS lawyer about their police bail. Lawyers then advise custody managers of the accused's circumstances and possible bail.

Improving alignment of court and police bail decisions

Interviewees were also asked for their opinion on how police and court bail decisions could be more closely aligned. Four options were proposed: (1) changes to show cause requirements; (2) appointment of bail specialists to the role of custody manager; (3) greater visibility of the bail information recorded in the COPS bail tool; and (4) bail support for persons in police custody.

An area for reform identified by various stakeholders is the show cause requirements (under s. 16B of the Bail Act). Stakeholders expressed concern that currently police tend to automatically refuse bail when an accused is charged with a show cause offence and do not give due consideration to other factors that may justify the accused's release on bail. One lawyer noted that the show cause provision "puts a massive barrier to someone getting bail, and I think it massively increases incarceration rates, unnecessarily" (Legal Aid lawyer), while another stated "I've never seen the police make a [release on bail] decision where someone has shown cause" (Legal Aid lawyer). The latter of which was confirmed within our data.

This can result in people being remanded for relatively low-level offences if, for example, the offence was committed while the person was on bail or parole, or subject to an arrest warrant. Police exercising discretion more frequently not to charge people with low-level offences and/or police undertaking more thorough and informed assessments when show cause is triggered could avoid unnecessary episodes of short-term remand (4 lawyers, 1 prosecutor, 2 magistrates). One magistrate suggested that s. 16B be modified so that low level offending is not captured under the show cause offence definition.

> I would probably say Table 1 offences, if you're charged with a table – if you wanted that – if you want that requirement for those people, the five-year imprisonment maximum penalty to my mind would be better replaced with something like a Table 1 matter so that low-level shoplifting, low-level fraud, Table 2 matters wouldn't be included, and that would take out a lot of show cause matters. (Magistrate)

Numerous stakeholders also identified the need for a bail specialist, who is independent of any police investigation, to be appointed to the role of custody manager in relation to police bail decisions. This would encourage informed, consistent and independent decision-making that focuses on the purposes of bail rather than the objectives of policing (7 lawyers, 1 prosecutor, 2 magistrates). As one lawyer stated, "Educate the police in general to say bail is not a crime prevention tool, bail is about risks and mitigation, and you will never absolutely eliminate the risk of further offending, but the authorities know that, the Bail Act presumes that, it's about mitigating it" (Legal Aid lawyer). A specialist custody manager should receive comprehensive training in the risk-management approach set out in the bail legislation, including how to apply the show cause requirement and the relevant case law, and how to appropriately use the COPS bail tool and weigh up the different s. 18 risk factors. A specialist custody manager would have a greater understanding of the process by which court bail is determined, and that may also improve alignment in bail decisions (17 lawyers, 1 prosecutor, 9 magistrates).

Some stakeholders suggested that the police should submit a copy of the bail application form produced from the COPS bail tool to the court at the first bail hearing to promote accountability. A requirement to disclose the reasons for bail refusal to the court may reduce the overreliance on the COPS bail tool to automatically formulate a decision without thorough assessment of s. 18 matters in the initial bail application (6 lawyers, 2 magistrates). We found that show cause was not tested when triggered (except in one matter). When s. 18 factors were considered, custody managers indicated a yes/no response with the reasoning not included as free text. Where custody managers did include text, they often entered Y irrespective of the explanation being for (should be indicated with a N) or against bail (should be indicated with a Y). One interviewee noted:

> We never really got any documentation of [the police bail decision] until – during COVID, all the bail papers automatically came to Legal Aid on an automated system. There's a form that comes to court with all of that, which is the police reason for bail. We never really got that before. It's interesting to see what the police actually write down in relation to why they're refusing bail. (Legal Aid lawyer)

The majority of stakeholders interviewed also advocated for greater support being provided to the defendants (e.g., advocates, lawyers, and support services) at the time of the police bail decision. This would not only assist custody managers in obtaining relevant information related to s. 18 risk factors, but also help to identify suitable options for conditional bail (12 lawyers, 2 prosecutors, 5 magistrates). One lawyer described this as "social support services actually available to be accessed from the police station with a priority on actually getting people accommodation and support, that might help police persuade them to grant bail in some situations" (Private lawyer).

