



# Understanding the impact of bail refusal on the Australian public health system

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## ABSTRACT

Australia's incarceration rates are the highest they have been in a century. Bail and remand contribute much to this trend, and yet the reasons why police refuse bail to vulnerable people are currently unclear. What is clear, though, is that a disproportionate number of vulnerable people are being refused bail, resulting in periods of remand incarceration which end up either longer than the prison sentence given by a magistrate, or undue if the alleged offender is found not guilty. This tendency is particularly observable for the most vulnerable: Aboriginal people, children, people with a mental health condition, the homeless, and women. The authors investigated how magistrates grant or refuse bail as part of the court process, then looked at two tipping points bracketing the bail continuum: 1) policing interactions leading to court appearance, and 2) the impact of bail refusal on public health and community safety and well-being in general. In the present article, they examined how authorized police officers consider refusing or granting bail. This new project aims to investigate the police bail decision-making process and generate new knowledge about the impact of bail refusal on vulnerable people. Through an iterative process with national practitioners and international experts, the authors aimed to identify factors to consider when bail involves vulnerable people. Expected outcomes included the development of mechanisms to benefit the full remit of criminal justice, reduce costs, and improve fairness, accountability, and procedural justice.

**Key Words** Police; remand; decision-making; vulnerable people; community safety; well-being.

## INTRODUCTION

Bail is a key driver in the over-representation of vulnerable people in the criminal justice system. Australian incarceration rates are at their highest in a century (Sarre, 2021). While bail and remand are a fundamental part of our legal framework for community safety and well-being (Australian Government Productivity Commission, 2021), the circumstances under which bail is refused to vulnerable people, particularly by police, are unclear. We urgently need to know why bail is being disproportionately refused to disadvantaged people, as well as the impacts of these refusals. This paper outlines the current state of knowledge of bail and of the bail decision-making process, demonstrating a pressing need to determine the various stages at which there should be explicit guidance and transparency on who makes bail decisions, and the impact of these decisions on defendants and public health overall.

A new research project aims to reveal specific tipping points where police may make better, vulnerability-informed bail decisions. Such guidance is crucial in light of the current state of remand imprisonment in the Australian justice

system. There are clear indications remand is in the disfavour of vulnerable people, and possibly aggravating vulnerability circumstances for defendants and the broader community.

Two important issues are currently unresolved in our understanding of how bail works. First, according to the most recent Australian Government Productivity Commission report (2021), most Australian inmates are from disadvantaged backgrounds, with significant increases in remand rates for vulnerable people such as Indigenous Australians (the most incarcerated population in the world; see Anthony, 2017), children, women, and people whose vulnerability conditions (acquired brain injury, substance use or mental illness) require medical evaluation or support.

Second, vulnerable remandees, who are still not proven guilty of any crime, are likely to see an aggravation of their condition through poor access to support services. This is of particular concern as remand in custody is a time during which specific forms of vulnerability can escalate, with limited public health service provision. Bail therefore comes at a considerable economic and social cost to individuals, communities, and Australian society as a whole.

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**To cite:** Bartkowiak-Théron, I., & Colvin, E. (2022). Understanding the impact of bail refusal on the Australian public health system. *Journal of Community Safety and Well-Being*, 7(4), 174–177. <https://doi.org/10.35502/jcswb.280>

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SG PUBLISHING Published by SG Publishing Inc. **CSKA** Official publication of the Community Safety Knowledge Alliance.

