Recommendations to Alleviate Gendered, Racial and Socio-Economic Inequalities in the Administration of the Bail System

Catherine Bugler and Alice Muir

Decades of reactive amendments to bail legislation have estranged bail from its purpose: to protect personal liberty and the presumption of innocence. These politicised changes undermine fundamental criminal justice principles and judicial independence. There are approximately 15,000 people in Australia on remand. Disadvantaged groups – particularly women, un-homed and Aboriginal and Torres Strait Islander people – disproportionately bear the brunt of this injustice. We examine the court's role in administering an inflexible system which traps vulnerable offenders in a cycle of stringent bail conditions and escalating tests which perpetuate and exacerbate existing inequalities. In the face of this bail crisis, court administrators should engage in a campaign to ameliorate this disadvantage by communicating with bailees, adopting flexible bail conditions, using court processes to avoid show cause situations, prioritising bail hearings in listings management, accommodating social services within courthouses, engaging in community-led cultural education, and gathering data about their bail applications.

Australia has experienced an enormous growth in its pre-trial detainee population. Across Australia, 15,000 people are in prison on remand,[1] and in some states, over half of the prison population are on remand and cannot get bail.[2] Australia has seen, since the beginning of the 21st century, the number of people held on remand more than triple,[3] a trend which significantly outpaces England and Wales and Canada.[4] Some of those on remand have not yet been tried by a court of law, and are innocent until proven guilty. Yet, they languish in prison. Others, who have pleaded guilty, are incarcerated without sentence, and may serve time on remand greater than their eventual sentence.

The growth in those held on remand is attributable to legislative reform across state jurisdictions.[5] The crisis is particularly grave in Victoria. Victoria saw reforms in 2013 and

1 Data showed there were 42,970 prisoners in custody on 30 June 2021, a 5 per cent increase from 30 June 2020, while the proportion of prisoners who were unsentenced increased from 32 per cent to 35 per cent: Australian Bureau of Statistics, *Prisoners in Australia, September 2021* (Catalogue No 4517.0, 9 December 2021).

2 Emma Russell et al, 'It's a Gendered Issue, 100 Per Cent': How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage' (2022) 11 (3) *International Journal for Crime, Justice and Social Democracy* 107.

3 Ibid 2.

4 R Walmsley, *World pre-trial/remand imprisonment list* (4th Ed, Institute for Crime and Justice Policy Research) <https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf>.

5 Lorana Bartels et al (2018) 'Bail, risk and law reform: a review of bail legislation across Australia' 42(2) *Criminal Law Journal* 91-107 et al 2018; Lachlan Auld and Julia Quilter, 'Changing the Rules on Bail: An Analysis of Recent Legislative Reforms in Three Australian Jurisdictions' (2020) 43(2) *UNSW Law Journal* 641, 644.

2018 which have significantly increased the rates of those on remand.[6] This is particularly concerning as "relatively little is known about how and why people are remanded … and the personal and social consequences of the increasing use of pre-trial detention".[7] While the number of people on remand declined during the pandemic – as judicial officers were reluctant to incarcerate people – the bail system has not fundamentally changed, such that high remand rates are already returning.

Tragically, in this context a "constellation of circumstances" contribute to disadvantaged groups' likelihood of being disproportionately impacted by these punitive bail laws.[8] As this essay will explain, the high incidence of certain groups being placed on remand is not due to individual choices or crime trends, but, rather, borne out of systemic inequalities and a bail system which fails to accommodate cultural, gendered and socio-economic differences.

As this paper will elucidate, court administrators and judicial officers should be concerned about the increasing use of remand. When we refer to *court administrators*, we refer to court leadership: Chief Justices, Chief Judges and Chief Magistrates, as well as Executive Directors and Principal Registrars. The *administration* of bail is the court processes surrounding bail (such as listings, referrals, adjournments, calendars, education of judicial officers, et cetera) rather than the *judicial determination* of bail. When we speak of bail, we refer to court bail rather than police bail.

Court administrators should use any means at their disposal to guard against bail being applied disproportionately to disadvantaged groups. This is for a few key reasons. Firstly, remand offends the principles that a person is innocent until proven guilty to the criminal standard, and that criminal sanction follows (rather than precedes) criminal sentence. Secondly, the literature reveals evidence that remand is criminogenic. Thirdly, tough-on-crime bail laws typically militate against the rights of disadvantaged groups. Finally, placing prisoners in remand is expensive.

In that context, this essay will explain how, without safeguards, the current bail system is working to significantly perpetuate pervasive inequalities and disproportionately disadvantages three vulnerable groups: Indigenous Australians, women, and people experiencing homelessness or housing precarity. Courts need to stand up against the tide of incarceration of the innocent and unsentenced. To do otherwise would be an implicit ratification of a bail system which does not cohere with the principle that everyone should be treated equally before the law.

In the absence of legislative change, courts should examine how they can administer the bail system to marginally ameliorate its inequitable impact on disadvantaged groups. Part I explains how the bail system has mutated and has now caused an incarceration crisis in some jurisdictions. Part II explains how the bail system interacts with gendered, racial and socio-

---

6 Marilyn McMahon, *No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention* (Library Fellowship Paper No 3, August 2019) 21.

7 Russell et al (n 2) 1.

8 Emma Russell et al, *A constellation of circumstances: The drivers of women's increasing rates of remand in Victoria*. (Report, July 2020).

economic disadvantage by looking at its impacts on Aboriginal and Torres Strait Islanders, women and un-homed people. Part III then situates the courts within this crisis. We examine what the court's role should be in the administration of this system, and why it is legitimate for court administrators to seek policies which redress disadvantage. Part IV then provides eight recommendations as to how courts can administer the bail system to alleviate some of the harmful impacts on disadvantaged groups. We suggest that, in the face of this bail crisis, court administrators and judicial officers modify their administrative practices to communicate proactively with defendants, use the system to enhance flexibility, use court processes to avoid show cause situations, be attentive to how bail listings are managed, accommodate social services within court buildings, gather data from their courthouses as to how bail is being administered in practice, and engage in community-led cultural education.