DISCUSSION

This study set out to determine which risk factors are influential in a defendant's first court bail application and the reasons why courts release adult defendants who have already been refused bail by police. We observed 252 first court bail hearings, recording information on the nature of the application made, show cause outcomes, factors considered in determining unacceptable risk, and bail decisions and conditions imposed. No bail application was made in 37 of these matters and 18 were finalised at first appearance in lieu of a bail application. A bail application was made in the remaining 197 matters. There were four pathways at court for these matters: 1) bail refused (74 matters); 2) released to conditional bail (104 matters); 3) released unconditionally (6 matters); and 4) bail dispensed with (accused released) via finalisation of the matter in the same hearing or mental health assessment referral (13 matters).

We found that the majority of accused (62%) who were initially police bail refused were subsequently granted bail by the court. The police and court generally considered the same factors when assessing risks related to bail concerns. However, disparities exist because the court bail hearing offers the accused an opportunity to argue why their detention is not justified (in the case of show cause offences) and to demonstrate their eligibility for conditional release. In only a very small number of cases (3%), the courts determined that no bail concerns were present.

Consistent with previous research on bail (including Allan et al., 2005; Cadoff et al., 2021; Klauzner & Yeong, 2021; Sarre et al., 2006; Travers et al., 2020), evidence collated from the court observations suggested that court bail decisions are largely informed by legal factors (those outlined in the Bail Act), most notably show cause, multiple fresh charges (for which separate bail applications are made during the same appearance), the severity of the index offence, and prior criminal history. In particular, stakeholders reported that any prior breaches of court orders (including bail, AVOs or penalty orders) were viewed unfavourably by the court as they are generally thought to be indicative of future non-compliance. In our sample, other legal factors, such as strength of the prosecution's case and likelihood of an ultimate custodial sentence, featured less prominently in magistrates' decisions. While vulnerabilities of the accused were often raised in defence submissions on bail, these were identified as relevant in only 16% (26 out of 158) of the bail matters observed. Vulnerabilities and needs relating to mental health, health conditions and drug and alcohol use were most frequently considered by the magistrate when determining bail. Complex vulnerabilities related to an individual's Aboriginality (e.g., deeply rooted intergenerational trauma) were less influential in magistrates' decisions. This is likely because magistrates find documentary material more persuasive in bail applications, and health-related vulnerabilities are better able to be supported by evidence from medical professionals and treatment/diagnostic records. Magistrates we interviewed indicated that in the absence of sufficient evidence from the defence on how the accused's vulnerability would be compromised or exacerbated in custody, and/or proposals to support the accused's needs if they were released on bail, they would tend to focus on what risks the vulnerability presented to the community if the defendant were to be released. The lack of definition and guidance for decision-makers on how vulnerabilities might affect risk and to what extent they should be considered, is a limitation of the bail legislation (Hughes et al., 2022). Coupled with this, is the lack of specific education lawyers, judicial officers, and custody managers receive on the fundamental association between different types of vulnerabilities, offending, and approaches to justice, and the benefits of a rehabilitative opposed to punitive approach.

Turning to our comparison of the police and court bail decisions, we find considerable overlap in the types of matters police and courts consider when assessing risk, with legal factors such as the seriousness of the index offence and prior offending history being significant considerations. Police were somewhat less inclined than the court to consider other factors, including any special vulnerability or need(s) that the accused person has, and were more inclined to refuse bail when show cause is triggered and where an offence is related to domestic and family violence. Stakeholders noted that this was likely due to the police prioritising community and victim safety over other bail concerns, being more risk averse, and, in some cases, using bail refusal as a 'circuit breaker' or a way to avoid immediate reoffending.

We identify three primary reasons for the disparity in court and police bail decisions. Firstly, the first court bail hearing offers an opportunity for bail authorities to thoroughly assess show cause requirements. In our sample, more than half of those unable to show cause to police were able to do so at their first court bail hearing and most of these individuals were subsequently released on bail by the court. A number of stakeholders suggested that this is both because police typically apply very little discretion in show cause matters and, where they do, the accused is often unable or unwilling to provide the necessary information/evidence to justify their release. Secondly, we find that bail conditions play an important role in securing court bail but are less often considered in police bail decisions. For the majority of those released (61%), magistrates cited the presence of conditions that could mitigate risk as the main reason for granting bail. Again, defence lawyers were cited by stakeholders as critical to achieving this outcome. Availability of suitable accommodation was seen as especially important in addressing bail concerns, with four out of every five matters where conditional court bail was granted being subject to an accommodation requirement. Thirdly, police decision-making is more risk averse than magistrates' decision-making. Stakeholders suggested that police bail decisions are held to a higher standard by the media and the community, with courts afforded a greater degree of authority and independence. Custody managers carry the personal burden or responsibility for a poor bail decision that leads to tragic or serious reoffending outcomes. As such, custody managers are more inclined to let courts make the decision to release a person on bail.

