Between bail and sentence: the conflation of dispositional options

Arie Freiberg* & Neil Morgan[1]

Introduction

In 2002, the New South Wales Parliament enacted the *Crimes Legislation Amendment (Criminal Justice Interventions) Act*. This Act introduced a new species of dispositional outcome, an 'intervention program order' into the range of options available to a court after an arrest (but pre-trial) or after a finding of guilt or a conviction. On the face of it, this is a departure from the Carr Labor government's more aggressive 'law and order' policies, and its purpose is laudable: to reduce the likelihood of the person committing further offences by inviting or requiring him or her to participate in a rehabilitation, treatment or restorative justice program. However, the means by which it does so, an order which can be used as a condition of bail or as a deferred sentence or as a condition in a good behaviour bond, raises significant issues with respect to the dividing line between bail and sentencing.

In similar vein, the Western Australian Parliament has very recently enacted the *Sentencing Legislation (Amendment and Repeal) Act* 2003. This creates the 'Pre-Sentence Order' (PSO), which will allow a court to adjourn sentence following a finding of guilt for a period of up to two years on condition that the offender addresses his or her criminal behaviour in the meantime. The means by which offenders are required to address their problems is through a series of conditions and obligations which are generally similar to those of a standard community-based sentence. Although the PSO is primarily intended to place the Western Australian Drug Court on a firmer statutory footing, it is an order of general application and creates some major issues of principle and practice.

The creation of 'pre-sentence' dispositions that closely resemble traditional sentencing options, whether based on new legislation or on the modified operation of bail laws is a creeping phenomenon in Australia, and one that tends to blur the lines between guilt, conviction and sentence. This article explores the problematic nature of bail and the increasing use of non-traditional bail conditions to provide the legal foundation for serious and relatively long-term interventions that are normally the province of sentencing courts. Programs such as drug courts, domestic violence courts and others are, in some jurisdictions, built upon the power of courts to impose conditions of bail. These innovative and important programs have often been pragmatic responses to emerging social and legal problems, and the product of judicial creativity and flexibility rather than firm and specific legislative mandate. On the one hand, it may be conceded that awaiting specific legislative change could stifle innovation, but on the other, flexibility and pragmatism are generally not the best foundations upon which to build a rational and coherent system of dispositional options.

* Professor of Criminology, The University of Melbourne.
1 Director of Studies, Crime Research Centre, The University of Western Australia.

The paper begins with a thematic analysis of the role of bail and sentences in the context of recent developments across Australia. By way of illustration, the WA Drug Court is then used as a more detailed case study.

Conviction and sentence

In recent years, the concepts of 'conviction' and 'sentence' have been eroded by the proliferation of dispositions in the form of diversion programs or orders. These have generally relied on promises of non-conviction in order to induce accused persons to consent to powerful interventionary measures. In many cases, such measures are imposed without requiring the prosecution to prove its case beyond a reasonable doubt or the court to impose a sentence. In 1989, Fox and Freiberg argued that it is:

> fundamental to the protection of the rights of persons accused of crimes that the sentencing powers of a court should not be exercised or executed without a prior formal judicial determination of guilt, usually manifested by conviction (Fox & Freiberg 1989:298).

They noted that the traditional orthodoxy of the sentencing process that required guilt, conviction and sentence before the execution of a sanction had been weakened, albeit for generally noble purposes. Non-conviction dispositions such as some community-based orders, the custody of mentally disordered offenders, pre-trial diversion schemes and others were being offered in the name of leniency and / or in the hope of rehabilitation. These orders purported to be consensual in nature and aimed to minimise the legal consequences of conviction.

However, Fox and Freiberg argued that despite these good intentions, such schemes were fundamentally flawed because (1) the question of 'consent' in such circumstances was problematic; (2) essentially coercive measures were imposed without moral and legal foundations of guilt and conviction; (3) the length of the orders could be disproportionate to the offence (which was often unproven); and (4) the consequences of breach of the order were uncertain and sometimes more severe than if a sentence had been imposed.