I THE BAIL SYSTEM

A The purpose of bail

It is first necessary to briefly examine how bail has evolved over the past three decades. The common law principles of a right to personal liberty, the presumption of innocence and the right not to be punished prior to sentence are fundamental to the Australian criminal justice system.[9] Bail is designed to protect these rights. Depriving an individual of their liberty through incarceration is one of the most serious actions of a state.[10] The incarceration of a person presumed to be innocent "should be of major concern to the courts and to the community".[11] Even where the bail applicant has pleaded guilty, it is important that their time on remand does not exceed their eventual sentence. The competing objectives of bail are to ensure the defendant will attend their court hearings and to protect the community and minimise the risk of reoffending.

In every bail decision the judicial officer is called upon to perform a balancing act, weighing the protection of fundamental rights against ensuring the risks of the defendant's behaviour (which may include absconding or reoffending) are mitigated.[12] In recent years the scales are unbalanced: in favour of minimising risk to the exclusion of other considerations. Bail was not conceived of as a mechanism to *prevent* criminal offending. Criminal sanction should not operate prophylactically and without trial. Using bail systems to imprison groups of people on the basis that they may commit a further offence offends the principle of equal treatment before the law. These new reforms have significantly contributed to rising remand rates.[13] The increasing number of persons who are denied bail and held on remand is a "key driver" of the "incarceration crisis". [14]

---

9 Natalia Antolak-Saper, 'The relevance of Bail Conditions to the Sentencing of Offenders' (2017) 19 *Flinders Law Journal* 89, 89; Lachlan Auld and Julia Quilter (n 4) 644.

10 David Bamford, Sue King and Rick Sarre, *Factors Affecting Remand in Custody A Study of Bail Practices in Victoria, South Australia and Western Australia* (Report No 23, 1999) 1.

11 Ibid; *Woods v DPP* [2014] VSC 1.

12 Auld and Quilter (n 5) 644.

13 Queensland Productivity Commission, *Inquiry into imprisonment and recidivism: Final Report*, (Final Report, 31 January 2020) 42 – 43; McMahon (n 6) 1–2.

14 McMahon (n 6) 21.

B Punitive bail reform of the 21st century

Following widely publicised cases of crimes being committed by bailees,[15] the community and the media called for tough-on-crime reforms. States and territories introduced legislation discarding the presumption of bail by reversing the onus of proof in regard to particular offences and in prescribed circumstances of offending.

This presumption generally attaches to terrorism offences,[16] family violence offences,[17] offences while at large, and so-called serious offences.[18] In Victoria, for example, defendants charged with a Schedule 1 or Schedule 2 offence are required to supply a 'compelling reason' or 'exceptional circumstances' to justify the grant of bail before the unacceptable risk test is applied.[19] The reform significantly widens the net of people who are caught by the remand system: it applies to over 100 offences, including very serious crimes such as murder, and other crimes such as home invasion. Other jurisdictions call upon the applicant to 'show cause' and justify why bail *should be* granted (thereby creating a reverse onus) prior to considering the risk and appropriateness of granting bail.

While most jurisdictions,[20] maintain a general presumption of bail, this presumption has been watered down by numerous – and at times complicated – exceptions.[21] For example, New South Wales, Queensland and Victoria adopt similar frameworks in which bail ***must*** be refused where there is an "unacceptable risk" that if bail were granted the accused would, inter alia:

1. commit a further offence (Queensland, Victoria)[22] or a serious offence while on bail (New South Wales)[23]; or
2. endanger public safety (New South Wales, Queensland, Victoria).[24]

Bail conditions function to mitigate the risks of releasing an applicant on bail. Namely, to decrease the likelihood that the bailee will abscond or reoffend. In 'unacceptable risk' jurisdictions bail conditions can be imposed to address criminogenic factors allowing someone who would otherwise be an 'unacceptable risk' to receive bail. Other states allow judicial officers to impose bail conditions where it is desirable to 'ensure the performance of the

---

15 *Bailee* is used in this paper to describe those who have been granted bail. McMahon (n 6) 21.

16 *Bail Act 1982* (NT) s (7A)(dc); *Bail Act 1977* (Vic) s 4AA (2)(a,b); *Bail Act* 2013 (NSW) s 22A.

17 *Family Violence Act 2004* (Tas) s 12 (1); *Bail Act 1982* (NT) s (7A)(dd).

18 *Bail Act 1980* (Qld) s16(3)(b,c); *Bail Act 2013* (NSW) ss 16A, 16B; *Bail Act 1985* (SA) s 10A(1a)(d)(e); *Bail Act 1982* (NT) s7A (1)(a) - (db).

19 *Bail Act 1977* (Vic) s 4C; Max Travers, Emma Colvin et al, *Bail Practices and policy alternatives in Australia* (Trends and issues in crime and criminal justice No 610, 22 October 2020) 3.

20 Queensland, South Australia, Tasmania, Western Australia, the Northern Territory, the Australian Capital Territory and Victoria (except for with regard to Schedule 1 and 2 offences and where the accused has a terrorism record).

21 *Bail Act 1977* (Vic) s 4; *Bail Act 1982* (WA) s 5; *Bail Act 1985* (SA) s10(1); *Bail Act 1982* (NT) s 8; *Bail Act 1992* (ACT) Div 2.2; *R v Fisher (1964) 14 Tas R 12*; *Bail Act 1980* (Qld) s 9.

22 *Bail Act 1980* (Qld) s 1 (a)(ii)(A); *Bail Act 1977* (Vic) s 4E (a)(ii).

23 *Bail Act 2013* (NSW) s 17 (2)(b).

24 *Bail Act 2013* (NSW) s 17 (2)(c); *Bail Act 1980* (Qld) s 1 (a)(ii)(B); *Bail Act 1977* (Vic) s 4E (a)(i).

accused's bail undertaking'[25] or 'in the interests of justice'.[26] Five states legislate that the conditions imposed upon an adult bailee must not be more onerous on the accused than is necessary. Which, depending on jurisdiction, may be decided considering the nature of the offence, the circumstances of the defendant and the public interest. [27] Such bail conditions may include requirements on the bailee to:

- report to a police station;
- reside at a certain address;
- maintain a curfew;
- not contact certain people;
- not enter a certain area;
- abstain from drug and alcohol usage;
- obtain a mental health plan; and
- attend a rehabilitation service.

The more restrictive these conditions are, the more likely the bailee is to breach their bail conditions.