In regard to the three identified reasons for discrepancies in bail decision making, police are not afforded the same legal training as judicial officers; a reflection of their varied roles and responsibilities. The lack of legal training police receive, limits the custody managers capacity to interpret the complexities of the Bail Act in the application of provisions such as show cause which is dictated by case law and is not outlined in the Bail Act. Court bail processes also benefit from legal advocacy for the release of the accused, where lawyers have the time and resources (although limited) to apply their legal expertise in explaining why detention is not justified, and how bail concerns can be ameliorated through suitable bail conditions. Current bail practices, legislation around the right to silence, public defender resourcing, and police risk aversity, act as barriers for the provision of legal advice at the point of police bail.

While our research set out to understand the processes by which court bail decisions are made, our ability to capture all the complexities of the bail process was somewhat limited by the study design. The protocol developed for the observations aimed to capture as many factors as possible that may affect bail decisions based on legislation and other evidence from the literature (e.g., Torres & Williams, 2022). However, the high volume of bail hearings and short hearing length severely limited what could reasonably be documented by the researchers through note taking. Recording of relevant information was also hampered at times by poor courtroom acoustics and by how details in written submissions were not always communicated orally by legal representatives or the magistrate during the hearing. For these reasons, it is likely that our research tools did not always accurately measure all factors impacting bail decisions. In particular, detailed information on any non-legal or contextual factors that did not directly inform the risk assessment may have been excluded from the analysis. Despite these concerns, several rounds of testing of the observation protocol and the high inter-rater reliability of the instrument boosts our confidence in the data collected through this process. The interviews also provided an opportunity to obtain additional information from stakeholders on other factors that may be influential in the court's decision.

The data available from COPS on the initial police bail decision also had several shortcomings. In particular, there were notable inconsistencies in how custody managers recorded answers in the COPS bail tool, with some officers entering detailed information in the free-text fields in response to each item listed in the risk assessment while others simply selected yes or no from the fixed field. Where free-text entries were made for s. 18 risk factors, we also found inconsistencies with regard to the information that was recorded under each section of the tool, with police often entering all relevant information only in the 'personal background' section. It was therefore necessary for us to recode this free-text data to align with the s. 18 matters outlined in the Bail Act and to ensure consistency with the data collected from the court observations. Where the custody managers recorded a yes/no outcome, it was also not clear how this information was used to inform the bail decision. For example, in 46% of the matters in our sample, police indicated that accommodation was a risk factor. However, without further free-text data we could not determine whether this was an absence of accommodation and therefore a factor that could potentially increase the risk of failure to appear or reoffending on bail, or alternatively, that accommodation had been secured and was therefore a factor that could mitigate risk. Notwithstanding, absent other (more accurate) data sources, we considered the COPS data the best available source for understanding the police bail decision once these inconsistencies had been rectified. The information collected during the stakeholder interviews further strengthened our understanding of the police bail process. There is, however, considerable scope for improving the recording of information in the COPS bail tool. This would not only enable ongoing monitoring of police decisions but also further promote transparency in decision-making and assist future bail research.

The complexity of the Bail Act and its show cause provisions has been discussed at length by several other scholars (Auld & Quilter, 2020; Bartels et al., 2018; Brignell & Jamieson, 2020; Law Enforcement Conduct Commission, 2023). As Brignell and Jamieson (2020) remarked, this complexity results in decision-makers having to apply their own evaluative judgements, which likely contributes to disparity in bail outcomes. In our study, interviewees identified several ways that police and court bail decisions could be better aligned within the existing bail framework to avoid unnecessary episodes of short-term remand and reduce the volume of court applications. Three main areas of improvement were discussed: (1) the show cause provisions; (2) the role of custody managers; and (3) bail support.

To reduce unnecessary bail refusals, offences for which the show cause provision applies could be amended and clearer guidelines provided to police on how to appropriately apply the provision to bail decision making. The application of the show cause requirements was where we observed the largest disparity in police and court decisions. Some stakeholders indicated that this was because custody managers applied very little discretion when show cause is triggered, even where the offending is relatively minor (e.g., shoplifting while on bail). This appeared to reflect the police's risk averse approach to bail.

