

2003

## The relationship between bail decision-making and legal representation within the criminal justice system

Alfred Allan  
*Edith Cowan University*

Maria M. Allan  
*Edith Cowan University*

Margaret Giles  
*Edith Cowan University*

Deirdre Drake  
*Edith Cowan University*

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Allan, A., Allan, M.M., Giles, M., & Drake, D. (2003) *The relationship between bail decision-making and legal representation within the criminal justice system*. Perth, Australia: Edith Cowan University.

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**THE RELATIONSHIP BETWEEN  
BAIL DECISION-MAKING AND  
LEGAL REPRESENTATION  
WITHIN THE CRIMINAL  
JUSTICE SYSTEM**

**A research project jointly sponsored by Edith Cowan University  
and the Western Australian Department of Justice**

**Alfred Allan  
Maria M Allan  
Margaret Giles  
Deirdre Drake**

## **Investigators**

**Alfred Allan**  
School of Psychology

**Deirdre Drake**  
School of Psychology

**Irene Froyland**  
The Sellenger Centre

**Peter Marshall**  
Western Australian Department of Justice (until 30 June 2001)

## **Western Australian Department of Justice Representatives**

**Robert Fitzgerald** (until 30 June 2001)

**Peter Marshall** (until 30 June 2001)

**Kati Krazslan** (from 1 July 2001)

**Peta Odgers** (From September 2002)

## **Research team**

**Research coordinator**  
Maria Allan

**Senior research assistants**  
Paul Knight (from 1 January to 30 November 2001)  
Margaret Giles (from 1 December 2001 to 31 December 2002)

**Research assistants**  
Ken Brigdale  
Tina Hankins

**Perth, January 2003**

## **Acknowledgments**

An Edith Cowan University and Western Australian Department of Justice collaborative grant supported this research. However, the views expressed in this paper and inferences made are those of the authors and do not necessarily reflect the official opinion of either Edith Cowan University or the Department of Justice.

The original idea and much of the early impetus behind this project came from Robert Fitzgerald and Peter Marshall who were at the time working for the Policy and Legislation Division of the Ministry of Justice, now called the Department of Justice. Peter was also a pivotal member of the research team until he and Robert both left the service of the Department of Justice at the end of June 2001. We would like to acknowledge their input to this study. However, due to their departure, the restructuring of the Department of Justice, and various practical problems that we encountered while doing the project, aspects of the study changed and the current investigators take responsibility for the end results.

We further wish to acknowledge the support for this study we received from the Chief Justice, The Hon. Justice David Malcolm AC, Her Hon. Judge Val French, President of the Children's Court at the time the project was executed, Mr Stephen Heath, Chief Magistrate, and Ms Pauline Phillips, Director of the Magistrates' Courts and Tribunals. A special word of thanks to the magistrates who allowed us to observe proceedings in their courts and the clerks of the various courts and members of their staff without whose assistance this study would not have been possible.

## CONTENTS

<i>Acknowledgements</i> .....	ii
<i>Contents</i> .....	iii
<i>Tables and figures</i> .....	iv
<i>Definitions</i> .....	v
1. Executive summary.....	1
2. Introduction.....	5
2.1 Concerns about bail decision-making .....	7
2.2 The dynamics of bail decision-making .....	12
2.3 Juvenile offenders and bail-decision making .....	19
3. Aims of the study.....	20
4. Methodology.....	21
4.1 Constraints .....	21
4.2 Sample .....	21
4.3 Materials .....	23
4.4 Design and Procedure .....	23
5. Descriptive statistics .....	26
6. Multivariate analysis.....	48
6.1 Factors affecting bail decisions .....	48
6.2 Logistic regression (logit) model .....	50
7. Summary and conclusions.....	57
REFERENCES.....	66
APPENDICES.....	71
A. Encoding guidelines.....	73
B. Survey instrument.....	74
C. Data - variables and valid values.....	83

## TABLES AND FIGURES

### Tables

Table 1: Sample Representation.....	22
Table 2: Days of Court Observation and Data Days .....	22
Table 3: Socio-demographic Variables – Frequencies .....	26
Table 4: Day of Week, Status and Bench Warrants - Frequencies .....	27
Table 5: Court Variables - Frequencies .....	28
Table 6: Legal Representation - Frequencies.....	30
Table 7: Other Orders - Frequencies .....	31
Table 8A: Offences .....	32
Table 8B: Legal Representation by Schedule 2 (Serious) Offences.....	34
Table 9A: Number of Charges.....	35
Table 9B: Number of Schedule 2 Charges.....	35
Table 10: Bail Application by Legal Representation.....	38
Table 11A: Bail Application by Bail Decision .....	37
Table 11B: Bail Application by Bail Decision.....	38
Table 12: Defence Argument by Legal Representation .....	38
Table 13: Defence Argument by Bail Decision .....	39
Table 14A: Defence Arguments by Bail Decision .....	39
Table 14B: Prosecutor Arguments by Bail Decision .....	41
Table 14C: Magistrate Reasons by Bail Decision... ..	42
Table 15: Chi-square Tests in Relation to Bail Decisions .....	43
Table 16: Bail Order by Court.....	44
Table 17: Chi-square Tests in Relation to Legal Representation in Bail Applications.....	45
Table 18: Bail Decision and Remand Time .....	45
Table 19A: Bail Decision and Bail Amount by Court .....	46
Table 19B: Bail Decision and Surety by Court.....	47
Table 19C: Surety and Bail Amount.....	48
Table 20: Predictors in the Database.....	48
Table 21: Potential Determinants for the Granting of Bail: Multivariate Analysis using Logistic Regression.....	52
Table 22: Factors Affecting Bail Decisions in the Children's Court .....	55

### Figures

Figure 1: Frequency Distribution of Number of Charges .....	36
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## DEFINITIONS

Aboriginal	Based on observation of the defendant in the courts and verified by reference to the legal presentation of the person (e.g. Aboriginal Legal Service) and from private lists where it was recorded (e.g. in the East Perth Court of Petty Sessions).
ALS	Aboriginal Legal Services.
Age	Age as a continuous variable was computed manually from a comparison of the date of birth for the defendant shown on the private list with the date of the bail hearing.
Argument	An argument, including any comment, recorded on the survey form in respect of a factor relevant to bail made by prosecutors, defendants or on behalf of defendants by legal representatives.
Bail application	Where the defendant, or a person representing the defendant, formally applied for bail or raised it indirectly during the course of proceedings.
Bail application withdrawn	Where the defendant, or a person representing the defendant, withdraws a formal bail application.
Bail consideration	Any case where a magistrate considered bail irrespective of whether it was raised by the prosecutor, or defendant or on the magistrate's own initiative.
Bail first mentioned by the magistrate	Bail was first mentioned by the magistrate in the absence of an application by or on behalf of the defendant or a mention by the prosecutor.
Bail first mentioned by the prosecutor	Bail was first mentioned by the prosecutor in the absence of an application by or on behalf of the defendant and no mention by the magistrate.
Bail mentioned	Any case where bail was mentioned irrespective of whether it was raised by the prosecutor, or defendant or on the magistrate's own initiative.
Bail not mentioned	Bail was not raised by, or on behalf of, the defendant, or by the prosecutor or the magistrate (except where the latter granted bail without asking for submissions about it, or mentioning it).
Bench warrant	A warrant issued under the Justices Act (WA) (1902) (Form 10A) for the apprehension of a defendant who failed to appear at the time and place mentioned in the recognizance. The presence or absence of a bench warrant was recorded on the survey instrument based on observations and on the private list.
CBO	A Community Based Order as defined in part 9 of the Sentencing Act (WA) (1995).

Child	A person who has not reached the age of 18 years and has the same meaning as juvenile and young person.
Comments	The survey instrument provided a list of specific arguments and reasons that had to be ticked if it was mentioned by one of the lawyers or magistrates. Where observers were uncertain whether a remark fitted the operational definition of any listed item they documented it as a comment. These comments were later coded as a specific argument or included in a general category.
CRO	A Conditional Release Order as defined in part 7 of the Sentencing Act (WA) (1995).
Custody pending trial or on remand	Any period of detention after arrest but prior to the trial of the defendant. Used interchangeably with <i>pretrial detention</i> and <i>remand in custody</i> .
Day of week	The day of the week on which bail was considered was derived manually from the date of the bail hearing as recorded on the survey instrument and private list.
First appearance	The first time a defendant who had not been granted police bail appeared in court on a charge. First appearances will also be referred to as cases. Bail was not necessarily considered at all first appearances.
Formal bail application	Any instance where the defendant, or somebody on behalf of the defendant, specifically asked for bail.
Gender	Gender was based on the observation of the defendant in the court.
ISO	An Intensive Supervision Order as defined in part 10 of the Sentencing Act (WA) (1995).
JJ Team	A juvenile justice team as defined in section 35 of the Young Offenders Act (WA) (1994).
Juvenile	A person who has not reached the age of 18 years and has the same meaning as child and young person.
Legal representation	Any assistance of a legal nature that the defendant received was recorded on the survey instrument. Where possible a distinction was made between Aboriginal Legal Services (ALS), duty lawyers, Legal Aid lawyers, Paralegal assistance, private practitioners and the Youth Legal Service (YLS).
Magistrate reason	Any verbal reason offered, or comment made, by a magistrate in court to justify or explain the bail decision.
Marital status	Was only recorded if mentioned during court proceedings and could not be verified.



MRO	A Misconduct Restraining Order as defined in section 36 of the Restraining Orders Act (WA) (1997).
No argument	If nothing was said in respect of bail by prosecutors or defendants, or on their behalf, by legal representatives.
Pretrial detention	Any period of detention after arrest but prior to the trial of the defendant. Used interchangeably with <i>custody pending trial</i> and <i>remand in custody</i> .
Private list	A record of information about defendants, charges and outcomes of proceedings held in a particular court on a specific day.
Schedule 2 offence	A serious offence listed in Schedule 2 of the Bail Act (1982).
Status	Refers to whether the defendant was in custody, on police bail, or on a summons or notice and was based on observations recorded on the survey instrument.
Suburban courts	Courts at Armadale, Fremantle, Joondalup and Midland. The location of the courts was recorded on the survey instrument and private lists.
SRO	A Supervised Release Order as defined in part 8 of the Young Offenders Act (WA) (1994).
Responsible person	As defined in the Bail Act (1982). This was recorded on the survey instrument and could not be independently verified.
VRO	A Violence Restraining Order imposing restraints of the kind referred to in section 13 of the Restraining Orders Act (WA) (1997)
YLS	Youth Legal Service.
Young person	A person who has not reached the age of 18 years and has the same meaning as child and juvenile.

## 1. Executive summary

The primary aim of this study was to examine the relationship between legal representation and bail decision-making within the criminal justice system in Western Australia. In doing so it was necessary to "rule out" a number of other factors and this process provided the opportunity to test whether some of the factors mentioned in the literature, such as age and race, have an independent effect on bail decision-making. The data also provided a valuable *snapshot* of bail decision-making in the Courts of Petty Sessions and the Perth Children's Court.

### Data collection

Data were collected during a period of 138 court days during the latter part of 2001 in seven different courts in Perth and its suburbs by observing the first appearances of 648 defendants. The highest percentage of first appearances was observed in the Central Law Courts (39%), followed by the East Perth Court (33%) and various suburban courts (17%). Cases in the Children's Court represented 11% of the observed first appearances.

### Demographics of defendants

The ages of the defendants involved ranged from 11 to 72, with about two thirds aged between 18 and 32 years. As expected the vast majority of defendants were male (81%), but a noticeably smaller percentage of the juveniles were male (70%). Another notable difference between the juvenile and adult samples was in respect of Aboriginality where only 24% of adult defendants compared to 48% of juvenile defendants were Aboriginal.

### Particulars of cases involved

While about 6% of the defendants attended court on a summons or notice, most were in custody when they first appeared and about 32% had been arrested on a bench warrant. Approximately half of the offences defendants were charged with were either property or violent offences. Slightly more than a quarter of defendants had only one charge against them, with the maximum number of charges 65. About 45% were charged for at least one serious (Schedule 2) offence. About 24% of the defendants reoffended while they were on bail for another offence, while only about 5% of the defendants had reoffended while on parole.

### Bail

About 58% of adult defendants in this study were granted bail compared to 72% of juveniles. The percentage of bail granted ranged from about 50% in the Armadale and Central Law Courts to about 73% in the Fremantle Court. Our data do not help us explain this wide range but it is notable that 26% of defendants who attended bail hearings at the Fremantle Court, were unrepresented compared with 7% overall. This suggests that the defendants in the Fremantle Court

may differ from those in the other courts, or that other factors may distinguish this court from the rest.

The results of a chi-square test indicate that bail was more likely for defendants who made a formal bail application. Overall 74% of defendants who were granted bail had made a formal application while only 44% of defendants who were refused bail had formally applied. In first hearings where bail was not mentioned by anybody other than the magistrates when making their orders, defendants who were not granted bail constituted about 12% of the total sample compared with 5% who were granted bail under these circumstances.

Where bail was refused the time (in days) for which the case was remanded was significantly less than when bail was granted (14 versus 20 days). An amount of bail for forfeiture was set for 272 of the 374 defendants who were granted bail, while a surety was stipulated for 176. Surety was usually only stipulated when an amount of bail for forfeiture was set, and in most instances the bail and surety amounts were the same. Payment of an amount of money was therefore required in about three-quarters of cases where bail was granted. For adults the modal amount was \$1000 for both bail and surety.

#### Legal representation

All the juveniles and 92% of the adults in this study had some form of legal representation. The likelihood of legal representation was significantly lower for defendants attending court *on a summons or notice* or in the Fremantle Court. Notably more (65% versus 14%) of represented defendants applied for bail. Looking at the effect of legal representation in isolation, unrepresented defendants were more likely to be granted bail at their first appearance, than represented defendants. However, when differences in other factors such as *number of charges* are taken into account, represented defendants were more likely to be granted bail. For represented defendants the ratio of number of defendants with formal applications for bail, to the number of those without formal bail applications, did not differ as a function of Aboriginality, but unrepresented Aboriginal defendants were much more likely to bring a formal bail application than unrepresented non-Aboriginal defendants.

#### Defence and prosecutor arguments

In the majority (60%) of cases there was an argument by, or on behalf of, the defendant in respect of bail, but arguments were significantly more likely to be submitted on behalf of represented defendants. About 50% of those who submitted an argument were granted bail while two thirds of those who did not submit an argument were granted bail. However, bail was more likely to be

granted for adults in the presence of any defence argument when differences in other factors such as *number of charges* were taken into account.

The likelihood of bail being granted is significantly higher when the defendant argues that the *offence is not serious* and that the defendant will be *able to obtain a surety*. The likelihood of bail being granted is significantly lower when the defence argument includes that the defendant was *under the influence of drugs*, that there were *exceptional circumstances* or *other comments*, but the arguments in the latter two categories are so diverse that no inference can be made in this regard.

The prosecutor opposed bail in 60% of cases and those defendants were less likely to be granted bail. The prosecutor submitted arguments in 54% of cases and, contrary to the defence arguments, they generally addressed legal factors, i.e. factors mentioned in the Bail Act (WA) (1982). The likelihood of bail is significantly lower when the prosecutor argues that the *outstanding offences are serious or numerous* (see clause 3(b) of Bail Act), that there is a *risk of reoffending* (clause 1(a)(ii) of the Bail Act) that the defendant had *an existing order*. Defendants are significantly less likely to be granted bail when the prosecutor argues that the *defendant's character is poor* (clause 3(b)).

#### Magistrate reasons for bail decisions

Magistrates provided reasons in 43% of cases and the likelihood of bail is significantly lower if the reasons magistrates provide for their decisions include any of the following: *the likelihood of reoffending*; *violation of existing orders*; *seriousness of the offence*; *breach of bail in the past*, that the defendant was a *drug user* and *other comments*. Most of these reasons are in accordance with the provisions of the Bail Act (1982) and magistrates were significantly more likely to give reasons when refusing bail.

#### Multivariate results

In the case of adults, bail decisions appear to be significantly related to a number of factors and the model explained 68.7% of the variation in bail decisions. Bail was *less* likely to be granted if:

- Reasons are given by the magistrate,
- Orders apply (prior bail, parole and other orders),
- No formal bail application is made,
- The defendant is attending the bail hearing in custody, and/or
- There are a large number of charges.

Bail was *more* likely to be granted if:

- The defendant has legal representation,
- Any arguments are made by the defence,
- The defendant has a bench warrant in place, and/or
- The prosecutor is unopposed to bail (with or without conditions).

Personal characteristics of the defendant identified in the literature as predictors of bail, such as age, gender and Aboriginality were not identified as significant predictors for adult offenders, while factors mentioned in the Bail Act (1982), such as a large *number of charges* and *other orders* made a significant contribution to bail decision-making. This suggests that magistrates are generally guided by legal rather than extra-legal considerations.

In the case of children the bail decision was only significantly related to one factor, namely the *number of charges*. The greater the number of charges the less likely that bail would be granted to a defendant, but the model only explained 24% of the variation in bail decisions. While the multivariate results do not provide much information about bail decision-making for children, the fact that a high percentage (72%) of them were granted bail, is in concordance with the Bail Act (1982), that gives children a qualified right to bail.

## 2. Introduction

English law has for many centuries acknowledged that accused people have a right to freedom and that they should not be deprived of this right without just cause (Friedland, 1965). One manifestation of this right is the procedural presumption that people who are suspected of having committed offences are presumed to be innocent until the contrary is demonstrated. By arresting people and keeping them in custody awaiting trial the State is therefore compromising their right to freedom<sup>1</sup>. To compound the problem, some people who are awaiting trial often remain in custody for a considerable period, frequently for a relatively minor offence (Barry, 1997; King, 1973). In a notable percentage of cases defendants who were held in custody awaiting trial are not subsequently convicted, and many of those who are convicted do not receive a custodial sentence (Ebbesen & Konecni, 1975). It is not only defendants' rights that are at stake, pretrial detention can also have important practical consequences for them, for their families and for the general public (King, 1973). Nevertheless, pretrial imprisonment cannot be totally dispensed with either, because it is sometimes important for the effective operation of the criminal justice system and the protection of the victims where there are victims (Hannaford, 1991).

To deal with the problems associated with pretrial detention, the practice of bail setting evolved (Ebbesen & Konecni, 1975). Bail can be defined as the decision that is made on the liberty or otherwise of an accused, between the time of arrest and the final verdict in the trial (Findlay, Odgers, & Yeo, 1999). Since the mid 1960s bail laws have evolved a great deal (Bamford, King, & Sarre, 1999; Goldkamp & Gottfredson, 1979; 1993; Sherwood-Fabre, 1987; Weatherburn, Quinn, & Rich, 1987). Three of the developments will be briefly reviewed.

First, concerned by the heavy reliance on the payment of money as a bail condition because it was considered inequitable, most jurisdictions moved away from this as the exclusive form of bail. Most jurisdictions today allow the release of defendants on bail without payment of money, or with a broad range of conditions that need not necessarily require the deposit of an amount of cash<sup>2</sup>.

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<sup>1</sup> Authors often argue that pretrial detention is punishment that is imposed in conflict with the presumption that an accused person is innocent until the contrary is demonstrated (see for example Barry, 1997). Strictly speaking, this is not true as pretrial detention is not punishment in legal terms and the presumption is only a rule of procedure that places the burden on the State to prove that a defendant is guilty. However, the presumption does reflect the emphasis on liberty and that it is wrong to refuse bail as a form of punishment.

<sup>2</sup> It should also be noted that some defendants who are granted bail nonetheless remain in custody because they are unable or unwilling to fulfil bail conditions.

Consequently, though often viewed as a choice between remand in custody or on bail, the bail-decision is not a dichotomous choice, but is essentially a three-tiered process (Nagel, 1983). In most jurisdictions the first question is whether the defendant should be released, and if the answer is affirmative, the next question is whether to set conditions. If the answer to that question is affirmative, the final question is what form the bail conditions should take.

Second, the emphasis on human rights has influenced criminal justice policies and this has led to some jurisdictions accepting that defendants have a right to bail<sup>3,4</sup> (Law Commission, 1999), or that there is a presumption in favour of bail (Dhami & Ayton, 2001; Roden, 1981). However, such a right or presumption is not universally accepted and in some jurisdictions there is a presumption against bail in respect of certain offences (see Bamford et al., 1999). In fact, Goldkamp and Gottfredson (1993) point out that where there is a perceived danger to public safety, pretrial detention has become preventative detention.

Third, in accordance with the emphasis on risk and risk management in contemporary culture (see for example Beck, 1992) bail decision-making has become a manifestation of risk decision-making (Kellough & Wortley, 2002). In many jurisdictions the bail philosophy today is that a defendant has a right to bail, and this may only be curtailed if there is a risk that the defendant will fail to appear at later court proceedings, will commit further crimes, or will interfere with the proceedings (Kellough & Wortley, 2002). One purported advantage of this risk reasoning is that it paves the way for the use of actuarial risk assessment instruments (for a discussion see Fitzgerald & Marshall, 1999; Gottfredson, 1974; Kellough & Wortley, 2002; Morgan & Henderson, 1998; VanNostrand, 2000).

One reason why people find the idea of a risk assessment attractive is that bail decision-making by police officers<sup>5</sup>, justices of peace, magistrates<sup>6</sup> and judges has been the subject of criticism by scholars on a variety of grounds (see for example Bases & Smith, 1976; Dhami &

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<sup>3</sup> This is never an absolute right, but always subject to the discretion of a police or judicial officer.

<sup>4</sup> This is not the case in Western Australia, except for children who have a qualified right to bail (clause 2 of Part 3 of the Bail Act 1982). Section 5 of this Act does give defendants in custody a right to have their case for bail considered, and judicial officers have a duty to consider defendant cases for bail (see sections 6 and 7).

