



## Police and Vulnerability in Bail Decisions

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### Abstract

Since bail legislation was enacted in the 1970s, Australia has experienced a continual increase in the number of prisoners on remand. Amendments to bail legislation and police discretion have been shown to contribute to this increase. Further, an accused's vulnerability affects whether they are granted or denied bail, with vulnerable people being more likely to be denied bail. Vulnerability in the criminal justice system refers to factors such as race, age, sex and socioeconomic status. Many vulnerable people have multiple intersecting vulnerabilities, which further compounds their contact with the justice system. This study employed a qualitative content analysis of bail legislation for the Australian states of New South Wales (NSW), Tasmania, and Victoria, along with key correlating second reading speeches. The aim was to better understand the way in which bail decision-makers, such as police, consider vulnerability when making decisions about bail, in particular, if and how they are legislated to consider factors relating to vulnerability. The research found that only police in NSW and Victoria were required to consider an accused's vulnerability explicitly under the law. Although legislation may cater for varying vulnerabilities, intersecting vulnerabilities are not considered.

### Keywords

Bail intersectionality; legislation; police decision-making; vulnerability.

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## Introduction

This article presents the key findings of some exploratory research into the way vulnerability is considered in bail legislation of three Australian states. The article starts by presenting an explanation of bail and bail processes, followed by an analysis of current literature. The methodology section outlines how we conducted the research, and our results and discussion are presented together, with each relevant state discussed separately followed by a comparative analysis and our concluding comments. This paper examines how vulnerability is considered in bail legislation and how decision-makers are required to consider vulnerability to ensure that vulnerable people are not remanded unnecessarily and to uphold the principle of imprisonment as a last resort.

The underlying goal of bail is to balance an accused's right to the presumption of innocence with the protection of alleged victims and witnesses, as well as the wider community (Steel 2009). Bail was originally used to mitigate 'flight risk' to ensure that non-detained defendants appeared at court. The altering fabric of society and changing community expectations resulted in various changes to the initial concept of bail. Bail is now further ingrained within the criminal justice system in Australia, and its grant or refusal affects an accused person's further experience within the criminal justice system (Steel 2009). Similarly, bail has been more heavily legislated, including the rolling back of presumptions in favour of bail, in other comparable jurisdictions such as New Zealand (Eckersley 2017), Canada and England (Grech 2017). In the UK, 2021 started with an announcement from the Home Office that pre-charge police bail would be reformed further to community and government consultation. This has been welcomed by a number of organisations, which saw, from a procedural justice lens, that current practice was to the detriment of victims (The Law Society 2021).

Police are the initial decision-makers on bail. Cultural attitudes towards bail within the police force affect the likelihood of an accused person being approved for bail (Sarre, King and Bamford 2006). Formal and informal rules surrounding bail practices also influence a police officer's decision to grant bail (Sarre, King and Bamford 2006). Police consider factors such as community safety, the seriousness of the offence and the prior criminal history of the defendant in their bail decision-making, but requirements to consider other pertinent factors, such as the vulnerability of a defendant, are less clear.

Vulnerability in relation to the criminal justice system refers to factors that can increase the likelihood of poorer criminal justice outcomes, such as bail refusal, because they are viewed as high risk; these factors can include race, gender, and age (Dunn, Clare and Holland 2008). Many people in the criminal justice system have either one or multiple intersecting vulnerabilities (Bartkowiak-Théron and Asquith 2012). However, research has not explored police officers' legal obligation to consider a detainee's vulnerability when deciding whether to grant bail or not. This study will illustrate the legislative obligations that police have to consider an alleged offender's vulnerability when making bail decisions.

The use of 'vulnerability' as a term has traditionally implied weakness, which makes the term potentially problematic. Despite new nuances that associate vulnerability with strength (Misztal 2011), many 'vulnerable' people and groups still do not accept the term because of the implication of weakness (Bartkowiak-Théron and Asquith 2016; Travers et al. 2020). Describing certain people and groups as 'vulnerable' can invite criticism: it may be perceived to disregard individual and group agency (Travers et al. 2020). We recognise the contentions around the use of this term; however, for this study, it is important we use terminology that is also used in our data sources and current literature (e.g., when searching terms used in legislation and policy). We also acknowledge that many practitioners we have spoken to in previous research use the term in a lay manner, which contributes somewhat to a normalisation of the term (Travers et al. 2020).

Contemporary Australian society is made up of many differing groups. Factors that contribute to diversity, such as ability, age, class, ethnicity, gender, Indigeneity, race, religion, sex and socioeconomic status, have the potential to make an individual or group vulnerable to the structures that control society (Bartkowiak-

Théron and Asquith 2012). For police to appropriately serve vulnerable groups and people, they must understand what constitutes a vulnerability, how they can work with vulnerable people, possess the 'knowledge and skills required to effectively and appropriately operate within a diverse environment' (Bartkowiak-Théron and Asquith 2012: 9), and be aware of issues facing particular groups or people (Keay and Kirby 2018).

