



# Conditional Justice

## Therapeutic Bail in Victoria

By Emma Jane Colvin

BA, MCrim (Melb)

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Department of Criminology, Monash University

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## Abstract

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Two fundamental principles of the Australian criminal justice system are those of innocence before proven guilty and imprisonment as a last resort. Remand imprisonment challenges these two ideals; as such, it is deemed a measure of last resort. In recent decades the criminal justice system has seen a shift in the granting of bail, from ensuring court attendance to a risk management tool. In conjunction with this shift, remand rates in Australia have been trending upwards. In response to growing remand rates, therapeutic bail initiatives, implemented through the courts, have flourished in many jurisdictions. These initiatives claim to assist in reducing remand rates by targeting risk factors that may result in remand through therapeutic measures, such as drug and alcohol treatment, before a person's case is heard in court. To date, little empirical, qualitative research has been conducted into the implementation and effect of these programmes, particularly on vulnerable people. This thesis aims to respond to this gap in scholarly research.

In this thesis I examine the use and effect of therapeutic bail conditions in the state of Victoria, to determine the ability of these processes to uphold the principle of remand as a last resort. This research draws on 33 interviews with key players in the bail and remand process, and observation of 117 bail and custody hearings in the Magistrates' Court of Victoria. I argue that therapeutic bail lends legitimacy to the risk management processes that now dominate bail. I show how therapeutic bail is used as a management tool for people experiencing multiple markers of vulnerability. Punitive responses that flow from a failure to comply with therapeutic bail conditions illustrate the extension of penal power beyond the traditional realm of the prison institution and into pre-trial processes. Limited access to services further marginalises vulnerable people, increasing the possibility of experiencing therapeutic bail punitively. As a result, therapeutic bail support programmes may have punitive and net-widening effects, particularly on those most vulnerable in our community. This thesis provides theoretically grounded empirical research on therapeutic bail conditions in Victoria, an area that has so far escaped academic attention.

## Declaration

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I declare that the work presented in this thesis contains no material which has been accepted for the award of any other degree or diploma in any university or other institution. To the best of my knowledge and belief, this thesis contains no material previously published or written by another person, except where due reference is made in the text of the thesis.

Signed:



Date: 31 January 2015

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## List of Acronyms

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**ABS:** Australian Bureau of Statistics

**BOCSAR:** Bureau of Crime Statistics and Research (NSW)

**CARDS:** Court Assessments and Referral Drug Scheme

**CASA:** National Centre on Addiction and Substance Abuse at Columbia University

**CBO:** Community Based Order

**CCO:** Community Corrections Order

**CISP:** Court Integrated Services Programme

**CREDIT:** Court Referral and Evaluation for Drug Intervention and Treatment

**FaHCSIA:** former Department of Families, Housing, Community Services and Indigenous Affairs (now Australian Government Department of Social Services)

**IVO:** Intervention Violence Order

**MAP:** Melbourne Assessment Prison

**MCC:** Melbourne Custody Centre

**MERIT:** Magistrates' Early Referral into Treatment

**NDCI:** National Drug Court Institute

**NJC:** Neighbourhood Justice Centre

**OPI:** Office of Police Integrity (now the Independent Broad-based Anti-corruption Commission)

**OPP:** Office of Public Prosecutions (Victoria)

**QMERIT:** Queensland Magistrates' Early Referral Into Treatment

**RODW:** Rural Outreach Diversion Worker

UK: United Kingdom.

USA/US: United States of America.

VACRO: Victorian Association for the Care and Resettlement of Offenders

VDOJ: Department of Justice (Victoria)

VLRC: Victorian Law Reform Commission

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## Chapter 1: Introduction

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### 1.1 Problem Statement

The use of bail in the criminal justice system traditionally began as a means to ensure attendance at court. However, recent shifts towards a risk-based approach to criminal justice (Baker and Roberts, 2005; Beck, 1992a) have seen the focus of bail decision making change (Edney, 2007; NSW Law Reform Commission, 2012; Roth, 2010; Stubbs, 2010). As a result, predicting a defendant's risk of offending or flight has become a significant focus of bail decisions. Bail decision making has broadened to include provision for restricting bail based on a person's risk to others, to themselves and their risk of offending while on bail. This application of a risk approach to bail represents elements of neo-liberal risk management techniques (Rose, 2000a), where the criminal justice system focuses on individual responsibility. As risk becomes more embedded in the framework of the criminal justice system, markers of vulnerability become key indicators of risk in bail decisions. This means that structural factors, such as poverty, become more intrinsically linked to remand imprisonment.

In recent decades, the criminal justice system has also experienced increasing delays at all stages of the court process and lengthier times for case disposition (Chan and Barnes, 1995; Weatherburn, 1993; Weatherburn and Baker, 2000; Weatherburn and da Huong, 1992; Swigert and Farrell, 1980). Focusing on a greater range of risks in bail decisions and delays in the court system have been identified as key contributors to increases in remand rates in Australian jurisdictions (Edney, 2007; Freiberg and Ross, 1999). Interestingly, length of time on remand has decreased over this period. In 2000, the average length of time on remand was 4.4 months; in 2011, it was 2.8 months (Australian Bureau of Statistics (ABS), 2000; ABS, 2011b). This dropped slightly in 2012 to 2.7 months, but climbed back to 2.8 month in 2013 (ABS, 2012; ABS, 2013). This indicates that more people are being remanded for less time, suggesting a lower tolerance for granting bail over the last decade. The increasing use of remand imprisonment presents a challenge to key tenets of due process. A primary capstone of

the Australian criminal justice system is the right to be presumed innocent before being proven guilty. Additionally, imprisonment is the criminal justice system's most severe punishment. As such, remand imprisonment is to be used as a last resort (Connolly, 2006; Ericson and Vinson, 2010; VLRC 2002). Given the documented increase in remand rates in Australia—while many states and territories have recorded little or no corresponding increase in crime rates (ABS, 2012b)—the implication is that remand is not being used as a last resort.

This is significant, as it is widely recognised that a term of imprisonment has multiple negative effects on imprisoned people, their families and the community. Many prisoners experience violence and trauma in prison (Steels and Goulding, 2009). Research has demonstrated that life expectancy for prisoners post-release is lower than the general population (Binswanger et al., 2007; Krieg, 2006). Many prisoners also experience barriers to desistance from crime post-release through homelessness, mental illness, trauma and drug and alcohol use. Limited access to support and education contribute to these barriers (Segrave and Carlton, 2011). Additionally, serving time in prison increases a person's likelihood of re-offending upon release. People on remand are further disadvantaged because of their remand status (Octigan, 2002). They are more likely to be held in secure facilities, more likely to die in custody than the general prison population and also more likely to be found guilty than bailed defendants <sup>1</sup>(Brookman and Pierpoint, 2003; Koza and Doob, 1974; Ombudsman Victoria, 2007; Williams, 2003). It is therefore imperative that remand numbers be kept as low as practicably possible to avoid negative consequences for individuals and communities.

What is also of continuing concern is the over-representation of vulnerable and marginalised people on remand. This includes people with multiple markers of vulnerability, including: gender, race and class, compounded by factors such as mental illness, homelessness, and drug and alcohol use (Bartkowiak-Theron and Asquith, 2012; Bartkowiak-Theron and Corbo-Crehan, 2010). Under the auspices of a neo-liberally influenced criminal justice system, the needs of vulnerable people are being

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<sup>1</sup> See section 2.5 of thesis for further explanation of this statement.

conflated with risk (Moore and Lyons, 2007). This may have a net-widening effect when vulnerable people are criminalised because of the presence of perceived risk factors in their lives, rather than their criminal behaviour. The over-representation of vulnerability is translated at the bail and remand stage of the court process into a refusal to grant bail to so called ‘risky’ individuals (Hannah-Moffat and Maurutto, 2012).

This increasingly risk averse approach to granting bail is demonstrated by rising remand rates. Bail conditions are now being relied upon to control and restrict the liberties of accused persons (Ringland and Weatherburn, 2010). Failure to comply with bail conditions may result in revocation of bail and harsher sentencing, consequently contributing to remand rate and general prison population increases. This trend continues with recent moves by the current Victorian State Government to create new offences relating to offending on bail. These would see potential prison sentences and immediate revocation of bail and subsequent remand imprisonment for any breaches of bail conditions (Hansard 31<sup>st</sup> May 2011). These legislative changes came into effect on 20 December 2013 through the enactment of the *Bail Amendment Act 2013* (Vic). The government’s move towards harsher penalties is emblematic of a law and order approach in a risk averse society. These recent changes to legislation, including a new offence in the *Bail Act*, demonstrate the strength of this punitive trend in the bail process. This mimics broader punitive trends in the criminal justice system, which have been characterised as a shift towards the re-valorisation of the prison as a solution to managing social problems (Baldry et al., 2011).

Sentencing law in Victoria has also been changed recently, again reflecting more punitive trends. After the change of government in 2011, the new Liberal government, which had won the election partly on the promise of a ‘tough on crime’ law and order approach, made significant changes to sentencing legislation with the *Sentencing Act, 1991* (Vic), and practice in the state (Sentencing Advisory Council website). The most significant aspect of these changes was the removal of a raft of medium level sentencing options via the *Sentencing Amendment (Community Corrections Reform Act, 2011)* (Vic). These include the removal of the combined custody and treatment order, home

detention, intensive correction order, and the community based order (Sentencing Council of Victoria website). The ability to order a suspended sentence had already been greatly reduced through the introduction of the *Sentencing Further Amendment Act*, 2011 (Vic). The government's aim was to 'simplify' sentencing by providing one option, a new community correction order, between fines and imprisonment, rather than the present varied option. It is within this context that this research takes place.

At the same time, there is recognition that many vulnerable people are being brought into the criminal justice system because of underlying issues, such as homelessness, mental illness and substance use (Bartkowiak-Theron and Asquith, 2012; Bartkowiak-Theron and Corbo-Crehan, 2010). One way the criminal justice system has attempted to respond to these issues is to take a more therapeutic approach to cases involving vulnerable people (Victorian Auditor-General, 2011). This approach, sometimes called 'problem solving', is guided by the therapeutic jurisprudence movement (Blagg, 2008). The definition of therapeutic jurisprudence has been debated extensively: for the purposes of this research, therapeutic jurisprudence is understood as a model that can be applied to an existing legal system. The therapeutic jurisprudence movement began post-World War II, with a particular focus on mental health law and the complications arising from the convergence of medical priorities with legal priorities (Wexler, 1990). However, therapeutic jurisprudence has expanded in recent decades to include initiatives that use a problem solving, therapeutic approach within the legal system (Bull, 2006; Goldberg, 2005; Mirchandani, 2005; Van de Veen, 2004).

Therapeutic jurisprudence inspired initiatives that have developed over the last few decades primarily consist of problem solving courts, such as drug or mental health courts. These special courts focus on addressing the perceived needs of defendants, rather than just meting out punishment under the law (Indermaur and Roberts, 2003). In the case of a drug court for instance, the sentencing stage is prolonged; defendants who plead guilty are assigned case workers and are given treatment orders as part of their sentence. They are required to meet certain goals of treatment and rehabilitation over a protracted period, with the aim of addressing their substance use to prevent further offending, rather than focusing solely on the current matter before the courts.

The application of therapeutic jurisprudence principles to bail conditions is a more recent addition to the therapeutic suite. Therapeutic bail conditions may be set by the police or magistrates to address perceived needs of the defendant, in addition to the traditional collection of conditions, such as surrendering a passport or regular reporting to a police station. These conditions range from ordering a defendant to see a doctor or counsellor to arranging long term intensive rehabilitation programmes. In recent years, formal bail support programmes have been implemented in some jurisdictions, where the treatment bail condition is to attend the bail support programme. What separates these conditional bail practices from other forms of therapeutic jurisprudence is that they involve court ordered treatment *pre-trial*; thus, before any finding of guilt. This essentially places the benevolent intentions of therapeutic jurisprudence above some of the rights afforded to people by due process.

While the intention of therapeutic jurisprudence is certainly benevolent—as Wexler (1990: 4) states of its aim, ‘the law should strive first do no harm’—the movement is not without its critics (Freiberg and Morgan, 2004; Slobogin, 1995; Phelan, 2004c). There has been significant discussion regarding the pros and cons of using a therapeutic approach in the legal system. These critiques highlight the tensions created when a therapeutic model is applied to an existing adversarial system. In particular, one key tension identified by therapeutic jurisprudence critics is the conflict between therapeutic jurisprudence and due process, particularly in relation to therapeutic bail conditions where extra-legal onus is placed on defendants before any finding of guilt. The cultural shift needed to institute effective therapeutic processes creates some legitimacy issues and potential conflicts between practitioners over competing aims. This prioritisation of therapeutic goals over punitive expectations, or vice versa, is also highlighted as problematic. Efficacy of treatment is also questioned, where evidence suggests that effective treatment must be voluntary, but court ordered treatment is coercive by its very nature. This may lead to unrealistic expectations for rehabilitation that are dealt with punitively within the criminal justice system (in contravention to the goals of successful therapy) and may mean that the law does do harm.



Additionally, several potential problems with the operation of therapeutic bail have been signalled by scholars researching bail more generally. This includes factors such as key players in the bail application process not always being aware of the availability of services that may strengthen the bail application (Colvin, 2009; VLRC, 2007). Eligible defendants may not have access to services due to lack of funding or available places (Corrections Victoria, 2008; VLRC, 2007). Bamford et al. (1999) found that bail support programmes comprise a complex system of services, and understanding the system is difficult. Additionally, rural areas have limited access to some of these resources in comparison to urban areas (Coverdale, 2011; King et al., 2005; VLRC, 2007). These are some of the potential problems highlighted by critics of therapeutic jurisprudence and bail support services. Investigation into the veracity and potential effect of these identified issues is warranted. There are calls within existing critical literature for research to be conducted on therapeutic jurisprudence in action, to explore its capacity for providing therapeutic alternatives in the area of bail (Allan, 2003; Bartkowiak-Theron et al., 2012; Cannon, 2007).

While there has been some empirical research into the efficacy and impact of therapeutic jurisprudence initiatives, these have primarily focused on the evolution and expanding nature of drug courts. Most likely this is because drug courts have existed longer than therapeutic initiatives at the bail stage. Formal therapeutic bail arrangements, in the form of court appointed bail support programmes, have only been instituted in the last couple of decades; many jurisdictions have few or no programmes. However, these programmes are currently growing and expanding into new jurisdictions. Empirical research is needed on the implementation and impact of current arrangements as they provide a model for new programmes. Victoria is widely recognised as a leader in pre-trial bail support programmes; its suite of pre-trial programmes, which run out of the Magistrates' Court, is one of the most comprehensive in English speaking criminal justice systems. Yet, current research into these programmes is limited. Existing research conducted on bail support and therapeutic bail conditions in Victoria consists primarily of government commissioned evaluations. These evaluations are principally quantitative in nature; as such, there is a dearth of in depth critical qualitative research. Additionally, where qualitative research by way of interviews has been conducted, the research does not draw on a

comprehensive theoretical framework. Specifically, these evaluations do not provide a detailed, critical analysis of theory in action. It is this gap that this research intends to address. It will provide a critical analysis of therapeutic bail conditions, using the theoretical frameworks of therapeutic jurisprudence and risk/needs paradigms as a platform for understanding the implementation and impact of therapeutic bail conditions on individuals, the community and the criminal justice system.

## **1.2 Aims and Scope of the Research**

### **1.2.1 Aim**

This thesis aims to explore the implementation and impact of therapeutic bail conditions in the state of Victoria. It draws on qualitative data through court observation of 117 bail applications and custody hearings in the Magistrates' Court of Victoria. Additionally, this research draws on the responses of semi-structured interviews with 33 participants in the criminal justice system. The people interviewed were magistrates, judges, defence lawyers, bail justices, a justice's associate, and an ancillary support worker. The thesis will conduct original research on therapeutic jurisprudence in action by exploring the implementation and effect of therapeutic bail conditions in an effort to see if related bail support programmes assist in upholding the principle of remand imprisonment as a last resort.

### **1.2.2 Scope**

It is important to note that this research takes a critical criminology approach. Criminology is interdisciplinary in its nature; as such, it draws on many different disciplines to inform research. While this thesis draws on areas such as mental health and law, the research is conducted through a criminological lens.

The thesis will examine the bail/remand process, and in particular, the court phase of the bail application process. The research will focus on Victoria, as it is known to have a comprehensive bail support system in comparison with other Australian and overseas jurisdictions (Denning-Cotter, 2008; Ross, 2009). It is difficult to gauge the extent of bail support within the current system. Although there are specific bail support programmes run through the Magistrates' Courts, there are many other non-bail specific programmes that can provide support to people prior to the hearing of charges. As such, this study will focus on the Magistrates' Court bail support programmes; however, it remains aware that these programmes often involve referral services to other resources, which may also be of interest. The background of these programmes will be reviewed to develop knowledge on existing programmes through examining government and non-government evaluations on available programmes. This research takes a qualitative approach to investigate the effect of therapeutic jurisprudence in action.

It is important to note that this research took place in the Magistrates' Court. Defendants brought to the lower courts are charged with less serious offending than those in the higher courts.

### **1.3 Research Questions**

To achieve the aim of the thesis, the following research questions are asked:

- How has therapeutic jurisprudence been implemented into bail support operations?
- What is the effect of therapeutic bail on vulnerable people?
- Does therapeutic bail assist in upholding the principle of remand imprisonment as a last resort?

## 1.4 Overview of the Study

To address each of the research questions the thesis will be presented as follows:

**Chapter 2: Bail and Remand in Victoria.** This chapter demonstrates how historically there has been a shift away from the basic principle of bail, which is to ensure a defendant appears at court, towards the use of remand to contain risk.

**Chapter 3: The Evolution of Therapeutic Bail.** This chapter provides an overview of bail support services in Australia and the rise of therapeutic bail initiatives. It continues with a critical analysis of past and contemporary research into therapeutic initiatives in the courts, particularly research conducted in a bail setting. This critique will first address the state of current research into therapeutic alternatives to punitive approaches in the courtroom. It will locate the contribution of this thesis to academic literature, nationally and internationally; in doing so it will provide a justification for the research design. This critique will then provide the background information that will be drawn upon in an effort to begin responding to the research questions.

**Chapter 4: Risk/Needs and Therapeutic Jurisprudence.** This chapter sets out the theoretical frameworks this thesis will use for analysis; namely risk/needs discourse, therapeutic jurisprudence, and the construction of vulnerability. This chapter will provide an argument to justify the use of these frameworks and demonstrate how they can be used to critically analyse the research data, responding to key research questions. It will demonstrate how therapeutic jurisprudence is inextricably linked to the rhetoric of risk/needs and individual responsabilisation both key elements of risk management techniques. It will examine the effect of key elements of these techniques on people, particularly vulnerable populations. In doing so it will demonstrate how vulnerability is constructed and understood through chaotic lifestyles and needs, and how it is deployed in ways that enable ongoing control over vulnerable groups by the state through risk/needs construction and individual responsabilisation. Further, it will

engage with key debates and critiques that will be used for data analysis, considering in particular the extant tensions between an adversarial system and a therapeutic model.

**Chapter 5: The Research Design.** This chapter will detail and justify the methodological approach deployed in the thesis to address the research questions. It will demonstrate why this research design is suitable for this research project. First, it will outline the development of a research tool for the court observation phase of the research. This includes a discussion of ethnographic research in the courtroom and briefly provides examples from similar research designs used to form the data collection tool for this phase of the research. It will also provide a discussion of the interview methodology, including the themes discussed during the semi-structured interviews, along with a brief section detailing data collection, analysis and coding of data. Finally, this chapter will explain why interview data was not collected from one particular cohort, underlining this explanation with a brief analysis of studies that experienced similar issues with access to this project. This discussion will demonstrate the institutional ‘gate-keeper’ effect on this research.

The data analysis will then be presented over three chapters. Each chapter draws on data collected from both the court observation phase and the interview phase of the research. These chapters will provide a critical analysis of the data and attempt to answer the three research sub-questions. **Chapter 6: Therapeutic Tensions–Risk Management Techniques and Risk/Needs** will examine how risk principles have pervaded the bail system to the extent that therapeutic jurisprudence practices are a part of the risk rhetoric rather than an alternative. It will critically analyse the research data through the theoretical frameworks critiqued in Chapter Three, which will then provide a broader understanding of the tensions that impact upon therapeutic jurisprudence in action. It will argue that therapeutic interventions ultimately legitimise risk management techniques because they provide avenues for controlling people. This chapter also argues these interventions have a particular impact upon vulnerable groups, partly because of the social control inherent in interventionist policies, and partly because criminal justice process language pathologises vulnerable and disadvantaged people to justify high levels of intervention.

**Chapter 7: Reconfiguring Punishment—Punitive practices and therapeutic efficacy** examines the potentially punitive aspects of therapeutic bail, particularly on vulnerable populations. Building on the tensions identified and analysed in Chapter Six, this chapter also analyses the way therapeutic jurisprudence has been implemented within the criminal justice system and how this has in turn affected the efficacy of treatment for individuals. It provides a contextual analysis of some recent changes to bail in Victoria and how the data provides illumination on how these changes may affect vulnerable populations. This chapter argues that therapeutic interventions at the bail stage of the court process may have punitive and net-widening effects. This is emblematic of extending penal power outside its conventionally recognised boundaries and into pre-trial practices.

**Chapter 8: Access to Justice.** This final analysis chapter reviews some logistical problems raised by the data, when implementing therapeutic interventions in the bail process. It examines the possible effects of unequal access to therapeutic bail as having bearing on the means to access justice. This chapter argues that the unequal demographic distribution of service provision results in unequal access to justice for people. This has particular impact on vulnerable populations, including people in some disadvantaged areas, homeless people and young people. The chapter argues that this reduced access to justice for some may also have punitive and net-widening effects, demonstrating further assemblages of penal power outside its traditional cabin of the institution.

Finally, **Chapter 9: Conclusion.** This chapter will revisit key themes arising from the research and detail the findings' implications. It will argue that therapeutic interventions—although well intentioned and well supported by the legal community and other key players in the bail process—do not address significant issues of underlying structural inequality because of their reliance on individual responsibilisation and embedded risk rhetoric. While the use of therapeutic interventions at the bail stage of the court process may have punitive and net-widening effects, emblematic of the assemblage of penal power in pre-trial practice, the finding that services may operate more successfully in some areas means there is potential to

improve this model through location specific research. Finally, this chapter will discuss the limitations of this research to identify gaps and issues that may inform future research possibilities.

## Chapter 2: Bail and Remand in Victoria

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*'Pre-trial detention cannot but amount to a radical rupture from normal life' (Duff, 2012: 12)*

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This chapter discusses the evolution of the use of bail in contemporary Western legal systems, particularly Australia. It will discuss the changing nature of bail and the introduction of a risk discourse in bail decision making, and the resulting increase in use of remand imprisonment. It will provide a detailed discussion of the codification of bail law and changes in legislation over the last few decades. It will then demonstrate why remand imprisonment should be used as a last resort and as such, why research into initiatives that aim to reduce remand rates is important. In particular, it will highlight the effect of changing bail practices on society's most vulnerable people and demonstrate why research in this area is necessary.

### 2.1 History of Bail and Remand

The concept of bail has its roots in Anglo Saxon law, where the families of murder victims were given a *blood price* by the accused that was returned if guilt was not proven (Attenborough, 1922; De Haas, 1940; Dow, 1981; Metzmeier, 1996). Common law established the practice of bail in English speaking countries before codification (Steel, 2009). Bail legislation formalised these mediaeval common law rights (Ares et al., 1963). The practice of bail in its contemporary incarnation, as a means to release people pending trial while ensuring their return to court, commenced in England in the ninth century CE<sup>2</sup> (Fitzjames, 1883). This more contemporary use of bail evolved from the writ of *Habeas Corpus*, a Latin term meaning 'we command you to show the body'. The writ of *Habeas Corpus* was set out in the *Magna Carta*,

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<sup>2</sup> Common Era – this means the same as Anno Domini (AD) without the religious connotation.



allegedly the first documentation of citizen rights (Frazier and Bishop, 1985). Its purpose was to summon the custodian of a prisoner to bring the prisoner to court so a decision could be made as to whether he or she should be released. Its original intention was to examine a prisoner's body for signs of torture and to hear the custodian's justification for keeping the person in custody. The aim was to prevent the spurious imprisonment of one's enemies. The right to have a bail hearing is now one of the fundamental principles of common law (Fox, 2005; Metzmeier, 1996; Smith, 1960). This right evolved over centuries of common law to provide a means of due process before trial in English speaking jurisdictions, where a person could be granted bail with the undertaking that they appear before a court at a later date (Metzmeier, 1996).

While traditionally the primary purpose of bail was to ensure a defendant attended court, there are indications that the purpose and use of bail is changing (Edney, 2007). Increasingly, denial of bail is based upon assumptions about the risk a person poses to the community, rather than flight risk (Baker and Roberts, 2005; Baldry et al., 2011; Beck, 1992a). This shift to risk thinking approaches to the criminal justice system is discussed in greater detail in Chapter Four. The next part of this chapter will look at the bail/remand process and highlight changes in legislation, statistics and current practice that illustrate this shift in the purpose of bail, particularly in the state of Victoria.

## **2.2 The Bail/Remand Process**

In Victoria, the prosecutorial process commences with a person being charged for an offence/offences. This may take one of two forms. A defendant may either be charged on summons, wherein they are served a summons to attend court for their matter to be heard, or a police officer may choose to arrest a person (White and Perrone, 2005). Once a person is arrested, there are three options available to the police. The defendant may immediately be remanded on bail on their own undertaking, where they are obliged to attend court at a specified date and time; or they can be remanded

on conditional bail, where they must adhere to conditions imposed by the police, such as a curfew or regular reporting to a police station. In Victoria, the principle of parsimony exists, which means that the least onerous necessary bail conditions should be imposed (Edney, 2007). Should a police officer believe it not is appropriate to remand a person on bail, they may recommend the person be remanded in custody while awaiting trial. This decision can only be made by a police officer of the rank of sergeant or an officer in charge of a police station. Police officers only have the power to remand a person into custody until the case can be heard, either by the next available court session or a bail justice (Fox, 2005).

The position of bail justice is unique to Victoria. The bail justice role has emerged from the powers allocated to Justices of the Peace, which include the ability to grant bail with or without conditions and remand a person until the next available court date (up to eight days). The role essentially adds another step in the decision making process between police and the courts, creating an out of session court. Bail justices have the power to remand a person into custody for up to eight days. In the event a person is arrested on a weekend or public holiday, they can appear before an out of session court for a hearing, rather than waiting until the court is in session again. The pool of bail justices is comprised of citizen volunteers who have completed a training course. Volunteers are expected to undertake regular refresher courses and extra-curriculum training to keep updated with any changes in legislation or practice (Department of Justice (Victoria), (VDOJ), 2013; VDOJ, 2010a). The position is voluntary and each bail justice is given on call shift work, where they must be available to attend police stations outside court hours (Fox, 2005; VLRC, 2007). This position enables a degree of accountability for police bail decision making and provides a review of decisions before they advance to a court hearing. If a defendant is remanded, or if they do not agree to the bail conditions imposed, the matter is then brought before a court at the earliest opportunity. At court, the decision is reviewed by a magistrate and the defendant has the opportunity to apply for bail. Once an application has been made, the magistrate may find the police decision to recommend remand into custody was appropriate, or they may release the defendant on bail. The magistrate may apply or alter bail conditions in these instances. People may reapply for

bail in some circumstances; there are strict limitations on this, as will be discussed in Section 2.4.

## 2.3 Legislation

Contemporary bail legislation in Australia appeared in the 1970s (Steel, 2009). In Victoria, legislation that codified common law provisions controlling bail decisions was created by the *Bail Act* of 1977 (the *Bail Act*). Victoria led the way in instituting bail legislation to replace common law (Steel, 2009); NSW followed with *Bail Act, 1978* (NSW); Queensland with *Bail Act, 1980* (QLD); then *Bail Act, 1982* (WA); *Bail Act, 1982* (NT); SA in 1985 with *Bail Act, 1985* (SA) (Devine, 1988). Tasmania's *Bail Act, 1992* was legislated much later than the other states (Steel, 2009). A recent evaluation by the VLRC found many problems with the current legislation and recommended a complete overhaul (VLRC, 2007), ultimately resulting in limited changes to bail legislation. Additionally, more recent changes were enacted in 2013. This legislative reform underlines the exigency of research into diversions from remand; as such, a brief history of bail legislation in Victoria and a discussion of the VLRC report warrant some attention.

The current legislation was based on previous common law practices and legislation introduced in the United Kingdom (UK). Originally, the primary purpose of the *Bail Act* was to ensure that the defendant would present themselves for trial (Bamford et al., 1999; Bondy et al., 2003; Freiberg and Morgan, 2004; Freiberg and Ross, 1999; Metzmeier, 1996). Changes to the *Bail Act* in recent years have placed more emphasis on other factors that affect the granting of bail, including the risk a defendant poses of committing offences while on bail (NSW Law Reform Commission, 2012; VLRC, 2007). Under s4(2)d of the *Bail Act*, the presumption is in favour of bail unless the suspect poses an 'unacceptable risk' of failing to turn up to court, committing an offence on bail, tampering with a witness or posing a threat to public safety. This places the onus on the prosecution to demonstrate that the suspect is an 'unacceptable risk'. Under s4 (3) of the *Bail Act*, the assessment of 'unacceptable risk' can factor in the following: charged offence; characteristics of the offender; prior record of the offender;

and the evidence against the offender (Bondy et al., 2003). In Victoria, under s4(4), a 'reverse onus' is placed on suspects charged with murder, treason and some drug offences; whereby the suspect is automatically remanded and can apply for bail only under exceptional circumstances (Bamford et al., 1999). This part of the legislation has been highlighted as problematic because 'exceptional circumstances' are not defined in the legislation (Jesuit Social Services, 2006).

A general *prima facie* right afforded in bail legislation in many jurisdictions is a presumption in favour of bail (Devine, 1988; Smith, 1960). The presumption in favour of bail is linked to the presumption of innocence. However, under s4 (a) of Victoria's legislation there is a presumption against bail for some offences, including treason, murder and serious drug offences. The *Anti-Terrorism Act, 2004* (Commonwealth (Cth)) came into force on 1 July 2004. This legislation inserted s15AA into the *Crimes Act, 1914* (Cth), and has the effect of reversing the presumption in favour of bail for terrorist suspects. Section 15AA states that bail may not be granted to persons charged with, or convicted of, certain Commonwealth offences unless the bail authority is satisfied that 'exceptional circumstances' exist to justify bail. This is known as the reverse onus test. The factors considered in a bail application include the likelihood that a defendant will fail to appear for trial, commit an offence on bail, pose a risk to the public, or interfere with witnesses. Additionally, a magistrate may also consider the nature and seriousness of the offence, the defendant's background, the strength of evidence against the defendant and previous bail history (Devine, 1988; Fox, 2005; Harbour, 2007). Section 4(2) of the *Bail Act* outlines reasons why a person may be refused bail, including s4(2)(d)(iii), where the *Bail Act* states 'that it has not been practicable to obtain sufficient information for the purpose of deciding any question referred to in this subsection for want of time since the institution of the proceedings against him'. This provision essentially means that a person can be refused bail if there is not enough evidence to assess risk; for example, there is not enough evidence to show the defendant will not commit an offence while on bail.

The *Bail Act* also creates a 'show cause' situation for a number of offences, such as arson, aggravated burglary and certain drug offences, whereby bail is not granted unless

the defendant is able to show cause as to why a remand into custody is not justified (Fox, 2005; Harbour, 2007; VLRC, 2007). In 2002, the VLRC investigated the reasons why people fail to answer bail. Their subsequent report concluded that s4 (2)(c) of the *Bail Act* should be repealed because it resulted in a presumption against bail for absconders who could not demonstrate that their failure to appear was beyond their control. The VLRC argued that this clause did not account for unintentional reasons for non-attendance; for example, illiteracy, inability to understand English and forgetting court dates (VLRC, 2002). The section was subsequently repealed (VLRC, 2007). A person may reapply for bail at any stage; however, under s18(4) of the *Bail Act*, if they have legal representation, then a change in circumstances or new facts must be proven to justify a new application; if a defendant represents themselves there is no limit on the number of times they may apply.

In 2004, the Victorian Attorney General requested the VLRC conduct a review of the *Bail Act* to examine whether current legislation ensured the fair and efficient functioning of the bail system (VLRC, 2005a). Changes in the operation of the criminal justice system, such as the adoption of therapeutic jurisprudence practices, had led to the institution of diversionary programmes. Victoria was also then in the process of introducing state human rights legislation, which addressed key due process matters such as the right to liberty. This meant that the *Bail Act* needed to be reviewed to see how it measured up in light of these changes (VLRC, 2007). The terms of reference included an examination of the presumption against bail and the efficiency of the system, particularly when determining a person's detention in custody (VLRC, 2005b). Submissions were received from organisations and groups involved in all areas of the bail/remand process, including police, lawyers and non-government groups (VLRC, 2006).

The final report was damning of current legislation and recommended that the entire *Bail Act* be re-written in plain language, as the primary users of the legislation were not lawyers, but police, bail justices and defendants. Many submissions to the VLRC argued that the legislation was inaccessible to lay people. The report found that in 'show cause' scenarios, and cases where there was a presumption against bail and

exceptional circumstances must be proven to justify the granting of bail, the process was complex and unclear (VLRC, 2007). The report also commented on the over-representation of Indigenous people and marginalised groups within the criminal justice system, and reviewed some support services available to these groups.

While the Victorian government has updated crime legislation in recent years by re-writing entire pieces of legislation—for example the *Criminal Procedure Act*, 2009 and the *Evidence Act*, 2008—to date the *Bail Act* has not been significantly re-written, and many issues identified by the VLRC remain. In 2010, the Victorian government introduced the *Bail Amendment Act*, 2010 in response to the VLRC report. The Explanatory Memorandum of the *Bail Amendment Bill*, 2010 states:

The Government is responding to the VLRC recommendations in two stages. The Bill responds to 40 recommendations and represents the first stage of reforms to Victoria's bail system. Broadly, the aims of the Bill are to clarify aspects of current bail law, codify some existing practices, and promote efficiencies in the operation of the bail system. The Bill also establishes a new legislative framework for the operation of the bail justice system.

The *Bail Amendment Act*, 2010 was repealed on 1 January 2012, but under s42 ‘The repeal of this Act does not affect the continuing operation of the amendments made by it’.

The amendments to the *Bail Act* included further clarification on the role of bail justices. This was a result of concerns highlighted by the VLRC that 95 per cent of bail decisions were made by lay people and police rather than trained legal practitioners (Bamford et al., 1999; VLRC, 2007). Changes were also made to the use of bail conditions, based on the recommendations of the VLRC (2007) report, recognising that bail decision makers rely heavily on bail conditions rather than sureties. Bail conditions were no longer separated into general and specific conditions. The amendment also stipulated that bail conditions were only to be used when necessary and to reduce the likelihood of failure to appear, committing an offence on bail, endangering public safety, and obstruction of justice (including witness tampering). Other amendments addressed the affordability of sureties so that a person's financial

status must be taken into consideration when setting a surety. Changes were also made to ensure compatibility with the *Charter of Human Rights and Responsibilities Act, 2006 (Vic)* (the Charter), as stipulated by s28 of the Charter, wherein all new legislation must be examined for compatibility with the Charter.

It is interesting to note that no changes were made to the two tests for bail acceptability: ‘show cause’ and ‘unacceptable risk’ (Hansard, p. 3,500–3, 29 July 2010), although these were the main concerns raised by the VLRC (2007) report, and were the subject of some of the more significant recommendations. In his speech to Parliament at the second reading of the *Bail Amendment Bill, 2010*, Mr Tim Lenders, Treasurer at the time, stated:

[y]et in some cases the criminal justice system recognises that a person must be kept in custody to ensure the safety of witnesses; or the safety of the community; or to ensure that the accused will appear in court (Second Reading, Mr Tim Lenders, p. 3,500, 29 July 2010, Victorian Hansard).

The quote demonstrates that perceived risk is considered as significant as appearance at court when refusing bail.

The intense media scrutiny and public outcry over the recent Jill Meagher<sup>3</sup> case reignited debate on offending on bail, meaning that law and order policies were again at the forefront of political debate and policy change<sup>4</sup>. As mentioned earlier, after the Victorian State election in 2010, the new Attorney General, Robert Clark proposed to Parliament that a new offence, ‘offending on bail’ should be added to the *Bail Act*. In addition, Mr Clark proposed restricting the number of bail applications a person can make and criminalising breaches of bail conditions. This is contrary to the recommendations made by the 2007 VLRC report. The proposal includes additional sanctions for those convicted of offending on bail (Hansard 31 May 2011). The

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<sup>3</sup> In 2012 a young woman, Jill Meagher, was raped and murdered in Melbourne. Adrian Earnest Bayley was arrested and convicted of her rape and murder. He was on parole and bail at the time of the offence. The case sparked significant media attention and calls for stricter measures against people committing serious offences whilst on bail and parole.

<sup>4</sup> See Hogg and Brown (1998) for a more detailed discussion of law and order policies and media coverage of serious crimes.

following comments made by Clarke in State Parliament demonstrate this government's law and order approach:

Going into the election last year we made a range of commitments to strengthen and make more effective bail laws in Victoria. Believe it or not, at present if someone is to breach bail conditions — conditions that are imposed to protect the community or reduce the risk of a person absconding while on bail — such a breach of bail conditions does not constitute a criminal offence. The only sanction that is available for such persons, other than their simply failing to turn up when the trial is appointed, is for them to be brought back before the court and the court again asked to do something. This has meant that bail conditions have often been treated with contempt, imposing additional work on the police force while not adequately protecting the community (The Hon Robert Clark, 31 May 2011, pp. 1,684).

On 20 December 2013, the *Bail Amendment Act 2013* (Vic) was enacted, bringing into legislation the offence of offending on bail. There were several other amendments brought about by this legislation. The offence of breaching bail conditions was also added. Both this offence and offending on bail carry up to three months imprisonment as a penalty. Bail conditions have also been listed in the Act, formalising the conditions placed on defendants by magistrates. This includes attending bail support services as a bail condition. Additionally, a defendant must now wait three days before being able to reapply for bail. The intention of this waiting period is to stop people from 'bail shopping', the practice of applying for bail numerous times before different magistrates until a defendant succeeds in being granted bail (Hansard 22 August 2013). These changes are not consistent with VLRC recommendations (VLRC, 2007).

Changes to Victoria's bail legislation are significant markers that demonstrate the shift to a more risk averse and punitive approach to bail practices. This phenomenon is not unique to Victoria or Australia. Metzmeier (1996) has documented similar legislative reforms over recent decades in many English speaking jurisdictions. Steel's (2009) comprehensive analysis of changes in Australian bail legislation since 1970 details this incremental shift through numerous minor amendments to legislation, which



encroaches on defendants' rights and restricts the use of bail<sup>5</sup>. What is significant about this analysis is that Steel (2009) demonstrates the right to bail has gradually receded. The number of offences for which there is a presumption against bail is increasing, indicating that risk factors other than court attendance are increasingly informing bail decision-making.

This inexorable rolling back of bail rights brings into question the criminal justice system's human rights obligations. This limitation of bail rights is at odds with the right to bail under the *International Covenant on Civil and Political Rights*, of which Australia is a signatory (Metzmeier, 1996), which states:

Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer...and shall be entitled to trial within a reasonable time or release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial (The *International Covenant on Civil and Political Rights*, December 16, 1966, Annex to the General Assembly Resolution 2200, 21 GAOR, Supp. 16, U.N. Doc. A/6316, Part III, Art. 9, ss3).

There are several sections of the Victorian Charter relevant to this topic. Section 21 sets out the right to liberty and s22 details the treatment standards for people in custody; these sections mirror the United Nations *Standard Minimum Rules for the Treatment of Prisoners*. In addition, s24 outlines the right to a fair hearing, a right that has already been cited in a human rights complaint in *R v Benbrika and Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008)[the Benbrika case], where defendants argued that harsh conditions on remand were compromising their access to justice (Carlton and McCulloch, 2008). In *Gray v DPP (Ruling No 12)* [2008] VSC 4 (16 January 2008), Justice Bongiorno also made reference to Charter provisions he saw as relevant to bail, especially in relation to procedural delays.

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<sup>5</sup> A detailed discussion of amendments in each state and territory is beyond the scope of this research. For details, including tables and charts illustrating the amendments, in particular punitive ones see Steel (2009).

When examining the rights afforded under the Charter, the increasing remand rates, the legislated presumption against bail, and the corresponding reduction in crime rates indicate that remand is not being used as a last resort, and thus may constitute a major breach of human rights (Connolly, 2006). Under s28 of the Charter, all new legislation written after 1 January 2008 must be compatible with the rights enshrined within the Charter. Thus, if the *Bail Act* is re-written and the presumption against bail for certain offences remains in the legislation, it may be in contravention of the Charter. Beyond the legal requirement to adhere to the Charter, there is also a moral obligation to uphold the rights afforded to people through the Charter. Given the imminent revising of current law, recent amendments to bail legislation and the new obligations to comply with human rights legislation in Victoria, it is timely to scrutinise therapeutic bail conditions and the operation of related bail support programmes, particularly the extent to which they assist in attaining the ideal of remand as a last resort.

## 2.4 Bail and Remand Figures

Gauging the use of bail in Australia is not easy. There is limited information available on rates of bail refusal, use of bail as opposed to summons, and bail conditions. This is primarily the result of poor data collection and a lack of a coordinated and cohesive approach to monitoring bail related practice in Australia<sup>6</sup>. This is particularly true of Victoria, which has been criticised for its lack of quantitative data on bail (VLRC, 2007). Additionally, data collection by the police and courts are not updated and are inadequately interlinked (VLRC, 2007). Some other states have better access to data. NSW in particular has a robust data collection service in the NSW Bureau of Crime Statistics. In a recent report by the NSW Law Reform Commission (2012) into the state of bail in NSW, detailed statistics were provided as part of an analysis of the use of bail in that state, although the authors did note difficulties in providing an accurate

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<sup>6</sup> Several attempts have been made to locate information on rates of bail refusal in Victoria. An exhaustive internet search of the Australian Bureau of Statistics, Victorian Department of Justice, Magistrates' Court of Victoria and Victoria Police websites did not yield fruitful data. In addition, the researcher has attempted to obtain statistics from the Magistrates' Court of Victoria in person and over the phone, but was advised the data was not recorded in a fashion that would elicit the desired information. Additionally, current literature on bail in Victoria indicates that obtaining information on the use of bail is often not available and what is collected is not done in a way that would allow any useful statistical analysis to be done (Bamford et al., 1999; VLRC, 2007; Sarre et al., 2006).

analysis because of different methods of data collection (NSW Law Reform Commission, 2012).

The VLRC *Review of the Bail Act Consultation Paper* (2005b) does provide some quantitative information on the use of bail. This is primarily sourced from King et al.'s (2005) study, 'Factors that Influence Remand in Custody', and is complemented by data collected by the VLRC from the VDOJ Court Services Unit. However, this information is now dated. Victoria Police do not provide any current data on the use of bail or bail decisions. The only publically available data on bail is police recording of failure to answer bail offences, i.e. failure to attend a court date, which increased from 5,010 in 2010/11 to 6,854 in 2011/12, representing a 37 per cent increase (Victoria Police, 2012). Of primary interest from the VLRC *Consultation Paper* (2005b) is the finding that granting of bail on first application in the Magistrates' Court increased slightly from 74.3% in 1995 to 79.2% in 2005. The VLRC posit this may be a result of implementing bail support during this time frame. They also note a drop in the granting of bail on the first application by bail justices during this time, from 41.6% to 16.13%. The *Final Report of the VLRC* (2007) heavily criticises the role of bail justices and states they have a reputation for refusing bail at a higher rate than magistrates. However, there is little information available on the knowledge and use of bail support services by bail justices. If the increase in granting of bail by magistrates is linked to the use of bail support services, then this factor is worthy of investigation when looking at the high rates of bail refusal by bail justices.

While it is difficult to obtain statistics on the use of bail, one way to gauge bail trends is to examine remand figures. Additionally, examining the demographics of those comprising the remand population gives a picture of who is denied bail. When evaluating remand statistics<sup>7</sup>, there are several factors to consider. More so than the general prison population, the yet-to-be-sentenced population is in a constant state of flux; thus, the numbers are difficult to compare. Statisticians have long agreed that

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<sup>7</sup> Much of the quantitative data refers to remand prisoners as 'unsentenced', as they are either awaiting trial or convicted but not yet sentenced. The terms 'remand' and 'unsentenced' are thus used interchangeably.

remand data is often crude and sparse, making it difficult to get a clear picture of who is on remand for how long (Collins et al., 1995; King et al, 2005).

According to Corrections Victoria, as at 30 June 2009, there were 815 prisoners awaiting sentence in Victoria under the jurisdiction of the correctional system (VDOJ, 2009). This contrasts with ABS (2009a) data for the June quarter 2009, showing the figure at 877, and 891 for December 2009. This disparity demonstrates the constant shift in remand figures as people move through the criminal justice process. Recent statistics published by the Sentencing Advisory Council of Victoria indicate significant increases in the number of people on remand in the state. In 2002, there were 587 people on remand; in 2012 this figure was almost double at 996 people (Sentencing Advisory Council, 2013). These figures do not include those kept in police cells, or those in custody centres at Magistrates' Courts. Some people in police cells may be held temporarily whilst awaiting charge and release and therefore would not be considered part of the remand population. However, some charged defendants may not have been granted bail and be waiting in remand custody for a court bail hearing or transfer to a Corrections Victoria facility. These people are not under the jurisdiction of Corrections Victoria; instead, they come under the care of Victoria Police. Additionally, custody centres at Magistrates' Courts may hold charged defendants temporarily whilst awaiting court bail hearings, these people are not counted as part of the remand population although they are being held in custody pending a bail hearing. Given that data on police cells includes those detained for public order offences and then released without charge, it is problematic to include these figures as part of the general remand population; however, as these people are in custody and under the care and control of Victoria Police, they warrant reference. Charged defendants and unsentenced, convicted prisoners in custody centres are formally considered within the care and custody of Victoria Police. The Melbourne Custody Centre (MCC) at the Melbourne Magistrates' Court, though managed by Victoria Police, is contracted out to a private security company (Office of Police Integrity (OPI), 2010). Thus, prisoners who are not yet sentenced or who are waiting a bail decision can be considered to be within the care and custody of Victoria Police, Corrections Victoria, or private security operators in charge of prisons and the MCC. It is important to note here that in these instances such cases may not be included in official remand statistics.

Remand prisoners are generally imprisoned initially in police cells prior to being brought before a court. In 1995, Carcach and MacDonald found that Victoria ranked second out of the Australian states in the number of custody occasions with 3,758 reported. The OPI (2010) report into conditions in police cells found that in 2009, 24,777 people were detained. It is not possible to compare these two figures as not enough is known about the data collection method. However, many people are detained for being drunk in public, which is still a criminal offence in Victoria under the *Summary Offences Act*, 1966 (Victoria Police, 2010). The OPI report found that 50 per cent of all custodies in police cells were for drunkenness. Remand prisoners may also spend time at MCC (not under the jurisdiction of Corrections Victoria), in the bowels of the Melbourne Magistrates Court. The Melbourne Remand Centre houses almost 500 remand prisoners in single occupancy cells under maximum security conditions. The Melbourne Assessment Prison (MAP), designed to accommodate prisoners with medical and psychiatric needs, and act as the primary prison reception centre, often houses remand prisoners. Approximately 40 per cent of remand prisoners are housed in this facility. There are other remand prisoners scattered throughout the rest of the prison system for various reasons. High profile male remand prisoners and those facing the most serious charges are held in Barwon prison. In June 2009, there were seven remand prisoners in this facility. Port Phillip prison also houses a significant number of male remand prisoners, including some under protection. Women on remand are primarily held in the Dame Phyllis Frost Centre, a maximum security women's prison with specialist accommodation for remand prisoners (VDOJ, 2009).