<sup>5</sup> We did not examine police bail, something that is becoming increasingly important (Raine & Wilson, 1997; Weatherburn et al., 1987).

<sup>6</sup> As the aim of this study is to examine bail decision-making by magistrates, we will use the word magistrate as a collective noun for all bail decision-makers, unless it is clear from the context that the word should be interpreted in its narrow and ordinary sense.

Ayton, 2001; Goldkamp & Gottfredson, 1993), some of which will be discussed below. In Western Australia (WA) specifically there has also been criticism (see Barry, 1997). There is a belief (see for example Law Commission, 1999; Morgan & Henderson, 1998; Wilkins, Kress, Gottfredson, Calpin, & Gelman, 1976) that to deal with this criticism, and human rights challenges, judicial discretion should be systematic and accountable. In order to achieve this, it is first necessary to identify the risk factors that are associated with defendants' failure to appear; offending while on bail; and obstruction of the course of justice. The second step is to improve the quality, accuracy and timeliness of information about these factors given to decision-makers. Finally, decision-makers must be trained to make objective bail decisions with reference to these factors in a transparent manner (see Law Commission, 1999).

Despite the criticism directed at bail decision-making since the 1960s (see for example Friedland, 1965) governments have given surprising "little attention to decision-making processes" (Bamford et al., 1999, p.13). One problem governments may have is that there is a lack of reliable empirical research data on bail decision-making (Fitzgerald & Marshall, 1999), especially in respect of young defendants (Varma, 2002). Moreover, from an Australian perspective, it is important to note that much of the relevant research was undertaken in the United States (US) and the United Kingdom (UK)<sup>7</sup>. Given the differences in, for example, legal rules, procedures, cultural and geographical factors between different jurisdictions it is not always appropriate to generalise the findings of bail research in one jurisdiction to other jurisdictions (Dhami & Ayton, 2001).

This study is an attempt to contribute to the body of empirical research available in WA, by examining the effect of legal representation on bail decision-making locally. Prior to discussing the aims of this study in more detail we will examine why scholars are concerned about decision-making and the dynamics of bail decision-making. As juveniles form a substantial, but unique, group within the offending population we will consider them briefly in conclusion.

## 2.1 Concerns about bail decision-making

It is useful to collapse the large number of concerns found in the literature into three categories, namely those related to the justice system, those related to defendants and their families and finally those related to society as a whole.

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<sup>7</sup> The implementation of the Human Rights Act 1998 in England and Wales gave new importance to research that examines the bail decision-making of judicial officers. Especially as the Law Commission (1999) recommended that they should be provided with appropriate guidance and training on making bail decisions in a way that is compliant with this Act.



### 2.1.1 The justice system

A major concern regarding bail decisions is the research findings that if all other things are equal, there is a relationship between pretrial detention and the outcome of a case. For example, defendants on remand in custody are more likely to plead guilty (Bottomley, 1970), more likely to be found guilty (Clifford & Wilkins, 1976; Ebbesen & Konecni, 1975; Foote, Markle, & Wolley, 1954; Friedland, 1965; Kellough & Wortley, 2002; Myers & Reid, 1995; Robertshaw, 1991), and more likely to be given a custodial sentence (Clifford & Wilkins, 1976; Ebbesen & Konecni, 1975; Friedland, 1965; Kellough & Wortley, 2002). Some of these research findings are not beyond criticism (see for example Bottomley, 1970) and should be interpreted with some caution. For example, it is possible that a magistrate may be more likely to remand defendants in custody for sentence or a report if they pleaded guilty, especially if it appears very likely that a custodial sentence will be handed down. Likewise, evidence that was decisive when bail was refused, may also have been influential when judgement was passed and the sentence was imposed (Bottomley, 1970). However, the soundness of this latter argument is in question as a number of researchers (see for example King, 1973) have pointed out that bail decisions are often made in the absence of reliable information (also see Bottomley, 1970).

Nevertheless, there are a number of factors related to bail that may on their own or in combination with others contribute to the higher number of guilty pleas and or convictions and more severe sentences for those who remained in custody on remand. The first, and probably most controversial factor, is the allegation that the police and judiciary deliberately use the threat of refusing bail to secure guilty pleas (Bottoms & McClean, 1976; Kellough & Wortley, 2002). There is no doubt that the police are very powerful in the early stages of the judicial process, especially as many defendants are bewildered at this stage and are ignorant about the system (Astor, 1986; Bottoms & McClean, 1976; Friedland, 1965). This places the police in a position where they can engage in what King (1973) aptly called *bail bargaining* in order to obtain guilty pleas, or at least confessions or information in return for bail.

The second factor that may also explain the high number of guilty pleas, is that defendants remanded in custody who believe they have a reasonable chance of being given a non-custodial sentence are more likely to plead guilty. The suggestion is that they do this to get out of prison, regardless of the strength of their case or whether they are, in fact, innocent (Kraszlan & Thomson, 1998a; 1998b).

Third, defendants on remand in custody may, by the time of adjudication, have taken on some of the stereotypical characteristics of a convicted prisoner, and this may unintentionally influence the judiciary when they make a judgement or pass sentence (Clifford & Wilkins, 1976). Factors that

may play a role here include seeing the defendant in the dock rather than in front of the bench, wearing prison clothes, or even being restrained (Barry, 1997; Fitzgerald & Marshall, 1999; Friedland, 1965). Myers and Reid (1995) describes the process that takes place as “routinization”, that is, judicial decision-makers deal with such defendants in accordance with a stereotype they have of convicted prisoners.

Fourth, convicted offenders on remand in custody may at the time of sentencing have lost many of the social supports such as employment, housing, family connections etc. which could mitigate against imposition of a custodial sentence (King, 1973).

Fifth, defendants remanded in custody are denied access to specialist diversion programs provided for in the Bail Act (WA) (1982) and this increase their likelihood of being sentenced to imprisonment.

Sixth, the magistrate passing sentence, especially in rural areas, may be the same person who refused the defendant’s bail application (Fitzgerald & Marshall, 1999). It is also possible that the magistrate may be unintentionally providing *post hoc* justification for the decision to keep the defendant in custody.

Finally, most defendants in custody on remand will not have any income and are unlikely to have the financial ability to pay a lawyer. Barry (1997), writing about the situation in WA, reports that many remandees did not have legal representation at their first court appearance, and that some of those who had legal representation were not well served by those who represented them. Even those defendants on remand in custody who can afford legal representation will be disadvantaged. At a financial level it is likely that the fees of lawyers will be higher when a defendant is in prison as lawyers must be compensated for their additional time and disbursements, such as the time and cost of travelling to prison to consult the defendant. The lawyer will often also have to undertake tasks, such as finding witnesses, that a remandee on bail could see to personally (Friedland, 1965). It is also likely that lawyers will spend less time with a defendant on remand in custody than they would with one who is not in custody.

### 2.1.2 Defendants and their families

Individuals in custody suffer emotionally and financially, and are stigmatised by the experience (King, 1973) and there is an argument that it is unfair to subject people to this if they have not been found guilty. This issue was discussed earlier. At a practical level those defendants who are not granted bail at their first appearance are likely to lose their employment and accommodation and this may have major implications for them at various levels. Viz a viz the judicial process defendants are, for example, less likely to obtain bail later during the process if they have no accommodation and or employment. Even if money bail is granted later they are much less likely to be able to pay it, or the fine if sentenced to pay one. On discharge from prison their reintegration in society will also be much more difficult as they may not have employment or accommodation to return to.

Detention of people also erodes their family and community ties. The impact may be amplified for Indigenous people who may be “remanded in custody far from home, community, and even Language and Skin group” (Fitzgerald & Marshall, 1999, p. 5). The family of a person in detention also suffers emotionally and financially (King, 1973), especially if the defendant is a breadwinner. Coupled with this are the financial burden, emotional discomfort and personal inconvenience of visiting the defendant in prison.

However, as time served while on remand is subtracted from subsequent sentence time it is possible that defendants who expect to serve a custodial sentence may prefer to serve as much time as possible on remand where they have more privileges and circumstances are sometimes more comfortable (Fitzgerald & Marshall, 1999).

### 2.1.3 The general public

Decisions whether to grant people bail, or not, have both a direct and an indirect impact on society. Remand in custody practices have an impact on the size of prison populations (Carcach & Grant, 2000). While the percentage of remand prisoners in WA prisons has always been under the national average (Carcach & Grant, 2000) there are concerns about the size of the population in both the adult (Bamford et al., 1999) and juvenile remand centres (Jones, 1999) and the concomitant financial burden on taxpayers (Barry, 1997).

Not only do most of these defendants not earn taxable income while on remand in custody, but the State must spend tax money on these prisoners who have not yet been convicted, and may not be convicted at all. To this direct financial cost must be added the burden the State must often bear of supporting and providing services to the defendant's family because their breadwinner is in prison (Fitzgerald & Marshall, 1999).

There are also hidden costs for persons in prison in the form of, for example, the increased risk of assaults; sexual harassment (Pangilinan quoted in the *Businessworld* "Promise to appear in court enough for temporary liberty?", 2002) and the risk of contracting communicable diseases (Barry, 1997). Of particular concern both internationally (Backett, 1988; Liebling, 1992, 1994) and in WA (Dear, Thomson, Hall, & Howells, 1998), is the finding that remandees, especially those who are imprisoned for the first time, consistently display a higher prevalence of self-harm and suicide.

There are also concerns that remand in custody may increase offending as remand prisons serve as *schools of crime* where innocent people or petty criminals who later receive non-custodial sentences, are exposed to hardened criminals (Fitzgerald & Marshall, 1999; O'Malley, Coventry, & Walters, 1993). This is a credible possibility as remand prisoners are not involved in intervention programs and complain of boredom (Bottomley, 1970; Dear et al., 1998; King, 1973) and are therefore probably more prone to negative influences than may otherwise be the case. Especially as, in WA, defendants on remand stay in custody for an average of about 16 days (though some stay as long as 165 days) and for 55% of them it is their first time in prison, with 14% not having a previous criminal history (Barry, 1997).

In conclusion, remand in custody is an infringement of defendants' fundamental human rights and may have serious implications for them, their families and the broader society. These consequences are, nevertheless not very visible. The contrary is true in respect of the inappropriate granting of bail if defendants reoffend while on bail (Brown, 1998; Fitzgerald & Marshall, 1999; Hucklesby & Marshall, 2000; Morgan & Henderson, 1998), fail to appear (Auditor General of Western Australia, 1997; Fitzgerald & Marshall, 1999) or interfere with witnesses (Fitzgerald & Marshall, 1999). The inappropriate granting of bail could have grave consequences for individuals and the general public, and is often also visible and frequently attracts media attention. It is therefore possible that magistrates may be over-cautious when considering bail (Davies cited by King, 1973) and that this leads to the inappropriate refusal of bail. However, finding the balance is very difficult, as the next section will demonstrate.

## 2.2 The dynamics of bail decision-making

In WA the legal provisions that govern bail can be found in the Bail Act (1982) and the Bail Regulations (WA) (1988). Clause 1 of Part 3 of the Act provides that in exercising their discretion judicial officers or authorized officers must have:

- “1. ... regard to the following questions as well as to any others which he considers relevant —
- (a) whether, if the defendant is not kept in custody, he may —
    - (i) fail to appear in court in accordance with his bail undertaking;
    - (ii) commit an offence;
    - (iii) endanger the safety, welfare, or property of any person; or
    - (iv) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
  - (b) whether the defendant needs to be held in custody for his own protection;
  - (c) whether the prosecutor has put forward grounds for opposing the grant of bail;
  - (d) whether, as regards the period when the defendant is on trial, there are grounds for believing that, if he is not kept in custody, the proper conduct of the trial may be prejudiced ...”

Clause 3 provides that in considering the aspects raised in clause 1(a):

- “the judicial officer or authorized officer shall have regard to the following matters, as well as to any others which he considers relevant —
- (a) the nature and seriousness of the offence or offences (including any other offence or offences for which he is awaiting trial) and the probable method of dealing with the defendant for it or them, if he is convicted;
  - (b) the character, previous convictions, antecedents, associations, home environment, background, place of residence, and financial position of the defendant;
  - (c) the history of any previous grants of bail to him; and
  - (d) the strength of the evidence against him.”

Clause 3A further provides that where a defendant is in custody awaiting trial for a serious offence that is alleged to have been committed while the defendant was on bail for another serious offence the magistrate shall refuse to grant bail, except if there are exceptional reasons why the defendant should not be kept in custody.

These provisions also apply in respect of children, however, subclause 2(2) provides that “a child defendant who is in custody awaiting an appearance in court before conviction for an offence has a right to be granted bail” provided certain requirements of the Bail Act (1982) are met. One of these requirements is that there must be a responsible person willing to sign a written undertaking that he or she will ensure that the relevant child will comply with the bail requirements. Children

over the age of 17 years who have sufficient maturity to live independently without the guidance or control of a parent or guardian may be released without such an undertaking being given.

Whilst very explicit these provisions, from a psychological perspective, have flaws similar to those found in the bail legislation of other jurisdictions (Dhami & Ayton, 2001; Goldkamp & Gottfredson, 1979). For example, Dhami and Ayton's critique of the Bail Act in England and Wales that it is "vague and ill-defined ... [and] silent on exactly what information should be used and how that information should be weighted and integrated" (p. 143) is true about the WA legislation as well. For instance, the concept "character"<sup>8</sup> in clause 3(b) has no operational definition and there is no indication of its weight relative to the other constructs listed in the relevant clause. Moreover, the phrase "any others which he considers relevant" is wide and allows magistrates to legitimately take into account virtually any factors they consider relevant given the facts of any particular case.

Research that has examined the decision-making practices of magistrates found that they usually respond to the legal rules that govern the granting of bail (Hucklesby, 1996; Konecni & Ebbesen, 1984; Morgan & Henderson, 1998), though not necessarily to all the rules (Nagel, 1983). Nevertheless, inconsistencies found among magistrates that cannot be fully explained by the differences in the relevant cases, suggest that other dynamics are at work (Hucklesby, 1996; King, 1973; Petee, 1994). Three of these will be discussed next.

### 2.2.1 Extra-legal factors

Research in other areas of judicial decision-making has demonstrated that extra-legal factors (i.e. not specifically prescribed in the relevant statutory law, Nagel, 1983) may play a role (see for example Gordon, Bindrim, McNicholas, & Walden, 1988; Myers & Reid, 1995). This is inevitable as "general rules of law cannot dictate specific outcomes; discretion must always intervene" (Nagel, p. 483). Nevertheless, it becomes a concern when magistrates discriminate against defendants on the basis of these extra-legal factors because that will violate the principle of equality before the law. However, as Clifford and Wilkins (1976, p. 4) state "it seems impossible to rule out the operation of subjective factors which introduce discrimination into the granting of bail and its effect in subsequent disposal of the case". In this regard Nagel (1983) distinguishes between bench and social bias. The former refers to the tendency of particular

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<sup>8</sup> Research by Kellough and Wortley (2002) in Canada indicates that defendants who receive a negative character description by the police and those about whom there is negative information regarding their legal background are less likely to be granted bail. It is not clear how they define character, but in England and Wales *character* means criminal record (Law Commission, 1999). In clause 3(b) of the Bail Act (WA) (1982) character is juxtaposed with, inter alia, previous convictions.

magistrates "to prefer some kinds of outcomes to others regardless of case characteristics" (p. 506) while social bias involves the systematic discrimination against a specific group or groups of people. It is the latter that is of the greatest concern. In the case of bail, personal characteristics such as age (Morgan & Henderson, 1998), gender (Bernat, 1984; Bottoms & McClean, 1976; Hucklesby, 1996; Kruttschnitt, 1984; Steury & Frank, 1990), demeanor (Petee, 1994) and race of defendant (Bernat, 1984; Morgan & Henderson, 1998; Petee, 1994) have been identified as factors that may play a role. Other factors that may influence bail decision-making include legal representation (Bernat, 1984), social status (Unnever, 1982), community differences (VanNostrand, 2000), familial relationship (Herzberger & Channels, 1991) and geographical (urban versus rural) differences (Bottomley, 1970). However, the findings in respect of these factors are not consistent (Brown, 1998; Nagel, 1983; Spohn, 1995).

We are not aware of any WA research regarding most of these factors, but in a retrospective study of offenders with non-custodial sentences Barry (1997) found a significant association between Aboriginality and remand status. While 37% of those remanded in custody were Aboriginal, only 13% of those at liberty in the community were Aboriginal. However, she also reported that 32% of the offenders initially remanded in custody were granted bail, with no significant difference in the proportion of Aboriginal and non-Aboriginal offenders.

### 2.2.2 Failure to exercise judicial discretion

It is possible that magistrates may fail to properly exercise their judicial discretion regarding bail. Support can be found in Friedland's (1965) finding that magistrates use standardised amounts of bail for specific offences, that suggests that it is the nature of the offence, rather than the likelihood that a defendant will appear, which dictates the amount of bail.

However, of greater concern is the contention that magistrates give undue weight to the opinions of police and prosecutors<sup>9, 10</sup> and are merely rubberstamping bail decisions that were made prior to the hearing<sup>11</sup> (Bamford et al., 1999; Hucklesby, 1996). There is evidence that the opinion of the prosecutor, or an earlier police bail decision, is independent from other factors, strongly predictive of judicial bail decisions (Bottomley, 1970; Hucklesby, 1996; King, 1973; Konecni & Ebbesen, 1984, Morgan & Henderson, 1998; Petee, 1994). For example, Hucklesby (1996) found that

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<sup>9</sup> It was unfortunately not possible to examine the relationship between police and judicial bail decision-making in this study.

<sup>10</sup> In WA the opinion of the prosecutor does carry weight as clause 1(c) of Part 3 provides that the magistrate can have regard to "whether the prosecutor has put forward grounds for opposing the grant of bail."

<sup>11</sup> This claim would be even more concerning if the allegations about bail bargaining directed at the police, discussed above, are true.

magistrates invariably give bail without conditions to defendants who have been unconditionally bailed by the police. While this body of research suggests that magistrates do not make independent decisions, another explanation may be that both the police and judiciary apply similar criteria to the same information and consequently reach similar conclusions (Fitzgerald & Marshall, 1999). As will be discussed below the information given to magistrates will often be restricted to that received from the police. It is possible that they arrive at the same results as the police even when they make an independent decision. It is of course also possible that the police and prosecutors may know specific magistrates well enough from experience to anticipate the decision they will make, and that they consequently make recommendations in line with this insight, though this is unlikely to account for many cases.

### 2.2.3 Abuse of remand in custody

The most worrying allegation is that judicial officers sometimes deliberately use bail for ulterior purposes. For example, there are allegations that magistrates use remand in custody as punishment, something that is “impossible to prove or disprove” (King, 1973, p. 29). In WA, Barry (1997) alleges that magistrates may refuse bail in lieu of a short custodial sentence because people are not actually imprisoned for such sentences.<sup>12</sup> Other claims include the possibility that the judiciary may use remand in custody to give somebody a *taster* of a custodial sentence, especially after a conviction and while awaiting a report. (Barry, 1997; Fitzgerald & Marshall, 1999). Barry also concluded that some of her participants “were remanded in custody to teach them a lesson ‘early’ in their criminal activities, i.e. a ‘short sharp shock’” (p. 90; also see King, 1973). This would especially be in respect of those with an unremarkable criminal record or juvenile defendants who pleaded not guilty (Barry, 1997; Fitzgerald & Marshall, 1999). For indirect support of this allegation, Barry (1998 cited in Fitzgerald & Marshall, 1999) relied on the finding that in three different Magistrates’ Courts in WA the use of a non-custodial sentence following remand in custody ranged from 49% to 76%. The finding that many defendants are refused bail at the first court appearance, and that there is a progressive increase in the likelihood of bail being granted from first court appearance to just before the final disposition of a case (Bottoms & McClean, 1976; Weatherburn et al., 1987) may also provide indirect support for this. However, neither of these observations are conclusive, for example, the initial refusal of bail may be due to a lower rate of legal representation<sup>13</sup> or an absence of relevant information at the first appearance.

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<sup>12</sup> These were sentences of less than 3 months when this study was executed (section 86 of the Sentencing Act (Western Australia) (1995).

<sup>13</sup> Even in jurisdictions with schemes to ensure that defendants are represented, some defendants remain unrepresented (Astor, 1986).



In conclusion, while it is arguable, the above appears to suggest that some bail decisions are inappropriate and inconsistent. It is possible that magistrates sometimes deliberately make these inappropriate and inconsistent decisions, but they are frequently the products of the decision-making environment and or unconscious thought processes. The literature suggests that a number of factors contribute to this situation and we will discuss five such factors next.

The first factor is related to the information that is available when magistrates make their bail decisions. The bulk of bail decisions are made at a very early stage of the legal process when there is usually a lack of relevant information<sup>14</sup>, and when the information available may be of poor quality (Dhami & Ayton, 2001; Hucklesby, 1996; King, 1973). For example, King reports “that in well over half of the bail cases decided, no objective information at all was available to the court” and that about 14% of the “defendants were remanded in custody without any details about them being given to the court, except the offence with which they were charged” (p. 37). Therefore, if, as Hogarth (cited by King) writes, real discretion can only be exercised in full consideration of relevant information, then many magistrates in England in the early 1970’s were not in a position to exercise their judicial discretion in respect of bail.