## **Background And Literature Review**

Up until the mid-1970s, bail laws across Australia were based on common law doctrines. The premise of bail was simple: release was granted following the payment of a monetary surety. There was a general presumption for bail and refusal centred on legitimate concerns for failure to appear for trial (Steel 2009). Codification of bail in the 1970–80s changed the focus from monetary payment to the need for bailees to report and comply with certain conditions placed upon them. A person charged on bail usually has a minimum requirement to attend their court date, but often other conditions are added, such as regularly reporting to a police station, surrendering their passport, or attending counselling. Breach of these conditions may result in revocation of bail.

Imprisonment rates across Australia have been rising in recent decades. A contributing factor has been the significant increase in the number of prisoners held on remand (Australian Bureau of Statistics (ABS) (2020c). Despite a slight drop in numbers in 2020, due to COVID-19 effects, 32% of the prison population are on remand, as opposed to the 14% of prisoners on remand in 1997 (ABS 2020c; Sarre 2016). The ABS (2020a) reported that between 2018 and 2019, there was a nationwide decrease of 3% in the number of offenders compared to 2017–2018. The question then posed is: if offending rates are dropping, why are imprisonment rates continuing to rise? This rise in imprisonment rates, without a rise in crime rates, can be explained by changes in 'reporting rates, policing practices, sentencing laws and bail laws' (Leigh 2020: 2).

The *tough on crime* political rhetoric expounded by politicians over the last several decades has been sensationalised by the media (Brown and Hogg 1998; Brown and Quilter 2014). By not wanting to appear *soft on crime*, various governments over the years have focused on mandatory sentences, tightening bail laws, increasing parole conditions, longer jail terms, fewer sentencing options and pursuit of minor offences. These factors, combined with increasing court delays, have resulted in the soaring imprisonment rates (Bushnell 2016). Further, attitudes towards bail and a decrease in police discretion have been shown to contribute to bail refusal (Brown and Quilter 2014; Sarre 2016). More invidiously, recent reforms have rolled back the presumption for bail, further contributing to bail refusal (Bartels et al. 2018).

### ***Vulnerability and Bail***

People from vulnerable groups are over-represented on bail, according to a variety of vulnerability attributes (Aboriginality, disability, etc.). This is particularly salient in relation to cross-sectional vulnerabilities. For example, due to systematic oppression and discrimination, Indigenous Australians are over-policed and over-incarcerated. There are many intertwining factors stemming from colonisation and intergenerational trauma that increase Indigenous Australians' vulnerability to policing and imprisonment. Indigenous Australians make up around 3% of the Australian population; however, they account for 28% of the Australian prison population (ABS 2020b; 2020c). Indigenous Australians are more likely to be refused bail if they are charged with a criminal offence and are more likely to be convicted once charged (Weatherburn and Holmes 2010). From 2001 to 2015, the number of Indigenous Australian remandees rose by 238%, and young Indigenous women on remand are the highest growing prison population in Australia (Weatherburn and Ramsay 2016; Kilroy 2016).

People with disabilities often require a variety of supports, such as communicative and physical adjustments and modifications. A lack of effective communication coupled with needs not being met results in people with disabilities being vulnerable to the negative effects of the criminal justice system. This includes having bail refused, breaching bail due to a lack of understanding of the bail conditions,

repeated contact with the criminal justice system, and a heightened likelihood of imprisonment (Australian Human Rights Commission 2014).

Many remanded people are either found not guilty of the supposed offence or do not serve any additional time in prison. Galouzis and Corben (2016) found that approximately 40% of remandees received a custodial sentence as a judicial outcome. The use of pretrial custody is supposed to be a last resort for decision-makers because of the negative effects of remand imprisonment. In scrutinising how vulnerability in bail decisions is legislated, this research aims to contribute to ensuring vulnerable people are not unnecessarily imprisoned before any finding of guilt.

### *The Effect of Vulnerability on Bail Decisions*

Throughout the last five decades, there has been a change in defendant characteristics. The proportion of defendants who present with mental health issues as well as defendants from an Indigenous Australian background have risen significantly (Australian Institute of Health and Welfare [AIHW] 2019; Sarre, King and Bamford 2006).

Vulnerable people are over-represented at every stage of the criminal justice system (Baldry 2009). Within Australia, Indigenous Australians held on remand often do not receive a custodial sentence, or their custodial sentence ends up being less than the time already spent on remand. Irregular employment and lack of secure housing can affect an Indigenous Australian person's application for bail (Australian Law Reform Commission [ALRC] 2017). Other vulnerable groups, such as people with a disability and women fleeing domestic violence, also experience high rates of homelessness and unemployment. This then increases their likelihood of bail refusal (AIHW 2015; ALRC 2017).