C Breaching bail creates an incarceration cycle

Failure to abide by these requirements results in the bailee breaching their bail. A breach of bail creates a new offence, which requires the bailee to attend court again. Failure to appear is also an offence.[28] The breach system is a central plank in the driver of high levels of remand. Between 2005 and 2017 the number of offenders sentenced for breach of bail more than doubled.[29] It is common for a breach of bail offence to be a defendant's most serious charge (in terms of their breach offence to be the offence with which carries the highest maximum sentence). This was the case for 59.2% of Queensland offenders sentenced for breach of bail between 2005 and 2016.[30]

Bail can also be varied. In many jurisdictions where a bailee wishes to vary their bail conditions they must bring an application to court. [31] This process involves the standard delays of a court application. These variations are typically determined by a Judge. However, in South Australia police officers too may vary conditions.[32]

Further contributing to the long periods spent in custody are laws which restrict the availability of bail applications once bail is refused. These only allow a further bail application where: the

---

25 *Bail Act 1982* (WA) Part D (1)(1).

26 *Bail Act 1994* (Tas) s7 (4).

27 *Bail Act 1980* (Qld) s11(1); *Bail Act 1982* (WA) s17(2); *Bail Act 2013* (NSW) s 20A(d); *Bail Act* (ACT) s 25(6)(b); *Bail Act 1977* (Vic) s 5AAA(2)(a).

28 *Bail Act 1992* (ACT) s 49; *Bail Act 1982* (NT) s 39; *Bail Act 1980* (Qld) s 33; *Bail Act 1977* (Vic) s 30*; Bail Act 1982* (WA) ss 51A, 52.

29 Queensland Sentencing Advisory Council, *Sentencing Spotlight on breach of bail offences* (Sentencing Spotlights, November 2017) 4.

30 Ibid.

31 *Bail Act 1980* (Qld) ss 8 (1)(b), 19(1)(2); *Bail Act 1977* (Vic) s 18(AI), s 18AC(3), s 18AD; *Bail Act 2013* (NSW) s 52; *Bail Act 1982* (WA) s14; *Bail Act 1994* (Tas) s 25.

32 *Bail Act 1985* (SA) s 11.

applicant was not previously represented; new information is to be presented; or the circumstances of the applicant have changed.[33] These provisions, it was contended by Legal Aid New South Wales, disincentivise remandees to apply for bail until they can 'maximise their chance of release', causing them to spend more time in custody.[34]

D Remand may lead to harsher sentences and undermine judicial discretion

A collateral impact of stringent bail laws and greater remand rates is the imposition of harsher sentences. The Sentencing Advisory Council has 'strongly suggest[ed]' that judges are modifying their sentences to post-hoc justify the person being placed in remand in the first place.[35] 2020 saw a 640% increase in the use of time-served sentences (a *time-served sentence* is where a Judge imposes a term of imprisonment which is equal to the time the offender has already spent on remand, such that the offender walks free on the day of the sentence). This sharp increase in the context of new tough-on-bail laws 'strongly suggests' that harsher penalties are being imposed because, in the absence of remand, judges may have ordered softer, community correction orders.[36] In that circumstance, sentencing Judges are placed in an unenviable position where the punishment already served by the remandees is excessive and they do not wish to impose an additional punishment – such as community correction orders. Further, there is a risk those who have plead guilty will spend too much time in custody awaiting sentence as their remand period will be greater than their sentence.[37]

II BAIL SYSTEM'S DISPROPORTIONATE HARM ON DISADVANTAGED GROUPS

A Aboriginal and Torres Strait Islanders

Bail and remand significantly contribute to the 'unnecessary imprisonment' of Aboriginal and Torres Strait Islander (ATSI) people.[38] The ATSI population has disproportionately experienced the increase in remand.[39] The data shows[40] the over-representation of ATSI

---

33 *Bail Act 2013* (NSW) s 74; *Bail Act 1977* (Vic) s18AA(1); *Bail Act 1982* (WA) s 14(2a). These provisions do not operate in South Australia or Tasmania.

34 Australian Law Reform Commission, "*Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples"* (Report No 133, 1 December 2017) 157.

35 Sentencing Advisory Council 'Growth in Victoria's Remand Population Is Driving Increase in Prison Sentences: New Report' (Media Release, Sentencing Advisory Council, 4 February 2020); Adam Thorn 'Surge in remand population results in unfair prison sentences' *Lawyers Weekly* (online, 5 February 2020) <www.lawyersweekly.com.au/news/27413-surge-in-remand-population-results-in-unfair-prison-sentences>.

36 Ibid.

37 Stephanie Ramsey and Jackie Fitzgerald, *Offenders sentenced to time already served in custody* (Issue Paper No 140, May 2019) 4.

38 Australian Lawyers for Human Rights, Submission No 59 to Australian Law Reform Commission, *Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (4 September 2017) 2.

39 Lorana Bartels "*The growth in remand and its impact on Indigenous over-representation in the criminal justice system*" (Indigenous Justice Clearinghouse, 24 May 2019) 1.

40 Australian Law Reform Commission (n 34) 149.

remandees is driven by two factors: first, ATSI people are less likely to be granted bail; and second, ATSI people are more likely to breach bail conditions.[41]

1 Grants of Bail

The National Report of the Royal Commission into Aboriginal Deaths in Custody some thirty years ago described an 'Aboriginal Disadvantage' in bail hearings. The Commission identified that ATSI people, due to intergenerational disadvantage, can have 'prior failures to appear at court, lack of a fixed residential address, lack of employment and other such indicators of possible non-attendance'.[42] A consistent history of low-level offending can suggest to the court that the applicant presents an unacceptable risk of reoffending while on bail. This can trigger the court to deny bail even where the applicant is likely to appear.[43]

Further, ATSI people may have language differences which make following and participating in the bail process impossible.[44] The Western Australian Auditor General has observed that a fifth of ATSI accused people may need help understanding bail processes.[45] Language barriers negatively affect bail outcomes for defendants who are unable to adequately outline their living arrangements, support networks and cultural obligations.[46] These factors contribute to ATSI people being denied bail disproportionately to their non-Indigenous counterparts.