Looking at the demographics of those falling within the jurisdiction of Corrections Victoria, women constitute 10 per cent of the unsentenced population compared to 6.5% of the sentenced prison population (VDOJ, 2009). Women's remand rates are much higher than men's; in 1999 the proportion of female remand prisoners to sentenced female prisoners was 19.6% and increased to 29.1% by 2009, whereas the corresponding male remand rates increased from 13.9% to 18 per cent respectively. Overall, the rate of unsentenced prisoners in the correctional system increased from

14.3% to 18.7% in the past ten years. Between 2007 and 2009 two thirds of Indigenous prisoners within Victorian prisons were unsentenced. Almost 80 per cent of all Indigenous women prisoners in Victoria were unsentenced (VDOJ, 2006; VDOJ, 2009: 64). This proportion has reduced in recent years to 60% between 2010 and 2011 (VDOJ, 2011: 78). Indigenous people represent 0.6% of the Victorian population (ABS, 2009c). The most common serious offences for which people are remanded are assault (23%), drug offences (21%) and various property offences (20%). Unsented women were less likely to be on remand for assault charges (11%), whereas female remand rates for property offences (24%) and drug offences (32%) are higher. The mean time spent on remand in Victoria for offences heard in the lower courts is 2.9 months. Over one third of unsentenced prisoners appearing before a higher court spend more than one year on remand<sup>8</sup>. Sixty per cent of unsentenced prisoners are kept under maximum security conditions (VDOJ, 2009).

As stated earlier, in comparison with the rest of Australia, Victoria has traditionally had lower remand rates, even though rates have been increasing in both Victoria and Australia as a whole over the past 15 years. The national rate of unsentenced prisoners was 22 per cent in 2009, compared with Victoria's rate of less than 19 per cent. Since then, Victoria's remand rate has increased slightly to 20.4% (ABS, 2013). Australia wide, the most serious offences for which a person is remanded remain similar to Victoria: acts intended to cause injury, drug offences and property offences. The actual number of remand prisoners has increased dramatically over the past ten years, from 3,206 in 1999 to 6,393 in 2009 (ABS, 2009b). Although rates have been increasing (ABS, 2000; ABS, 2007), in recent years the increases have slowed and some jurisdictions experienced a downwards trend in remand rates; more recent evidence indicates rates have increased again (ABS, 2009b; ABS, 2012a; ABS 2013). South Australia has the highest proportion of remand prisoners (31.3%), while Victoria (20.4%) is the third lowest, behind Western Australia (19.6%) and Tasmania (17.8%)(ABS, 2013). Nationally, Indigenous remand rates decreased slightly between

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<sup>8</sup> Nationally the top three proportionally most serious charges for remand prisoners were 1. Acts intended to cause injury (29.3%), 2. Illicit drug offences (12.9%), and 3. Unlawful entry with intent (10.9%). Most serious charge breakdown for unsentenced prisoners is not available on a state level. Nationally 52% of unsentenced prisoners had experienced prior imprisonment with theft and other related offences being the offence with the highest rate of prior imprisonment (68.1) and illicit drug offences being the lowest (30.6%) (ABS, 2012a).

2008 and 2009 (23% to 21% respectively), while the proportion of remand prisoners who were Indigenous was 68 per cent, similar to Victorian figures. In 2011, a 5.6% increase in the Indigenous remand rate was recorded nationally, with a further increase of 2.2% in 2012 (ABS, 2013). Significantly, Indigenous prisoners spent less time on remand than non-Indigenous prisoners, though evidence indicates this may be because they are less likely to be diverted away from remand, and thus are remanded for less serious offences (ABS, 2009b; Denning-Cotter, 2008; Polk 2003).

The most significant fact that can be drawn from these statistics is that remand rates have trended upwards, while evidence demonstrates that this increase is not related to any increase in serious offending (VLRC, 2007). This suggests that more people are being remanded for longer despite crime rates reducing overall (Victoria Police, 2010; ABS, 2009b). Further, these increases have been attributed to the paring back of bail rights in legislation (Steel, 2009), and increasing consideration of risk in bail decision making (Sentencing Advisory Council, 2013). This evidence suggests that it is becoming increasingly difficult for people to be granted bail.

Statistics on case disposition are also not readily available but there are indications that remand imprisonment does not necessarily mean a person will receive a custodial sentence (Sarre et al., 2003). Marshall and Reynold's (1998) study measuring remand decisions with final case outcomes in South Australia found that more than half of people remanded did not ultimately receive a custodial sentence. Richards and Renshaw (2013) recently completed a research project that found two thirds of young people remanded did not ultimately receive a custodial sentence. Richards and Renshaw's (2013: 25) research indicates that this may be partly due to time served on remand and practices of 'backdating' sentencing to allow for immediate release. These indications raise pertinent questions about the emphasis of risk in remand decisions when many people are released from custody after their court hearing. While the complex and often non-comparable statistical information on remand does not always provide a clear picture, it is apparent that remand rates are higher and generally still rising, despite the estimation that up to 40 per cent of people remanded may not be

convicted or given a custodial sentence (Ericson and Vinson, 2010; King et al, 2005; Polk, 2003).

## 2.5 Why is Remand a Last Resort?

Human rights principles demand that remand imprisonment be used as a last resort. This last section sets out some consequences of remand imprisonment for prisoners and their families. Remand may negatively affect a person's health, finances, relationships, housing, and the legal outcome of their case (Brookman and Pierpoint, 2003; Octigan, 2002). The remand population comprises people from some of the most socially disadvantaged groups in society, such as the homeless, women, Indigenous people, those with a mental illness, and young people. Many remand prisoners are members of multiple disadvantaged groups, compounding that disadvantage (Australian Institute of Health and Welfare (AIHW), 2012; Boyle, 2009; Denning-Cotter, 2008; Player, 2007).

There is a significant amount of research demonstrating that remand prisoners are further disadvantaged by their time in custody (Brookman and Pierpoint, 2003; Sacks and Ackerman, 2014). There are many documented incidents of abuses and discrimination against unsentenced prisoners, such as the Benbrika case (Carlton and McCulloch, 2008) and incidents documented by the former OPI in their report on conditions in police custody (OPI, 2010). A more recent report by Ombudsman Victoria (2014) found Corrections Victoria facilities were subject to significant overcrowding for both sentenced and unsentenced prisoners. The report also documented failures in practices to segregate remand prisoners from sentenced prisoners in accordance with the United Nations *Standard Minimum Rules for the Treatment of Prisoners*. Additionally, the report observed that Corrections Victoria had failed to ensure prisoners attended court dates. VDOJ notes on their website that they adhere to the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (VDOJb, 2010). Despite this, there are many examples of abuse and sub-standard treatment of remand prisoners in Victoria (and more broadly in Australia),



some highly publicised, others barely recognised<sup>9</sup>. Without doubt, mistreatment and poor conditions for those on remand is not uncommon. Notwithstanding particular incidents, the serious consequences of remand imprisonment can be viewed as a human rights violation in and of itself because of the demography of disadvantage within the remand population, which is compounded by remand imprisonment.

Remand is a pathway to prison. For most people, their first time in custody is experienced on remand. For those who are released without charge or custodial sentence it is their only experience of prison. However, recidivism rates indicate that once a person has spent time in prison their likelihood of returning is much higher than those who have not spent time in custody (VLRC, 2007). The potential economic costs of keeping a person in jail are not just limited to the resource drain on the prison system (Ericson and Vinson, 2010). A remandee is unable to be a productive member of the community: if they are employed at the time of their arrest, their employer incurs costs for replacing their employee; social services resources may be needed to assist with dependent children; a remanded person may lose their housing while in prison and may then need government assistance to find housing once released (Jesuit Social Services, 2006).

This discussion highlights that a period of remand may compound existing disadvantage and inequality. Some of the most vulnerable people in society: young people, homeless people, mentally ill people, Indigenous people and women, are particularly affected by remand imprisonment. The presence of vulnerable people in the criminal justice system is endemic. The socially disadvantaged are more likely to be remanded. Thus, are also more likely to be further disadvantaged by a period of custodial remand. Many people are remanded for want of accommodation in the

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<sup>9</sup> For more detail see the following: the Benbrika Case (*R v Benbrika and Ors (Ruling No 20)* [2008] VSC 80 (20 March 2008); Carlton and McCulloch, 2008; Human Rights Law Resource Centre, 2007; Nekvapil, 2008). Reference to human rights violations through remand imprisonment can be found in *Gray v DPP (Ruling No 12)* [2008] VSC 4 (16 January 2008). Also, Parliamentary reference to 'warehousing of intellectually disabled on remand can be found at Parliament of Victoria Legislative Assembly 2009, 4,061. Report on sexual violence in prisons uncovered a serious case of abuse where a teenage boy was raped and beaten while being held on remand. He was then transferred to an infirmary to have his injuries treated, but subsequently sent straight back into the same unit with the man who had attacked him (Steels and Goulding, 2009).

community. Research demonstrates that many young homeless people are denied bail because there is no accommodation available to them outside of prison; indeed, homelessness is the single most significant factor in remand decisions for young people (Boyle, 2009; Denning-Cotter, 2008; Mather, 2007). Homelessness is also a significant factor in the remanding of Indigenous people (Denning-Cotter, 2008). Player (2007) argues that women are particularly disadvantaged by bail procedures and are thus more likely to be remanded than men. Often this is because women display signs of emotional distress, such as self harming; they are then remanded to protect them from harm (Moore and Lyons, 2007). The conflation of needs with risk in bail decision making can also be illustrated with reference to Indigenous women, who are more frequently remanded due to homelessness (Russell and Carlton, 2013).

Once a person is on remand the conditions can be severe, especially as the majority of remand prisoners are held under maximum security arrangements (VDOJ, 2009). The main women's prison in Victoria, the Dame Phyllis Frost Centre, is a maximum security prison. This means that women are more likely to experience the harsher conditions of a maximum security environment than men, as there are no options available for more relaxed conditions. In contrast, there is potential for more flexibility in men's prisons (Sentencing Advisory Council, 2011).

It is a requirement under international conventions, including the *Standard Minimum Rules for the Treatment of Prisoners*, that unsentenced prisoners should be kept separate to the general prison population. This means that in some prisons, such as Port Philip, remand prisoners are kept in maximum security wings, often reserved for prisoner management or solitary confinement. This is particularly concerning given that remand prisoners are still presumed innocent. Octigan, a senior prison officer describes the typical remand experience as follows:

When a person is remanded in custody, they can lose their accommodation, their job, be locked away for 23 hours each day, and endure the pressures, hazards and indignities of prison life. Remand prisoners have inadequate access to legal representation, their prison conditions while on remand are poorer than their sentenced counterparts and the suicide rate among remandees is very high. Such

defendants suffer regular invasions of privacy each time they are searched and often fear danger from those incarcerated with them (Octigan, 2002: 19).

Shõnteich (2008) found there were many negative effects of detention on individual defendants and their families. Deaths in custody, particularly from suicide, are higher for remand prisoners than for sentenced prisoners. In 2004, the death rate for remand prisoners was more than double that of sentenced prisoners (Joudo, 2006; Sarre et al., 2006). In 2010, the now defunct OPI released a report on the conditions in police cells. The report found that unlike prison officers, police are not sufficiently trained to manage the care of people under their control. They also found the attitude of police towards custody management regards it as a waste of resources and not a high priority. Despite this, the reality is that 24,000 people a year will be under the care and control of police (OPI, 2010). In Victoria, there have been several recent deaths in custody of remand prisoners, leading to investigations into the treatment of prisoners in police custody, and the examination of various institutions that house unsentenced prisoners. This includes high profile cases where two men died in police custody in 2010. The police have been highly criticised in the media and by human rights groups, as these incidents were not made public until an interpreter who witnessed the treatment of one of the deceased contacted the media to publicise the death (Sexton and Millar, 2010). These deaths in custody are occurring more than 20 years after the Royal Commission into Aboriginal Deaths in Custody made recommendations to prevent deaths in police custody (Cunneen and McDonald, 1997).

Conditions in the MCC have also recently been the subject of investigation. Ombudsman Victoria conducted an investigation after a complaint was received from a remand prisoner alleging mistreatment at the hands of staff. The incident was reported in the media (Holroyd, 2007; Ombudsman Victoria, 2007; Shanahan, 2007). The allegations were proven and the security company staffing the centre has since lost its contract. However, the report shed light on many concerns with the facility and the human rights of the prisoners housed there. It is an underground facility designed to hold prisoners during the day, while waiting for their cases to be heard, and is unsuitable for holding prisoners for more than 48 hours. Yet, there is evidence that

many prisoners are being held in these conditions for up to one month. The Ombudsman also found that prisoners there had little access to visitors or to telephones. Given that many of the prisoners were held there in the lead up to and during their hearings, this made it very difficult for them to obtain adequate access to legal advice and prepare their case. This corresponds with research findings in many jurisdictions that the limited access to legal advice for remand prisoners contributes to a person's chance of being found guilty (Brookman and Pierpoint, 2003; Ombudsman Victoria, 2007), and also may result in longer sentences (Sacks and Ackerman, 2014).

Ultimately, remand imprisonment has a serious effect on a remandee and their family. Not only does a remandee experience deprivation of liberty, which is reserved as the most serious punishment in our criminal justice system, but their time in prison puts them at risk of further harm (for example, sexual assault in prison), and an increased risk of death while in custody. The separation from their family may compound the situation, causing distress to remand prisoners, particularly in the case of women who are separated from their children. As many women are the sole carer for their children, arranging care for children when on remand is often difficult and negatively affects the children concerned. Parents are at risk of losing custody of their children while they are on remand (Victorian Association for the Care and Resettlement of Offenders (VACRO), 2006). Added to this emotional trauma is the stress experienced preparing for a legal trial, further compounded by the restricted access to legal assistance. Remand prisoners may lose their housing while imprisoned. The loss of income during their period of imprisonment means that it is harder for remand prisoners to re-establish themselves once they are released. These factors compound experiences of vulnerability. As such, vulnerable people may be further marginalised by remand imprisonment, which can be a pathway to further imprisonment. The effect of remand imprisonment on people reinforces the need for it to be used as a last resort. Given that therapeutic bail partially aims to divert people away from remand imprisonment, examining its efficacy and effect on vulnerable people is important.

## **Chapter 3: The Evolution of Therapeutic Bail**

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The previous chapters provided both an overview of the problem that this research will investigate and background to contextualise the study, as well as the research imperative. This chapter examines the historical development of therapeutic jurisprudence and therapeutic interventions in the criminal justice system. It will provide a history of the evolution of therapeutic bail, in the form of bail support programmes, and then summarise extant programmes in Australia, particularly Victoria. The second part of the chapter will critically analyse past and contemporary studies that have influenced the research design of the current study. This includes therapeutic interventions in the criminal justice system, bail research and evaluative research on support services in the criminal justice system. This chapter provides a rationale for the research design, which is detailed in the following chapter.

### **3.1 The Rise of Therapeutic Jurisprudence**

#### **3.1.1 Problem solving and therapeutic interventions**

Over the last few decades, the term ‘therapeutic jurisprudence’ has appeared in contemporary legal vocabulary. It is generally understood that therapeutic jurisprudence draws upon many disciplines, such as psychology, psychiatry, sociology, philosophy, criminology, public health and mental health, to inform its study of the role and effect of law on people’s lives (Wexler and Winnick, 1991). Therapeutic jurisprudence’s evolution has led to significant policy change and academic debate around the world. Its beginnings focused on specific mental health issues. The early literature on therapeutic jurisprudence focused primarily on emerging mental health law and their effects on mentally ill people, particularly in the United States of America (USA) (Wexler, 1990; Wexler and Winnick, 1991). Most of the early research and debate focused on three key areas: the insanity defence; involuntary committal of mental health patients; and mental health professionals’ duty to warn the public about potentially dangerous patients (Appelbaum, 1985; Fein, 1990; Gurevitz, 1977;

Mendelson and Mendelson, 1991; Morris, 1968; Rose, 1985; Schopp, 1991; Shuman, 1993).

Originally, therapeutic jurisprudence specifically focused on mental health law and grew from concerns about the direction of mental health legislation (Wexler, 1992). The last few decades have seen an expansion of the practice and definition of therapeutic jurisprudence, from a specific mechanism to address mental health issues in areas of law, to a broader approach by the legal system responding to underlying issues relating to criminal offending (Braithwaite, 2002; Daicoff, 2000). This occurred during a time when many critics believed that therapeutic jurisprudence needed to be understood more broadly (Braithwaite, 2002; Slobogin, 1995). Proponents of therapeutic jurisprudence believe it is a better approach than risk techniques, such as those used in offender treatment and rehabilitation, which are seen as punitive and anti-therapeutic (Birgden, 2004). Therapeutic jurisprudence's focus is now not just on mental health law, but on social disadvantage and the potential for realising social justice (Braithwaite, 2002; Popovic, 2003). As Blagg (2008: 12) succinctly puts it:

The notion of 'therapeutic' in therapeutic jurisprudence is a fairly simple one. A therapeutic experience is positive and encourages meaningful change, while an anti-therapeutic experience is negative and has adverse consequences for the actors involved.

The broadening scope of therapeutic jurisprudence led to significant debate. Some scholars have wrangled over the tensions created within human rights when the law takes a therapeutic approach (Freiberg and Morgan, 2004; Gould, 1993; Slobogin, 1995). Others have debated the efficacy of treatment in a justice setting, when priorities are different to those within a health setting (Klotz et al., 1992). Wexler (1990) has addressed some of this criticism over the obfuscation of priorities when the law is applied with a therapeutic approach. He believes that the 'law should err on side of humane treatment rather than adversarial due process' (Wexler, 1990: 199). These debates will be critiqued extensively in the following chapter. While therapeutic jurisprudence originated in the USA, over concerns with the future of mental health law, its expansion to a broader approach of social justice has been adopted by many

countries (Magner, 1998; Wexler, 1992). Australia is one of the more avid adopters of the movement (McMahon and Wexler, 2003). This next section will look at one early adoption mechanism of therapeutic jurisprudence that has been developed more comprehensively in Australia: special courts.

### 3.1.2 Special courts and supports

The scope of therapeutic jurisprudence has expanded and now many areas of the legal system are understood through a therapeutic jurisprudence lens (Birgden and Ward, 2003; Freiberg, 2003; Makkai, 1999; McMahon and Wexler, 2003; Scheff, 1998; Slobogin, 1995). Recently, policy applications of therapeutic jurisprudence have become the focus of an evolving court system; this includes the introduction of problem oriented courts (Freiberg, 2007). These courts are still emerging, with different courts focusing on different issues, making it difficult to define a problem solving court.

However, according to Berman and Feinblatt (2001), when looked at in the aggregate, there are similarities that help identify problem solving initiatives. Essentially, a problem solving initiative is where the court focuses on issues of social harm linked to offending, such as drug addiction. Rather than being limited to legal facts and decisions, these courts go beyond this to address future behaviour and attempt to ameliorate problems within the community (Berman and Feinblatt, 2001). Winnick and Wexler (2003: 105) believe that there:

...is a clear symbiotic relationship between problem solving courts and therapeutic jurisprudence. Simply put, problem solving courts can serve as laboratories for therapeutic jurisprudence, insofar as therapeutic jurisprudence is especially interested in *which* legal arrangements lead to successful therapeutic outcomes and *why*.

Problem solving courts exist as adjunct to the traditional court systems, which are based in the traditional form of jurisprudence. The problem solving court has three

key manifestations: first, courts designed to address a specific issue or part of the judicial process; second, community courts or centres that are specifically designed to implement justice through therapeutic jurisprudence principles; and last, new initiatives based in existing courts, such as therapeutic support programmes. Problem solving courts may take several forms. Payne (2006) separates these into three types: case management courts; diversionary and monitoring courts; and, adjudicators. Although arguably alternative courtrooms have been present in some form since the late nineteenth century (Berman and Feinblatt, 2001), the late 1980s saw the first example of a problem solving court in a contemporary incarnation in the Dade County Drug Court in Florida (USA).

As noted by Freiberg (2007), while therapeutic jurisprudence is intrinsically linked with drug courts, a therapeutic jurisprudence approach was not applied until after the genesis of drug courts. Originally, these courts were created as an administrative solution to the increasing number of drug related offences clogging up the courts (Freiberg, 2003). The court was set up to address high levels of recidivism among drug addicted offenders. Rather than resorting to punitive incarceration sentences, judges ordered drug related defendants to attend long term supervised drug treatment programmes. A participant's progress in the programme would be rewarded with charge reductions and failures sanctioned by punitive responses. Preliminary research into the success of drug courts has demonstrated lower recidivism rates by defendants sentenced in this way than those processed through the traditional system. In response to these positive results, other jurisdictions initiated their own versions of drug courts (Berman and Feinblatt, 2001; Indermaur and Roberts, 2003). Other types of special courts include youth courts, domestic violence courts, mental health courts, and cultural courts (Edwards, 2003; Elliott, 2003; Marini, 2003; Rivera, 2003). Sentencing circles, where restorative justice principles are applied through the participation of victims and other related parties in the sentencing process, provide further examples of special court processes (Braithwaite, 2002; Winnick and Wexler, 2003).

Numerous studies have been conducted to gauge the efficacy of these special courts. Initial studies into the long and short term effects of the resultant pilot drug courts



remained positive in relation to reduction in short term offending. However, not enough data was available to gauge the long term effect of these courts (Belenko, 2001). Several meta-analyses of evaluation studies were conducted to gauge the success of special courts in North America. These found that generally, special courts were seen as successful and met their required aims and criteria (CASA, 2003; Finigan et al., 2007; Latimer et al., 2006). These positive evaluations ensured the continued expansion of special court programmes throughout North America and beyond. Since then, further evaluations have been conducted into the efficacy of these courts; these will be discussed in Section 3.2.

Initially, although therapeutic jurisprudence offered Australian jurisdictions an interdisciplinary approach to legal problem solving, its American law focus did inhibit its application (Magner, 1998). Australian academics, such as Astrid Birgden, Tony Ward and Arie Freiberg have extended the scholarship to include an Australian perspective, through which much of therapeutic jurisprudence's relevance in this country becomes apparent (Birgden and Ward, 2003; Freiberg, 2003; McMahon and Wexler, 2003). Special courts have been operating in Australia since 1998, with the establishment of the New South Wales Drug Court in Sydney (Indermaur and Roberts, 2003). This was followed by a drug court in Queensland; then South Australia created new divisions to its existing Magistrates' Court that addressed specific issues including; a drug court, a domestic violence court and an Aboriginal court day (Freiberg, 2003). Victoria had adopted a raft of special court initiatives by the turn of the millennium, and was already noted for its robust adoption of the therapeutic jurisprudence narrative in these new initiatives (Freiberg, 2003; Freiberg and Morgan, 2004). There are two special courts now operating in Victoria: the Koori Court, operating in various Magistrates' Court locations around the state; and the Drug Court, operating out of the Dandenong branch of the Victorian Magistrates' Court.

Special courts attempt to treat the offender rather than solely mete out punishment. They are also interested in addressing the harm done to the community by minor crimes (Phelan, 2004a). Where drug courts, sentencing circles and other such initiatives focused on particular issues or parts of the legal process, in the USA a

second type of special court evolved from this into broader initiatives, providing a more whole of system approach to crime and offending. To achieve this, community courts were created. In 1993, the New York Midtown Community Court commenced, aiming to improve outcomes for offenders and the community, established on the principles of therapeutic jurisprudence (Phelan, 2004c). Sentences handed down by this court may include provision for community restitution, for example removing graffiti or cleaning streets (Berman and Feinblatt, 2001; Feinblatt and Berman, 2001). Since the success of the Midtown Community Court, many other examples of community court have appeared in other jurisdictions<sup>10</sup>. These courts focus on tackling ‘quality of life crime’ from the ground up and providing outreach services for people on the street (Feinblatt and Berman, 2001: 34; Phelan, 2004a).

In Australia, the first community court of this nature is the Neighbourhood Justice Centre (NJC) in Collingwood, Victoria. This court is modelled on the Red Hook Centre. The court has been designed to reflect its community spirit. It has open spaces with local art displays, free tea and coffee, and meeting spaces for local support services (Murray, 2009). The NJC is described as more than a court; in addition to being a part of the Magistrates’ Court of Victoria, the centre is a focal point for community support services, Legal Aid and Victoria Police. A recent evaluation of the NJC pilot project provided some positive findings. A comparison of the re-offending rates of those sentenced through the NJC, compared to those sentenced through the traditional Magistrates’ Court system, demonstrated that NJC ‘graduates’ were 14 per cent less likely to re-offend (VDOJ, 2010c). These results are similar to evaluations of drug court efficacy discussed previously (Latimer et al., 2006). However, as the NJC is in its infancy, longitudinal data on recidivism rates will not be available for some time. The evaluation also noted that the crime rate in the surrounding area had dropped

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<sup>10</sup> Some of these courts have come about in response to a particular local crime issue, for example, the Red Hook Community Centre was created after a highly publicised local murder (Murray, 2009). A high school principal was shot and killed in rival gang warfare, outraging the local community (Phelan, 2004b). Significantly, this Centre represents the evolution of community courts to justice centres (Phelan, 2004b). It has jurisdiction to hear cases that traditionally could have been heard in three separate courts: the Civil; Criminal; and Family Courts. In this way, the Centre aims to provide a more holistic, coordinated approach to community problems (Feinblatt and Burman, 2001). This ethos extends to the symbolic space in which the Centre was created. A locally recognised community building (a Catholic School in its previous existence) is the primary court building. The building is perceived as sitting on ‘neutral territory’, in that it is not a part of a public housing complex, nor is it solely in the private sphere (Phelan, 2004b: 171–172).

since the implementation of the NJC. Although the study acknowledged there were many factors that could have influenced this result, the corresponding decrease in re-offending by NJC ‘graduates’ may be a correlate.

### **3.1.3 Development of bail support programmes**

It is not just community courts that are fashioned around the core principles of therapeutic jurisprudence; the lower courts have also taken on therapeutic jurisprudence practices. Bail support programmes are a significant part of this third and final type of special court stemming from the therapeutic jurisprudence approach.

The first formal bail support programme originated in New York in 1961, as part of the Manhattan Bail Project. This project constituted the first systematic evaluation of the bail decision process and represented the foundation for many remand diversion programmes, including the UK’s bail information schemes (Ares et al., 1963; Bottomley, 1973). Given that some people spend more time on remand than sentenced prisoners spend in jail, the propensity for injustice with denial of bail is a serious reality (Ares et al., 1963). Additionally, the US system of bail bonds meant that the final decision to bail a defendant more often than not rested with a bail bondsman’s willingness to fund a bond, than any magistrate’s evaluation of risk. This resulted in higher rates of remand among those of lower socio economic status (Ares et al., 1963; Vera Institute of Justice, 2010). While the bond system does not exist to the same extent in Australia, defendants from more disadvantaged backgrounds are less likely to receive bail due to their inability to demonstrate they have secure housing and employment when facing a bail decision (Boyle, 2009; Denning-Cotter, 2008).

The key component of the Manhattan Bail Project was to provide courts with comprehensive information on the defendant, and factors such as their ties to the community, on the understanding that the more known about each individual situation, the more likely a person was to be granted bail. A written summary of a defendant’s

relevant information and a recommendation of whether or not to grant bail would then be provided to the court. A control group was used to provide a basis for comparison to evaluate the effects of the project (Ares et al., 1963; Doherty and East, 1985).

While initially magistrates appeared unwilling or slow to accept the recommendations of the Project reports, gradually it began to affect the decision making process. Magistrates were able to make a decision with greater access to information about the defendant rather than just relying on the nature of the charges (Ares et al., 1963). This finding led the Vera Institute researchers to conclude that a proper investigation prior to a bail hearing was imperative to adequate bail decision making. It was estimated that once similar systems were implemented in other US jurisdictions, defendants were four times more likely to receive bail, while the rate of absconding on bail reduced by almost 50 per cent (Ares et al., 1963; Davies, 1971; Doherty and East, 1985).

The Manhattan Bail Project conducted several additional experiments alongside the main project. It endeavoured to identify ways to divert those deemed a ‘poor risk’ of meeting bail conditions—people who did not have significant ties to the community or whose background could not be verified—away from remand. Another side project conducted with women on remand resulted in an over 30 per cent reduction in the number of women on remand in a New York detention centre. While acknowledging that the project may not have been the sole reason for the decrease in remand, the results were deemed successful enough to ensure it was made permanent in the detention centre (Ares et al., 1963). The findings from these studies have provided the basis for a bail support and information scheme model that has been drawn upon in the USA and the UK (Ares et al., 1963; Doherty and East, 1985).

The UK, buoyed by the success of the Manhattan Bail Project, attempted several information and diversion schemes in the 1970s and 1980s with mixed results. The less than satisfactory results appeared to primarily result from reluctance on the part of police and magistrates to participate actively in these initiatives, and that they were instituted without funding. Courts wishing to participate in information schemes had to

finance them out of existing funds. After a Home Office directive in 1975 to introduce an information scheme, just over five per cent of eligible courts in England acted on this directive (Doherty and East, 1985). This highlights that programmes aimed at diverting defendants from remand need to be supported by key players within the system if they are to be successfully implemented.

Eventually, after the ill-fated attempts of the 1970s, the bail information scheme was introduced in the UK in 1987. In this scheme, probation officers recorded and verified details that might identify a defendant as a low risk for bail, including such factors as ties to the community; however, they did not make recommendations to the court. Bail information schemes target those defendants for whom bail has been refused by the police, as they are more likely to be remanded by a court. Many studies have found bail information schemes to be successful in facilitating diversion from remand. Stone (1988) evaluated the freshman statistics of the scheme finding that one third of defendants who would previously have been remanded were diverted as a result of the scheme. Lloyd (1992) found that one quarter received bail because of information provided as part of the bail information scheme.

However, one study by Dhami (2002) concluded that the additional information did not have any bearing on a magistrate's decision; it only increased their confidence in the decision. She argued that the previous studies were methodologically challenged in that they did not provide experimental controls. In reality, magistrates relied more upon legal information, such as the nature and seriousness of the offence, than individual personal information when making decisions. However, her argument regarding experimental controls does not necessarily correlate with the results seen through using a control group in the Manhattan Bail Project.

From the 1980s onwards, a series of bail support programmes commenced around the UK, culminating in the introduction of the Bail and Accommodation and Support Service in 2007, which provided national cover (Drakeford et al., 2001; Hucklesby, 2011). The West Midlands Probation Service (1997) noted an 83 per cent success rate

in the bail support programmes. In each case, success was defined as the completion of the programme by the defendant without offending on bail. The Northamptonshire Probation Service reported an even higher success rate of 92 per cent completions on the scheme (Octigan, 2002). Octigan also notes that, although there many evaluations and studies show that once bail support programmes are initiated within a particular jurisdiction they operate successfully, ownership of, and commitment to, these programmes is lacking. This again mirrors Doherty and East's (1985) observations on the limitations to bail support in the UK.

Key to findings on the operation of bail support programmes in the US, as compared to the UK, is that the US has reported more success. Examining the reasons for this will hopefully elucidate methods of successfully operating information and diversion schemes. Dhami (2002) asserts that the US system may operate more successfully because more specific and detailed information is collected; the collection officers also make recommendations to the court. It may also be that police and courts in the US are more amenable to these systems than in the UK, based on Doherty and East's (1985) comments. As the US relies more heavily on the bail bond system, courts may have been more ready to accept diversions from remand where previously the defendants could not afford to post bail. This contrasts with the UK system, where financial status is not such a direct indicator for a remand decision. While it is important to note that the UK, US and Australian jurisdictions differ in terms of arrest rates and also bail processes in local jails, these studies from the US and the UK can provide some insight into the effective implementation of bail studies and shed light on potential issues that may occur in Australian jurisdictions.

#### **3.1.4 Bail support in Australia**

In Australia, Victoria has one of the most comprehensive and interlinked bail support systems of all jurisdictions. In many of the state's Magistrates' Court, there is a primary bail support programme that provides assessment services and then refers eligible persons to other relevant services (or in some cases, provides services within the

primary programme). The two main programmes found in Victoria are the Court Referral and Evaluation for Drug Intervention and Treatment Bail Support Programme (CREDIT) and the Court Integrated Service Programme (CISP). These programmes evolved through a series of pilot schemes. In 2001, a formal bail support programme was introduced into the Melbourne Magistrates' Court in response to rising prison numbers. The initial pilot programme, the Pilot Bail Advocacy and Support Services program, commenced in January 2001. In conjunction with this programme, funding was provided to community services to provide bail advocacy.

The programme was evaluated in 2003. The report recommended the programme be expanded (Bondy et al., 2003), and in 2004 it was combined with the CREDIT to form the CREDIT Bail Support Programme (Department of Human Services (DHS), 2005; Magistrates' Court of Victoria, 2007). In 2006, the Magistrates' Court extended their bail support options with the creation of the CISP. The CREDIT programme operates out of Broadmeadows, Dandenong, Ringwood, Heidelberg, Frankston and Ballarat Magistrates' Courts. The CISP operates out of the Melbourne, Sunshine and La Trobe Valley Magistrates' Courts (Magistrates' Court of Victoria, 2007). These two programmes provide key bail support services in each relevant location. The Magistrates' Court website states that the CISP aims to:

- provide short term assistance before sentencing for accused with health and social needs
- work on the causes of offending through individualised case management
- provide priority access to treatment and community support services
- reduce the likelihood of re-offending (Magistrates' Court of Victoria, 2012).

The CREDIT aims are listed on the website as:

- successful completion of bail by the accused who would otherwise be remanded in custody
- reduction in the number of accused remanded due to lack of accommodation and/or treatment or support in the community
- successful placement of the accused in drug treatment and/or rehabilitation programs

- long term reduction in involvement of the accused in the criminal justice system (Magistrates' Court of Victoria, 2012).

Apart from these two main programmes there are local network groups, such as the Local Area Resources Team in the Broadmeadows region (although, as at August 2013, this does not appear to exist anymore); and a Rural Outreach Diversion Worker (RODW) located at the Bendigo Magistrates' Court to provide referral services in regional areas.

In Victoria, there is growing recognition that a 'joined up' approach to service delivery—where government organisations work together with community organisations to provide services to those most in need of assistance—is an ideal approach. The Victorian DHS policy is committed to this service provision approach, particularly in relation to housing for people at risk of homelessness (DHS, 2002; Lake, 2005; State Government of Victoria, 2005). Programmes such as CREDIT and CISP are designed to interlink with other services.

While it is widely recognised that Victoria has the most comprehensive system of bail support in Australia, there are other key programmes outside that state. In NSW, trials have been run for programmes aimed at reducing breaches of bail conditions and ensuring defendants attend court. Additionally, most states and territories have formed their own referral services similar to the CREDIT programme; for example, the NSW MERIT, the Queensland version QMERIT, the SA Court Assessment and Referral Drug Scheme (CARDS), and the court Mandated Diversion Programme in Tasmania (Denning-Cotter, 2008).

While bail legislation was discussed above, it is worth noting that legislative provisions for bail support services are still patchy. Although changes to Victorian legislation, in the form of the *Bail Amendment Act*, 2010, were enacted because the extensive use of conditions for granting bail was recognised, there was limited reference to using therapeutic conditions, especially bail support programmes. This means that



therapeutic conditions were primarily used informally until recently. Changes made to the *Bail Act* by the *Bail Amendment Act*, 2013 have now codified these conditions. Other states have made specific provisions for bail support programmes or treatment within legislation, including NSW, SA, ACT and WA. Although bail support programmes are generally not enforced by statute, the Victorian legislation allows for significant use of discretion by decision makers, allowing these programmes to be used as therapeutic conditions (Edney, 2007).

## **3.2 Literature Review**

This thesis is the first study of its kind in Australia due to the dearth of qualitative research in this area. This section will examine empirical research conducted in the area of therapeutic jurisprudence and bail. To present a clear picture of the research, this section will first examine studies into bail decision making and bail conditions. This is important to provide a picture of what research exists regarding the use of conditions and alternatives to remand imprisonment. Next, current research into therapeutic jurisprudence in action will also be critiqued to identify the gap in knowledge this research addresses. The majority of empirical research into therapeutic jurisprudence has focused on special courts, in particular drug courts. Much of this research has been conducted in the US; however, there is a burgeoning pool of research into Australian initiatives. Finally, this section will examine current research into bail support programmes. Most of this research consists of government driven evaluative research. This discussion will demonstrate that Victoria has a robust system of therapeutic initiatives, including a well established bail support system. Despite this, there is a dearth of dedicated qualitative research focused on the implementation and effect of these programmes.

### **3.2.1 Bail studies**

Several UK authors have published extensively their empirical research into bail and bail conditions in the UK (Dhami, 2002, 2003, 2004; Dhami and Ayton, 2001;

Doherty and East, 1985; Hucklesby, 1996, 1997a, 1997b, 2004, 2011; Hucklesby et al., 2007). These studies have informed much current bail research because they document and examine some shifts in bail practices in the UK over the last few decades. These provide some context for cross-jurisdictional comparison with Australia.

Doherty and East (1985) conducted 496 bail hearing observations in Cardiff Magistrates' Court over six months. Their analysis was primarily quantitative in nature, providing statistical analysis of certain relevant factors in bail decisions, such as whether or not there was a police objection to granting bail. Their study is useful in that it provides a superficial understanding of the bail hearing process; however, it does not provide an in depth qualitative analysis of the bail decision or the attitudes of the key players. The findings of the study point to the problematic nature of bail decision making and extant resistant attitudes to reform. The authors also recommend reform of the current system in the form of bail support services. This study has had a significant effect on future reforms, being often cited in later literature on the implementation of bail support services.

Following on from Doherty and East's (1985) study, Anthea Hucklesby conducted research on variations in use of bail and bail conditions. Her study drew on both quantitative and qualitative methods over three years to gather data in the form of court observations, examination of archive materials, survey and interviews (Hucklesby, 1997a, 1997b). She found that variations in the use of bail can be explained by court culture, and that the reputation of a court may affect remand decisions. This finding is particularly interesting to this study, as it demonstrates the importance of qualitative research in understanding how attitudes and culture can affect policy and procedure in the legal system. Hucklesby's study did not focus on bail conditions or the use of therapeutic programmes, but it did establish her as a bail expert in the UK; as such, she was part of a team of researchers that examined bail support in the late 2000s (Hucklesby, 2011). Even though this research did not extend to examining therapeutic bail, Hucklesby's research is invaluable to this study as it provides a qualitative

understanding of how bail decisions are made and how the court's culture influences the use of bail.

Mandeep Dhami's research examined bail decision making by using court observation methodology. In line with previous research on bail that used court observation as a means of data collection, the results gathered were quantitative, using statistical analysis. Dhami's research demonstrated that, although best practice for bail decision making required taking time and gathering as much information as possible about circumstances before making a decision, this did not happen in reality. Rather, bail decisions were made in a 'fast and frugal' fashion, where magistrates relied on police and prosecution recommendations (Dhami and Ayton, 2001). This practice has potentially resulted in punitive outcomes for defendants (Dhami, 2003). Another part of Dhami's (2004) research into bail decision making required magistrates to make bail decisions on hypothetical cases in an effort to examine the consistency of magistrates' decisions. She found that magistrates were inconsistent when deciding on bail conditions and that they were less confident of their decisions when using conditional bail. She recommended further research into the use of conditions and their relation to corresponding bail risks (Dhami, 2004).

In Australia, a large study into bail decision making was undertaken for the Criminology Research Council by Bamford, King and Sarre, looking at two Australian jurisdictions: South Australia and Victoria (Bamford et al., 1999; King et al., 2005; King et al., 2008; Sarre et al., 2003; Sarre et al., 2006). The research methodology included conducting courtroom observations in those states. Their study used data from over 350 cases and found that in general, court hearings lasted longer in Victoria than in other jurisdictions. However, their observation data was primarily quantitative in nature and limited in scope. As a result, they concluded that there was limited scope for further observations. The only new data they recorded in their study was that bail applications in Victoria took longer than in the UK (based on comparisons with Hucklesby's 1996, 1997a and 1997b work). The study also provided some qualitative data in the form of extensive interviews with key players in the bail process from each jurisdiction. It also had limited scope for examining issues of social disadvantage in bail

decision making. It did examine gender and indigeneity to some extent, but the effects of factors such as substance use, mental illness and homelessness were not examined in any detail.

A more recent study by Allan et al. (2005) highlighted the dearth of empirical research focused on bail practices, particularly studies using observational research in courtrooms. Allan et al. (2005) recognised the research already conducted by Hucklesby (1996), Dhami (2003) and Bamford et al. (1999), but noted that these studies only provided some information on the bail process and that more was required. They found that magistrates primarily drew on legal matters rather than factors such as race or gender when making bail decisions. While the findings of this study are useful to informing this current study, because Allan et al.'s (2005) research primarily looked at the impact of legal factors on decision making in comparison to extra-legal factors (such as socio demographic variables) it does not provide any illumination on therapeutic bail conditions.

This discussion demonstrates that historically there has been limited research into the court processes of granting bail. Much research conducted has provided only limited information from which this current study can build upon. It is too general in nature (i.e., it does not focus on the therapeutic aspect), and is primarily quantitative or is now out dated. This means there is scope for new studies into bail to update this prior research. It is also clear that further qualitative research is required to provide a fuller picture of bail practices and procedures. This chapter will now turn to examining studies that examine therapeutic jurisprudence initiatives in the legal system and then specifically into the use of therapeutic bail.

### **3.2.2 Empirical research into special courts**

This section provides an overview of empirical research into therapeutic jurisprudence in action, commencing with studies into more established forms of therapeutic

jurisprudence in action, namely special courts. The bulk of literature that provides empirical research into this area originates from the USA. This is due to therapeutic jurisprudence's origins in the US and the fact that most established systems have been operating in the US for many years. Much criticism levelled at therapeutic jurisprudence initiatives centres around a lack of empirical research (Klotz et al., 1992; Slobogin, 1995). While this is still the case to an extent, empirical research has been conducted in recent years, warranting scrutiny. Given the lack of research into bail, specifically in the area of therapeutic bail, examining empirical research into special courts as therapeutic initiatives will bolster the exploration for an appropriate research methodology in this field.

Phelan (2004c) has critiqued the lack of evaluation into special court initiatives. Although his assessment may be slightly unfair, given that many evaluations are underway, due to the newness of this approach efficacy testing is still in its early stages. Longitudinal studies are not yet possible in many jurisdictions. Since his critique, there have been more evaluative studies conducted into these initiatives. In 2009, the National Drug Court Institute (NDCI), based in the USA, provided a comprehensive review of drug courts. The NDCI (2009) recognised that numerous evaluations had been done around the country on these courts; it has provided this meta-analysis of current studies to assist researchers. This critical review found that many evaluations into drug courts were methodologically weak. Additionally, most studies focused on quantitative data, such as participant dropout rates and graduate numbers, rather than providing a more in depth analysis based on theory and qualitative data. The NDCI (2009) concluded that, although most evaluations of drug courts indicated positive results and encouraged the ongoing use of drug courts and problem solving approaches, the poor quality of empirical research into this area limited the claims' substantiveness. However, the report did believe that more recent evaluations were sounder, and recommended more comprehensive data collection for future studies to ensure reliable results.

One drug court evaluation that does provide some useful qualitative data, in addition to comprehensive quantitative data, is that of the National Centre on Addiction and

Substance Abuse at Columbia University's (CASA) (2003) study into the Drug Treatment Alternative-to-Prison programme, run out of Brooklyn in New York. Overall, this study reported positive results for defendants whose cases were disposed of through the drug court, rather than the traditional system. They found that defendants were more likely to complete drug treatment programmes than those who volunteered (Berman and Feinblatt, 2001; CASA, 2003). This finding is interesting in light of concerns raised by Durham and LaFond (1990b) and Fagan and Fagan (1990) over coercion and treatment efficacy (discussed in more detail in the next chapter). Certainly, this finding deserves attention when constructing research tools for this project, and when interpreting data. The NDCI (2009) review also attempted, where possible, to gauge the effect of drug courts on a defendant's future offending. While not all evaluations in their study tested recidivism rates, and not all tests were comparable, what evidence they were able to produce indicated lower recidivism rates.

A drug court evaluation meta-analysis study done by the Canadian Department of Justice did specifically address the issue of recidivism. This meta-analysis examined over 50 studies that evaluated 66 drug courts and concluded that the combined results of these studies indicated defendants whose cases were disposed of through a drug treatment court were 14 per cent less likely to re-offend than those who went through the traditional system (Latimer et al., 2006). Economic studies into the potential cost savings of these programmes also provided welcome results to an overburdened and under-resourced justice system, demonstrating primary savings through drug court case disposal, in addition to the less tangible economic benefits to a community with less offending (Finigan et al., 2007).

Studies have shown there can be issues with the implementation of special courts. Resistance to these alternatives to traditional courts still exists, and government and key stakeholder 'buy-ins' are critical to successful implementation. The Multnomah County Drug Court in Oregon, USA was evaluated as successful. It demonstrated cost savings and positive results; however, since its evaluation, funding has been threatened because of government budget cutbacks (Finigan et al., 2007). This demonstrates the myopic responses to alternative forms of justice. The wider economic benefits of these

sorts of interventions are often not acknowledged by those who prefer a traditional punitive approach to justice (Finigan et al., 2007).

In Australia, there have been some important studies into drug courts over the last decade. Indermaur and Roberts' (2003) analysis of the 'first generation' of drug courts in Australia provides a comprehensive background to the evolution of problem solving alternatives in this country. However, it does not provide any empirical data with which to build upon. Indermaur and Roberts (2003) critically examined the literature and evaluations of drug courts in Australia and found that preliminary examinations of the fledgling system were unable to provide any definitive evidence of these programmes' success. Harry Blagg's (2008) research paper on problem oriented courts provides a more theoretical analysis regarding the use of these courts. However, his analysis, although drawing on a therapeutic jurisprudence paradigm, examines several other theoretical approaches that are also argued to influence the evolution of problem oriented courts.

Klotz et al. (1992) called for more empirical research on therapeutic jurisprudence theory to see what benefit it might hold for policy-making, and also to understand more about treatment motivations. Two significant studies responded to this call and provided in depth theoretical analyses of therapeutic jurisprudence in action (Bull, 2006, 2010; Fischer, 2003). Fischer (2003) conducted a critical assessment of drug courts in North America. Although his study does not provide any original empirical data, it does employ a theoretical critique of therapeutic jurisprudence in action through a critical review of drug court literature and evaluation outcomes. His analysis raises concerns that treatment strategies may actually reinforce punitive responses to drug use, rather than add a therapeutic dimension to sentencing. Melissa Bull's (2006, 2010) work on Australian drug courts is significant in framing the current study. She used a mixed methods approach to examining the rhetoric of therapeutic jurisprudence in the drug court setting, first through discourse analysis of court transcripts, followed by observing the drug courts in practice. Her observational research was qualitative, providing one of the only in depth critical insights into practices and procedures of therapeutic jurisprudence in special court settings. Her

analysis is presented through a Foucauldian governmentality lens, and provides a vital critique of therapeutic jurisprudence in action. She notes that Foucault distinguished governmentality separately for individuals and the general population, with discipline being the focus for individual management and security for the general population. She observed that

The characteristics that Foucault links to the rise of the prison in the nineteenth century are evident in the drug courts, where offenders and their specific biography and capacity for correction and change rather than the offence, are the focus of judgement (Bull, 2010: 128).

As drug courts focus on the individual and an individual's needs, not the offence, therapeutic jurisprudence initiatives such as drug courts can be analysed through a governmentality lens. Bull (2006; 2010) concluded that drug courts are more than a reinvention of traditional surveillance or post-conviction practices, the drug court extends beyond this and allows freedom of self expression and self management. Her critique of the therapeutic jurisprudence framework in the drug court helps researchers recognise and analyse key elements of this more contemporary and burgeoning use of therapeutic jurisprudence mechanisms in the legal system. Her work also informs the theoretical framework for this study, further discussed in section 4.5.