### *Police Attitudes Towards Bail*

Police attitudes towards bail affect the likelihood of an accused person being approved for bail. Formal and informal rules surrounding bail practices also influence a police officer's decision to grant bail (Sarre, King and Bamford 2006). Colvin (2009) found that the knowledge police officers possess of bail is largely procedural and is based on confusing legislation that has undergone many amendments (a point that has been raised in the aforementioned UK reform consultation about police pre-charge bail and the issue of bail-under-investigation). This procedural approach to bail decisions can mean that the vulnerabilities of alleged offenders are not considered. More problematically, it has been shown in various jurisdictions that most individuals under bail orders suffer from a or multiple types of vulnerability (poverty, addiction, mental ill-health; see, for example, the case of provincial courts in Canada) (Canadian Civil Liberties Association 2014).

Police have also been found to set onerous bail conditions when they do grant bail. These conditions include restricting access to public transport, excluding persons from entering large geographic areas, and placing abstinence conditions on offenders (Victorian Law Reform Commission 2007). Conditions such as these have the greatest negative effect on those who are already disadvantaged, such as people of low socioeconomic status, who rely on public transport, people from rural areas who may be excluded from their township and, thus, face homelessness, and people with addictions who are not presented with adequate support services. Arduous and demanding bail conditions such as these nearly always result in people breaking their bail conditions and being remanded. When people are remanded, their risk of recidivism increases. Placing onerous bail conditions upon an accused offender can often result in more harm than good (ALRC 2017; Robinson and Bartkowiak-Théron 2014).

### *Bail Legislation in Differing Jurisdictions*

Against a contextual backdrop of international applicability and timely relevance, this study focuses on NSW, Tasmania, and Victoria. These jurisdictions were chosen for differing reasons. The first jurisdiction to flag the introduction of bail legislation was NSW (1978); however, it has been amended since. Tasmanian bail legislation (1994) has remained un-amended since shortly after its enactment in 1994 and

still reflects common law doctrines. Reforms have been proposed to bring it into line with other Australian bail legislation. Victoria has the highest remand rates in Australia and has undergone the most extensive recent reforms.

Other Australian or international jurisdictions were not included in the study due to time and editorial constraints. In 1978, NSW was one of the first jurisdictions in Australia to introduce bail legislation. This was in response to criticism of the bail system at the time, whereby money was forfeited to be granted bail. It was believed that there should be a presumption in favour of bail, as bail deals with people who have not been formally found guilty of an offence (Steel 2009). The original legislation was replaced with the *Bail Act 2013* (NSW). This Act has undergone several legislative amendments since its enactment, each rolling back presumptions for bail (Snowball, Roth and Weatherburn 2010).

Tasmanian bail legislation was introduced in 1994, with the aim to provide a comprehensive piece of legislation to deal with the grant or refusal of bail and issues that arise from such. The legislation was created with the aim to reduce confusion surrounding relevant common law and various statutory provisions that previously dealt with bail. As such, the intention of the *Bail Act 1994* (Tas) was that it would deal purely with *machinery matters*, and any substantive legal issues arising from bail would continue to be dealt with by way of common law precedent.

Victorian bail legislation has undergone more reforms than any other jurisdiction in Australia. Having been enacted in 1977, the *Bail Act 1977* (Vic) has been significantly amended a total of six times. The latest major amendments, in 2017 and 2018, came about following the Bourke Street tragedy in 2017. Justice Paul Coghlan advised the Victorian Government on how best to reform Victoria's current bail system to manage the risks of granting bail balanced with community safety (Coghlan 2017).

### ***Research into Bail Practices and Vulnerability***

Little research has been conducted specifically on the legislative requirements of police to consider an accused's vulnerability when making bail decisions (Travers et al. 2020). Research has traditionally focused on either the effects of legislation and its amendments or the effects of various vulnerabilities on bail decisions (Bartels et al. 2018; Brown and Quilter 2014; Leigh 2020; Sarre 2016; Steel 2009). No study has combined the two. Rather than a general focus on bail and its application, this project explores how an accused's vulnerability is considered in bail legislation.

For a nationwide, rather than jurisdictional, overview of bail amendments, Steel (2009) examines legislative amendments to Australia's bail laws between 1992 and 2008. Although the study is dated, it presents a concise analysis of the ever-changing presumptions for or against bail across jurisdictions. Steel's (2009) analysis largely focuses on types of punitive changes to Australian bail laws and their effect on prisoner and remand rates. Ultimately, the study found that legislative intervention results in increases in remand rates.

Brown and Quilter (2014) analyse the role that the media played in bringing about the 2014 reforms to the *Bail Act 2013* (NSW). Brown and Quilter (2014) found that negative media attention and pressure influenced the NSW government to make amendments to the newly implemented bail laws, resulting in a disregard of the rising remand rates that the legislation was originally amended to address. Through a legislative analysis, the authors were able to draw out how the disproportionate influence of the media negatively affects legislative amendments.

