Bail in Australia: legislative introduction and amendment since 1970

Alex Steel, University of New South Wales

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Abstract

This paper examines the rate of amendment of bail laws across Australian jurisdictions since the 1980’s. It examines stated justifications for those changes by Parliamentarians in a number of jurisdictions and seeks to provide insights into the increasing rate of legislative amendment in some states in recent years. The paper analyses whether Australia wide trends exist or whether the reasons for amendment are more locally based. It forms part of the ARC funded Australian Prisons Project grant.

Introduction

Prisoner rates in Australia have risen consistently since the 1970’s. One significant factor has been the steep rise in the numbers of persons held on remand. This is a trend reflected worldwide, and many have considered the degree of public support for imprisonment to be increasing. Pratt and others have termed this development, the “new punitiveness” (Pratt et al 2005). Internationally, there has been examination of whether such new punitiveness is an expression of the development of a penal culture. Garland, for example, has termed this culture a ‘culture of control’ (Garland 2001). This paper is part of an ongoing research effort that seeks to determine whether a distinctly Australian penal culture can be exposed, that might explain this rise in punitiveness. One key part of this examination is to determine whether there is any evidence of such a culture across all Australian jurisdictions, or whether the approach taken in each jurisdiction is so specific that no general culture exists.

Bail legislation in Australian jurisdictions primarily sets up a structured discretion to be exercised by the relevant authorities. There are differences between jurisdictions, and over time, in the scope of this discretion and the presumptions on which it operates. Remand rate increases are not even across Australian jurisdictions, and a number of studies have found that the differential rates between jurisdictions are likely to be based on different cultural attitudes to remand in law enforcement and the judiciary in each jurisdiction (e.g. Bamford et al 1999; King et al 2005). However, such local cultural
differences are framed and limited within the scope of jurisdiction granted by the legislation. While Australian jurisdictions initially enacted bail legislation with broad discretion there has been consistent amendment of that legislation over time.

This paper seeks to provide an Australia-wide analysis of the degree and nature of that change. While the most significant direct impact on remand rates is likely to be found in hardening cultural attitudes against bail, it remains important to attempt to quantify the degree to which Parliaments have sought to intervene in the bail decision process. An increasing level of constraint on the discretion of those authorities charged with making decisions on bail, can suggest both a lack of Parliamentary faith in those authorities or public pressure caused by fear of crime, or both. The timing and nature of interference can also provide a basis for the broader question of whether penal cultural change occurs across Australia, or remains based on local State issues. Importantly, it also provides evidence that any popular calls for increased punitiveness has translated into actual change in the penal regime, a relationship that has at times been questioned (Green 2009).

**Bail in 1970**

Across Australia the right to bail following arrest and charge was until the mid 1970’s based on common law doctrines. At common law bail was restricted to a release following a payment of money, and the prime justification for refusing bail was a concern over the likelihood of a failure to attend the subsequent trial (see eg *R v Watson* (1947)). However analysis of the common law case-law in the early 1970’s repeatedly criticised the confused nature of the right to bail, and the lack of any clear guidance as to the weight to be given to the various factors that a magistrate or judge was required to consider in deciding whether to grant bail (e.g. Milte 1972; Roulston 1972; NSW Bail Review Committee 1976). Significant concern was expressed over the limitation of bail to an amount of money entered by a surety – which was seen to discriminate against the poor and to benefit the rich (Stubbs 1984:3-5). Such
concerns led to a number of seminars and government inquiries throughout the 1970’s and finally legislative reform, beginning with Victoria in 1977.3

Drawing on overseas research (for a summary see Friedman 1976), the law reform reports on which the legislative reforms were based emphasised the need to move away from a monetary basis for bail towards a concept of conditional bail that emphasised forms of reporting or compliant behaviour. There was also concern to codify the considerations to be taken into account in a decision to grant or deny bail. A significant argument was that there should be strong presumptions in favour of bail, with no specific exemptions to this principle.

Each jurisdiction however took different approaches to these questions. In some jurisdictions, a general presumption in favour of bail was established (eg Victoria) or a prima facie general right to bail (eg Queensland) and in NSW a right to bail for minor offences was created, and a presumption in favour of bail for other offences. In Western Australia, no general presumption in favour of bail was created. Some jurisdictions however enacted limited offences for which there was a presumption against bail, or no presumption either for or against bail.4

Subsequent amendments to bail legislation

There have been significant amendments to bail legislation in most jurisdictions since their introduction.