Popovic (2003) raised similar concerns about funding issues for Australian initiatives that had been highlighted by Finnigan et al. (2007). She sees issues with ensuring the Victorian special courts are adequately funded to achieve what they set out to do. While Popovic (2003) criticises the Koori Court as being very time consuming, she also praises it for being therapeutic. This raises the question as to whether or not evaluations can measure these less tangible benefits to society. An evaluation of the Koori Court might be able to evaluate the length of time for hearings to be completed and compare this negatively to a traditional court, but the benefit of the longer hearing to people may not be illuminated. This may result in funding being cut, or measures being taken to ensure the court functions more economically, at the cost of the therapeutic factor.



An evaluation of the NJC was completed in 2010, examining the first year of operations at this community court (VDOJc, 2010). This evaluation had positive results and noted that, since the implementation of the court, crime rates in the area had decreased. While the report acknowledges that many other factors could have affected crime rates, it does imply that the centre's existence has had an influence on this reduction. However, as noted by the NDCI (2009), there are methodological challenges in evaluation driven studies, particularly those using quantitative data collection approaches.

### **3.2.3 Evaluations of bail support**

There are a few studies that specifically examine the use of therapeutic bail conditions and bail support services. As previously mentioned, most of these are evaluative studies. Their research design and aims are driven to evaluate the efficacy of programmes and their outcomes, and justify funding rather than inquiring more broadly or seeking to create frameworks for analysis, and understanding bail and related law practices and programmes. Examining these studies in light of the previous discussion on general bail studies, and research into therapeutic jurisprudence in action, crystallises the significant and concerning gap in research that this study addresses.

Little research exists on bail support services and therapeutic bail, particularly in Australia. In the UK, Dhami's (2002) assessment of the bail information schemes found that they were less influential than previous studies had indicated; she concluded this was due to poor implementation and training, but noted the scheme had potential to be successful. Octigan (2002) found that the introduction of bail information schemes effectively reduced offending on bail and saved costs associated with remand. There is really only one current study that has provided robust empirical research, grounded in theory, on therapeutic pre-trial bail conditions: Hannah-Moffat and Maurutto's (2012) multijurisdictional Canadian study examined risk and bail conditions using interviews with key players in the bail process, court observation and

document analysis of pre-sentence reports (Maurutto and Hannah-Moffat, 2010; Hannah-Moffat and Maurutto, 2012). Their study highlighted the reliance of bail support programmes on correctional models of risk and need. It also highlighted the possible net-widening effects of these initiatives, finding that the punitive and controlling aspects of the approach represented an extension of penal power and experiences of punishment beyond the traditionally defined boundaries of the prison (Hannah-Moffat and Lynch, 2012). In this regard, Maurutto and Hannah-Moffat (2010) theorised that bailed defendants were therefore experiencing punishment *before* the imposition of sanction.

Many UK bail support schemes that were scattered around the country were short lived, and as such were never evaluated (Drakeford et al., 2001). However, Hucklesby (2011) was funded by the UK Ministry of Justice to conduct a process evaluation on their Effective Bail Scheme. This programme was implemented at ten courts around the country. This evaluation consisted of a multiple methods approach, drawing data from: observation of processes; interviews with lawyers, case workers, and defendants; and statistical analysis of records. While the evaluation collected a great amount of data, little theoretical analysis was conducted. The study found some evidence that bail support schemes could divert people away from remand imprisonment. There was also a risk that net-widening could occur, as those who might not have been subject to bail conditions were now placed into programmes. Hucklesby (2011) also stated that bail support schemes could be effective in diverting people from remand imprisonment only if they were properly funded. Previously, Hucklesby et al. (2007) had been commissioned by the UK Home Office to evaluate a Restriction on Bail Project that used similar methods. That study did not find significant evidence linking the use of the project to reduced recidivism rates.

In Victoria, Heale and Lang (2001) conducted an evaluation on the CREDIT pilot programme before it was extended to include people on bail. Their study found that although there was significant support for this programme from key players such as magistrates and police, there was no concrete evidence that the programme was successful in meeting its key performance indicators. The key performance indicators

for the programme focused on client retention and satisfaction. The study was informed by interviews with key players such as magistrates, programme staff, police, and a small number of clients. This was combined with a quantitative study of data from the Victoria Police website on uptake and re-offending rates. Support for this programme, even though the data did not demonstrate significant success, led to the extension of the CREDIT programme to bail applicants. This direct support from those involved in the process may be the reason why Victoria has such a comprehensive support system in place, in comparison with other jurisdictions.

The CREDIT programme was evaluated again after it had been expanded to include people on bail (Bondy et al., 2003). Bondy et al. (2003) analysed data from the Magistrates' Court on outcomes and conducted interviews with case workers and programme clients. The evaluation report found the programme was successful, in that clients of the programme were less likely to breach bail conditions than those not in the programme. This report involved collaboration and input from many organisations involved in the area, such as Victorian Legal Aid and the Victorian Magistrates' Courts. Important findings of the evaluation included evidence that bail support programmes in Victoria were successful in ensuring more defendants received bail, less defendants committed further offences on bail and gave defendants access to services that could assist in areas of vulnerability. Overall, the report's recommendations focused on improving and diversifying the benefits noted in the pilot study, rather than overt criticism of the programme itself.

This pilot study provided the foundation for the re-vamped CREDIT programme initiative that was launched in November 2006 (Magistrates' Court, 2006). Bail support services have so far been able to give the greatest assistance in providing accommodation to homeless people (Bondy et al., 2003). The potential to assist those with substance abuse problems does exist within the programme; however, this is one area where the evaluation recommended more could be done. A more recent evaluation of the CREDIT Programme by Corrections Victoria found it was beneficial to both individuals and the system as a whole; yet, there were resource problems that needed long term solutions. Additionally, there were indications that these

programmes remain understaffed, under-resourced and overwhelmed (Corrections Victoria, 2008).

In Victoria, there is growing recognition that a ‘joined up’ approach to service delivery, where government organisations work together with community organisations to provide services to those in most need of assistance, is an ideal approach. The Victorian DHS publicised its commitment to this new approach to providing services, particularly in relation to housing for people at risk of homelessness (Lake, 2005). Frequently, bail support case workers refer defendants to housing programmes, in line with the joined up approach to service delivery (DHS, 2002; Lake, 2005; State Government of Victoria, 2005).

Given many people are remanded for no other reason than homelessness (Boyle, 2009; Hucklesby, 2009) this practice demonstrates how bail support services can divert people away from remand imprisonment (Bondy et al., 2003). However, there are indications that shortage of housing and resources negatively affect the ability of these services to successfully achieve this. A magistrate may be presented with a CISP report that addresses all the risk factors that would otherwise lead to a remand decision, including the lack of fixed address, but due to a lack of available accommodation, the defendant is likely to be remanded even though a system is in place to prevent this from occurring. This was a significant issue identified by Denning-Cotter’s (2008) broad summary of bail support in Australia. This contradicts Bondy et al.’s (2003) finding that bail support services can assist in securing bail for homeless people.

Since CISP implementation at three Victorian Magistrates’ Court locations in 2006, two evaluative studies have been conducted on this particular programme. Ross (2009) completed an evaluation over a two and a half years from 2006–2009. Ross’s (2009) evaluation found that the CISP had successfully met its key aims over the study period. It had exceeded client retention goal figures, had support from key stakeholders and defendants had lower recidivism rates than those who had not participated in the programme. The study recommended a centralised programme available at all courts

and a greater link to the principles of therapeutic jurisprudence by linking people into post-support services. As yet, these recommendations have not been implemented.

Ross and Graham (2012) also published some of their findings from the 2009 evaluation in *Psychiatry, Psychology and Law*, focusing more specifically on mental health problems at court. This paper argued that although there were short term benefits for people experiencing complex mental health issues at court, there was no evidence of ongoing support and improvement. This indicates that without adequate resourcing and post-support services, bail support programmes may be just ‘band aid’ solutions. It also highlights that programme ‘success’, measured through recidivism rates, does not necessarily mean better outcomes for vulnerable people going through the criminal justice system.

Ross’s (2009) study did not provide an econometric evaluation. Price Waterhouse Coopers (2009) (commissioned by the VDOJ) conducted an economic evaluation at the same time as Ross’s (2009) evaluation. Their cost-benefit analysis compared days of imprisonment between a CISP sample and a control sample, and estimated the potential cost savings based on several recidivism scenarios. Each scenario predicted the cost saving from reduced re-offending over a certain period of time (30 years = \$16.8m; 5 years = \$7.5m; and 2 years = \$4.9m). While this study demonstrates the potential financial benefit to society from reduced recidivism, the study is limited in that there is no extant evidence of long term reduced re-offending rates post-programme. Also, the study only measures one tangible variable of cost benefit to society, the cost of imprisonment. Many other factors, for example, pain and suffering from re-offending, or less post-imprisonment trauma experienced by people diverted from remand, were not measured by this evaluation.

The MERIT programme in NSW offers similar services to adults with substance abuse problems as the CISP and CREDIT programme in Victoria and has undergone two evaluations (Passey et al, 2007; Donnelley et al, 2013). Passey et al. (2007) evaluated the pilot programme using funding from the NSW Attorney General’s

Department. The study took a quantitative approach and examined court data on programme participants, particularly trying to extrapolate recidivism data. The study found that a reduction in offending was significantly related to programme completion. However, a more recent evaluation conducted by researchers from the Bureau of Crime Statistics and Research (BOCSAR) (Donnelley et al., 2013) into the CREDIT programme in NSW found that defendants completing the CREDIT programme re-offended at a similar rate to those who did not complete the programme. While MERIT focused on people at the bail stage of the court process, and CREDIT in NSW operated more as a diversionary programme, the studies were designed similarly, and have similar demographics and participant attributes.

### 3.3 Conclusion

The background on the rise of therapeutic jurisprudence and bail support programmes, provided in Section 3.1, contextualises the second part of this chapter, which critically analysed empirical research and evaluative data on extant therapeutic initiatives. As demonstrated, there is limited qualitative research into bail, and almost none focusing on therapeutic bail conditions. Therapeutic bail initiatives aim to provide pathways to bail for vulnerable people; as such, they may assist in upholding the principle of remand as a last resort. Evaluations of these programmes tend to rely on recidivism rates as markers of success. What Donnelly et al.'s (2013) and Passey et al.'s (2007) studies show—in line with Ross and Graham's (2012) findings on the CISP in Victoria—is that measuring the 'success' of programmes based on recidivism rates does not necessarily result in 'successful' outcomes for individuals. The overview of these studies does raise several issues about the way these programmes are measured and evaluated.

First, recidivism rates are not necessarily the most appropriate way to measure 'success', particularly in empirical studies (Maidment, 2006), given that these programmes are designed to divert people from remand imprisonment. A study conducted by a government department trying to find out if a programme has

economic benefit may value crude recidivism rate data, but empirical scrutiny needs more robust research before conclusions can be drawn regarding a programme's success. The emphasis on quantitative measurement and limited qualitative measurement of these evaluative studies may not provide a complete picture of the implementation and effect of these programmes on individuals and the wider community. Neither do they provide analysis on whether therapeutic initiatives reduce remand imprisonment. It is this area that provides potential to advance knowledge, and as such is the focus of this study. Qualitative research may yield data that complements and builds upon existing quantitative research in this same field; as stated by Noaks & Wincup (2004: 14):

Qualitative studies can contribute to our understanding of the context in which crime occurs and criminal justice is administered through providing rich and detailed data to flesh out the bare skeleton provided by quantitative data.

There are strengths and weaknesses in both qualitative and quantitative methods of research. For example, Bamford et al's (1999) court observation data provided useful quantitative data on bail decisions but did not provide a deeper analysis of the way magistrates had come to these decisions. While there have been qualitative aspects utilised in existing evaluations, there has been a tendency for studies in this field to prioritise quantitative data and analysis. While this thesis prioritises qualitative methods, arguably combined use of these along with quantitative approaches is needed in this area to provide depth of knowledge about bail processes and effects.

Both Hucklesby's (2011) and Hannah-Moffat and Maurutto's (2012) work address this gap. However, these studies were published after the commencement of this research and were conducted in other jurisdictions. This demonstrates not only how necessary research in this field is, particularly in Australia, but that this gap is finally being addressed. This demonstrates the importance of robust, empirical research in this field.

Supporters of recent developments in legal thinking—including the rise of the therapeutic jurisprudence model—argue they provide pathways away from

imprisonment. Detractors have critiqued these developments as having potentially an opposite and anti-therapeutic effect. The next chapter will provide a critique of this theoretical framework and these debates, providing a context for the data analysis.



## Chapter 4: Risk/Needs and Therapeutic Jurisprudence

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*Therapeutic jurisprudence is a legal theory that aims to maximise therapeutic effects of the law and minimize anti-therapeutic consequences of the law (Birgden, 2004: 351).*

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*Just as the knowledge and activities of the ‘human sciences’ (psychology, therapeutics, medicine) have contributed to the transformation and the formation of an autonomous and independent self who is endowed with the capacities of choice and free will, they have also contributed to the formation and linkage to health and welfare of another notion, namely risk (Nettleton, 1997: 214–5).*

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### 4.1 Introduction

This chapter provides a critical discussion of therapeutic jurisprudence and its relationship to risk paradigms and control techniques administered through criminal justice processes; particularly in the context of bail and therapeutic bail support. To begin, this chapter examines key issues and criticisms surrounding the evolution of the therapeutic jurisprudence model and the use of therapeutic measures within the legal system. It questions the principles and aims of this model and in particular critically examines the individualised focus of therapeutic jurisprudence approaches. Risk paradigms centre on identifying and mitigating individual risk factors (Hannah-Moffat, 2005). This focus on the individual underpins the entanglement between therapeutic jurisprudence and risk. The chapter also takes a critical approach to understanding the problems and limitations that arise when applying a therapeutic model within a system that is increasingly risk-averse (O'Malley, 2010). This discussion is complemented by analysing the concept of needs and how vulnerability is constructed through a needs discourse (Fraser, 1989; Hannah-Moffat, 2010), vulnerability and disadvantage

(Herring and Henderson, 2012; Rose, 2000a; Irwin, 1985), and structural determinants (Scruton, 2007; Scruton and Chadwick, 1991). It then explores some tensions resulting from a purported shift away from an adversarial approach to a more therapeutic model (Hannah-Moffat, 2005). The discussion in this chapter provides a foundation for the data analysis in subsequent chapters and assists in shedding light upon the ways in which principles of therapeutic jurisprudence are implemented within the context of bail support, and its effects.

This chapter identifies two significant criticisms of therapeutic jurisprudence relevant to this study. First, the application of therapeutic jurisprudence models within the criminal justice system leads to tensions that may have unintended anti-therapeutic effects. In particular, the influence of ‘risk thinking’ (Rose, 2000a, 2005) on therapeutic jurisprudence models that legitimises the use of control techniques over vulnerable populations. This may result in net-widening and ultimately tests traditional assemblages of punishment (Gray, 2013; Hannah-Moffat and Lynch, 2012). Second, by focusing on individuals, therapeutic jurisprudence techniques are limited insofar as they are unable to address the structural and systemic inequalities that contribute to offending. This critique will provide a framework for a critical analysis of therapeutic models within a bail context, which follow in the analysis of this thesis.

## **4.2 What is Therapeutic Jurisprudence?**

While the previous chapter presented the background to the rise of therapeutic jurisprudence, defining therapeutic jurisprudence has been a controversial topic. Initially, it was defined by David Wexler (1990: 4)—one of the two academics credited with the evolution of therapeutic jurisprudence—as the ‘study of the use of the law to achieve therapeutic objectives’. This definition was revised and expanded in his later works to ‘an interdisciplinary examination of the law’s potential as a therapeutic agent’ (Winnick and Wexler, 2003: 105). Although by no means the first academics to look at the role of law and its effect on the wellbeing of people involved in legal processes, Wexler and Winnick were the first to examine it under the rubric of therapeutic

jurisprudence (Wexler, 1990; Wexler and Winnick, 1991; Winnick and Wexler, 2003; Winnick, 1997). Their working definition of therapeutic jurisprudence is hotly debated; in particular, its ambiguity is criticised (Shuman, 1993; Slobogin, 1995; Winnick, 1997). Other scholars provide simpler, practical definitions that describe it as the application of social science informed policies and processes to solve problems through the courts (Goldberg, 2005; Mirchandani, 2005; Van de Veen, 2004).

Despite the ongoing contestation of definitions, it is generally understood that therapeutic jurisprudence draws upon many disciplines, such as psychology, psychiatry, sociology, philosophy, criminology, public health and mental health, to inform its study of the role and effect of law on people's lives (Wexler and Winnick, 1991). Wexler (1990) contextualises this definition by stating that if the law takes on a philosophy of juridical psychopathology, for instance that if law does no harm, then the law is taking a therapeutic approach. More simply, Wexler's (1990: 4) belief is that 'the law should strive first to do no harm'. While this understanding of therapeutic jurisprudence is still broad, contemporary applications of therapeutic jurisprudence demonstrate the concept is so extensively applied that a more narrow definition would not suffice. To understand therapeutic jurisprudence, one must go beyond considering it a theory or a framework, although these terms are to some degree necessary for contextualising therapeutic jurisprudence in discussion. As Freiberg (2003) explains, therapeutic jurisprudence is better understood as a model that can be applied to the legal system, one that necessitates a change from the traditional adversarial system. It is this conceptualisation of therapeutic jurisprudence that this research uses.

### **4.3 Therapeutic Jurisprudence and Risk**

A key element of a therapeutic jurisprudence approach is that it focuses on individual needs to address underlying causes of offending. Needs have also become key to risk to the extent that needs are inherently tied up with risk discourse (Hannah-Moffat, 2005, 2010). As such, therapeutic techniques are integrally linked to this risk/needs discourse. Recently, risk has become a defining force in society (Adam and van Loon,

2000; Baker and Roberts, 2005; Beck, 1992a, 1992b; Giddens, 1999). In the 1980s, Ulrich Beck (1992a, 1992b) coined the term 'risk society' to reflect his outlook on the impact of modernity on industrialised, Western society (Adam, Beck and van Loon, 2000). Beck (1992a) espouses that industrialisation creates more risks to people and society, such as environmental harm and industrial accidents. This leads people to distrust those with power and authority, such as governments and corporations. To mitigate risk, society takes preventative measures, including regulation. Beck (1992a: 21) defines a risk society as a 'systemic way of dealing with hazards and insecurities induced and introduced by modernisation itself'. While Beck (1992a, 1992b) sees the evolution of a risk society as a movement away from a class based society, he does see unequal distribution of risk as a key feature of the risk society. His belief is that wealthy people are more able to mitigate some risks by drawing on their resources to practice risk avoidance (Beck, 1992a; Scott, 2000). Accordingly, issues of structural inequality are important. Vulnerability and marginality are then linked to an inability to avoid risk.

Risk is a key element of the neo-liberal state (O'Malley, 2008, 2010). The neo-liberal state is built upon economic de-regulation, restrictive social policy and expansive criminal justice policy (Wacquant, 2009). These political strategies mark the decline of the welfare state, which is characterised by outsourcing services and restricting funding to services (Cohen, 1985; Garland, 2001). This is achieved through shifting from a welfare model to a 'workfare' model of governance (Wacquant, 2008, 2009). Under the 'workfare' model, an individual's place in society is dependent on their ability to earn wages and to obtain services traditionally supplied by the state, for example, healthcare. The increasing privatisation of services creates what Wacquant (2008) terms a government of poverty, where the hollowing out of the welfare state means that those who lack access to wealth and capital are unable to access resources. Within this context, the state pursues a policy of individual responsabilisation, which relies upon citizens to risk manage themselves (Nettleton, 1997; Rose 2000a). It becomes the citizen's duty to manage their own risks, such as health and wellbeing, and to maintain 'normalcy'. To do so, citizens employ 'technologies of the self' (Foucault, 1982, 1991; Lemke, 2000; Martin et al., 1988). Foucault (in Martin et al., 1988: 18) defines these as:

Techniques that permit individuals to effect, by their own means or with the help of others, a certain number of operations on their own bodies, their own souls, their own

thoughts, their own conduct, and this in a manner so as to transform themselves, modify themselves, and to attain a certain state of perfection, happiness, purity, supernatural power.

Responsible citizens, according to Foucault (in Martin et al., 1988) employ strategies, such as abstinence from illicit substances, as a form of self governance. As such, individual responsabilisation is a key driver of risk technologies.

This process of encouraging responsabilisation is a key neo-liberal strategy (Rose, 2000a). By incorporating individual responsabilisation as a governing strategy in contemporary liberal democracies, governments problematise people who cannot self-manage risk. They do this to legitimate their power over people. Social anxiety results when people fear downward mobility because they will not earn enough to improve their lives, and the concept of 'betterment' becomes entrenched in an individual's ability to obtain goods and services (Rose, 1990, 1992; Wacquant, 2009). This fear of downward mobility risks government legitimacy, where citizens lack faith in a government perceived as unable to ensure a citizen's standing in society. To regain and maintain legitimacy, government must be seen to provide security against those who might destabilise upward mobility. Becker (1963) argues that people who threaten governmental legitimacy are constructed as outsiders. 'Normal' is constructed with reference to what is 'abnormal' and the concept of 'self' becomes inseparable from the state (Rose and Miller, 2008). People who deviate from normalcy are those who fail to self risk manage. These people are constructed as abnormal and lacking the self-discipline to qualify for citizenship. The state must then exert power over them to manage their risks; this power is applied through social control techniques (Foucault, 1977; Garland, 2001). The effect of individual responses to managing risk is that it assumes people are able to make choices. It is precisely this focus on individual choices that ignores the role of structural contexts that lead to offending.

Within the criminal justice sector, risk is increasingly the primary lens through which offenders are viewed (Ericson and Haggerty, 1997; O'Malley, 2010). The criminal

justice system has moved towards using a language of risk that puts public and individual safety above individual liberty. Cohen (1985) and Simon (1988) both describe a shift in contemporary Western societies towards managing behaviour as a product of the risk society. They argue that those in power (i.e., governments) are unwilling to accept risks that threaten their legitimacy and that governments are now risk averse, practicing this by exerting their power over risks that can be controlled.

Cunneen, Baldry, Brown, Brown, Schwartz & Steel (2013) and Baldry & Cunneen (2014) provide a framework for understanding risk in the criminal justice system by conceptualising the ways in which criminal justice responses are shaped by colonial dynamics and legacies. They note that the concept of a risk society and individualism are not new practices but new tools of penal colonialism that target vulnerable groups with racialised and gendered responses. O'Malley (2010) states that in this current risk climate, risk categorisation and an individual's potential risk factors are more important determinants than behaviour. Vulnerability and risk are linked through the conflation of needs and risk (Fraser, 1989). This means that factors signifying vulnerability (e.g. homelessness, mental illness), i.e. needs, are associated with risk of offending and therefore impact upon criminal justice decision-making processes. This thesis draws on these links between vulnerability, needs and risk as a framework to understand the impacts and effects of therapeutic jurisprudence mechanisms, and more specifically therapeutic bail, in the criminal justice system. The discussion in the next two sections unpacks these concepts in more detail.

By the 1990s, a series of actuarial models of risk prediction had been adapted to determine a person's risk of offending (Andrews et al., 1990; Andrews and Bonta, 2006; Hannah-Moffat, 2009). These actuarial models are based on a mathematical method referred to as 'actuarialism', where a series of factors are evaluated to gauge the likelihood of a future event occurring. These models have traditionally been used in the insurance and financial service industries. Different factors are labelled as static or non-static, with static risks those that cannot be changed, such as a person's ethnicity (Andrews and Bonta, 2006). The focus of actuarial models is non-static factors, which

are malleable. The idea behind actuarial models is that by addressing the non-static factors, a person's risk can be reduced (Feeley and Simon, 1992).

Risk technology aims to predict offending behaviour. Risk techniques include identifying so called 'criminogenic' factors—non-static risk factors attributed to offending, which can be treated (Andrews and Bonta, 2006). Offenders can be categorised based on the presence or absence of different risk factors, so vulnerable offenders may be differentiated from predatory offenders based on more than just their offences. These include factors such as drug use; whereby, if a person's drug use is contributing to their offending (i.e., stealing money to support a drug habit) this drug taking risk factor can be treated. This works on the assumption that by removing the addiction, the person is less likely to steal money because they do not need to fund a drug habit. More recently Ward and Brown (2004) have argued that the criminal justice system needs to look beyond risk management strategies. Instead there should be a focus on rehabilitation efforts that provide offenders with the tools to achieve ongoing fulfilment in their lives that are not control oriented. This approach is known as the Good Lives Model. Birgden analyses both the therapeutic jurisprudence approach and the Good Lives Model within the prison system in her 2002 article. She argues that the Good Lives Model relies on motivation, which may be more difficult to achieve in a correctional setting. She recommends the use of a therapeutic jurisprudence approach to enhance offender rehabilitation. While the risk/needs approach and Good Lives Model are primarily used to effect rehabilitation within prison settings (Byrne and Howells, 2002; Gendreau, 1996; Ogloff and Davis, 2004; Ward and Brown, 2004), risk models are also integral to bail rulings. Particularly where they necessitate the incorporation of conditions that target assessed risk factors. The demonstrated increase in using bail conditions or treatment remands to mitigate risk (Moore and Lyons, 2007) can be related directly to an increasingly risk averse society. This is a shift in law and practice in the application of bail.

The emergence of risk management within criminal justice theory and practice has invited debate (Hannah-Moffat, 2005; O'Malley, 2010; Pratt et al., 2005). Some believe that using risk techniques has a positive effect on reducing crime victimisation

and the economic costs of crime, and leads to increased service provision to people (Giddens, 1999). Birgden (2004: 353) provides a positive outlook, stating that 'therapeutic jurisprudence provides the opportunity to integrate the risk, needs, and responsivity principles in to the criminal justice system'. In contrast, others raise concerns over the effect this has on individual liberties and social justice, believing that risk technology is exerting excessive control over people (Hannah-Moffat, 2005; Hannah-Moffat and Maurutto, 2012; O'Malley, 2010; Pollack, 2005). Pat Carlen (2008) characterises contemporary governments as being 'risk-crazed'. While debates are ongoing, O'Malley (2010: 7, 99) hopes that the 'uncertain promise of risk' may result in a stronger, risk-taking criminology that uses the best risk techniques while maintaining the integrity of due process and the social justice values implicit within the legal and criminal justice system, and may yet still be realised. It is with reference to this ideal that therapeutic jurisprudence initiatives should be critiqued and assessed.

#### **4.4 Constructing Vulnerability: Complex Needs and Structural Inequality**

The practice of risk mitigation techniques in a criminal justice setting is highly problematic. In Shoshana Pollack's (2005: 71) research on mental health treatment of women prisoners in Canada she argues that current risk management approaches label women prisoners as 'disorderly and disordered'. Pollack (2006) further argues that the evolution of risk management paradigms within the prison setting results in 'needy' female offenders being managed through treatment, rather than punished for their crimes. This can be disempowering for offenders, particularly women, and have negative ramifications on their release from prison, because the focus on treatment has been at the cost of other skill development programmes like education and job training (Pollack, 2009). With bail and remand, Moore and Lyons (2007) believe this results in what is termed 'therapeutic remands', particularly for women. This is where people are treated and controlled on an individual level for their risk-posing problems, rather than ensuring their court attendance.



A key criticism is that needs are conflated with risk, where the needs of vulnerable people (such as housing) are indicative of risk. One effect of this conflation is that vulnerability and structural disadvantage becomes synonymous with risk. Vulnerable people are then increasingly viewed through a risk lens and the presence of risk factors is used to justify greater intervention by the criminal justice system (Hannah-Moffat, 2005, 2009). Hannah-Moffat and Lynch (2012) have criticised these practices and argue they demonstrate fluidity in penal power operating outside its traditional assemblage of the prison institution. Additionally, this creates situations where onerous conditions designed to manage risk mean that some people may risk remand imprisonment for ‘engaging in activities for which a non-criminalised person would not be sanctioned’ (Moore and Lyons, 2007: 186). Given that many people in ‘at risk’ groups are essentially vulnerable people committing multiple minor offences, these ‘risky’ people are the most likely to be controlled through ‘therapeutic’ measures (Hannah-Moffat, 2004).

To understand this conflation of needs and risk, the discussion has so far focused on the concept of risk. It is also important to examine the discourse of needs and the construction of vulnerability through the notion of complex needs. This discussion will now demonstrate how needs discourse is linked to vulnerability, and in doing so how it inexorably ties vulnerability to risk. The discourse of needs is instrumental in understanding the conceptualisation of vulnerability. This research draws on the literature of needs (Fraser, 1989; Hannah-Moffat, 2004, 2005; Wacquant, 2009) and structural inequality (Scruton, 2007; Scruton and Chadwick, 1991; Sim et al., 1987) to understand how vulnerability is constructed and understood through criminal justice responses.

First, Fraser’s (1989) dissection of needs discourse highlights the political nature of needs; in particular, the way needs discourse justifies increased intervention by the state. As Foucault (1977: 26) states ‘need is a political instrument, meticulously prepared, calculated and used’. Fraser (1989: 292) also provides a means to understand vulnerability, and its link to risk, through the ‘politics of needs interpretation’. Her conceptualisation of ‘thick’ and ‘thin’ needs demonstrates the role

of power in determining vulnerability. Thin needs appear to be reasonably straightforward, requiring a simple solution, for example, homeless people need shelter. However, she expounds that deeper analysis reveals the influence of power on how needs are constructed and understood. Rather than simply seeing shelter as the solution to homelessness, Fraser (1989: 293) asks what ‘more “thickly”, do homeless people need to be sheltered from the cold’, deconstructing layers of need all the way from thin conceptualisations through to understanding the legal, financial and political spheres upon which needs are based. Needs are first and foremost based in material conditions associated with socio-economic disadvantage and inequality. How these are applied within criminal justice settings is where need can be seen to serve ideological purposes.

Solutions to needing shelter could reach all the way from ‘thin’ solutions, such as homeless shelters, to ‘thick’ solutions, such as incentivising low income housing for private investors. This demonstrates that the ‘politics of need interpretation’ is influenced by different groups and lobbyists, all competing to have their own needs agenda recognised as hegemonic. The more powerful groups are able to have their needs language recognised as the dominant language. Power therefore determines how people’s needs are defined and responded to by the system. In turn, this creates a hierarchy of needs that perpetuates the hegemonic domination over vulnerable people. Vulnerability is then intrinsically linked to risk through this politics of need interpretation, demonstrating that the concept of vulnerability itself is deeply political (Foucault, 1977; Hannah-Moffat, 1999).

To exert power over those who threaten legitimacy, the state then constructs vulnerability through the politicising of needs attributed to elements of disadvantage (Wacquant, 2009). The state’s dominance and control over the vulnerable is illustrated in John Irwin’s (1985) study, captured in his book, *The Jail*. Irwin spent considerable time in Californian jails in the early 1980s. US jails are where people are held in pre-

trial detention, along with those awaiting sentence, or who have been sentenced to short terms of imprisonment (less than 12 months). Jails in the US play a similar role to Australian remand centres and prisons. Irwin (1985) argues that vulnerable people are constructed as problematic and risky by the State and that jails are full of them. This leads the public to perceive vulnerable people as dangerous and deviant, believing that the jail is full of dangerous people who are being kept safely away from the general public. However, Irwin's research found that most people in jail were not dangerous but what he phrased 'detached and disreputable'. Irwin (1985: 3) argues:

from among the poor there will also emerge a rabble who are perceived as a more serious and constant threat to the social order, a group in need of the more direct forms of social control delivered by the criminal justice system.

This research demonstrates that poverty and complex, multiple markers of vulnerability are significant characteristics of people who are refused bail. Since this 1985 study, criminal justice mechanisms are increasingly relied upon to manage people with complex needs. Risk approaches are a manifestation of these trends towards controlling instability.

Scraton's primary determining contexts (Scraton and Chadwick, 1991) may be used to understand criminalisation, marginalisation and the reproduction of structural inequality and injustice. Scraton (2007) and Sim et al. (1987) argue that rather than focusing on individuals, criminological scholars should look to social structures and identifiers to understand more about the structural forms of oppression and how the structure determines a person's identity and place in society. Scraton and Chadwick (1991: 161) believe that:

questions of power, legitimacy, marginalization and criminalization could only be addressed with reference to the structural relations of production, reproduction and neo-colonialism as *the* primary determining context.

The structural forms of oppression—neo-colonialism, capitalism and patriarchy—create inequalities by defining a social hegemony. Differentiation from the hegemonic

identity enables discrimination. If the structural forms of oppression are neo-colonialism, capitalism and patriarchy, then hegemony is determined by white, wealthy men and the absence or presence of differentiating identities creates a social hierarchy (Sim et al., 1987). Hence, it is argued that marginalised groups experience imbrications of inequality and their experiences in criminal justice are driven by these structural determining contexts. This argument contrasts with the risk focused approach of the criminal justice system and highlights the problematic nature of its focus on individual pathologies and behaviours.

Simone de Beauvoir's (1953) feminist writings on outsider groups argued that social hegemony was defined not by inclusion but by exclusion. This idea—of circuits of inclusion and exclusion—is further explored by Rose (2000a). Scraton (2007: 221) paraphrases this idea succinctly when he states that 'no group ... conceives itself as the "One", the essential, the absolute, without defining and conceiving the "Other"'. Becker's (1963) theory of the outsider draws on this notion of 'othering', as defined by exclusion from the culturally determined hegemony. Becker (1963) argued that the way the hegemonic state views differing identities is as what he terms 'outsiders'. These outsider groups could be people categorised as prisoners, the physically handicapped, the mentally ill, or drug users (Sim et al., 1987).

Significantly, these outsider groups experience multiple forms of inequality and include members of multi-level disadvantaged groups. As these identity descriptors comprise multiple group memberships, there is no one culturally determined identity descriptor relevant to a member of a group. Herring and Henderson (2012: 633) believe that this 'dynamic' character of vulnerability demonstrates critical diversity; that one signifier of vulnerability cannot be accounted for on its own, but rather in conjunction with other signifiers of vulnerability. Essentially, static signifiers such as race, gender and age are combined with 'thick' conceptualisations of needs (Fraser, 1989), such as substance use, mental illness and homelessness, to construct politically defined vulnerability.

However, it is not membership of these groups alone that contributes to vulnerability. The construction of needs by institutions and the state and access to services and support (Fraser, 1989) also impact on the construction of vulnerability. For example one can be an indigenous drug using woman and thus a member of multiple groups identified as vulnerable, but she is not in herself necessarily vulnerable. However, an interaction with the criminal justice system may result in her being classified as vulnerable. Indeed her experience of the criminal justice system may compound vulnerability. There are potentially negative effects when a person is labelled vulnerable. Mechanisms in the criminal justice system may then be focussed towards individual pathologies rather than structural problems associated with disadvantage and poverty (Rose, 2000a).

Scraton's (2007) and Scraton and Chadwick's (1991) work further demonstrated the complexities in using risk-based responses towards 'outsiders' that do not account for structural factors. Within a risk centred system, people presenting with vulnerable identifiers may be classified as outsiders and therefore risky people. This classification legitimises the power of the state, through the discourses of risk and needs, over less powerful, more vulnerable people. This discussion indicates that a risk-based system aligns vulnerability with individual pathologies rather than impacts of structural inequality and by extension responsabilises vulnerable people for their inherent disadvantage. Scraton and Chadwick (1991) and Scraton (2007) argue that taking a whole of system, structural approach to understanding vulnerability is needed rather than responsabilisation. However, taking this structural and systemic approach to supporting individuals presenting with multiple needs can be complex. It raises questions as to how this approach can provide ways to support people and address their needs in a manner that is respectful. Individuals need to be treated as partners in this approach, not as subjects, but in a way that still progresses social justice and equality.

## 4.5 Bail, Risk and Control

Now that the links between risk, needs and vulnerability have been discussed, it is important to examine how this translates to a bail context, particularly in relation to therapeutic interventions. Bull (2010) argues that elements of neo-liberal control techniques and individual responsibilisation are key limitations to therapeutic jurisprudence models. Allan (2003) documents the importance of risk in therapeutic settings as a result of the process of deinstitutionalisation, and subsequent reliance on community services provisions, which occurred in the mid-twentieth century. He sees the need to categorise the risk of violence posed by mentally ill people as a consequence of this deinstitutionalisation. As mentally ill patients were discharged to the community, there was an increased risk that some of these people could behave violently (Snowden, 1997). Given the litigious nature of contemporary society and the increasing onus placed on practitioners to accurately predict negative consequences of releasing a person into the community<sup>11</sup>, the ability to predict the risk of a person committing a violent act became paramount (Allan, 2003; Douglas, 1992). Developing risk prediction models based on actuarialism became integral to this; demonstrating the increasing influence of risk paradigms and risk management practices within therapeutic jurisprudence discourse and practice (Allan, 2003; Borum, 1996; Rose, 1998). This was despite criticisms regarding the ability of these tools to accurately predict risk (Allan, 2003; Borum et al., 1996).

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<sup>11</sup>In the 1970s, a landmark decision, the Tarasoff decision, in the Californian courts placed additional burdens on practicing psychologists that conflicted with the principles of confidentiality and trust. The ruling came after the death of Tatiana Tarasoff, who was murdered by an ex-boyfriend, Prosenjit Poddar. The offender had been undergoing psychological treatment and during the treatment sessions, the psychologist became concerned by the threats his client was making against Tatiana Tarasoff. The psychologist believed the threats to be serious and breached patient confidentiality by notifying the authorities, thus contravening professional standards of confidentiality. Unfortunately, although the psychologist warned the authorities, they were unable to prevent the murder of Tatiana Tarasoff. Her family sued, claiming that the psychologist had not made enough effort to warn the victim. The subsequent legal case, *Tarasoff vs. the Regents of the University of California* 1974 (*Tarasoff 1*) essentially produced the directive that 'protective privilege ends where public peril begins' (Gurevitz, 1977: 289). It mandated that if psychotherapists believed that a client was making serious threats against a person they then had a legal duty to warn these potential victims (Mendelson and Mendelson, 1991; American Psychological Association, 2002). This decision was vacated by *Tarasoff vs. the Regents of the University of California II* (*Tarasoff 2*) 17 Cal. 3d 425, 131, Cal. Rptr. 14; 155 P.2d 334, (Cal. 1976). Ultimately, as a result of *Tarasoff 2*, psychologists must now predict the danger a client poses to the public to meet their legal obligation to protect.

Bail by its nature is about risk management. As discussed previously, there is an increasing contemporary focus on risk (Adam and van Loon, 2000; Baker and Roberts, 2005; Beck, 1992a, 1992b; Giddens, 1999). This resulted in the purpose of bail shifting from limiting flight risk to managing the risk of future offending pre-trial, as such factors deemed ‘criminogenic’ become important determinants in bail applications (Edney, 2007; Ozanne et al., 1980). People identified as risky during bail hearings are responded to with increased surveillance and control measures. When applying a therapeutic jurisprudence model to bail, control techniques are embedded into treatment rhetoric. Criminality is pathologised under this model of thinking (Rose, 2007; Nettleton, 1997). Further, Rose (2007) has highlighted not just the potential for therapeutic jurisprudence to operate as a strategy of control, but also other effects of pathologising crime. He believes there is a possible iatrogenic effect of using therapeutic initiatives as control strategies. For example, the ‘addict’ is constructed as abnormal and therefore posing a risk under the rhetoric of ‘responsibilisation’ (Valverde, 1998). This risk must then be controlled. This is an example of Foucault’s technologies of the self, discussed earlier, where the state’s strategy for people who cannot manage their own risk is to manage and control them. Therapeutic bail conditions aim to target risk factors and use control techniques to ‘treat’ risky people, who are identified by their ‘thick’ needs. As Bull (2006: 5) states ‘this lack of control is translated through prisms of medical, therapeutic and corrective expertise into an inability for self governance, which in turn impinges on capacities for citizenship and the practice of certain types of freedom’; demonstrating therapeutic jurisprudence’s capacity to become a risk management strategy over vulnerable people facing bail decisions.

## **4.6 Tensions**

While the first part of this chapter discussed the convergence of therapeutic jurisprudence practices with risk paradigms and the potential for therapeutic jurisprudence to become a tool of risk management techniques, the second half discusses some tensions that have become apparent when applying a therapeutic jurisprudence approach within the existing legal system. Many scholars have debated

the pros and cons of applying therapeutic measures in courts and prisons (Blagg, 2008; Phelan, 2004a, 2004b, 2004c; Slobogin, 1995). In essence, while therapeutic jurisprudence aims to ensure physical and psychological health, these aims sometimes do not correlate with other effects of the law's application, for example, punishment. In these cases, Winnick (1997: 206) believes that 'the conflict sharpens the debate, but does not resolve it'. As such, he believes that the aim of therapeutic jurisprudence must be prioritised in conjunction with other legal system aims to ensure a complementary approach to managing the needs of those coming before courts. The tensions identified in this critique include problems with implementing therapeutic initiatives, establishing the legitimacy of therapeutic jurisprudence in the legal system, efficacy of treatment, response to failure, and conflicts with due process. This discussion of these tensions demonstrates that the application of therapeutic jurisprudence in contemporary legal systems is not without its problems. Identifying these tensions in this discussion will help provide a framework for analysis of therapeutic jurisprudence in practice.

#### **4.6.1 Implementing therapeutic jurisprudence**

A key element of therapeutic jurisprudence is a shift in the roles of practitioners in the criminal justice system (Bull, 2010; Potter, 2006; Wexler, 1990). Implementing therapeutic models requires cultural change from law enforcement officers, lawyers and judges who need to adopt a more therapeutic, rather than punitive approach to cases. Peoples' roles may change in the criminal justice system. Potter (2006) and Blagg (2008) both note the increasing pressure on defence lawyers, particularly those providing public advocacy in the form of legal aid, to deal with legal *and* extra-legal issues their clients may be facing. This may be a side effect of the joined up approach to service delivery approach (Lake, 2005). Community legal centres have centred their services on addressing legal and extra-legal issues of their clients by linking them up with outreach and support services; in essence they have been using this approach since their inception in the 1970s and are therefore a potentially useful source of information on taking this approach.



Initiating changes in the legal system can be stymied by what Freiberg (2003) sees as the resistance of the traditional system to change. To illustrate his point, Freiberg (2003) draws on David Garland's work. Garland (2001: 173–4) believes that traditional systems 'have exerted an inertia of their own, an ability to withstand shocks and to defuse the impact of externally imposed change. As a consequence, they have changed more slowly and subtly'. This comment demonstrates the changes required to adopt a therapeutic approach may result in an uneasy tension between traditional law processes and newer therapeutic initiatives (Blagg, 2008; Freiberg, 2003; Magner, 1998). Critics question whether there is a place for therapeutic jurisprudence in the legal system at all, given that it aims to solve not just legal issues but broader societal problems. Phelan (2004c) also questions whether courts should provide the solution to social problems when they are designed to deal with legal issues. He expresses a concern that if solving social problems becomes a primary aim of the legal system individuals may rely on courts to solve their personal issues. Roach-Anleu and Mack (2007) argue this view is myopic, noting that magistrates have responsibility for legal cases that are by their nature social problems, for instance, domestic violence. They see it as part of the legal system's role to bring about positive social change because it has the opportunity to play a part in these issues.

Both Phelan (2004c) and Roach-Anleu and Mack (2007) make good points. However, this debate illustrates that if people deal with social problems through the courts, there is the potential that a person's individual agency in resolving their own conflicts may be reduced, creating an expectation that the law will resolve problems. If offending is believed to be a product of social disadvantage and social exclusion that can be fixed by prescribing treatment, which is therapeutic jurisprudence's premise, it is possible that treatment may be prescribed based on perception, not actuality. This is where the conflation of needs and risk may occur within court based therapeutic initiatives. If treatment is predicated upon perceived needs, rather than actual risk, it is possible to unnecessarily pathologise people within the criminal justice system. This pathologising according to risk and needs can be paternalistic. It also demonstrates the potential for net-widening by ordering people into involuntary and perhaps unnecessary treatment

programmes when implementing therapeutic initiatives. This concern was highlighted by Hucklesby's (2011) and Hannah-Moffat and Maurutto's (2012) studies on bail support programmes. Pollack's (2005, 2006, 2009, 2010) work on rehabilitating women prisoners argues that structural issues experienced by women offenders are being constructed as deficiencies for which the individual is responsible for rectifying. Her research provides a stark warning about the effect of overly onerous treatment on vulnerable people and the risk of reproducing of serial incarceration.

While a cultural shift is needed to successfully implement therapeutic initiatives within the criminal justice system, it is only part of the process. The legitimacy of therapeutic initiatives also needs to be accepted at a more structural level. If alternative options, such as community courts, are not recognised as legitimate options, then they may lose support from the legal community and society (Murray, 2009). As noted above, the role of key players in the legal system changes in therapeutic jurisprudence. Therapeutic jurisprudence practitioners, including magistrates, police and lawyers, need to focus on listening rather than telling. Practitioners need to have what Freiberg (2003) terms 'narrative competence', where participants are patient with the process, even if it takes more time than traditional measures. Potter (2006) reiterates the importance of listening skills, particularly in relation to defence lawyers. Defence lawyers are in a critical position when they discuss matters with their clients. Their ability to identify problems that might inhibit success (e.g., peer group pressure), which could be dealt with therapeutically, is imperative in ensuring defendants have the opportunity to engage with therapeutic measures. If potential issues are not raised in court, the opportunity to draw upon services may not be used.

Potter (2006) also links this finding with the knowledge defence lawyers have of available services. She argues that a good therapeutic practitioner should know what services may apply in each situation. Murray (2009) also emphasises the importance of the role of the practitioner when she found the judicial officer's ability to liaise with the community and engage with less traditional forms of justice is imperative to the proper functioning of a community court. Significant importance needs to be attached to the attitudes and abilities of key players in therapeutic jurisprudence when critiquing its

efficacy. Attitudinal problems of the judiciary, lawyers and others may negatively affect the ability of therapeutic jurisprudence related initiatives to provide 'better' outcomes.

There is a perception that therapeutic jurisprudence initiatives constitute a 'soft' justice approach (Freiberg, 2003; Murray, 2009; Popovic, 2003; Roach-Anleu and Mack, 2007). This may negatively affect the implementation of therapeutic models. Whether or not therapeutic jurisprudence measures are perceived as 'soft' on crime is imperative to maintaining support. Community and systemic support is vital to the implementation and ongoing legitimacy of operations (Murray, 2009). If the judiciary or the community see therapeutic jurisprudence measures as being 'soft' on crime and ineffectual, then they are less likely to be implemented.

Roach-Anleu and Mack (2007) highlight the frustration some magistrates feel with the act of listening as opposed to practicing decision making. Change is often difficult and shifts in the role of a magistrate may result in an uncomfortable period of adjustment. As many therapeutic jurisprudence initiatives in Australia are in their infancy, this shift is still in progress and magistrates' negative attitudes may result. Popovic (2003) believes that these attitudes do change over time, particularly once participants are more familiar with the cultural shift in judicial administration (Popovic, 2003). Additionally, top down leadership is led by the Chief Magistrates in some jurisdictions (Roach-Anleu & Mack, 2007). Interestingly, Roach-Anleu and Mack's (2007) findings indicate that while some magistrates had a negative perception of therapeutic jurisprudence, in many cases they were using the principles of therapeutic jurisprudence in their language and judgements without realising. Popovic (2006) refers to Rottman's (2000) survey, which indicates there is support from society for therapeutic jurisprudence initiatives, so fears that therapeutic jurisprudence may not be seen as legitimate may be allayed to some extent. Wexler (2000: 449) also defends the legitimacy of therapeutic initiatives by arguing that the culture of critique, that is what he views as the adversarial way of approaching matters, may limit 'creative problem solving'. He argues that what is needed is integrative scholarship documenting therapeutic jurisprudence and its effects in practice, rather than unconstructive critical scholarship of therapeutic jurisprudence.