As discussed above, media attention can lead to amendments to bail legislation. Research conducted by Bartels et al. (2018) presents a qualitative analysis of historical and current bail legislation, bail tests and bail restrictions for each Australian state and territory. This study highlights the recent developments and recommendations in relation to bail in each jurisdiction and how these affect imprisonment rates and an accused's risk of reoffending. This study is one of the more recent and most comprehensive studies of bail legislation in Australia. However, Bartels et al. (2018) do not specifically examine the effect that an



accused's vulnerability can have upon them being granted or refused bail and how this directly relates to imprisonment and recidivism rates.

Sarre (2016) discusses more individual factors. These factors include legislative procedures and practices, operational priorities of criminal justice personnel, as well as the characteristics and vulnerabilities of accused persons. Although Sarre (2016) discusses how and why an accused's vulnerability can have an effect on granting of bail, he does not analyse bail decision-makers legal obligations to take these vulnerabilities into account.

The Tasmanian Department of Justice's (2018) recent position paper discusses current bail procedures and examines the need to reform Tasmanian bail practices. A requirement to protect the most vulnerable citizens is expressed in the foreword. Travers et al. (2020) found that the criminal justice system needs to better address vulnerability arising out of structural inequalities. Gaining an understanding of police obligations to consider vulnerabilities in bail applications will help to achieve this.

### **Intersectionality—A Theoretical Framework**

Many theories have been developed to explain the experiences of different marginalised groups within society. However, there was a lack of theorising around people who were members of multiple intersecting vulnerable groups until Crenshaw's (1991) use of intersectionality. Crenshaw posits that identity politics have failed to understand the differing injustices that each group was subjected to, thus, contributing to tension between groups. For example, the double marginalisation that a woman of colour would experience (race and gender) was often dismissed (Crenshaw 1991). An intersectional approach examines these complexities that single-axis frameworks that do not consider (Crenshaw 1991). Since its inception, intersectionality has broadened from race and gender to be applicable to the various vulnerabilities that people within society may face, such as class, sexuality and disability. By society failing to recognise intersecting vulnerabilities, various groups are subjected to unnecessary disadvantage (Atrey 2018). Intersectionality is a movable theory in that it can be adapted and applied to emerging and changing vulnerabilities as required (Carbado et al. 2013). Therefore, practising intersectionality and applying it to the criminal justice system requires a broad understanding and analysis from the researcher (Choo and Ferree 2010).

As highlighted earlier, the fastest-growing group on remand are Indigenous Australian young women (Jeffries and Newbold 2016). These women and girls experience intersecting vulnerabilities due to their age, their Indigeneity, and their sex. Drawing on intersectionality in our analysis allows us to unpack how siloed responses to vulnerability may affect the most disadvantaged people in the criminal justice system.

### **Methodology**

#### *Research Design*

Through an analysis and comparison of bail legislation and related second reading speeches (where the Minister who introduces the Bill to Parliament explains its purposes and objectives) of three Australian jurisdictions—NSW, Tasmania, and Victoria—this research addresses the following questions:

- Are vulnerability/vulnerabilities legislated for in the Bail Acts across the differing jurisdictions?
- If so, what vulnerability/vulnerabilities are required to be considered by police?
- To what extent do police need to consider these vulnerability/vulnerabilities?

In answering the above research questions, this study aimed to determine whether police are legally obliged to consider a detainee's vulnerability when making decisions on bail and, if so, to what extent.

Content analysis as a descriptive tool is an established research method that applies to a wide range of texts (Maier 2017; Macnamara 2005). Techniques of content analysis can lead to an increased understanding of such as meaning can be more readily extracted (Martin, Saalfeld and Strøm 2014). This form of content analysis was used as it could systematically analyse large volumes of data, make inferences that can be supported by the collection of data via other methods, and was inexpensive and relatively unobtrusive (Stemler 2001). Through the analysis of the Bail Acts and second reading speeches for NSW, Tasmania and Victoria, as well as their various amendments, this study was able to understand the extent to which vulnerability is legally required to be considered by police officers. Legislation is publicly accessible via government websites, so it is a useful source of data ready for analysis. The study is limited to the Bail Acts and corresponding second reading speeches for the relevant states. This limits the scope of the study. A broader analysis could include internal policy documents for courts and police.

A codebook was used for the analysis (Hsieh and Shannon 2005). As discussed above in the background, literature review and theoretical framework, vulnerable groups comprise Indigenous Australians, people with disabilities, people of low socioeconomic status, youth, people with mental health issues and people with addictions. A group of search terms relating to vulnerability were derived from the literature review, and each piece of legislation and speech were then coded according to the search terms. The search terms used were at-risk, Aboriginality, background, characteristics, circumstances, considerations, differing groups, disadvantage, impairment, intoxication, special needs, support, vulnerable, vulnerability and youth. The meaning behind the presence, or lack thereof, of search terms within the data for each state was drawn out through a thorough critical thematic analysis (Bryman 2015). It is imperative to remember that qualitative and thematic analyses are often subject to researcher interpretation and bias. Therefore, other researchers may interpret findings differently or place greater emphasis on different themes. The reasoning behind using qualitative research was to gain a deep insight into the meaning of the data, understand how the legislation caters for vulnerabilities, and have the ability to apply the theoretical framework of intersectionality.