2 Breach of Bail

The likelihood of inadvertent non-compliance with bail conditions is increased where language barriers exist. Bail conditions are often set in legal jargon in a 'time-poor' environment.[47] This makes it difficult, particularly for unrepresented bailees, to understand their responsibilities in meeting these conditions and the consequences of breach.[48]

Bail conditions, by their prescriptive nature, burden ATSI people with restrictions which conflict with familial and cultural obligations and practices. Onerous bail conditions and subsequent breaches tend to have a compounding effect: should an applicant reoffend following a breach they will face harder bail tests even where their breaches are 'minor or technical in nature and result from [their] disadvantage'.[49] ATSI defendants are over twice as likely to have been previously convicted of a breach offence.[50]

---

41 Ibid 154; Lucy Snowball et al, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act* (NSW Bureau of Crime Statistics and Research, July 2010) 5.

42 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, National Report [1991] Vol 3 [21.4.15].

43 Ibid.

44 Ibid [21.4.20].

45 Western Australian Auditor General, '*Management of Adults on Bail*' (Report 10, June 2015) 15.

46 Australian Lawyers for Human Rights (n 38).

47 Ibid 5.

48 Jennifer Sanderson, Paul Mazerolle, Travis Anderson-Bond, *Exploring Bail and Remand Experiences for Indigenous Queenslanders* (Final Report, January 2011) 53.

49 Ibid; Human Rights Law Centre, Submission No 58 to the Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (24 August 2021) 9.

50 Australian Law Reform Commission (n 34) 154.

3 Indigenous women

It is important to note that ATSI women experience 'intersectional and systemic discrimination'.[51] This has caused an 'especially sharp and alarming' growth in the population of female ATSI remandees.[52] Between 2001 to 2015 the number of Indigenous Australians on remand grew by 238% with young Indigenous women being the fastest growing prison population in Australia.[53] Many ATSI women on remand are either found not guilty of the offence or do not serve any additional time. 60% of ATSI women held on remand were released without sentence in Victoria in 2012.[54] This suggests an over-incarceration of ATSI women on remand for minor offences. This trend is especially damaging for ATSI women for whom the 'social as well as the financial costs of these short-term remands can be very high'.[55]

B Women

Remand laws have particular impacts on women. In 2021 in Victoria, over half[56] of those in women prisons were on remand. This has particularly impacted ATSI women, whose remand rates increased by 440% in the same period.[57] This is largely attributable to changes to the *Bail Act 1977* (Vic) which have 'egregious effects on women'[58] and make it harder to obtain bail.[59] Women's offending is, according to a lawyer in a qualitative study, 'driven by poverty and trauma and disadvantage'.[60] This qualitative observation is reflected in the data. Women prisoners tend to be arrested for lower-level offences and are more likely to: have some kind of need or vulnerability;[61] have experienced sexual violence; experience depression and self-harm than men while in prison,[62] and come from socio-economic disadvantage.[63]

---

51 Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-Represented but Rarely Acknowledged' (2011) 15(1) *Australian Indigenous Law Review* 47.

52 Office of the Inspector of Custodial Services, *Western Australia's Rapidly Increasing Remand Population* (Report, October 2015) 2; Australian Law Reform Commission (n 34) 153.

53 Danielle Hughes, Emma Colvin and Isabelle Bartowiak-Theron, 'Police and vulnerability in bail decisions' (2021) 11 (3) *International Journal for Crime, Justice and Social Democracy* 122.

54 Victorian Equal Opportunity and Human Rights Commission, 'Unfinished Business: Koori Women and the Justice System' (Report, August 2013) 20; Australian Law Reform Commission (n 34) 153.

55 Australian Law Reform Commission (n 34) 153; Office of the Inspector of Custodial Services (n 51).

56 Corrections Victoria 2021 showed that in June 2021 54% of detainees in Victoria's women prisons were unsentenced, compared for 22% in 2011: Corrections Victoria 'Monthly time series prisoner and offender data', *Corrections, Prisons & Parole Dataset* (Dataset, July 2021) <https://www.corrections.vic.gov.au/monthly-time-series-prisoner-and-offender-data>.

57 Ibid.

58 Russell et al (n 2) 1.

59 Russell et al (n 8).

60 Russell et al (n 2).

61 Andrew Forrester, Gareth Hopkin, Linda Bryant, Karen Slade and Chiara Samele, 'Alternatives to custodial remand for women in the criminal justice system: A multi-sector approach' (2020) 30 *Criminal Behaviour and Mental Health* 68, 68.

62 Ibid.

63 Madeline Petrillo 'The Corston Report: A review of women with particular vulnerabilities in the criminal justice system' (2007) 54(3) *Probation Journal* 285, 285–287.

The literature highlights the criminogenic impact imprisonment has on women.[64] Imprisonment of women typically fails to address 'and often exacerbates' trauma, racism, illnesses and poverty. [65] Moreover, the experience of incarceration reinforces the process of victimisation and powerlessness which many women remandees may have experienced:[66] women are more likely to have trauma from violent or sexual victimisation[67] and the punitive regimes of discipline and surveillance often trigger prior victimisation. This has been described by Bree Carlton and Emma Russel as a 'carceral continuum' of gendered violence.[68]

There is a 'nexus between DFV, homelessness and criminalisation' that women face which is exacerbated by strict bail laws.[69] Russell et al identify six factors which, in concert with Victoria's bail laws, create a pipeline for women to enter prison.[70] These were: "(1) the denial of bail to women without access to housing; (2) intervention orders precluding women from housing; (3) DFV related isolation and control disadvantaging women's bail applications; (4) police pursuing other matters when called to respond to DFV incidents; (5) police 'misidentification' of the predominant aggressor in DFV; and (6) a perception of women as less 'innocent' or 'deserving' of protection if they are already criminalised".[71] Tough-on-crime bail laws are enforced largely due to the public's repulsion to violent crimes – largely committed by men – which has caused some to claim that women prisoners are being punished for male violence.[72]

C Homelessness and housing precarity

---

64 Bree Carlton and Marie Segrave, 'They died of a broken heart: Connecting women's experiences of trauma and criminalisation to survival and death post-imprisonment'(2014) 53(3) *The Howard Journal of Crime and Justice* 270, 270–289; Petrillo (n 63); Sacha Kendall et al, 'Holistic conceptualizations of health by incarcerated Aboriginal women in New South Wales, Australia' (2019) 29(11) *Qualitative Health Research*, 1549, 1549–1565; Pauline Klippmark and Karen Crawley 'Justice for Miss Dhu: Accounting for Indigenous deaths in custody' (2017) 27(6) *Social & Legal Studies* 695, 695–715; Linda Moore, Phil Scraton and Azrini Wahidin, *Women's imprisonment and the case for abolition: Critical reflections on Corston ten years on* (Routledge Press, 2017); Shoshana Pollack, 'An imprisoning gaze: Practices of gendered, racialized and epistemic violence' (2012) 19(1) *International Review of Victimology* 103, 103–114; B Richie, *Arrested justice: Black women, violence, and America's prison nation* (New York University Press, 2012).