Critics highlight further problems when inserting therapeutic jurisprudence into the system (Slobogin, 1995). Therapeutic jurisprudence adds another set of priorities and outcomes to be attained through the legal system. Where the legal system's priorities in relation to a case may have traditionally been deterrence and punishment, they may now include treatment options. These outcomes may conflict, where one outcome needs to be sacrificed to achieve another. This could include providing an offender with drug treatment rather than prison, thus elevating the treatment aim above the punishment aim. These aims and outcomes need to be prioritised and balanced; ultimately, judges and magistrates need to decide which aim trumps another (Slobogin, 1995). However, if prioritisation is applied differently throughout the system, inconsistencies may occur and defendants may have differing experiences in the criminal justice system, depending on who has influence in their matter. While this is not a new phenomenon in the criminal justice system, it again demonstrates the prioritisation of individual rather than structural factors within the criminal justice system. Therapeutic jurisprudence processes and approaches may be problematic if the application results in decisions that potentially compound injustice and inequality.

Another element of therapeutic jurisprudence that critics highlight may threaten its implementation is its additional burden on time and resources (Freiberg, 2003; Murray, 2009; Phelan, 2004b, 2004c; Popovic, 2003, 2006; Roach-Anleu and Mack, 2007). As discussed previously, therapeutic practitioners are expected to listen more and take more time considering cases. Popovic (2003) demonstrates this when she discusses the time consuming nature of the Victorian Koori Court<sup>12</sup>. Despite this, she extols its therapeutic potential. Roach-Anleu and Mack (2007) and Freiberg (2003) also criticise the additional time taken up with administrative duties under a therapeutic model, noting that this inhibits practitioners' ability to complete their jobs and may add to delays in court processing. Phelan (2004b, 2004c) and Popovic (2006) also identify the higher costs of therapeutic jurisprudence courts/models as an issue in establishing legitimacy for therapeutic endeavours. The NJC in Collingwood, Victoria has been

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<sup>12</sup> The Koori Court is a special court that was established in Victoria in 2002. It 'provides an informal atmosphere and allows greater participation by the Aboriginal (Koori) community in the court process' (Magistrates' Court of Victoria, 2013).

heavily criticised for its higher running costs compared to the ordinary Magistrates' Courts (Murray, 2009). These criticisms are typical of evaluations of therapeutic jurisprudence programmes, such as drug courts. It is possible these critiques demonstrate that evaluations are limited to providing cost-benefit analyses in terms of direct costs and output. As discussed in the previous chapter, evaluations may be unable to grasp less tangible benefits of these programmes because the criticisms of costs and resources do not necessarily correlate with resultant reduction in costs and burden of resources in other parts of the justice system, such as in corrections.

#### **4.6.2 The efficacy of involuntary treatment**

An area of mental health law that was paid significant attention in the early therapeutic jurisprudence debates is that of involuntarily committing patients to mental institutions. While original debates on this issue were specific to mental health law, the link between the mental health system and the criminal justice system, and the increase in court ordered treatment of mentally ill offenders, means the questions raised by involuntary treatment orders are as relevant within the criminal justice system as in mental health law. Durham and La Fond (1990a) criticise the increasing use of involuntary committal to deal with social problems. They see society as becoming less tolerant of 'bizarre behaviour' and note that laws have changed to make it easier to commit a person against their will. The increased use of involuntary commitment has put the mental health system under pressure for resources. They assert it has since become much more difficult for voluntary patients to access treatment, because the system is overcrowded with involuntary patients (Durham and La Fond, 1990a). Not only is this a human rights issue, both for the liberty of involuntary patients and the right to treatment for voluntary patients, but evidence suggests that involuntary commitment is not the best course of action for successful treatment of mental illness. Durham and La Fond (1990a) believe that involuntary committal leaves a person reliant on the system and unable to function outside the institution. Durham and La Fond's identification of issues with treatment efficacy on coerced patients is supported by other research into legal coercion into treatment (Klag, O'Callaghan and Creed, 2005).

Durham and La Fond (1990b) further argue that the efficacy of treatment is affected by the involuntary nature of the committal. They assert that relying upon drugs as a sole mechanism for treatment is ineffectual. Success in treatment is predicated upon the seriousness of the illness, the voluntary nature of treatment and outpatient care. Their assessment of studies into the efficacy of treatment is that there is no sound empirical evidence to show committing a person for involuntary treatment is successful. Fagan and Fagan (1990) also express concern with the effectiveness of treatment on people who are coerced into treatment. Their review of studies into the effects of legal coercion on treatment found that many studies supporting legal coercion of treatment were methodologically weak. They echo Durham and La Fond's (1990b) assertion that involuntary or coerced treatment leaves patients at risk of becoming reliant on treatment without self-sufficiency: the legal system enables mental illness.

However, arguably coercing a person with impaired judgement into treatment to prevent self-harm or risking their future may still trump individual agency. In this instance questions are raised as to how far the system can intervene in a person's life for their own good while also ensuring individual agency and decision-making are maintained where possible. A person with impaired reasoning and inability to understand consequences may make decisions that would cause harm to themselves and others. To what extent would the system be responsible if intervention did not occur where it could have prevented harm? At what stage do the State's coercive powers to treatment become necessary to prevent harm as opposed to creating unnecessary or unjustified intervention into a person's life. These questions frame the trumps debate, and do not readily provide simple answers. This trumps debate demonstrates the complexity of treatment through the justice system. Essentially, when viewing involuntary treatment through a therapeutic jurisprudence lens, it is arguable that the law may do harm and that alternative mechanisms inspired by therapeutic jurisprudence may address some of the raised issues.

In examining the efficacy of treatment in relation to the prescription of treatment as an alternative to punishment, the issue of coercion is also problematic. Previtera (2006) notes that many mentally ill or drug addicted defendants may not be competent to give informed consent to some available treatment options. Given that many people facing possible remand imprisonment have substance abuse and mental health concerns, their consent may not necessarily be informed or voluntary. Confidentiality issues arise when drug treatment counsellors also need to report to courts on patients' progress and to notify courts when a defendant has failed to meet bail conditions, knowing that reporting a person could lead to immediate imprisonment and cessation of treatment (Birgden, 2013; Candilis and Neal, 2014; Previtera, 2006). As stated above, the evidence suggests that the voluntary nature of treatment is integral to its success (Fagan and Fagan, 1990). However, when a defendant is facing a choice of imprisonment or treatment, their decision to enter a drug treatment programme is not wholly voluntary (Allan, 2003). It seems that when faced with these choices, a defendant is coerced, or at least pressured, into treatment as the 'less severe' option. Bail support services may, in practice, be anti-therapeutic and treatment potentially less effective because a defendant could feel coerced into attending a programme to avoid remand imprisonment. If treatment is less likely to be successful when a person is coerced into undergoing that treatment, and if their liberty is dependent on their performance in the treatment programme, there is a risk that in using therapeutic measures people are set up to fail.

Another issue related to treatment efficacy in criminal justice settings is the expectation placed upon defendants to succeed in treatment. It is accepted that treatment, particularly substance addiction treatment, may not be successful for every person. Some people undergo treatment several times before significant progress is made. When treatment is court ordered, there are expectations that the defendant will perform well or there may be consequences. There are potential negative and punitive consequences to poor progress in court ordered treatment (Edney, 2007). This is especially important to note, given that many people entering court ordered treatment may not be psychologically ready to undergo treatment, but have agreed to undertake it to avoid more punitive sanctions. Additionally, several critics have noted that particularly onerous conditions could set people up to fail by placing significant

expectations on people to manage multiple appointments and treatment, where they have a history of chaos in their lives (Freiberg and Morgan, 2004; Patrick, 2006).

The punitive effect of some therapeutic responses to offending has also raised human rights concerns, highlighting that therapeutic jurisprudence and rights are not always synonymous (Allan, 2003; Birgden, 2013). There is an irony that some of these new ‘therapunitive’ initiatives aimed at improving quality of life do so by restricting people and curbing rights more than the traditional system (Carlen and Tombs, 2006). The traditional system just focused on the offences for which that person was charged; however, more recent holistic measures may lead to greater intrusion into their lives, and paternalistic treatment. This issue arises particularly with reference to pre-trial ‘therapunitive’ measures. Forcing people to undergo treatment prior to being found guilty is a rights issue (Jones, 2010; Seddon, 2008). Freiberg and Morgan (2004) problematise the onerous nature of therapeutic jurisprudence where treatment conditions are integrated into the granting of bail. They argue this goes against what they see as the ‘correct’ meaning of bail. Again, this raises the balancing dilemma, where traditionally the granting of bail was a process based on the right to liberty and the principle of innocence until proven guilty. This process conflicts with therapeutic jurisprudence initiatives that may impose punitive conditions aimed at addressing the offender’s social problems. These may ultimately improve a vulnerable person’s quality of life, improve community safety and reduce the need for pre-trial imprisonment, but at the cost of the rights afforded under due process. They may also increase the burden on the defendant to meet compulsory treatment obligations (Patrick, 2006).

This conundrum essentially pits autonomy against wellbeing in the context of offending, guilt and recidivism. This has led Slobogin (1995) to debate whether a person’s wellbeing is more important than their sovereignty, questioning Schopp’s (1993: 42) position that ‘sovereignty takes priority because it enables that person to define his [or her] own life and embrace various aspects of well being as his [or her] well being’. That is, when balancing therapeutic considerations against the principles of due process and justice, Slobogin (1995) questions whether a person’s autonomy or



their wellbeing should be paramount. The legal system may be stripping defendants of their agency by controlling them through therapeutic means. Therapeutic jurisprudence measures have the potential to give the state more control over its citizens through the enforcing of treatment orders (see Turnbull and Hannah-Moffat, 2009). Again, this continues the debate over which measures should be prioritised within the legal system, and when therapeutic measures should trump individual rights. It also suggests the potential for therapeutic jurisprudence to be a mechanism for increased monitoring, intervention and control; in essence, a management tool.

#### **4.6.3 Conflicts with due process**

One of the cornerstone principles of the legal system is that of open justice. Justice should be seen to be done (Popovic, 2006). Yet, therapeutic jurisprudence practices do not necessarily follow this principle. However, critics disagree as to whether or not this is necessarily a negative outcome. Some see the circumvention of rights afforded by due process to instigate therapeutic practices as unacceptable and unethical (Phelan, 2004c). In contrast, others believe the potential for more positive outcomes for people caught up in the criminal justice system justifies some curbing of rights. Popovic (2006) provides an example of this ethical conundrum. In her role as magistrate, she heard a case where she believed the defendant suffered from a mental illness. The defendant's lawyers had not addressed this issue in the hearing, even though Popovic believed this fact would have a bearing on the case's outcome. She took the matter into her own hands and contacted a prison psychologist for advice as to whether the defendant would be a suitable candidate for bail. The psychologist did not make the decision for her, but did provide her with the ability to make a more informed decision. Although she advised the court of her conversation with the psychologist, technically, normal due process had been circumvented. Yet, Popovic believed that her decision making in this case was superior because she had sought this advice. If she had followed due process, she would not have been able to make an informed decision.

The magistrate's actions contravened the defendant's rights and the community's 'right to know' through a process of open justice, by arranging for a prison psychologist to provide an assessment of a person without going through their legal counsel. Yet arguably, a better outcome for the defendant and the community was achieved because of this diversion from the traditional workings of the court system. However able this 'justice in the shadows' phenomenon is to provide better outcomes, it cannot supersede traditional rights without completely reframing the way in which we see individual versus community rights. Popovic's actions may have resulted in a better outcome for the defendant, but her methods were paternalistic, and her ultimate decision, although 'better' for the defendant, would be her own construction of 'better'. Additionally, this intrusive act was part of a bail hearing, again demonstrating the broadening of the use of bail and potential for net-widening. It highlights a tension that is created when applying therapeutic thinking to an adversarial, punitive system. Potter (2006) believes that 'best interests' of the defendant should always be the benchmark for treatment options. However, questions remain as to who decides what is in a person's best interest, particularly when they are a defendant as opposed to a client.

#### **4.7 Conclusion**

This chapter has provided a critical discussion of the practical implications of therapeutic jurisprudence mechanisms, the legal framework guiding therapeutic bail conditions. First, it examined the evolution of therapeutic jurisprudence and looked at its ties to risk thinking and risk management approaches to the criminal justice system. It provided a critique of this in light of the growing use of risk management strategies to govern people who are unable to self govern, by looking at Foucault's technologies of the self. While its role is to provide alternatives to punitive approaches when responding to vulnerability in the criminal justice system, a key criticism of therapeutic interventions is that they do not provide an alternative to risk management, sometimes punitive, forms of control. Therapeutic jurisprudence's inextricable ties with risk/needs and subsequent social control techniques mean that therapeutic measures have the potential to legitimise risk management strategies to vulnerable people, through the conflation of risk and needs. The state may then manage disadvantage through therapeutic techniques, which continue to be proactive, punitive and intrusive (Rose,

1998; Wacquant, 2009). Yet, these measures do not address the structural inequalities that determine vulnerability (Scruton and Chadwick, 1991). This indicates that the use of therapeutic bail conditions may be onerous and punitive; as such, therapeutic bail may lead to the extension of penal power beyond the institution and into pre-trial practices (Gray, 2013; Hannah-Moffat and Lynch, 2012).

The chapter then analysed some of the academic debate over therapeutic jurisprudence, in an effort to construct an analytical framework for therapeutic jurisprudence in action. The discussion found that many tensions are created when applying a therapeutic model within an existing adversarial, punitive system. The tensions explored in this discussion include: systemic tensions and attitudes of police, judiciary and legal practitioners in establishing a therapeutic system within the current system; the legitimacy of therapeutic aims in relation to other aims in the legal system; tensions with rights of defendants and the circumvention of due process to initiate therapeutic responses; the expectations and efficacy of court ordered treatment; and punitive consequences of non-compliance. The critique and tensions identified in this chapter form the basis of the analytical framework that will be used for analysing the research data in later chapters. This discussion has demonstrated that therapeutic jurisprudence cannot be understood without examining its relationship to risk and needs paradigms, and how this affects vulnerable people.

## Chapter 5: The Research Design

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### 5.1 Introduction

This research project utilises qualitative methods to explore therapeutic bail conditions and related bail support programmes in Victoria. The previous chapters discussed the role of bail support programmes in providing alternatives to remand imprisonment and the significance of this for vulnerable people. It was also identified that, to date, limited qualitative studies have been conducted, both internationally and in Australia, on the implementation and use of these programmes. Studies that have examined this field questioned the viability and effectiveness of these mechanisms to serve as diversions from remand imprisonment, particularly given that success is often measured through recidivism rates. In particular, much existing research is confined to evaluative, quantitative studies from the administrative criminology stream. This research aims to provide a theoretically grounded, qualitative critique of therapeutic jurisprudence in action by looking at the use of therapeutic bail conditions in the form of bail support programmes. It will do this through observations of 117 bail hearings in the Magistrates' Court of Victoria, Melbourne, and data collected via in depth interviews with 33 key players in the bail process. This will be analysed through a comprehensive critique of therapeutic jurisprudence, the framework that guides therapeutic bail. This research design aims to answer the research questions set out in Chapter One.

This chapter describes the methodological approach and provides a justification for the chosen research design. The first section of this chapter will provide an explanation of the research methods chosen and a detailed justification for these methods. The second part of the chapter will detail the design of the research tools, including the recruitment and selection of research participants. This is followed by a discussion of the project's ethical considerations, including a discussion of the difficulty and delay experienced in accessing some data. Lastly, this chapter explains the coding and analysis of the collected data.

## 5.2 Explanation of Methods

While recognising that ‘research design is an exercise in compromise’ (Davis and Francis, 2011: 282), this thesis sought to answer key questions about the operation of therapeutic bail support programmes in Victoria, by using the most feasible and appropriate method. The methodology for this research project was a dual process qualitative inquiry, commencing with field observation of bail applications at the Magistrates’ Court of Victoria, Melbourne. This assisted in formulating the research tools for the second part of the research. The second phase of the research consisted of semi-structured interviews with key stakeholders in the bail support service community. As Nugus (2008: 191) found, ‘the grounded researcher needs to observe in order to know what to look for and to talk to people to know what to ask them’; hence, a dual methodology drawing on both observing and interviewing techniques for gathering data was designed. Using multiple methods to ‘enhance data quality and minimise the subjectivity of findings and interpretations’ is a form of research design known as triangulation (Richards and Bartels, 2011: 5). Other qualitative criminological researchers have found triangulation a useful method in revealing inconsistencies between theory and practices within the criminal justice system through comparative analysis (Flynn, 2011; Richards, 2011; Travers, 2013).

This dual process methodology is a combination of: inductive research, where research is conducted before the application of a theoretical framework, and the theory is then generated from the data (Glaser and Strauss, 1999); and deductive research, where the theoretical framework is applied prior to designing the research tools (May, 2001). Using this approach, court observation data was the primary, inductive phase of the research (Rudes and Portillo, 2012). It informed the second, deductive phase of the study by providing a framework through which the current bail application process could be understood. This assisted in identifying appropriate research subjects for the interview phase of the research. Additionally, it informed which key areas should be explored within the interviews and assist in constructing discussion topics. This combination of complementary methods allowed what May (2001: 144) considers crucial for social research, that ‘a fuller understanding can be

achieved only by witnessing the context of the event or circumstances to which people refer’.

### **5.3 Justification for Court Observation Methodology**

Court observation helped address the gaps identified in the remand and bail literature. It also provided a means to elucidate the differences in Victoria’s approach to therapeutic bail and provided data that may be comparable with other jurisdictions in potential future research. The literature on bail and remand can only provide part of the picture regarding this process. A full understanding of the practical application of the process and the theoretical underpinnings of the programmes had to be examined to provide a fuller understanding of bail support. This helped to provide a more complete picture of the operation of bail support programmes in Victoria. Observation of court processes is also a good way to gain knowledge and insight into the attitudes of key players in the legal process, particularly on bail practices (Allan et al., 2005; Hannah-Moffat and Maurutto, 2012; Varma, 2002). It was hoped that by observing the process, some of the limitations of the current system would be identified. Additionally, the observational data directly informed and enhanced the interview data.

The courtroom observation method of data collection provided abundant, productive data, particularly for bail research (Allan et al., 2005; Varma, 2002). Baldwin (2008) advises that this approach provides a rich source of data that is underused in criminological research. The interviews gave a ‘behind-the-scenes’ view of the process, while observation provided a clear picture of the process in action. This further provided opportunity to contrast what happens in public to how the process plays out behind closed doors. Flynn’s (2009a, 2009b) study of plea bargaining in Victorian courts used a similar methodology to gain an inside perspective on the secret deals made outside courtrooms. Additionally, Sarre et al.’s (2006) study (as part of the Criminology Research Council funded research project) found that lower remand rates were linked to longer bail hearings and that therapeutic bail support services have given magistrates in Victoria more options to divert people away from remand.

However, as previously discussed, their study does not focus on these options. Detailed research needed to be conducted into what options are available to magistrates, the attitudes of key players in the bail application process to these options, and an examination of their use in the bail application process. The current study used methods that aimed to shed light on some of these areas; namely, the attitudes of some key players in the process, and the way in which bail support programmes feature in contested bail applications, through a qualitative research design.

Observing the bail application process was the only practical method of collecting significant information about the conditions being imposed in the granting of bail. To understand justice at the coal face, it is imperative to observe the process in action. Although bail and remand studies have conducted extensive courtroom observations as part of a methodological approach, there are limited studies based on court observation of bail conditions and their effect on socially disadvantaged people facing a remand decision (as detailed in Chapter Three). King et al.'s (2005) study utilised court observation primarily because they found it was not feasible to run a study drawing on information from court records. They found that court records in Victoria contained limited recorded data, and what did exist was of little use in determining significance for remand decisions. When conducting preliminary enquiries into the viability of drawing on information from court records, it was found too costly and logistically impossible to effectively collect significant data from this source. The court charges a fee per piece of paper requested, the fee must be paid prior to obtaining the document and is non-refundable even if the information is irrelevant or not of use to the study. Thus, observing the bail application process was the only practical method of obtaining a data set on the bail application process and the use of bail support services in the process.

## **5.4 Research Design**

### **5.4.1 Court observation research design**

Observational field research has been an integral part of social research since the Chicago school first encouraged its use as a key tool to understanding society; as May (2001: 148) states, 'knowledge of the social world does not come from the proposition of logic upon which the theorist then descends upon the world to test'. It is for this reason that observation research methodology was chosen; it was clear that only so much can be learnt from examining research by others into the bail/remand process. While court observation is not an unusual method for collecting data in criminological research, little research is available detailing the methodologies used in this type of data collection. Much of what has been written in this area focuses on the ritual of the courtroom and the degradation process for defendants and victims (Booth, 2012; Garapon, 1997; Goffman, 1969; Tait, 2001). These studies, while interesting, are not directly relevant to the current research.

Tait (2001) has written extensively on comparative studies of court observation. However, his work focuses on the physicality and sovereignty of the courtroom drama. While providing an interesting setting through which one can understand the role of power in court processes, this does not assist in illuminating the data collection process. His work is vital to understanding how power, ritual and symbolism play out in the courtroom, and this does provide useful information on the expectations of the court process and insight into methods of understanding the attitudes of key players and the role of power in the process. Additionally, Tait (2001) believes that the key to understanding the court is through comparisons of different types of courts. While this is an important way to understand the court, a cross-court comparison is a luxury that not every research project has; certainly, it is beyond the scope of this research. Garapon (1997), upon whose work Tait (2001) draws heavily, discusses the influence of ritual on court processes. Again, although this work is important in understanding the power roles within the court, it does not shed light on the practicalities of data collection through court observation.



To conduct effective observations, investigation beyond the realms of the criminological discipline was required to understand the details of data collection methods and ultimately build a sound methodology. Drawing particularly from observational research studies within the education sector (Jackson, 1990; Smith, 1978), anthropology (Tedlock, 2000), and the health sector (Nugus, 2008), it was concluded that conducting participant observation field research was a sound method for collecting large amounts of raw data, through which a foundation of intimate knowledge of a particular process or place can be understood. The work of Paul Nugus (2008), whose ethnographic research of emergency room departments in NSW collected data through symbolic interactional observation, provides a useful basis upon which to build a data collection method for observation studies. He conceptualised the dichotomy of insiders and outsiders within places and processes; a concept evolved from anthropological studies of the *emic-etic* distinction of human behaviour (Nugus, 2008: 193; Tedlock, 2000). An emic account of a process comes from a person within the process itself and an etic account is given by an observer. The collection of these two different accounts is used as a methodological approach within anthropology to understand groups and cultures. Although Nugus' role as a researcher was more interactive than a researcher in the courtroom is able to be, this study is still important to understand the techniques for gathering data through observing processes. This includes a clear understanding of the etic researcher's role in the research setting, and the ability to read and understand the relationships between key players in the process.

Criminological and legal studies into processes in the courtroom and the behaviour of key players in the courtroom in other jurisdictional settings do provide some insight into gathering data through observation; however, most of these studies do not provide details of the research design. Danziger, Levav and Avniam-Pesso's 2011 study of Israeli judges found that favourable rulings were influenced by court recess times, with judges making less favourable rulings before breaks. They provide a detailed method for quantitative data collection but they did not conduct qualitative research. Jacobsson (2008) examined the objectivity of prosecutors in Sweden. Her research primarily focused on interviewing prosecutors, rather than observing them. She informed her interview topics through reviewing other observational studies into court proceedings and attitudes. Findlay and Grix (2003) observed the use of DNA evidence in criminal

trials, as part of a review of the use of forensic evidence in the courtroom. Their study led to recommendations for changes in the way in which DNA evidence is introduced into criminal trials. However, their study does not provide any insight into their observation research design. Therefore, although these studies are useful in confirming that court observation is a useful and informative tool for data collection within the discipline, they do not assist in illuminating the design of specific projects.

Mileski's (1971) comprehensive study into the workings of lower courts does provide significant information on the court observation process. She conducted this study because she found that most information on court behaviour was derived from official court records and statistics, which did not represent a full picture of the workings of the court. She noted that a large amount of information was not recorded by court clerks, for example disapproving looks from magistrates that demonstrated their attitude in proceedings. This information provided vital clues to understanding the court, its processes and procedures. Mileski's (1971) work also illuminates the limitations of this approach. Key limitations include observer bias and the ability to sift through all the information and record meaningful data. Additionally, factual information, as opposed to symbolic information, can only be collected if it is verbalised in the court. It is common for participants in the legal process to assume that because they have the court file in their possession that vital information is not verbalised but assumed. Regardless of these limitations, Mileski's (1971) study demonstrates that a plethora of significant data can be collected through the observation process. Mastrofski et al. (1998) provide useful insight into the methods of observing key players in the criminal justice process, which highlights the importance of designing a precise research tool for data collection. However, their study focuses on police officers working in the field, rather than on the intricacies of court procedures.

Recent research by Flynn (2009a, 2009b, 2011) combines observation of prosecutors within the criminal justice system with interviews. In this study, Flynn (2009b) observed 51 key players in the plea bargaining process over four months to understand different attitudes and approaches to plea bargaining. This study again verifies the sagacity of the

dual process methodology in understanding court processes and legal proceedings, and provides some information on conducting observational research within a courtroom setting. Although Flynn's (2011) study involves participant observation, where this study uses non-participant observation, her detailed description of the data collection process was valuable in determining what information to collect during the observational phase of the research.

To date, there have been several studies using observation of bail hearings as a method of data collection, including Hucklesby (1996, 2011), Dhami and Ayton (2001), Hannah-Moffat and Maurutto (2012), Sarre et al. (2006) and Allan et al. (2005)<sup>13</sup>. Only Sarre et al.'s (2006) research focuses on Victoria. As Allan et al. (2005: 322) advise it is 'not always appropriate to generalise findings of bail research in one jurisdiction to other jurisdictions'. Also, these studies have primarily provided superficial quantitative data, which does not necessarily result in a comprehensive picture of the process and practice of bail applications. Dhami and Ayton (2001) observed 342 bail decisions in UK courts, (this included non-contested hearings), but their research merely comments on the time frame of these cases. Hucklesby's (1996, 1997a, 1997b) work drew on court observation study in the UK in the early 1990s. Her study concluded that magistrates are usually just rubber stamping previously made private bail decisions. However, she did not provide a systematic examination of those cases where magistrates disagree with previous decisions and other contested cases. Her 2010 research, conducted for the UK Ministry of Justice, also drew on court observations. Evidence gathered by the Criminology Research Council study (detailed elsewhere in this section) demonstrated that Victoria does not necessarily follow this pattern of rubber stamping (King et al., 2005).

Hucklesby's (1996) original study was conducted in the UK almost 20 years ago and her findings are in contrast to bail practices in Victoria's system, which has developed more comprehensively through the use of bail justices and therapeutic jurisprudence initiatives. Additionally, in the UK at the time of Hucklesby's (1996) study, bail support programme options were not put before the magistrate. In this jurisdiction

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<sup>13</sup> These studies were discussed in more detail in Chapter Two.

they were given to the Crown Prosecution Service (CPS) and a decision was made outside the courtroom. However, Hucklesby's study does demonstrate the importance of a dual methodology for examining bail practices. Her research comprised 1,524 cases, but her study only discussed the type of information available to magistrates in these cases. Both Dhami and Ayton's (2001) and Hucklesby's (1996) studies are UK-specific. In Victoria, existing evidence indicates that more time is taken with bail applications in the courts (King et al., 2005; Sarre et al., 2006). This is another reason for choosing this methodology in this jurisdiction; longer bail hearings meant it was possible to collect more complex, qualitative data from a smaller data set, rather than basic quantitative data from multiple short hearings, as most prior research has done. In depth qualitative research into the bail application process is sparse, particularly in reference to the use of bail support programmes as part of the application. King et al.'s (2005) comprehensive study into factors influencing remand in custody did undertake court observation as part of their methodological approach. King et al.'s (2005) study does provide some interesting data in relation to judicial decision making and it comments on some effects of bail support programmes on the decision making process; however, it does not focus on these therapeutic alternatives. Therefore, the study does constitute a useful foundation upon which this thesis builds.

#### **5.4.2 Court observation—ethnographic research**

This phase of the study constitutes a form of ethnographic research. It has been disputed whether or not non-participant observational research constitutes ethnographic research (Atkinson and Hammersley, 1994). However, using Gold's (1958) typology this research qualifies, sitting at the passive end of the ethnographic spectrum scale. I completed the observations at the Magistrates' Court of Victoria, Melbourne; wherein, as May (2001) describes, the researcher is the instrument of data collection (see also previous discussion of Paul Nugus' work). I took an overt role in an open setting, which meant that my identity and purpose was not concealed (Hobbs, 1988). The added benefit of this type of research is that I became a participant observer to some degree, in that frequent attendance at court meant that key players became familiar with my presence. This was the experience of Rock (1993) in his

ethnographic research of a British Crown Court. He observed that court processes created a unique social world in which the key players were created by the world in which they moved; thus, understanding this social world lead to a better understanding of court processes and their outcomes. His research set up the courtroom, and all the people involved in the legal process, as part of their own exclusive social world; judges, lawyers and prosecutors constituted the insiders and others the outsiders. He experienced the research as intensive; it involved being an outsider who did not understand idiomatic practices. Tait (2001) also draws on research conducted by Goffman (1969) to aid his understanding of the courtroom. Goffman's (1969) research on human interaction in the courtroom demonstrated the roles of insiders and outsiders in the process though body language and the 'everyday aspects of human behaviour' (Tait, 2001: 203). Flynn's (2011: 47) research also draws on this insider/outsider dialectic as 'breaking into legal culture'.

It was originally anticipated that observation of approximately 200 cases would yield a suitable data set to identify trends and anomalies. This was seen as a feasible sample that could be gathered within the project's time parameters. The original sample size was based on initial pilot observations undertaken at the start of the data collection phase of the research, and from other studies that used an observational methodology (Dhami and Ayton, 2001; Hucklesby, 1996; Sarre et al., 2006). The proposed number of cases was less than the number used in some UK studies (Dhami and Ayton, 2001; Hucklesby, 1996). This is due to Victorian hearings being observed as taking longer than other jurisdictions (Sarre et al., 2006). King et al.'s (2005) court observation research collected data from 182 cases in Victoria and 177 in South Australia as part of a comparative study. For this study, data was collected from 113 cases over 21 days of observations, spread out over the period February 2010 to May 2011. In addition, four observations of out of sessions hearings were conducted while 'on call' with a bail justice, making the total number of observations 117. After these observations had been recorded, it was noted that the same patterns of information repeated and no new data was emerging. As a result, it was decided to stop collecting court observation data at this stage. Heckenberg (2011) advises it is important to recognise when to stop collecting to limit over-saturation of data (see also Baldwin, 2008; Rudes and Portillo, 2012).

### 5.4.3 Designing a research tool

The data collected from court observations was primarily qualitative in nature, though there was scope for some quantitative analysis. Basic quantitative demographic information, such as gender, length of application, number of times bail support services were stated in most bail applications, and the proportion of successful applications yielded useful statistical trends. However, the majority of information collected was more suited to a qualitative analysis; as such, this is the focus of the collection and analysis. The data comprises magistrate deliberations, as well as information put forward by the defendants' legal representatives and the prosecution service, and any testimony by witnesses and the defendants. The decision to collect these categories of information was modelled on Hucklesby's (1997a, 1997b) studies and the Criminology Research Council study (King et al., 2008). Hucklesby (1996: 232) collected 24 categories of information in her court observation study. These categories were: 'offending-related factors, present offence, co-defendants, previous convictions, previous custodial sentence, plea, and possibly future sentence; bail history, past periods on bail or in custody, whether on bail, previous failure to surrender or breached conditions; community ties: residence, employment, partner, family, and children; other information concerning the defendant: state of relationship, medical problems, level of education, financial circumstances, drug/alcohol problems, surety available; court factors: delays and prison industrial action; other'. This list proved useful when selecting categories for the observation data collection tool.

In Sarre et al.'s (2003: 6) explanation of the design of their court observation tool for the Criminology Research Council funded project, they state they collected data on:

the bail status of the person at the beginning of the hearing, the position of the prosecutor, determination of the magistrate or judge, the length of time taken for the bail determination, the key factors in the submission, and the effect of the legal presumptions against bail (where they apply).

King et al. (2005) collected data not just from bail applications but from custody hearings where changes were made in conditions or comments were made about refusal to grant bail or any other significant information was recorded. The current study also collected data from any remand custody hearing that yielded relevant data (i.e., information regarding therapeutic bail options was sometimes raised in hearings for defendants who were not opposing remand decisions). The qualitative approach provided more freedom to collect useful data as it arose in the courtroom setting, rather than predicting in advance what might be significant. As the Criminology Research Council project used ABS descriptors in their research tool, they were limited in how they could collect their data. Their analysis is also primarily statistically based. The research tool designed for this project allowed me the freedom to enter any data that related to key categories identified as important for data collection. Table 5.2 provides an excerpt of the data collection tool.

Baldwin (2008) and Rudes and Portillo (2012) recommend conducting a small pilot sample of data. As such, a pilot study was conducted to identify the practicalities of collecting data in the courtroom. This was conducted on one day and data from seven hearings were collected. This pilot study allowed me to finesse the data collection tool. It also enabled me to identify which courtrooms were the most appropriate for the study, to introduce myself to the court staff and explain the project. The court staff were then able to advise where and when would be optimum times for data collection. Initially, the pilot observations took place on a Monday, based on the logic that there would be more bail applications heard on this day; however, I found that the number of bail applications made on a certain day varied, and no specific trend was identified. In the Melbourne Magistrates' Court, Courtroom One is specifically set aside to hear custody matters when they arise. This courtroom was used for the data collection process.

The pilot study indicated that useful data could be collected from approximately two to eight cases on each day of observation. This meant that the observation process was time consuming. However, it was also discovered during the pilot study that prior to the lunch recess every day the magistrate issued a 'call-over', where prosecutors and

defence lawyers have to appear for any matters listed and advise how long they will take and what the nature of the hearing will be. This proved vital to informing me as to whether any relevant cases would be heard in the afternoon or whether they were adjourned to another date. In this way, I minimised the time spent in court by identifying whether it was worth staying in court for the afternoon session. While the aim of the pilot observations was to refine and improve the proposed research tool, it was still possible to collect some useful data from these observations. Therefore, these observations are included in the final data set. The nature of this research has dictated that data collection is an ever-evolving and ever-improving process (Rudes and Portillo, 2012).

Designing a research tool to collect valid data on the court process for systematic analysis is vital to the court observation methodology. However, given the importance placed on symbolism, human interaction and ritual in other qualitative courtroom studies (Garapon, 1997; Goffman, 1969; Tait, 2001), notes were also collected when I made general observations that did not relate back to a direct case. This was a useful source of information in understanding the attitudes of the key players within the court, and the effect of human interaction on the process. This allowed me the freedom to collect data that might be significant, but did not fit within the chosen categorisation of the observation data collection tool. This included comments made in between cases in the public forum. In addition, recollecting the mood and manner of the magistrate was particularly useful when determining the effect of attitudes towards bail support programmes and diversions from remand. This manner of data collection is more reflective in nature than the court observation tool.

#### **5.4.4 Research design—interview phase**

This second phase of the research used semi-structured interviews to gain a more detailed insight into the way in which bail support services feature in the bail/remand process. May (2001) recommends semi-structured interviews as an interview technique allowing the interviewer to probe participants beyond initial answers and engage them



in a conversation managed by the interviewer. The interviewer still uses an interview topic schedule, but has flexibility in the order of questioning and ability to ask follow-up questions (Noaks and Wincup, 2004). The interviewer then has more freedom to lead a discussion and obtain further clarification. This method is particularly useful when a researcher has an idea of the research's direction but unforeseen issues or unpredicted discussion points are raised during the interview. The interviewer is then able to act on this new information and explore it further to see if it yields useful data. Semi-structured interviews allow the researcher to explore topics with more freedom and flexibility, while still enabling responses to be compared (Flynn, 2011). By constructing a schedule of topics for discussion, the researcher is able to probe participants further when necessary, without losing the interview's focus (May, 2001; Noaks and Wincup, 2004). A copy of the interview topic schedule is appended to this document (Appendix A). The interview phase of the research commenced after initial analysis of the courtroom data was completed. This allowed the data from Phase One to shape the direction of the interview topic schedule. The courtroom observation data and the research questions were used to construct a topic schedule. This interview schedule acted as a thematic guide to the semi-structured interviews.

#### **5.4.5 Interview participants**

Key players in the bail/remand process were identified from Phase One of the research and were approached to participate in the interview phase. A flyer detailing the research project and asking for participants to volunteer was emailed to potential participants. The email addresses of these people were publically available. The sample of people approached to participate in the research consisted of defence lawyers, bail support service case workers, magistrates and judiciary, and bail justices. Table 5.1 provides a breakdown of research participants. These participants are all in positions of authority over the users of bail support programmes. It was important for the research to obtain the perspectives of those in power, to understand the power structures within the bail support system. As found by Richards (2011), 'interviewing up' is the most effective way to understand power/structure issues. Therefore, all interview participants were selected based on their professional interactions with bail

applications and bail support programmes. As the scope of the research was limited to Victorian bail support programmes, the interviews were all conducted in the state of Victoria.

It was decided not to include client perspectives of bail support programmes for several reasons. First, this research focuses more on how therapeutic jurisprudence has been conceived and implemented through bail support, rather than the experiences of people on bail support. Interviewing these people may have opened up a range of issues outside the remit of this thesis. Second, many practical limitations impeded this research avenue. It would have made the ethical considerations and approval process more onerous. Participants of the programme are considered vulnerable people, with many undergoing treatment for mental illness and addiction. These people are also still entitled to the presumption of innocence, as they are unconvicted. Interviewing them about issues relating to their alleged offending poses ethical concerns. Given that significant delays were incurred in obtaining the existing ethics approval, as will be discussed below, it was considered prudent to protect the research from further delays. In addition, gaining access to clients of the programme would have proved difficult because of the temporary nature of the contact between clients and bail support services. Therefore, issues raised about clients' experiences of bail support programmes are second hand and told from the participants' perspectives.

It was also decided not to approach police or prosecution for this study. The observation phase of the research revealed, that as that the study focused primarily on repeat low level offending in the Magistrates' Court, the majority of prosecution representatives were police prosecutors. Prosecutors from the Office of Public Prosecutions were usually involved in cases involving more serious offending where bail was unlikely. While their views would have been an interesting addition, because they were less likely to be directly involved in bail applications that used bail support services, their input was not sought. It would have been useful to garner the opinions of police prosecution and police informants on the use of bail support programmes and therapeutic bail options, but due to additional ethics requirements and the timeframe of the project it was believed that pursuing this cohort would put too much

pressure on the timeframe for the project's completion. Additionally, a prominent community legal centre (CLC) was approached and initially agreed to participate in the research but due to a management change and new staff the centre decided not to proceed. Unfortunately, this occurred late in the data collection phase and it was not possible to garner the opinions of other CLCs at this stage.

Initially, it was anticipated that the research would draw on the perspectives of approximately 30 interview participants. Prior research of a similar nature indicated that a sample size of approximately 30 participants would yield a meaningful set of data (King et al., 2005). A total of 33 interviews were conducted over a period of five months, from September 2011 to February 2012. Most interviews were conducted at the interviewee's place of business during business hours. Eighteen interviews were conducted with participants from outer suburban or regional areas. I travelled to the locations of these participants, except in two cases where the interviews were conducted via telephone. Two of the participants elected to be interviewed together, and a further three also elected to be interviewed together on a separate occasion. While it would have been preferable to interview these people separately, it was not possible in these cases because of availability and participants' time constraints. The interview length ranged between 30 minutes and 90 minutes, with the approximate average length being 45 minutes. Table 5.1 details the breakdown of participants by their role in the criminal justice system.

**Table 5.1: Interview Participants**

Group Name	Number of Participants
Judiciary/Magistrates	5
Defence Counsel	22
Bail Justices	4
Justice Associate	1
Support Service	1
<b>Total</b>	<b>33</b>

## 5.5 Data Analysis

The information collected through court observations and the semi-structured interviews provided rich data on bail application processes and the operation of bail support programmes, attitudes and opinions of key players towards the programmes and their conceptualisation of therapeutic jurisprudence (Holliday, 2007: 62). The court observation data was collected via handwritten notes taken in court and then entered into the data collection tool at the end of each observation. The data collection tool was created using the Excel Spread sheet program. The construction of the data collection tool was detailed in the previous section. A sample of this tool can be found in Table 5.2. As previously discussed, during the court observation, data collection phase key themes began to emerge. This preliminary analysis assisted in shaping the interview schedule. The data collected was then loaded into NVIVO (software program) and coded with the interview data.

**Table 5.2: Sample of Court Observation Data Collection Tool**

Case No	Date	Magistrate	Courtroom	Timing	Length of hearing (approx)	Defendant Info.	Notes
1	3/02/2010	Broughton	One	early am	5 mins	Male, young, intellectual disability	Assessed by CISP –eligible but no available accommodation therefore on remand.

All interviews were audio-tape recorded and transcribed verbatim to ensure accurate recall of the interview and enable use of direct quotations. Audio-recording the interviews also allowed the interviewer to focus on the interview's content rather than manually recording the data, which allowed a deeper engagement with the interviewees' responses. The raw interview data was then thematically coded, which involves 'systematically coding, grouping or summarising the descriptions, and providing a coherent organising framework that encapsulates and explains aspects of the social worlds that respondents portray' (Holstein and Gubrium, 1997: 126-7). This required

me to read through the transcripts and identify key themes arising from the research questions. As the interview topics were generated from the research questions, and the raw data emerged from the court observation, many key themes were immediately identifiable.

When conducting critical qualitative criminology data analysis the researcher needs to conduct two layers of analysis (Hudson, 2011). The first layer of analysis requires the research to look at the questions arising from the raw material itself, without applying external viewpoints or criticisms; this is called 'internal critique'. This critique usually provides an examination of the effectiveness and objectives of policies. Once this part of the critique has been undertaken, and the analysis has reached a point where there are still unanswered questions arising from the data (i.e., policy objectives are still being achieved but there inequality remains in the application of the policy), the researcher moves to an external critique. This is where:

...the use of a theory or perspective which incorporates the value stance of the researcher and/or which expresses a counter-standpoint to that exposed by the internal critique. Juxtaposing external critique, the external standpoint, to internal critique is the dialectic of critical theory. The objective of external critique is to raise issues, and to propose values and understandings, that do not arise in internal critique (Hudson, 2011: 338).

Several major themes were identified from both an internal and external critique. The internal critique primarily focused on the operation of the bail support system, whereas the external critique examined the theoretical underpinnings of the system, primarily using criticisms of the therapeutic jurisprudence model to analyse the data. Each of the key themes developed sub-themes that emerged upon more detailed analysis of individual cases and anecdotes arising from interview responses. The key themes identified are:

#### External

- risk
- needs

- punishment and control
- vulnerability
- access to justice
- tensions.

### Internal

- support by stakeholders
- sentencing and legislative changes
- punitive practices
- resourcing
- location
- efficacy of treatment.

The interview transcripts were then entered into the NVIVO software program for the coding process. The court observation data was also loaded into NVIVO and coded on the same nodes as the interview data. The NVIVO software made it easy to use the coded data, as each coded quotation could be easily tracked back to the respondent, and quotations that linked back to several themes could be coded multiple times.

## **5.6 Ethical Considerations**

### **5.6.1 Ethics approval**

It is a requirement of Monash University (MU) that all research involving humans receive ethical approval. This project sought ethics approval from the Monash University Human Research Ethics Committee (MUHREC), and was granted approval.

### 5.6.2 Anonymity

One of the key ethical considerations when interviewing people about their professional behaviour and opinions is confidentiality. In line with current ethical requirements by MUHREC, written informed consent was provided by all participants prior to commencing the interview. Participants were also provided with an explanatory statement and advised that their participation was voluntary. To ensure the privacy and confidentiality of the research participants, each person's data was de-identified and pseudonyms assigned. Pseudonyms were assigned based on the role the person played in the bail support process, followed by a number representing the order in which they were interviewed: for example, Defence 1 is used for the first defence lawyer to be interviewed, while Bail Justice 4 represents the fourth bail justice to be interviewed. These pseudonyms have been used consistently in the data collection, analysis and within this thesis. Occasionally, reference is made to the location of the participant when relevant to the analysis, for example, Defence 1 (Regional).

All participants were provided with my contact details and had the option of viewing a transcript of their interview. No participants have taken up this opportunity; however, two participants requested that any of their direct quotations were approved (by them) before being used in publication. Where applicable, I gained this approval from the participants. All data for this project is kept in a lockable filing cabinet accessible only to me. Computer files containing transcripts and references to the data do not contain any identifying information. In line with current Monash University practice, the data will be destroyed after five years.

Research participants were placed at minimal risk of stress and discomfort during the research project because they were interviewed about their professional role and spoke about their daily experiences within their role, rather than sensitive or personal information. The research component posed a small inconvenience to the participants in that they tended to have busy schedules and had to take time away from work to

participate in the interview. No participants were considered vulnerable or unable to provide informed consent; therefore, there was minimal risk of a participant becoming emotionally distressed by the interview content. As a precaution, in the unlikely event that a participant did feel distressed by the research, details of several counselling services were provided in the explanatory statement. Upon completion of the data collection phase of the research, no participants reported feeling distressed or upset by the research.

### **5.6.3 Delays**

There were significant delays in obtaining ethical approval for the project. MUHREC approval took six months from the date the application was submitted. This was a result of a complicated internal process for assessing criminology research that underwent several changes during this time.

While rich data was collected in both the interviews and the court observation, it was originally planned to approach approximately 12 to 15 court appointed bail support case workers. It was hoped this would provide valuable and relevant information on the implementation and effect of bail support programmes by people at the heart of the operation. Additionally, previous studies into therapeutic initiatives have drawn on the experiences of support workers (see Heale and Lang, 2001; Hucklesby et al., 2007; Hucklesby, 2011; Hannah-Moffat and Maurutto, 2012). However, problems were encountered when trying to access the Court support services data cohort. I was informed that the process for obtaining ethics approval for this type of research firstly involved getting approval from the Court support services management committee. Once this approval had been received, I could then approach the VDOJ Ethics Committee and submit an application for ethics approval. Initially, I approached the front office of the Court support services division of the Magistrates' Court of Victoria. After explaining the purpose of the visit and requesting information as to how to proceed in gaining access to participants, I was informed there should be no problems



with this request, and was given the contact details of the manager. This began eight months of unreturned phone calls and mixed messages from various court employees.

After first approaching the court in August 2011, a response in the form of a letter was received on 5 April 2012. A copy of this letter can be found in Appendix B. Although the letter did ultimately state the court's approval of the research project, it was decided not to go ahead with this part of the research for two reasons. First, due to the significant time delays already experienced in the project, and given that to proceed I would have to go through a lengthy and unpredictable VDOJ ethics process, it was deemed imprudent to risk further delays to the project. Second, the court's stipulation in their letter regarding publication embargoes left the research open to significant restriction in publication and control over data dissemination. It was felt that agreeing to these demands compromised the integrity of the research.

This experience is emblematic of official discourse deployed by governments and agencies to gate-keep research access (Burton and Carlen, 1979). This is a growing issue in criminological scholarship (Mopas and Turnbull, 2011). Wahidin and Moore (2011), Dixon (2011) and Israel (2004) all comment on the tensions and delays that can affect criminological research. In particular, Wahidin and More (2011) note that the burden of ethics stemming from strong ties between administrative criminology and government guided research can be significant and can negatively affect the research process. Other researchers have experienced similar issues and have commented on the delay tactics used by institutions to limit researcher access. Rigakos and Worth (2011) found their research was hampered by unfounded complaints and delays in receiving responses. In addition to communication barriers and delay tactics, many other criminological researchers have experienced conditional approval that compromised the independent nature of their research, or affected data collection and publication (Rigakos and Worth, 2011; Segrave and Carlton, 2011; Spivakovsky, 2011).