Data collection occurred on these dates: NSW: 25 July 2020, Tasmania: 15 and 19 August 2020, and Victoria: 15 August 2020.

## **Results and Discussion**

This section presents findings from the analysis of the legislation and second reading speeches from the three chosen jurisdictions. It first examines the findings from each jurisdiction in turn, then provides a comparison. Table 1 details the prevalence of each search term within the data analysed for each state. The pieces of legislation analysed are listed in Appendix 1.

**Table 1. Prevalence of search terms**

Search term	Prevalence		
	NSW	Victoria	Tasmania
Aboriginality	1	18	0
At-risk	0	0	0
Background	4	1	0
Characteristics	0	0	0
Circumstances	5	4	0
Considerations	0	0	0
Differing groups	0	2	0
Disadvantage	0	2	0
Impairment	1	4	0
Intoxication/alcohol and other drugs	4	6	0
Special needs	0	0	0
Support	0	0	0
Vulnerable/vulnerability	5	12	0
Youth	3	20	0

### NSW

When originally enacted, the *Bail Act 2013* (NSW) legislated a presumption in favour of bail in all cases except for violent or armed robbery cases. This was eventually rolled back to varying presumptions dependent on the charges (Snowball, Roth and Weatherburn 2010). The decision of whether to grant or refuse bail is also based on the accused's criminal history, the offence alleged to be committed and a defendant's particulars, such as background and characteristics (Weatherburn and Fitzgerald 2015). Amendments to the *Bail Act 2013* (NSW) have resulted in an increase in the number of accused persons being ineligible for bail when they would have been eligible and granted bail prior to the amendments. This has resulted in a slight, but not insignificant, increase in the remand population within NSW prisons (Thorburn 2016).

The enactment of the *Bail Act 2013* (NSW) substantially changed the bail procedure in NSW. The presumption for bail was eventually replaced with a presumption against bail and the requirement for police officers and other bail authorities to consider an accused's risks of failing to appear, among other risks (Snowball, Roth and Weatherburn 2010). Matters that can weigh against the belief that an accused will attend a court hearing include a lack of suitable employment or housing (Kilroy 2016). Remand rates in NSW have increased since the amended legislation was enacted (BOCSAR 2015).

Although the *Bail Act 2013* (NSW) and associated second reading speeches make mention of vulnerable/vulnerability (n = 5), it does not include, nor do any of its amendments, a definition for either vulnerable or vulnerability. Section 18 of The Act requires that an accused's background and circumstances must be considered when making bail decisions. Further, section 18(1)(k) of the Act states that in an assessment of bail concerns, the bail authority is to consider:

any special vulnerability or needs the accused person has, including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment.

This consideration is not entirely inclusive of all recognised vulnerabilities. For example, it does not explicitly state physical disability, gender, sexuality or other ethnicities, apart from Indigenous Australians (n = 1). Although the Act legislates for bail authorities (i.e., police) to consider any special vulnerability, there is no context given to what this may mean.



The test for granting bail under the *Bail Act 2013* (NSW) is the unacceptable risk test. Under s 17(2), this test posits that an accused is an unacceptable risk if, once released from custody, they will fail to appear. This test does not actively discriminate against people with vulnerabilities. However, people in vulnerable groups such as Indigenous Australians, women fleeing domestic violence, people with a disability and non-heterosexual youth may be discriminated against due to the fact that they have less access to stable accommodation than the population average, which may result in them being denied bail as an unacceptable risk (Boyle 2009).

It is important to note the language in the Act. It states that the bail authority *is to consider* any vulnerability that the accused may have. Although this legislates that police must consider vulnerabilities in their bail decision-making, it does not state to what extent, nor does it state that bail authorities are bound to make decisions that take into account any special vulnerabilities. However, the language surrounding the term *is to consider* demonstrates that the NSW Government recognises that the presence of a vulnerability in an accused person can result in them having a different experience of the criminal justice system than those without any notable vulnerabilities (Croucher 2018). Yet, no guidance or definitions are provided in legislation to help decision-makers employ this appropriately. This means that decision-makers may draw on their own, differing interpretations and could result in inconsistency or inadequate consideration of relevant factors.

The *Bail Act 2013* (NSW) and its amendments appear to focus on vulnerability indirectly by addressing intoxication (n = 4). The second reading speech for the *Bail Bill 2013* (NSW) states that 'it is not appropriate for a bail decision to be made in circumstances where a person's intoxication means they are unlikely to understand it'.

By indicating intoxication at the time of making a bail decision may require further consideration, it could be inferred that there is a recognition of the effect of underlying problematic alcohol and drug use that affect a defendant's ability to understand and effectively engage with legal processes such as bail. Given the higher use of alcohol and other drugs among prison entrants than the general population, a link can be drawn to see this section as acknowledging vulnerability (AIHW 2018). Intoxication may compound intersecting experiences of vulnerable people, for example, those with mental illness and/or cognitive impairment (Quilter et al. 2016).