At this early stage of the judicial process most of the information available to the magistrate will come from the police. Even the police may sometimes make mistakes that favour the defendant because of the poor quality of information they have when they make decisions about bail (Morgan & Henderson, 1998). In ideal circumstances the defendant should furnish the court with pertinent information about statutory factors that will allow it to make an informed decision<sup>15</sup>. As King points out, this is often difficult even for a defendant who is represented because the prosecution may only disclose its reasons for opposing bail in court when it may be impossible to take proper instructions and furthermore because cross-examination of the police in bail applications is often restricted. The problem becomes even worse when defendants are unrepresented as they are often so confused, distressed and ignorant that they fail to provide information that could influence the decision the magistrate makes (Astor, 1986; Bottoms & McClean, 1976; Dell, 1971; Friedland, 1965; King, 1973).

The solution is not more information, in fact as will be discussed below, more information may make the decision-making process more difficult, but probably rather that only information that

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<sup>14</sup> However, as will be discussed later, increasing the volume of information creates its own problems as it is difficult to for decision-makers to make decisions that use all available information.

<sup>15</sup> In WA defendants are not obliged to provide information (section 23) and where they provide information such information may not be used in evidence against them (section 25A).

has predictive accuracy should be presented. In England and Wales, for example, research by Morgan and Henderson (1998) reveals that factors which had the most bearing on court bail decisions were: address status; seriousness of offence; previous breaches of bail; whether on bail when charged with current offence; a previous custodial sentence; employment status; and gender. It is interesting to compare these factors with those that the same researchers found to predict reoffending while on bail, namely if the defendant had no fixed abode; was charged with car theft or burglary; had served a previous custodial sentence; had a previous record of breaching bail; and was unemployed. From this it would appear that most of the factors that magistrates in England and Wales currently take into account when considering bail are in fact ones that predict who are most likely to reoffend while on bail. The study unfortunately does not give the factors that predict which offenders will fail to attend their hearing. There appears to be a need to identify those factors that will predict which defendants will fail to appear at later court proceedings, will commit further crimes, or will interfere with the proceedings.

Secondly, if there is a bail hearing<sup>16</sup> large case loads and time pressure often force bail decision-makers to make fast decisions (Saks & Hastie, 1986). Dhimi and Ayton (1998, cited in Dhimi and Ayton, 2001, on p. 144) found that “the duration of bail hearings ranged from 50 seconds to 62 minutes, with an average of six minutes” (also see Bamford et al., 1999; King, 1973). Tversky and Kahneman’s (1971; 1974) influential work suggests that due to human cognitive limitations people often use heuristics in decision-making, that is they take mental short cuts. This is even more likely when there is time pressure (Davis & Davis, 1996). Given the difficult decision-making environment faced by magistrates it is likely that they use *fast and frugal heuristics* that focus on a minimum of information<sup>17</sup> (Rieskamp & Hoffrage, 1999). While the use of heuristics are usually effective (Gigerenzer & Todd, 1999) this approach can lead to problems when it introduces bias in the decision-making process (Tversky & Kahneman, 1974) and this may explain some of the discriminatory decisions allegedly made by magistrates. In the forensic area it has been demonstrated, for example, that legally irrelevant factors, such as surnames, may influence the judgement of legal decision-makers (Luscri & Mohr, 1998).

The third factor that may play a role is that bail applications do not follow a standardised structure (King, 1973) and the sequence of events will often depend on factors such as who raised bail and

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<sup>16</sup> For example, King (1973) found that in over 55% of cases he examined bail was not raised in the court and that about 9% of defendants in his sample were detained without any discussion of bail having taken place in court.

<sup>17</sup> Rieskamp and Hoffrage’s (1999) finding that that people seldom use more than one or two factors at any one time is in accordance with Konecni and Ebbesen’s (1984) finding that for judges in their study, only one factor was significantly associated with outcome, namely the prosecutors’ bail recommendation.

so forth. From an experimental cognitive psychological perspective the sequence in which the available information is often presented in bail hearings may not be the most appropriate to enhance decision-making (Dhimi & Ayton, 2001). Moreover, while the sequence in which evidence is presented in criminal cases is considered fair to the defendant (Lind & Tyler, 1988), the sequence followed in typical bail applications may not be fair to the defendant if it diverts from that model.

Fourthly, magistrates do not have an opportunity to learn from experience because they receive no formal, and little informal, feedback about the appropriateness of their bail decisions<sup>18</sup> (Dhimi & Ayton, 2001). The informal feedback that they receive will often be in the form of biased and negative media coverage when something went wrong, such as when a remandee on bail reoffends (see Hucklesby & Marshall, 2000) and this is likely to enhance conservatism.

Finally, the lack of legal representation (Hucklesby, 1996) may play a role. Researchers have identified a number of specific instances where the lack of legal representation may effect whether bail is granted. For example, King (1973) reported that there is a statistical difference between the number of represented and unrepresented defendants' cases that are remanded for a sentencing report, and that defendants who had legal representation were less likely to be remanded in custody. In King's study the same proportion of unrepresented as represented defendants received bail, but when he considered only those cases where the police opposed bail, generally the more serious offences, slightly more represented than unrepresented defendants received bail. He believed that this finding would have been more pronounced if it was not that there are factors that sometimes restrict lawyers from making bail applications at the first appearance of a defendant. These include that they may not know the reasons why bail is refused until the hearing and may therefore not be prepared to proceed with the application. After taking into account a number of other factors King concluded that "representation at the bail hearings may be of considerable importance" (p. 31). In *Dietrich v. The Queen* (1992) the High Court of Australia acknowledged that there is a risk that unrepresented defendants charged with serious criminal offences will not receive a fair trial. Implicit in this, although not stated explicitly, is that unrepresented defendants may be disadvantaged because of the imbalance of power, resources and legal knowledge as they face the whole might of the State. In the case of defendants in custody on remand the problem is compounded as they have less access to free legal and paralegal services available from community organisations, libraries or friends and relatives than those to whom bail was granted.

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<sup>18</sup> It is an open question whether it is possible to measure the outcome of bail decisions accurately as it is impossible to know about all offences bail remandees commit as many crimes are not reported or solved.

### 2.3 Juvenile offenders and bail decision-making

While the bail decision-making process is broadly similar for both juvenile and adult defendants, and many of the decision-makers and other stakeholders are the same people, there are very important differences as well. Varma (2002) points out that juveniles are said to require special protection within the legal system because of their immaturity and dependency. For example, they are usually dependent on other people to ensure that they attend their trial and desist from committing further offences if released. They may, furthermore, be less able to understand the criminal proceedings, the justice process and their rights (Scott & Grisso, 1998). Finally, as was pointed out earlier subclause 2(2) of the WA Bail Act (1982) provides that juveniles have a qualified right to bail. Despite these factors and the reality that the bulk of offenders in Australia are aged between the 10 and 19 (Australian Institute of Criminology, 2002) we could find very few bail studies that included them as a separate group.

### **3. Aims of this study**

As the introduction demonstrates, international research has demonstrated that legal representation is associated with the outcome of bail decisions. It is not certain what the situation is in WA, but Barry (1997) found that a large number of defendants are not represented at their first appearance and that some of those who had legal representation were not well served by those who represented them.

The main aim of the study was to examine the relationship between legal representation and bail decision-making within the criminal justice system in WA. In doing so it was necessary to *rule out* a number of other factors, but this process gave us the opportunity to test whether some of the factors mentioned in the introduction have an independent effect on bail decision-making. A secondary aim of this study was to collect data that could at a later stage be used in a longitudinal study. A special attempt was made to collect information regarding bail decision-making in respect of juveniles.

Finally, while it was not a specific aim of the study the data collected provide a valuable and very rich source of information about bail decision-making in general in the urban Courts of Petty Session and the Perth Children's Court. We will therefore present some of the descriptive data we collected.

## **4. Methodology**

### **4.1 Constraints**

A number of constraints narrowed the ambit of the study. For example, defendants could not be interviewed and the WA Police refused to give us access to data that we initially had been led to believe we would have access to, such as the criminal records of defendants. Consequently data collection was restricted to observations in court and information that was available on private lists.

Given findings such as those by Bottomley (1970), the research proposal envisaged that regional and rural courts would be included in this study, however, this part of the project could not be proceeded with for a number of reasons. The primary problem was that the proposed use of staff of the Department of Justice to collect data could not be arranged. When the alternative plan, that is to use research assistants, was piloted in Bunbury as representative of the regional courts, the frequency of bail applications did not justify the cost that had to be incurred to observe them. Hence data collection at rural and regional courts was abandoned.

### **4.2 Sample**

Ideally observations at specific courts should have been random, however, this was considered unfeasible as certain courts generally only hear bail applications on specific days. The sampling was therefore non-random as researchers attended specific courts on days that prior investigation demonstrated the highest number of bail applications took place.

In respect of adults, the East Perth Court was regarded as representative of the whole of Perth in terms of bail hearings, as all magistrates take turns to preside at this court on Saturdays where all first appearances in metropolitan Perth are heard over weekends. We therefore targeted 200 cases, about a third of the planned sample, at the East Perth Court. The rest of our sample was based on the assumption that there would be an association between the number of charges dealt with by Courts of Petty Sessions and the number of bail applications heard. In an attempt to ensure that our distribution of bail observations was approximately similar to the distribution of bail applications heard in all the other Courts of Petty Sessions in Perth, we planned the number of days of observation based on the distribution of charges dealt with by these courts. This was calculated from data provided by the Department of Justice in respect of charges dealt with by the relevant courts for the period from 1 July 1999 to 30 June 2000.

As the suburban Children's Courts hear relatively few bail applications, and only do so sporadically, the Perth Children's Court (Children's Court) was taken to represent all of the Children's Courts and we targeted 50 cases from this court.

Table 1 provides the percentage distribution of charges with the exclusion of the sampling at East Perth and the Children's Court. Table 1 shows that some courts appear to be over-represented in the sample (Fremantle, Joondalup and Midland) whilst other courts were under-represented (Armadale, Perth). However, as the distribution of bail applications and the distribution of charges are unlikely to be identical, the representation differences were thought not to be problematic.

**Table 1: Sample Representation**

Courts	Charges July 99 - Dec 00		Days of observation	
	No.	%	No.	%
Armadale	8362	7.9	8	7.5
Fremantle	17171	16.1	19	17.8
Joondalup	12953	12.2	17	15.9
Midland	11504	10.8	13	12.1
Central Law Courts	56368	53.0	50	46.7
Subtotal	106358	100.0	107	100.0
East Perth	n.a.	n.a.	17	n.a.
Children's Court	n.a.	n.a.	14	n.a.
Total	n.a.	n.a.	138	n.a.

n.a. not applicable

In the East Perth Court 200 bail applications were to be targeted but a total of 216 cases were subsequently included in the database. In the case of the Children's Court, 50 bail applications were targeted with 69 cases being included in the database. Table 2 provides more detail about the court observations.

**Table 2: Days of Court Observation and Data Days**

Courts	Observation days		Days without data		Days with data	
	No.	%	No.	%	No.	%
Armadale	8	5.8	1	3.8	7	6.3
Fremantle	19	13.8	0	0	19	17.0
Joondalup	17	12.3	10	38.5	7	6.3
Midland	13	9.4	4	15.4	9	8.0
Central Law Courts	50	36.2	8	30.8	42	37.5
East Perth	17	12.3	0	0	17	15.2
Children's Court	14	10.1	3	11.5	11	9.8
Total	138	100.0	26	100.0	112	100.0

### 4.3 Materials

In order to collect data a survey instrument was developed (see Appendix B). The development of the initial instrument was informed by data collected during the literature review, statutory factors in the Bail Act (1982) and Regulations (1988), input from various stakeholders within the WA Department of Justice and a preliminary investigation by members of the research team. The initial instrument was changed after it had been used during the training of the observers (see paragraph 4.4).

### 4.4 Design and Procedure

The observers attended specific courts on predetermined days and remained in court for the duration of proceedings for that day. They observed all the first appearances that took place on the specific day.

Courtroom observation was used despite it being a time consuming method of collecting information because it is such a rich source of data to work with in terms of understanding the qualitative factors thought to be involved in decision-making (Varma, 2002). Moreover, the information recorded in this fashion approximates the information that the presiding magistrate has in making a bail decision.<sup>19</sup>

The three observers were trained and independently rated the same bail applications during the training period to enhance inter-observer reliability. Charge numbers<sup>20</sup> were recorded in order to be able to verify the data recorded on the survey instruments, and obtain missing data (e.g. date of birth of the defendant), from court private lists. No names or identifying information were encoded in the database.

The data collection process and the subsequent encoding of the data are discussed below. Summary statistics from the data collection, including chi-square tests of significance for a number of variables in relation to the bail decision, are provided in Section 6 (unless otherwise stated, an alpha level of .05 was used for all statistical tests in this report).

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<sup>19</sup> Kellough and Wortley (2002) suggest the use of complementary sources of case information such as local Police documents related to the case; tracking the case on the linked records system; remand centre data; national police data; and face-to-face interviews with those defendants remanded in custody. This was not possible in this study due to logistical and ethical constraints.

<sup>20</sup> The charge numbers will also be useful should a follow up study be undertaken.



A literature review of factors affecting bail decisions is provided in Section 6.1. The bail decision was analysed in relation to legal representation and a number of other variables. A number of models were estimated using logistic regression (logit). A dichotomous variable for the bail decision (granted/not granted) was used as the dependent variable. A number of categorical variables that had been identified in Section 6 and raised in the literature review as significantly related to the bail decision were included. These results are shown in Section 6.2.

The data encoding proceeded as follows:

- From the survey form, variables (fields) were chosen and valid values determined. Some encoding guidelines were applied (see Appendix A).
- An SPSS data file was set up in terms of the aforementioned variables and values. Default values were chosen and entered into the data file (see Appendix C).
- Information from the completed survey instruments (see Appendix B) and court private lists was encoded on a case-by-case basis into the SPSS data file by three encoders working independently.
- One encoder added a new variable to pick up comments related to the defendant's argument regarding previous convictions. This variable was subsequently removed from the working file as it was not used.
- The three encoders independently added values to some variables (fields). All fields had to be reconciled before the three files were merged at the conclusion of the encoding.
- The merged file was saved but set aside whilst data cleaning (for example, checking and changing invalid values), and recoding (see below) was undertaken to produce a working file suitable for the analyses.
- The working file contains variables and fields shown in Appendix C.
- Recoding was undertaken for a number of reasons:
  - Some variables (fields) were inappropriately used and/or values inappropriately selected. The cases were identified primarily via variable frequencies.
  - Frequencies for system missing values for many variables were high, suggesting miss-coding. These values were checked, on a case-by-case basis against the appropriate survey instrument and private list to ascertain valid values. Crosschecking frequencies for variables (fields) also highlighted possible miss-coding. For example, in the working file, 69 cases were identified as being heard in the Children's Court. However only 65 of these cases had the defendant's age under 18. Checking the survey instruments and related private lists revealed the Children's Court cases included three defendants aged 18 and one defendant with age of 19. Offences were probably committed whilst these four defendants were juveniles (under 18 years).

- The database has 648 cases, but the sample size is smaller in some tables due to missing values being excluded.

## 5. Descriptive statistics

As Table 3 demonstrates, about 80% of all defendants in this study were male, two thirds were aged between 18 and 32 years and one quarter were Aboriginal. About 90% of juvenile

**Table 3: Socio-demographic Variables – Frequencies**

Variable	All Courts		Adult Courts		Children's Court	
	No.	%	No.	%	No.	%
Gender						
- Male	522	80.6	474	81.9	48	69.6
- Female	126	19.4	105	18.1	21	30.4
- Total	648	100.0	579	100.0	69	100.0
Age (years) <sup>1</sup>						
- 11 – 12	2	0.3	0	0	2	2.9
- 13 – 17	61	9.4	0	0	61	88.4
- 18 – 22	151	23.3	147	25.4	4	5.8
- 23 – 27	134	20.7	134	23.1	0	0
- 28 – 32	133	20.5	133	23.0	0	0
- 33 – 37	66	10.2	66	11.4	0	0
- 38 – 42	33	5.1	33	5.7	0	0
- 43 – 47	23	3.5	23	4.0	0	0
- 48 – 77	19	2.9	19	3.3	0	0
- Sub total	622	96.0	555	95.9	67	97.1
- Not stated	26	4.0	24	4.1	2	2.9
- Total	648	100.0	579	100.0	69	100.0
Age <sup>2</sup>						
- Under 18	65	10.0	0	0	65	94.2
- 18 and older	583	90.0	579	100.0	4	5.8
- Total	648	100.0	579	100.0	69	100.0
Aboriginality						
- Aboriginal	171	26.4	138	23.8	33	47.8
- Non-Aboriginal	470	72.5	434	75.0	36	52.2
- Subtotal	641	98.9	572	98.8	69	100.0
- Unknown	7	1.1	7	1.2	0	0
- Total	648	100.0	579	100.0	69	100.0
Marital status						
- Single	23	3.5	23	4.0	0	0
- Married	11	1.7	11	1.9	0	0
- Divorced	1	0.2	1	0.2	0	0
- Separated	10	1.5	10	1.7	0	0
- De facto	29	4.5	28	4.8	1	1.4
- Girlfriend/Boyfriend	1	0.2	1	0.2	0	0
- Sub total	75	11.6	74	12.78	1	1.4
- No reference	573	88.4	505	87.22	68	98.6
- Total	648	100.0	579	100.0	69	100.0

### Notes to Table 3:

1. Age groups were based on five-year groupings for adults with juveniles divided into two groups.
2. The dichotomous age variable was based on the type of court (adult versus children's) adjusted for the four defendants who were over 17 years but had bail hearings in the Children's Court. The two juveniles with age 'not stated' were assumed to be 'under 18'.

defendants were aged 13 to 17 years, with only two under 13 years. The modal age group for adult defendants was 18 –22 years, with the oldest 72 years.

Noticeably, a larger percentage of juveniles were female (30% versus 18% for adults). Less than one quarter of adult defendants (24%) were Aboriginal compared with nearly half of juvenile defendants (48%). Marital status could only be recorded in about 10% of cases.

Court data are presented in Tables 4 to 6. Table 4 shows that one third of the bail considerations observed in this study took place on a Saturday. As was mentioned in Section 4.4 this was because the East Perth Court, where the Saturday hearings take place, was regarded as representative of the whole Perth area and because of the relatively high number of bail hearings that take place in this court compared to other courts.

**Table 4: Day of Week, Status and Bench Warrants - Frequencies**

Variable	All Courts		Adult Courts		Children's Court	
	No.	%	No.	%	No.	%
Day of week						
- Monday	121	18.7	70	12.1	51	73.9
- Tuesday	44	6.8	36	6.2	8	11.6
- Wednesday	84	13.0	78	13.5	6	8.7
- Thursday	59	9.1	59	10.2	0	0
- Friday	124	19.1	120	20.7	4	5.8
- Saturday	216	33.3	216	37.3	0	0
- Total	648	100.0	579	100.0	69	100.0
Status of the defendant						
- In custody	592	91.4	532	91.9	60	87.0
- On summons/notice	36	5.6	29	5.0	7	10.1
- Police bail <sup>21</sup>	10	1.5	10	1.7	0	0
- Sub total	638	98.5	571	98.6	67	97.1
- Not stated	10	1.5	8	1.4	2	2.9
- Total	648	100.0	579	100.0	69	100.0
Bench warrant						
- Applies	205	31.6	181	31.3	24	34.8
- Does not apply	417	64.4	374	64.6	43	62.3
- Sub total	622	96.0	555	95.9	67	97.1
- Not stated	26	4.0	24	4.1	2	2.9
- Total	648	100.0	579	100.0	69	100.0

About 90% of the defendants attended the hearing while in custody, while most of the rest had come to court on a summons or notice. About one third of all the defendants in custody had been apprehended on bench warrants. (Of the defendants attending court on bench warrants virtually all, 198, were in custody.) The adult and Children's Court percentages only differ

<sup>21</sup> These cases of police bail were observed in error but the data were nevertheless included in the analyses. However, because of their small number any findings in this regard should be interpreted with caution. A reference in this report to bail granted therefore includes these 10 cases as the magistrate renewed bail in each instance.

substantially with respect to the day of the week. For juveniles, Monday has the most number of cases (74%) and for adults, Saturday is the modal day (37%).

As it was not the primary purpose of the study to compare different courts with each other the adult courts have been grouped together and compared with the Children's Court in most of the bivariate analyses and in the multivariate analyses.

**Table 5: Court Variables - Frequencies**

Variable	All cases	
	No.	%
Court location (1)		
- East Perth Court	216	33.3
- Children's Court	69	10.6
- Central Law Courts	250	38.6
- Fremantle Court	65	10.0
- Armadale Court	14	2.2
- Midland Court	17	2.6
- Joondalup Court	17	2.6
- Total	648	100.0
Court location (2)		
- East Perth Court	216	33.3
- Children's Court	69	10.6
- Central Law Courts	250	38.6
- Suburban Courts	113	17.4
- Total	648	100.0
Children's Court		
- Responsible person		
- Present	36	52.2
- Not present	11	15.9
- Not stated	22	31.9
- Total	69	100.0
- Ward of the court		
- Ward	2	3.0
- Not a ward	3	4.0
- Not stated	64	93.0
- Total	69	100.0

Commensurate with the information presented in Table 4, Table 5 shows that one third of the bail hearings observed took place in the East Perth Court of Petty Sessions that has Saturday sittings. The court with the most cases is the Perth Central Law Courts (39%). This is consistent with Table 1's information that 53% of charges are processed at this court. About 10% of cases were heard at the Children's Court. This corresponds to Table 3 in which 10% of defendants were age under 18 years. About one fifth of cases observed were heard in suburban courts (Armadale, Fremantle, Joondalup and Midland).