It is evident that negotiating research access is increasingly fraught in the justice sector. There is ongoing debate and concern over this in academic circles (Bryden and

Mittenzwei, 2013; Israel, 2004; Israel and Hay, 2006; Richards and Bartels, 2011; Tombs and Whyte, 2002). Independent research can be suppressed through denial of access, hefty ethical requirements, or impossible conditions, such as publication embargoes. The impact of these gate-keeping techniques on independent research in this particular field means that research is then limited to evaluations funded by government departments, which are put forward as official accounts (Bryden and Mittenzwei, 2013; Burton and Carlen, 1979). One can only speculate that in the case of this research, perhaps the significant support for these programmes from many key players, coupled with the risk of budgetary cuts to an already underfunded system (particularly after a change in government and a swing to the right in politics), means that courts are less open to independent scrutiny.

Critical scholars have highlighted some negative effects that institutional gate-keeping has on the very institutions that use these strategies. When gate-keepers refuse to allow independent research, institutions do not benefit from the insights of objective researchers (Brenner, 2011; Millar and Owusu-Bempah, 2011). Brenner (2011: 598) articulates this by stating:

given that governments, in shaping policy and passing laws, often rely upon exactly the sorts of research performed by socio-legal scholars and analysts, by unnecessarily adhering to these overly protective policies, current governments may be effectively blinding their future selves.

Brenner's (2011) work demonstrates that researchers unable to access information via legitimate government channels will turn elsewhere to source information, for example, Wikileaks (Brenner, 2011: 596). This study has not needed to do this, given the ability to draw on data from court observations and completed interviews. However, it is disappointing that the voices of support workers are missing from this research.

## 5.7 Conclusion

This thesis will build upon existing knowledge by providing theoretically grounded empirical research on therapeutic bail and related bail support programmes, through the framework of therapeutic jurisprudence and risk/needs discourse, focusing on vulnerable people in the criminal justice system. Methodologically, this thesis contributes an original research design to the topic area. An in depth understanding of how the system works in practice can only be gained by observing a multitude of cases in action. Although only five per cent of bail decisions are made in the courts, it is important to examine this part of the process, as this is where contested bail decisions are heard in a public forum. As far as bail support services are concerned, in courts that have implemented the CREDIT programme, referrals can only be done by a magistrate. In the courts using the CISP, magistrate referrals are prioritised above other referrals, therefore, the court is the key forum to observe referral processes. The public nature of court proceedings ensures this information is easily accessed. This, in addition to the information provided by the interview data, will help provide a clear picture of therapeutic jurisprudence in action. It will do this by providing a more complex understanding of bail support programme operation in the Magistrates' Court of Victoria through empirical research. The following three analysis chapters explore the findings of this research by tracing the relationship between risk/needs and therapeutic jurisprudence, and the effects this has on the implementation of bail support services through the courts, along with the effect this has on individuals and the community.

## Chapter 6: Therapeutic Tensions: Risk Management Techniques and Risk/Needs

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*I guess that contact with the criminal justice system can then provide that opportunity to link in with services, and in some cases the incentive to do it because they have been ordered to by the court. I think that's kind of problematic too because philosophically I think if people are going to do therapy, if they're going to counselling, or if they go to do drug rehab it's got to be their free choice to do it. But the reality is, if they're in the criminal justice system, they are participating in CISP or something like that they don't really have the free choice of being involved in the criminal justice system. So if they get some sort of order that involves a therapeutic aspect they have to do it. So there is a tension there I think (Defence 7).*

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In practice, the administration of therapeutic jurisprudence is not easily reconciled with its philosophical underpinnings. Critics of therapeutic jurisprudence have identified some tensions that may arise when applying a therapeutic model to an existing adversarial system (Blagg, 2008; Cannon, 2007; Edney, 2007; Freiberg and Morgan, 2004; Slobogin, 1995). In line with these critiques of the therapeutic jurisprudence movement, empirical research with participants at the interview stage of this project confirmed these tensions do exist in the practice of therapeutic bail. Further, analysis of court observation and interview data link these tensions to risk/needs paradigms. This chapter will identify how the discourses of risk and needs underlie these extant tensions by examining risk dynamics and hierarchies of need in therapeutic bail decisions. First, this chapter will critically analyse participants' perceptions towards therapeutic bail initiatives and their understanding of therapeutic jurisprudence. Then, the chapter will outline how the court observational data reveals that risk influences therapeutic bail decisions, particularly through the denial of unconditional bail, based on the 'unacceptable risk' posed by the defendant (as perceived by prosecutors). It will also examine the aims and intentions of therapeutic bail in the context of 'needs', finding that high needs people are viewed as 'chaotic' and

thus unable to self-manage risk. Further, this construction of vulnerable high needs people as risky endorses increased control and pathologising from the criminal justice system. In essence, I argue this demonstrates how practices focused on risk/needs management of people seen as chaotic or vulnerable, dominates therapeutic bail.

## **6.1 Perceptions of Therapeutic Bail**

### **6.1.1 Support for therapeutic bail**

Prior research into bail and bail support services in the UK and USA indicated there was little or no support for therapeutic alternatives (Doherty and East, 1985; Octigan, 2002). Contrary to other jurisdictions, Victoria reportedly boasts a high level of support from police, prosecution, defence and the judiciary for therapeutic initiatives (Ross and Graham, 2012). It was noted in Chapter Three that evaluations of bail support services in Victoria reported positive responses from judges, defence lawyers and prosecutors in the bail process (Heale and Lang, 2001; Ross and Graham, 2012). This may indicate why Victoria has invested in therapeutic bail and other initiatives, such as the NJC, more than other jurisdictions. Empirical research for this thesis also found high levels of support for therapeutic bail conditions and bail support programmes from the research participants. One respondent contended that the benefit of these programmes extended beyond the individual, to have wider amenity effects:

It is not just the accused themselves who benefit, it is the community at large (Judiciary 1).

Linking clients to bail support services was seen as a tactical advantage by defence lawyers applying for bail on their client's behalf. The data indicated that having a client linked to support services before the bail hearing was a hook for prosecutors who might otherwise have opposed bail. When questioned, Defence 22 agreed there was greater cooperation with the prosecution when the defence brought a bail support programme condition into a bail application. Defence 9 agreed that:

I think informants and prosecution are assisted by the fact that there will be regular monitoring in relation to matters.

Judiciary 1 also believed that the prosecution were less likely to oppose granting bail if people were bailed to attend support services.

During the court observations, it was repeatedly observed that many magistrates were supportive of the bail support services in place. This support indicated that a therapeutic relationship may arise between magistrates and defendants. In Case 54, the magistrate was encouraged to see a defendant who had originally presented at court with significant mental health issues 'looking better, a lot clearer'. The magistrate was visibly happy to see improvement in the defendant's mental health and linked that to his time on the CISP. Case 76 demonstrated that a favourable CISP assessment might allay prosecution fears of a defendant's risk. In this case, an unemployed, homeless man with a significant drug history was viewed by the prosecution and the magistrates as a poor risk for bail. However, the defendant had received a favourable CISP assessment that demonstrated how the risks he presented could be mitigated. The police prosecutor confirmed that this did reduce his concern; however, in this case the defendant was unsuccessful in his bid to be granted bail, because he was viewed as having an unacceptably high risk of offending on bail.

Support for programmes from the bench was also demonstrated when magistrates responded negatively towards people who did not seem to be making the most of their opportunities on the programme. This negativity appeared to arise partly from a therapeutic interest in defendants from the magistracy, and partly from concern over wasting resources on people who would not take advantage of the programmes' perceived benefits. One of the ways this manifested was when magistrates gave poor programme performers a 'telling off' for not making the best use of services. In Case 72, a young, homeless, Indigenous man with an acquired brain injury had been bailed to the CISP and was in court to check on his progress. The magistrate was advised that the defendant had not been doing well on CISP and he had to decide whether to allow

the defendant's bail to be extended. The magistrate allowed the bail to be extended but sternly told the defendant that he had to really want to do it, because these programmes had limited resources and he did not want to see them wasted.

In Case 55, a defendant who had received positive monthly CISP reports was brought back to court for breaking bail conditions. The magistrate knew the defendant from previous hearings and was disappointed to see him back in court. She stated that he had demonstrated he could live in the community, not using drugs, and that he could contribute to society, but something had gone wrong. She asked him what went wrong and noted that he could not look her in the eye. These examples provide an insight into potential ongoing therapeutic relationships between judiciary and defendants that may be formed through these therapeutic initiatives. This indicates that some magistrates may have adopted a more therapeutic approach, a key element of successful implementation of therapeutic initiatives outlined by Wexler (1990), Bull (2010) and Potter (2006).

There were also 14 participants who worked, or had experience working, in regional areas with little or no access to bail support services. These participants were less able to provide any positive feedback on therapeutic bail programmes, where few existed in their area, but they did express negative feedback. They believed they did not have adequate access. People from regions with few or no programmes expressed envy and disappointment that they did not have access to these desirable programmes and services at their locations. This comment exemplifies some of these feelings:

unfortunately there is nothing like that, and not only there is nothing like that... I would love that, I know that the reality of that would be slim, even if something like CISP were not available in its entirety as it is say as at the La Trobe Valley Magistrates' Court, something along those lines, so ideally I would love CISP (Defence 1—Regional).

Defence 1's comment also exemplifies another sentiment expressed by participants, a desire to have more access to services. This reinforces the positive feedback received

by other participants, that access to programmes is desirable. Regional issues are further analysed in more detail in Chapter Eight.

This same feeling was expressed by the bail justice interview participants. They believed they were often criticised for making harsher decisions than magistrates, and that bail justices had a reputation for never granting bail. This reputation has been highlighted in bail literature (Richards and Renshaw, 2013; VLRC, 2007). This was also evident during the four observations of out of session court hearings that were conducted for this research. In these cases (114, 115, 116 and 117), the bail justice was reluctant to grant bail and did not do so in any of the cases witnessed. However, during discussions with bail justice interview participants, they advised they were not in a position to draw on these therapeutic services when making bail applications, where police and magistrates were able to do this:

We can't have access to them as part of the decision making process. We can recommend [treatment] but little else (Bail Justice 2).

Similar to the participants from regional areas, the bail justices were disappointed that they could not draw upon support services or therapeutic conditions when considering bail applications. Bail Justice 3 believed that enabling them to draw on services would be positive:

I would think that would make the whole [system], not just the CISP programme there are many others that would benefit to streamline across-the-board.

While there may be many practical limitations to extending therapeutic bail conditions to the realm of out of session court hearings, the positive support indicated by bail justice participants demonstrates a high level of support from many areas; as such, this is an area warranting future investigation.

This research finds support for therapeutic alternatives even when the participants criticised the pitfalls. The consensus among participants was that having this system in



place, however flawed, was better than nothing. Every single interview participant said that it was better to have these options in place than no options at all. Throughout the interviews it was acknowledged that placing a defendant on bail with therapeutic conditions was preferable to remanding them. There was a commonly held view (arising from the observations/interviews) that placing a defendant on remand ultimately increased the risk posed by a defendant, because their needs could not be addressed in remand. People on remand do not have access to therapeutic services and programmes that could assist in addressing their needs. Defence 3 voiced concern over this, stating:

So in simple terms of outcomes [bail support services] are better outcomes for our clients because we are generally of the view, and I certainly am, that being on remand is even worse than serving a sentence in prison. Remand is at least generally of a lower standard, and there is much less availability of rehabilitative training programmes for clients. So being on remand has a very negative effect on the life of an offender in itself and obviously interrupts their social support networks and prevents them from continuing to gain employment, disrupts their familial relationships and all that bad stuff.

There was clear support among the interview participants for providing alternatives to remand imprisonment that addressed the needs of the offender, while mitigating their risk to the community. However, there was also a recognition that the alternative was not without its problems. Analysis of the interviews found that each positive comment was qualified by criticisms of the system, demonstrating recognition that the system was problematic. For example, Defence 13 was asked about what was working with the current system; she stated that it was definitely working really well. She then gave a long list of qualifications to her original comment, which she believed inhibited the proper operation of the bail support system, without actually providing any discussion of what was working. Defence 5 also highlighted this, saying:

there was this idea that if the court gets involved in their lives and start to get them hooked into counselling and whatever, that somehow the court is going to improve your life. I think that is problematic. It can't solve all the problems that impact on the reasons why people offend. It just can't.

The analysis provided in the rest of this thesis focuses on these qualifying remarks and criticisms, while recognising that research participants wanted to provide constructive feedback on the current programmes, rather than suggesting they should be removed. It would be a disservice to the research participants not to expound their endorsement of bail support programmes. Indeed, some participants wanted to go on record with their positive feedback because they were concerned their negative feedback might eventually result in programmes and resources being rolled back. It is fair to say that no one wanted to see services cut or reduced. But while there was overwhelming support for the programmes, each participant was able to identify many issues they saw as problematic in the current system. Most of the positive comments made by interview participants were qualified, and many positive statements ended in words such as ‘however’, ‘but’ and ‘yet’. It is these expressed reservations and qualifications that the rest of this analysis draws upon, to critique these programmes in light of the key research questions.

### **6.1.2 Understanding therapeutic jurisprudence**

This research exposes tensions between theoretical accounts of ‘therapeutic’ viz a viz practical understandings and their applications. As previously outlined, the purported aim of therapeutic jurisprudence is that the ‘law should do no harm’ (Wexler and Winnick, 1991). Court observations and participant interviews revealed varied conceptualisation and understandings of therapeutic jurisprudence in practice. This was also emphasised in the court observation, where therapeutic mechanisms were discussed and used by key actors in the bail application process. However, rather than overtly using therapeutic jurisprudence as a framework behind the process, they demonstrated a more nuanced use of therapeutic language. This highlighted an area that warranted further examination in the interview phase of the research. As part of this exploration, participants in the research were asked what their understanding of therapeutic jurisprudence was and their opinion of its use in the criminal justice system. This discussion explores the effect of therapeutic interventions at the bail stage of the court process and critically, whether therapeutic interventions indeed ‘do no harm’.

Participants in this research provided varied definitions of therapeutic jurisprudence. Defining therapeutic jurisprudence has been problematic, as discussed in Chapter Four (Richardson, 2008; Slobogin, 1995). Therefore, it was interesting to see how the interview participants viewed the concept of therapeutic jurisprudence as a starting point for analysing critiques of these practices. Many participants struggled to articulate a clearly defined understanding of the concept. Although some commented that they were familiar with the terminology and its implementation in the criminal justice system, they had not really thought about the definition and meaning of the term. These discussions are exemplified through the following comment:

It's a nebulous concept in that it's hard to define. Therapeutic justice<sup>14</sup> to me is not just a straight sentence it's not just. It's about addressing the underlying problems with the person. I know the NJC is probably at the forefront of that, the whole idea of therapeutic justice and supports such as CISP help along those lines, but it's more of a holistic view to tackle the problems of a person and the reasons why they commit an offence. To not only address the criminality of it but also the underlying behaviours and I know I'm repeating myself but like I said it's difficult to define. But by helping these people in a broader sense you try to prevent future relapses along the same way. So while an immediate jail term can be considered somewhat of a deterrent it's not really fixing the problem, it's not really addressing all those things that are causing the offences themselves. So it's like a holistic approach to criminal behaviour (Defence 12).

This statement from a defence lawyer indicates a clear understanding of the practical applications of therapeutic interventions, but he has some difficulty in articulating the theoretical concept underpinning these interventions. The repetition, hesitation and acknowledgement of the repetition indicate his difficulty in explaining his understanding. However, his response clearly indicates that therapeutic jurisprudence is beneficial because he believes it aims to address underlying structural inequality. But he does also indicate that to do so, the focus must be on an individual's problems. So, while acknowledging that therapeutic jurisprudence addresses structural issues, he articulates individual approaches as a solution. This highlights that even the act of defining therapeutic jurisprudence reveals inherent tensions.

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<sup>14</sup> The term 'therapeutic justice' is used interchangeably with 'therapeutic jurisprudence'.

Three participants demonstrated a more sophisticated understanding of the concept. These comments came from participants whose particular roles had more direct contact with therapeutic jurisprudence initiatives or who had explored it independently out of general interest. This defence lawyer gave a very formulaic definition:

attempt, in so far as it is possible, to administer the laws of the State in a way that, as a minimum, don't harm the people that are the subject of those laws, offenders (Defence 3).

This comment echoes Wexler and Winnick's (1991) call that 'the law should do no harm'. It pares back the concept in the same way that Wexler and Winnick (1991) did, to explicate an all-encompassing, clear definition. However, this simple definition was not repeated by any other research participant, who leaned towards more complex and confused definitions, as exemplified by Defence 12's above comment.

Another defence lawyer gave her more nuanced insights of therapeutic jurisprudence:

I see it as a different approach to perhaps the traditional approach of the courts, so instead it's a step away from a punitive approach. I won't say it is non-legalistic because I think there's a whole lot of case law that is coming out that is supporting a therapeutic approach. So it is starting to become part of law as well. But I think maybe it also has been a little bit of a different approach than very black letter approaches to sentencing or bail. More of a practical problem solving approach that looks at the causes of people's offending. I think a therapeutic justice approach does come from a more nuanced understanding about the factors that contribute to offending behaviour instead of just ticking things off as considerations under the *Sentencing Act* (Defence 7).

This explication is clearer and more focused than some previous comments. Only three interview participants (including Defence 7) provided such clear and cogent insights into their understanding. This definition draws attention to the less formulaic mechanisms in therapeutic jurisprudence. It speaks directly to some benefits of therapeutic jurisprudence, such as addressing underlying structural causes of offending

behaviour, that are outlined by scholars such as Wexler (1990), Wexler and Winnick (1991) and Winnick and Wexler (2003).

Yet, even though the majority of participants did not provide nuanced understandings of the definition of therapeutic jurisprudence, this did not seem to impede their opinion of what it was trying to do. The participants used the tools of therapeutic jurisprudence in their daily work. Their comments demonstrated a belief that they understood what therapeutic interventions aimed to do and how they could be used in the criminal justice system:

In a practical level what I understand it to be is understanding what underpins offending behaviour and is addressing it in a way that reduces re-offending. So it is better for the offender, it's better for the community, better all round. It's a better understanding of what leads to people offending what things they might need or treatment or support to address those. I know that's not the academic definition but that's what I understand it to be in practical terms (Defence 13).

This comment provides another example of tensions that arise when articulating the aims of therapeutic jurisprudence. Again, reference is made to addressing structural reasons for offending, but focus is also given to reducing individual risk. This discussion provides a useful picture of how therapeutic jurisprudence practitioners engage with the concept of therapeutic jurisprudence and its application in practice, complementing academic debates on its meaning and value. The fact that all participants were involved in therapeutic practices, but had not questioned their definition or use, indicates these practices may have become ubiquitous in Victoria, and thus unquestioned. This justifies the use of these techniques without unpacking and critiquing the frameworks behind the mechanisms. This may contribute to support for therapeutic techniques and the desire to have therapeutic options, because they are viewed uncritically. This research demonstrates that practical understanding of the aims of therapeutic jurisprudence leads practitioners to see therapeutic jurisprudence as addressing underlying structural issues relating to offending. However, links are also made between therapeutic initiatives and addressing individual risk. This indicates the presence of competing aims: one focusing on structural issues that may lead to

offending and one that focuses on individual risk. This is an important tension that is unpacked in the rest of this chapter.

### 6.1.3 Reconciling tensions

While showing support for therapeutic alternatives, participants did problematise aspects of therapeutic jurisprudence, and tried to reconcile these tensions in light of their positive views. All participants made comments that indicated tensions existed between these two systems. Defence 7's comment exemplifies this attitude:

But the reality is if they're in the criminal justice system, they are participating in CISP or something like that they don't really have the free choice of being involved in the criminal justice system. So if they get some sort of order that involves a therapeutic aspect they have to do it. So there is a tension there I think, but I still think having scope for a therapeutic approach is fantastic but there are a few issues that it throws up as well ... I don't see that as fatal but there just is that inherent tension (Defence 7).

This participant expresses positivity about the opportunity to avail therapeutic programmes, but simultaneously recognises that doing so conflicts with fundamental principles of due process. Although she feels conflicted by this tension, it appears she is able to reconcile this because she believes it is still a better alternative, regardless of its pitfalls.

Judiciary 5 also recognises the presence of tensions in the system; she also does not feel these tensions are intractable:

I think there is a really significant tension between them but I don't think that is an insurmountable tension, I think that you can be fairly fluid moving through all of the different considerations in order to balance them out and sometimes you reject the therapeutic option or the therapeutic approach as an inappropriate one in all the circumstances (Judiciary 5).

She reconciles this tension by seeing therapeutic jurisprudence as a fluid option, drawn on when needed, but highlights the need to balance considerations. This mirrors Slobogin's (1995) advice on balancing dilemmas to ensure therapeutic jurisprudence does not become anti-therapeutic.

Although there was a general feeling among the participants that these inherent tensions were not 'fatal' to therapeutic interventions, some examples given by participants gave a different picture of the way conflicting ideologies meet in the courtroom. This next comment demonstrates that participants recognised how defendants may be coerced into treatment, which may then be used as a tool to punish people. This places incredible pressure on defendants to engage with their therapy on the court's schedule and indicates that treatment may become paradoxical insofar as it is coercive:

The client has the sword of Damocles<sup>15</sup> hanging over their head because if they don't do what CISP say then CISP will write a dirty report and the magistrate will get it on the next return date (Defence 16).

The following comment also draws on the tension created by the coercive element to therapy through the courts. This defence lawyer, while advocating for treatment through therapeutic interventions, identifies coercion as problematic:

I think the ability to hook people in with counselling is a huge step and it may be the first time the person has ever had counselling. They might have been a heavy drinker for 25 years but they have never thought of themselves as having a problem and all of a sudden they are mandated to do so through a programme and it might be something that leads to a change for that person and that can be great by having the ability for people to deal with a professional for the first time to properly deal with someone (Defence 2).

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<sup>15</sup> Damocles was a figure from Greek mythology who was given the chance of having power but with a sword hung by a horse's hair dangling over his head, so there was always fear looming over him.

This participant demonstrates that he is wrestling with the competing aims of providing therapeutic help through access to counselling and alcohol programmes, and the fact that the treatment is not by choice. Mandating a person to attend a treatment programme before trial, with possible punitive responses to non-compliance is inherently problematic (Durham and La Fond, 1990a, 1990b; Fagan and Fagan, 1990). However, he reconciles this tension through his hope that the programme will lead to change.

While interview participants recognised these significant tensions, their need to reconcile the tensions to justify continued practices demonstrates the fine line to tread between respecting a person's right to innocence before proven guilty, and ensuring the community's safety from a defendant. A more detailed analysis of punitive responses to non-compliance is presented in Chapter Seven, but the analysis here demonstrates this tension extends to therapeutic interventions, where treatment is administered and prescribed through the courts, rather than being sought out voluntarily through the mental health system. It makes sense to link vulnerable people with services. However, doing so in a legal system fraught with tensions highlights Phelan's (2004c) question as to whether or not the legal system is the right place to do this (as opposed to a broader societal approach).

## **6.2 Tensions and Risk/Needs**

So far, this chapter has identified that while the data revealed significant support for therapeutic bail mechanisms, significant tensions were recognised by the research participants. One significant tension that became apparent through the research data was the belief that therapeutic jurisprudence initiatives aimed to address structural inequalities, but also hoped to reduce the individual risk of re-offending. The link between therapeutic jurisprudence and risk is demonstrated in this following discussion, first by analysing risk as a key theme emerging from the data, then by demonstrating how needs are conflated as risk through the practice of therapeutic bail; particularly through risk techniques. This includes analysis of the language used to construct vulnerable people as needy, and therefore risky. In particular, language that



pathologises, and use of the term ‘chaos’ are analysed as indicators of an individual’s inability to self-manage risk. This individual approach to risk/needs demonstrates that managing risk dominates therapeutic bail.

### 6.2.1 Expanding the use of ‘unacceptable risk’ provisions

Analysis of the observation data reveals the dominant influence of ‘risk’ on decision making and its effect on the meaning of bail and bail legislation. Not only was there a shift detected in the legislated meaning of bail (Steel, 2009), but data from the observational stage of the research indicates that interpretation of the legislation is increasingly focused upon a defendant’s perceived risk to society, as opposed to their likelihood of appearing for a court date. This risk aversion is apparent in the language used in bail applications in the Magistrates’ Court. In particular, this is demonstrated by the frequency with which an individual’s risk of offending while on bail is cited as the reason for the prosecution opposing bail, rather than their flight risk. Of particular significance in this ensuing discussion is the use of the term ‘risk of re-offending’ by magistrates, prosecution and defence, which assumes that the current unresolved charges will be proven, rather than ‘risk of offending’, which is less weighted.

As discussed, the concept of bail began as a means to ensure a defendant appeared at court and did not abscond from justice (Smith, 1960). This means the primary factor in a bail decision is whether or not a defendant will appear at court for the case to be heard. A significant Victorian Supreme Court decision (*Asmar [2005] VSC 487*) was cited both in the court observation data and the interview data. This case relates to Section 4(4) of the *Bail Act*, relating to the test for acceptable risk. Prior to *Asmar*, the granting of bail under a ‘show cause scenario’ was considered a two-step test. First, the magistrate had to determine if cause had been shown then they had to decide if the defendant posed an unacceptable risk of offending while on bail. In handing down his decision, President Maxwell stated that if cause had been shown then there was no unacceptable risk; if there had been unacceptable risk, then cause would not be shown. This essentially means that a shown cause decision is now a onestep test and the idea

of unacceptable risk was now intrinsically linked with show cause (*Asmar* [2005] VSC 487; VLRC, 2007). This participant draws on his knowledge of the *Asmar* case when clarifying his understanding of the key factors driving bail decisions:

The primary focus of bail is to ensure that the person turns up to court. There are a number of Supreme Court authorities, and you are probably aware of them, cases like McGee and *Asmar*, bail is predominantly to get people to court. Sure, there is an aspect involved in that in the assessment of the risk and re-offending is one of those risks (Defence 22).

Here the participant highlights the shift in bail decision making from decision making based on assessing flight risk, towards the increasing importance placed on risk of re-offending. This participant indicates that although offending on bail is part of the decision making process, flight risk is still supposed to be the primary factor. However, the observational data reveals that in many of contested show cause bail applications, the reason the defendant was in a show cause position was because they had allegedly offended while on bail, or they had breached their bail conditions. Unacceptable risk of offending was also the most significant factor in determining bail ineligibility in 31 cases. In these cases, the prosecution's case was linked to the 'nature and seriousness of offence' and 'unacceptable risk of re-offending', rather than the defendant's likelihood of appearing at court. Flight risk was only mentioned in 13 cases; in only three of these 13 cases were defendants denied bail because of their perceived flight risk.

The tension between risk of offending and flight risk as the primary reason for denying bail was also stressed in Case 34 of the court observation data. In this particular bail hearing, the police prosecutor was opposing the granting of bail on the grounds that the defendant posed an unacceptable risk of re-offending. The defence lawyer mooted that the primary issue relating to bail is that a defendant appears at court when the case is heard. In this case, the defendant had no prior history of failing to appear at court and he did not pose a flight risk. The defence lawyer argued, citing case law that bail should be granted because it should be the primary factor in bail decision making. The magistrate did grant bail, noting that although the defendant posed some risk of

offending, it was not an unacceptable risk. She acknowledged that 'bail is to ensure the person appears to answer charges'.

The meaning of bail in contemporary society has expanded significantly since its first iteration and now has an increasing focus on managing perceived risk (Baker and Roberts, 2005; Baldry et al., 2011; Edney, 2007). Section 4 of the *Bail Act* extends the original meaning of bail to include the risk of a defendant interfering with witnesses, committing other offences and also to prevent them from harm or harming themselves. However, analysis of both the court observation and the interview data reveals that the meaning of bail has not only been extended to encompass more risk factors, but that the emphasis for granting bail has shifted from ensuring a defendant attends at court to a focus on the possibility of them offending while on bail. In a number of the contested bail hearings (n=74) observed, the prosecution's reason for opposing bail was because of an unacceptable risk of offending while on bail (n=24). There were several contested bail hearings (n=4) where the prosecution cited both failure to appear while on bail, in addition to an unacceptable risk of offending, with failure to appear the more significant factor in only one case.

While bail has always been a risk-based decision to some degree, clearly now it has moved towards the likelihood a person has of offending while on bail. This demonstrates a conflated interpretation of the risk of offending with predicting dangerousness. Predicting dangerousness is an exclusionary technique usually used on those who need more permanent controls excluding them from society, rather than using active intervention to draw them back into the fold (Rose, 2000a, see also Rose, 2000b re: circuits of exclusion). Now a person's risk of (re)offending is enough to provide a justification for exerting pre-emptive control over a person in case they offend while on bail. The comments from the interview participants and the observational data indicate that there is a belief held by key players in the system that denial of bail is increasingly linked with risk and control. This focus on controlling risk before trial is generally recognised as a means to control people seen as 'dangerous', not the type of frequent, low level offender seen in the Magistrates' Court. Predicting dangerousness, known as pre-crime, is a murky issue as it enters the dubious legality of

detaining a person based on what they ‘might’ do (Duff, 2012; Zedner, 2011; for broader debates on predicting dangerousness and pre-crime see also Jones, 2010; McCulloch and Pickering, 2010; Mythen and Walklate, 2010; Zedner, 2010). The link between unacceptable risk of offending and bail identified here touches on some issues raised in debates on dangerousness (Jones, 2010; Rose, 2005, 2010). Further research should question the concept of bail and offending on bail in these debates.

The language of ‘unacceptable risk’ is also the driving force behind offending on bail changes to legislation made by the current Victorian government in the *Bail Amendment Act*, 2013, which introduced legislation to formalise offending on bail as a standalone offence, with specific sanctions (see Chapter One for discussion and background). The proposed legislative changes were reported in the print media in August 2011 (*The Age*, 28 August 2011), and therefore it became topical at the time of the interview data collection. As a result, many participants (n=18) were asked about their opinions on this proposal. Their responses were impassioned. All 18 interview participants responded negatively to the government’s proposal. In particular, the mandatory sentencing aspect of the proposal was highlighted as highly problematic:

and to what you’re trying to do it’s managing risk, most bail offences, most people on bail who commit offences don’t commit major offences, they are really minor and you really need to look at each case separately, individually (Defence 17).

A significant question raised by analysis of the observational data was regarding how much the risk of a person offending on bail was emphasised as a justifiable reason for denying bail, when the types of cases appearing in the Magistrates’ Court are primarily defendants charged with committing frequent, low level offending with either no, or short custodial, sentences (Chew and Midgley, 2004; Midgley, 2004). The observational data provides some examples that illuminate this issue. In Case 92, a male defendant with a history of drug use, who was charged with attempted burglary and property damage, was denied bail because he was seen as an unacceptable risk of re-offending. He was unable to access CISP and therefore was unable to mitigate the risk of persistent drug use perceived by the court. The defence lawyer protested the denial of bail vehemently, because he believed his client would not receive a custodial

sentence if found guilty. He dramatically stated to the court ‘so you have to stay in jail longer if you’re not guilty than if you are’.

In Case 68, a female defendant with mental health issues and a history of alcohol use was seen as a significant risk by the court, but was unable to get a CISP assessment for three weeks. The defence lawyer pointed out that, while she did present risks if she was not bailed, she would ‘end up spending more time in custody than had she been convicted’. In this case, the magistrate agreed with the defence lawyer and released her because he did not believe she would end up with a custodial sentence when the case was heard. However, as the prosecution had concerns about her risk, and the magistrate also voiced concerns, despite granting bail, this draws attention to the issue of mitigating perceived risk. If people are likely to be released soon after case disposition, after a short prison sentence, or after time served on remand, how are they less risky than as compared to their risk before case disposition? Why are they so much more risky before hearing and sentence, when those sent to remand may be released back into the community with no rehabilitation or steps taken to make them less risky? The observational data reveals that the language of risk is prominent at this front end of the court process, before sentencing. This finding indicates that unacceptable risk may be the language used to justify risk management techniques that legitimise control over people before sentence.

### **6.2.2 Risk of re-offending and hierarchies of need**

The previous section revealed a link between risk and bail in both the interview data and the court observation data. The data also revealed a link between risk and therapeutic bail. The rest of this chapter discusses this link through analysis of the research data, wherein it emerged that vulnerability and risk are linked through constructing people with multiple markers of vulnerability as having high needs. Research participants’ responses indicate that needs and risks are being conflated. This may have the effect of constructing vulnerable people with multiple needs as risky. Analysis of the data indicates that markers of vulnerability are being repackaged as risk.

Medicalised language and the language of ‘chaos’ were mechanisms used by the research participants to demonstrate a person’s inability to self-manage risk. This analysis draws on Fraser’s (1989) work on needs discourse, Hannah-Moffat’s (1999, 2005) commentary on risk, Foucault’s technologies of the self (see Martin et al., 1988) and Rose’s (2000) work on circuits of exclusion.

Data collected during the interview phase of the research indicates a confusion between evaluated success of programmes based on recidivism rates, compared to the interview participants’ view of what bail support programmes aim to do. While programme evaluations often demonstrate their success through recidivism rates, the interview participants frequently talked about whether the programmes could improve the lives of vulnerable people, as demonstrated by Defence 5’s comment on pp. 119:

This comment echoes Fraser’s (1989) and Hannah-Moffat’s (2005) concerns that needs discourse is dictated by recidivism; that is, what needs gain treatment are determined by which needs are linked to risk of re-offending. Risk/needs discourse focuses on treating needs to mitigate risk; its aim is not to ‘improve’ lives per se, but to address reasons for offending. The question raised by Defence 4’s comment is whether therapeutic interventions should improve people’s lives or reduce their risk of re-offending. As bail support programmes aim to do both, it really becomes a question of whether this is possible. Therapeutic jurisprudence aims to do no harm, and while the essence of these programmes is therapeutic intent, recidivism rates remain fundamental to the running of the programmes. As such, the aims of therapeutic bail support programmes may not correlate, and may indeed compete. This is evidence of the balancing dilemma debated by Birgden (2013), Gould (1993), Slobogin (1995) and Winnick (1997). The fact that it is done through the courts means that risk management may trump quality of life outcomes.

The following comment raises the question of determining the needs that require addressing:

Sometimes the hardest person to get bail for is the person who’s got no [drug and alcohol] problems, doesn’t need support. But for some reason he’s got other

problems, accommodation, that is actually more difficult because it is easier if there is an issue or problem, you can say look there is an issue, there is a problem but hey we can deal with that problem by using CISP (Defence 8).

This comment indicates that some needs may only be dealt with if they are seen as the ‘right’ sort of needs for these programmes to address. In this particular case, the defence lawyer is demonstrating she was unable to get assistance for a homeless man because he did not have other issues. Yet, homelessness has been linked to denial of bail (Airs et al., 2000; Boyle, 2009; Hucklesby, 2009). If the programme’s aim is to address the social needs of people appearing before the court, and this person faced remand imprisonment because of his homeless situation, this should meet the aims of the programme. This comment indicates that health and social needs may be hijacked by a desire to demonstrate success by reducing recidivism. This is a problem that Fraser (1989) expressed concern about in relation to addressing needs in the criminal justice system. The comments made by participants indicate that the practice of therapeutic bail may rely on an unofficial ‘hierarchy of needs’, with preference made towards addressing needs that are more closely attributed to reducing re-offending.

This is evidence that some needs are placed above others in terms of importance, creating this hierarchy of needs. This is exemplified again in Defence 22’s comment:

I think if that sort of programme is going to be put in place it does need to be more holistic. From that point of view it needs to be able to link in to available services in terms of social support and housing, financial security, social work, psychological counselling, there are probably ten other things, but people’s reasons for offending can be complex and their lives can be very complex and I think the system shouldn’t necessarily anticipate that short periods on something like a credit bail programme is going to make significant differences to people’s lives if other issues in their lives are not being addressed. Certainly the housing and employment issues tend to be very significant factors in terms of people’s stability and their self medication, suicide inclination, their mental health generally. All of those things impact and ultimately the criminal offending is, in my view, is just a by-product of the chaos that is going on in people’s lives (Defence 22).

This participant is concerned that a short term programme does not necessarily provide long term benefits or assistance to vulnerable people. This concern is also highlighted by Ross and Graham (2012). If a programme is still meeting the aims of reduced re-offending for a short time after bail is granted, but is not providing a true improvement to a vulnerable person's quality of life, then it is still deemed a success.

This analysis indicates a tension is created by these processes, caused by the competing aims of therapeutic initiatives. Bail support programme aims include reducing re-offending, as well as assisting people with health and social needs (Magistrates' Court of Victoria 2007, 2012; Ross, 2009). Ross and Graham's (2012) and Ross's (2009) reporting of bail support programme evaluations measured 'success' by looking at factors such as recidivism rates. However, this might not mean they are 'successful' in addressing markers of vulnerability and providing better outcomes for people going through the programmes. The primary reliance on recidivism as a measure of success means that needs are prioritised based on those directly linked to reduction in re-offending, and not necessarily those that might assist people in other ways, such as stable employment. Some solutions may result in better experiences for the offender, (i.e., drug treatment), but the driving force behind treatment through the criminal justice system is to address the risk of re-offending, not to improve the person's life. This has begun to be addressed more recently in the corrections sector through the introduction of Good Lives initiatives (Ward and Brown, 2004) but this has yet to evolve to the bail sector. It just happens that in many instances the aims of therapeutic jurisprudence and the aims of risk/needs management correlate, so that court ordered treatment appears to focus on improving a person's life. These therapeutic mechanisms operate under the guise of helping people, but in reality they may mask risk management techniques.

This prioritising of needs to meet the aim of reduced re-offending and demonstrate success through reduced recidivism rates is also problematic when looking at competition for places on programmes. There are limited places available on bail



support programmes<sup>16</sup>, and as such it can be a competitive process. There is a danger of cherry picking people who will best fit the aims of the programme or for lawyers to make their clients appear needier to get them access to services. This is problematic because it may mean that programmes do not interact with the people for whom they were designed. These practices may have a net-widening effect, as they result in people being unnecessarily put under court orders to attend treatment, while denying treatment to people who are too risky and may then end up on remand. These programmes may not be targeted towards people with needs that do not correlate with reduced re-offending.

### 6.2.3 ‘Chaotic’ lives/‘risky’ people

One term that featured heavily in both the court observation and interview data was ‘chaotic’. This term was used to describe the lives of people appearing before the courts awaiting bail. When asked to describe a typical candidate for therapeutic bail, many participants used the term ‘chaotic’. They also identified these people as high needs. As Defence 20 states, ‘their lives are chaotic, they are the people that need the help because their lives are so chaotic’. It was also clear many participants believed that people seen as having chaotic lives were deemed ‘risky’, as evident from this comment:

Certainly the housing and employment issues tend to be very significant factors in terms of people’s stability and their self medication ... their mental health generally. All of those things impact and ultimately the criminal offending is in my view, is just a by-product of the chaos that is going on in people’s lives (Defence 22)

For many practitioners involved in the bail process, the chaos in peoples’ lives is what situates them as a risk to the community, and to a lesser extent a risk to themselves. Interestingly, when decisions to place someone in a bail support programme were made, the primary rationale/argument put forward was to protect the community from further offending. To the defendant, it was painted as beneficial. For example, in Case 54 of the observation data, a defendant is brought before the magistrate for a CISP

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<sup>16</sup> This is discussed in greater detail in Chapter Eight.

rollover hearing. This is essentially a ‘check-up’ for the magistrate to gauge a defendant’s progress on CISP. In this case, the magistrate notes that the defendant has to meet a lot of targets and attend a lot of appointments while on the programme. She says ‘there is a lot going on but you are getting treatment, and moving on’. She adds that going forward she hopes to see continued improvement and commends the defendant on his progress. Although it is acknowledged that the defendant’s conditions are onerous, the magistrate is keen to point out that this is still positive intervention.

Many interview participants made the link between chaos and low socioeconomic status. They observed that many people deemed risky experienced homelessness, unemployment and significant levels of unemployment. One particular defence participant noted that middle class people presented as less ‘unwell’ than people who could not afford their own legal representation:

The legal aid client is the lowest common denominator I suppose, even private practice is different. In private practice you still have middle class people who offend for various reasons but usually due to drug and alcohol addiction. So they’re not usually so floridly unwell (Defence 15).

Another aspect that became apparent was the way that chaos in a person’s life could make them poor contenders for bail, more so than the charges for which a person was due to appear. This is evident in Judiciary 5’s comment:

essentially if you are coming into custody it is usually because things have become extremely chaotic around you and it is the chaos that creates the risk.

Several participants made comments indicating that it was more difficult for defendants to be granted bail based on their chaotic lives, rather than for the seriousness of the charges. The following account from Defence 1 is an example of this:

But the interesting part of it was that the previous guy who did his own bail application, the charges were quite minor it was simply that there were so many of them and that he failed to appear at court so many times that the court almost had no alternative but

to give him a jail term, it was a short jail term. With this [other] guy he actually had very, very serious charges, 15 charges of attempted rape and three charges of indecent assault, so the charges themselves were very significant. But in actual fact the bail application was quite a lot more straightforward than I thought it was going to be.

This is interesting, in that in the first case example, the defendant was facing multiple repeat driving and failure to appear for court charges with a long history of similar offending. He was therefore considered 'risky' and this resulted in his placement on remand. While his failure to attend obviously influences a magistrate's decision on bail, this risk could have been more appropriately addressed by bail support services, something for which the participant here had advocated. However, the impact of his low level, repeat offending indicated a further risk for consideration. In terms of fear of crime and public safety, there is potentially a public perception that people who are remanded are facing more serious charges (Brignell, 2002). This public perception has influenced recent legislative changes and is discussed in Chapter 2. In the case of the second defendant, he was facing charges considered quite serious, and that would concern the public: he was bailed, not the defendant with minor, non-violent, non-sex related charges. In the first case, the defendant's risks of re-offending and not attending court were managed through denying him bail, thereby controlling him pre-trial by restricting his liberty. Yet, he faced a minor jail term if he were sentenced. The question is raised as to whether this would stop his offending in the future? As the participant went on to state:

He got a six-month sentence on a series of I think it was 15 or 16 relatively minor offences, all theft, all silly things where he's nicked things from Bunnings to the tune of I think roughly \$2,000 each theft, so monetarily it was a reasonable amount of money but also he was a repeat offender. So this is his sixth conviction on five separate occasions he has been sentenced for theft (Defence 1).

The interview participant's language implies almost a sense of levity when describing the actual offending, 'silly things', indicating that she found less problem with the actual offending than the risk he had of re-offending.

Defence 18 highlights this problem again with this example:

[The magistrate] thinks it is best for this person to be remanded because they are a drug user and they are going to go out and use, that is very true, in a practical sense. But in a legal sense the submissions are, the offence is that he is doing shop theft, shop theft to support the drug use, that's not so serious as to require him to be remanded so it's like that balance between the seriousness of the offending which is at the low end of the scale but it is clear he is a rampant drug user so that a remand is not supposed to be used for a person's own protection from themselves for drug use, that's not a proper reason for remanding someone (Defence 18).

In this particular example, the participant is expressing frustration with the attitude of a magistrate who sees a defendant's risk of drug use as a reason to remand. As the participant points out, this is not necessarily a legal response to the decision. What is of note in this example is that the participant brought this up as a reason to support therapeutic measures. In essence, this is a comment supporting therapeutic intervention when it provides a diversion from remand imprisonment; but perhaps it should act as more of a cautionary tale for what may be happening in the therapeutic area. This questions the premise of therapeutic initiatives to act as a real alternative to remand imprisonment. If one strips away the chaos in a person's life, it goes back to a question of law. This research argues that risk management strategies have convoluted this, demonstrating the risk management strategies underpinning therapeutic measures.

Chaotic people were seen as poor prospects for bail, and this was not necessarily due to the nature of their offending. Often the charges that brought them before the courts were reasonably minor (e.g., shop theft, driving offences, theft from vehicles and public transport offences). These offences are types of 'quality of life' offending (Midgely, 2004); that is, offending typical of people identified as vulnerable. This offending is characterised by frequent, minor crimes that are fuelled by a need for food, shelter or to procure drugs and alcohol. This research demonstrates that the more chaotic a person's life is, the less likely it is they will be granted bail. If they are granted bail, it is highly likely that very onerous bail conditions will be attached to the bail

decision, even if the charges are minor. ‘Chaos’ and ‘chaotic lives’ are language used to legitimise these practices.

This indicates that markers of vulnerability are being repackaged as markers of risk. The most significant factors that indicate a high needs ‘risky’ individual to the participants included: people who demonstrated signs of a mental illness; those with drug and/or alcohol histories; anger management issues; homelessness; poverty; and those from Indigenous and culturally and linguistically diverse backgrounds. These are all factors that may correlate with disadvantage, particularly when more than one factor is present, demonstrating—in line with the literature (Fraser, 1989; Irwin, 1985; Nettleton, 1997)—that people constructed as risky are profoundly disadvantaged. This disadvantage is perceived as undesirable by society (Irwin, 1985; White, 2008). Rose (2000a) draws on ‘responsibilisation’ rhetoric by identifying vulnerable people as unable to take responsibility for themselves, their needs and their behaviour. However, if this is examined through the lens of Scruton and Chadwick’s (1991) structural determining contexts, it is clear that what is being described here are people with multiple markers of disadvantage who are being held responsible for their vulnerability, without taking structural influences on their status into account. Structural vulnerabilities are translated into individual choices and responsibilities as found by Hannah-Moffat’s (2004) research.

Perhaps the clearest way to understand the importance of individual responsibilisation of vulnerable people is through Rose’s (2000a) conceptualisation of the circuits of inclusion and exclusion. Rose (2000a: 324) states that:

This alloy of autonomization and responsibilisation underpins shifts in strategies of welfare, in which substantive issues of income distribution and poverty have been displaced by a focus upon processual issues that affiliate or expel individuals from the universe of civility, choice and responsibility, best captured by the dichotomy of inclusion and exclusion.

Inclusion relates to inbuilt conduct controls within society. These might include institutions of social control, such as schools or factories. Within these regimes, people self-regulate and self-manage their behaviours and environment, guided by these informal controls. Acceptance into society requires adherence to informal controls and interaction in society is regulated. Responsibility is placed on citizens through these controls. Circuits of exclusion extend to those deemed unable to self-regulate or self-manage risk. Excluded persons are constructed and dealt with in ways that reflect social inadequacy and dangerousness and are subject to elevated levels of social control. This can manifest either in active controls aimed at drawing people back into inclusive society or reinforcing the exclusion of those seen as too dangerous to neutralise. Using the label of chaos, which emerged from the data, legitimises risk management techniques used to exert control over vulnerable people. As such, this research finds that therapeutic interventions may be a form of this active control, aimed at risk-managing these ‘chaotic’ lives to bring them back into society.

Rose (2005, 2000b) critiques the concerns within literature on risk management with the ‘monstrous individual’ and the use of indefinite detention as a form of management for these ‘scary’ people. But the risk management techniques observed in this research demonstrate that there exists a mid-level of ‘undesirables’. As the research data focuses on the Magistrates court, the individuals are those whose offending is not so serious; indeed it is often very minor but repetitive offending. However, their lives are often ‘chaotic’ and this can lead to harmful repercussions for themselves and others in the community. This level of offending does not necessarily result in imprisonment, but is subject to a risk management approach by decision makers. These people are classified as high needs and deemed ‘risky’, and are then placed under heavy surveillance and controlled through therapeutic measures. This ‘no-man’s land between the monstrous individual and the ‘public’ represents the realm of ‘chaotic’ people, who need to be ‘helped’ though the control of therapeutic interventions.

#### 6.2.4 Emergency room at the Magistrates Court: pathologising social marginalisation

The prevalence of medical language used by participants was a striking finding of this research. The language of treatment constitutes a necessary addition to bail applications and discussion about the bail process when a therapeutic approach is introduced to the system. In many interviews, the defence lawyer participants discussed how they prepared cases for defendants facing a bail application. One of the primary concerns for these lawyers was treatment options for and diagnoses of the defendants. Several participants talked about their clients ‘presenting’ with certain issues, as a doctor would say a patient ‘presented’ with certain symptoms. It was not just defence lawyers that used this same language. A judicial participant stated: ‘that is the biggest presenting issue and the dual diagnosis of psychiatric issues and drug dependency’ (Judiciary 1). When talking about the perceived risk their clients were to the community, several defence lawyers stated their client was a risk but focused on their health as the key concern, rather than their risk of (re)offending. For example, one participant stated:

I was duty lawyer and a fellow came in, he seemed to be really unwell he seemed to also have drug and alcohol issues, he had somewhere to live at that time but it really wasn’t permanent it wasn’t stable or safe (Defence 13).