Relatedly, the appointment of bail specialists to the role of custody manager may help achieve more informed, independent, and consistent decisions. Requiring police to submit a copy of the bail application form produced from the COPS bail tool to the court at the first bail hearing was also suggested by several stakeholders as a means of encouraging police to undertake more thorough risk assessments and to promote accountability in decision-making.

Finally, all respondents remarked on the potential benefits of legal representation or some other form of bail support at the point at which the initial police decision is made. While this would greatly assist custody managers in gathering the necessary information to assess risk and to identify any suitable bail conditions, significant barriers would need to be addressed to facilitate the involvement of legal representatives in police bail decisions.[32] Bail support is currently offered in limited circumstances in NSW and stakeholders are sceptical of their influence upon custody managers.[33] There are also significant costs associated with providing 24/7 access to legal assistance to accused persons whilst they are in police

32 For example, the Evidence Act discourages the provision of legal advice during police bail as a 'special caution' may be issued which prejudices the accused person's right to silence and prohibits the lawyer representing the person in court. It is this reason why even private lawyers will not attend in person.

33 Due to resourcing issues the CNS mostly checks on the wellbeing of Aboriginal persons in custody, with legal advice confined to the right to silence.

custody and there is mixed evidence for the impact of bail support programs on police bail refusal rates (such as the Bail Assessment Officer intervention, see Donnelly & Corben (2018); Bail Assistance Line, see Klauzner (2021); and bail supervision, see Willis (2017)). Any such initiatives would need to be rigorously tested before they could become a centralised component of bail.

This paper clearly demonstrates the complexity of bail decision making as well as the inconsistencies in how bail laws are applied in NSW. While the accused's offending profile and prior criminal history are highly influential in both police and court bail decisions, two out of every five defendants refused bail by police are subsequently released by the court. Better alignment of police bail decisions with the courts has the potential to reduce unnecessary episodes of short-term remand and the negative consequences that arise for defendants. However, this would require not only more extensive legal training for custody managers, clearer guidance on how show cause provisions apply and, where appropriate, bail support for defendants, but also a significant shift in the risk threshold applied by police. With police prioritising community and victim safety and making decisions in a context where there is limited information and significant time pressures, this may prove challenging.

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REFERENCES

Allan, A., Allan, M. M., Giles, M., Drake, D., & Froyland, I. (2005). An observational study of bail decision-making. *Psychiatry, Psychology and Law, 12*(2), 319-333. https://doi.org/10.1375/pplt.12.2.319.

Anwar, S., Bushway, S. D., & Engberg, J. (2023). The impact of defense counsel at bail hearings. *Science Advances, 9*(18), 1-8. https://doi.org/10.7249/RBA1960-1.

Auld, L., & Quilter, J. (2020). Changing the rules on bail: An analysis of recent legislative reforms in three Australian jurisdictions. *University of New South Wales Law Journal, 43*(2), 642-673. https://doi.org/10.53637/FLIR9959.

Australian Bureau of Statistics. (2024). *Prisoners in Australia* (Cat No. 4517.0). Retrieved from the Australian Bureau of Statistics website: https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/2023.

Bartels, L., Gelb, K., Spiranovic, C., Sarre, R. T., & Dodd, S. (2018). Bail, risk and law reform: A review of bail legislation across Australia. *Criminal Law Journal, 42(2)*, 91-107. https://ssrn.com/abstract=3340981.

Brignell, G., & Jamieson, A. (2020). Navigating the Bail Act 2013. *Sentencing Trends and Issues: An Analysis of NSW Sentencing Statistics, 47*(1), 1-32. https://www.judcom.nsw.gov.au/publications/sentrends/st47/.

Cadoff, B., Wolff, K. T., & Chauhan, P. (2021). Exploring variation in factors associated with increased likelihood of pretrial detention. *Journal of Criminal Justice, 74*(1), 1-15. https://doi.org/10.1016/j.jcrimjus.2021.101799.

Corrective Services NSW. (2023). NSW prison system (Fact sheet 1). Retrieved from the Corrective Services NSW website: https://correctiveservices.dcj.nsw.gov.au/content/dam/dcj/corrective-services-nsw/FACT_SHEET_1_PRISONS_May_2023.pdf.

Department of the Prime Minister and Cabinet. (2024). *Aboriginal and Torres Strait Islander people are not overrepresented in the criminal justice system (7B. Table B: Outcome 10).* Retrieved from the Closing the Gap website: https://www.closingthegap.gov.au/national-agreement/national-agreement-closing-the-gap/7-difference/b-targets/b10.