Two pieces of additional information pertaining to juvenile defendants were included on the survey instrument as they could have a bearing on whether bail is awarded to a juvenile. These were whether the juvenile defendant had a responsible person present at the bail hearing and whether the defendant was a ward of the court. Both pieces of information had high missing values: 32 % and 93%<sup>22</sup> respectively. Nonetheless, for cases where information about the responsible person was available ( $n = 47$ ), 77% of juveniles had a responsible person present. The presence of a responsible person was not required (defendant aged 17 or older) for the granting of bail in 13 of the 33 cases where no responsible person was recorded as present.

The final variable considered as a court variable is whether the defendant had legal representation. This variable is presented in three forms in Table 6. The first form (Grouping 1) is in terms of the initial encoding with six categories of legal representation together with no (None) and unknown (Not stated) representation. About 33% of all defendants had duty lawyers, 20% had legal representation from the ALS, and about 20% had a private lawyer. About 93% of all defendants had some form of legal representation.

The second form (Grouping 2) recognises the difficulties faced by the research assistants in identifying the subtle differences between some of the categories of legal representation utilised in the survey instrument. Hence representatives identified as paralegal, legal aid lawyer or duty lawyer are grouped together. Some checking of categories was undertaken in the data clean-up phase by obtaining from the courts the status of particular lawyers (where the name was known). However, some lawyers work under different categories for different clients. For example a duty lawyer might also have some private clients and it is not always clear from the private list in which capacity they are appearing. Using this distribution, about half of adult defendants are represented by the category 'paralegal, legal aid or duty lawyer' with a further fifth each using either ALS or a private lawyer. For juvenile defendants, on the other hand, the majority had either ALS (36%) or YLS (33%) representation.

The final form (Grouping 3) of legal representation is the dichotomy of represented and unrepresented defendants. The dichotomous representation variable was computed from the variable Grouping 1 on the basis that 'None' referred to the defendant being unrepresented and any other stated category referred to the defendant being represented. Most defendants have legal representation with 100% for juveniles and 93% for adults.

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<sup>22</sup> It is unlikely that many of these would have been wards of the court given the relatively few children who are wards of the court in any event. However, given the high percentage of missing values this variable was not used in further analyses.

**Table 6: Legal Representation – Frequencies**

Variable	All Courts		Adult Courts		Children's Court	
	No.	%	No.	%	No.	%
<b>Grouping 1</b>						
- None	45	6.9	45	7.8	0	0
- Aboriginal Legal Service	128	19.8	103	17.8	25	36.2
- Paralegal	2	0.3	2	0.3	0	0
- Legal aid	100	15.4	98	16.9	2	2.9
- Duty lawyer	210	32.4	204	35.2	6	8.7
- Private	137	21.1	124	21.4	13	18.8
- Youth Legal Service	24	3.7	1	0.2	23	33.3
- Sub total	646	99.7	577	99.7	69	100.0
- Not stated	2	0.3	2	0.3	0	0
- Total	648	100.0	579	100.0	69	100.0
<b>Grouping 2</b>						
- None	45	6.9	45	7.8	0	0
- Aboriginal Legal Service	128	19.8	103	17.8	25	36.2
- Paralegal/Legal aid/Duty lawyer	312	48.1	304	52.5	8	11.6
- Youth Legal Service	24	3.7	1	0.2	23	33.3
- Private	137	21.1	124	21.4	13	18.8
- Sub total	646	99.7	577	99.7	69	100.0
- Not stated	2	0.3	2	0.3	0	0
- Total	648	100.0	579	100.0	69	100.0
<b>Grouping 3</b>						
- Represented	601	92.7	53	91.9	69	100.0
- Unrepresented	45	6.9	45	7.8	0	0
- Sub total	646	99.7	577	99.7	69	100.0
- Not stated	2	0.3	2	0.3	0	0
- Total	648	100.0	579	100.0	69	100.0

Table 7 shows whether the defendant is subject to other orders. The data collected in respect of this variable are represented in three different formats in Table 7. The first form (Grouping 1) represents the initial encoding and shows that about half of all defendants appear to be under some sort of order, the most prevalent being prior bail (24%). Compared with adult defendants, juveniles have a higher percentage of other orders (58% compared with 51%). Whilst the percentage of prior bail is lower for juveniles (22%) compared with adults (24%), a number of other categories have higher percentages for juveniles compared with adults. These include CROs (10% for juveniles compared with 1% for adults) and CBOs (7% compared with 4%). Moreover, 10% of juveniles were subject to JJ Team referrals. About 24% of the all defendants had reoffended while on bail while about 5% were on parole.

**Table 7: Other Orders - Frequencies**

Variable	All Courts		Adult Courts		Children's Court	
	No.	Valid %	No.	Valid %	No.	Valid %
<b>Grouping 1<sup>1</sup></b>						
- Bail – prior	154	23.8	139	24.0	15	21.7
- Parole	30	4.6	30	5.2	0	0
- CRO	14	2.2	7	1.2	7	10.1
- CBO	27	4.2	22	3.8	5	7.2
- ISO	23	3.5	20	3.5	3	4.3
- VRO	31	4.8	30	5.2	1	1.4
- SRO	1	0.2	0	0	1	1.4
- Return to prison warrant	1	0.2	1	0.2	0	0
- Suspended sentence	19	2.9	19	3.3	0	0
- Custody on other matters	7	1.1	7	1.2	0	0
- Sentenced prisoner	15	2.3	14	2.4	1	1.4
- JJ Team referral	7	1.1	0	0	7	10.1
- Directions hearing	1	0.2	1	0.2	0	0
- MRO	1	0.2	1	0.2	0	0
- Under Mental Health Act	1	0.2	1	0.2	0	0
- Hospital Order	2	0.3	2	0.3	0	0
- Sub total	334	51.5	294	50.8	40	58.0
- No reference	314	48.5	285	49.2	29	42.0
- Total	648	100.0	579	100.0	69	100.0
<b>Grouping 2<sup>2</sup></b>						
- Bail – prior	154	23.8	139	24.0	15	21.7
- Parole	30	4.6	30	5.2	0	0
- CRO, CBO, ISO, SRO	65	10.0	49	8.5	16	23.2
- VRO, MRO	32	4.9	31	5.4	1	1.4
- Other	53	8.2	45	7.8	8	11.6
- Sub total	334	51.5	294	50.8	40	58.0
- No reference	314	48.5	285	49.2	29	42.0
- Total	648	100.0	579	100.0	69	100.0
<b>Grouping 3<sup>3</sup></b>						
- Any	334	51.5	294	50.8	40	58.0
- No reference	314	48.5	285	49.2	29	42.0
- Total	648	100.0	579	100.0	69	100.0

**Notes to Table 7:**

1. Any orders were listed on the survey instrument. However, only one prior order could be encoded. In cases with more than one prior order, the first prior order was encoded.
2. These groups were compiled from the originally encoded prior orders (from Grouping 1).
3. The group 'Any' refers to the encoding of any prior orders (from Grouping 1). The group 'No reference' refers to no prior order being recorded on the survey instrument.

The database includes two variables in respect of offences defendants were charged with, namely the type of offence and the number of charges. Table 8A provides information about the type of offences.



Table 8A Offences<sup>1</sup>

Offence	Number of defendants		Indigenous defendants (%)
	All	Children's Court	
Aggravated assault/bodily harm/unlawful wounding	35	4	40.0
Wilful murder	8	0	0
Subtotal	43	4	
Common assault	65	7	41.5
Conduct endangering life	5	0	20.0
Concealment of birth	1	0	0
Assault public officer	45	9	48.9
To cause fear that someone will be injured/disabled	9	0	33.3
Subtotal	125	16	
Rape/indecent assault	11	1	27.3
Indecent dealing with child under 13 years	5	1	40.0
Other sexual offences (bestiality, procuration, prostitution and brothels, pornography)	6	0	16.7
Subtotal	22	2	
Robbery/stealing with violence	28	3	17.9
Home burglary	52	11	36.3
Aggravated burglary	40	12	45.0
Other property offences (arson, commit an offence in dwelling of another with aggravation)	14	2	28.6
Subtotal	134	28	
Stealing	112	0	28.6
Fraud/false pretences/obtaining credit by fraud and cheating	19	0	10.5
Receiving	26	0	11.5
Damage to property	29	0	27.6
Motor vehicle stealing	45	0	37.8
Unlawfully on premises/curtilage	10	0	30.0
Burglary not human habitation	24	0	33.3
Other property offences not involving physical threat (falsely obtaining social security benefit, forgery and uttering.)	2	0	0
Subtotal	267	0	
Supply of drugs	12	1	0
Possession of drugs	63	6	25.4
Supply and possession of drugs	15	0	6.7
Other drug offences (possessing smoking implement, cultivation, prohibited imports)	10	0	30
Subtotal	100	7	

Offence	Number of defendants		Indigenous defendants (%)
	All	Children's Court	
Heroin	4	0	25.0
Cannabis	37	4	21.6
Amphetamines	32	2	21.9
More than one of H/C/A	10	0	10.0
Other drugs (ecstasy, unspecified)	3	1	0
Subtotal	86 <sup>2</sup>	7	
No driver's license	37	4	18.9
Driving under suspension/legally disentitled disqualified	55	0	20.0
Reckless/dangerous driving/failing to stop/speeding	23	0	26.1
Drink driving (exceed blood alcohol level 0.08 and refuse breath test)	16	0	50.0
Subtotal	131	4	
Threaten to kill, injure or harm any person	11	0	27.3
Deprivation of liberty	4	0	0
Escaping legal custody	2	1	0
Other serious offences (public officer offences)	1	0	0
Subtotal	18	1	
Giving false name and address	54	9	31.5
Breach of bail	16	3	75.0
Breach of CBO,CRO or community order	16	0	18.8
Breach of VRO	30	0	16.7
Resisting/obstructing Police/railway officer	23	3	43.5
Possessing weapon	20	0	25.0
Disorderly conduct	28	0	39.3
Attempt to bring people in/immigration	8	0	0
Failing to report to JJ Team	3	3	33.3
Other less serious offences	47	5	17.0
Subtotal	242	23	

**Note to Table 8:**

1. The sum of subtotals is greater than the number of cases ( $N = 648$ ) due to some defendants being charged with multiple offences. Moreover, the total number of cases in this Table does not sum to the total number of charges that can be calculated from Table 9 because some defendants had more than one charge for the same offence type.
2. 14 of the drug offences ( $n=100$ ) did not specify the type of drug.

A frequency distribution of number of charges is shown in Table 9A and Figure 1. The most prevalent offences for all defendants are property offences not involving physical threat, such as stealing and fraud ( $n = 267$ ) and other less serious offences including giving false name and address and breach of bail ( $n = 242$ ). The least frequent offences are other serious offences such as escaping legal custody ( $n = 18$ ). For juveniles, the most common offences are the more severe forms of property offences ( $n = 28$ ) and assault (excluding sexual assault) and related offences ( $n = 16$ ), while no instances of property offences, not involving physical threat, were recorded.

A closer investigation of the data reveals that 292 of defendants had been charged with a Schedule 2 offence and that most of them were represented (see Table 8B). This Table also shows that 94% of offenders charged with a serious offence had some form of representation, 22% by a private lawyer.

**Table 8B Legal Representation by Schedule 2 (Serious) Offences**

Legal representation	Serious offences	
	No.	%
<b>Grouping 1</b>		
- None	18	6.1
- Aboriginal Legal Service	67	22.9
- Paralegal	1	0.3
- Legal aid	42	14.4
- Duty lawyer	84	28.8
- Private	65	22.3
- Youth Legal Service	15	5.1
- Total	292	100
<b>Grouping 2</b>		
- None	18	6.1
- Aboriginal Legal Service	67	22.9
- Paralegal/Legal aid/Duty lawyer	127	43.5
- Youth Legal Service	15	5.1
- Private	65	22.3
- Total	292	100

Table 9A shows that about one quarter of all defendants have only one charge. For juveniles this is about one third. One fifth of all defendants and 16% of juvenile defendants have seven or more charges. Figure 1 demonstrates that the Children's Court cases have a higher percentage of one and two charges compared with adult cases. At the other end of the distribution (greater number of

charges), adult defendants have a higher percentage of cases if one ignores the *9 or more charges* category where the percentage for children is slightly higher than for adult defendants.

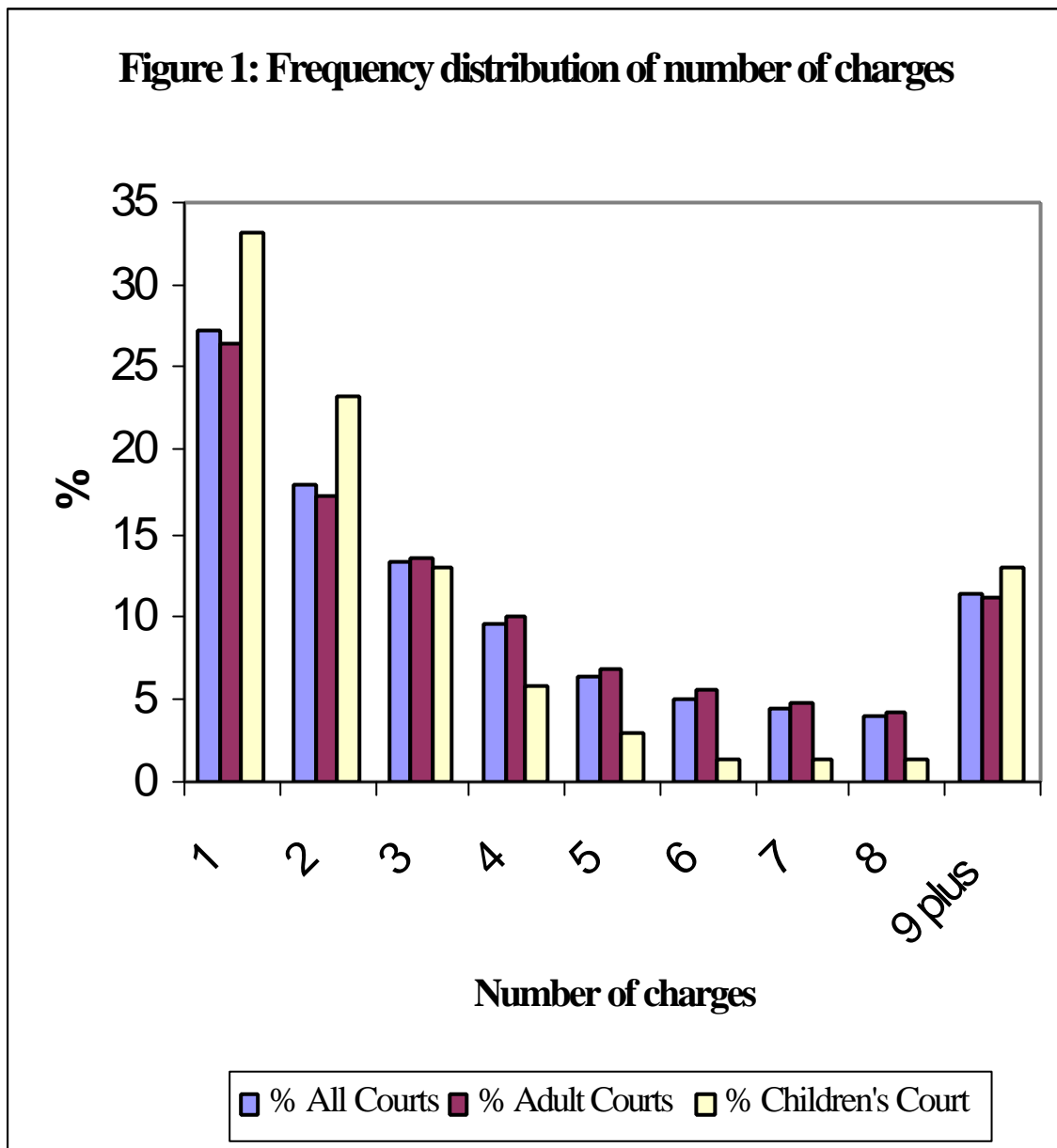
**Table 9A: Number of Charges**

Number of charges	All Courts		Adult Courts		Children's Court	
	No.	%	No.	%	No.	%
1	176	27.2	153	26.4	23	33.3
2	116	17.9	100	17.3	16	23.2
3	87	13.4	78	13.5	9	13.0
4	62	9.6	58	10.0	4	5.8
5	41	6.3	39	6.7	2	2.9
6	33	4.9	32	5.5	1	1.4
7	28	4.3	27	4.7	1	1.4
8	25	3.9	24	4.1	1	1.4
9 – 65	73	11.3	64	11.1	9	13.0
Subtotal	641	97.7	575	99.3	66	95.7
Not stated	7	0.3	4	0.7	3	4.3
Total	648	100.0	579	100.0	69	100.0

Table 9B displays the number of charges for defendants with at least one Schedule 2 offence. Approximately 45% of both adults and juveniles have at least one offence that can be classified as a Schedule 2 offence (see Appendix A). A larger proportion of juveniles with a Schedule 2 offence have one or two charges only (55%) compared with adults (39%).

**Table 9B: Number of Schedule 2 Charges**

Number of charges	All Courts		Adult Courts		Children's Court	
	No.	%	No.	%	No.	%
1	71	24.5	62	23.9	9	29.0
2	48	16.6	40	15.4	8	25.8
3	38	13.1	37	14.3	1	3.2
4	35	12.1	32	12.4	3	9.7
5	19	6.6	18	6.9	1	3.2
6	15	5.2	15	5.8	0	0
7	14	4.8	14	5.4	0	0
8	10	3.4	9	3.5	1	3.2
9 – 65	40	13.8	32	12.4	8	25.8
Total	290	100.0	259	100.0	31	100.0



In Table 10, the distinction between a formal application for bail and no formal application is cross-tabulated with variables for legal representation and Aboriginality. Overall, 14% of unrepresented defendants and 65% of represented defendants had formal applications for bail. For defendants with legal representation, the ratio of number of defendants with formal applications for bail to the number of those without formal bail applications is about 2:1. This ratio is the same for Aboriginal and non-Aboriginal defendants. For defendants without legal representation, the ratio of the number of defendants with formal bail applications to those without is 1:3 for Aboriginal defendants and 1:8 for non-Aboriginal defendants.

**Table 10: Bail Application by Legal Representation (N = 607)\***

Bail application	Unrepresented			Represented			Total
	Aboriginal	Non Aboriginal	Sub-total	Aboriginal	Non Aboriginal	Sub-total	
Formal	2 (25.0%)	4 (11.1%)	6 (13.6%)	93 (63.3%)	273 (65.6%)	366 (65.0%)	372 (61.3%)
None/ Withdrawn	6 (75.0%)	32 (88.9%)	38 (86.4%)	54 (36.7%)	143 (34.4%)	197 (35.0%)	235 (38.7%)
Total	8 (100%)	36 (100%)	44 (100%)	147 (100%)	416 (100%)	563 (100%)	607 (100%)

**Notes to Table 10:**

- \* For Bail application and Legal representation,  $\chi^2 = 46.945$ ,  $df = 1$ ,  $p = 0.000$ . For Bail application and Aboriginality,  $\chi^2 = 0.001$ ,  $df = 1$ ,  $p = 0.970$ .

In Table 11A, defendants are grouped in terms of bail application, bail decision and race. Overall, 44% of defendants who were not granted bail had formally applied for bail whereas 74% of defendants who were granted bail had formal applications for bail. The ratios of numbers of defendants with and without formal bail applications are about the same for Aboriginals and non-Aboriginals for bail not granted (1:1.13 versus 1:1.32) and bail granted (1:0.37 versus 1:0.36). Of the applicants who applied for bail about 70% were successful, while 40% of those who did not formally apply for bail were granted bail.

**Table 11A: Bail Application by Bail Decision (N = 595)\***

Bail application	Bail not Granted			Bail Granted			Total
	Aboriginal	Non Aboriginal	Sub-total	Aboriginal	Non Aboriginal	Sub-total	
Formal	32 (47.1%)	77 (43.0%)	109 (44.1%)	62 (72.9%)	194 (73.8%)	256 (73.6%)	365 (61.3%)
None/ Withdrawn	36 (52.9%)	102 (57.0%)	138 (55.9%)	23 (27.1%)	69 (26.2%)	92 (26.4%)	230 (38.7%)
Total	68 (100%)	179 (100%)	247 (100%)	85 (100%)	263 (100%)	348 (100%)	595 (100%)

**Notes to Table 11A:**

- \* For Bail application and Bail decision,  $\chi^2 = 56.434$ ,  $df = 1$ ,  $p = 0.000$ . For Bail application and Aboriginality,  $\chi^2 = 0.001$ ,  $df = 1$ ,  $p = 0.970$ .

Table 11B on the next page compares formal applications for bail with all other categories of bail application. The ratios of number of defendants refused bail to number of defendants granted bail are 1:2.39 for those with formal bail applications, 1:0.30 for those without formal applications, 1:2.50 for those where the prosecutor mentions bail and 1:7.00 for those where the magistrate grants bail in the absence of a formal application. For four cases in which bail applications are withdrawn, no bail is granted.

**Table 11B: Bail Application by Bail Decision<sup>1</sup> (N = 602)\***

Bail application	Bail not Granted	Bail Granted	Total
Formal application	109 (18.1%)	260 (43.2%)	369 (61.3%)
No formal application	128 (21.3%)	38 (6.3%)	166 (27.6%)
Mentioned by prosecutor	2 (0.3%)	5 (0.8%)	7 (1.2%)
Mentioned by magistrate	7 (1.2%)	49 (8.1%)	56 (9.3%)
Withdrawn	4 (0.7%)	0	4 (0.7%)
Total	250 (41.5%)	352 (58.5%)	602 (100.0%)

**Notes to Table 11B:**

\*  $\chi^2 = 133.935$ ,  $df = 4$ ,  $p = 0.000$  .