## STATE OF KNOWLEDGE ON POLICE BAIL AND REMAND IN AUSTRALIA

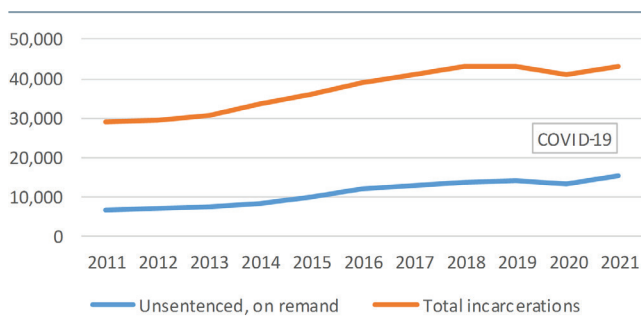
Australia’s incarceration rates have grown out of line with other countries (Figures 1 and 2). Bail refusal and subsequent remand imprisonment contribute significantly to the overrepresentation of people from disadvantaged groups in custody. Being refused bail means that a defendant spends an undetermined amount of time in custody before trial. This remand imprisonment is a significant factor in the growth of incarceration numbers. In 2021, a third of all persons incarcerated in Australia were on remand, doubling since 2000.

Our preliminary research, which focused on how magistrates approach bail (Travers et al., 2020) found significant flaws in procedural and distributive justice when bail is refused by police. This is particularly problematic as people are remanded at a younger age, when homeless women are remanded “for therapeutic reasons” (with no provision for therapy in remand settings), when some remandees stay in custody for months, and when some commit suicide during such extended periods (JIIE, 2020). Studies from New South Wales and South Australia have shown that over 50% of prisoners who committed suicide in the relevant study period were on remand at the time of their death (Willis et al., 2016).

Some authorized police officers have the power to grant or refuse bail (Hucklesby, 2001), and to grant special bail conditions. Police were initially given this power to *reduce* the number of alleged offenders held in custody overnight before appearing at court, and to retain some control over defendants’ whereabouts during bail. While this gave police a decision-making framework, only limited data exist on bail granted by police, which reveals inconsistent decision-making. Differences in types of defendants and their vulnerability attributes are not considered (Hucklesby, 2001). Instead, the five broad criteria that are taken into account are:

1. likelihood of showing up at court or absconding,
2. concern over the safety of the person,
3. criminal record and history,
4. the seriousness of the alleged offence and the strength of the prosecution case, and
5. the likelihood of re-offending by the accused while on bail.

Aside from these, the specific grounds for granting or refusing bail are not often recorded in police files, unless it



**FIGURE 1** Remand and total incarceration rates, Australia 2011–2021. Source: ABS, Prisoners in Australia 9/12/2021.

is a prosecutorial file. Our preliminary research showed that in Australia, police officers are making decisions to refuse bail according to criteria that differ vastly between officers, and that vulnerability factors usually are *to the detriment* of defendants. As a result, a significant number of citizens are being deprived of their liberty without clear justification. Procedurally arbitrary decisions have resulted in growing incarceration instead of a decline (Figure 1).

Hucklesby (2001) has questioned whether such decisions are even legal. While they are lawful in general, the fact that personal circumstances are not considered, and that vulnerability or disadvantage disfavors so far unconvicted defendants may imply that decisions are illegal in virtue of being discriminatory. This is of particular concern when the person is ultimately found not guilty, and when remanded people have limited access to support services.

## WORK IN PROGRESS

After working on the topic of how magistrates consider bail and securing federal funding to study bail decision-making by magistrates (2017–2019), the team is now considering where, throughout the bail timeline, crucial tipping points exist that could facilitate procedural and distributive justice. We are also exploring how bail (particularly bail refusal) impacts on public health more broadly, as well as community health and safety. Current pressure on the criminal justice system, from concern over increases in prison numbers to increased financial cost and legal rights erosion, indicates a need for restructuring how bail decisions are made for vulnerable people. While there exist some legal guidance frameworks for the granting of bail, there is no agreed approach to how vulnerable people should be responded to in the decision-making process.

Specifically, there is no clarity about how to set and apply—consistently and equitably—what is called the “unacceptable risk threshold.” The “threshold test,” which is provided for in legislation, means the decision-maker must consider levels of risk of, for example, offences being committed while on bail. Little is known, however, about the threshold of risk considered acceptable by decision-makers in practice. Bail decisions are a balancing act between core



**FIGURE 2** Remandees in proportion to national populations and prison populations, 2016. Source: Institute for Crime and Justice Policy Research, World Prison Brief, 2021.

competing legal principles and the probability of something actually occurring. Such competing principles and matters of probable fact need to be weighed against a range of likely consequences for the persons concerned—even when it is granted that some do genuinely pose a risk to the community and, for that reason, should be remanded in custody awaiting trial.