Donnelly, N., & Corben, S. (2018). *Evaluation of the Bail Assessment Officer (BAO) intervention* (Crime and Justice Bulletin No. 209). Retrieved from the BOCSAR website: https://bocsar.nsw.gov.au/documents/publications/cjb/cjb201-250/cjb209-report-evaluation-of-the-bail-assessment-officer-intervention-2018.pdf.

Hughes, D., Colvin, E., & Bartkowiak-Théron, I. (2022). Police and vulnerability in bail decisions. *International Journal for Crime, Justice and Social Democracy, 11*(3)*,* 122-138. https://doi.org/10.5204/ijcjsd.1905.

Judicial Commission of NSW. (2022). *Local Court Bench Book – Bail.* Retrieved from the Judicial Commission of NSW website: https://www.judcom.nsw.gov.au/publications/benchbks/local/bail.html.

Klauzner, I. (2021). *An evaluation of the youth Bail Assistance Line* (Crime and Justice Bulletin No. 237). Retrieved from the BOCSAR website: https://bocsar.nsw.gov.au/documents/publications/cjb/cjb201-250/cjb237-report-evaluation-of-bail-assistance-line-2021.pdf.

Klauzner, I., & Yeong, S. (2021). *What factors influence police and court bail decisions?* (Crime and Justice Bulletin No. 236). Retrieved from the BOCSAR website: https://bocsar.nsw.gov.au/documents/publications/cjb/cjb201-250/cjb236-report-what-factors-influence-police-and-court-bail-decisions-2021.pdf.

Law Enforcement Conduct Commission (LECC). (2023). *Executive summary: Operation Mantus. A report under section 132 of Law Enforcement Conduct Commission Act 2016 concerning alleged excessive use of force and issues concerning police interviews of young persons in custody.* Retrieved from LECC website: https://www.lecc.nsw.gov.au/publications/publications/executive-summary-opertion-mantus-december-2023.pdf.

Lens, V. (2016). Against the grain: Therapeutic judging in a traditional family court. *Law and Social Inquiry, 41*(3), 701-718. https://doi.org/10.1111/lsi.12153.

NSW Bureau of Crime Statistics and Research (BOCSAR). (2024). *New South Wales custody statistics: Quarterly update.* Retrieved from the BOCSAR website: https://bocsar.nsw.gov.au/documents/publications/custody/2024_06_NSW_Custody_Statistics_Jun_2024.pdf.

NSW Law Reform Commission. (2012). *New South Wales Law Reform Commission Report: Bail* (Report 133). Retrieved from the NSW Law Reform Commission website: https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-133.pdf.

Rahman, S. (2021). T*he marginal effect of bail decisions on imprisonment, failure to appear, and crime* (Crime and Justice Bulletin No. 224). Retrieved from the BOCSAR website: https://bocsar.nsw.gov.au/documents/publications/cjb/cjb201-250/cjb224-report-bail-decisions-on-imprisonment-2019.pdf.

Roach Anleu, S., Bergman Blix, S., & Mack, K. (2015). Researching emotion in courts and the judiciary: A tale of two projects. *Emotion Review, 7*(2), 145-150. https://doi.org/10.1177/1754073914554776.

Sarre, R., King, S., & Bamford, D. (2006). *Remand in custody: Critical factors and key issues* (Trends and Issues in Crime and Criminal Justice No. 310). Retrieved from the Australian Institute of Criminology website: https://www.aic.gov.au/sites/default/files/2020-05/tandi310.pdf.

Torres, L. C., & Williams, J. H. (2022). Tired judges? An examination of the effect of decision fatigue in bail proceedings. *Criminal Justice and Behavior, 49*(8), 1233-1251. https://doi.org/10.1177/00938548221081072.

Travers, M., Colvin, E., Bartkowiak-Théron, I., Sarre, R., Day, A., & Bond, C. (2020). *Bail practices and policy alternatives in Australia* (Trends and Issues in Crime and Criminal Justice No. 610). Retrieved from the Australian Institute of Criminology website: https://www.aic.gov.au/sites/default/files/2020-10/ti610_bail_practices_and_policy_alternatives_in_australia.pdf.

Willis, M. (2017). *Bail support: A review of the literature* (Research Report No. 4). Retrieved from the Australian Institute of Criminology website: https://www.aic.gov.au/publications/rr/rr4.