- The results reported in this table should be interpreted with caution. First, low expected cell counts suggest caution with the interpretation of the chi-square result. Furthermore, an investigation of the data suggested that observers might have recorded *no formal application* for cases where the prosecutor or magistrate mentioned bail. We decided not to recheck the encoding of bail applications because of time and funding constraints and because this was not regarded as a serious problem as the dichotomous form of this variable (shown in Table 11A) was used in further analyses.

Tables 12 and 13 show the defence argument in terms of legal representation and the bail decision respectively. Table 12 shows that of the represented defendants, 62.2% had some defence comments. Of unrepresented defendants, one third had some defence comments, see Table 14A.

**Table 12: Defence Argument by Legal Representation (N = 646)\***

Defence argument	Unrepresented	Represented	Total
No argument	30 (66.7%)	227 (37.8%)	257 (39.8%)
Argument	15 (33.3%)	374 (62.2%)	389 (60.2%)
Total	45 (100.0%)	601 (100.0%)	646 (100.0%)

**Note to Table 12:**

\*  $\chi^2 = 14.592$ ,  $df = 1$ ,  $p = 0.000$

Table 13 shows that of defendants with 'Argument', about 50% are granted bail. For defendants with 'No argument', two thirds are granted bail.

**Table 13: Defence Argument by Bail Decision (N = 631)\***

Defence argument	Bail not granted	Bail granted	Total
No argument	127 (34.3%)	125 (65.7%)	252 (100.0%)
Argument	130 (50.4%)	249 (49.6%)	379 (100.0%)
Total	257 (40.7%)	374 (59.3%)	631 (100.0%)

**Note to Table 13:**

\*  $\chi^2 = 16.244, df = 1, p = 0.000$

Many of the defence argument variables have low 'affirmative' frequencies as shown in Table 14A. This means that the results are less robust and more susceptible to the influence of outliers. Of the 631 cases referred to in Table 14A, 39.9% had no defence argument.

**Table 14A: Defence Arguments by Bail Decision (N = 631, df = 1)**

Defence argument	n	$\chi^2$	Significance <sup>1</sup>
Present offence is not serious	21	6.292	0.012*
Previous convictions exist	16	1.682	0.195
Confused/unaware	25	3.018	0.082**
Sick	28	1.794	0.180
Abused	3	0.840	0.359
Under influence of drugs	37	4.183	0.041*
Under influence of alcohol	17	0.214	0.644
Under influence of peers	4	0.413	0.521
Having anger management	3	2.071	0.150
Having treatment	55	0.030	0.863
Type of treatment			
• Medical/psychiatric	16	0.611	0.434
• Drug	32	1.200	0.273
• Alcohol	7	0.013	0.908
Returned to education	6	0.137	0.711
Able to meet bail	16	0.611	0.434
Able to obtain surety	147	4.342	0.037*
Willing to do Community Based Order	3	0.840	0.359
Willing to accept curfew	8	0.288	0.591
Willing to report	79	2.286	0.131
Home environment	86	2.026	0.155
Unemployed	35	1.328	0.249
Receiving social welfare benefits	10	0.485	0.486
Employed	35	0.070	0.792
Children	73	0.193	0.661
Sole parent	5	0.775	0.379
Exceptional circumstances mentioned	18	7.613	0.006*
Any other comment by defendant	101	6.873	0.009*
No argument	252	16.244	0.000*

**Notes to Table 14A:**

\*  $p \leq 0.05$

\*\*  $p \leq 0.10$

1. Low expected cell counts suggest caution with interpretation of chi-square results.



Cognisant of the above mentioned shortcomings, the results in Table 14A show that the bail decision is likely to be affected by:

- The present offence being serious or not. Of those defendants with an argument that the present offence was not serious, 85.7% were granted bail compared with 59.3% of all defendants being granted bail.
- The defendant being able or not to obtain a surety. Of those defendants with an argument that the defendant is able to obtain a surety, 66.7 % were granted bail compared with 59.3% of all defendants being granted bail.
- The defendant being or not being under the influence of drugs (at the time of the offence). Of those defendants with an argument that the defendant was under the influence of drugs, 56.8% were refused bail compared with 40.7% of all defendants being refused bail.
- The existence or not of exceptional circumstances such as the defendant having a sick relative or death in the family, the defendant facing financial loss if bail is refused, etc. Of those defendants with an argument that there were exceptional circumstances, 72.2% were refused bail compared with 40.7% of all defendants being refused bail.
- The existence or not of any other circumstances sympathetic to the defendant's case such as a domestic dispute, going through detoxification, etc. Of those defendants with any other comments in the defence argument, 52.5% were refused bail compared with 40.7% of all defendants being refused bail.
- No argument. In those instances where the defendant presented no argument 50.4% were refused bail, compared to 40.7% of all defendants.

Table 14B on the next page shows that the bail decision is associated with a number of prosecution arguments.

The following percentages are significantly different from the average of 40.7% (bail refused):

- For cases in which the prosecutor's argument included the defendant's outstanding offences being serious or numerous, 63.2% of defendants were refused bail.
- Of the ten cases in which the prosecutor argued that the defendant's character was poor, 80% were subsequently refused bail.
- If the prosecutor argued the presence of existing orders, 64.5% of defendants were refused bail.
- If the prosecutor argued that there was a likelihood of the defendant reoffending, 64.7% of defendants were refused bail.
- For cases in which the prosecutor presented no argument, 45.7% of defendants were refused bail.

**Table 14B: Prosecutor Arguments by Bail Decision ( $N = 631$ ,  $df = 1$ )**

Prosecutor argument	<i>n</i>	$\chi^2$	Significance <sup>1</sup>
Seriousness of offence	91	3.351	0.067**
Number of offences	20	0.735	0.391
Serious outstanding or number of charges	19	4.082	0.043*
Character of defendant (poor)	10	6.491	0.011*
Previous convictions	133	0.054	0.816
Antecedents or associations	3	0.068	0.794
Home environment	0	n.a.	n.a.
Background	8	0.035	0.852
Residence	12	1.254	0.263
Financial position (unable to pay bail)	1	1.458	0.227
Breach of bail	74	0.945	0.331
Strength of evidence	26	3.232	0.072**
Dependents	1	0.688	0.407
Existing orders	62	16.116	0.000*
May fail to appear	28	0.305	0.581
A likelihood of reoffending	34	8.558	0.003*
May interfere with witnesses	5	0.001	0.973
May obstruct course of justice	2	1.379	0.240
For own protection	2	1.379	0.240
For safety of complainant	13	0.028	0.866
May endanger safety, etc	4	0.143	0.705
Premeditated	1	1.458	0.227
Likelihood of imprisonment	8	0.035	0.852
Any other comment	96	2.423	0.120
No argument	293	5.676	0.017*

**Notes to Table 14B:**\*  $p \leq 0.05$ \*\*  $p \leq 0.10$ 

1. Low expected cell counts suggest caution with interpretation of chi-square results.

The results in Table 14C on the next page show that the bail decision is associated with a number of reasons regarded by the magistrate. These are:

- The seriousness of the offence. Of the cases in which the magistrate had regard for the seriousness of the offence(s), 57.5% of defendants were refused bail, compared with 40.7% of all defendants.
- The defendant's background. In three of the cases, the magistrate had regard for the defendants being drug users. All three were subsequently refused bail.
- Previous breach of bail. Of the cases in which the magistrate had regard for defendant's previous breach of bail, 54.4% of defendants were refused bail, compared with 40.7% of all defendants.
- Violation of existing orders. Of the cases in which the magistrate had regard for the violation of existing orders, 67.3% of defendants were refused bail, compared with 40.7% of all defendants.

**Table 14C: Magistrate Reasons by Bail Decision ( $N = 631, df = 1$ )**

Reasons	<i>n</i>	$\chi^2$	Significance <sup>1</sup>
Seriousness of offence	87	11.717	0.001*
Number of offences	19	2.391	0.122
Serious outstanding or number of charges	17	1.079	0.299
Character of defendant	8	0.288	0.591
Previous convictions	97	0.616	0.433
Antecedents or associations	3	0.840	0.359
Home environment	8	0.830	0.362
Background (drug use)	3	4.387	0.036*
Residence	32	0.146	0.703
Financial position (unable to pay)	1	0.688	0.407
Breach of bail	57	4.841	0.028*
Strength of evidence	10	3.606	0.058**
Dependents	2	0.071	0.789
Violation of existing orders	55	17.585	0.000*
May fail to appear	32	2.146	0.143
A likelihood of reoffending	25	20.190	0.000*
May interfere with witnesses	2	1.379	0.240
May obstruct course of justice	2	1.379	0.240
For own protection	2	2.920	0.088**
For safety of complainant	11	0.104	0.748
May endanger safety, etc	2	0.071	0.789
Likelihood of imprisonment	12	3.409	0.065**
Any other comment	89	28.048	0.000*
No reasons given	358	5.101	0.024*

**Notes to Table 14C:**\*  $p \leq 0.05$ \*\*  $p \leq 0.10$ 

1. Low expected cell counts suggest caution with interpretation of chi-square results.

- The likelihood of reoffending. Of the cases in which the magistrate had regard for the likelihood of reoffending, 84.0% of defendants were refused bail, compared with 40.7% of all defendants.
- Any other comments. Of the cases in which the magistrate made any other comments, 66.3% of defendants were refused bail, compared with 40.7% of all defendants.
- No reasons. In those instances where the magistrate did not mention any reason, 63.1% of defendants were granted bail, compared with 59.3% of all defendants.

A closer analysis of the data reveals that there were 103 instances with no formal application, argument or comments by or on behalf of the defendant, no argument or comments by the prosecution, and where the magistrates provided no reasons for their decisions. Seventy-seven of these defendants, that is 11.9% of the total sample, were not granted bail while bail was granted in 4.5% of first hearings without being mentioned by anybody.

The bail decision was not significantly related to the number of charges ( $F(1, 623) = 1.556, p = .213$ ), but Table 15 demonstrates that the bail decision was related to the prosecutor's position

regarding bail. In cases where the prosecutor did not oppose bail, 90.1% of defendants were granted bail, compared to 59.3% of all defendants.

**Table 15: Chi-square Tests in Relation to Bail Decisions ( $N = 648$ )**

Variable	<i>n</i>	$\chi^2$	<i>df</i>	Significance <sup>1</sup>
Aboriginality	624	0.502	1	0.478
Adult/juvenile	631	3.897	1	0.048*
Age	606	7.856	1	0.448
Bench warrant	606	19.638	1	0.000*
Breach of bail	631	10.057	2	0.007*
Court	631	20.608	6	0.002*
Day of week	631	2.160	5	0.827
Gender	631	6.390	1	0.011*
Legal Representation (all)	629	33.086	7	0.000*
Legal representation (yes/no)	629	3.614	1	0.057**
Prosecutor unopposed	631	164.961	1	0.000*
Magistrate	631	33.667	29	0.252
Other orders (1 – 5)	631	57.828	4	0.000*
Other orders (yes/no)	631	5.943	1	0.015*
Schedule 2	629	29.992	1	0.000*
Status of defendant	621	27.771	2	0.000*

Notes to Table 15:

\*  $p \leq 0.05$

\*\*  $p \leq 0.10$

1. Low expected cell counts suggest caution with interpretation of chi-square results.

In addition, the bail decision was related to whether the defendant:

- was a juvenile. Of juvenile defendants, 72.3% were granted bail compared with 59.3% of all defendants being granted bail.
- was apprehended on a bench warrant. Of those defendants with a bench warrant, 72.4% were granted bail compared with 59.3% of all defendants being granted bail.
- had breached bail. Of those defendants with who had breached bail, 67.2% were granted bail compared with 59.3% of all defendants being granted bail.
- was a female. Of defendants who were granted bail, 22.5% were female, compared with 19.2% of all defendants who were female.
- was legally represented. Of unrepresented defendants, 72.7% were granted bail compared with 59.3% of all defendants being granted bail.
- was subject to other orders. Of those defendants with other orders, 57.2% were refused bail compared with 40.7% of all defendants being refused bail.
- was charged with a Schedule 2 offence. Of those defendants charged with a Schedule 2 offence, 52.4% were refused bail compared with 40.7% of all defendants being refused bail.
- was attending the bail hearing on police bail/summons. Of defendants attending the hearing on police bail or summons, 95.6% were granted bail compared with 59.3% of all defendants

being granted bail. The bail of all 10 defendants on police bail was renewed, but bail was refused for 2 of the 36 defendants who attended court on summons.

- was charged in a specific court. Of defendants in the Children's Court, 72.3% were granted bail compared with 59.3% of all defendants who were granted bail. Of defendants attending bail hearings in the Central Law Courts, 49.8% were granted bail, etc, compared with 59.3% of all defendants who were granted bail. Of defendants attending bail hearings in the Fremantle Court, 27.4% were refused bail, etc, compared with 40.7% of all defendants who were refused bail. Of defendants attending bail hearings in the Midland Court, 29.4% were refused bail, etc, compared with 40.7% of all defendants who were refused bail. See Table 16 for more information.

**Table 16: Bail Order by Court (N = 631)\***

Court	Bail order		Total
	Refused	Granted	
East Perth	81 (37.7%)	134 (62.3%)	215 (100%)
Children's Court	18 (27.7%)	47 (72.3%)	65 (100%)
Central Law Courts	121 (50.2%)	120 (49.8%)	241 (100%)
Fremantle	17 (27.4%)	45 (72.6%)	62 (100%)
Armadale	7 (50.0%)	7 (50.0%)	14 (100%)
Midland	5 (29.4%)	12 (70.6%)	17 (100%)
Joondalup	8 (47.1%)	9 (52.9%)	17 (100%)
Total	257 (40.7%)	374 (59.3%)	631 (100%)

**Note to Table 16:**

\*  $\chi^2 = 20.608, df = 6, p = 0.002$

Table 17 shows that the presence or not of legal representation is related to:

- the defendant's age. Of juvenile defendants, 100% had legal representation compared with 93.0% of all defendants.
- the court at which the bail application is heard. Of defendants who attended bail hearings at the Fremantle Court, 26.2% were unrepresented compared with 7.0% overall.
- the magistrate. One magistrate heard bail applications where 34.5% of defendants were unrepresented. This compares with 7.0% of all defendants who were unrepresented.
- the status of the defendant. Of defendants who attended their bail hearing on summons or notice, 75.0% were represented compared with 93% of all defendants.

**Table 17: Chi-square Tests in Relation to Legal Representation in Bail Applications  
(N = 648)**

Variable	N	$\chi^2$	df	Significance <sup>1</sup>
Aboriginality	639	1.717	1	0.190
Adult/juvenile	646	5.411	1	0.020*
Age	620	21.396	8	0.006*
Bail decision	646	5.067	1	0.024*
Bench warrant	646	0.118	2	0.943
Breach of bail	646	0.587	1	0.746
Court	646	53.403	6	0.000*
Day of week	646	6.726	5	0.242
Gender	646	2.104	1	0.147
Magistrate	646	94.644	29	0.000*
Other orders	646	22.819	1	0.119
Schedule 2	643	0.572	1	0.450
Status of defendant	637	18.945	2	0.000*

**Notes to Table 17:**

\*  $p \leq 0.05$

1. Low expected cell counts suggest caution with interpretation of chi-square results.

Table 18 shows that the number of days between the bail hearing and the next court attendance is fewer for those remanded in custody (bail not granted) and greater for those defendants remanded on bail (bail granted). This result is significant at the 1% significance level.

**Table 18: Bail Decision and Remand Time \* (N = 572)**

Number of days	Bail not granted (n = 223)	Bail granted (n = 349)	Total (N = 572)
$\bar{X}$ (SD)	13.85 days (13.95)	20.34 days (22.89)	17.81 days (20.12)

**Notes to Table 18:**

\*  $F(1, 570) = 14.470, p = 0.000$

As Tables 19A and 19B demonstrate that the modal bail and surety amounts across all courts were \$1000. The outlier bail amount of \$500 000 was granted to a person charged with supplying drugs. Table 19C demonstrates that where both bail money and a surety were required the respective amounts coincided in most instances. It is possible that the number of instances where bail money and or a surety were required was higher than indicated as there may have been instances when observers left the relevant box empty because they were not able to hear the amount mentioned.

**Table 19A: Bail Decision and Bail Amount by Court**

Variables	Categories	All Courts		Adult Courts		Children's Court	
	\$	No.	%	No.	%	No.	%
Amount	0	28	7.5	17	5.2	11	23.4
	50	1	0.3	0	0	1	2.1
	100	2	0.5	1	0.3	1	2.1
	200	4	1.1	4	1.2	0	0
	300	1	0.3	1	0.3	0	0
	400	2	0.5	2	0.6	0	0
	500	41	11.0	41	12.5	0	0
	750	3	0.8	3	0.9	0	0
	1000	100	26.7	100	30.6	0	0
	1500	9	2.4	9	2.8	0	0
	2000	34	9.1	34	10.4	0	0
	2500	8	2.1	8	2.4	0	0
	3000	11	2.9	11	3.4	0	0
	5000	32	8.6	32	9.8	0	0
	6000	1	0.3	1	0.3	0	0
	10000	12	3.2	12	3.7	0	0
	15000	1	0.3	1	0.3	0	0
	20000	5	1.3	5	1.5	0	0
	100000	4	1.1	4	1.2	0	0
	500000	1	0.3	1	0.3	0	0
	Subtotal	300	80.2	287	87.8	13	27.7
	None recorded	74	19.8	40	12.2	34	72.3
Bail Granted		374	100.0	327	100.0	47	100.0
Bail Refused		257		239		18	
Not stated		17		13		4	
Total		648		579		69	

**Table 19B: Bail Decision and Surety by Court**

Variables	Categories	All Courts		Adult Courts		Children's Court	
	\$	No.	%	No.	%	No.	%
Surety	0	4	1.1	2	0.6	2	4.3
	50	1	0.3	0	0	1	2.1
	100	2	0.5	2	0.6	0	0
	200	6	1.6	4	1.2	2	4.3
	300	1	0.3	1	0.3	0	0
	400	0	0	0	0	0	0
	500	28	7.5	27	8.3	1	2.1
	750	2	0.5	2	0.6	0	0
	1000	48	12.8	48	14.7	0	0
	1500	5	1.3	5	1.5	0	0
	2000	24	6.4	24	7.3	0	0
	2500	6	1.6	6	1.8	0	0
	3000	7	1.9	7	2.1	0	0
	5000	28	7.5	28	8.6	0	0
	6000	1	0.3	1	0.3	0	0
	10000	7	1.9	7	2.1	0	0
	15000	0	0	0	0	0	0
	20000	5	1.3	5	1.5	0	0
	30000	2	0.5	2	0.6	0	0
	100000	2	0.5	2	0.6	0	0
200000	1	0.3	1	0.3	0	0	
500000	0	0	0	0	0	0	
	Subtotal	180	48.1	174	53.2	6	12.8
	None recorded	194	51.9	153	46.8	41	87.2
Bail Granted		374	100.0	327	100.0	47	100.0
Bail Refused		257		239		18	
Not stated		17		13		4	
Total		648		579		69	

Table 19C: Surety and Bail Amount

		Surety ('00)																			Total
		0	0.5	1.0	2.0	3.0	5.0	7.5	10.0	15.0	20.0	25.0	30.0	50.0	60.0	100.0	200.0	300.0	1000.0	2000.0	
Bail amount ('00)	0	2	1				1				1										5
	1.0	1																			1
	2.0				3																3
	5.0						12		1												13
	7.5							2													2
	10.0	1		1			9		39					1							51
	15.0								2	5											7
	20.0			1	1	1	2		3		18			1							27
	25.0										1	4									5
	30.0						1		1		2		7								11
	50.0								1		1	1		26							29
	60.0														1						1
	100.0											1				7					8
	200.0																5				5
	1000.0																	2	2		4
5000.0																				1	1
Total		4	1	2	4	1	25	2	47	5	23	6	7	28	1	7	5	2	2	1	173



## 6. Multivariate analyses

In Section 6.1, a summary of predictive factors from the literature review is linked to the variables in the database. These factors provide the basis for the multivariate data analyses reported in Section 6.2.

### 6.1 Factors affecting bail decisions

The literature on bail decision-making highlights a number of possible predictive factors for decisions related to remand in custody or on bail, terms of bail, and duration of pretrial detention. Some of these factors can be linked to one or more variables in the database as shown in Table 20.