People with mental health conditions, disabilities, and impairments are extremely vulnerable in the criminal justice system. Around 40% of Australian prisoners report having had a mental health condition at some point in their life, and one in three Australians aged between 20 and 30 who have a diagnosed psychiatric illness have been arrested (AIHW 2019). Under s 28 of Law Enforcement (Powers and Responsibilities) Act (LEPRA) 2002 (NSW), the NSW Government mentions cognitive disabilities and impairments along with mental health conditions as recognised vulnerabilities. However, this is not stated in the Bail Act.

The needs of people with mental health conditions are often interpreted to be risk factors by bail decision-makers (Moore and Lyons 2007; Stanford 2012). The recognition in legislation of mental health as a vulnerability, rather than a risk factor, is a step forward from the NSW Government in addressing the increase in defendants presenting with mental health issues (AIHW 2019; Sarre, King and Bamford 2006). But this is only one step towards making positive change; implementation and action are needed beyond just recognition.

In relation to considering mental illness as a vulnerability, it has been demonstrated that the recognition of mental health issues at the bail decision stage of the criminal justice system can assist with decreasing the prevalence of mental health conditions within Australian jails (AIHW 2018). Acknowledging mental illness as a vulnerability rather than a risk factor reduces the number of remanded prison entrants with mental health conditions and, therefore, leads to a decrease of prisoners with mental health conditions in jails (Moore and Lyons 2007). However, given that around twice as many prisoners suffer mental health

conditions compared to the general Australian population, the identification of mental illness as a special vulnerability and the unintended negative consequences of treating the symptoms of mental illnesses as criminal behaviours might not be appropriately comprehended by police and other bail decision-makers. There are still many individuals who seem to fall through the gaps upstream of the bail process, despite many initiatives to prevent this. It may also be that mental illness may be predominantly perceived as a criminogenic risk, as opposed to mentally ill individuals being perceived as 'at-risk', an important nuance that should be articulated in any decision-making process (AIHW 2019; Stanford 2012).

Although NSW bail legislation does not offer a definition of vulnerable or vulnerability, there have been attempts to cater for people from marginalised groups within the legislation. However, the legislation provides little context through which to understand how this might be employed, leaving decision-makers with little guidance or consistency.

### **Tasmania**

Tasmania's bail legislation is still largely based on common law doctrine. The *Bail Act 1994* (Tas) provides for a general presumption in favour of bail, excluding people who have either contravened bail, had a restraint order taken out against them, or have been accused of family violence or stalking. Apart from amendments in 1994 and 1995, Tasmanian bail legislation has remained unchanged since its enactment (Bartels et al. 2018). Despite the development of specific bail legislation, the Tasmanian Government decided that it was still best if common law dealt with bail matters. As such, *R v Fisher* (1964) 14 Tas R 12 is the leading precedent when it comes to bail decisions within the Tasmanian jurisdiction (Department of Justice 2018). *Fisher's* underlying premise is that all accused persons are entitled to freedom until they stand trial. It outlines multiple considerations that must be taken into account when making bail decisions:

These include but are not limited to: the accused's ties with his or her family; the accused's character and antecedents; the accused's health; and the state of the accused's business. (Department of Justice 2018: 14)

This shows that an accused's background and circumstances at the time of the alleged offence must be considered when determining bail; however, it does not state to what extent they must be considered providing little guidance for decision-makers.

A thorough analysis of Tasmanian bail legislation and its corresponding Bills reveals that there are no references to vulnerability whatsoever. An analysis of *R v Fisher* (1964) shows that, save for a mention of the accused's health, there is no consideration of vulnerability when determining whether bail should be granted.

Since *Fisher* was determined in 1964, there have been changes in community and court expectations, as well as an increase in offences committed by people on bail. Discussions began in 2017 to bring Tasmania's bail legislation into line with that of other Australian states (Bartels et al. 2018). The proposed inclusions into Tasmanian bail legislation include ensuring the protection of individuals and the community while still respecting an individual's presumption of innocence, restrictions of bail for those accused of murder and treason, a risk criteria similar to that in NSW (Department of Justice 2018).

An analysis of the Tasmanian Government's bail reform position paper shows that the government's aim is to create new bail legislation that 'protects Tasmania's most vulnerable, reflects community expectations and provides a strong deterrent to criminal behaviour' (Department of Justice 2018: 4). The government's long-term stated aim is to ensure that the most vulnerable groups within the community are protected by Tasmania's legislation and sentencing practices. This demonstrates that the government recognises that their current bail legislative practices do not cater for the differing vulnerabilities present today. The Tasmanian Government also has an aim to incorporate provisions from other jurisdictions, such as the recognition of:

any special vulnerability or needs the accused person has, including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment. (Department of Justice 2018: 30)

Despite these positive potential amendments to legislation and sentencing practices, which aim to protect the most vulnerable in the community, as it currently stands, Tasmanian police officers are not required by legislation to consider an accused person's vulnerability when making decisions on bail.