65 Russell et al (n 2) 1

66 Pollack (n 64) 103–114.

67 Daniel Jones, Sandra Bucerius and Kevin Haggerty, 'Voices of remanded women in Western Canada: A qualitative analysis' (2019) 4(3) *Journal of Community Safety and Well-Being* 44, 44–53; Mary Stathopoulos et al, *Addressing women's victimisation histories in custodial settings Australian Institute of Family Studies* (Report No 13, 2012).

68 B Carlton and E Russell, *Resisting carceral violence: Women's imprisonment and the politics of abolition* (Palgrave Macmillan, 2018); Marie Segrave and Bree Carlton 'Women, trauma, criminalisation and imprisonment' 22(2) *Current Issues in Criminal Justice* 287.

69 Russel et al (n 2) 7.

70 Russel et al (n 8) 1.

71 Russel et al (n 2) 1.

72 Melanie Poole, 'In Victoria's prisons, women pay for men's violence' *The Age* (online, 29 June 2019) <www.theage.com.au/national/victoria/in-victoria-s-prisons-women-pay-for-men-s-violence-20190628-p5226v.html>.

Housing precarity is the most significant structural barrier for people to acquire bail.[73] This is largely because housing precarity prevents accused offenders from nominating a permanent address in their bail conditions. Moreover, those who are remanded are at greater risk of being evicted from housing and losing their employment, which further perpetuates socio-economic injustice.[74] For those who are being assisted by support services prior to their arrest – such as psychological, health or drug rehabilitation support – being on remand disrupts their access to support services, further compounding socio-economic injustice and exacerbating their pre-existing issues. [75] Corrections Victoria indicates that 26% of women entering prison on remand experienced homelessness or housing instability before prison.[76] Other researchers put that proportion as higher, with Russel et al stating that more than a third of their observed bail and remand hearings saw housing as a factor in the decision as to bail.[77]

III THE ROLE OF THE COURTS

Before we examine *how* the courts can prevent this bail system from applying inequitably against disadvantaged groups, we must first justify *why* courts should do so. Alexander Hamilton said that because the executive 'holds the sword of the community' and the legislature 'commands the purse' the judiciary is 'beyond comparison the weakest of the three departments of power'.[78] For this reason, the authors support changes to bail through the legislature by meaningful legislative reform. In the meantime, this part examines how court administrators and judicial officers can ensure that the law is not applied in a way that, in practice, disadvantages vulnerable groups. When we speak of administration, we generally mean the court processes themselves, rather than the actual decisions of judges. This part explains why it is both legitimate and necessary for courts to seriously consider how they can administer bail in a way which does not, in practice, contribute to disadvantage.

A Legitimacy

It is legitimate for court administrators to look to how their processes can alleviate disadvantage. To do so is not inimical to judicial independence. Judicial independence can be seen as independence from the two other arms of government: the executive and the legislature. It also requires court administrators to implement systems that will not unduly disadvantage particular groups in society. While it has been said that 'judicial independence is understood

---

73 Russel et al (n 2).

74 Elizabeth Sullivan et al, 'Aboriginal mothers in prison in Australia: A study of social, emotional and physical wellbeing' (2019) 43(3) *Australian and New Zealand Journal of Public Health* 241.

75 Australian Law Reform Commission (n 33) 149. Forrester (n 60) 68–78. Andrea Lachsz and Monique Hurley 'Why practices that could be torture or cruel, inhuman and degrading treatment should never have formed part of the public health response to the COVID-19 pandemic in prisons' (2021) 33(1) *Current Issues in Criminal Justice* 54, 54–68.

76 Corrections Victoria, 'Women in the Victorian Prison System', *Corrections, Prisons & Parole* (Web Page, January 2019) <https://www.corrections.vic.gov.au/women-in-the-victorian-prison-system>.

77 Russel et al (n 2) 5.

78 Alexander Hamilton, "The Federalist No 78: The Judges as Guardians of the Constitution", in Alexander Hamilton et al, *The Federalist* (Belknap Press, 2009) 508 at 509–510. The passage was quoted in *Evans v Gore* (1920) 253 US 245 at 249–250.

to require freedom from any external influence other than the law itself',[79] it also requires that judges be *seen* to administer the law equitably. Judicial legitimacy can only be maintained where judges are seen to administer the law in a way which promotes equality among all groups. As Chief Justice Kiefel noted, 'the public must have faith' that courts can operate 'fairly and impartially'.[80]

In administering the criminal justice system in a so-called "equal" manner, without any consideration of individual circumstances or systemic inequalities, the law has disproportionate and unintended impacts on disadvantaged groups, as we have explained. While the law itself needs to be applied without ideology, that needs to be tempered with administering the court in such a way which makes courts accessible and their processes fair. For instance, providing hearing loops in courtrooms so the hearing-impaired can hear the proceedings by hearing aids is not bringing ideology into the courtroom. Rather, ensuring equal access to court processes and assisting the community are a part of the role of a judicial officer and court administrators. Similarly, it is legitimate for court administrators to look at the social disadvantage that some groups face in accessing courts and taking steps to ameliorate that disadvantage.

B Necessary

Further, it is necessary for court administrators to amend their processes to not unduly disadvantage vulnerable groups, particularly in the context of bail. Bail is a 'high volume and hugely consequential' part of the criminal law process.[81] The discretion afforded to judicial officers in setting bail conditions remains broad. In the context of increasing rates of people being placed in remand, it is vital that courts take action to preserve the fundamental principles of liberty and ensure punishment is reserved only for those who have been sentenced.

On that basis we recommend court administrators make eight changes which are explained below. We recommend that courts use innovative court practices to lessen the impact of remand and stringent bail conditions on vulnerable groups and welcome social services into the courthouse. This should begin and evolve with judicial education to shape bail practice and court administrators gathering data over time as to how bail is being set and breached. Finally, court administrators should implement communication practices to engage applicants and reduce failure to appear rates.