One way to measure the extent of legislative intervention in the scope of the principles of bail is to compare the number of amendments across time. This has been done by capturing the number of discrete pieces of legislation passed each year that significantly amended the bail regime.5 For this


4 In NSW this presumption against bail was for one type of offence only – armed robbery (s 9(1)(c))– and in direct response to a particular incident involving person on bail for a charge of armed robbery (Weatherburn et al: 1987). In Victoria bail was to be refused for indictable offences alleged to have been committed while on bail, aggravated burglary and offences involving firearms or weapons unless the accused could show cause (s4(4)). This approach was mirrored in the Queensland Act (s 16(3)). For a detailed examination of the operation of the various Acts in 1989 see Devine (1989).

5 There are significant difficulties in choosing how to appropriately quantify the number of distinct changes. For example if a single amending Act changes the application of bail to 3 different offences the question arises as to whether that be seen as one change or three. Such problems may well be intractable, and so only the number of amending Act are analysed.
purpose a significant amendment is any amendment that does more than alter terminology or references to other Acts.  

Such analysis of significant amending Acts can demonstrate the number of times a legislature feels the need to change bail legislation, and the degree to which the amendments are the result of considered reform or alternatively ad hoc reactions to law and order crises. One can assume that generally, once procedural legislation has been enacted, the need to make adjustments to increase bureaucratic efficiency would only need to be made annually, and that all adjustments could be made in one omnibus Bill. If a parliament feels the need to amend bail legislation more than once annually this could be evidence that the reasons for amendment instead relate to more political issues of increasing or decreasing the punitiveness of bail refusals. Indeed once the legislation has been in operation for some time one would expect that there would be little need to make annual amendments.

The following table demonstrate that the degree of legislative interference varies significantly across jurisdictions.

Table 1: Significant amendments to bail legislation in each jurisdiction by year

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<tr>
<th>Year</th>
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Examples of non-significant amendments would include changes to include non-gender specific language, or a change of all references of Commissioner to Director etc.
For this data arranged in chart form for each jurisdiction see the Appendix. A full listing of all the amending legislation and a summary of their provisions can be found on the Australian Prisons Project website (www.app.unsw.edu.au).

What is significant about this table is that while there is a general increase across most jurisdictions of the number of legislative interventions from the late 1990’s, the change across these jurisdictions is not uniform. Two jurisdictions which have little change are Tasmania which relies on common law principles rather than legislative codification, and Western Australia which is the only jurisdiction to not have a presumption in favour of bail. As the paper goes on to point out, the significant movement in bail legislation in the last decade has been the restriction on presumptions in favour of bail. It may be that for Western Australia, such intervention was not considered necessary because there was not a position in favour of bail that it was felt needed to be resiled from.

By contrast, NSW stands out as the both the jurisdiction that initially had the most liberal approach to bail, but has reacted to this since the late 1990’s with a high degree of amendment to its bail laws.

**The nature of the changes to bail legislation**

While this analysis demonstrates distinct differences between jurisdictions, it does not provide any understanding of the nature of those changes. The actual impact of changes to bail legislation can be complex and counter-intuitive. Amendments that are designed to enhance efficiency in busy city courtrooms may well have unforseen impacts in remote communities with less access to support services. It is therefore not possible in a board survey of legislative change across Australia to chart in depth the impact of individual changes. Such changes in individual jurisdictions have at times been noted (e.g. Bamford et al 1999; Weatherburn et al 1987; Vignaendra et al 2009).
The aim of this paper is instead to provide some broader indications of the nature of change from the perspective of whether there has been an increase in punitiveness. In order to do this, the substantial changes to legislation across all jurisdictions were analysed and placed into one of two categories – punitive or administrative.\(^7\)

Administrative changes were those that involved a change to the way in which applications for bail were processed, breaches proceeded against, etc. Without further research it was not possible to determine whether such changes had the effect of increasing or decreasing the prison population. Clearly many such changes would have helped to decrease the population by speeding the granting of bail. However, it is also apparent that some changes have had the opposite effect – such as the 2007 NSW prohibition on repeat applications for bail without new evidence (\textit{Bail Amendment Act} 2007) (Vignaendra et al 2009). The number of such changes have been recorded but not further analysed in this paper.