The interview data provides examples where participants demonstrate both direct and indirect conflation of needs with risk. One lawyer detailed a case of a client in custody for whom she was preparing a bail application. She arranged for the court psychiatric nurse to see the client in custody and prepare a report for the application:

so she went and saw him and wrote a report for the judge which was very helpful, which said he’s certainly unwell, not psychotic but he is unwell (Defence 15).

When preparing her client’s bail application, this lawyer referenced her client’s needs when discussing how she would address the risk of re-offending in the bail application. This provides another example of conflation of needs and risk in that this participant

focussed on addressing how she could mitigate the risk of the client being ‘unwell’ as opposed to ‘psychotic’ to argue that the magistrate should grant bail. This participant’s use of the term ‘unwell’ rather than ‘psychotic’ is interesting in that the term ‘unwell’ is generally used to describe physical illness rather than mental illness. This may imply that the participant believed psychotic might be too strong a word to persuade a magistrate that the risk could be mitigated, instead presenting the defendant’s risk as more manageable through the use of the term ‘unwell’. In doing so the emphasis on the participant’s argument that the defendant should be granted bail was on the risk presented by the mental health of the client not the need for mental health supports that may address and assist her client’s mental health issues.

Another member of the judiciary noted that often defendants cannot be bailed until they have ‘stabilised’ on remand. In these cases, the criminal justice system perceives the defendants as a risk because of their health issues, where in reality the process of bail conditions and remand traditionally purport to avoid flight risk. Needs may be viewed as risks, leading to criminal behaviour as identified by this lawyer, who stated that ‘this person needs pharmacotherapy, detoxing in prison is really horrible medically but obviously if they are let out straight away they are going to go out and score unless they can get on pharmacotherapy’ (Defence 20). This indicates recognition that the defendant has health concerns that *may* lead him to commit criminal acts upon release into the community, but it is not the sole risk predictor. The charges were yet to be substantiated, and the defence lawyer was using health as a predictor, in what was essentially guesswork. But the participants were discussing this potential risk at the stage before it became a risk of criminal behaviour (i.e., the defendants’ health status). The result is a person’s medical condition is used as a proxy for the risk of (re)offending.

This use of medical language was also apparent when assessments were made about the status of a defendant’s case, in particular use of the term ‘diagnosis’. The following statement suggests that defendants’ risk factors, such as drug dependency, history of mental health issues, or unstable housing, are presented as a diagnosis in court staff reports:



[it is helpful to have] a formalised structure that allows court staff to report to the courts saying this person suffers from X, Y, and Z (Defence 1).

It is important to note here that this summation is based on the opinions of the participants, not of the court staff or clients themselves. While court staff and clients were not able to be included in this research, it would be valuable to take stock of their insights in future research.

Defence 13 talks of the assessment process as a diagnostician would:

being sent away for a [CISP] assessment and then it comes back with a diagnosis and then CISP will work out how we are going to treat that.

This language sets up bail support programmes as the treating doctor, and bail applications as the assessment and application for a prescription. The assessment process itself is seen as a form of triage, a term often associated with emergency rooms, by some participants. Judiciary 1 sees the process as such, stating:

the triage person does an assessment and works out where the person might best be assisted. And that is very much the way CISP works.

The legal process of a bail application is likened to presentation at an emergency room, where a diagnosis is made based on symptoms presented. Treatment is then considered and administered to the ‘patient’ in the hope that they will be cured. This use of language may blur the lines between therapeutic and legal language.

Once a defendant is on a court bail support programme, the medicalisation of the process continues. Defendants are bailed to a certain date, usually four weeks from the date bail was originally granted. This can depend on the magistrate, and be as little as one week. They are then called back in for rollover of the programme. A report is given to the magistrate, who, if satisfied with the defendant’s engagement with the programme, will bail them to another rollover date. This rollover process is seen as a regular ‘check-up’ on the defendant’s progress with the ‘cure’ that is bail support. However, these check-ups are not without problems. One defence lawyer noted that:

I think my experience there was that it was very traumatic for people to be continually brought back to court and back to court and back to court, over and over” (Defence 4).

This comment suggests that exposing a person’s vulnerabilities and needs in an open courtroom may be traumatic. This traumatising effect was also indicated by another participant, who recounted a case where the process of ‘diagnosing’ her client’s problems to the court had a negative effect on the individual and led to them disengaging with the therapeutic process:

CISP said ‘yes’ we can assess him but I think there was a three-week delay, I put this to the magistrate who was really unhelpful and I think just having a bad day. And so she questioned me quite strongly about why he needed to have CISP, so that means I then had him open court to tell her all of his problems and I could feel him getting agitated. And then she agreed, she then said I’m not adjourning it three weeks but it was in a very unhelpful way, she was in doing for his benefit she just said ‘that I’m not going to adjourn something for that long’, so was all about ‘for his convenience’ and it was just the tone of it all. Then it turned out that CISP had given [him a place] so she adjourned it to a shorter period of time and then CISP couldn’t do it on that day and they told me that the same day. So the client left and I said ‘look it’s nothing to do with you, it’s all right we are going to get you on this program and you are committed to it, stay safe and strong until then’. Then the CISP worker or the admin person said ‘look we’ve made a mistake, we have no capacity to assess on that particular date. Can you please mention it again and we will try and change it to the next date’. [But] he had already gone, well then the magistrate barked and roared at me as though somehow it was my fault. And said ‘no the date is staying the same’ so he comes back to be told know no one can do anything for you today, you will have to be adjourned to another time. Anyway he got the same magistrate who again was really rude and unhelpful and insensitive. And so he is thinking straight away ‘this system is not there to help me at all, it’s just there to make me feel like shit and it’s all my fault’ (Defence 13).

These examples reveal the potential for anti-therapeutic effects of dealing with social and health issues in a legal setting. That therapeutic jurisprudence is discussed though a medicalised lens is not necessarily surprising because it is in essence about therapy

and treatment. In spite of this, existing research does not comment on implications that flow from this use of medicalised language and its possible impact on vulnerable populations who come within the criminal justice system. This analysis touches the surface of these issues and generates evidence that warrants further investigation.

Participants referred to ‘therapeutic’ components of court orders as ‘treatment’ rather than bail conditions or punishment, when that component was part of a defendant’s bail conditions or a sentence outcome. Participants also talked about whether bail support services were ‘treatment’ that could be a ‘cure’ for defendants’ ‘illnesses’. Defence 21 believed that when:

They are on a four-week programme with CREDIT, you can’t expect then to be miraculously cured by the end of the four weeks.

Defence 13 stated that ‘community based treatment’ was what underpinned the primary court bail support programmes. Defence 16 also used this terminology, stating that:

Treatment: that is a function that CISP performs well.

Another lawyer also indicated that she thought of defendants’ criminogenic risks as symptoms to be cured when she stated:

I do think it protects the community a lot better when you can actually treat the issues (Defence 15).

Arguably, this use of pathologising language is symptomatic of a system that criminalises health issues. The language demonstrates that health issues, in particular mental health and substance use, are singled out as problematic and risky, constructing mentally ill people/substance users as criminogenic. This is not the case of the law acting as a therapeutic agent (Wexler, 1990; Wexler and Winnick, 1991; Winnick and Wexler, 2003), indeed it demonstrates the law is decidedly anti-therapeutic by placing

therapeutic controls on individuals because of their 'failure' to control themselves and again emphasises individual responsabilisation. This analysis mirrors elements of Foucault's technologies of the self and Rose's circuits of exclusion.

Clearly, when therapeutic measures are implemented then the language of treatment becomes part of the legal process and is used with legal language within court processes; but the use of medical language extended beyond this in some cases. The process itself was described using medical terminology for legal processes. This again highlights the tensions extant in conflicting systems. Where health language is used to describe a legal process, the process becomes less about legality and more about pathologising not just the defendant but the process itself. Defence 3 verbalised this parallel between the health system and the legal system when he said:

It is to my mind a bit like public health prevention, preventative interventions in public health. Spend some money now to stop people getting diabetes rather than treating the consequences of diabetes down the track. Same goes for mental health and I think to some degree the same goes with criminal justice.

The use of medical and therapy language in a legal setting is evidence of using therapeutic practices. It also highlights the tension of trying to implement healing and therapy in a system designed to punish people. While the use of this language does demonstrate that therapeutic jurisprudence has been adopted into the criminal justice system, perhaps it is also evidence that it is not suited to the system. Perhaps the pathologising of vulnerable people in the courtroom is evidence that these tensions cloud decision making.

This research shows that the bail process has not been immune to therapeutic governance and the blurring of lines between the health system and the criminal justice system. Increasingly, vulnerable people, in particular marginalised women, are subject to therapeutic remand, where remand is seen as necessary for the good of the defendant (Hannah-Moffat, 2004; King et al., 2009; Moore and Lyons, 2007; Pollack, 2005, 2006, 2009, 2010). Remand can be used to treat rather than to ensure people

attend court. High 'needs' people are increasingly regarded as 'risky' people and pre-trial imprisonment has become a hook for managing risk (Moore and Lyons, 2007). Several of the judicial participants interviewed commented on the 'need' to remand people for a few weeks so they could become 'stabilised' (Judiciary 5; Judiciary 1). This was deemed necessary in cases where the defendant's presentation was deemed so chaotic that the granting of bail was not an option. Judiciary 1 gave the following example:

I can think of instances where I have encountered somebody say on a Friday and they are just shambolic and chaotic, bordering on making no sense whatever, even though it pains me to do it, seeing them on the Monday and then they are much calmer and settled. They are a much better risk for bail after being assessed after a few days, because they are calmer, all the drugs out of their system... Sometimes you just can't let people out if the first thing they are going to do is go chasing drugs

The use of the term 'chaotic' also appears again, linking chaos in the person's life to the risk they might pose if granted bail. This practice of temporary remand was seen as a transitional measure by most participants, where the aim was to hold a defendant until they were ready to be assessed for 'therapeutic bail'. This practice of remanding people for their own good is examined further in Chapter Seven.

During the Magistrates' Court observation, bail was never granted without conditions. Some conditions related to flight risk, where defendants had to surrender documents and agree not to go near places of departure such as airports. Bail conditions may act as a form of surveillance. Defendants can be ordered to report to a police station to ensure not only that they do not abscond, but also to be observed. These bail rulings that incorporate conditions addressing a defendant's behaviour while on bail are integral to a risk management approach. Bail conditions sometimes include a treatment component, 'therapeutic bail'. Therapeutic conditions, in the form of CISP, other support programmes, treatment or reporting to medical/health professionals, were ordered in all but five of the successful bail applications (n=32). This is an example of Rose's (2005) risk thinking approach to criminal justice processes, problematised by Hannah-Moffat and Maurutto (2012) and Pollack (2010). In the bail

process, it manifests when a defendant who is perceived as high needs and therefore 'risky' is prescribed treatment to mitigate their risk and give them candidacy for bail. The aim of therapeutic bail is to provide an alternative to remand imprisonment for people deemed too risky for regular bail. The majority of bail applications that involved therapeutic bail used the court's own support programme as the treatment condition.

Moore (2011) sees conditional treatment within bail conditions as a form of therapeutic surveillance, where the criminal justice system acts as a 'benevolent watch'. Rather than taking an overtly traditional punitive approach to surveillance, this approach is more insidious. Defence 8 demonstrates the existence of this 'benevolent watch' when discussing proposed additional pre-trial therapeutic measures:

And it [a new proposal] talked about police putting people on bail as a form of diversion. Which at first I thought was cute and then I thought about it and it made sense. By putting them on bail you're not locking them up, so we avoid that experience, particularly for people that may have got some priors but have never actually been in jail, or even remanded. And is not a good experience for anybody. But in a sense it is a form of diversion, or if nothing else it's the delay for that kind of contact with the criminal justice system (Defence 8).

### 6.3 Conclusion

This chapter has analysed the tensions created by therapeutic initiatives in the criminal justice system that were identified in the research data. It drew on the critique of therapeutic jurisprudence tensions presented in Chapter Four to analyse this data. This chapter argued that tensions do exist between therapeutic bail initiatives and the criminal justice system, which can result in anti-therapeutic impacts upon vulnerable people. This discussion indicated that the language of chaos and therapy is now underpinned by risk/needs discourses. As such, the 'benevolent watch' of therapeutic bail is really acting as a risk management technique that may exert control over vulnerable people through therapeutic conditions. As such, this chapter further argued that therapeutic jurisprudence practices may harm vulnerable people. A significant

tension is the competing aims of bail support programmes, particularly those that aim to reduce re-offending and those that aim to address the health and social needs of vulnerable people. The research data demonstrated that sometimes the aims of these programmes cannot be reconciled, when reducing re-offending is prioritised above an individual's needs.

The discussion also demonstrated the presence of risk techniques on vulnerable people through the management of their needs. It was evident from this that the shift to a risk management approach to bail was implicit in therapeutic alternatives to remand imprisonment, and that bail has become much more than ensuring people attend court. The language of chaos and the pathologising of vulnerable people's needs has become the mechanism used to legitimise control over people. Vulnerable people are labelled as chaotic and this label enables their identification as risky. Needs are then linked to their risk of re-offending, and these needs are targeted through therapeutic bail conditions. This gives the criminal justice system the appearance of a benevolent, therapeutic system. However, in reality it may be controlling and paternalistic. While these measures are supposed to be benevolent, they are still being administered through an adversarial system. This research found that because of these tensions, the criminal justice system may not be the most effective place to implement therapeutic mechanisms. Examining this finding in line with Hannah-Moffat's (2005: 43) work it is possible that the application of therapeutic bail may 'refram[e] social problems as individual problems'. Hannah-Moffat (2005: 29) argues that aligning risk and 'intervenable' needs may result in a 'transformative risk subject' who is amenable to treatment, by focusing on the individual, but not in ways that responsabilise them for their vulnerability. Instead she argues this can be achieved by looking to long-term means of addressing issues such as ongoing access to counselling, secure housing and education, rather than compliance with the conditions and requirements of short-term treatment programmes may be more effective. This approach may be worth consideration in the Victorian system.

## Chapter 7: Reconfiguring Punishment—Punitive Practices and Therapeutic Efficacy

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*Scholars have yet to connect the vast body of literature about mass imprisonment and penal change to the range of pre-trial detention practices—and to date none have considered how specialised courts are transforming the parameters of bail by using it to manage the accused prior to formal sentencing (Hannah-Moffat and Maurutto, 2012: 202).*

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Hannah-Moffat (2005) and Hannah-Moffat and Lynch (2012) criticise penal scholars for focusing on punishment solely as a mechanism meted out by courts during the sentencing phase of the court process. They argue that the criminal justice system exerts penal power over people outside these traditional parameters, and as such the boundaries of traditional punishment have blurred. This chapter draws on this critique and analyses research data indicating that therapeutic bail conditions represent an example of reconfiguring punishment's boundaries and the extension of penal power into pre-trial practices. Drawing on the work of Hannah-Moffat (2005), Hannah-Moffat and Lynch (2012), Hannah-Moffat and Maurutto (2012), Gray (2013) and Edney (2007), this chapter presents an analysis of the assemblage of penal power within bail support services. The analysis examines several sub-themes that emerged from the research, including punitive responses to non-compliance, systemic coercion, treatment efficacy and the notion of 'setting people up to fail'. It also looks at the use of sentencing practices in pre-trial therapeutic initiatives.

Recent changes to sentencing legislation, identified in Chapter One, describe policy changes in the state of Victoria that contribute to the use of penal power on people applying for bail. The analysis provided significant responses to the following key research questions: how has therapeutic jurisprudence been implemented into bail support operations; and what is the effect of therapeutic bail support programmes?



This chapter argues that one of the more significant impacts of bail support services is that it may have punitive and net-widening effects. This results from some of the tensions created when applying a therapeutic model to the criminal justice system, as identified in Chapter Six. It argues that penal power extends beyond sentencing and into bail practices; that the use and function of punitive practices has extended beyond the traditional assemblage of the prison institution. This chapter argues that there may be concerns that therapeutic jurisprudence and bail support are being used in ways that could be characterised as control driven and punitive. This is in line with Hannah-Moffat and Lynch's (2012) and Gray's (2013) observations that there has been a shift in recent decades towards the extension of punishment beyond traditionally defined boundaries into areas that are not historically associated with punishment and control, i.e. beyond the prison.

## **7.1 'Giving People a Taste': Using Bail and Remand Punitively**

While this thesis concerns therapeutic bail, its implementation and effects, comments made by interview participants about remand experiences and practices are pertinent to this study as many people released on therapeutic bail first experience time on remand before being granted bail due to delays (further discussed in the next chapter), thus, for many therapeutic bailees their experience of bail is inextricably tied to experience on remand<sup>17</sup>.

One practice that became apparent through the data was that of 'giving someone a taste' of punishment. This refers to the unofficial practice of remanding a person for a short time so that they experience prison conditions. 'Giving someone a taste' is supposed to have a deterrent effect upon the defendant. This practice contravenes several key tenets of law upon which the criminal justice system is based. It breaches the presumption of innocence (Edney, 2007; Gottfredson and Gottfredson, 1988; Metzmeier, 1996; Zedner, 2011). Evidence of punitive practices was redolent in the

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<sup>17</sup> Evidence for this assertion is provided in the discussion in Chapter Eight through the court observation data and participant's comments.

accounts of the interview participants. The following conversation with Defence 18 highlights these issues:

Defence 18—And then there are the people where those counter-bailing issues are strongest where you can really see that they shouldn't be getting a jail term, but they're aren't ready for a [community based order] CBO. Then do you let them out or not? And if CISP isn't there straight away, I think that the magistrate I mentioned, the first one, really did take that on board that it would be improper use of detention to lock them up whereas the second magistrate I mentioned doesn't care about things like that so much.

Researcher—So some magistrates do potentially use [remand imprisonment] as a preventive detention?

Defence 18—Absolutely, it's so improper but it happens quite often.

Researcher—I've heard the term—'therapeutic remand'—remanding for their own good—have you come across this attitude within the court?

Defence 18—Yes, not that term, but that attitude, yes. But the magistrate wouldn't or shouldn't actually say that because it's legally wrong.

Researcher—But the practice is still there whether the terminology is used or not?

Defence 18—Yes, also called giving them a taste—yes, so they see what it's like to be remanded and hopefully don't want to go back and, look, in a practical sense, often it does work.

Several issues are apparent from these comments. First, this quote illustrates the acceptance of the practice of 'giving people a taste'. Although the participant does problematise the practice by saying that it is 'so improper', she also expresses the view that it often 'works'. This indicates notional support for the practice, even though there is recognition that it is extra-legal. She also points out that some people who are remanded in this manner are people who are unlikely to receive jail terms if convicted, indicating that conditional bail may have been more suitable, even in the absence of CISP assessment. Her statement that they are also people who are not ready for a CBO also implies that vulnerable people (i.e., those perceived as chaotic), are unable to undertake conditional bail, and as a result are the recipients of remand punishment.

This is particularly problematic given discussions in previous chapters about vulnerability, chaotic lives, and risk management of the vulnerable (Irwin, 1985; Scraton 2007; Scraton and Chadwick, 1991; Waquant, 2008, 2009). This practice of ‘giving someone a taste’ may serve as a form of control over vulnerable people.

This conversation with Defence 18 also highlights delays in the legal process (Chan and Barnes, 1995; Weatherburn and Baker, 2000). Delays in obtaining bail support assessments and the repercussions of these delays will be discussed in detail in the next chapter. It is also important to this discussion, as delays may lead to remand imprisonment while awaiting programme assessment. People may experience such delays punitively. While not all magistrates may have punitive intent when they choose to remand a person, extant delays while awaiting assessment have resulted in many magistrates remanding people deemed too risky to be released without CISP conditions. The negative effects of imprisonment were discussed at length in Chapter Two, and this demonstrates the reason why remand imprisonment is supposed to be a last resort (Boyle, 2009; Brookman and Pierpoint, 2003; Denning-Cotter, 2008; Joudo, 2006; Octigan, 2002; Player, 2007; Sarre et al., 2006; Shonteich, 2008). However, this research demonstrates there are people who experience pre-trial imprisonment where other options might have been presented had adequate resources been available. Whether it is because a magistrate has chosen remand imprisonment over conditional release pending assessment as a more punitive option, or because they genuinely felt there was no other choice, it is a stretch to see this type of incarceration as a ‘last resort’. The fact that many people released on therapeutic bail also experience remand imprisonment before being released raises questions as to whether therapeutic bail is in fact diverting people from remand imprisonment and whether the disadvantages of imprisonment are still experienced by these people. It certainly indicates that this potential warrants further research.

Instances where the practice of ‘giving someone a taste’ was applied were also noted in the Magistrates’ Court observations. ‘Giving someone a taste’ was used as a tactic for obtaining bail, subsequently placating magistrates and opposing prosecutors. In Case 4 of the court observations, a defendant had been charged with various offences,

including breaching an intervention violence order (IVO). He had been remanded for several days before the bail hearing. During the hearing, the defence lawyer stated ‘he has had time in custody to hammer home the consequences of this breach’. This language again indicates implicit acceptance of the practice of ‘giving someone a taste’, both through the lawyer’s use of it as a reason to bail the defendant and the magistrate’s subsequent acquiescence to the statement. In this particular case, the magistrate did not grant bail, but noted that the use of a bail support programme would tip the balance in the defendant’s favour. The defendant was remanded until an assessment could be done. Ultimately, the defendant was granted conditional therapeutic bail two weeks later in a separate hearing. In this case, although the defendant did eventually receive treatment for his needs and he was granted bail, he was still punished through remand imprisonment and his release was delayed while awaiting access to a bail support programme. Although ultimately access to a bail support programme facilitated his release on bail, he was still exposed to the disadvantages associated with remand imprisonment (Brookman and Pierpoint, 2003; Octigan, 2002;). While bail support programmes do have potential to provide an alternative to remand imprisonment, in practice this is not always done in a timely or appropriate manner.

In Case 24 of the court observation data, the defendant was remanded in custody overnight on drug trafficking charges. This case was originally a bail application, but it was turned into a plea hearing at the defendant’s request. The defence lawyer stated in this case that the night the defendant was on remand was his first time in custody and it was an ‘eye opener’. This resulted in the defendant wanting to deal with the charges immediately and avoid any further incarceration that could occur if he defended the charges. This highlights some significant issues, discussed below.

First, lengthy delays in legal processes affect a defendant’s decisions on whether to plead guilty or go through the process of pleading not guilty. Although legal delays pertaining to resourcing issues will be discussed in Chapter Eight, the point made here is that the lengthy process may influence a defendant’s decisions as to whether or not to defend charges. The legal system encourages early pleas as a means to curb delays;

as a result pleading guilty is incentivised (Chan and Barnes, 1995; Corns, 1997; Flynn, 2009a, 2009b; Weatherburn and Baker, 2000). The effect of these measures has already been explored in academic research (e.g., Flynn's 2009a, 2009b research on plea bargaining and sentence indications). However, this research demonstrates that these types of incentives, in addition to the practice of 'giving someone a taste' of imprisonment pre-trial, may affect a person's decision to defend their case. This finding indicates that further research into this area is warranted.

Second, this example demonstrates that conditional bail can be onerous and as such, it may be experienced punitively. If the defendant had applied for bail and incorporated drug treatment to show cause for the granting of bail, he may have had to wait on remand for up to two weeks to arrange an assessment through the court's bail support programme. This is exemplified in Case 4 of the court observation data discussed previously. He would then have to attend the programme and appear at court for monthly reviews until the case was settled. If he had not pled out or applied for bail he faced months on remand awaiting conclusion of the case. The average time spent on remand at the time this defendant was facing court was 2.8 months (ABS, 2011b). Given that this defendant was experiencing his first time in custody and that he pled guilty, it is possible that he would have received a sentence at the lower end of the sentencing scale. As the defence lawyer had indicated that he wanted to get the matter settled immediately, the defendant did not end up going through any of the treatment/support offered through bail support programmes. This means that although the defendant did not have the added burden of treatment conditions, he also did not have the opportunity to access these services should he have wanted them. The nature of the programmes and the means of accessing them are punitive and onerous, if this is discouraging to defendants then it also means they are less likely to seek assistance for their needs through these means.

Although the data indicates that 'giving them a taste' appears commonplace and accepted by many key players in the criminal justice system, albeit unofficially, there were some who voiced concern. For example, Defence 14 highlights her disapproval and its potential negative effects:

I have never been a fan of the short sharp shock that is give them two weeks in jail, give them a taste of it to see what it is like to try and rehabilitate. Because the most hideous things can happen to someone, a two day period which can have major adverse effects on their prospect of rehabilitation. I am dead set against it (Defence 14).

While her statement again shows systemic complicity in the practice, it also demonstrates there are some who disagree with it. Whether or not this is translated into active vocal resistance was not revealed through the data, though it does indicate the matter warrants further investigation. Certainly, the comments made by dissenters implied that, although they disagreed with the practice and saw it as extra-legal they did not speak out against it. This suggests there may be a culture of complicity, which could serve as a legitimising force for such practices. This indicates a need for more research in this area.

Although therapeutic bail may potentially provide an alternative to remand, in practice people are still experiencing the disadvantages of remand prior to being released on therapeutic bail. The under resourcing of the programmes, combined with the attitudes of key players in the system negates the potential positive impact of these bail support programmes. The introduction of bail support programmes may have a productive effect until the underlying structural attitudes and framework are rethought and brought into line with the tenets of due process. What needs to be examined further is the way the criminal justice system deals with offenders before their cases are disposed of, as exemplified in the following comment:

And then they do prevention by locking them up as a way of protecting the community is flawed philosophically because whilst it protects the community arguably for a short period of time it actually, in my view, probably places the community at further risk ultimately (Defence 21).

This comment alludes to the negative effects of imprisonment that may lead to higher recidivism rates, compounding disadvantage and resulting in an increased likelihood of further offending, as the reasons for offending are exacerbated by remand

imprisonment. Giving people a ‘taste of punishment’ pre-trial may contribute to this situation.

The due process of proving guilt, convicting a person, and then applying an appropriate sentence is flagrantly subverted through the practice of ‘giving someone a taste’. Effectively, this practice acts as an unofficial sentence on the defendant by meeting two aims of the *Sentencing Act, 1991* (Vic): punishment and specific deterrence. Clearly, it is contrary to the tenets of due process, as it involves pre-trial punishment (Brookman and Pierpoint, 2003; Duff, 2012; Edney, 2007; Gottfredson and Gottfredson, 1988; Raine and Willson, 1996). Second, imprisonment is the most severe sanction in the Australian criminal justice system (Kiselbach, 1989). By utilising pre-trial imprisonment as a form of punishment, unconvicted people are subject to the most severe punishment in the law’s artillery, without going through an open trial/court hearing and sentencing process. This practice does not just circumvent the legal process. After pre-trial imprisonment, a person still passes through the normal procedures of court hearings and sentencing and, if convicted, will be punished. This process means potential double punishment for those who have been ‘given a taste’ and are subsequently found guilty via official channels.

Also concerning was not merely the existence this practice that clearly contravenes key rights afforded under due process (Brookman and Pierpoint, 2003), but that some of the research participants discussed it using language suggesting this practice is currently normalised. At times during the interviews and through the observations, some lawyers and magistrates discussed this practice without problematising it. This acceptance of pre-trial punishment is emblematic of wider, entrenched views that a defendant is assumed guilty pre-trial (Bottomley, 1973; Colvin, 2009; Freiberg and Morgan, 2004; Octigan, 2002; Smith, 1960). Taking the view that a person should be punished pre-trial is a tacit acceptance of guilt by the criminal justice system. The granting of bail should be based on the extent that a person poses a flight risk, not on a person’s guilt or innocence. Yet, if a person’s remand imprisonment is referred to as having a punishing and deterring effect, then it is meeting the key aims of sentencing according to the *Sentencing Act, 1999* (Vic), effectively presuming guilt. This inherent

presumption of guilt may stem from participants' experience of the criminal justice system and statistics that demonstrate guilt as a common outcome in Magistrates' courts (97% of adjudicated cases nationally through a combination of guilty pleas and findings of guilt)(ABS, 2014) .

This section has discussed several key themes emerging from the data that demonstrate the implementation of bail support programmes result in pre-trial practices with punitive effects and consequences. Comments made by research participants and language used in the courtroom indicate this practice has become normalised. Because of the normative nature of 'giving someone a taste', the state and key players in the legal process are complicit in extra-legal practices that contravene key tenets of the Australian legal system. This section has also indicated that the lengthy process of defending a case discourages defendants to seek bail or wait on remand imprisonment to defend charges. The influence of chronic delays in the legal system on defendants' decision making has been noted in academic literature (Chan and Barnes, 1995; Flynn, 2009a, 2009b; Weatherburn and Baker, 2000), but this finding reveals an avenue that requires further scrutiny. The onerous nature of the bail support process also makes seeking access to services through pre-trial support less desirable because of the way it is implemented in the criminal justice system. All these serve to make therapeutic bail treatment orders onerous, with potentially punitive consequences, resulting in the creation of more pathways to prison. This indicates that the implementation of bail support services may not be meeting the needs of vulnerable people in a therapeutic manner. As a result, the principle of remand imprisonment as a last resort may not be upheld. This has significant implications for vulnerable people in light of the disadvantages of imprisonment. As highlighted in Chapter Two, remand imprisonment has many negative effects on vulnerable people, including a higher risk of dying in custody and difficulty in accessing legal assistance. It also demonstrates the shift away from deterring flight risk towards a new suite of risk management practices couched in therapeutic jurisprudence language.



## 7.2 Therapeutic Efficacy

As discussed in Chapter Four, therapeutic jurisprudence critics identify several factors that may affect treatment efficacy; in particular, the idea that involuntary treatment has a negative impact on treatment success (Allen, 2004; Durham and La Fond, 1990b; Fagan and Fagan, 1990; Previtera, 2006). However, as discussed in Chapter Three, there is some evidence that treatment ordered through special courts may be successful even when administered coercively (Berman and Feinblatt, 2001; CASA, 2003); although recent research refutes these claims (Donnelley et al., 2013). Critics also express concern that there may be a propensity to set people up to fail by placing unreasonable expectations upon a person with punitive responses to non-compliance. This is of particular concern for unsentenced and unconvicted people ordered into therapeutic bail (Freiberg and Morgan, 2004). Punitive responses to non-compliance pre-trial could amount to the imposition of pre-emptive punishment. As discussed, innocence before being proven guilty is a capstone of the criminal justice system (Gottfredson and Gottfredson, 1988; Metzmeier, 1996; Zedner, 2011). The response to non-compliance of a court order pre-trial poses a conundrum to the criminal justice system.

While the principle of innocence before being proven guilty needs to be upheld, the court also places requirements on people to meet expectations of court orders. To respond punitively defies the principle of innocence; as such, people are not supposed to be punished for non-compliance in pre-trial bail support programmes (Edney, 2007). Additionally, those who are subsequently convicted and sentenced may receive a more severe sentence because of non-compliance. This is technically not supposed to happen in the criminal justice system. However, this research demonstrates the process of setting people up to fail, and court responses to failure to comply with therapeutic bail conditions means that people are experiencing punitive responses to non-compliance.

Defence 7's example below demonstrates how this concern may be realised in the bail support system:

But I think sometimes expectations might be too high, when you think about the years of disadvantage that that person has lived through and they might be on CISP for months or on a CBO for year or so a lot can be achieved but sometimes I think expectations are a bit unrealistic. Sometimes I think is that reasonable to order somebody to do counselling and confront their repressed memories? You know in this client's example, sexual violence, when even though it may be beneficial, you've got to be careful because if you're ordering somebody to do that, is that actually therapeutic? Or is it re-traumatising her because it is not really her choice to do it at this stage? And even though formally all of the therapeutic jurisprudence aspects of the court like CISP, certainly like ARC (Assessment and Referral Court), technically it's based on the client's consent but really she knew if she didn't do this and she ended up breaching her order she would go to jail. So it's not really free consent I think, you don't consent to being caught up in the system, even though the person's actions have led them to the point (Defence 7).

In this particular case, the Defence 7's client had been ordered to participate in counselling. The court identified past trauma in her life and saw that as a need that could be addressed through court ordered treatment. The court ordered her to undergo counselling to deal with these issues. This woman was reluctant to attend the counselling sessions because although she had experienced serious sexual violence in her life, she did not feel comfortable discussing this issue. This demonstrates the potential for court ordered treatment to have an anti-therapeutic effect. The court demonstrated benevolent paternalism (Moore, 2011; Previtera, 2006; Slobogin, 1995) by ordering this person to undergo counselling. However, in this case it resulted in the proscription of anti-therapeutic treatment because of the woman's reluctance to participate in counselling. She was being ordered to deal with her victimisation against her own wishes but felt coerced into participating because there would be a punitive consequence to non-compliance. In this case, the court is in effect operating in a role beyond legal consideration, assessing and prescribing treatment for conditions by making decisions about her mental health and need for counselling, based on law. The court decided what her needs were and how they should be dealt with, using the legal framework while trying to be therapeutic. This is another example of the hierarchy of

needs (Fraser, 1989) discussed in the previous chapter. In this part of the analysis it is also relevant because it represents an example of penal power over a vulnerable person. In this particular case, the participant was discussing a client who had previously been through bail support and had received a CBO as a sentence, so the treatment aspect here was attached to a post-trial court order. As such, the punitive response to non-compliance was more real for this woman than if the court ordered treatment had been done through bail support. However, as will be discussed shortly, in practice punitive responses are not restricted to post-sentence non-compliance.

Another problematic aspect of therapeutic jurisprudence is demonstrated here. Defence 7 recognises the coercive nature of court orders. She states that although treatment ordered through the courts is supposed to be with a person's free consent, in reality, the way the system is set up and the nature of the criminal justice system as punitive and adversarial means it cannot be truly free consent. The effect of individual responsibilisation is clearly present here. The court deemed her abusive background part of the reason for her offending, but their response to this was to place responsibility on her to 'fix' herself, therefore placing the onus on her to undergo this treatment, and assuming she was able to make choices about her mental health and welfare. As previously discussed, Pollack's work has found similar examples of this influence of individual responsibilisation on women undergoing treatment in prison (Pollack, 2006, 2005, 2009, 2010). She concludes that women's behaviour is regulated through therapeutic programmes in prisons (Pollack, 2005). This focus on individual responsibilisation ignores the structural inequality experienced by the person (Scruton, 2007; Scruton and Chadwick, 1999; Sim et al., 1987). If a person is faced with a decision about whether to undergo treatment or go to prison, it is understandable that most people would choose to undergo treatment. But this might result in situations, as with this particular case, where people are not mentally in a position to undergo treatment but chose to accept a court order to avoid prison. However, the treatment process may then be anti-therapeutic, either because it forces the person to deal with issues they may not be ready to deal with, or it could set them up to fail because they are not in a position to participate effectively in the treatment. This could then lead to a negative report from the counsellor that may be construed as non-compliance by the

courts. Consequently, this may result in a punitive response by the courts to non-compliance with treatment orders.

This question of whether therapeutic pre-trial court orders may set people up to fail featured prominently in the interviews. Using bail support programmes as a ‘pre-sentence’ sentence (this will be detailed in the next section) may end up having a negative impact on a person’s sentence. Sometimes magistrates use bail support treatment orders as a means of gauging a defendant’s ability to comply with court ordered treatment before deciding on a sentence. Their aim is to obtain an indication of a person’s ability to comply with court orders. This will then direct their decision making regarding whether they will mete out a term of imprisonment or look to other options, such as treatment orders via a CBO, when sentencing. However, this practice raises the possibility that people may be doubly punished; firstly by serving a period on therapeutic bail as a ‘pre-sentence sentence’, but also if they do not comply they may still serve a term of imprisonment on top of the treatment conditions they have attempted. As the below quote illustrates, poor performance on a bail support programme may result in a harsher sentence:

The court would probably want to give them a CBO so that they get the rehabilitation and those kind of services but if they immediately put them on a CBO they would fail immediately because they’re not in a place in their life where they are going to be able to comply with an order straight away, so CISP is like that buffer straight away between we’re in a hopeless state and ready to go CBO, if it all goes well. But realistically, if you pleaded them up on those charges rather than apply for bail, the Magistrate would still then be considering bail if they wanted to put them on the CISP because they would realise that putting them on a CBO straight away is just setting them up to fail. So even though you pleaded them up they are still, we are still asking for bail for a deferral of sentence basically, so it is still bail (Defence 18).

Here, the participant’s comment shows that many magistrates and lawyers recognise the problem with ordering ‘chaotic’ people to comply with orders where their experiences thus far demonstrate an extant difficulty in meeting orders. In doing this, the criminal justice system may effectively set people up to fail. As a result, a solution

developed by magistrates and lawyers has been to use therapeutic bail as a ‘bellwether’ mechanism, providing an indication of a person’s ability to comply with court ordered treatment before sentence. This solution aims to reduce the likelihood of people failing to comply with court orders post-sentence, which may result in punitive outcomes, by essentially letting people ‘practice’ adhering to treatment orders pre-trial. In some respects, this is a positive step by the judiciary to address the not insignificant issues of non-compliance with treatment order sentences. The above comment by Defence 18 demonstrates his support for this practice, as a means to ensure more favourable sentencing for clients, and to improve the likelihood of successful completion of treatment orders, with the hope of ultimately improving people’s lives through successful completion.

This particular case also provides evidence that supports the existence of double punishment and setting people up to fail within the criminal justice system. There is a risk of lawyers and magistrates being overly cautious and ordering people to undergo treatment before and after sentence, which ends up being quite onerous. This raises the question of proportionality in sentencing. Historically, positivist inspired rehabilitation programmes aim to address individual offending by ordering the appropriate amount of treatment for that particular person (Garland, 1985, 1988). This gave rise to practices such as indeterminate sentencing and eventually became a limitation of positivist responses to crime (Young, 2011). The current criminal justice system upholds the principle of proportionality in sentencing. Yet, ordering people into onerous treatment conditions before bail and subsequent onerous sentencing options for potentially minor offending, defies this principle of proportionality in sentencing. By using bail support as a pre-sentence sentence, the courts are able to impose double punishment on people. This is not recognised as such because of the way in which it is administered: that is, pre-trial.

The following discussion with a member of the judiciary demonstrates how failure to comply with court ordered therapeutic bail conditions could affect their future sentencing options:

Researcher—So could that also go against them when it comes to sentencing?

Justice 5—Yes, I suppose you are not going to penalise them but some people, by not complying with CREDIT, will demonstrate an incapacity to comply with a court order and those people may be rejected by you for example for a CCO [community correction order] that you might have otherwise taken the risk with.

Here, this participant recognises it is improper practice to penalise people for non-compliance with bail conditions as part of sentencing procedure. Penalising people for failing to comply with pre-trial court ordered treatment is not formally part of sanctioning when the time comes to pass sentence (Edney, 2007; Freiberg and Morgan, 2004). Despite this, the fact that people who perform poorly on pre-trial programmes may receive a more serious sentence because of their performance on bail support programmes demonstrates possible punitive consequences to participating in these types of programmes. The point this participant is making is that by using pre-trial treatment orders as a bellwether mechanism, she is able to identify who might fail to comply with court orders and consequently who might be unsuitable for a sentence that requires the offender to participate in treatment, such as a community correction order (CCO). This means that if someone performs poorly on the pre-trial programme, she will be less inclined to look at alternatives to imprisonment when the time comes to sentence. This is because she believes that expecting a person who has not demonstrated an ability to comply with courts orders to start complying is setting that person up to fail. While this is a valid point, and certainly there may be cases where people failing to comply with court ordered treatment pre-trial might never have been considered for lesser sentences, this has not been tested empirically. This comment indicates that some magistrates might believe that people undergoing treatment in bail support programmes would never have been considered for lower level punishment had they not participated in the programme. As this has not been rigorously tested, there is also the possibility that had they not participated in the programme, they might not have failed to meet their bail conditions and therefore been given the opportunity for lower level sentencing. This sort of thinking does not account for situations where people are given onerous conditions and are essentially set up to fail in therapeutic bail.

Many participants felt that onerous conditions, especially treatment conditions addressing drug and alcohol use, could set people up to fail. During one interview, the participant was recounting a case where a person had been ordered to attend counselling sessions as a therapeutic bail condition. While discussing the matter, it became apparent to the lawyer that the condition was quite onerous and could end up affecting the person's ability to achieve success in other areas:

obviously being in employment is one of the greatest indicators of not committing further offences, of re-engaging with the community, and a so called normal life. So if we are limiting people's options for getting employment then the odds on re-offending massively increase. I hadn't thought about it actually in terms of that context but just the length of time you are taking up in terms of travelling to get to counselling sessions massively impact on your ability to work (Defence 2).

Defence 2's realisation that one aspect of therapeutic bail could negatively affect another factors that could assist the person and reduce their likelihood of offending demonstrates that the onerous nature of therapeutic bail can be anti-therapeutic. This may prohibit a person from 're-integrating' into the community.

Defence 5's comment discussed on pp. 119 in relation to needs, highlights the difficulty in using court ordered treatment to help people address underlying issues that lead to offending.

What is germane to this discussion is that Defence 5 identifies that court ordered treatment does not address all the reasons why people offend. She recognises that putting people into court ordered treatment pre-trial, as a test to see how they perform, but not addressing structural reasons for offending, means that the potential exists for people to fail to comply. They will then be held responsible as an individual for their failure. This is problematic because structural reasons for offending have not been addressed. The very fact that therapeutic bail focuses on individual responsibilities and does not seriously address underlying structural inequality means that people may be set up to fail. The argument for using therapeutic bail conditions as a bellwether

mechanism becomes circular when people who are placed on bail support to ‘earn’ a lesser sentence are not equipped to comply with these types of court orders.

This is demonstrated by the following comment from Defence 18, who suggests that often the court and court workers can place unrealistic expectations upon defendants ordered to complete therapeutic bail conditions:

the manager at CISP at the moment, who we’ve had some issues with, is saying that for some people that ‘oh its setting them up to fail, they can’t cope with the programme’ well I mean some of the people are the most vulnerable people who need the assistance and so, come on, give them a go. And if they stuff up once he’ll be like no they’ve stuffed up, they’re off the programme (Defence 18).

This highlights a significant level of intolerance from the management level for failure to comply. This zero tolerance approach is not practical when ordering treatment for people who may experience a host of complex needs, some of which are deemed to be the individual’s responsibility. The individual in question may not be in a position to deal with those issues. Additionally, the coercive nature of court ordered bail conditions, on threat of remand imprisonment, means that people may undergo treatment and fail because they are essentially involuntary patients. Defence 20 highlights the importance of a more tolerant and less punitive approach to failure:

How much flexibility do you give? If you give too much, like I’ve already said before, it may not be in their best interests. It’s a tough one. I think it does come back to, with certain clients you’ve got to keep trying, it takes five to six attempts to get better, before they start making inroads. They have to be ready themselves before they really embrace it (Defence 20).

This participant recognises the difficult process that many people go through when undertaking therapy or treatment. From a therapeutic perspective, it is widely recognised that people do not necessarily succeed the first time they undertake treatment (Allan, 2003). Sometimes it is a process where each attempt is more successful than the previous one. While several participants did recognise the



complexity of the treatment process, the data demonstrates a lack of recognition from some people, particularly at a management level, that undergoing treatment for long term issues is not easy and success is not necessarily instantaneous. Maruna (2001) highlights that recovery, rather than programme defined rehabilitation, is an ‘individual, agentic, purposeful process’. Yet this level of understanding of the therapeutic process is not present in the implementation of bail support programmes. Perhaps the reconstruction of structural disadvantages and victimisation as individual responsibilities and choices could be avoided by looking to Hannah-Moffat’s (2005: 29) critique on the ‘transformative risk subject’ where she argues systemic responses are limited to addressing ‘manageable’ needs defined by the state, resulting in responsibilising vulnerable people experiencing structural disadvantage. Instead, the criminal justice system’s response to vulnerability should be to look beyond ‘manageable’ needs and take a structural and systemic approach to reducing vulnerability and disadvantage.

One of the judicial participants in the study highlights the importance of recognising that recovery and rehabilitation are an ongoing process:

They don’t always work and it’s hard grinding work often and these people usually fail three or four times before they get it right. If they do. (Judiciary 3)

While bail justices have no ability to attach treatment conditions to bail, the data indicates they do recognise that resources are needed to assist people so they do not fail. This bail justice’s comment demonstrates his understanding that success does not necessarily happen immediately in treatment:

in most cases, particularly in drug cases, the idea is to get people before the court as soon as possible simply because if you don’t, you know that you are setting up to fail. Therefore the court has workers and significant resources that they can bring to either help the person with drugs rather than an out of sessions hearing. That is with the understanding that people are going to fail on a regular basis until they succeed (Bail Justice 2).

Some participants took a more pragmatic approach to the issue of setting up to fail. This meant they often did not try to refer clients to services because they did not believe they would succeed with treatment conditions. This is illustrated through the following comments:

Sometimes I haven't referred clients because I've said look, are you realistically going to be able to keep up the appointments? And some of them have been saying I don't think I can. In that case I wouldn't refer them because I would be setting up to fail. So sometimes you have to consider that as well (Defence 21).

This comment indicates that defence lawyers and potential bailees see therapeutic bail as quite an onerous process. This has resulted in lawyers advising clients that they should not seek therapeutic bail because of the risk of failure. This following comment echoes Defence 21's position:

the first thing is the person wanting to take up that opportunity, not being set up to fail by well-meaning lawyer, who thinks are you've got to do this but the person really not being equipped at all to address whatever it is going on in their life or not at all interested (Defence 13).

Defence 13 also highlights that the bail support case workers are also conscious of this situation:

it's a case-by-case basis. I think some of the CISP workers are really sensitive to that, they don't want to set the client up to fail. They can see the client is struggling (Defence 13).

On the surface, this appears to be a sensible and sensitive response to the problem. However, again it is using the focus on the individual as a response to the problem, not addressing the structural inequalities that may have contributed to this situation. Again, individuals are disadvantaged by this approach. Some people may be in a position where they benefit from the services provided through therapeutic bail, yet the punitive response to non-compliance means that their legal counsel may advise them against seeking bail because of the risk it may end up making their situation worse.

Therapeutic bail is supposed to channel people away from remand imprisonment while providing access to services for vulnerable people. But if the system is set up in such a way that it provides expectations and onerous conditions that are unrealistic for people to meet, this can only be counterproductive. This discussion demonstrates that there have been instances where people may either apply for therapeutic bail and then through non-compliance experience negative consequences; alternatively, they might not apply for bail in the first place to avoid ending up in that situation.

As stated, what is problematic about this approach is that these people are not being linked to services and treatment they could benefit from because they might not succeed. This is not a therapeutic approach and again demonstrates the difficulty in achieving a therapeutic outcome in an adversarial setting. A punitive response to failure results in the withdrawal of treatment and services. Instead, many of these people who are seen as a high risk of failure end up on remand. As evidenced earlier, treatment on remand is limited and remand imprisonment itself is anti-therapeutic. Trying to administer treatment and therapy through the courts is coercive and punitive. Unrealistic notions of what determines ‘success’ have the potential to negatively affect sentencing options for defendants. It may have a carceral widening effect (Hannah-Moffat and Lynch, 2012; Hannah-Moffat and Maurutto, 2012) by reducing non-custodial sentences being given to people who fail therapeutic bail. Links between carceral widening effects and bail support have not been researched in Australia but Hannah-Moffat and Maurutto’s (2012) research indicates this may be an issue in the Canadian context. Further research in the Australian context is recommended to analyse any potential links.

It may also have this effect by discouraging lawyers to link clients with treatment pre-trial, not seeking bail, therefore seeing people who are in need of support being remanded without access to vital services. Rather than a process of therapeutic bail, perceived failure may see increased use of therapeutic remand, or ‘remanding for someone’s own good’. However, it should be emphasised again that further research in the Australian context is needed to document current practices in this regard. Defence

13 acknowledges the need for a more therapeutic approach, rather than focusing on punitive responses:

So is really important if you are going to keep him alive that you have people who can work with him in a really warm and positive way, and not in a punitive way where he might just stop engaging altogether (Defence 13).