### *Victoria*

Over the years, Victoria's Bail Act (1977) has undergone more amendments than any other jurisdiction's bail legislation. This has been the result of changes in government and media attention on specific crimes (Bartels et al. 2018). Previously, Victoria had one of the lowest remand populations in Australia; however, remand prisoners now make up around 37% of the Victorian prison population, one of the highest remand prison populations in Australia (ABS 2020c). This is in line with legislative reform and can be attributed to Victorian legislation rolling back the presumptions for bail (McMahon 2019). The recent rise in remand rates correlates with a change in defendant characteristics, being that defendants with known vulnerabilities, such as Indigenous Australians, those with mental illnesses, and women, are being imprisoned on remand at rates higher than ever before (AIHW 2019; Sarre, King and Bamford 2006).

References to vulnerability in the *Bail Act 1977* (Vic) are heavy. Vulnerability, in general, is mentioned (n = 12), along with an accused's background (n = 1) and the circumstances leading to the alleged offence (n = 4). The specific vulnerabilities legislated for in Victorian bail legislation are Indigeneity (n = 18), age (specifically youth) (n = 20), and impairment (mainly mental) (n = 4). In relation to temporary vulnerabilities, intoxication as a result of alcohol and/or other drugs is only mentioned a total of six times (n = 6).

The *Bail Act 1977* (Vic) s 3AAAA defines a vulnerable adult as being:

a person over the age of 18 years or more and has a cognitive, physical, or mental health impairment that causes the person to have difficulty in: understanding their rights, making a decision, or communicating a decision.

Section 3AAA of the Act states that bail decision-makers *must* take into account surrounding circumstances relevant to the matter at hand. These circumstances can include, but are not limited to, the accused's personal situation, home life, and background. Any special vulnerabilities such as being a child, Indigenous Australian, having an intellectual disability or mental health illness, or having poor health must also be considered by the bail decision-maker under s 3AAA(1)(h) of the Act. The consideration of these special vulnerabilities also extends to the various tests applied when bail decision-makers decide whether to grant bail. These tests include the exceptional circumstances test, the unacceptable risk test, and the show compelling reason test. By legislating that bail decision-makers consider special vulnerabilities while applying these tests, the Victorian Government has recognised that the presence of a vulnerability within an accused person affects the result of bail tests.

Section 3A states that bail decision-makers must consider issues arising from an Indigenous Australian's culture, such as an individual's ties to extended family and places, as well as any relevant cultural obligation. The second reading speech of the Bail Amendment (Stage Two) Bill 2018 (Vic) states that 'there is a highlighted need to treat certain groups of people differently within the bail system'. This includes Indigenous Australians.

Statistics show that Indigenous Australian imprisonment rates within Victoria are on par with the high rates in NSW, Queensland, South Australia and the Australian Capital Territory (ABS 2020b). This can be understood to mean that although the consideration of Indigenous Australians' vulnerability is legislated

for in Victorian bail laws, bail decision-makers may not be actively implementing this consideration in the way it was intended.

The Bail Amendment Bill (2015) was introduced to Parliament to address the increase in children and young people being held on remand in Victoria. Children and young people have different laws pertaining to them than that of adults when it comes to criminal matters. This was not reflected in the Victorian bail legislation until the introduction of the Bail Amendment Act 2016 (Vic). A thorough analysis of the Bail Act 1977 (Vic) showed that specific references to children and young people were not inserted until 2016. The second reading speech of the Bail Amendment Bill 2016 (NSW) states that 'children are entitled to a system of bail that recognises their particular needs and vulnerabilities'. All other avenues should be considered prior to handing a child an imprisonment sentence.

The Bail Amendment Act 2016 (Vic) was introduced to address the increasing rates of children held on remand in Victorian detention centres. However, since 2016 the daily rate of remanded Victorian children has continued to increase (AIHW 2020). This shows that the 2016 reforms to the *Bail Act 1977* (Vic) have been inadequate in addressing the specific vulnerabilities that children and young people have in relation to bail as well as demonstrating that many children are placed on remand unnecessarily (Wahlquist 2020). By recognising in legislation that Indigenous Australians have different cultural needs and requirements than the rest of the Victorian community, the Victorian Government is acknowledging the systematic oppression and discrimination many Indigenous Australians are faced with when they encounter the criminal justice system (Bushnell 2017). However, acknowledging and legislating for the vulnerabilities faced by Indigenous Australians does not necessarily mean that it is transposed into practice.

Victorian bail laws appropriately legislate for particular vulnerabilities such as Indigeneity, youth, intellectual disabilities and mental illness. However, they do not state to what extent these vulnerabilities must be considered by bail decision-makers such as the police. Further, the Victorian bail laws are lacking in is a consideration of other known vulnerabilities. For example, rates of women's imprisonment and remand rates have dramatically increased over the last two decades (Jeffries and Newbold 2016). Women prisoners and remandees are more likely to be victims of past crimes. Therefore, it is necessary that bail legislation is amended to reflect the special vulnerabilities that women face when encountering the criminal justice system (Jeffries and Newbold 2016; Kilroy 2016;).