IV Proposals for change

This part will outline the steps court administrators can take to ameliorate the impacts of the bail laws on disadvantaged groups. These involve pragmatic solutions to make it easier for people to attend court and abide by their bail conditions.

1 Communicating with bailees

---

79 Chief Justice Susan Kiefel, 'Judicial independence – from what and to what end?' (Speech, Austin Asche Oration, 27 March 2021) 7.

80 Ibid.

81 Auld and Quilter (n 5).

Given that a failure to appear is an offence, courts should implement strategies which help bailees to appear for their hearings, breach hearings and sentences. Reminding bailees of their court appearances lowers failure to appear rates. The Victorian Magistrates Court operates the 'CISP' program at twenty of its locations.[82] This program assigns case workers to bailees who remind them of upcoming court dates.[83] Several American states have adopted a similar system, reminding bailees by postcard, text or phone call. A study of this practice in Arizona found that directly reminding the defendant of an upcoming court appearance lowered failure to appear rates by 76.7%.[84] Other states saw similar, but less significant, decreases of failure to appear rates.[85] The data gathered by these US states broadly suggest that a phone call is the best method to reduce failure to appear rates, followed by a text. Postcards were also used in some systems, with researchers concluding that such reminders are more effective where they explain to the recipient the sanctions that may follow should they fail to appear for their court date.[86]

Implementing a reminder system is cost effective for the court. Researchers in Nebraska compiled a cost-benefit analysis of the impact of administering a postcard system of reminders.[87] Those researchers determined that, assuming that the system reduced the failure to appear rate by 3.5% (as previously recorded by a pilot program in Nebraska) there was a net cost saving of $22,628 per year by eliminating the cost and time burden of 561 failures to appear. However, those researchers opined that, if the system was not automated, increased labour costs within the courts limited these benefits to $5,999 per year.[88] This research suggests that court date reminder systems can reduce overall court system costs. However, how that system is implemented impacts the extent of savings.

Closer to home, a South Australian Court has their registrar call defendants if they fail to appear at the time of their court appearance. [89] If the registrar can contact the defendant that day and they have simply made a mistake, the registrar reschedules their appearance for later that day without recording that they have failed to appear.[90]

---

82 CISP is the Court Integrated Service Program.

83 Matthew Willis, *Bail support: A review of the literature*. (Research Report No 4, 2017) 11.

84 Ross Hatton and Jessica Smith, *Research on the Effectiveness of Pretrial Support and Supervision Services: A Guide to Pretrial Service Programs* (Report, July 2021) 3.

85 Ibid 3–8. Different states used different methods (such as call, text, voicemail, call to a family member, postcard) to contact the defendants and for different kinds of offending and court appearances. Colorado saw a 12% increase in defendants attending court; Louisiana saw a 14% increase in overall appearances; New York saw a 8.9% decrease in failures to appear; Oregon saw a 12% reduction in their failure to appear rates; Louisiana saw an increase from 48% appearance rate to 62% court appearance rate; and Washington saw a 22% higher appearance rate for those receiving calls.

86 For example, David Rosenbaum et al, 'Court date reminder postcards: A benefit-cost analysis of using reminder cards to reduce Failure to Appear rates' (2012) 95 (4) *Judicature* 177, 186.

87 Ibid.

88 Ibid 186.

89 Sue King, David Bamford and Rick Sarre, 'The Remand Strategy: Assessing Outcomes' (2008) 19(3) *Current Issues in Criminal Justice* 327, 341.

90 Ibid.

We recommend that a program of texting bailees to remind them of their upcoming court dates be adopted by courts of all jurisdictions and States across Australia. This system could be integrated into pre-existing court listing systems and, hopefully, automated. For instance, applications for bail in some Supreme Courts are already partially managed by digital systems.

2 Diverting the management of bail conditions from the courts

As discussed in part II, inflexible bail conditions have disproportionate impacts on ATSI people and those experiencing poverty. For example, a condition that a person reside at a particular address makes those who experience housing precarity more prone to breaching their bail, and therefore exposes them to the harms of a breach of bail offence due to their disadvantage. In jurisdictions where bail can be varied by non-judicial officers, judicial officers should be willing to pass their responsibilities to other actors. This is because non-curial actors typically reduce the cost and burden on bailees. For instance, in South Australia police officers too may vary conditions.[91] These schemes provide greater flexibility which is particularly needed for people experiencing housing precarity. Ideally, the courts could pass these responsibilities to a parole officer-like figure for bailees. This would provide bailees not only with flexibility but also the support needed to meet their bail conditions.

Judicial officers should be attentive to tailor their bail conditions to accommodate greater flexibility where possible, particularly in circumstances where it is evident that the person experiences socio-economic disadvantage. For instance, rather than judicial officers setting a bail condition that a person is to reside at a particular address, judges can set a bail condition that the bailee is to seek approval from the office of the Director of Public Prosecutions to vary their address or reporting station or times. This saves the bailee from having to attend court to change their conditions. As an ancillary benefit, it also saves the court time in hearing as many applications to vary bail.

3 Using court processes to avoid undue 'reverse onus' and 'show cause' situations

Judicial officers can utilise court processes to prevent particular groups from being disadvantaged by the inflexible application of the bail framework. One example is using adjournments to allow applicants to gather more information to maximise the success of their hearing (and avoid being put in a 'show cause' situation). We observed a bail hearing in which a self-represented Indigenous woman had been brought into custody and was applying for bail. She had a four-month-old child and stated that she was desperate to be released on bail. In her bail application, she did not provide any detail as to her nominated address (such as a lease or letter from her relative explaining the living arrangements to demonstrate that she could live there). In this context, her application was bound to fail. The Judge offered the applicant an adjournment to allow her the time to contact her relatives to gather more documents in support of her application for bail. The Judge took the time to explain the consequences should the application for bail be unsuccessful. This avoided the woman then having her bail refused and, from then, being in a 'show cause' situation. This kind of sympathetic approach is particularly important in hearings for bail of women. As women are more likely to have particular

[91] *Bail Act 1985* (SA) s 11.

vulnerabilities, to be re-victimised by incarceration, and to have dependent children whose lives will be impacted by separation.[92]