Punitive changes were those that related to a change in the presumptions or restrictions on bail for certain classes of offences or offenders; or a change in the nature of the considerations in determination of applications. Each one of these changes is seen as having a direct effect on the prison population – though of course the amount of impact will vary greatly.\(^8\)

Given that it was only in 1992 that all Australian jurisdictions had a codification of bail laws, the data presented is from 1992 to 2008.\(^9\) The differences between the jurisdictions are stark:

\begin{table}[h]
\centering
\begin{tabular}{|l|}
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Tasmania: 1 \\
Queensland: 3 \\
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\end{tabular}
\caption{Number of Punitive Changes to Bail Legislation 1992-2008}
\end{table}

\(^7\) Amendments only involving changes in terminology or nomenclature had already been removed.
\(^8\) Again, the difficulty of determining whether a restriction on bail for a group of offences constituted one change or a number of changes meant that this paper presents punitive changes by amending Act rather than by provision. Thus any amending Act that contained both a change in the conditions of bail and the factors to be taken into account in granting bail would be counted as both one punitive Act and one administrative Act. By adopting this methodology a broad understanding of the nature of Parliamentary intervention in bail legislation can be seen.
\(^9\) It should be noted that each jurisdiction’s Bail Act was first enacted with a different set of presumptions and restrictions in relation to bail. However, by taking 1992 as a baseline year for comparative purposes it allows a sense of the degree of need for change from that point onward. For those jurisdictions with already enacted bail legislation, the evidence of significant amendments prior to 1992 provides some basis for supposing that any perceived issues with the scope and operation of the legislation arising prior to 1992 would already have been dealt with in amending legislation. On that basis it is possible to presume that in 1992 the bail legislation in operation in each jurisdiction largely reflected that form of bail regime that each jurisdiction thought appropriate.
It is clear that NSW has by far a greater involvement by politicians in the setting of the parameters of bail availability. To this extent it would appear that NSW is in an exceptional position in comparison to other Australian states. Interestingly, as suggested earlier in this paper, NSW also began its codification of bail with the most liberal approach to bail with a right to bail for minor offences, and a restriction against bail to only one offence – armed robbery.

**The types of punitive changes to bail across Australia**

When these punitive changes to bail legislation are set out chronologically, it is also clear that the changes to bail laws follow certain national trends – though jurisdictions are not in lock-step with each other. For the purposes of tracking trends, the following description includes all amendments to bail laws post introduction of the various Bail Acts. For direct comparison with the above table, amendments prior to 1992 should be disregarded.

**Drugs:**
The first major trend is the increasing restriction of bail for those accused of drug offences. Presumptions against bail are created for major drug offences in Victoria in 1983 and NSW in 1986. NT introduced presumptions against bail for serious drug offences in 1994, and further restrictions in 1996. WA introduced presumptions against drugs offences in 2004, and the ACT in 2004.


**Domestic Violence and protection of victims:**
Personal and domestic violence offences became a focus of restrictions on bail availability in NSW for the first time in 1987 with denial of bail for accused previously in breach of bail conditions aimed at
protecting victims and the addition of consideration of the protection of the alleged victim as a factor in assessing bail applications. These factors were further broadened in 1988. NSW further restricted bail availability for persons accused of violent offences, domestic violence offences and breaches of apprehended violence orders in 1993 by removing the presumption in favour of bail for such accused.

Presumptions in favour of bail were also removed for breaches of apprehended violence orders or where the accused had been involved in violent crime against the victim in 1998. In 2006 the presumption in favour of bail was removed for charges of stalking.

Victoria introduced a presumption against bail for those accused of family violence or stalking offences in 1994. In 1997 the ACT created a presumption against bail for those accused of domestic violence offences. In 2006 Tasmania introduced provisions restricting bail to those accused of family violence, in 2007 SA introduced a presumption against bail for those in breach of conditions aimed at the physical protection of a victim.

Domestic violence continued to be a matter of concern to ACT legislators with further restrictions on the granting of bail to those accused of domestic violence offences in in 1999, 2001, 2003 and 2008.

**Fears of victims:**
The fears of or threats to victims were made a fact or to be included in assessments for bail in the NT in 1989 (if the alleged offence was a breach of a restraining order). In 1990 NSW introduced a broader consideration of the protection of the community if the alleged crime was a violent or sexual offence. The ACT introduced a factor of harassment or violence to the victim in 1994. In the same year, 1994, SA introduced a requirement that any fears of the victim of violence should be paramount in bail determinations. In 1995 Qld added a factor of the likelihood that the alleged victim could be endangered if bail was granted. In 1997 Victoria added as a factor in considering bail the attitude of the victim to a grant of bail.