### **Comparison**

Out of the three states, Tasmanian legislation appears to cater the least for vulnerability in bail decisions due to a lack of reference to vulnerability within the *Bail Act 1994* (Tas) or the *Bail Amendment Act 1995* (Tas). Overall, 26 references to vulnerability were found within NSW bail legislation and second reading speeches. These mainly related to impairment arising out of the use of alcohol and other drugs as well as youth as a vulnerability. References to vulnerability within the data for the state of Victoria were heavy and totalled 69 separate references. The majority of these references mentioned vulnerability in general, youth, and an accused person's Indigeneity. From the data analysed, each of the discussed jurisdictions varies greatly in their consideration of bail within legislation. Victorian police are more greatly required to consider vulnerability when making bail decisions than NSW police or Tasmania police. However, Victoria has the highest remand rates in the country (ABS 2019). This gives pause to consider the efficacy of legislating around vulnerability in bail decisions. The lack of legislative intervention in Tasmanian bail laws coupled with their relatively low rates of imprisonment may suggest that government changes to bail laws in other states have a negative effect on prison rates and vulnerability (Bartels et al. 2018).

Although the three states differ in their legislative requirements to consider vulnerability, something that all states have in common is the fact that they do not cater for multiple, intersecting vulnerabilities. For example, Indigenous Australian women (vulnerabilities as ethnicity and gender) are the fastest-growing prison population group in Australia, and Indigenous Australian youth (vulnerabilities as ethnicity and age) make up over 50% of the juvenile detention population (Australian Human Rights Commission 2018; AIHW 2020). Vulnerable people make up a large proportion of the Australian prison population (Baldry

2009). Through common factors such as low socioeconomic status and homelessness, an accused's intersecting vulnerabilities can put them at a greater risk of being charged with an offence, having bail denied and being sentenced to imprisonment (AIHW 2015; Weatherburn and Holmes 2010).

## Conclusion

This research found that vulnerabilities are legislated for in the NSW and Victorian Bail Acts. However, they are not legislated for in the Tasmanian Bail Act. The vulnerabilities that are required to be considered by police when making bail decisions in NSW and Victoria are Indigeneity, youth, mental impairment and illness, intoxication arising out of alcohol and other drugs and an accused's individual circumstances and background. The extent to which police need to consider these vulnerabilities differs from NSW to Victoria. In Victoria, vulnerabilities *must be taken into account*, whereas in NSW, vulnerabilities only need to be *considered*. Taking the literal meaning of these provisions (following the approach used in *Amalgamated Society of Engineers v Adelaide Steamship Co Limited* (1920) 28 CLR 129), it is clear that there is a nuanced difference between the two terms. There is a stronger emphasis on vulnerabilities in Victoria as the bail decision-maker must acknowledge any vulnerabilities when making a decision on bail, whereas, in NSW, the decision-maker need only turn their mind to the vulnerabilities before making a decision. Current legislation does not state to what extent police must consider such vulnerabilities.

For the sake of procedural justice, it is crucial to gauge the importance of police obligation to consider vulnerability at any stage of the policing process, up to bail and prosecution stages, and as the gateway to criminal justice, the extent to which police involvement in the bail process is essential in addressing Australia's rising imprisonment rate. Understanding requirements to consider vulnerability can assist in reducing imprisonment rates and recidivism while still balancing the rights of the accused with the interests of the community. It is essential that intersecting vulnerabilities are considered by police when making bail decisions to help reduce the number of vulnerable people being remanded or imprisoned (Potter 2013).

## Limitations

This article provides an overview of the key findings from the research and highlights areas that warrant further inquiry. One limitation of the study is that only bail legislation and its supporting explanatory documents (second reading speeches) were collected and analysed. Police may consider vulnerability at earlier stages of the criminal justice process. For example, in NSW, LEPR specifically addresses vulnerability at the early stages of arrest and questioning. However, despite vulnerability being identified at earlier stages, it may still be absent or discarded at the bail decision-making stage. Further guidelines and explicit instructions as to whether/when police are required to consider an accused's vulnerability when making bail decisions may be mentioned in procedural manuals and police training, rather than just in legislative instruments. Future research in this field is required to determine this.

Further research is needed to consider the legislative requirements of the five other Australian jurisdictions. In addition, police practice manuals may provide further extensive instructions and directions as to whether vulnerability should or should not be considered when deciding whether to grant or refuse bail. This further research is crucial, as it may be able to help improve policing practices and reduce rates of imprisonment, especially ever-increasing remand rates. A next step could be to talk to police officers who make bail decisions about their understanding of their obligations to consider vulnerability when making bail decisions. Critically, this study provides a starting point for comparative analysis with other jurisdictions, both those similar in process and those differing (e.g., the Gladue system in Canada).

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## Appendix 1

### Legislation

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