Her comment illustrates the importance of a pastoral care approach to therapeutic measures implemented through the courts, rather than the punitive approach that stems from current criminal justice system practices.

### **7.3 Sentencing**

One of the more positive comments that participants made about bail support programmes was that it potentially resulted in more favourable sentences for some people. The previous section discussed the potential negative consequences of non-compliance with pre-trial therapeutic court orders on a person. Conversely, some research participants identified situations where compliance with these types of orders resulted in a more favourable sentencing outcome for some people. Members of the judiciary noted that they did take into account a person's compliance with therapeutic bail conditions when the case moved to the sentencing part of the legal process. This quote from Defence 14 explicates how a defendant's compliance with appointments as part of therapeutic bail conditions may strengthen the defence's submissions for non-custodial sentencing:

If you have got compliance with the four or five most strict regime appointments then you can with some veracity make a forceful submission in relation to rehabilitation and risks of re-offending. Because you have got runs on the board, rather than he tells me he's committed to turning his life around, he wants to access this counsellor and that counsellor, and you actually say here's the report, he's actually done it. So massive benefit on sentencing as well (Defence 14).

Here, the participant uses the onerous nature of therapeutic bail conditions to demonstrate the ability to comply with court orders. This is then used as a justification for sentencing at the lower end of the sentencing bracket. While this effect of pre-trial therapeutic treatment does benefit some people, the notion that an individual is responsible for, as this participant phrases it, ‘turning their life around’, reinforces the rhetoric of individual responsibilisation in this practice. As has already been demonstrated, the presence of chaos in the lives of many vulnerable people means that they may not have the requisite tools to ‘turn their life around’. Yet the individual responsibilisation approach assumes that people are able to access ‘choices’ or ‘options’ to engage in pro-social behaviour. Their experiences of structural inequality are not accounted for when focusing on individual responsibilisation; as such, some people may not be able to access this benefit arising from pre-trial bail support. This means that the more vulnerable people in the system are at risk of receiving more severe sentences, because they will not be able to argue for more favourable sentencing options. This has a punitive effect on people in this situation, and could result in more pathways to prison for vulnerable, high needs people.

Following from this point, Defence 2’s below comment provides an example of the less favourable sentencing options available to people who are unable to access therapeutic bail:

You get people, especially homeless people, stealing food, stealing clothes, committing driving offences. They are living in their car, they can’t pay for registration, and they can’t afford to get interlock installed in their car, or whatever it is they had to do to become properly licensed. So they are just continually committing offences whether it is driving offences or low level thefts, eventually the police feel compelled to remand, but even an objective sentencing sense it is inappropriate to imprison and so yes you certainly do get that. That happens everywhere. The danger perhaps is that it is easy for a magistrate to order time served. Whereas if they hadn’t been on remand they wouldn’t have got a jail sentence (Defence 2).

This comment from Judiciary 5 also demonstrates that without access to bail support programmes, some defendants may not qualify for non-custodial sentencing options:

you are left now under the current sentencing regime with either escalating to imprisonment or going down to fines. So many of those people are clearly incapable of paying fines and you know that they are going to come back before you on warrants in relation to the non-payment of fines and so there is this huge gulf and without a transitional step, which CREDIT acts as, you might actually proceed to imprisonment because you know that the community corrections order is doomed to failure (Judiciary 5).

This comment draws attention to recent changes in Victorian sentencing laws discussed in Chapter One. These changes came into effect in January 2012. This was after the majority of interviews for this project had been completed, so the cases and examples provided by the participants were not affected by the new legislation. However, as the changes were impending at the time of the interviews, some participants' responses, such as Judiciary 5 above, demonstrate they had considered the potential effect of these changes.

The changes to sentencing legislation meant that the options available to magistrates were significantly reduced. These are the changes to which Judiciary 5 is referring in the above comment. Although the CCO had not yet been instituted, her comment reflects a lack of faith in the ability of that new sentencing option to replace now defunct sentencing options. Her comment indicates that these changes warrant rigorous academic scrutiny and empirical testing.

Another significant change to sentencing laws that has the potential to affect pre-trial court order procedures is that of deferral. Sentences can now be deferred for any person up to 12 months. Previously, sentences could only be deferred for people aged between 18 and 25, for a period of not more than six months (Sentencing Advisory Council website). People on sentence bail could then be ordered to comply with treatment conditions to gauge their ability to comply with court orders (Sentencing Advisory Council website). Their performance could then be taken into account during sentencing. It appears that this practice of deferral of sentence has formalised the practice of using bail support performance as a bellwether device for compliance

with court orders. In doing so, it again raises the aforementioned issues of punitive responses to non-compliance and double punishment. Clearly, there is evidence from some participant responses that therapeutic bail is able to successfully reduce not just the need for remand imprisonment but, ultimately, also affect the sentencing decisions of magistrates. It can thereby potentially reduce the use of custodial sentences. This is demonstrated through the recent addition of deferral practice to sentencing procedures.

While the practice of granting more favourable sentencing options to compliant people was evident, it did raise the question as to whether the opposite happened in practice. Did failure to comply with therapeutic bail conditions lead to people receiving harsher sentences because of the way they engaged with the programmes? The study participants indicated that although it was acceptable for magistrates to draw on therapeutic compliance to positively affect sentencing, it was stated clearly as patently unacceptable for magistrates to respond punitively to non-compliance. However, several participants did note this practice does exist to some extent, such as Defence 2's following comment:

It is certainly in my view more of a punishment related approach in the adult supervisory orders than in the youth supervisory orders. I can understand the reasons for that but it doesn't perhaps allow the trust relationship to build up as much (Defence 2).

Although this is a potential issue, it did not seem pervasive, as other members of the judiciary who participated in the research commented on the inappropriateness of this practice. Judiciary 5 gave the following explanation of how non-compliance can negatively affect the sentencing process:

And we need to be careful that the perception is that you don't get punished for non-compliance with CREDIT but I warn people about that when I put people on CREDIT. I say to them I will get reports about how you are going and one of your risks is that if you don't go well then I will know about that and that will affect the way that I deal with you in terms of the options that are open to me in sentencing. So they don't have much of a choice if they are in custody but at least they are aware of that

and I know that when I come back to sentence them I can say to them, 'look I did caution you that you needed to show me that you are capable of complying with these orders and now that you have demonstrated that you are not capable of doing that then this option I reject as an option that is open to me now'. And I think that that is a fair thing provided I have given them that warning (Judiciary 5).

This explanation is interesting in that although the participant is quick to state that non-compliance with therapeutic bail conditions is not to be dealt with punitively, this discussion demonstrates these practices can have a punitive effect on an individual. Her strategy to manage this situation is to warn participants that they may receive a harsher sentence if they fail to comply. Yet, is this strategy really all that different from taking a punitive approach? The principle of punishment is that a person should experience a level of pain as a consequence of a specific infraction. Judiciary 5's strategy fits with this criterion and thus cannot be seen as anything but punitive, regardless of warnings.

These strategies present a complex situation. As discussed, although a participant may be seen to be punished according to the criminal justice system, that they may have lesser sentencing options removed because of their non-compliance is a form of punishment. This reinforces Gray (2013), Hannah-Moffat and Lynch's (2012) and Hannah-Moffat's (2005) arguments that these practices are reconfiguring traditionally assumed assemblages of punishment. It demonstrates that the operation of penal power extends beyond the administration of custodial sentences and into the bail sphere. Although formally these practices are not called 'punishment', they bear all the hallmarks of punishment and they certainly appear to be experienced as punishment, as evidenced by this discussion. As such, these practices are punitive.

Conversely, there is an argument that people participating in bail support programmes are those who might previously have faced remand imprisonment, and in the absence of available therapeutic bail conditions, they would not have had the opportunity to demonstrate compliance with court ordered treatment. In these cases, they may never



have had the opportunity to petition for lesser sentencing options; particularly given that research has shown those on remand face less favourable sentencing options anyway (Brookman and Pierpoint, 2003). What is clear is that therapeutic bail conditions have the potential to provide a wider range of options at the sentencing stage of the process, which may reduce not just remand imprisonment but also sentenced imprisonment. New changes in sentencing legislation have curtailed these options to some extent, and future research should be undertaken to measure that impact. Irrespective of these recent changes, the implementation of these programmes within the system needs to be scrutinised carefully so that people do not end up having options removed solely because of non-compliance. This research challenges this practice, where people who might still be eligible for a lower sentencing option in the absence of therapeutic bail conditions should not lose their opportunities because of non-compliance. This would be a punitive response. This is contrary to one of the key principles of the criminal justice system: bail and remand are not to be used punitively as this constitutes pre-trial punishment (Brignell, 2002; Freiberg and Morgan, 2004).

While compliance with therapeutic bail may benefit some participants of bail support programmes, one of its effects is to add to the disadvantage of those who do not qualify for bail. As discussed, performance on bail and compliance with bail conditions can be taken into account by magistrates when sentencing. Conversely, people on remand do not have the advantage of case worker reports and therapy diaries replete with successful attendance at appointments when making sentencing submissions. Judiciary 2 agreed this is a significant issue in the following exchange:

Researcher—Do you feel people who are remanded and not given the opportunity to use those services might be disadvantaged because they don't have the opportunity to prove they can.

Judiciary 2—Of course they are. Definitely, most certainly.

The inability of remand prisoners to access therapeutic programmes in prison means that they cannot demonstrate their ability to engage with therapeutic options. This compounds the marginalisation and disadvantage experienced by people on remand.

This is because those on remand are unable to access services and demonstrate ability to comply with orders, resulting in less favourable sentences. Therapeutic bail support programmes, while ultimately providing those who engage well with programmes more opportunities to reduce their sentence (perhaps inadvertently), nevertheless have the effect of making people on remand less favourable candidates for reduced sentencing options. This widens the gulf between those who can get bail and those already vulnerable people who are unable to secure release on bail, even therapeutic bail. Given research that demonstrates remand imprisonment is a pathway to prison (Baldry et al., 2011), this practice could contribute to this outcome. The fact that people in this position represent some of the more vulnerable people in society (i.e., those who are supposed to be helped by therapeutic initiatives), is significant and concerning.

One highly pertinent issue raised by Judiciary 3 was the impact of changes in the use of sentencing deferral. As a result of the reduced means for judges and magistrates to draw on therapeutic initiatives when sentencing, several participants mooted increasing the scope of bail support programmes and allowing them to be implemented in the higher courts as sentence bail (Judiciary 3, Judiciary, 4, Justice Associate 1 and Defence 15). Currently, bail support programmes cannot be accessed by people outside the Magistrates' Court. There have been a couple of exceptions to this rule; which is why these research participants believed it would be beneficial to see of bail support services extended to higher courts<sup>18</sup>. Judiciary 3 noted that pre-trial treatment orders are increasingly being used by magistrates pre-conviction, to address the perceived removal of treatment sentencing options post-conviction; as such, he wanted to see this extended to the higher courts. Judiciary 4 also believed there was a place for bail support programmes in the higher courts, particularly the County Court. She suggested that, based upon the good results of the programme evaluation lauded by the Magistrates' Court (Price Waterhouse Coopers, 2009; Ross, 2009), should these programmes be opened up to the higher courts, she would support their use as a means to reduce sentencing penalties.

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<sup>18</sup> It may be inappropriate to further clarify these examples as the participants might be identified.

This is seen as beneficial for defendants, providing treatment options that might improve their future sentence prospects and addressing a lack of treatment options post-conviction. However, as discussed, it is contrary to key principles of due process and can be seen as a punitive approach to the treatment of unconvicted defendants. Effectively, this creates a situation of ‘sentence bail’, where people are bailed to programmes before sentence to see if they can comply with treatment orders. The result of this may influence a sentencing judge’s opinion as to whether a person should be incarcerated. This could doubly punish a defendant who must comply with orders both pre- and post-sentence. While it could result in diversion from prison, it could also result in punitive responses to non-compliance that may ultimately be carceral widening; in effect, practices that are trans-carceral (Hannah-Moffat and Maurutto, 2012; Maidment, 2006). Another possible effect on therapeutic bail practices would be for the courts to react in a paternalistic way and order more people to go through treatment pre-trial.

## 7.4 Changes

As discussed in Chapter One, another factor relevant to the change of government in the state of Victoria in 2011 (brought up in the research’s interview phase) was the proposal by the new Attorney General, Robert Clark, to introduce a new offence: offending on bail. Mr Clark introduced this proposal in the Victorian Parliament on 31 May 2011. The legislation formalising the proposal was enacted in December 2013 through the *Bail Amendment Act* (2013). His comments in Parliament, as discussed in Chapter One, indicate he is in favour of a punitive, law and order approach to non-compliance with bail conditions. This public proposal of the changes in legislation coincided with the fieldwork for this research; as a result, it was prominent in the minds of some interview participants. As a result, this issue was mentioned several times in the first set of interviews conducted. To explore this issue in more depth, it was added as a question to all interview participants after it became apparent this proposal might have significant influence on the practice of therapeutic bail. Eighteen participants were asked about their opinions of the proposed change and how they thought it might impact upon people going through the criminal justice system.

Most comments indicated they believed that introducing this type of legislation was duplicitous. As discussed, people who breached bail conditions already face harsher sentencing and revocation of bail. It was also noted that a significant amount of offending on bail constituted minor, repeat offending and as such, was not at the more severe end of the sentencing scale. For example, Defence 18 commented:

A lot of people who breach bail still end up getting fines or CBOs, things other than jail (Defence 18)

There was an indication that mandatory sentencing could be attached to the proposed offending on bail legislation. It is beyond scope of this thesis to examine all the issues raised by mandatory sentencing. There has already been research conducted into the negative consequences of this type of policy (Blagg, 2001; Hogg, 1999). However, the following comments highlight the exigency of issues raised by this research:

I am not a fan of mandatory sentencing at all to be honest. I'm very much a supporter of the current government but not on that issue. I think mandatory sentencing on any offence just defeats the concept of the Sentencing Act. To remove a sentencer's discretion to me is just draconian (Defence 14).

This comment also demonstrates that many people who would be affected by these proposed changes are committing multiple, low level offending:

if the client is on bail for a long history, or offending in relation to driving matters, a long history of driving offences but no history of dishonesty, and while on bail for driving offences, commits a minor shop theft that is an offence committed while on bail but it's hard me to say that the community would regard that as incredibly serious (Defence 1).

Here Defence 3 mirrors Defence 1's comment:

some of the re-offending that has taken place has been quite minor, when I say minor offences can include driving offence, which means something like driving while

suspended, so in relative terms it's not a hugely serious matter, but it might come up on a statistic as someone who has re-offended whilst on bail (Defence 3).

This demonstrates that these proposed changes could have a significant effect on people going through the justice system. Vulnerable people may get caught up in this because of the nature of their frequent low level offending. While this legislation is aimed at 'serious offenders' under the rhetoric of law and order and fear of crime (Hogg and Brown, 1998), the reality is that people who are charged with multiple small offences will be picked up by this change. As a result it may have a net-widening, carceral effect. Now that the government has enacted this legislation, they may effectively be creating another pathway to prison for vulnerable people. The negative consequences of this approach for these people and the community have already been expounded at length in this research. The tough on crime approach is not always effective, as has been demonstrated in scholarly literature (Blagg, 2001; Hogg, 1999; Hogg and Brown, 1998). Again, these legislative changes demonstrate a punitive approach by the executive, pushing through to judiciary. Defence 18's comment infers many of the respondents' opinions of this question:

There will be a lot more charges. People who do offend when they are on bail and I don't think that that should be an offence by itself to commit another offence while on bail. It seems ridiculous (Defence 18).

This research questions the government's claim that introducing this legislation was appropriate. The comments discussed above indicate that the law may affect vulnerable, less serious, repeat offenders; yet the law is targeted at a small category of serious violent offenders. The data indicates that these changes will be subject to significant criticism by the legal community. Given this, this thesis indicates the need for further research targeted to investigate whether there have been carceral widening impacts associated with these programs upon vulnerable groups. Clearly there is a greater need for further research that investigates the impacts of this new legislation.

## 7.5 Conclusion

This chapter has analysed one of the significant themes emerging from the data; that of the possible extension of penal power to bail practices, outside its traditional assemblage of the prison institution. The effect of therapeutic measures is to impose a punitive response, particularly on vulnerable, high needs people, which may have a net-widening effect. This research provides empirical evidence that therapeutic bail conditions, in the form of bail support services, may be an example of this extension of penal power. This is in line with Gray's (2013), Hannah-Moffat's (2005), Hannah-Moffat and Maurutto's (2012) and Hannah-Moffat and Lynch's (2012) concerns and warrants further research. This analysis of the function of punishment within bail support practices has examined the existence of punitive responses to non-compliance. It has also examined the effect of coercion on treatment efficacy, finding that people may agree to onerous bail conditions they are unable to meet to avoid jail. This finding indicates that people may be set up to fail by the system, and subsequently experience punishment for non-compliance. This could be in the form of revocation of bail, leading to remand imprisonment, or less favourable sentencing options. These are both pathways to imprisonment, and as such demonstrate the possible net-widening effects of therapeutic bail. Onerous therapeutic bail conditions can be experienced as a form of 'double punishment' if people are subsequently sentenced. This may result in them undertaking more treatment orders/punishment than those who have not completed therapeutic bail. The onerous nature of therapeutic bail conditions also acts as a disincentive to people who may need access to services. The way therapeutic initiatives are implemented through the criminal justice system may make treatment less desirable (Edney, 2007; Kiselbach, 1989). These extant practices are all examples of the reconfiguration of punishment and the extension of penal power beyond the prison and into pre-trial and remand practices.

This chapter also examined the links between conditional bail court orders and sentencing practices. This research has found evidence that therapeutic bail conditions are being used as a form of pre-sentence sentence; that is, they are used by magistrates to provide an indication of whether or not court ordered treatment will be an effective sentencing option. While this practice aims to prevent people from being set up to fail

on sentenced court orders, the effect of this practice is that some people may experience this as a form of double punishment, by completing more court orders than those not diverted through bail support services. This is again evidence of the extension of penal power to pre-trial practices. Several proposed changes to legislation, now enacted, were highlighted by participants, who identified these changes as having an impact on therapeutic bail practices. Changes to sentencing legislation that removed a raft of middle range sentencing options were brought into focus. Some participants saw a consequence of this legislation was that therapeutic bail would be used pre-sentence to replace defunct treatment options such as a CBO. This could lead to more paternalistic practices by the court to get people into treatment pre-trial. This was seen as a means to lessen the likelihood of more severe sanctioning at the sentence stage of the legal process, but could result in more people being expected to comply with court orders than necessary. The introduction of changes to deferral of sentencing will formalise the process of using sentence bail as a bellwether device for sentencing, demonstrating tacit approval of pre-trial punishment by the criminal justice system. Also, the changes by the Attorney General to include offending on bail as a specific criminal offence may formalise and extend the unofficial practice of punishing people for non-compliance with treatment orders. This research demonstrates there could be serious ramifications for vulnerable people, in the form of net-widening, as a result of these changes.

## Chapter 8: Access to Justice

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The ability for people to access pre-trial services, and therefore to access justice emerged as a significant issue in this research. As discussed in Chapter Three, remand prisoners experience poorer outcomes in case disposition than those on bail for similar offences, particularly vulnerable people (Williams, 2003). By addressing certain risk factors, therapeutic bail aims to divert vulnerable people away from remand imprisonment, while reducing the risk of offending on bail. Thus, it may reduce the negative effects of imprisonment and uphold the principle of imprisonment as last resort. However, this research finds that limited resources and limited access to services means that these aims are not always met. Concerns were raised by many interview participants that these resourcing and access issues led to compromised services and disparity in access to justice. Delays in accessing services significantly affected the likelihood of people being imprisoned pre-trial. This endemic problem of limited access to resources also results in lawyers taking on extra-legal work to assist their clients with non-legal issues, to the possible detriment of legal cases.

A key to understanding these issues is the concept of ‘postcode justice’<sup>19</sup>. Current research indicates that a significant dearth of resources exists in rural and regional areas, as compared to their urban counterparts (Coverdale, 2011). However, this research finds that while, on the surface it appears that a rural/urban binary exists with respect to service provision, upon deeper analysis the issue is more complex (Liepens, 2000). While the data revealed that rural areas did experience less service provision, the ways in which people experienced service access and justice were influenced by a whole range of issues, rather than just a rural/urban binary. Specific areas of concern included the remanding of homeless young people solely because of a lack of housing options and the inability of people in rural communities to comply with onerous bail conditions because of the impracticalities of travelling over long distances to access services. These ‘access to justice’ issues have significant effects on individuals and the community. Many participants believed that these effects undermined the fairness of the criminal justice system. This chapter will provide a detailed analysis of these issues

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<sup>19</sup> According to Coverdale (2011), this term was first used by the British media—see O’Neill et al. (2005).



and address the importance of location in understanding service provision and access to justice as a means to address some issues raised by this research.

### **8.1 Postcode (In)justice: the Fallacy of the Rural/Urban Binary**

Comments made by interview participants indicated there were differences in the way that bail support services operated in different regions. These differences indicated possible negative effects of the lack of access to bail support services on some groups in the community. As detailed in the background chapter of this research, different accessibility of bail support programmes exists in different regions of the state. CISP, the most comprehensive programme, is available through three of the Magistrates' Courts of Victoria: Sunshine, Morwell and Melbourne. The CREDIT/BSP programme, which focuses primarily on drug and alcohol rehabilitation, is available at a further eight locations: Ballarat, Broadmeadows, Dandenong, Frankston, Geelong, Heidelberg, Moorabbin and Ringwood (Magistrates' Court of Victoria Annual Report, 2012). People applying for bail before the NJC in Collingwood are linked into the NJC support network as part of the resources offered by that centre (VDOJ, 2010c). Outside these regions the options are significantly reduced. A Rural Outreach Worker (RODW), who can provide limited bail support, is assigned to rural courts. However, there is limited information available through the VDOJ about the parameters of this service.

The criminal justice system is predicated upon the tenets of fairness and equality. It is widely recognised that issues of disadvantage and social exclusion exist when comparing regional to metropolitan areas in Victoria (Alston, 2005; Cocklin and Dibden, 2005; Coverdale, 2011; Lockie and Bourke, 2001; Pritchard and McManus, 2000; Roche, 1985). Current research by Richard Coverdale (2011) into the accessibility of services in rural and regional areas indicates that people in rural communities are increasingly disadvantaged by the phenomena of 'postcode justice', where the ability to access services is dependent on the area in which a person lives. Research indicates that the ability to access services offered through the courts and by

non-government organisations is significantly limited outside metropolitan areas (Cocklin and Dibden, 2005; Coverdale, 2011; Lockie and Bourke, 2001; Pritchard and McManus, 2000). As highlighted in the methodology, a portion of the interviews (n=14) were conducted with participants working in regional and rural areas of Victoria. These participants discussed issues relating to the accessibility of resources in rural and regional areas as compared to their urban counterparts. This particular aspect of the research cohort came about after the researcher was approached by a defence lawyer from a regional area, who expressed interest in participating in the research, but was concerned he would not be able to provide a 'useful' interview because there were no bail support services in his particular area. However, he was keen to address the *absence* of services. Once it was established that the research was interested in both the presence and absence of service provision, more participants from regional areas volunteered to participate in the research, because they felt they could contribute by discussing the absence of bail support services and the impact that had on people in rural and regional areas.

Some participants identified a significant dearth of resources between urban and regional areas. A defence lawyer who had worked for many years in the Horsham region discussed her understanding of the RODW service based on her interactions with this diversion programme during her time working in a rural area:

I can't be exact as to when they started the RODW and then you had some bail supports there with those workers. They mainly dealt with drug and alcohol. There was always a drug and alcohol person at court any way and you could refer the person to them. But they weren't necessarily there as bail support that was just a service that was available. But then when it became the ROD workers that not so much bail support that they could say yes we are willing to take them on for counselling and then the magistrate would consider giving them bail because they were doing something to address those issues if that was a reason for offending. It was intended to run similar to the CREDIT bail system but you didn't have the support as you do with the credit bail system because there [are] really only two agencies in the Wimmera area that is assist people and that is Grampians community health and Wimmera Uniting Care. Not a lot of choices as to where people go (Defence 6).

This comment highlights some differences in service provision observed by practitioners between urban and rural areas. Of these participants who commented on rural disparity in service provision, some were familiar with the concept of postcode justice and gave examples of situations where people were disadvantaged in the bail process because of their location. This defence lawyer from a rural region highlights this:

the bigger problem with it is the postcode justice in a sense in that you get it in Bendigo [regional centre] if you have one postcode and if you have another postcode and you live somewhere else then it is not available to you, even if you may be dealt with by the same court theoretically and the same sentencing and legislation regimes around that (Defence 22).

As this participant notes, people in Victoria are governed by the same legislation and subject to the same sentencing regimes, but the application of the law is reliant to a degree on the resources available in that region. The structural inequality inherent in the inconsistent availability of resources impedes some peoples' ability to access the same level of justice as those in other areas. Another defence lawyer, who had worked in several different regions but was now based in Melbourne, highlighted the 'unfairness' of the system's operation:

The fact that it is limited to Melbourne, again it has to be resource issue but as a matter of fairness it doesn't seem to be fair (Defence 14).

This notion of fairness was echoed by other participants. This defence counsel illustrates his concern with the unfairness of the disparate resources:

I think that the postcode justice issue is a very strong one. Why, if you are being dealt with by the court in Sunshine should you have access to CISP but if you are in Kerang you don't? You could extend that and say why, if you are in Dandenong, should you have access to the drug court but if you are anywhere else then you can't? Why, if you are in Collingwood should you have access to the NJC, but if you are anywhere else you can't? (Defence 22—Regional)

This comment demonstrates the idea of ever decreasing circles of service provision as one moves farther away from urban environments. Defence 6's comment also reflects this idea of rural/urban postcode (in)justice:

If there was any funding it stopped at Ballarat, [lawyers at] Ballarat are always saying we haven't got any services, there is not funding. But they get a lot more than we get. There would be smaller towns than us that would be saying why does everything have to go to Horsham? Why can't we have stuff out here, it's not fair.

Comments on rural/urban disparity were not limited to regional commentators. This member of the judiciary from an urban location also believed that postcode (in)justice was a significant issue the further one was from urban environments:

It is still postcode justice... what we are trying to do is use the resources that are out in the community to the best advantage to link people in, and it is not fair that it is only people in certain geographic regions who benefit from it. And I can tell you the magistrates don't think it is fair. They scratch their heads and think what are we going to do with these people, they shouldn't be in custody, they need help. They haven't got access to anything. (Judiciary 1)

Upon unpacking this quote, several significant issues are raised. First, she believes the phenomena of postcode (in)justice is very real, couched in terms of a rural/urban binary. She also alludes to the influence of limited resources regarding service provision by recognising that the system has to rely on services available in the community to access help for people in the criminal justice system. She also highlights the fact that many people facing this problem are vulnerable people with complex needs. This means that granting bail for people from communities with limited service availability results in reduced options for magistrates and lawyers to draw upon when trying to divert people from remand imprisonment. As Judiciary One states above, this results in vulnerable people being remanded because of a lack of services provision. If the criminal justice system is unable to offer all people the same access to justice, then it is not operating in a manner consistent with the principles of fairness and equality. A lack of resources in rural and regional areas can affect the levels of disadvantage and

marginalisation experienced by vulnerable people going through the criminal justice system.

What is also significant about these participants' comments in this section is that they all reflect the idea of a rural/urban binary in respect of services provision and access to justice. This reflects the ideas of postcode (in)justice as espoused by Coverdale (2011), of ever decreasing circles of service provision. However, comments by other participants demonstrate that the issue is far more complex than a simple binary. Inconsistencies in the provision of services are not always directly related to an urban/rural divide. The way in which disparity was observed differed between rural and urban environments. Sometimes this disparity was reflected through an urban/rural binary, but other times it became location specific. For example, one regional area has benefitted from resource targeting by the State Government.

The La Trobe Valley is the most disadvantaged demographic in Victoria. Consequently, more resources have been provided to this area to address its status as 'the most disadvantaged'. The extent of the bail support services available is highlighted by the following comment:

In Morwell it is much better, it is probably same day or one to two days delay in ability to assess for CISP, which is perfectly acceptable. It often takes you sometimes one or two days to get materials, addresses, things ready for a bail application anyway. Yes so very successful down here not so much in Melbourne (Defence 16, Morwell).

While the infusion of resources into areas requiring higher levels of access to support services should be applauded, it has also resulted in inconsistent and unequal application of resources throughout the state. Being branded the 'worst' has been beneficial for Morwell. But it does bring into question what happens in regions that are in the second worst or third worst position for disadvantage in the community. What is also interesting about this participant's view is that he feels the system is running more smoothly in Morwell because there is a smaller population. While attempts have been made by governments to address regional disparity, some of these have resulted in

further disparity; yet, this disparity is not necessarily limited to regional areas. Contrary to some previous commentators, Defence 16's comment highlights that Melbourne Magistrates' Court, although envied by many for its level of service provision, has a much larger number of people trying to access services, leading to delays and limitations. This experience was echoed by other participants working in the Melbourne metropolitan region, highlighting the importance of volume, in addition to access to resources, as a significant issue. What becomes apparent from this analysis is that location plays an important part in the way people experience access to justice. Rather than adhering to the fallacy of a rural/urban binary, a deeper understanding can be gained from looking at different experiences across locations. The next part of this chapter will look at specific issues raised in relation to resourcing matters and will demonstrate that understanding location specific issues may provide insights into improvements to the current system.

## **8.2 Resourcing**

Some of the specific resourcing issues that were raised by participants included: delays due to an imbalance in supply and demand for service; a lack of services specific to children and young people; limited resources affecting the role of the defence lawyer; homelessness; and transport.

### **8.2.1 Limited access and delays**

A significant criticism of the implementation of bail support programmes made by interview participants was a lack of resources. Many Magistrates' Courts in Victoria offer limited places to bail support programmes. The CREDIT programme that is run through eight of the Magistrates' Courts does not just limit places, but assessments for places. For example, Defence 21, Defence 4 and Defence 5 noted that at the courts using CREDIT/BSP, funding is provided for 15 assessments each month. If a person is assessed but found unsuitable for the programme, that is one less assessment

available for that month. It is then possible that 15 funded assessments could be done at one of these courts in a calendar month with no resultant places on the programme filled. Several participants from these areas commented this affected their thinking in respect to a client's suitability for the programme, as exemplified by Defence 5 in the following comment:

We have got one CREDIT bail worker who sees 15 people a month and that's referrals, also so she may not even take them on the program. And now the court has been implementing a policy where you actually have to ask permission of the magistrate before you run a bail application which is going to rely on CREDIT bail as the main lynchpin for why they should get bail. Because they will assess whether or not that is actually going to get them over the edge, because if it is not, they are not going to refer them. And that is going to be the end of it. So you have to ask permission to be assessed, even if they are not in breach of any other order. Because we are so stretched (Defence 5).

In these cases, six participants indicated they only referred people to assessment who they believed were most likely to be accepted on the programme, not necessarily those who might benefit most. This creates competition, where vulnerable people must vie for a place on the programme based on a hierarchy of disadvantage. This example illuminates the underlying 'politics of need interpretation' highlighted by Fraser (1989: 292). The ability for vulnerable people to access services through the courts is determined by the approval of those in power, who use their own hierarchies of need to determine who is most deserving, for instance, who fits the hegemonic needs paradigm.

These limited resources affected not only the number of funded places/assessments that were available for defendants. Many participants commented on delays in accessing the programmes because there were not enough staff to meet demand. As highlighted previously, those processed through the Melbourne Magistrates' Court experienced significant delays in obtaining assessments for the CISP. In the court observations, significant delays in obtaining assessments were noted, causing distress to some defendants. Additionally, several times magistrates and lawyers expressed

frustration with delays between the bail application date and the next available appointment/assessment. In Case 51, a woman with a history of drug use was experiencing her first time in custody on remand. Her bail hearing was adjourned for two days so she could have a CISP assessment. She was visibly upset by this and cried throughout the hearing. Even longer delays were observed: in Case 57, a man with an intellectual disability was awaiting an assessment through the DHS, but the earliest appointment was one month away. The magistrate in this case was concerned by this delay, finding it inappropriate and unacceptable. She even wanted the DHS worker to front up to the courtroom to explain why it would take so long for a person to get an assessment when they were waiting on remand. In Case 113, a man was waiting in custody for a bail application that needed a CISP assessment. He was advised that at that stage the waiting time for an assessment was more than four weeks.

In Case 66, the magistrate advised that bail for a man with a history of drug use could not be granted without a CISP assessment, which could take several days to organise; in the interim the defendant would have to wait on remand. The police prosecutor in this case supported CISP bail, but believed that without CISP he would pose too great a risk to be bailed. The defendant became angry and agitated when told that although he would qualify for bail, he would have to wait in custody for several days before this could happen. He began banging his hands on the bar and swearing. His reaction angered the magistrate who then changed her decision and said that 'based on your behaviour bail is refused', as his behaviour 'demonstrates an unacceptable risk'.

These examples from the court observations demonstrate it is clear that demand had overtaken supply in respect to accessing bail support programmes in some locations. The following comments of interview participants expand on this issue. The general view of the interview participants was that the programmes were limited in their ability to achieve their aims because of this under resourcing. Participants identified negative implications for defendants as a result of this chronic under resourcing. Several participants noted that delays in provision of services were becoming more prominent. Defence 20 stated:



Resources, just generally resources. At [suburban court] we've seen the transition from it being a very effective program, where you could book a client in within say one to two days from a court date for an assessment, to delays of a month (Defence 20).

Defence 14 also found that the Melbourne Magistrates' Court experienced significant delays that did not exist when the programme started:

It's appalling. That wasn't the case when I first came to Melbourne in 2007. The delay was only a matter of days with that. Certainly, there were same day assessments. People were put into custody that night and were assessed the next day (Defence 14).

Whether or not this reduction in availability has been caused by a reduction in resourcing, a rise in demand in excess of resource provision, or a combination of both is not clear from this comment. However, Defence 15's following comment indicates these delays have become commonplace:

I think the delay at the moment is about two weeks, I've seen it two to three weeks, has been the maximum. It's really difficult because it means you can run an application that the magistrate might say grant bail and you can come back for your assessment in two weeks but most of the time they will say we will wait for the assessment [before granting bail] (Defence 15)

His comment also highlighted that one effect of these delays was that bail support services were no longer acting as diversions from pre-trial imprisonment. The court observation data discussed above also demonstrated that many people are on remand while awaiting access to therapeutic bail. The delays in service provision mean people are being remanded while awaiting access to services, as demonstrated by Defence 11's comment:

rarely can we get them bail while pending services are being arranged.

Defence 20 also highlights this issue:

Well they're going to be stuck in custody for longer than they should, so this is when not only lawyers are dependent on CISP for getting your clients out, the courts become dependent on CISP. They won't bail someone unless they have the support of CISP. Until they get that assessment, even though there's going to be some delay in getting the treatment started we will keep clients in custody until they've been assessed and accommodation has been lined up by CISP (Defence 20).

This comment indicates that the participant believed the court now depended on support services as an indicator for bail eligibility. This potential reliance of key stakeholders on intervention services may actually be part of the reason for these delays. This also may contribute to creating a bail system that relies on intervention as necessary for bail eligibility.

Defence 16's comment below demonstrates some frustration the participants voiced over delays in service provision:

in Melbourne there is about a two week delay running at the moment in Melbourne so your client is still behind the eight ball in that respect because CISP is often the difference between bail and not bail or a similar sense CREDIT bail in Dandenong or whatever. But it is often the difference. In Melbourne it is irritating because you have got between one and three weeks lag in resourcing to assess the CISP. So if you want to make a bail application on the date of CISP you've got no hope. You will have to have your client remanded to the first available CISP date which may be two to three weeks down the track (Defence 16).

Several participants voiced concerns over the negative effect this had on people. These comments illustrate how these delays in service provision contributed to the marginalisation of vulnerable people:

I think it does cause some discrimination against people who are in the criminal justice system because there is such a shortage (Service Provider 1).

This comment is interesting because it links to previous comments raised by research participants about the fairness of the system. The limited availability and subsequent reduction in access to justice has already been described as unfair by some research participants, but this comment takes this idea further by viewing this as a form of discrimination against people who are unable to access services. Peoples' need for services, as determined by their vulnerability, results in poorer access to justice. In turn, this could negatively affect outcomes in the criminal justice system. This inherent unfairness can be seen as a form of discrimination against vulnerable people.

It was also noted that the under resourcing of bail support programmes had a negative influence on programme effectiveness. Defence 20 illustrates this in his comment:

but if there is so much delay with CISP that the program is not working effectively, you want to be getting clients there when they need it, to get on bail and to get linked into the programs as quickly as possible. If there is a delay of months you're missing the boat a little bit. It's not the point of the program ... I think that at the end of the day if the program is not resourced and if you don't have good caseworkers clients may come to the end of the three months despite their best efforts not getting the most out of the program (Defence 20).

Further, Defence 9 raises concerns about the problematic effect of delays in service provision. She notes that people may have to be remanded for several weeks prior to being assessed for a bail support programme. If sentenced, they may not receive a custodial sentence:

And the delays are not completely prohibitive but a couple of weeks, or three weeks or whatever, as I understand the delays can sometimes be, it's three weeks of someone's life in custody when they may ultimately be not going to get a custodial sentence in the end, but they may not be a good risk of bail. Often if someone has not got a lot of priors and not got a lot of form, the police are a lot more sympathetic to bailing them than if they do. But you might find someone that's in custody for a shop theft for example and they didn't commit the shop theft so there is no ability to get that dealt with that day. They might have pages and pages of fail to appear and pages and pages of priors and not be a good chance of bail by virtue of their history but the

reality is they may not spend three weeks in custody for the offence and so not having a CISP assessment for another two or three weeks, if they present with multiple issues as they often do, then potentially that delay may keep someone in custody (Defence 9).

If people are indeed spending time on remand awaiting service provision, while on minor charges, as indicated by Defence 9, then in some cases there is a strong potential that bail support programmes are arguably diverting people *to* remand rather than diverting *away* from remand imprisonment. This raises potential for a carceral widening effect and highlights a need for research that investigates the links between carceral widening effects and bail support in the Australian context (Hannah-Moffat and Lynch, 2012; Hannah-Moffat and Maurutto, 2012). Defence 9's opinion is further corroborated by Defence 8's comment:

No, the one thing that can happen is delay because they are busy. Again there are some in custody today that you think you could get bail for if they were assessed by CISP and they were accepted that it would tip the scales, but the way it is right now you might have to wait a week in custody before that happens. Before you can do the assessment and then do the bail. So you try and do that on the same day so that works. So you get remanded to that day and you get assessed in the morning and then do the bail application (Defence 8).

Whether this under resourcing is the result of the programmes' increasing popularity or because of a high turnover of staff, was debated:

Because again the delays only in terms of people having assessments, they are only there because they don't have enough staff. If there were more staff then you wouldn't have those delays. And I think particularly for clients with mental illness, people who are so vulnerable, who all the case law says they shouldn't be in jail but they are in jail waiting to apply for bail because there aren't the right services available for them to be linked into (Defence 13).

The effect of under resourcing led to delays in service provision. As the data provided by the interview participants indicates, these delays impact negatively on defendants.

Bail support services are not always meeting their aim of providing a diversion from remand imprisonment. Indeed, in some cases they may be ‘spreading the carceral net’ (Hannah-Moffat and Maurutto, 2012: 215) by causing people to be remanded while awaiting access to treatment, when their ultimate sentence may not be custodial. Although people may experience shorter periods on remand when they are finally able to access services, they have still experienced imprisonment and all the disadvantages that accompany that experience. This means that many defendants who potentially would benefit from bail support services may not experience these benefits and may be further disadvantaged by their time on remand imprisonment.

### **8.2.2 Lawyers as social workers**

One of the tensions identified in Chapter Four was the nature of the changing role of professionals as some legal systems adopted therapeutic models. This change may be the result of the State Government’s push for a joined up approach to service delivery (DHS, 2002; Lake, 2005; State Government of Victoria, 2005). Blagg (2008) noted the language of therapy being adopted by professionals who had no background or formal training in behavioural sciences. Potter’s (2006, 2010) research also examined the role of the lawyer in therapeutic models, finding that to successfully adopt a therapeutic model, it was essential for defence lawyers to have insight into their clients’ needs and to be aware of how they could link their clients to support services. Comments from lawyers who participated in this research indicated that their legal role in the bail process had changed because of the implementation of bail support programmes. This participant’s comment demonstrates the multiple roles some lawyers have, particularly in regions with limited access to service provision:

So you are much more taking on the role as social worker and accommodation worker and drug and alcohol worker, just because you are further from Melbourne. It’s a regional location and we don’t have that (Defence 2).

This demonstrates that the implementation of a therapeutic model to the bail system in Victoria has redefined and in many ways made the role of the defence lawyer more

complex. Lawyers have become aware of the appropriate therapeutic programmes in place for needy clients, which is what Potter (2006; 2010) believes is needed for successful implementation of therapeutic models to the criminal justice system. This comment also provides evidence to support Moore's (2007: 44) findings that professionals working within therapeutic settings in the criminal justice system develop a 'knowledge crossover'. Defence 2 has had to become aware not just of the services available to his clients, but also to take on the informal role of case managing his clients. While this meets Potter's (2006, 2010) requirements for the desired qualities of a lawyer working within a therapeutic model, it also highlights the lack of appropriate services to support lawyers. What is also important to note from Defence 2's comment, is the frustration this particular participant has experienced in taking on these additional roles because of a lack of service provision. As such, this research has demonstrated that inadequate provision of resources to support the therapeutic model has resulted in the lawyer's role changing to become not just a legal representative, but also a social worker to their clients.

Several defence lawyers from metropolitan areas also commented that they had problems balancing their role as a lawyer with the demands of therapeutic initiatives. This again highlights that the effects of inadequate resourcing cannot be understood simply through a rural/urban binary. While a lower number of services were present in rural areas than metropolitan areas, this did not mean that the additional workload experienced by lawyers drawing on therapeutic services diminished in urban environments. Defence 18, a suburban lawyer, mirrored Defence 2's (the rural lawyer) experiences here:

Part of the difficulty in being the lawyer is you're not the social worker and you don't want to be the social worker, you don't have time to be the social worker (Defence 18)

Participants did recognise the problematic nature of their additional roles, beyond just time pressures. It was noted that lawyers spent considerable time linking clients with services or preparing lengthy bail applications to address perceived risk factors. This again highlights the recurring issue of inadequate resourcing. Often, participants felt they were doing this work because resources in the bail support sector were not

available to provide these services. Lawyers also found themselves entangled, and to an extent mediating, in intra-departmental disagreements over service provision. This comment here demonstrates some difficulties lawyers have in arranging services for clients:

Child Protection are engaged in an act of turf war with Youth Justice in the cells, you've got a kid in cells, you need to provide him housing, [and they say] 'no he is in the cells, that's a youth justice problem, it's criminal behaviour'. But in terms of getting out if that kid had somewhere to go he could go out, while youth justice can't find accommodation it's up to Child Protection. (Defence 11).

This demonstrates that lawyers can expend a lot of time and energy trying to link their clients with appropriate services in an effort to successfully apply for bail. Given that many vulnerable people already have limited access to legal representation, especially pre-trial, it is of concern that so much time is taken up by non-legal matters. This frustration, that lawyer's legal expertise was being pushed to the background while they focused on 'emergency' matters such as housing or drug treatment, is again demonstrated in Defence 10's following comment:

You need a bail support programme to help coordinate that rather than having a lawyer engaging in perhaps more of a social worker role, which can be difficult. It is not something necessarily we have training in and for us say focusing on bail, focusing on getting an address and perhaps not thinking so much about whether it is an ideal address for that person. So sometimes having someone else who can coordinate that, can look at alternatives can really help. So I think, yes, a lack of services can be a real problem (Defence 10).

This indicates that when lawyers are taking on a social worker role, their time is taken up with navigating this alternative role, which may detract from the time spent addressing the relevant legal issues. The effect of this may be that the legal advice needed by people making bail applications is prioritised below therapeutic matters linked to a person's needs. The effect of needs discourse politics (Fraser, 1989), as discussed in Chapter Six, means that therapeutic interventions may take precedence over client's legal matters in some cases. This is another example of the politics of

needs interpretation affecting people going through the criminal justice system. While there is already evidence to show that people on remand have difficulty accessing adequate legal advice, this research demonstrates that the pressures put on lawyers in therapeutic models creates potential for the quality of a person's legal advice to be compromised because of these pressures. The effect of therapeutic models in a bail setting may be to place more focus by legal representatives on needs dictated issues, rather than on adequate legal advice. This could then result in less favourable outcomes at the bail and later stages of the court process. Although this section does highlight resourcing as a significant factor that may negatively affect a lawyer's ability to prepare a client's case, it also highlights how much lawyers not only rely on but need adequate services to assist their role.

### **8.2.3 Homelessness**

This thesis' findings support prior research that homelessness is a risk/need that translates into denial of bail (Ericson and Vinson, 2010; Boyle, 2009; Bamford et al, 1999) and indicate that homelessness is also a problematic factor in obtaining therapeutic bail. Homelessness was identified as a significant issue by the research participants. The court observation data also demonstrated that homelessness affected the implementation and outcome of bail support services. As discussed in Chapter Two, homeless rates have been rising in recent years, and there is a shortage of adequate facilities and low income housing to address the growing number of people experiencing homelessness (ABS, 2006, 2011a; Australian Government, 2012; Chamberlain and McKenzie, 2006; Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA), 2008; Ericson and Vinson, 2010). Many people who experience homelessness also experience other issues, such as mental illness, complex drug and alcohol histories and a history of abuse that make them a particularly vulnerable group (Hucklesby 2009; Jesuit Social Services, 2006; Uniting Care, 2009; Vinson, 2004; Women in Prison Advocacy Network (WiPAN), 2011). Homelessness has been shown to be a significant factor in the refusal of bail (Bamford et al., 1999; Boyle 2009; Ericson and Vinson, 2010; Kellough and Wortley, 2002; Midgley, 2004). The high rates of remand for some vulnerable groups, particularly



young people and Indigenous women, are due to this exact reason (Baldry, 2010; Denning-Cotter, 2008; Ericson and Vinson, 2010; Richards and Renshaw, 2013).

Case 1 of the court observations involved a young man being denied bail because there was no suitable housing available for him. He had been assessed as suitable for the court's bail support programme, but because the programme staff had been unable to find housing for this man, he was remanded. The man had been diagnosed with an intellectual disability, he was under 25 years of age and this was his first offence. This case was not an isolated incident. This same scenario was observed in several other cases: Case 6, Case 36, Case 37 and Case 96. This is clear evidence supporting prior research that vulnerable people are being remanded because they do not have access to adequate housing (Ericson and Vinson, 2010; Jesuit Social Services, 2006; Kellough and Wortley, 2002; Midgley, 2004; Richards and Renshaw, 2013). In these cases, bail support services had been identified as a means to address this issue, but because of the chronic shortage of adequate housing, these measures were not been realised.

The comment by Defence 8 on pp 132 also demonstrates the problem homelessness poses to people who are trying to access pre-trial housing services. The following comments also confirm and reinforce Defence 8's observation that homelessness is a significant factor impeding successful bail applications. Defence 13's comment below demonstrates the vulnerability of homeless people, and their disassociation from society:

I'm thinking particularly about so many homeless people. Who get picked up for begging and maybe even arrested and so we going to do a bail application for someone who is charged with beg arms and find out that they are really adrift in society completely (Defence 13)

This 'drift' that Defence 13 observes provides a very real example of Becker's (1963) concept of outsiders. Homeless people represent a significant part of vulnerable populations (Irwin, 1985). As such, they need to be managed. Given the link between homelessness and refusal of bail, even where other support services are in place, this

research provides evidence suggesting that homeless people are being refused bail on the grounds of inadequate access to housing, beyond any risk they may pose to society. This demonstrates a conflation of need with risk.