**Repeat offenders:**
In 1993 WA imposed a general prohibition on bail for all serious offences alleged to have been committed while on bail for another alleged serious offence unless exceptional reasons existed, and further

A more specific approach to repeat offenders was taken in NSW from the late 1990’s. In 1998 the number of offences with which the accused was charged could be taken into account in assessing the seriousness of the charges. In 2002 the presumption in favour of bail was removed for any breach of a Community Justice Intervention order. From 2003 bail was to be refused other than in exceptional circumstances for any repeat serious personal violence offences, and presumptions against bail were introduced for serious firearms offences or in circumstances where the accused had been accused of any two property offences within two years and convicted of one of these. In 2006 this was extended to repeat car thieves and in 2007 those involved in property damage during riots.

A presumption against bail for repeat offenders was introduced in the NT in 2006.

Firearms offences:
In 2001 NSW removed the presumption in favour of bail for a range of firearms offences, and in 2003 created a presumption against bail for those offences. It further extended this presumption to other firearms offences in 2007.

Murder and other serious offences:
Presumptions against bail for persons accused of murder were introduced in Victoria in 1981, NSW in 1993, the NT in 1994. NSW created a presumption against bail for conspiracy and attempt to murder in 1995. Presumptions in favour of bail were removed in 1998 for manslaughter, wounding with intent, and various sex assaults. From 2003 bail was to be refused for those accused of murder except in exceptional circumstances.

Other changes:
Although an offence never charged, Victoria introduced restrictions on bail being granted in cases of alleged treason in 1981, the NT in 1994. Bail for crimes committed in concert were subject to restriction in Victoria in 1981.
Qld created a presumption against bail for demands on the government with menaces (1984) and added convictions as a child as a factor against bail (1996). In NSW presumptions against bail were introduced for conspiracy, attempt to murder and documents containing threats to harm (1995), aggravated sexual assaults and kidnapping (2001), terrorism offences (2004), offences by lifetime parolees, breaches of sex offender supervision orders and attempted at child sex assault (2006).

The NT created presumptions against bail for serious sex offenders and factors against bail of any of risk of interfering with witness, carer of child, breach of peace etc (2007). SA created presumptions against bail for police pursuits (2005) and breaches of organised crime orders (2008).

**Conclusions**

In the early 1970’s there was a general prima facie right to bail at common law. That right receded in light of the seriousness of the offence. One of the most important aspects of the bail reform process was to break the nexus between an a priori assumption of the seriousness of the crime and a refusal of bail in favour of a case-by-case analysis of the offender and his or her circumstances. The emphasis was primarily on ensuring court attendance. Since that time, commentators have argued that a culture of penalty or punitiveness has arisen. If so, one would expect that to be reflected in amendments to bail legislation.

Since the 1970s, and particularly in the last decade or so, the original principles that promoted release on bail have been largely reversed. Most Australian jurisdictions now have a list of offences for which bail is to be normally refused, or for which there is a presumption of refusal. Further, if judged by the nature of the amendments, the aim of bail refusal is now much more an attempt to protect the community against dangerousness than to ensure court attendance. Increasingly, dangerousness is assumed by the nature of the alleged offence.

That said, the trends are by no means uniform. The two largest criminal jurisdictions, NSW and Victoria, are the most legislatively active – with NSW in a category of its own when it comes to punitive amendments. None of this however provides any direct link to remand numbers. South Australia on the basis of this analysis has had relatively few legislative amendments. Yet it continues to have
comparatively the highest remand numbers in Australia. On the other hand it may be that if remand rates are already high, there is less pressure for legislative intervention.

Further research that flows from these findings will include an examination of the degree to which the punitive amendments can be linked to individual criminal incidents of public notoriety. Another avenue of analysis will be to plot the timelines of administrative changes across the jurisdictions and in particular the degree to which such changes have increased likelihood of breach of bail conditions and re-incarceration. The aim will be to discover whether such amendments can be seen to be linked to any developing culture of punitiveness.
References
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Stubbs J 1984 Bail reform in NSW NSW Bureau of Crime Statistics and Research S


List of cases
R v Watson (1947) 64 WN (NSW) 100
Appendix

Bail Act 1977 (Victoria)
Substantive Amending Acts

Bail Act 1982 (NT)
Substantive Amending Acts
Bail Act 1982 (WA)
Substantive Amending Acts

Bail Act 1982 (Queensland)
Substantive Amending Acts