4 Setting bail conditions which consider the unique needs of some groups

Judicial officers need to be alive to the unique cultural needs of ATSI people in setting bail conditions. Bail conditions are not typically 'being adapted to account for the particular circumstances' of many ATSI people.[93] Common bail conditions such as curfews, exclusion orders and travel limitations may conflict with ATSI cultural obligations including sorry business following a death in the family or community and restrict people from contacting their community networks.[94] The New South Wales Law Reform Commission explained that standard bail conditions can conflict with ATSI culture, in which 'frequent short-term mobility is a normal part of life'.[95] It is common for Indigenous young adults to travel for a few days or months to visit family, attend funerals, cultural or sporting events and access health services. The common bail conditions of a fixed address and frequent reporting requirements to a defined police station (which may be required daily) conflict with these cultural practices. Onerous bail conditions effectively set-up ATSI people to fail by breaching bail conditions which are ill-suited to their cultural and familial practices.

Judicial officers need to be wary of excluding particular locations in setting bail conditions. ATSI people may have strong cultural, historical or religious ties to a particular location. A location restriction or reporting requirement which limits travel may seriously impact a bailee with a strong connection to 'place'.[96]

Moreover, particularly for those ATSI bailees who live regionally, meeting reporting requirements is far more onerous in places without adequate public transport. The Law Council of Australia observed anecdotal evidence of 'over-prescriptive bail conditions'.[97] Including a condition not to consume alcohol in circumstances where a person is highly unlikely to be able to comply as they have no access to clinical support to help them detox.[98]

Initiatives such as the *Equality before the Law Bench Book* of New South Wales are to be commended for identifying the unique needs of ATSI people and educating judicial officers on those needs.[99] However, these equality bench books, which are common across jurisdictions, typically focus on criminal trials rather than bail. In March 2022 the federal government awarded a grant for the development of a 'National Bench Book on Aboriginal and Torres

92 Forrester (n 61).

93 Law Council of Australia, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Discussion Paper No 84 6 October 2017) 8.

94 Judicial Commission of NSW, *Equality before the Law Bench Book* (2016) [2.3.2]; New South Wales Law Reform Commission, *Bail* (Report No 133, 2012) 11.54.

95 NSW Law Reform Commission, *Bail*, (Report No 133, 2012) [11.56]; Australian Law Reform Commission (n 34) 157.

96 Australian Law Reform Commission (n 34) 157.

97 Law Council of Australia (n 93) 9.

98 Ibid.

99 Judicial Commission of NSW (n 94) [2.3.2].

Strait Islander Peoples' which will specifically address criminal proceedings.[100] We strongly recommend all courts adopt this bench book and encourage judicial officers to refer to it in bail proceedings. We further recommend the implementation of bench books which specifically relate to bail proceedings.

5 Courts should be attentive to who hears bail proceedings

Managing bail by the same judge across all hearings is a simple adjustment which courts can make. In the trial division of some courts, typically breach hearings for the breach of bail, and variations of bail, are heard by the same trial division judge who determined bail at first instance. The Judge will hear the breach hearing regardless of whether they are sitting in the criminal jurisdiction in that week. In this way, there is a continuity of management for the accused in their bail.

Managing the bail process with one judge has numerous benefits. Where a judge is already familiar with the defendant's case, they can be more attentive to submissions regarding the breach itself, rather than having to dedicate time to understanding the person from the beginning. It also has an ancillary benefit: judges effectively get 'feedback' on the bail that they have determined. Judges can see, over time, which conditions people tend to breach, what kind of circumstances judges should be attune to in setting bail, and the consequences of their decisions. This makes the judicial officer better in their decision-making, promotes efficiency within courts and benefits the bailee.

6 Bail decisions should be published

While it is acknowledged that bail judgments are of limited precedential value as "more than in any other area of the criminal law, each decision involves an evaluative judgment based on the interplay of a multitude of factors particular to an individual case",[101] access to bail decisions can be beneficial. Justice Hulme observed in *DPP (NSW) v Zaiter* [2016] NSWCCA 247 at [31]–[32] that "[i]t is useful for 'bail authorities' to have examples of how particular factual circumstances have been considered by Supreme Court judges". This is particularly relevant in relation to promoting consistency among judicial officers: they can see how other judicial officers have handled an applicant's vulnerabilities and ameliorated their disadvantage.

However, bail decisions are rarely appealed and so precedent in bail decisions is somewhat limited. Further, the original decision of bail is not typically published. As such, judges are limited in their ability to apply precedent in bail decisions and cannot consider and apply the approaches of other judicial officers.

We recommend that court administrators introduce a bail database across all Australian jurisdictions. For example, Queensland has created the "Queensland Sentencing and Information Service" (QSIS) a free online resource which "supports participants in the criminal justice system to achieve consistency in sentencing by making it easy to search, locate and

---

100 Community Grants Hub, 'Archived Grant Opportunity View – GO5545', *Grant Connect* (Web Page, 30 March 2022) <www.grants.gov.au/Go/Show?GoUuid=a9fdb376-058f-44c9-b0ff-c5f043268c5a>.

101 Georgia Brignell and Amanda Jamieson, *Navigating the Bail Act 2013* (Report No 47, June 2020, Judicial Commission of New South Wales).

compare Queensland sentencing outcomes".[102] The creation of a database like this for bails would help create consistent bail outcomes between judges and assist judges in difficult bail decisions. It would also help legal practitioners and self-represented applicants in presenting arguments to the court.

6 Collecting data

Data can be invaluable in determining policies and understanding how the law is impacting our communities. Court administrators are well-placed to gather data about their bail application hearings, the bail conditions and breaches, and currently there is an absence of up-to-date and quantitative research across states and territories. We recommend court administrators adopt a system which records data related to:

- the identity of the bailee, their vulnerabilities, supports and basic information including age and postal code;
- bail applications, including the result and whether the defendant was self-represented;
- bail variations, including what kinds of variations bailees apply for;
- breaches of bail, including what kind of conditions bailees tend to breach;
- whether the bailee failed to appear; and
- the period of custodial sentences, including time served sentences, where the defendant has been previously held on remand.