**Table 20: Predictors in the Database**

Author(s)	Country	Predictor Variable	Database Variable
Clifford & Wilkins (1976) Landes (1974) McAveney (1991)	Australia UK Australia	Seriousness of offence	Schedule 2 offence Def arg – present offence not serious Pros arg – serious Mag arg – serious
Clifford & Wilkins (1976) Landes (1974)	Australia UK	Prior arrests/ Previous record	Def arg – previous convictions Pros arg – previous convictions Mag arg – previous convictions
Clifford & Wilkins (1976) Friedland (1965) Landes (1974) McAveney (1991)	Australia Canada UK Australia	Possibility of recidivism/further offences while awaiting trial on bail	Pros arg – likelihood of reoffending Mag arg – likelihood of reoffending
Clifford & Wilkins (1976) Friedland (1965) Landes (1974) McAveney (1991)	Australia Canada UK Australia	Likelihood of flight/failure to appear	Pros arg – may fail to appear Mag arg – may fail to appear
Bottomley (1970) East and Doherty cited in Dhami & Ayton (2001) Jones cited in Dhami & Ayton (2001) King (1973) Morgan cited in Dhami & Ayton (2001)	UK UK UK UK UK	Initial police action	Status of defendant
Bottomley (1970) Jones cited in Dhami & Ayton (2001) Hucklesby (1996) King (1973)	UK UK UK UK	Court (urban/rural) Magistrate	Court (all metropolitan)
Bottomley (1970)	UK	Bail application deferred as requested by defendant (for legal advice/lawyer to better prepare case)	Another day (for legal advice, etc)

Author(s)	Country	Predictor Variable	Database Variable
Bottomley (1970)	UK	Weight of evidence	Pros arg – strength of evidence Mag arg – strength of evidence
Bottomley (1970) Clifford & Wilkins (1976)	UK Australia	Likelihood of subsequent conviction/ Severity of punishment	Pros arg – likelihood of imprisonment Mag arg – likelihood of imprisonment
Wald cited in Bottomley (1970)	UK	Employment	Def arg – employed Def arg - unemployed
Wald cited in Bottomley (1970)	UK	Home environment	Def arg – children Def arg – home environment Def arg – sole parent Pros arg – home environment Mag arg – home environment
Clifford & Wilkins (1976) Foote et al. (1954)	Australia UK	Socioeconomic status/ability to pay bail/ability to pay surety	Def arg – ability to meet bail requirements Def arg – ability to obtain surety Def arg – benefits Pros arg – financial position Mag arg – financial position
Bottomley (1970) Friedland (1965) McAvaney (1991)	UK Canada Australia	Procedural – further police enquiries, Arrest and joint trial of co-defendants, witnesses or Complainants to recover	n.a.
Friedland (1965) Clifford & Wilkins (1976)	Canada Australia	Likelihood of tampering with witnesses	Pros arg – may interfere with witnesses Mag arg – may interfere with witnesses
Clifford & Wilkins (1976)	Australia	Known overcrowding of remand centres	n.a.
Clifford & Wilkins (1976)	Australia	Court lists are too long	n.a.
Clifford & Wilkins (1976) McAvaney (1988)	Australia Australia	Previous breaches of bail	Breaches of bail
Kellough & Wortley (2002) Hamilton & Sinclair cited in Kellough & Wortley (2002)	Canada Canada	Race	Aboriginal/non-Aboriginal
Doherty and East cited in Dhami & Ayton (2001) Morgan & Henderson (1998) Zander cited in Bottomley (1970)	UK UK UK	Prosecutor's recommendation	Prosecutor's recommendation

The best multivariate procedure for modelling the relative effects of various factors on bail decisions is the logistic regression (logit) model. Binary logit models are generally appropriate when the outcome is dichotomous (Gallo, 1996). Such a model will be examined in Section 6.2. As was explained in the Introduction, the bail decision is not dichotomous and there is a range of options when the magistrate's decision is not to grant bail. These options include refusing bail or deferring, withdrawing bail, or having no application made. In the binary logit model considered in Section 6.2, these options have been combined as a single outcome *bail not granted*. Police bail renewed applied to one case and this was included with *bail granted*.

## 6.2 Logistic regression (logit) model

An outline of this model can be given by considering the regression model,  $y_i^* = x_i \mathbf{b} + u_i$ , where  $y_i^*$  is not observed but rather is a latent variable. The actual observations are  $y_i$  where  $y_i = 1$  if  $y_i^* > 0$  and  $y_i = 0$  otherwise. Thus,  $y_i^*$  is the propensity/desire/ability to grant bail, and  $y_i$  is whether or not bail is granted (adapted from Maddala, 1983). The explanatory variables,  $x_i$ , include variables which explain the propensity to grant bail.

$$\begin{aligned} \text{Then, } P(\text{Bail}) &= \text{Prob}(y_i = 1) = \text{Prob}[u_i > -(x_i' \mathbf{b})] \\ &= 1 - F[-x_i \mathbf{b}] \text{ where } F \text{ is the logistic cumulative distribution of } u_i \\ &= F[x_i \mathbf{b}] \end{aligned}$$

If  $F$  is logistic cumulative distribution and  $y_i^* = x_i \mathbf{b} + u_i$ , and  $y_i$  is, as defined earlier, a dichotomous variable for the granting of bail, then  $F(x_i \mathbf{b}) = \exp(x_i \mathbf{b}) / [1 + \exp(x_i \mathbf{b})]$ . Hence  $\log \{F(x_i \mathbf{b}) / [1 - F(x_i \mathbf{b})]\}$  or  $\log \{B / (1 - B)\} = x_i \mathbf{b}$ , where  $\log \{B / (1 - B)\}$  is the log odds ratio - the log odds of bail being granted. In the logit model, this ratio is a linear function of the explanatory variables,  $x_i$ .

The effects of an explanatory variable on the probability of bail being granted in the logit model is given as  $\frac{\partial B}{\partial X_i} = \hat{\mathbf{b}}(1 - B)B$ , where  $B$  is the probability of bail being granted. This

partial probability effect is often computed at the mean probability of bail being granted. In this data set, this mean probability is 0.577, which gives a value of  $(1 - B)B$  or 0.2441.

Accordingly, partial effects can be obtained by multiplying the coefficients in the models listed in Table 21 by this value and multiplying by 100.

Using the logit model, the coefficients are shown in Table 21. These coefficients give the partial effect on the log odds of bail being granted, holding constant all other factors. A positive coefficient will increase the log odds ratio and therefore increase the probability of bail being granted. A negative coefficient will reduce the log odds ratio thereby also reducing the probability of bail being granted.

Six models were estimated. The first of these, Model 1 shown in Table 21 Column 2, has only the socio-economic variables of *age*, *gender* and *Aboriginality* as predictors. The coefficient for the *Aboriginality* variable is negative suggesting that the probability of being granted bail

is lower for Aboriginal defendants relative to non-Aboriginal defendants. However, this regressor is not significant at the 5% significance level.

In Model 1, the *gender* variable has a negative coefficient suggesting that females are less likely to be granted bail than males. This result is significant at the 5% significance level. The coefficients of the *age* variables are all positive except for youngest age group (11 - 12 years). Thus, relative to the oldest age group (48 - 77 years), defendants in other age categories are more likely to be granted bail. Defendants aged 11 or 12 years are less likely to be granted bail relative to defendants aged 48 to 77 years. The only coefficient to be significant at the 5% significance level is the age group 13 to 17 years. The constant in this model is only significant at the 10% significance level. Model 1 has little explanatory power (Nagelkerke  $R^2$  is 3.4%).

The second model shown in Table 21, Column 3, has only the aggregate comment variables *any defence argument*, *any prosecution argument* and *any magistrate reason* as predictors. All of these have coefficients that are significant at the 5% significance level. For cases in which some comment was made by the defendant (defence lawyer), the estimated coefficient of 0.782 indicates that the granting of bail in the presence of such comment is 218.58% ( $e^{0.782} \times 100$ ) of the odds of bail being granted when no such comments are made. Moreover, the partial effect of defence comment on the probability of bail being granted is 0.1908  $\{=0.782(1 - 0.577)(0.577)\}$  or 19.08%.

For cases in which some comment was made by the prosecutor, the estimated coefficient of 0.430 in Model 2 indicates that the granting of bail in the presence of such comment is 153.73% ( $e^{0.430} \times 100$ ) of the odds of bail being granted when no such comments are made. Moreover, the partial effect of prosecutor comment on the probability of bail being granted is 10.50%.

For cases in which magistrates provided reasons for the bail decision, the estimated coefficient of -0.780 in Model 2 indicates that the granting of bail in the presence of such reasons is 45.84% ( $e^{-0.780} \times 100$ ) of the odds of bail being granted when no such reasons are provided. Moreover, the partial effect of magistrate reasons on the probability of bail being granted is -19.04%.

However, Model 2 also has little explanatory power (Nagelkerke  $R^2$  is 7.3%). This suggests that there are other predictors than the aggregate argument and reason variables used in this model that may better explain the bail decision.

**Table 21: Potential Determinants for the Granting of Bail: Multivariate Analysis using Logistic Regression**

Variables	Model 1 <sup>1</sup> All Courts <i>N</i> = 631	Model 2 <sup>2</sup> All Courts <i>N</i> = 631	Model 3 <sup>3</sup> All Courts <i>N</i> = 631	Model 4 <sup>4</sup> All Courts <i>N</i> = 593	Model 5 <sup>5</sup> Children's Court <i>N</i> = 63	Model 6 <sup>6</sup> Adult Courts <i>N</i> = 542
Any defence argument	n.a.	0.782*	n.a.	0.509	n.a.	0.734*
Any prosecution argument	n.a.	0.430*	n.a.	0.152	n.a.	0.046
Any magistrate reason	n.a.	-0.780*	n.a.	-0.849*	-0.903	-0.921*
Female	-0.553*	n.a.	n.a.	-0.122	n.a.	-0.133
Aboriginal	-0.250	n.a.	n.a.	-0.290	n.a.	-0.257
11 to 12 years	-0.072	n.a.	n.a.	-1.702	n.a.	n.a.
13 to 17 years	0.915*	n.a.	n.a.	0.576	n.a.	n.a.
18 to 22 years	0.276	n.a.	n.a.	0.536	n.a.	0.475
23 to 27 years	0.164	n.a.	n.a.	0.686	n.a.	0.659
28 to 32 years	0.109	n.a.	n.a.	0.660	n.a.	0.701
33 to 37 years	0.532	n.a.	n.a.	0.790	n.a.	0.652
38 to 42 years	0.440	n.a.	n.a.	-0.233	n.a.	-0.323
43 to 47 years	0.551	n.a.	n.a.	0.409	n.a.	0.328
48 years and older	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Prior bail	n.a.	n.a.	n.a.	-0.752*	n.a.	-1.060*
On parole	n.a.	n.a.	n.a.	-2.497*	n.a.	-2.541*
On special orders	n.a.	n.a.	n.a.	-0.227	n.a.	-0.152
On other orders	n.a.	n.a.	n.a.	-1.446*	n.a.	-2.154*
Legally represented	n.a.	n.a.	0.646**	1.725*	n.a.	2.021*
No formal bail application	n.a.	n.a.	n.a.	-1.814*	n.a.	-2.319*
Children's Court	n.a.	n.a.	n.a.	1.642	n.a.	n.a.
Breach of bail	n.a.	n.a.	n.a.	0.735*	n.a.	0.681
Schedule 2 offence	n.a.	n.a.	n.a.	-0.557*	-0.762	-0.434
Attending in custody	n.a.	n.a.	n.a.	-4.113*	n.a.	-5.131*
Hearing adjourned for legal advice	n.a.	n.a.	n.a.	0.191	n.a.	0.001
Female magistrate	n.a.	n.a.	n.a.	-0.349	n.a.	-0.368
Number of charges	n.a.	n.a.	n.a.	n.a.	-0.089*	n.a.
2 charges	n.a.	n.a.	n.a.	0.583	n.a.	0.637
3 to 4 charges	n.a.	n.a.	n.a.	-0.059	n.a.	-0.426
5 to 8 charges	n.a.	n.a.	n.a.	-1.017*	n.a.	-1.264*
9 or more charges	n.a.	n.a.	n.a.	-2.065*	n.a.	-1.948*
Married	n.a.	n.a.	n.a.	-0.121	n.a.	n.a.
Bench warrant in place	n.a.	n.a.	n.a.	0.727*	n.a.	0.867*
Prosecutor unopposed to bail	n.a.	n.a.	n.a.	2.858*	n.a.	3.110*
Constant	0.598**	0.035	0.334*	5.961*	2.414*	7.605*
Nagelkerke R <sup>2</sup>	0.034	0.073	0.008	0.638	0.242	0.687

**Notes to Table 21:**

\*  $p \leq 0.05$

\*\*  $p \leq 0.10$

- Model 1 includes only socio-demographic variables as predictors. The benchmark age group is 48 to 77 years.
- Model 2 includes only arguments by the defendant (or lawyer) or the prosecutor and reasons by the magistrate. If the defendant presented any argument then *any defence argument* = 1, else *any defence argument* = 0. If the prosecutor presented any argument then *any prosecution argument* = 1, else *any prosecution argument* = 0. If the magistrate gave reasons then *any magistrate reasons* = 1, else *any magistrate reason* = 0.
- Model 3 includes only a variable for legal representation.
- In addition to variables identified in Models 1, 2 and 3, Model 4 includes other court and offence variables. The benchmark group for existing orders was no or unknown orders. The benchmark group for number of charges is one charge only and the benchmark age group is 48 to 77 years.
- Model 5 was estimated on juvenile defendant cases, following chi-square tests of variables from Model 4 found to be significant at the 5% significance level. Only three variables were found to be significant. Number of charges was entered as a continuous variable rather than the grouped variable in Models 4 and 6. A Model 4 approach was not possible as we only observed 69 first appearances in the Children's Court (63 excluding cases with missing values).
- Model 6 includes only cases heard in the adult courts. Thus the two youngest age groups were excluded together with the court variable (Children's Court) and the variable for marital status (only 1.7% of defendants  $\{n=11\}$  were identified in the database as being married at the time of the bail hearing). Otherwise the model was the same as Model 4. The benchmark age group is 48 to 77 years.

Model 3, shown in Table 21, Column 4, includes *legal representation* as the only predictor variable. The regressor is significant at the 10% significance level. The estimate of 0.646 suggests that the odds of bail being granted, relative to bail not being granted, are 190.79% higher if the defendant has legal representation relative to the odds of being granted bail in the absence of legal representation. The partial effect of legal representation on the decision to grant bail is 15.77%. Model 3 also has little explanatory power (Nagelkerke  $R^2$  less than 1%).

Model 4 is a parsimonious model<sup>23</sup> that includes variables shown in earlier bivariate analyses to make statistically significant individual contributions to bail decisions. The following discussion pertains to the interpretation of those coefficients estimated for Model 4, shown in Table 21, Column 5, to be significant at the 5% significance level.

For cases in which some reason was provided by the magistrate, the estimated coefficient of -0.849 shows that the granting of bail in the presence of such comment is 42.78% of the odds of bail being granted when no such comments are made. In addition, the partial effect of magistrate comment on the probability of bail being granted is -20.72%.

A number of variables have negative coefficients showing that the probability of bail being granted is lower in their presence. These variables are *prior bail*, *on parole*, *on other orders*, *no formal bail application*, *Schedule 2 offence*, *attending in custody*, *5 to 8 charges* and *9 or more charges*.

The odds of being granted bail given there is a prior bail order are 47.14% of the odds of being granted bail if there is no prior bail order. Similarly, the odds of being granted bail relative to being refused bail if there is a prior order for parole or other orders are 8.23% and 23.55% respectively of the odds of being granted bail in the absence of these.

The odds of being granted bail if no formal application for bail is made is 16.30% of the odds of being granted bail if a formal bail application is made. Some of the more common reasons for adjournment without a formal bail application, excluding cases for which there was no reference ( $n = 97$  (40.8%)), are *for legal advice* (17.2%), *for various reports*<sup>24</sup> (5.5%) and *for mention* (23.1%). For cases in which formal applications were made, adjournments, excluding

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<sup>23</sup> An attempt was made to estimate a logit model of the bail decision that included all variables, irrespective of either the results of earlier bivariate analyses or hypotheses in the literature. Many of the regressors contained in this *kitchen sink* model had coefficients that were very small and statistically insignificant. We therefore did not proceed with this model. The parsimonious model (Model 4) excluded such regressors.

<sup>24</sup> These reports may be psychological, pre-sentence and Juvenile Justice Team.

*no reference* cases ( $n = 158$  (41.8%)), are *for legal advice* (23.3%), *for various reports* (3.7%) and *for mention* (19.8%).

The odds of being granted bail if the defendant has at least one Schedule 2 offence is 57.29% of the odds of being granted bail if the defendant is not facing any Schedule 2 offences. The odds of being granted bail if the defendant attends the bail hearing in custody is 1.64% of the odds of being granted bail if the defendant is on summons or has received police bail. The odds of being granted bail for 5 to 8 offences and 9 or more offences are 36.17% and 12.68% respectively of the odds of being granted bail for lesser numbers of offences.

Four variables have positive coefficients. These are *legally represented*, *breach of bail*, *bench warrant in place* and *prosecutor unopposed to bail*. Thus represented defendants and defendants with a bench warrant or in breach of bail have a higher probability of being granted bail than unrepresented defendants, those without a bench warrant and those who have not breached bail, respectively. Additionally, bail is more likely to be granted if the prosecutor did not oppose it.

The odds of being granted bail when the defendant has legal representation are 561.25% of the odds of being granted bail without legal representation. In addition, the partial effect of legal representation on the probability of bail being granted is 42.11%. Tables 16 and 17 showed that the relationship between legal representation and bail decisions is statistically significant at the 5% significance level.

The odds of being granted bail if a breach of bail has been observed is 208.55% of the odds of being granted bail if no such breach is observed. The partial effect of breach of bail on the probability of being granted bail is 17.94%. The odds of being granted bail if a bench warrant applies is 206.89% of the odds of being granted bail in the absence of a bench warrant. The partial effect of a bench warrant of the probability of being granted bail is 17.75%. The odds of being granted bail relative to not being granted bail if the prosecutor is unopposed to bail. (with or without conditions) is 1742.66% of the odds of being granted bail if the prosecutor is opposed to bail. The partial effect of the prosecutor not opposing bail is 69.76%.

Model 4 has a Nagelkerke  $R^2$  of 63.8% suggesting that nearly two thirds of the variation in the bail decision (granted/not granted) can be explained by variations in the included predictor variables.

Model 5 applies to bail hearings in the Children's Court only ( $n = 63$ ). With so few cases, a model with fewer regressors than Model 4 was appropriate. Chi-square tests shown in Table 22 showed that the continuous variable *number of charges* was significantly different from

**Table 22: Factors Affecting Bail Decisions in the Children's Court ( $N = 69$ )**

Variable	Chi-square	p-value
Age	1.658	0.437 <sup>1</sup>
Bench warrant in place	0.409	0.522
Breach of bail	0.105	0.746
Formal bail application	0.696	0.404
Any defence argument	0.773	0.379
Female magistrate	0.025	0.873
Any magistrate reason	3.382	0.066**
Any order	5.111	0.164 <sup>1</sup>
Prior bail	1.602	0.206
Any prosecutor argument	0.006	0.939
Prosecutor unopposed to bail	2.288	0.130 <sup>1</sup>
Attending in custody	0.788	0.375 <sup>1</sup>
Female	0.591	0.442
Number of charges (grouped)	17.112	0.002* <sup>1</sup>
Number of charges (ungrouped)	26.529	0.022*
Aboriginal	0.029	0.864
Schedule 2 offence	3.593	0.058**
Significant person in attendance	6.055	0.301 <sup>1</sup>

**Notes to Table 22:**

\*  $p \leq 0.05$

\*\*  $p \leq 0.10$

1. Low expected cell counts suggest caution with interpretation of chi-square results.

zero at the 5% significance level in relation to the bail decision. The variables *any magistrate reason* and *Schedule 2 offence* were significant at the 10% level. Thus three variables were included in Model 5<sup>25</sup>. In the logistic regression model, only the variable *number of charges* had a coefficient that was significant at the 5% significance level. This coefficient of -0.089, suggests that the greater the number of charges the less likely is bail to be granted. Model 5's explanatory power is, however, poor with a Nagelkerke  $R^2$  of 24.2%.

Model 6 is shown in Table 21 Column 7. This model explains 68.7% of the variation in the bail decision. Only defendants appearing in adult courts ( $n = 542$ ) were included in the estimation of this model. Model 6 differs from Model 4 in that the variables for young ages (11 to 12 years and 13 to 17 years) are excluded from the former model. For both models the

<sup>25</sup> Legal representation was not included in Model 5. The dichotomous legal representation variable could not be used as 100% of the Children's Court cases had representation, and the sample was not large enough to include various types of legal representation.



age group '48 years and older' is the benchmark group. In addition the variables 'Children's Court' and 'Married' are also excluded from Model 6.

All but one of the regressors in Model 6 are similar in size, magnitude and significance to those in Model 4. This corresponds to the variables *any defence argument*. In Model 6, the coefficient of the variable *any defence argument* is significant at the 5% significance level compared with being insignificant in Model 4. The variables *breach of bail* and *Schedule 2 offence* have coefficients that are significant in Model 4 but insignificant in Model 6.

In summary, Model 6 suggests that bail is *less* likely to be granted if:

- Reasons are given by the magistrate,
- Orders apply (prior bail, parole and other orders),
- No formal bail application is made,
- The defendant is attending the bail hearing in custody, and/or
- There are a large number of charges.

Bail is *more* likely to be granted if:

- The defendant has legal representation,
- Any arguments are made by the defence,
- The defendant has a bench warrant in place, and/or
- The prosecutor is unopposed to bail (with or without conditions).

## 7. Summary and conclusions

The primary aim of this study was to examine the relationship between legal representation and bail decision-making within the criminal justice system in WA. In doing so it was necessary to "rule out" a number of other factors and this process provided the opportunity to test whether some of the factors mentioned in the introduction have an independent effect on bail decision-making. The data available also provided a valuable *snapshot* of bail decision-making in the Courts of Petty Sessions and the Children's Court.

### Difficulties

We experienced a number of difficulties in the course of this research project of which the following three are the most important. First, the ambit of the study was restricted by the fact that the team was not permitted to interview the defendants, their families or legal representatives, nor did the team have access to the defendants' criminal records. This meant that it is difficult to compare our findings with that of, for example, Morgan and Hendersen (1998), but on the other hand it does mean that our data reflect very accurately the data the magistrates usually had available. Second, the number of bail considerations was notably fewer than we anticipated. Our data do not allow us to make any conclusions in this regard, but it appears as if the number of cases where police bail had been granted was much higher than we were led to believe would be the case. This meant that data collection progressed much more slowly than we anticipated would be the case. Third, as a result of changes in the staff of the Department of Justice during the planning and implementation stage, the data collection was delayed. Consequently the planned pilot study was not undertaken and therefore some aspects of the survey instrument did not satisfy encoding or statistical conventions.