Yeong, S. and Poynton, S. (2018). *Did the 2013 Bail Act increase the risk of bail refusal?* (Crime and Justice Bulletin No. 212). Retrieved from the BOCSAR website: https://bocsar.nsw.gov.au/documents/publications/cjb/cjb201-250/cjb212-report-did-the-2013-bail-act-increase-the-risk-of-bail-refusal-2018.pdf.

APPENDIX: OBSERVATION PROTOCOL

Q1 **Hearing details**

Start time _____ **Court room** _____

Defendant's name (First, Middle and Last as available) _____

Police H number _____ **Defendant's JusticeLink number** (12 digit number) _____

Q2 **Enter a date:** _____

Q3 **Defendant mode of appearance**: O In person O AVL O Not present

Q4 **Status of Offender:** O Police custody O In custody O Other: _____ O Unclear

Q5 **Parties attending the hearing:** O None/not known O Family member O Support person O Translator

O Other: _____

Q6 **Type of legal representation:** O Represented: type unclear O Represented: Legal Aid Commission

O Represented: Aboriginal Legal Service O Represented: Private O Not represented

Q7 **Type of prosecutor:** O Police O DPP O Private O Unclear

Q8 **Is it a first bail hearing?** O Yes O No - Variation or second hearing (stop recording)

Q9 **Type of bail application:** O Release application O Detention application O Bail not applied O Finalisation

Q10 **What offence(s) has the accused been charged with?** _____

Q11 **Reasons for police bail refusal if mentioned?** _____

Q12 What criteria were considered in assessing each unacceptable risk?:					
	Submissions made by		**Magistrate accepts submissions presented by:**		**Magistrate's reasoning**
	Defence	**Prosecution**	**Defence**	**Prosecution**	**Reasoning**
Personal background			O	O	
Accommodation			O	O	
Vulnerabilities			O	O	
Criminal history			O	O	
Nature/seriousness of current offence			O	O	
Effect on community/victim/ families			O	O	
Strength of prosecution's case (prospect of conviction)			O	O	
Likely remand/custody and length			O	O	
Bail conditions			O	O	
Need to be free			O	O	
Fail to appear			O	O	
Other			O	O	

Q13 What conditions were proposed to show risks were able to be adequately addressed?				
	Condition proposed by		**Magistrate imposes condition**	**Magistrate's reasoning**
	Defence	**Prosecution**	**Accepts**	**Reasoning**
Accommodation/residence			O	
Reporting			O	
Curfew			O	
Treatment/Rehabilitation/ Diversion program			O	
Drug/alcohol testing			O	
AVO (existing)			O	
Non-contact (victim/witness)			O	
Non-association (other person)			O	
Place restrictions			O	
Travel restriction			O	
Technology restrictions			O	
Character acknowledgment			O	
Security agreement (incl. cash for-feiture)			O	
Other			O	

Q14 Which of these statements most closely describes the prosecution's submission?

- Does **not oppose**, No reason provided
- **Opposes, Risks** are too **significant**
- Does **not oppose conditional release** (risks can be adequately addressed)
- **Opposes**, No reason provided
- Does **not oppose** bail **without conditions**

Q15 Was it a show cause offence? and, was the magistrate satisfied that detention is not justified?

- **Yes**, show cause offence - Accused **has not shown** cause why detention is not justified (s16A (1)) (2)
- **Yes**, show cause offence - Accused **has shown** cause why detention is not justified (s16A (2)) (3)
- **No**, not a show cause offence

Q16 What were the magistrate's main concerns? (s.17a-d)

- Fail to appear
- Commit serious offence
- Endanger safety
- Interfere with witnesses or evidence
- No bail concerns

Q17 What was the magistrate's bail decision?

- Bail refused
- Conditional release - Bail with conditions
- Unconditional release - Release without bail
- Unconditional release - Dispensing with bail
- Unconditional release - Bail without conditions
- Bail decision on first appearance upon court's own motion (bail granted without a release application) (s 53)
- Deferral of bail decision due to intoxication (s 56)
- Decision adjourned
- Finalised matter

Q18 What was the magistrate's reason for granting bail?

- No unacceptable risks ever present
- Risks can be mitigated with appropriate bail conditions
- Previous risks no longer relevant
- Other _____

Q19 What were the most important considerations for the Magistrate in their bail decision?

Q20 Any other observer comments?

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