The team's project addresses four intersecting socio-legal and judicial challenges which fundamentally impact on public health, community safety, and defendants' well-being.

**1. The over-representation of vulnerable people in prison:**

Vulnerable people are more likely to come into contact with police (Justice Reform Initiative, 2021; Bartkowiak-Théron & Asquith, 2012) and are over-represented in criminal justice: nearly seven times more than in the general population. The Australian Productivity Commission (2021) indicates that vulnerability traits actually contribute to individuals entering the prison system. Most prominent among these vulnerability attributes are:

- mental illness (50% of incarcerated adults and 80% of incarcerated youth have been diagnosed with a psychological disorder),
- Indigeneity (Australian Aboriginal people make up 28% of all inmates, but only represent 3% of the general population; the imprisonment rate for Aboriginal and Torres Strait Islanders has increased by 35% since 2006, compared with 14% for the nonIndigenous population),
- gender (women are the fastest growing prison population; Justice Reform Initiative, 2021).

Some public health agencies argue that a much higher proportion of defendants experience these difficulties (Australian Institute of Social Welfare, 2019). The New South Wales Commission determined, in 2015, that the cycle of disadvantage for First Nations peoples is likely to be exacerbated due to the detrimental impacts of prolonged periods of remand and separation from family (JIIE, 2020). This is a significant challenge to vitally important legal principles, such as imprisonment as a last resort, the presumption of innocence, and duty of care for the most vulnerable (Travers et al., 2020).

**2. Lack of support while on remand:** Vulnerable defendants generally come from economically and socially disadvantaged backgrounds and have low levels of education, and most defendants require social support. While remandees should have access to a custody nurse (under the jurisdiction of corrections, and not police), there remains limited access to support services. Remand incarceration does not provide for much follow-up on medical and vulnerability issues, which increases disparities for disadvantaged and vulnerable groups upon release and aggravates health outcomes for Indigenous people (Justice Reform Initiative, 2021). Remand can therefore have a particularly adverse impact on individual and overall public health and well-being indicators.

**3. Remand is at least as costly as incarceration, both economically and socially:** There are considerable costs

to remanding vulnerable people, usually higher than the cost of imprisonment after a court decision. People are typically not remanded overnight, with an average increase from 4.5 to 5.8 months between 2001 and 2020 (Australian Government Productivity Commission, 2021). While the Productivity Commission (2021) reported that 90% of defendants were found guilty, 25% of them received a sentence consisting of less time than they had already spent on remand or received no custodial sentence at all. Being refused bail and placed on remand means that the circumstances of disadvantage worsen, resulting in fractured families and communities. The entire ecosystem (housing, employment, primary and public health care) is destabilized, especially given how long remand may last.

**4. Transparency, accountability, and procedural justice:**

Hardship and worsening of vulnerability conditions should be a fundamental consideration of the bail decision-making process, focused on individual circumstances (Murphy & Ferrari, 2020). Our latest publication shows that, currently, “only police in NSW and Victoria are required to consider an accused’s vulnerability explicitly under the law,” and that “although legislation may cater for varying vulnerabilities, intersecting vulnerabilities are not considered” (Hughes et al., 2021, 1).

## CONCLUSION

Our proposed project contributes a tangible “research lab” in which to test methodological approaches to policing, justice, and vulnerability assessment, as a political and social priority for Australia and beyond.