### Limitations

The generalisability of the study is restricted by a number of factors. First, the study only collected data in urban courts because of the reasons discussed in the methodology section. Second, while studies based on observations provide a wealth of information, the findings based on data collected in this manner must be dealt with cautiously. For example, Friedland (1965) believes that observers may influence magistrates. This is possible, but given that we used different observers and collected information in a number of courts it is possible that the magistrate may in many instances not even have realised that an observer was present. Observations have also been criticised in "that they do not control for the inter-correlations that may exist between variables either at the design or the analysis stage of research. This means that the effect of one variable ... cannot be discerned independently of the effect of another variable ..." (Dhami & Ayton, 2001, pp. 145-146). To address this problem we used

a multivariate technique of multiple linear regression, though we are aware of the argument that human (magistrate) decision-making is unlikely to be the product of a “linear, compensatory integration of multiple cues that are weighted optimally” (Brehmer & Brehmer, 1988, cited in Dhimi & Ayton, 2001, p. 147). Despite these limitations the study still produced very valuable findings.

#### Data collection

For a period of 138 court days during the latter part of 2001 three trained observers attended seven different courts in Perth and its suburbs to observe the first appearances of 648 defendants. Observations were recorded on a survey form and private lists obtained from court staff also provided data. When the data was coded and captured on the data set no identification data were recorded to ensure privacy of the defendants. However, charge numbers and remand dates were recorded to allow use of the collected data during a possible future study that examines the outcome in cases where defendants remained in custody on remand compared to those remanded on bail.

The distribution of observation days in the different courts is comparable with the distribution of charges in these courts, except for East Perth Court and the Children’s Court that had special targets in terms of the number of first appearances observed. As explained in Section 5.2 our sample can therefore be regarded as fairly representative of urban Courts of Petty Sessions in WA in respect of first appearances. The highest percentage of first appearances was observed in the Central Law Courts (39%), followed by the East Perth Court (33%) and various suburban courts (17%). Cases in the Children’s Court represented 11% of the observed first appearances.

#### Demographics of defendants

The ages of the defendants involved ranged from 11 to 72, with about two thirds aged between 18 and 32 years. As expected the vast majority of defendants were male (81%), but a noticeably smaller percentage of the juveniles were male (70%). Another notable difference between the juvenile and adults samples was in respect of Aboriginality where only 24% of adult defendants compared to 48% of juvenile defendants were Aboriginal.

#### Particulars of cases involved

While about 6% of the defendants attended court on a summons or notice, most were in custody when they first appeared and about 32% had been arrested on a bench warrant. Defendants were charged with offences ranging from murder to noncompliance with an order

to report to the JJ Team. About half of the offences were either property or violent offences. Slightly more than a quarter had only one charge against them, with the maximum number of charges 65. About 45% were charged for at least one serious (Schedule 2) offence. In about 52% of cases there were also other orders such as a prior bail, parole and conditional orders that may have influenced the bail decision. In respect of Children's Court cases, the presence of a responsible person was recorded for about half of the defendants.

Given the concerns about defendant reoffending while on bail (Hucklesby & Marshall, 2000; Morgan & Henderson, 1998) it is interesting to note that 24% of the defendants reoffended while they were on bail for another offence, this is at the higher end of the range reported by Morgan and Henderson. In comparison only about 5% of the defendants had reoffended while on parole.

### Bail

About 58% of adult defendants in this study were granted bail, while this was the case for 72% of juveniles. Given the differential treatment of juveniles and adults in the Bail Act (1982) it came as no surprise that relatively more juveniles were granted bail than adults were, and this is appropriate given their age and lack of maturity (Scott & Grisso, 1998). The percentage of bail granted ranged from about 50% in the Armadale and Central Law Courts to about 73% in the Fremantle Court. Our data do not help us explain this wide range but it is notable that 26% of defendants who attended bail hearings at the Fremantle Court, were unrepresented compared with 7% overall. This suggests that the defendants in the Fremantle Court may differ from those in the other courts.

The results of the chi-square test indicate that bail was more likely for defendants who made a formal application. Overall 74% of defendants who were granted bail had made a formal application while only 44% of defendants who were refused bail had formally applied. Bail was mostly considered after an application by or on behalf of the defendant (61%), but in some cases after it was mentioned by the prosecutor (1%) or magistrate (9%). Bail was granted in 5% of first hearings without being mentioned by anybody other than the magistrate while making the final order. A concern is that at 12% of first hearings, defendants were remanded in custody without bail being debated or discussed in court<sup>26</sup>.

Where bail was refused the time (in days) for which the case was remanded was significantly less than when bail was granted (14 versus 20 days). An amount of bail for forfeiture was

stipulated for 272 of the 374 defendants who were granted bail. The modal amount of bail for adults was \$1000. This finding that \$1000 was stipulated in 37% of the cases where an amount was fixed for adults does raise the question whether the amount of bail stipulated bears any relationship to the financial ability of defendants to pay bail. On the face of it, it appears as if little judicial discretion is exercised in this respect (also see Friedland, 1965). Surety was stipulated for 176 of the 374 defendants who were granted bail and the modal amount of surety was also \$1000. In most instances surety was only stipulated when an amount of bail for forfeiture was set, and the bail and surety amounts were usually the same. Payment of an amount of money was therefore required in 72.7% cases, and if surety is also taken into account money was involved in 74.6% of instances. While this appears to be a high percentage it is probably, as was explained in the results section, a conservative estimate. It was beyond our study to determine how many defendants actually were able to raise the bail amount and or the necessary surety, but this would be possible in a future study.

The fact that those apprehended *on a bench warrant*, or because they had *breached bail*, were significantly more likely to have bail granted was a surprise. Regarding the breach of bail it is possible that the relevant defendants were able to present plausible explanations for the relevant breach. However, we cannot explain why those who had been apprehended on a bench warrant were more likely to have bail granted. As expected, the existence of *another order*, or being charged with a *Schedule 2 offence* significantly *decreased* the likelihood of bail being granted, while attending the bail hearing on *police bail*<sup>27</sup> or *summons* significantly *increased* the likelihood of bail.

#### Legal representation

Contrary to Barry (1997) we found that all the juveniles and 92% of the adults in this study had some form of legal representation, mostly provided by the ALS or YLS in the case of juveniles and duty lawyers in the case of adults. The likelihood of legal representation was significantly lower for defendants attending court *on a summons or notice*. The reason for this may be because these matters are often of a less serious nature, or because the defendants

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<sup>26</sup> About 9% of defendants in King's (1973) sample were detained without any discussion of bail having taken place in court.

<sup>27</sup> All ten instances of police bail were renewed. However, this finding should be interpreted with great caution as it was not an aim of this study to examine this aspect and the research assistants recorded these instances in error. Nevertheless this appears to tentatively confirm the findings of researchers in other jurisdictions that magistrates seldom interfere with police bail (Bottomley, 1970; Hucklesby, 1996; King, 1973; Konecni & Ebbesen, 1984, Morgan & Henderson, 1998; Petee, 1994).

anticipated that the case would be remanded to a later date for a hearing. We cannot explain the finding that defendants in the Fremantle Court were less likely to be represented than in the other Courts of Petty Sessions. However, we suspect that there may be fewer duty lawyers available at this court, but our data do not allow us to examine this possibility. It is notable that only slightly more than one fifth of the adults and less than a fifth of the children employed a private lawyer. Our data do not allow us to express an opinion about the quality of the legal advice the defendants received.

Notably more (65% versus 14%) of represented defendants applied for bail. However, unrepresented defendants were more likely to be granted bail at their first appearance than represented defendants. A possible explanation for this is that less serious offences for which defendants believe they do not require legal representation, are also the types of offence where bail is more likely to be granted. For represented defendants the ratio of number of defendants with formal applications for bail, to the number of those without formal bail applications, did not differ as a function of Aboriginality, but unrepresented Aboriginal defendants were much more likely to bring a formal bail application than unrepresented non-Aboriginal defendants.

#### Defence and prosecutor arguments

In the majority (60%) of cases there was an argument by the defendant in respect of bail, but arguments were significantly more likely to be submitted on behalf of represented defendants. Interestingly 50% of those who submitted an argument were granted bail while two thirds of those who did not submit an argument were granted bail. A possible explanation is that bail is routinely given for certain less serious offences and that defendants and their representatives know this and therefore do not consider it necessary to argue the matter. An alternative explanation is that bail was arranged prior to the hearing and that the defendant did not consider it necessary to submit arguments in support of bail.

The affirmative frequencies were low for certain arguments of the defence and the chi-square results should therefore be interpreted with caution. However, as expected, the likelihood of bail being granted, is significantly higher when the defendant argues that the *offence is not serious* and that the defendant will be *able to obtain a surety*. These factors are mentioned in clause 3(a) and 3(b) of the Bail Act (1982) respectively. The likelihood of bail being granted is significantly lower when the defence argument includes that the defendant was *under the influence of drugs, exceptional circumstances* or *other comments*, but the arguments in the latter two categories are so diverse that no inference can be made in this regard. Defendants

and their legal representatives often addressed extra-legal factors, i.e. factors not mentioned in the Bail Act (1982), during their arguments.

The prosecutor was opposed to bail in 60% of cases and those defendants were less likely to be granted bail. The prosecutor submitted arguments in 54% of cases and contrary to the defendant arguments they generally addressed legal factors, i.e. factors mentioned in the Bail Act (1982). The affirmative frequencies were low for certain arguments and therefore the chi-square results should also be interpreted with caution. Nevertheless, the likelihood of bail is significantly lower when the prosecutor argues that the *outstanding offences are serious or numerous* (clause 3(b)), that there is a *risk of reoffending* (clause 1(a)(ii)) and, or, that the defendant had *an existing order*. It is also notable that, as in Canada (see Kellough & Wortley, 2002), defendants are significantly less likely to be granted bail when the prosecutor argues that the *defendant's character is poor* (also see clause 3(b)). A possible explanation for the significant association between *no argument* by the prosecutor and the refusal of bail may be that the prosecutor anticipates that the magistrate will not grant bail and therefore does not consider it necessary to submit an argument.

#### Magistrate reasons for bail decision

Magistrates provided reasons in 43% of cases but as the affirmative frequencies were low for certain reasons offered by magistrates for the bail decision, the chi-square results should be interpreted with caution. However, the likelihood of bail is significantly lower if the reasons magistrates provide for their decisions include any of the following: *the likelihood of reoffending; violation of existing orders; seriousness of the offence; breach of bail in the past*, that the defendant was a *drug user* and *other comments*. The *other comments* are so diverse that no inference can be made about them. As can be expected, and is predicted by research in other jurisdictions (see for example Hucklesby, 1996; Konecni & Ebbesen, 1984; Morgan & Henderson, 1998), most of these reasons are in accordance with the provisions of the Bail Act (1982) and magistrates were significantly more likely to give reasons when refusing bail.

#### Multivariate results

If the multivariate results are considered, bail decisions appear to be significantly related to a number of factors. Regressors that were significant include *gender* and *age* (Model 1); any *argument* by defence or prosecutor and any *reasons provided by magistrate* (Model 2); and *legal representation* (Model 3) but these models had little explanatory power. Model 4 included all the variables used in Models 1, 2 and 3 as well as a number of additional variables, and explained 63.8% of the variation in the bail decision. Model 4 suggests that bail is significantly *less* likely to be granted if any *reasons are given by the magistrate; orders*

*apply* (prior bail, parole and other orders); *no formal bail application* is made, the charge is a *Schedule 2 offence*; the defendant is *attending the bail hearing in custody*; and/or there are a *large number of charges*. All these factors are in accordance with our expectations.

Model 4 also suggests that bail is significantly *more* likely to be granted if the defendant has *legal representation*; is *in breach of bail*; has a *bench warrant in place*; and/or the *prosecutor is unopposed to bail*. The fact that those apprehended on a *bench warrant*, or because they had *breached bail*, were significantly more likely to have bail granted, was a surprise. As explained above a possible reason for the finding in respect of the *breach of bail* is that the relevant defendants may have presented plausible explanations for the breaches.

Most of the significant regressors identified in Model 4 were also significant in the bivariate analyses of factors that are associated with the bail decision. However, while, the significant chi-square results indicate that bail was more likely for *unrepresented defendants*, the significant findings in Model 4 suggest that bail is more likely if the defendant has *legal representation*, when differences in other factors such as the number of charges or the presence of a Schedule 2 offence are taken into account. Furthermore, the significant chi-square results indicate that bail was less likely when the prosecutor has *no arguments*, while this variable was not significant in Model 4, when differences in other factors are taken into account. While the ANOVA results did not show a significant difference in the *number of charges* of defendants who were granted and refused bail, Model 4 suggests that when differences in other factors are taken into account, bail is less likely when there are a large number of charges.

The results of Model 6 (based on adults only, and excluding some of the variables used in Model 4 that are related to children) are very similar to that of Model 4, but there are differences. Any *defence argument* was a significant regressor in Model 6, and bail was *more* likely to be granted in the presence of any defence argument, while it was not significant in Model 4. *Defence argument* is therefore more likely to be associated with bail being granted in the case of adults than in the case of children. The variables *breach of bail* and *Schedule 2 offence* had coefficients that were significant in Model 4 but not significant in Model 6, although the size and magnitude of the coefficients were fairly similar. Bail was more likely to be granted when there was a *breach of bail*, and less likely to be granted if a defendant was charged with a *Schedule 2 offence*. We are not able to offer any plausible explanation for the differences between Models 4 and 6.



The chi-square tests for the Children's Court cases, indicate that the bail decision was significantly associated with the *number of charges* at the 5% significance level, and presence of *magistrate reasons* and *Schedule 2 offences* at the 10% significance level. Only the variable *number of charges* had a coefficient that was significant at the 5% significance level in the Children's Court model (Model 5). However, this Model had little explanatory power. The low number of defendants in the Children's Court sample meant that there was less rigour in the analysis, and this may have contributed to the lack of useful results. The variables examined in this study were influenced by the literature on bail decision-making in adult cases, and it is possible that other variables, not investigated in this study, influence the bail decision in Children's Court cases. Future research about the bail decision in the Children's Court should thus employ a larger sample that will allow the construction of a model based on more variables.

It is notable that personal characteristics of the defendant identified in the literature as predictors of bail, such as age (Barry, 1997; Morgan & Henderson, 1998) and gender (Bernat, 1984; Bottoms & McClean, 1976; Hucklesby, 1996; Kruttschnitt, 1984; Steury & Frank, 1990) were not identified as significant predictors for bail decisions in adult courts. Nor were we able to confirm Barry's (1997) finding of an association between Aboriginality and being remanded in custody in her study of offenders with non-custodial sentences. In contrast, factors mentioned in the Bail Act (1982), such as a large *number of charges* and *other orders* made a significant contribution to bail decision-making.

In conclusion, this study found that the majority of adult offenders and all juvenile offenders had legal representation, more represented defendants applied for bail and they were, based on the multivariate analyses, more likely to be granted bail than unrepresented defendants. Like Bernat (1984) we therefore found that legal representation was a significant predictor of bail. Unrepresented Aboriginal offenders were more likely to bring a formal bail application but the multivariate results demonstrate that Aboriginality does not predict whether a defendant will be granted bail or not.

This study confirms the finding of other researchers (Bottomley, 1970; Hucklesby, 1996; King, 1973; Konecni & Ebbesen, 1984, Morgan & Henderson, 1998; Petee, 1994) that the stance of the prosecutors is, independent from other factors, strongly predictive of judicial bail decisions.

Overall, most of the legal factors (i.e. those mentioned in the Bail Act 1982) that could be expected to be related to the bail decision, for example the number of charges, were

significant in the prediction of bail for adults. In contrast none of the extra-legal factors (for example gender and Aboriginality made) a significant contribution to the bail decision for adults. This suggests that magistrates are generally guided by legal rather than extra-legal considerations when making bail decisions in respect of adult defendants.

The multivariate results do not provide much information about bail decision-making for juveniles, but the fact that a high percentage (72%) of them were granted bail, is in concordance with the Bail Act (1982), that gives children qualified right to bail.

Though this project provided valuable information, it does provide a limited perspective of bail practices in WA as it was beyond the scope of the study to examine whether defendants were able to meet the bail conditions and what the outcomes of their cases were. However, as was mentioned earlier, the data collected provide a foundation for a future study to investigate these factors. Ideally the police practice in this area should also be examined in future.

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## APPENDICES

### A. Encoding guidelines

These guidelines were supplied to the encoders<sup>28</sup> to aid in the choosing of variable values to be input to the data file. There is no record of whether these guidelines were strictly followed.

1. Where a defendant is charged with a breach of bail all the outstanding offences (for which bail was originally given) are entered in the data file. Thus the categories of type of offence and number of offences include the original offences. The rationale behind this is that the magistrate will again consider the original offences (i.e. why bail originally granted) in determining whether to grant fresh bail. This also applied in the presence of a bench warrant.
2. Where two or more offences fall under the same category then only the most serious (a subjective decision) will be entered. The number of offences variable NO.CHARG will reflect this.<sup>29</sup>
3. Only the *first* Charge Number from the Private List is encoded (CHARGENO).
4. All situations where a bail application *could be* made are recorded. Some cases are not, however, clear. For example, a sentenced prisoner may or may not apply for bail depending on the term of imprisonment and when he is eligible for parole. The term of imprisonment is usually not referred to and it seems that the magistrate has that information before him in writing. Many cases were labelled 'no bail application' by the research assistant but had bail decisions recorded also. Hence, unless a completed survey was crossed through by the research assistant, all completed surveys were encoded.
5. The variable DEFARGU was not reliably encoded. The main reason for this is that this variable precedes the individual argument or information from the defendant/defence counsel on the survey form. Hence, 'no defence argument' might be ticked on the survey form when there is subsequent information pertaining to such argument. This was supposed to be picked up at the encoding stage, with the DEFARGU variable revised, if necessary, on the basis of the subsequent information. There is no certainty that this was achieved for all cases. DEFARGU excludes comment on the defendant's financial position (e.g. can get a surety) or employment/unemployment status as these relate to the ability to meet bail conditions rather than argument for bail.

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<sup>28</sup> Some of the guidelines have been supplemented with information arising from the data encoding.

<sup>29</sup> This results in a loss of information. With hindsight we realise this could have been avoided if we had used a series of variables for each offence code, together with a number of offences under each code. The offence codes indicated on the private lists could have been used for this purpose.



6. The magistrate sometimes *splits* bail. For example, a defendant may plead guilty to certain charges but not others, and all may be referred to District Court for sentencing for mention. Here the *total* bail/surety (BAILMON and SURETMON) is entered in the data file.
7. The defence argument variable DUNAWARE usually occurs in cases where bail has been breached and the defendant states he/she was unaware/forgot/got confused as to appearance date or did attend but was told to go away/thought counsel alone could appear, etc.
8. The variable WAITTIME was constructed manually from the number of days between the date of the hearing and the adjournment date given at the conclusion of the hearing.
9. The variable DEFAGE was constructed manually from the year difference between the date of the hearing (DATE) and the defendant's date of birth (REPDOB).
10. The variable SCHD2 was encoded on the basis of matching the offence codes on the private list with a list of Schedule 2 offences.
11. The variables CUSTODY and BAILORD were encoded from the survey instrument. There is some indication that the former might not have been reliably observed or encoded as some inconsistencies were apparent in the analyses. BAILORD was thus used as the more reliable of the two bail application outcome variables.

**B. Survey instrument**

Day/date	Court	Surname of Magistrate	Family Name, Initials, of Defendant	Initials of Research Assistant
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**1. Type of legal representation**

- None  1  
 ALS  2  
 Paralegal  3  
 Legal Aid  4  
 Duty Lawyer  5  
 Youth Legal Service  7  
 Private  8  
 Other (including sacking lawyer)  9

Remarks....

**2. Status of offender on arrival at court**

- In custody  1  
 Police bail  2  
 On Summons/Notice  3

**3. Offender before Court on a Bench Warrant**

- yes  1

**4. Charges (see attached)**

Most serious offence – specify....

**5. Other offences awaiting trial (only if raised)**No. of charges 

- Yes  1  
 No  2

**6. Age/date of birth****7. Race**

- |                 | Obs                      | Conf                     |
|-----------------|--------------------------|--------------------------|
| Aborigine       | <input type="checkbox"/> | <input type="checkbox"/> |
| Non - Aborigine | <input type="checkbox"/> | <input type="checkbox"/> |
- 1  
2

**8. Interpreter**

- Interpreter present  1  
 Defendant requests interpreter  1  
 Magistrate/Prosecutor mentions interpreter  1  
 Other language specify...

**9. Gender**

- Male  1  
 Female  2  
 Unknown  3

**10. Observed physical or mental disability?**

- observed  1

Defence lawyer raises  2  
 Magistrate raises  3

Specify....

**11. Marital Status**

No reference  1  
 Single  2  
 Married  3  
 Divorced  4  
 Separated  5  
 De facto  6  
 7

Other - specify .....

**12. Children's Court - Responsible person available?**

yes  1  
 no  2

**13. Children's Court – Ward of Court?**

yes  1  
 no  2

**14. Previous Convictions (only if raised)**

yes  1  
 no  2  
 No reference  3

Comment (e.g. extensive)...