By collecting this information courts will have the necessary data to analyse and consider their practices. For instance, when breaches and failures to appear are recorded, Judicial officers can objectively assess which conditions are effective in ensuring bailees attend their hearings and which perpetuate inequalities and are often breached. Collecting basic data on the bailee's background allows vulnerable groups to be particularly considered in this analysis. This objective data can better inform judicial officers and assist in creating practices which address systemic inequalities in the bail system. It also allows the court administrators to assess the effectiveness of these practices after they have been implemented, and to also see how the bail system is operating in practice after amendments to the bail framework.

7 Courts should accommodate social services

While the provision and funding of social services is outside the scope of this essay, courts need to be amenable to other services, where available, coming into the courthouse. In London, the Alternatives to Custodial Remand for Women (ACRW) service was established to use community sector services to 'identify vulnerable women early in court proceedings, improve co-ordination of their care and promote use of community sentences for them'.[103] This service, funded by the UK Department of Health, operated across three Magistrates Courts in London.

---

[102] Supreme Court Library Queensland, 'Queensland Sentencing Information Service', *Queensland Sentencing Information Service* (Web Page) <www.sclqld.org.au/caselaw/queensland-sentencing-information-service>.

[103] Forrester et al (n 61) 70.

It involved collaboration across NHS court liaison and diversion teams, an accommodation voluntary sector service and a voluntary sector mental health service. All women attending court were eligible to be seen by an ACRW service. There, they would meet with some kind of practitioner (a registered nurse with social work background, or a mental health practitioner with a psychology degree) from charities. They would review the case and determine whether specialist services might be required. These specialist services included domestic violence services, community mental health teams, human trafficking specialists, debt and finance advisers, housing services, exit sex work projects and drug and alcohol services.[104]

Courts need to be amenable to other social services collaborating with judicial officers, rather than being resistant to collaboration by perceiving it as some kind of afront to the rule of law. Relevantly for the courts' administration of the criminal justice system, the ACRW service would provide courts with reports. Each report would contain recommendations as to the disposition of the court, taking into account the offence, level of risk to others, and risk of re-victimisation. Recommendations were followed by courts in most cases.[105] Where the reports recommended bail, the court granted bail in 63.5% of cases. Crucially, over time, there was a downward trend in the use of custodial options for women who were being supported by the service. Forrester et al observes that by the conclusion of the program, after two years, custodial orders for women who used the service went from 43% in the first quarter to 21% by the final quarter.[106] Judicial officers should be willing to value the recommendations from these social services in setting their bail conditions. Court administrators should be willing to accommodate such services within their courthouses, as their work is demonstrably valuable.

Further, judicial officers can suggest services or make the attendance upon or admission to a service a condition of bail.[107] Educating judicial officers about the social programs and supports available to ATSI and female bailees can help reduce remand rates. Judges are more likely to grant bail where they can leverage social services to support the applicant while on bail.[108] Moreover, judicial education is particularly helpful for self-represented applicants as the judge does not have to rely on legal counsel to suggest these programs.[109]

8 Cultural Education

To properly determine bail for disadvantaged applicants, judicial officers must have an underlying knowledge of the issues these groups face. We recommend that court administrators introduce and increase mandatory judicial education programs regarding: DFV issues; ATSI cultural concerns and vulnerabilities; and the programs and social supports available to these disadvantaged groups if released on bail. This education should be tailored

---

104 Ibid 71.

105 Ibid 75.

106 Ibid 75.

107 Judicial College of Victoria, Submission No 102 to Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples* (September 2017) 4.

108 Ibid.

109 Gabrielle Appleby et al, *Judicial education in Australia: A contemporary overview Report prepared for the Australasian Institute of Judicial Administration* (Report, December 2021) 10.

to the local area of the court. Educating judicial officers is vital as judges have such discretion in setting bail conditions.[110]

Currently, most judicial training is voluntary. We recommend that court administrators mandate training programs for their judges. The Judicial College of Victoria recommends tiered programs which can be delivered at a skill level tailored to judges' experience.[111] Judges' conferences are an ideal place to situate this training. These conferences are typically organised by court administrators and mean that the training is effectively mandatory.

As to how the training should be conducted, we join with the Judicial College of Victoria in recommending that cultural competency training should be developed in substantial consultation with local ATSI community.[112] Education for judicial officers is recommended to create a deep understanding of the "unique and systemic background factors which affect ATSI offenders".[113]

This compulsory training is necessary as the introduction of laws which mandate the consideration of ATSI and gendered concerns alone has proven to be insufficient. Research by the Victorian Equal Opportunity and Human Rights Commission suggests that section 3A of the *Bail Act 1977* – which requires consideration of aboriginality – is underutilised by judicial officers and recommends further education for judicial officers.[114] Only with meaningful community-led education can provisions like section 3A be implemented to their intended effect.

Conclusion

Decades of reactive amendments to bail legislation have caused an incarceration crisis. This essay has explained how the bail system, as it stands, worsens gendered, racial and socio-economic inequalities. Within this crisis, courts should examine the role they have in perpetuating disadvantage, and the concomitant role that courts *can* play in alleviating disadvantage. We examined why the courts can take up a role to redress disadvantage and provided proposals as to how courts can administer the bail system equitably. We recommend that court administrators implement community-led education, use court processes to promote flexibility in bail conditions, and utilise court processes to avoid undue show cause situations. Court administrators need to encourage judicial officers to be willing to refer and respect social services and be educated on how bailees can be supported in community. So that the impacts of bail laws can be tracked over time and judicial officers can objectively assess the impacts of their practices, we also recommend that courts collect data related to bail hearings.

Ultimately, there are two avenues of alleviating the current remand crisis: legislative reform or a shift in court administration. The first avenue of redress is, at this stage, impossible. While

---

110 For example, *Bail Act 1980* (Qld) s 11(2).

111 Judicial College of Victoria (n 109) 3.

112 Ibid 3.

113 Ibid 4.

114 Victorian Equal Opportunity and Human Rights Commission (n 54) 49–50.

the second will not entirely solve this crisis, perhaps, as we have explained, it has some capacity to ameliorate these systems. Judging is, inherently, a human endeavour, which requires the impartial application of the law, with the recognition of human dignity and the society within which the law operates. The bail system has placed judicial officers in an unenviable position and undermined judicial discretion. However, by recognising the impacts the bail system has on disadvantaged groups, courts can do better in their administration of the criminal law.