- **From a public health perspective:** Prisoners can be highly vulnerable, and over-represented vulnerable people in remand can see their vulnerability aggravate (whether due to primary ill-health, public health issues, or social factors), as any stay in prison amplifies difficulties associated with accessing services. Such unfavourable circumstances result in fractured communities, service inefficiencies, and a steep escalation of conditions for the vulnerable during incarceration and upon release.
- **From an economic perspective:** Prisons are expensive. Increasing incarceration figures come with a heavy financial burden (AU\$20 billion overall in 2019–20), due to the nature and the logistics of “living in prison.” This social cost continues upon release (rise in homelessness, unemployment rates, etc.).
- **From a legal perspective:** Remand is particularly problematic in terms of human rights, procedural fairness, and due process, since some bail refusals end up in non-guilty verdicts or no additional prison time. This means that some individuals have spent traumatic time in jail for nothing.

The COVID-19 pandemic saw magistrates granting bail more liberally, as time on remand and time-pressure on the system were deemed unfair and risky to defendants. As a result, a notable “dip” in remand rates has been recorded, with an associated decrease in incarceration rates altogether

(Figure 1). If unnecessary remand can be avoided in pandemic circumstances, and if incarceration can decrease out of concerns of fairness and public health, then there is significant social, economic, and public health benefit to considering how the circumstances of vulnerable people can be consistently ameliorated and carefully assessed in police custody suites prior to deciding on bail. Such restructuring would increase police accountability and transparency and better articulate procedural justice for the most disadvantaged members of society. There are additional benefits concerning the liability of police officers in making rushed or ill-advised bail decisions and in avoiding serious health complications or irreparable consequences, such as suicides by remandees. The criminal justice system is under scrutiny for its lack of procedural and distributive processes. Our project is a significant step in correcting the current overincarceration trajectory.

#### CONFLICT OF INTEREST DISCLOSURES

The authors declare that there are no conflicts of interest.

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#### REFERENCES

- Anthony, T. (2017, June 6). FactCheck: Are first Australians the most imprisoned people on Earth? *The Conversation*. Retrieved from: <https://theconversation.com/factcheck-are-first-australians-the-most-imprisoned-people-on-earth-78528>
- Australian Government Productivity Commission. (2021). *Australia's Prison Dilemma*. Commonwealth of Australia. Retrieved from: <https://www.pc.gov.au/research/completed/prison-dilemma>
- Australian Institute of Health and Welfare. (2019). *The health of Australia's prisoners 2018*. AIHW. <https://www.aihw.gov.au/reports/prisoners/health-australia-prisoners-2018/summary>
- Bartkowiak-Théron, I., & Asquith, N. L. (2012). *Policing vulnerability*. The Federation Press.
- Hucklesby, A. (2001). Police bail and the use of conditions. *Criminal Justice*, 1(4), 441–463.
- Hughes, D., Colvin, E., & Bartkowiak-Théron, I. (2021). Police and vulnerability in bail decisions. *International Journal for Crime, Justice and Social Democracy*, 10(3), 1–17.
- Jumbunna Institute of Indigenous Education and Research (JIIE). (2020). *Submission to the Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody*, in Inquiry into High Levels of First National People in Custody and Oversight and Review of Deaths in Custody.
- Justice Reform Initiative. (2021). *Jailing is failing*. Retrieved from: <https://www.justicereforminitiative.org.au>
- Murphy, B., & Ferrari, T. (2020). Bail in the time of COVID. *Criminal Law Journal*, 44, 427–463.
- Sarre, R. (2021, October 22). Australia's prison rates are up but crime is down. What's going on? *The Conversation*. Retrieved from: <https://theconversation.com/australias-prison-rates-are-up-but-crime-is-down-whats-going-on-170210>
- Travers, M., Colvin, E., Bartkowiak-Théron, I., Sarre, R., Day, A., & Bond., C. (2020). *Rethinking bail: Court reform or business as usual?* Palgrave Macmillan.
- Willis, M., Baker, A., Cussen, T., & Patterson, E. (2016). Self-inflicted deaths in Australian prisons: Australian prison suicide statistics 1999–2013. *Trends and Issues in Crime and Criminal Justice*, 513, Canberra: Australian Institute of Criminology.