**15. Other orders (e.g. on parole, bail, ISO, CBO, etc)**  
 Specify...

**16. Bail Application:**

Formal Application for Bail Made	<input type="checkbox"/>	1
No Formal Bail Application Made by Defendant	<input type="checkbox"/>	2
No Formal Application but Mentioned by Prosecutor	<input type="checkbox"/>	3
Magistrate raises	<input type="checkbox"/>	4
Application withdrawn	<input type="checkbox"/>	5

**17. Defendant's argument for bail**

	No Argument	<input type="checkbox"/>
	Offence not serious	<input type="checkbox"/>
	No previous convictions	<input type="checkbox"/>
	No similar convictions	<input type="checkbox"/>
	No other recent offences	<input type="checkbox"/>
	Was not aware unlawful	<input type="checkbox"/>
	An abused child/spouse	<input type="checkbox"/>
	Poor health/Disabled	<input type="checkbox"/>
Specify....	Under influence of drugs	<input type="checkbox"/>
	Under influence of alcohol	<input type="checkbox"/>
	Under influence of peers	<input type="checkbox"/>
	Is having anger management	<input type="checkbox"/>
Requiring/Undergoing Medical/Drug/Alcohol treatment		<input type="checkbox"/>
Specify...	Has returned to school/TAFE/University	<input type="checkbox"/>
	Defendant cannot meet bail requirements	<input type="checkbox"/>
Financial position :	Can pay bail monies	<input type="checkbox"/>
	Can't pay bail monies	<input type="checkbox"/>
	Can get surety	<input type="checkbox"/>
	Can't get surety	<input type="checkbox"/>
	Can report	<input type="checkbox"/>
	Can't report	<input type="checkbox"/>
	Other	<input type="checkbox"/>
Specify...		
Unemployed:	Looking for work	<input type="checkbox"/>
	Has job interview	<input type="checkbox"/>
	Starting work soon	<input type="checkbox"/>
Benefits:	Disability	<input type="checkbox"/>
	Sickness	<input type="checkbox"/>
	Retired	<input type="checkbox"/>
	Youth allowance/Newstart etc	<input type="checkbox"/>

Employed:

Self-employed	<input type="checkbox"/>
Part time employed	<input type="checkbox"/>
Fulltime employed	<input type="checkbox"/>

Children:

No. of Children. Specify	<input type="checkbox"/>
Age(s) of Children. Specify	<input type="checkbox"/>

Home environment:

poor	<input type="checkbox"/>
good	<input type="checkbox"/>
Lives with mother/father	<input type="checkbox"/>
Lives on own	<input type="checkbox"/>
Other	<input type="checkbox"/>

Specify...

Matters raised as Exceptional Circumstances (i.e whilst on bail for other offences; on parole)  <sup>9</sup>

Specify...

**Order sought** (e.g. for legal advice, Drug Court, elect District Court):

**18. Defendant's Comments:**

**19. Prosecutor's Position**

Bail Opposed	<input type="checkbox"/>	1
Bail unopposed	<input type="checkbox"/>	2
Bail Unopposed but Conditions	<input type="checkbox"/>	3
Specify Conditions...		

**20. Prosecutor's Recommendations:**

Release on Undertaking or Responsible adult undertaking:	<input type="checkbox"/>	1
Bail	<input type="checkbox"/>	2
Specify amount of forfeiture	\$	
Surety/Surety undertaking	<input type="checkbox"/>	3
Specify amount of any surety money	\$	
Bail Hostel	<input type="checkbox"/>	4
Curfew	<input type="checkbox"/>	5
Bail terms incorporate restraining order conditions	<input type="checkbox"/>	6
Bail terms with reporting conditions	<input type="checkbox"/>	7
Other Special Conditions	<input type="checkbox"/>	8
Specify .....		

**21. Factors Prosecutor refers to:**

Seriousness of offence	<input type="checkbox"/>
Number of offences	<input type="checkbox"/>
Seriousness or number of outstanding offences	<input type="checkbox"/>
Character of Defendant	<input type="checkbox"/>
Specify character...	
Previous Convictions	<input type="checkbox"/>
Antecedents or Associations	<input type="checkbox"/>
Specify antecedents/associations...	
Home environment	<input type="checkbox"/>
Specify home environment.....	
Background	<input type="checkbox"/>
Specify background...	
Place of residence:	
No fixed abode	<input type="checkbox"/>
Temporary WA residence	<input type="checkbox"/>
Interstate	<input type="checkbox"/>
Foreign	<input type="checkbox"/>
Financial Position	<input type="checkbox"/>
Specify financial position..	
Previous Grants of Bail	
Non Compliance	<input type="checkbox"/>
Partial Compliance	<input type="checkbox"/>
Strength of Evidence	<input type="checkbox"/>

Specify dependants... Dependents

Specify existing orders..... Existing orders (e.g. on Parole)

May fail to appear in court in accordance with bail undertaking   
A likelihood of reoffending   
May interfere with witnesses   
May obstruct the course of justice/interfere with police investigation   
Own protection   
Safety of complainant   
May endanger the safety , welfare or property of any person (excl. complainant)

Specify.....

Premeditated   
Other

Specify .....

**22. Prosecutor's Comments:**

***Bail Decision*** (Date:                    /                    /01)

**23. The Magistrate had regard to the following** (Sch 1,PartC.3):

	Seriousness of offence	<input type="checkbox"/>
	Number of offences	<input type="checkbox"/>
	Seriousness or number of outstanding offences	<input type="checkbox"/>
	Character of Defendant	<input type="checkbox"/>
	Specify character.....	
	Previous Convictions	<input type="checkbox"/>
	Comments (e.g. extensive)....	
	Antecedents or Associations	<input type="checkbox"/>
	Specify antecedents/associations....	
	Home environment	<input type="checkbox"/>
	Specify home environment.....	
	Background	<input type="checkbox"/>
Place of residence:	W A	<input type="checkbox"/>
	No fixed abode	<input type="checkbox"/>
	Interstate	<input type="checkbox"/>
	Foreign	<input type="checkbox"/>
	Financial Position	<input type="checkbox"/>
	Specify financial position.....	
Previous Grants of Bail		
	Non Compliance	<input type="checkbox"/>
	Partial Compliance	<input type="checkbox"/>
	Strength of Evidence	<input type="checkbox"/>
	Dependents	<input type="checkbox"/>
	Specify dependants .....	
	Violation existing orders (e.g. already on parole)	<input type="checkbox"/>
	Specify existing orders violated.....	
	May fail to appear in court in accordance with bail undertaking	<input type="checkbox"/>
	A likelihood of reoffending	<input type="checkbox"/>
	May interfere with witnesses	<input type="checkbox"/>
May obstruct the course of justice/interfere with police investigation		<input type="checkbox"/>
	Own protection	<input type="checkbox"/>
	Safety of complainant	<input type="checkbox"/>
May endanger the safety , welfare or property of any person (excl. complainant)		<input type="checkbox"/>
	Specify....	
	Premeditated	<input type="checkbox"/>
	other	<input type="checkbox"/>
	Specify other...	



**24. Magistrate's Comments:**

**25. Remand :**

Date remanded to:

- In custody
- For mention
- For legal advice
- For pre-sentence report
- For sentencing
- For hearing
- Another magistrate
- Drug Court
- Superior Court (District or Supreme)
- Hospital order
- Other

Specify...

**26. Bail Order**

- No bail application/ application withdrawn  1
- Bail refused  2
- Bail granted  3
- (Police)Bail renewed  4

Conditions:

- Bail monies and undertaking  1
- Specify amount of forfeiture \$
- Surety/Surety undertaking  2
- Specify amount of any surety money \$
- Release on Undertaking or Responsible adult undertaking only  3
- Bail Hostel  4
- Reporting conditions  5
- Home Detention Bail  6
- Curfew  7
- Incorporate restraining order conditions  8
- Residential requirements  9
- Aboriginal Community conditions  10
- Treatment  11
- Other Special Conditions  12

Specify special conditions...

**Specific Non-Statutory Factors Governing Grant or Refusal of Bail**

**26. Significant others present and referred to in Court:**

Victim	<input type="checkbox"/>	1
Mother	<input type="checkbox"/>	2
Father	<input type="checkbox"/>	3
spouse/partner	<input type="checkbox"/>	4
children	<input type="checkbox"/>	5
other	<input type="checkbox"/>	6

Specify other....

**27. Significant persons demeanour/attitude to proceedings and /or defendant (if relevant). Specify....**

**28. Magistrate recognises defendant**

<input type="checkbox"/>	1
--------------------------	---

**29. Defendant's Demeanour** (including dress, intoxication, smelly/dirty, personal communications, interrupting, swearing, criticising, arguing, nervousness, ill-health, crying, laughing,, etc.):

(Narration)



**C: Data - variables<sup>1</sup> and valid values**

Variable number	Variable name	Variable	Type of variable	Valid values	Missing value(s)/number of missing cases (N) <sup>2</sup>
1	CASE	Case number	Scale	1 - 928	N = 280
2	DATE	Date of application	Scale	02.06.2001 - 30.11.2001	None missing
3	ADJDATE	Date adjourned to	Scale	05.06.2001 - 06.06.2002	N = 68
4	WAITTIME	Length of adjournment	Scale	0 - 251 days	N = 68
5	REPDOB	Defendant's date of birth	Scale	28.07.1928 - 12.11.1989	N = 26
6	DEFAGE (= DATE - REPDOB)	Defendant's age	Scale	11 - 72 years	N = 26
7	DOW	Day of week	Scale	1 (Sunday) - 7 (Saturday)	None missing
8	RESEACHE	Research Assistant	Nominal	1 - 3	None missing
9	COURT	Court location	Nominal	1 - 8	None missing
10	MAGISTRA	Magistrate	Nominal	1 - 31	None missing
11	LEGALREP	Legal representation	Nominal	1 - 9	99 = Not stated
12	STATUS	Status of defendant	Nominal	1 - 3	9 = Not stated
13	GENDER	Gender of defendant	Nominal	1 - 2	3 = Unknown
14	RACE	Aboriginality	Nominal	1 - 2	3 = Unknown
15	AGE	Adult or Juvenile	Nominal	1 - 2	None missing
16	DOB	Defendant's date of birth	Scale	28.07.1928 - 12.11.1989	N = 26
17	RESPONPE	Responsible person - Children's Court	Nominal	1 - 4	1 = No reference, 2 = Not applicable
18	WARD	Ward of the court - Children's Court	Nominal	1 - 4	1 = No reference, 2 = Not applicable
19	MARITAL	Defendant's marital status	Nominal	1 - 7	1 = No reference
20	BENCHW	Bench Warrant	Nominal	1 - 2	9 = Not stated
21	PRE.ORDE	Other orders	Nominal	1 - 17	1 = No reference
22	SCHD2	Schedule 2 offence	Nominal	1 - 2	9 = Unknown
23	CHARGENO	Charge number	Scale	n.a.	N = 48

24	BREACHBA	Breach of bail	Nominal	1 - 3	1 = No reference
25	INJORDEA	Offences causing serious injury or death	Nominal	1 - 4	1 = No reference
26	RELISSAU	Common assault & offences related to assault	Nominal	1 - 10	1 = No reference
27	SEX	Sexual offences	Nominal	1 - 8	1 = No reference
28	SERIPROP	Property offences involving physical threat	Nominal	1 - 7	1 = No reference
29	OFFPROP	Property offences not involving physical threat	Nominal	1 - 11	1 = No reference
30	DRUGS	Drug offences	Nominal	1 - 8	1 = No reference
31	TYPEDRUG	Type of drug	Nominal	1 - 10	1 = No reference
32	TRAFFIC	Traffic offences	Nominal	1 - 12	1 = No reference
33	SERIOTHR	Other serious offences	Nominal	1 - 10	1 = No reference
34	OTHER	Other less serious offences	Nominal	1 - 36	1 = No reference
35	NO.CHARG	Number of charges	Scale	1 - 65	N = 7
36	OTHEROFF	Other offences waiting trial	Nominal	1 - 3	1 = No reference
37	INTERPRE	Interpreter request	Nominal	1 - 6	1 = No reference
38	DISOBS	Observed physical or mental	Nominal	1 - 2	9 = Unknown
39	DISABILI	Disability - mental or physical	Nominal	3 - 5	1 = No reference
40	APPLICAT	Bail application	Nominal	1 - 5	9 = Unknown
41	DEFARGU	Defendants argument for bail	Nominal	1 - 2	9 = No reference
42	DNOTSERI	Defence argument - present offence not serious	Nominal	1 - 2	1 = No reference
43	DCONVICT	Defence argument - previous convictions	Nominal	1 - 8	1 = No reference
44	DUNAWAR	Defence argument - confused with dates/was not	Nominal	1 - 2	1 = No reference

		aware unlawful			
45	DPORHEAL	Defence argument - poor health/disability/psychiatric - was sick	Nominal	1 - 2	1 = No reference
46	DABUSE	Defence argument - was abused	Nominal	1 - 2	1 = No reference
47	DINFDRUG	Defence argument - under influence of drugs	Nominal	1 - 2	1 = No reference
48	DINFALCO	Defence argument - under influence of alcohol	Nominal	1 - 3	1 = No reference
49	DINFLPEE	Defence argument - under influence of peers	Nominal	1 - 2	1 = No reference
50	DANGERMA	Defence argument - having anger management	Nominal	1 - 2	1 = No reference
51	DTREATME	Defence argument - having/requiring medical/psychiatric, drug or alcohol treatment	Nominal	1 - 2	1 = No reference
52	DTREATYP	Defence argument - type of treatment	Nominal	1 - 4	1 = No treatment
53	DRETSCHO	Defence argument - returned to school/college/university	Nominal	1 - 2	1 = No reference
54	DBAIL	Defence argument - ability to meet bail requirements	Nominal	1 - 3	1 = No reference
55	DSURETY	Defence argument - ability to obtain surety	Nominal	1 - 3	1 = No reference
56	DCOMMUNI	Defence argument - willingness to do CBO	Nominal	1 - 3	1 = No reference
57	DCURFEW	Defence argument - willingness to accept curfew	Nominal	1 - 3	1 = No reference

58	DREPORT	Defence argument - willingness to report	Nominal	1 - 3	1 = No reference
59	DUNEMPLO	Defence argument - unemployed	Nominal	1 - 8	1 = No reference
60	DBENEFIT	Defence argument - benefits	Nominal	1 - 5	1 = No reference
61	DEMPLOYE	Defence argument - employed	Nominal	1 - 7	1 = No reference
62	DCHILDRE	Defence argument - children	Nominal	1 - 3	1 = No reference
63	DNUMCHIL	Defence argument - number of children	Scale	1 - 7	N = 580
64	DAGECH1	Defence argument - age of child 1	Scale	0 - 11	N = 615
65	DAGECH2	Defence argument - age of child 2	Scale	0 - 15	N = 630
66	DAGECH3	Defence argument - age of child 3	Scale	2 - 5	N = 645
67	DAGECH4	Defence argument - age of child 4	Scale	0	N = 648
68	DHOME	Defence argument - home environment	Nominal	1 - 9	1 = No reference
69	DSOLEPAR	Defence argument - sole parent	Nominal	1 - 3	1 = No reference
70	DEXCEPTC	Defence argument - exceptional circumstance	Nominal	1 - 7	1 = No reference
71	DEFCOMM	Defendants' Comment	Nominal	1 - 30	1 = None
72	PROSPOS	Prosecutor's Position	Nominal	1 - 5	1 = No reference
73	PSERIOUS	Prosecutor's position - seriousness of offence	Nominal	1 - 3	1 = No reference

74	PNUMBOFF	Prosecutor's position - number of offences	Nominal	1 - 3	1 = No reference
75	POUTSTOF	Prosecutor's position - seriousness or number of outstanding offences	Nominal	1 - 4	1 = No reference
76	PCHARACT	Prosecutor's position - character of Defendant	Nominal	1 - 3	1 = No reference
77	PPRVCONV	Prosecutor's position - previous convictions	Nominal	1 - 3	1 = No reference
78	PCOMPRVC	Prosecutor's position - comment previous convictions	Nominal	1 - 14	1 = No comment
79	PANTECED	Prosecutor's position - antecedents or associations	Nominal	1 - 5	1 = No reference
80	PHOME	Prosecutor's position - home environment	Nominal	1 - 4	1 = No reference
81	PBACKGRO	Prosecutor's position - background	Nominal	1 - 7	1 = No reference
82	PRESIDEN	Prosecutor's position - residence	Nominal	1 - 5	1 = No reference
83	PFINANCI	Prosecutor's position - financial position	Nominal	1 - 5	1 = No reference
84	PPRVBAIL	Prosecutor's position - previous grants of bail	Nominal	1 - 4	1 = No reference
85	PSTRENGT	Prosecutor's position - strength of evidence	Nominal	1 - 2	1 = No reference
86	PDEPENDE	Prosecutor's position - dependents	Nominal	1 - 8	1 = No reference
87	PEXISTOR	Prosecutor's position - existing orders	Nominal	1 - 10	1 = No reference



88	PFAILAPP	Prosecutor's position - may fail to appear in accordance with bail undertaking	Nominal	1 - 3	1 = No reference
89	PREOFFEN	Prosecutor's position - a likelihood of reoffending	Nominal	1 - 3	1 = No reference
90	PINTERFE	Prosecutor's position - may interfere with witnesses	Nominal	1 - 3	1 = No reference
91	POBSTRUC	May obstruct course of justice/police investigation	Nominal	1 - 3	1 = No reference
92	PPROTECT	Prosecutor's position - for own protection	Nominal	1 - 3	1 = No reference
93	PCOMPSAF	Prosecutor's position - for safety of complainant	Nominal	1 - 3	1 = No reference
94	PENDANGE	Prosecutor's position - may endanger safety, welfare, property of any person	Nominal	1 - 5	1 = No reference
95	PPREMIDI	Prosecutor's position - premeditated	Nominal	1 - 3	1 = No reference
96	PIMPRISO	Likelihood of imprisonment	Nominal	1 - 3	1 = No reference
97	PROSECOM	Prosecutors' comments	Nominal	1 - 19	1 = None
98	PROSECRE	Prosecutors' recommendations	Nominal	1 - 15	1 = No reference
99	MSERIOUS	Magistrate's regard - Seriousness of offence	Nominal	1 - 3	1 = No reference
100	MNUMBOFF	Mag regard - number of offences	Nominal	1 - 3	1 = No reference
101	MOUSTOF	Mag regard - seriousness or number of offences outstanding	Nominal	1 - 4	1 = No reference
102	MCHARACT	Mag regard - character of defendant	Nominal	1 - 3	1 = No reference

103	MPRVCONV	Mag regard - previous convictions	Nominal	1 - 3	1 = No reference
104	MCOMPRVC	Mag regard - comment previous convictions	Nominal	1 - 10	1 = No comments
105	MANTECED	Mag regard - antecedents or associations	Nominal	1 - 6	1 = No reference
106	MHOME	Mag regard - home environment	Nominal	1 - 7	1 = No reference
107	MBACKGRO	Mag regard - background	Nominal	1 - 4	1 = No reference
108	MRESIDEN	Mag regard - residence	Nominal	1 - 6	1 = No reference
109	MFINANCI	Mag regard - financial position	Nominal	1 - 4	1 = No reference
110	MPRVBAIL	Mag regard - previous grants of bail	Nominal	1 - 4	1 = No reference
111	MSTRENGT	Mag regard - strength of evidence	Nominal	1 - 3	1 = No reference
112	MDEPENDE	Mag regard - dependents	Nominal	1 - 8	1 = No reference
113	MVIOLATI	Mag regard - violation of existing order	Nominal	1 - 9	1 = No reference
114	MFAILAPP	Mag regard - may fail to appear in accordance with bail undertaking	Nominal	1 - 3	1 = No reference
115	MREOFFEN	Mag regard - a likelihood of reoffending	Nominal	1 - 3	1 = No reference
116	MINTERFE	Mag regard - may interfere with witnesses	Nominal	1 - 3	1 = No reference
117	MOBSTRUC	Mag regard - may obstruct the course of justice/ police investigation	Nominal	1 - 3	1 = No reference
118	MPROTECT	Mag regard - for own protection	Nominal	1 - 3	1 = No reference

119	MCOMPSAF	Mag regard - for safety of complainant	Nominal	1 - 3	1 = No reference
120	MENDANGE	Mag regard - may endanger safety, welfare, property of any person	Nominal	1 - 5	1 = No reference
121	MPREMEDI	Mag regard - premeditated	Nominal	1 - 3	1 = No reference
122	MIMPRISO	Likelihood/real possibility of imprisonment	Nominal	1 - 4	1 = No reference
123	MAGISCOM	Magistrate's comments	Nominal	1 - 33	1 = No comments
124	CUSTODY	Custody order	Nominal	1 - 2	None missing
125	ANRCRT	Remand to another court	Nominal	1 - 9	1 = No reference
126	ANRDAY	Remand to another day	Nominal	1 - 18	1 = No reference
127	HOSPITAL	Hospital order	Nominal	1 - 2	1 = No reference
128	DATEADJ	Date adjourned to	Scale	05.06.2001 - 06.06.2002	N = 68
129	BAILORD	Bail order	Nominal	1 - 6	N = 17
130	BAILCOND	Bail conditions	Nominal	1 - 30	N = 344
131	BAILMON	Amount of bail money	Scale	0 - 500,000	N = 348
132	SURETMON	Amount of surety money	Scale	0 - 200,000	N = 468
133	SIGNIFPE	Presence in court of significant persons	Nominal	1 - 10	1 = No reference or unknown
134	RECOG	Magistrates' recognition of defendant	Nominal	1 - 3	1 = Unknown

1. New variables were created by transforming some of the above variables. These new variables were then used in the bivariate and multivariate analyses.
2. Generally, for scale variables, the number of missing cases is given. For nominal variables, the missing value code is shown. For some nominal variables, there was no missing value code. Hence if the case did not provide information, then the field was left blank. This gave rise to system missing values (for example, 'Bail order').