However, Defence 15's comment below demonstrates that bail support services can address this to some extent. Defence 15's comment shows that if access to adequate housing is in place, then this issue can be addressed and bail support services really can act as a diversion from remand imprisonment:

Another massive issue for our clients is homelessness and lack of accommodation generally, itinerant type lifestyles. They [bail support case workers] help find housing and when someone has a house, it just makes such a difference it really gives them something to live for, a sense of security. It's really important I think (Defence 15).

Although, as Defence 15 goes on to say, access to stable housing remains tenuous for criminalised people. Those bailed to supported accommodation may then risk losing their newly found housing stability if they are sentenced to a term of imprisonment. This comment illustrates how short term prison sentences may have a significant effect on those at risk of homelessness, compounding disadvantage:

And that's the other thing that people have when they finally get community housing, they've been on a waiting list for ten years, they finally get community housing and then if they go in to custody they lose it after three months (Defence 15).

Accessing suitable housing through bail support services was also fraught with problems. This comment by a regional defence lawyer demonstrates that in rural areas, housing options were significantly limited:

All of a sudden you are in [regional town], and there are people literally on remand because there is no accommodation and there is no one whose job, no centralised person whose job it is to find them accommodation. I've got one client at the moment who really because of his intellectual disability should be bailed and it comes down to accommodation. If there was suitable accommodation, everyone is in agreement, including the magistrate, and the OPP and informant have all agreed that he should

not be on remand. In [regional town] there are two very iffy boarding houses that are the primary port of call for emergency accommodation. If they are not available, and you can't get a family member, then there are limited options. Most caravan parks won't even, once the lady from CREDIT bail contacts them, or a lawyer contacts them, they will say they are full. They don't want criminals there. The boarding houses have an agreement with the person from credit bail that she has to tell them what the person is charged with and they will automatically reject people charged with arson or sex offences (Defence 2).

The limited housing options available to people in rural areas meant that situations arose where some boarding house proprietors or managers of housing facilities did not want to provide access to criminalised homeless people. This meant that homeless people may not be able access services even if they were technically available. This participant goes on to provide a specific example of the effect of selective access to services on criminalised homeless people:

I had a client who the only reason he was refused bail again was accommodation. He was on parole for unrelated offending, he had come down from Queensland, he had been on parole for eight months. He was then charged with committing an indecent act with a child, non-penetration sex offence, wherein I would say 99 per cent of cases a person would be bailed, he was assaulted in his home by the victim's family and [religious organisation] who ran the accommodation service for his parole became aware of it and because of the fact that it was a sexual offence they classed that as a class one offence, the same as murder or armed robbery or rape, despite the fact that it was an offence that was being heard in the Magistrates' Court but because it had the word sex in it they classify that as meaning he is ineligible for their [religious]-based services. He was remanded solely because he had the accommodation pulled out from under him by that organisation (Defence 2).

This example highlights how pre-emptive criminalisation and stigmatising occurring at the level of pre-trial sentencing may further disadvantage vulnerable people. The fact that in some areas, the only available services may be run by people who morally object to providing services to criminalised people means there is a lack of services available to some of society's most vulnerable people. Without viable services available

to all, pre-trial bail support services cannot provide assistance to the very people they are designed to help. This research demonstrates that the lack of available options limits pre-trial support and restricts its ability to be a diversion from remand imprisonment.

Another frequent situation identified by some research participants was when lawyers were able to find housing for people, but the nature of the housing was problematic. In particular, large urban boarding houses were often the only available housing option for vulnerable people. These boarding houses are populated by many vulnerable, criminalised people. Those who live in these houses are exposed to drug and alcohol use and the risk of violence. These compound many existing issues for vulnerable people on bail. Defence 5's comment draws attention to this:

Housing is a massive problem at the moment. It is almost, for some clients, not even worth referring them to credit bail because the only thing that credit bail can do at the moment is get a rooming house. For some people that is going to be even worse for them (Defence 5).

Defence 21 also highlights this issue, pointing to the reluctance of magistrates to bail a homeless person to these types of boarding houses because of their reputation:

And where they should go is another thing. If a lot of the offending happens in boarding houses, then the magistrates aren't going to be as willing to bail them to another boarding house, because that is where some of the issues stem from, trying to find accommodation which is not the boarding house is another issue unto itself (Defence 21).

Judiciary 1 confirms Defence 21's observations; expressing frustration that the only alternative when suitable housing is unavailable is pre-trial imprisonment and how inappropriate this is from a human rights and due process perspective:

But it's a very vexed issue this lack of housing. You have obviously twigged to the idea of just how hard it is to get people accommodated. As a human rights exercise, do you keep people locked up just because there isn't the ideal housing you would like to

have them in. People shouldn't be locked up where we can let them out. Because these are people who have not been convicted of anything. There has been no proof, no finding of proof in relation to them. We shouldn't be keeping them locked up if there is any alternative (Judiciary 1).

Defence 7 recognises the effect that residing in a boarding house may have on a person who is going through drug treatment. A person who may be bailed to a boarding house, in tandem with drug treatment conditions, who is then exposed to drugs in their place of residence is put in a difficult situation:

To get someone out on bail who has no housing options at all, you are happy to get a room in a boarding house. But it's not really ideal, especially if someone is trying to get off drugs in a boarding house environment it's not ideal at all (Defence 7).

This opinion is echoed by Defence 14, who highlights here the potential for people with complex drug and alcohol histories to experience difficulty in keeping to their bail conditions in inappropriate housing:

It's elementary, if you have got someone who has a long term exposure to drug etc., and you put them in a place like the Gatwick [a boarding house in St Kilda, a suburb of Melbourne] where there is going to be drugs there, I mean you might as well give them the drugs yourself. It's like putting a kid in a candy shop. No wonder they get up to no good. And there are other people who are involved in other sorts of crimes, they are going to be with their own. It's just as bad as having them in jail (Defence 14).

This demonstrates that in some situations, this type of scenario could be setting unrealistic conditions that compound vulnerability and disadvantage. From Defence 21's and Judiciary 1's previous comments, this is a scenario recognised by magistrates, whose only option is then to remand a person because of a lack of suitable housing options; again reducing the potential for pre-trial support to assist vulnerable people.

Defence 13's comments below on this particular issue speak to deeper issues than just obtaining housing to successfully apply for bail. She questions more deeply what the ultimate aim of these services is: whether they have been implemented to enable people to apply for bail, or to provide people with the appropriate tools to make meaningful change in their lives:

So if they are homeless or in a boarding house, say it's a young man whose 18 and the only accommodation he can find is in a boarding house with 50-year-old alcoholics who all they are thinking about is their next drink, that's probably not the right place for that young man. And it's about can he hang in there long enough to be find somewhere suitable, whether he needs to go off to detox himself, maybe a youth detox place, or something more long term stable suitable for him can be found, but if he continues living in a place that is unsuitable it might be that all of the other thing is that people are setting up for him aren't ready to make any meaningful difference in his life because his immediate environment is people who are themselves caught up in their own battles, internal battles. So much of it is about services to bring about long term change but also about that person within, whether they are able to take up those opportunities or not. And sometimes it takes longer with someone and that's two steps forward one step back and then eventually ... (Defence 13).

These comments demonstrate that the issue of housing is a prominent and urgent issue that affects the way bail support services provide therapeutic alternatives to remand imprisonment for vulnerable people. This research indicates that the impact of some services is reduced because of the housing crisis. This problem has effects beyond simply addressing immediate housing concerns for vulnerable people seeking bail. This discussion demonstrates that the lack of appropriate housing options may reduce a person's likelihood of successfully applying for bail, put them at risk of failing to meet bail conditions, or even at risk of harm in less salubrious housing options. From a long term perspective, this can further marginalise and criminalise vulnerable people. This compounds structural inequality and may result in disadvantaged people becoming more vulnerable (Irwin, 1985; Scraton, 2007; Scraton and Chadwick 1991). Given that the criminal justice system places responsibility for reducing risk on individuals, the fact that this chronic lack of resources and limited access to service provision further affects the structural inequality experienced by vulnerable people,

means that the system itself is making it more difficult for people to address their needs. This is of grave concern.

#### 8.2.4 Children

When discussing access to service provision and resources pre-trial, several research participants referred to issues that particularly affected children and young people. Defence 6's following comment implies that young people in some areas were not given realistic bail options; this resulted in their being remanded. This demonstrates that pre-trial service provision may be used appropriately and as such, does not always provide viable alternatives to remand imprisonment for vulnerable cohorts of young people:

More recently our biggest problem in [regional town] was with kids. Police giving them unrealistic bail conditions in terms of not associating with co-offenders and not being out after certain hours and then they would revoke the bail very quickly and easily and of course it would go before the magistrate and the magistrate would give them even more onerous bail conditions which they had no hope of complying with (Defence 6).

This following comment provides an example of how disparity in services can result in different levels of justice for children in different regions:

Sometimes, for example, in Children's Court where the ROPES Programme [a youth diversion programme where the young person and the officer who charged them team up to climb ropes as part of a physical challenge (Victoria Police, 2007)] isn't available. So they can avoid having any type of record at all, so you are in an absurd situation where an adult can get diversion for an offence, but if the co-accused is a child they can't get diversion. I did actually have that situation in Warrnambool where the adult co-offenders got diversion and the child who would previously have one caution, they wouldn't caution him, there was no diversion available, so he was the one with a record and he was under 18. It was absurd (Defence 2).

In this particular situation, the participant is talking about a juvenile diversion programme (ROPEs), rather than a pre-trial support programme. The lack of diversion options for young people mean that more young people face possible remand imprisonment as they go through the court process, rather than being diverted away from the bail/remand process.

Further, interview participants provided evidence of the remanding of homeless young people solely because of a lack of housing options. This confirms issues raised by Borowski (2013) and Richards and Renshaw (2013), that young people are being remanded because they are unable to access housing. As such, remand imprisonment is not being used as a last resort:

Housing issues are an absolute nightmare particularly for young people because they have been on the waiting list long enough. Sometimes they will get temporary housing. But even that could be really miserable for them. Or they will get told there is housing but it is in Morwell, or far from the city. It's really, really difficult. The only thing that is probably a step up from being homeless is being in a boarding house, and boarding houses are really not ideal. It's a really big issue (Defence 15).

This following comment also highlights some of the housing issues for young people in State care:

There are some alternatives through the DHS with support placement but for many of my clients they are not appropriate when you meet someone who is on remand where the court is considering refusing bail precisely because they have persistently assaulted workers in DHS contracted agencies you become aware that some people there is a need for a different level of support or care and we just simply don't provide those services in Victoria any more (Defence 3).

While children and young people and bail support were not a specific focus of this research, the comments discussed in this section demonstrate this is a significant issue of concern and warrants further research, particularly with relation to children in State care.



### 8.2.5 Transport

Another issue raised, highlighting problems some people experience while trying to access pre-trial support services, was the inability of some people to travel to services, particularly in regional areas. Defence 1's comment speaks to this issue:

clients who often are older males who live in isolated areas, they are farmers, they are mildly illiterate, so that their reading skills are quite low and their contact with social networks and the community at large is very limited. Acknowledging they might have an alcohol problem, for one, is quite significant. Secondly, to actually attend appointments that would address those problems is again another big problem as well. So in part it is down to what the client group can actually manage in many ways ... but to get someone to drive down from Mallacoota on a regular basis to attend an anger management class when he thinks he probably doesn't have a problem is quite difficult (Defence 1—Regional).

What is evident from this comment is that, notwithstanding whether or not a person has the inclination and ability to access private travel to services, the fact that large distances need to be covered by people accessing these services means they are experienced as more onerous than those who have more ready access, because of their location. In the ensuing discussion this research participant also notes that driving offences are a significant in her particular regional area:

Researcher—Do you also find that people in regional areas have more difficulty getting around? Sometimes their offences of driving related?

Defence 1 (Regional)—I would say in terms of the ongoing minor offences, that would be our biggest category, driving offences.

This means that some people, who may have had access to private travel, have lost access to it because of their interactions with the criminal justice system. However, this research shows that many people have no other means of transport after their licences

are disqualified and as a result, they continue to drive illegally. This comment by Judiciary 5 draws attention to this issue:

So they breach bail conditions repeatedly, they commit offences like driving while suspended because they can't work out how else to get about (Judiciary 5—Suburban).

For those who are not able to use private transport, most regional places had limited access to public transport. This made it impossible for some people to access services. This discussion with Defence 6 illustrates this issue:

Researcher—What if they have to go to court is in one area and they live in another area and there is no public transport?

Defence 6—Or there is only one bus a day, it gets in at 10 o'clock in the morning and leaves again 11 [in the morning].

Researcher—Many clients would be unable to have private transport?

Defence 6—Some particularly if they've lost their licence

Some more specialised services that are used as bail conditions, such as sex offender programmes, are only available in Melbourne. The following story from Defence 2 provides evidence of transport's effect on vulnerable peoples' ability to access justice through court ordered treatment. This example concerns a pensioner with a history of alcohol use and no access to private transport who was convicted of indecent assault:

The huge concern of mine is ... if the magistrate wants to give them some type of [sex offender] services they have to get from Warrnambool or Portland to Melbourne once a week. And the odds on people breaching those type of orders I would guess be 90 per cent... in terms of the cost for someone on a pension to get to and from Melbourne would be enormous ... and the likelihood of him committing a further offence is higher because he is not getting any services. So you have both a better chance of him going back to jail and a greater chance for the community for him to re-offend because the services aren't available. It is the same here to a lesser degree, you are still getting 115 km each way to Melbourne, the train is a lot quicker obviously from here but it is still a 20 dollar return ticket that people just can't afford. And the

people in other towns have to get into Ballarat and they don't have a licence so they drive unlicensed and then they are committing an offence (Defence 2).

This discussion highlights the difficulties some people encounter, particularly in more remote regions, to access pre-trial support programmes and/or comply with onerous bail conditions because of the impracticalities of travelling over long distances to access services. Although this observation is based on a several comments from a few regionally based participants, the empirical evidence discussed in this section does raise questions on the feasibility of access to services in places where people experience difficulty in travelling. This issue also warrants further investigation.

### **8.3 Location Specific Issues: A Case Study**

So far, this chapter has looked at the ability of vulnerable people to access justice through pre-trial support as a means to divert them from remand imprisonment, primarily through therapeutic bail conditions. The findings discussed in this chapter indicate that location has an effect on the viability and efficacy of these services in assisting people to access justice. The level of access to services is experienced differently in different areas. In particular, some specific issues have been highlighted as area-specific. This demonstrates that understanding the implementation and effect of pre-trial support services needs to be broadly understood, alongside the intricacies of location specific issues, to see the overall picture. During the interviews it became apparent that one particular location was experiencing a constellation of issues that severely impeded its ability to provide adequate access to pre-trial services for vulnerable people.

One benefit that arose from interviewing participants from different regions within the state of Victoria was that upon analysis of the data it became possible to see how the impact of a programme may differ depending on the attitudes of key players in the process. Some of the criticisms applied to therapeutic jurisprudence relate to its capacity to become anti-therapeutic in terms of its effects on the very people it aims to

assist, because there is an imbalance in the level of risk management used in the process (Freiberg and Morgan, 2004; Patrick, 2006; Slobogin, 1995). Practices at a particular suburban Magistrates' Court demonstrate how readily therapeutic measures can succumb to the dangers highlighted by the critique of therapeutic jurisprudence initiatives. Three participants interviewed about bail support at this location raised concerns with some current practices in the bail support process. This section examines this particular suburban Magistrates' Court as a mini case study into location specific understandings of pre-trial support options.

The participants noted, in line with what participants from other areas had found, that the court support programmes were under-resourced and had limited capacity to complete assessments. The resourcing issue has already been discussed at length in this chapter; however, it is particularly relevant to this example because of the way the research participants noted pre-trial support service staff had dealt with the chronic shortage of resources. While the resourcing issue was present in all areas of the state, this was the only area that appeared to have instituted unofficial 'policies' that effectively rendered the process anti-therapeutic, potentially violating the basic principles of due process. It had become common practice that an assessment for a place on the bail support programme offered at this particular Magistrates' Court could only be done if it had been ordered by a magistrate. As Defence 18 commented:

I think the court has become a bit hung up on having services in place and rather than having an application run and CISP being a bonus on top of whatever the situation otherwise would be, some magistrates are seen as 'I'm not going to let you out without CISP'.

This indicates that magistrates at this location had become dependent on services and were reluctant to grant bail without placing a defendant on a programme. She went on to say:

I don't know how they do it in other courts, but you know if I was at another court without CISP there, would I think every bail application is hopeless? Because, you know we don't have those immediate supports in place [here] (Defence 18).

This demonstrates that not only does the defence lawyer believe that magistrates are overly reliant on bail support programmes, but that she herself has become dependent on them in her role. She raises an important point for comparison here, noting that as CISP is only available at three locations in the state, currently bail is not granted without CISP being in place. If this ‘policy’ was practiced elsewhere, in places that did not have ready access to support services, then many bail applications would be refused for lack of services.

Defence 18 also felt that clients, who previously may have been released on bail without the need to go through a bail support programme, were now being remanded because they were unable to get an assessment. A key reason mooted by the participants for some of these problematic practices was the need for the programme to appear successful to continue receiving funding. Therefore, the programme manager in this area had become risk averse and refused to take on any defendants who might not succeed in the programme. These participants gave examples where people who were low risk, and potentially did not need the services provided by the court, were put on the programme, but those who were high needs and at risk were deemed ineligible by the court support manager and were remanded. Defence 20 confirmed he had arranged for defendants to be placed on the bail support programme when he was well aware his client did not need any of the services provided. He did so knowing it was the only avenue for his client to be granted bail. Given the previous discussion in Chapter Seven regarding treatment efficacy, it was generally understood by practitioners in the field that people undergoing treatment did not necessarily succeed on their first, or even second, attempt. This was also recognised by legal practitioners at this location, as Defence 20 noted ‘it sometimes is going to take a while to get off drugs and take a while to engage, they need some flexibility’. The intolerant attitude of the bail support programme manager at this location towards the risk of non-compliance by applications to the programme is in stark contrast to the experience of practitioners at other locations. This is clearly evident from this comment by Defence 14, based at an inner city location:

It's very rare that an offender will be exited from CISP due to non-compliance. It's normally due to re-offending. And there is a level of tolerance with CISP as well. It's not 100 per cent, ten out of ten or you are out. There is a level of tolerance for not going to some appointments. I don't think I've seen an arrangement when it has been every day. And they are mindful. Again, the CISP workers are experienced and they are mindful of those types of issues (Defence 14).

This lack of tolerance for non-compliance and lack of understanding of the treatment process at this location gives currency to some major criticisms of therapeutic interventions. They can impose unnecessary compliance and control measures on people while also leading to neglect through labelling and management of vulnerable people as high needs. This example goes to the heart of the problems with implementing therapeutic measures through bail support. It reveals the inability of bail support programmes to address the structural and systemic factors underpinning the chaotic, destabilising, and ongoing conditions that lead to continued criminalisation of marginalised people in the criminal justice system.

Defence 19 believed that due process was being circumnavigated, as he had witnessed several incidents where the case manager for the bail support programme was conducting meetings where a defendant's progress on the programme was discussed with magistrates in their chambers, rather than in an open courtroom. The participant was concerned about this practice, stating:

I don't think it is comforting to think that people with that attitude can have talks to a magistrate in charge. It just gives rise to the inference that accused people are being disadvantaged without any opportunity. Gainsaying anything that is said about them (Defence 19).

This provides an example of the propensity for these sorts of interventions to devolve into backroom bargaining for bail, rather than open court hearings. This sort of practice has elements of the secret deals highlighted by Flynn's (2009a, 2009b) research into plea and charge bargaining. It also brings to mind the example raised by

Popovic (2006) that was discussed in Chapter Four, where the magistrate spoke privately with a health practitioner about the defendant's health and made a decision on evidence not mooted in a court hearing. While it is beyond the scope of this research to debate the validity of these decisions, the fact that other research has questioned these sorts of practices at different stages of the court process (Flynn 2009a, 2009b), and that it links to some key criticisms of therapeutic initiatives, means that this issue should be subject to further scrutiny and research.

Defence 20, who had experience working at several different Magistrates' Courts also felt that programmes had morphed into less positive incarnations, because of the increasing bureaucratic pressure 'now having been through it being a really positive program and now it's becoming too bureaucratic'. This particular suburban Magistrates' Court presents an important case study, demonstrating many pitfalls of therapeutic jurisprudence initiatives. Participants from this area believed that the bail support programme manager was cherry picking clients who would be successful candidates. This meant that the people accepted into the programme probably did not need the additional support interventions provided by pre-trial services. It also meant that the programme excluded people who would have benefitted from access to these services. The participants believed this stemmed from a concern by the bail support programme manager about the need for positive evaluations, cost-benefit analyses and funding boosts. In this instance, it appears that the manager was tailoring applicants to the programme to make it look successful, thereby defeating the therapeutic objectives of the programme and rendering it anti-therapeutic.

This case study also serves as an example of the effect of risk management practices on therapeutic programmes, particularly in reinforcing circuits of exclusion (Rose, 2000a). The reduction in funding to services and outsourcing to the community has an effect on the way programmes operate to ensure they are adequately funded. This research has already demonstrated a state of underfunding and under resourcing exists that negatively affects the efficacy of therapeutic intervention. The interviews indicate that the fear of funding reduction, based on evaluative and actuarial approaches to implementing therapeutic interventions, may affect management of these sorts of

intervention programmes, further restricting their efficacy. As such, another key factor to account for when looking at the implementation and efficacy of therapeutic interventions, is the financial stress on running the programmes and how key personnel react to this stress. Different reactions to financial stress and resource pressure can result in disparate application of services from place to place, meaning that some people may be further disadvantaged at some locations. As discussed in Chapter Five, it would have been desirable to hear the opinions of the people working at the coal face of these issues, the programme managers and case workers themselves; however, as discussed, interviewing this cohort was not possible. While the interview data did indicate that participants perceived location to be central in determining the practices and experiences of therapeutic bail, future research that combines both quantitative and qualitative methods in this area would undoubtedly shed additional light on location specific disparities.

## **8.4 Conclusion**

This chapter has examined the ability of vulnerable people to access justice, through the provision of pre-trial bail support services in the form of therapeutic interventions. The empirical evidence presented here showed that many services experienced chronic underfunding and under resourcing that effectively negated the positive effects of pre-trial support. Prior research has indicated that people in rural communities are increasingly disadvantaged by the phenomena of ‘postcode justice’ (Coverdale, 2011), where the ability to access justice is dependent on the area in which a person lives. This research has demonstrated that while the ability to access services offered through the courts and by non-government organisations is significantly limited outside metropolitan areas, this does not mean that access to services can be understood through a simple rural/urban binary. It is clear that there are less extant services in rural areas; where services do exist, the limited options available can impede access; but disadvantage also exists in the city and its surrounds. Although there are more options available to people in urban areas, greater demand and stretched resources mean that many people nevertheless experience longer waiting periods. The effect of disparate resources in a rural context means that some people do not have access to



the same levels of service provision as others. The effect of this is to further compound the disadvantages experienced by marginalised people in areas with less service provision. It also highlights that regions with a high volume of people going through the system may be disadvantaged by delays and limits on resources, no matter the breadth of service provision on offer. These disadvantages may be experienced punitively by people through reduced access to bail, again providing an example of the extension of penal power to bail and remand practices.

The analysis presented in this chapter also draws attention to some specific areas that warrant further scrutiny, such as the role of the lawyer in therapeutic interventions, homelessness, children and transport. These will be canvassed in the next and final chapter. The overarching finding from this chapter's analysis is that examining location specific issues, rather than generic understandings of the programmes themselves, is needed to gain further insight into the successes and pitfalls of therapeutic interventions. The example of the suburban court operating distinct from other areas to address its resourcing issues shows what can happen when initiatives such as pre-trial therapeutic bail support are not properly implemented. The risk management rhetoric that dominates the implementation of funded programmes means that programme managers and staff are tied to the evaluative framework of cost-benefit analysis, tangible evidence of success and fear of losing limited resources, with possible punitive and net-widening effects. As discussed in this, and the previous two analysis chapters, this ignores the underlying issues of structural inequality vulnerable people experience that cannot be adequately addressed through these individualistic, evaluative, actuarial based approaches.

## Chapter 9: Conclusion

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*The negative is easier than the positive, but the positive is more important (Maruna, 2011: 664).*

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*In some ways it's almost too late once people have hit the criminal justice system because their problems have gotten so bad and so out of control they are already offending. It would be better of things kicked in beforehand (Defence 7).*

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This thesis has examined the implementation and impact of therapeutic bail conditions in Victoria. These conditions are realised through the provision of bail support services offered through the Magistrates' Court of Victoria. Scholars have already noted the dearth of research into all aspects of bail; this paucity is particularly apparent in the area of therapeutic bail and bail support services. Extant studies either do not focus on therapeutic aspects of bail, or are limited to quantitative, evaluative research focused on assessing agency and programme performance indicators rather than examining how people experience such practices on the ground. This leaves a handful of overseas studies, which do focus on this area and are theoretically grounded, that currently contribute to this debate. This research addresses this significant gap in empirical research into therapeutic bail practices, particularly in an Australian context. This research has questioned how the principles of therapeutic jurisprudence have been employed through bail support to better understand the implementation and impact of therapeutic bail in Victoria, and whether it contributes to upholding the principle of remand imprisonment as a last resort.

This thesis has answered these questions by first examining how the framework of therapeutic jurisprudence shaped the development of bail support through a critical

analysis of extant literature on therapeutic jurisprudence and bail support services. Second, it has critically analysed research data, collected via court observations and interviews, to understand how therapeutic jurisprudence has been implemented into bail support services in Victoria. Last, it has also analysed this data to illuminate the effect of therapeutic bail support services on people, in particular vulnerable people, the criminal justice system and the wider community.

This thesis has drawn upon data collected from court observations and participant interviews. The interview participant cohort comprised defence counsel, judiciary, bail justices, a justice associate and a service provider. The research had originally intended to interview an additional cohort of participants from the Magistrates' Court bail support programmes; however, it eventuated that it was not possible to collect data from this cohort.

This thesis has three significant findings. First, this research has demonstrated how risk is embedded into bail practices and the pervasiveness of imposing individual responsabilisation on vulnerable people in the criminal justice system. Therapeutic bail conditions aim to address social and health needs of vulnerable people by focusing on their individual risk, ignoring structural factors that are beyond an individual's control. The language of high needs and chaos are used to legitimise control over people with multiple markers of vulnerability. Second, this research found that the practice of therapeutic bail represented an extension of penal power to bail and remand practices under the guise of beneficence. These punitive practices negatively affect vulnerable people. They are potentially net-widening. As such, these practices inhibit the ability of therapeutic bail conditions to uphold the principle of remand imprisonment as a last resort. Third, this research has synthesised existing knowledge on the effect of poor resourcing on programme efficacy and operation. While evidence already suggested that bail support programmes operated problematically due to limited resourcing (Coverdale, 2011), this research examined this issue more deeply and concluded that resourcing issues were better understood by taking a location specific approach to service provision.

This thesis also found that bail support programmes were very popular with people directly involved in the bail process. While much of the discussion of this thesis focuses on the problems identified through data analysis, it is important to remember this support for therapeutic bail initiatives by the research participants. Whilst problems were identified by them as part of this research, there were also positive experiences recounted. These positive comments demonstrate the ability of these initiatives to have a positive effect on individuals and the community. The popularity of these programmes, as demonstrated through this research shows that since early incarnations of bail support programmes, attitudes to therapeutic alternatives have improved (Doherty and East, 1985). It also confirmed prior research demonstrating that Victorian programmes have enjoyed a higher level of support than other jurisdictions (Sarre et al., 2003). Given this underlying support from key players, it is possible that programmes of this nature may continue to expand in the state of Victoria, depending on budgetary constraints and political priorities. As such, the findings of this thesis are crucial to understanding how programme expansion will affect individuals and the community. The popularity of therapeutic bail is also important to note when examining the broad scope of Victoria's bail support system, when conducting trans-jurisdictional comparisons. The findings of this thesis represent a significant contribution to academic research on therapeutic alternatives in the courtroom. It also paves the way for future research into therapeutic bail practices.

## **9.1 Bail Practices and Risk**

There is growing evidence that bail decisions are increasingly about a person's risk of re-offending, rather than flight risk (Edney, 2007). The fact that bail support programmes include reducing re-offending in their aims further supports this shift. This research has provided empirical evidence that therapeutic bail practices, rather than being an alternative to a risk-based approach to the granting of bail, are actually intrinsically linked to risk paradigms in their use of risk management techniques. The embedded nature of risk in bail practices was particularly evident in the court observation data. The observation data provided many examples of magistrates' reasoning for the denial of bail being reduced to the potential prospect of committing

offences while on bail. This, coupled with evidence indicating a high frequency in which risk of offending on bail was present in bail hearings, demonstrated the significant relationship between risk and bail.

This focus on potential offending should be regarded with unease. Recent moves by the current State Government towards more emphasis on law and order based policies indicate that the risk of re-offending will continue to be a key focus of bail decisions. Proposals made by the government, and recent changes in legislation, signal a political climate that is intolerant of breaching bail and ultimately favours using remand imprisonment to control people in the criminal justice system. This environment is concerning, given that many people affected by a reduction in the ability to access bail, or more punitive responses to bail breaches, are some of the most vulnerable people in the state. While the rhetoric behind these movements to more controlling, punitive practices in the criminal justice system is fuelled by fear of crime (Hogg and Brown, 1998) and grounded in the image of serial, violent offenders roaming freely in the community on bail<sup>20</sup>, the reality is starkly different. Many people breaching bail and offending on bail are vulnerable people committing low level, repeat offending. These changes in legislation and proposals to reduce bail options even further are aimed at serial, violent offenders (the Adrian Earnest Bayleys of the criminal justice system), but many people who will be affected by this are not serious, violent criminals. They are some of the most marginalised and disadvantaged people in the community, including women, Indigenous people and homeless people (VACRO 2006; Boyle 2009; Denning-Cotter 2008; Player 2007). These changes will further marginalise vulnerable people. The findings of this research indicate that these changes may be inappropriate.

## **9.2 Effect of Risk and Needs on Therapeutic Bail**

The discourses of risk and needs have a significant effect on the operation of therapeutic bail in Victoria. Risk and needs, and the conflation of the two, highlight

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<sup>20</sup> For example, the recent high profile case of Adrian Earnest Bayley has raised questions about parole and bail in the state. A detailed discussion of this case is beyond the scope of this research but it does provide fuel for the response of the criminal justice system to breaches of bail and offending on bail.

tensions between the traditional, adversarial criminal justice system and the therapeutic model. The embedded nature of individual responsabilisation in therapeutic bail practices assumes vulnerable people have choice. It ignores structural inequalities and ultimately questions the place of therapy in the criminal justice system. The measuring of success in therapeutic bail through recidivism rates and the focus of reduced re-offending, competes with the aim of ameliorating the social and health needs of vulnerable people. This thesis has found that these competing aims result in the prioritisation of some needs above others. This means that some people's needs are not being met through the criminal justice system because their needs do not correlate with measures linked to reducing re-offending. Yet other needs are being used to control people through risk management techniques. This may be the result of a pragmatic response to resourcing issues and the complex nature of presenting issues. This supports Fraser's (1989) assertion that addressing vulnerability through the criminal justice system results in a hierarchy of needs. By focusing on responsabilising people to redress what are essentially structural forms of injustice through therapeutic behavioural programmes, these practices may set people up to fail. Yet the individual responsabilisation approach holds individuals responsible for their failure. This is concerning when there are punitive consequences to failure, as people may be punished for situations outside their control. Arguments made by scholars such as Ward and Brown (2003)(Good Lives Model), Pollack (2005)(feminist mental health approaches), and Hannah-Moffat (2005)(transformative risk subject) in the correctional setting demonstrate the need for rehabilitative/therapeutic approaches to go beyond the focus on individual risk management and responsabilisation. Instead systemic responses should look to ways forward in securing long term improvement in quality of life for vulnerable offenders. This may address some of the structural issues that compound criminal justice issues.

This thesis found that the tensions created in the criminal justice system, by placing a therapeutic imperative within an adversarial punitive context, can result in anti-therapeutic experiences for some vulnerable people. To be truly therapeutic, these interventions should take place outside the criminal justice system. This research points to a need for early intervention outside the criminal justice system, where punitive practices are not used in tandem with therapeutic endeavours and net-

widening is not a consequence of treatment failure. This requires better communication and resourcing in mental health and education sectors, rather than responding through the justice system. It requires a 'whole of system' approach to addressing the needs of vulnerable people in the community. The lesson to be learnt here is that the essence of this idea should flow into policy decisions and service provision at all levels. It requires a cultural shift; this shift can be achieved by changing the message from one seeing vulnerability most appropriately responded to via the criminal justice system, to a response from outside the criminal justice system.

### **9.3 Extending Penal Power**

Hannah-Moffat and Lynch (2012) and Gray (2013) challenge the traditional notion of punishment. They argue that penal power has extended beyond its narrowly understood conception. Punitive practices now occur in areas not usually connected with punishment, such as bail and remand. This research has also challenged traditional assemblages of penology. It argues that punishment is not a static concept. Penal power is evident in bail courts and bail practices, particularly through the pre-emptive use of remand and pre-trial punishment. This research has generated empirical evidence of using remand imprisonment as pre-emptive punishment. Therapeutic bail conditions are often onerous and experienced punitively by people. Setting people up to fail through onerous and inappropriate conditions results in people being diverted into remand imprisonment via therapeutic bail, rather than being diverted away from it. This means that therapeutic conditional bail can have a net-widening effect. This research has also demonstrated that the people most affected by these punitive practices are those with multiple markers of vulnerability. These practices see vulnerability being punished through bail practices. At this point in the criminal justice process, people are not guilty, yet punitive practices are applied in the name of therapy. This challenges two cornerstones of the criminal justice system: innocence before being proven guilty, and imprisonment as a last resort.

This research has contemporised Irwin's (1985) work on disadvantaged populations in jails. It found that vulnerable people are still controlled through bail practices, as well as through carceral techniques. Onerous and punitive bail practices may not be the same as physical incarceration, but they can be seen as a form of 'doing time on the outside'; as such, they have a trans-carceral effect (Maidment, 2006).

#### **9.4 Importance of Location**

Under resourcing, under-staffing and unmet demands for service provision were highlighted by the research participants as significant impediments to effective running of bail support programmes. Given that these programmes are targeted at improving bail options for vulnerable people, an extant lack of services, or an inability to access services, impeded people's ability to access bail. As remand imprisonment has been demonstrated to further marginalise people and negatively affect their case disposition, this means that restricted access to bail through a lack of services leads to vulnerable people having less access to justice. This again demonstrates a net-widening affect through bail practices that contravenes key tenets of the criminal justice system: the importance of innocence before guilt is proven, and the use of punishment outside its traditional assemblages.

Prior research by Coverdale (2011) indicated that people in regional areas suffered disproportionately from a lack of service provision compared to their urban counterparts. This research found that while some rural areas have significantly less extant services than urban areas, when scrutinised more comprehensively, service provision cannot be understood solely through a rural/urban divide. Urban areas, while having more services in terms of numbers, also often experienced greater delays and demand than other areas. Some regional areas actually experienced more access to a broader, more comprehensive range of services than inner city areas traditionally associated with high level service provision. Other areas experiencing problems with access to services needed more than just the addition of services. These included, for example, transport access to existing services, or additional options to reduce the



chance of service refusal, based on discriminatory practices by monopoly services in regional areas. As these situations were often location specific and complex, this research found that greater understanding of location specific issues was needed if service provision was to improve in a meaningful way.

### **9.5 Limitations and Future Directions: A New Hope**

The research methodology for this study was limited in the types of people who agreed to be research participants. The study did not approach the police or prosecution for their opinions. While indications of their opinions were garnered through the research data, including court observations, these were second hand accounts and were based on the opinions of the research participants. It would be interesting to conduct research that more fully included the voices of these people. One particular area of interest would be to examine police decisions to charge on summons rather than on bail. This type of research would take a chronological step backwards in the bail process. It would examine why people were placed in a position where they had to apply for bail. This could provide an understanding of whether or not the applications for bail were increasing because of police decision making.

Another limitation of the study was the inability to speak with bail support case workers about their experiences. While this research project collected rich data, it would have benefitted from these missing voices. Programme participants were also excluded from this research. Their voices are important, and if the possibility of conducting future research including the voices of court support workers and their clients arose, then the opportunity to hear these people should be taken up enthusiastically.

These limitations highlight opportunities for future research. While this research has so far identified persistent, inherent negatives that demonstrate the problematic nature of implementing a therapeutic model to an adversarial system, and the ramifications of

these therapeutic conditions on vulnerable groups, it has also identified areas that warrant further research. These areas signal potential ways of ameliorating some potential harms resulting from using therapeutic bail; namely, punitive consequences, onerous conditions, setting people up to fail and focusing on individual responsabilisation rather than structural inequality. While comprehensive shifts in the way justice is achieved in the criminal justice system should occur to reduce structural inequality, this task is significant. This research has identified several avenues that offer potential to address issues raised by the research. Upon further scrutiny, these potential pathways may provide a way forward in providing better options for vulnerable people going through the criminal justice system, particularly at the bail and remand stage of the process.

The first and most significant area that should be subject to future research is the extension of penal power into non-traditional areas. Hannah-Moffat and Lynch (2012) argue that penal scholars have, to date, been too limited in their understanding of penal power. This research found that using therapeutic bail conditions could be punitive. Therapeutic initiatives, while intended to provide support, can be experienced punitively as onerous forms of control. Further research should examine other potential examples of penal power in non-traditional settings, for example the use of immigration detention, or mental health institutions. Penology scholars should conduct future research using fieldwork staged outside prison settings. There needs to be a departure from macro-sociological analysis to empirically grounded studies that document on the ground practices in action.

The analysis in Chapter Eight also illuminated several areas of that were only briefly touched upon. These included the effect of limited bail options on children in the criminal justice system, particularly those who were also caught up in the child protection system. Also noted was the inability of geographically isolated people to access an equal level of justice to those less isolated, through access to services based on proximity and transport options. This research has also demonstrated that the role of the defence lawyer is changing dramatically, where lawyers are taking on more of a social worker role. Further research on the divergence of legal defence work towards

social work is imperative to understanding the ramifications of this changing role in the legal environment. This is particularly pertinent in light of Cannon's (2007) assertion that people need to be taught how to be therapeutic in their interactions with therapeutic initiatives. The key finding from Chapter Eight was that understanding specific location based issues was more important than generic understandings of therapeutic bail. Drilling down into the details of why programmes appear to operate better at one location than another has potential to yield important, fruitful information, further improving access to justice through therapeutic programmes.

This scope for location specific research potentially indicates an opening up of this area to research in the burgeoning new area of justice reinvestment. The phenomena of justice reinvestment emerged as a response to the law and order rhetoric that has dominated criminal justice policy over the last few decades. It was first defined by Tucker and Cadora in 2003. The principle of justice reinvestment is that, rather than investing money in costly, ineffective prison systems, governments should reduce spending on incarceration and reinvest that money back into impoverished, disadvantaged communities (Brown, 2010; Brown et al., 2012). This concept speaks to the idea of early intervention, where people with high needs are provided with services to prevent contact or interventions with the criminal justice system. Currently, many people do not interact with services until after they reach the criminal justice system (Hamilton, 2010). This thesis has demonstrated that service provision and therapeutic interventions from within the criminal justice system are fraught with unintended, and intended, negative consequences. As such, this thesis concludes that ideally, people experiencing complex, multiple needs should be linked with services and assistance outside the criminal justice system. Such services should aim to reduce structural inequality without placing onerous and punitive conditions on people. As identified in the research, while bail support programmes and conditions aim to be therapeutic, because they are instituted via the criminal justice system, the extant tensions between these two paradigms—of therapy applied within a legal system based on adversarial principles and approaches can translate into anti-therapeutic effects for vulnerable groups. The marriage of community based therapeutic programmes with justice reinvestment outside the criminal justice system has the potential to realise the therapeutic intent without being punitive; although naturally this would no longer be

jurisprudence if applied outside the criminal justice system. However, it does provide a pathway for what Maruna (2011: 66) describes as ‘the translation of beautiful ideas into workable policy’. As justice reinvestment is in its infancy, a substantive body of research does not yet exist in this area. Criticisms and limitations have been identified (Brown, 2010; Clear, 2011; Maruna, 2011); yet the optimism inherent in this approach means it is worthy of consideration as a potential future research pathway.

This thesis has made some significant findings, contributing to academic knowledge of therapeutic bail conditions and bail support services. These services have been analysed by drawing on therapeutic jurisprudence and the legal framework that guides these practices. Therapeutic jurisprudence aims to do no harm (Wexler, 1990). This research argues that harm is being done to vulnerable people who experience negative consequences as a result of punitive, controlling bail practices. Through its individualistic focus and limited access to justice for vulnerable people, therapeutic bail does not address structural and systemic issues. As such, these practices are anti-therapeutic. Therefore, current therapeutic jurisprudence ‘solutions’ to rising remand rates and increasing use of bail are relegated to band aid solutions with potential net-widening and trans-carceral effects.

These findings are not necessarily fatal to the operation of therapeutic bail and related bail support programmes; particularly in light of the significant support from the legal community and other key players in the bail process. Therapeutic jurisprudence has significant potential to ‘do good’, but placed within an existing, adversarial system it is weighed with tensions and pre-existing issues. Historically, therapeutic interventions have been introduced to ‘help’ people but in practice in some cases they have actually had unfair and unjust outcomes for some vulnerable people, for example, the application of indeterminate sentences on young people (McCoy, 2003). As this research has demonstrated, while well-intentioned, therapeutic bail may also potentially have negative implications. Given this, it is important to raise awareness about these potentials in order to reduce experiences of injustice through the application of therapeutic interventions. There needs to be a focus on preventative care outside the criminal justice system. When these types of solutions are implemented in the criminal justice system it is important to note they hinder success.

Ultimately, systemic change of the wider system is needed. Until then, it is important to keep these tensions and criticisms in mind. Shifting embedded cultural understandings of responses to vulnerability from the criminal justice system to more appropriate arenas is the key to addressing the issues raised in this research.

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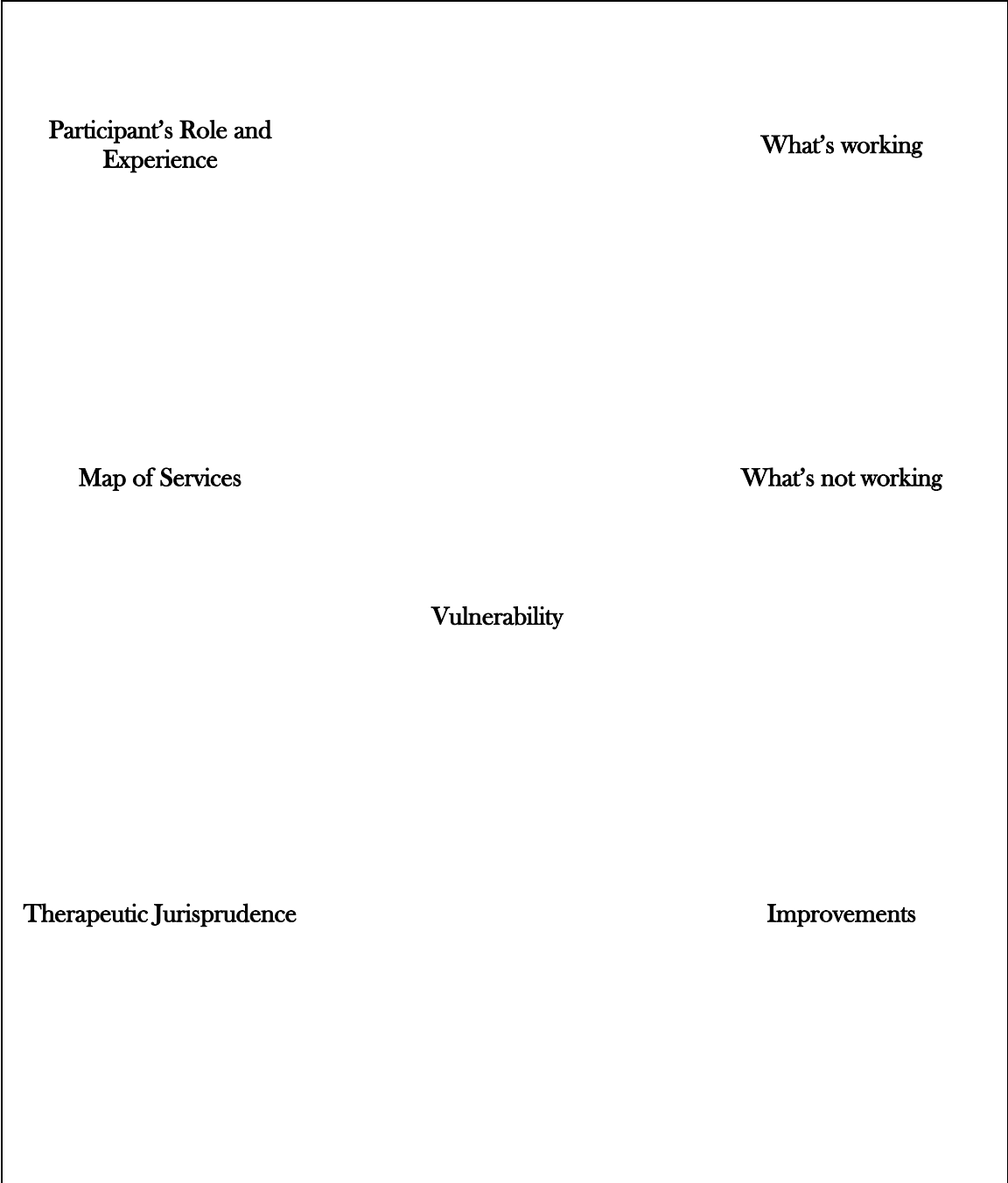
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Appendices

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Appendix A: Interview Tool



## Appendix B: Letter from Magistrates' Court



### Magistrates' Court of Victoria

Specialist Courts and Court Support Services

Level 5, 6435 Lonsdale Street  
Melbourne Victoria 3000  
GPO Box 8826  
Melbourne Victoria 3001  
DX 55070 Melbourne  
Telephone: (03) 9635 3311  
Facsimile: (03) 9603 9044

– 5 APR 2012

Emma Colvin  
Monash University  
School of Political and Social Inquiry  
Faculty of Arts  
Wellington Road Clayton VIC 3800

Dear Ms Colvin

**RESEARCH PROJECT – BALANCING COMMUNITY SAFETY AND INDIVIDUAL LIBERTY:  
HOW BAIL SUPPORT SERVICES CAN REDUCE THE NEED TO REMAND A DEFENDANT  
IN CUSTODY**

I refer to your proposed research project *Balancing community safety and individual liberty: How bail support services can reduce the need to remand a person in custody*. I note the contents of the explanatory statement and the Monash University human ethics certificate of approval dated 4 August 2011 you have provided.

Given the qualitative nature of the research and the status of the Court's therapeutic programs, in principle support for this research can only be provided subject to appropriate confidentiality agreements and limited embargo provisions with respect to publication of the whole or parts of the final thesis.

The Court would require you to enter into a confidentiality agreement not to disclose information provided to you by court staff without the express written approval of the Chief Executive Officer and would reserve the right to apply a 3 year embargo on publication of the thesis subject to our consideration of its contents. I understand that university policy provides for such arrangements.

Subject to your agreement with these conditions, the Court provides in principle support for the research proposal and commends it to the Justice Human Research Ethics Committee. Upon approval, the Court will facilitate the research project and will make relevant staff available to participate in accordance with the project summary.

Your primary point of contact will be Glenn Rutter, Manager Court Support & Diversion Services. Mr Rutter can be contacted on 03 96039362.

Yours sincerely

**SIMON McDONALD**  
Manager, Specialist Courts & Court Support Services