They suggested that the appropriate response to the growing conceptual confusion in relation to sentencing dispositions was for legislators to define clearly the purposes of the dispositional process, the sanctioning powers of the courts and the legal and moral foundations of these powers (Fox & Freiberg 1989:323). During the 1990s, some jurisdictions revised their sentencing legislation to clarify these distinctions (e.g. *Sentencing Act* 1991 (Vic); Fox & Freiberg 1998:65; *Sentencing Act* 1995 (WA); Morgan 1996). Innovation, however, cannot be stifled and over the past few years, initiatives based on bail, and the creation of new orders which may operate pre- and post-sentence, have generated serious conceptual and practical confusion.

Bail

Bail is an ancient institution regulated first by the common law and now by statute (e.g. *Bail Act* 1977 (Vic); *Bail Act* 1981 (WA)). Given recent developments, it is worth emphasising the basic rationale of bail: it is that a person who is taken into custody for an alleged criminal offence may be set at liberty upon entering an undertaking to appear before a court at some later date (Fox 2002:146). The undertaking can be conditional and the alleged offender may be asked to find another person or persons (surety) to enter a similar undertaking to ensure that the accused appears in court on the due date. Broadly speaking, bail may be granted by a court, judges, by police, magistrates and bail justices (Fox 2002:152–3). It may be granted pre-trial, during a trial, while awaiting sentence or (on rare occasions) pending an appeal against conviction or sentence.

Though legislation varies between jurisdictions, it is common ground that the primary considerations in determining whether or not bail should be granted are (1) to ensure that an offender will appear before a court to determine his or her guilt or innocence (or for sentencing); (2) to protect witnesses; (3) to ensure the safety of the defendant, and (4) to ensure that the defendant will not commit further offences before the matter is brought to trial (e.g. *Bail Act* 1978 (NSW) s32; Bamford, King & Sarre 1999). Courts will also have regard to the interests of the person in relation to the period of time which may be spent in custody, the conditions under which they may be held and their ability to obtain legal advice and prepare their case.

In essence, therefore, bail laws are designed mainly to ensure the smooth and effective running of the justice system with respect to the processing of past events, not a means of imposing positive obligations upon a person in order to provide a new basis for future decisions. They are *'criminal process-oriented'* rather than *'performance-based'*. The conditions that traditionally attach to bail are designed to ensure that these purposes are satisfied. The standard bail conditions relate to the provision of undertakings, deposit of money or security and/or sureties (e.g. *Bail Act* 1977 (Vic) s5). Special conditions, such as surrender of a passport, reporting to police, restrictions on movement or association with named individuals may also be imposed to secure the four basic purposes of bail (Raine & Willson 1996:258).

Bail and sentence

A person on pre-trial bail has not been convicted of an offence and is to be treated as innocent until proven guilty. Consequently, there is no mandate for pre-trial punishment (Brignell 2002). Bail has not been regarded as a sentencing, or final dispositional option and 'punitive' remands (where the person is remanded in custody as a short punishment) are objectionable in principle. A sentence, on the other hand, is 'a dispositive order of a criminal court consequent upon a finding of guilt, whether or not a formal conviction is recorded' (Fox & Freiberg 1999:73). A sentencing order may require the consent of the offender. A wide definition of a sentence may include adjournment of proceedings to determine whether the offender can conform to the conditions imposed, but sentencing orders are usually regarded as a final disposition, following which the court is *functus officio*.

However, over recent years, both bail and sentencing orders have evolved. Some sentencing orders are now less final in their disposition, allowing the court either to retain direct supervisory responsibility (as with various forms of drug treatment orders in New South Wales, Queensland and Victoria) or to defer sentence pending treatment or other programs. Bail has also become, in some instances, the equivalent of a deferred sentence on conditions that allow continued judicial supervision of the offender in the period between arrest and sentence or between conviction and sentence. The South Australian and Western Australian Drug Courts provide examples of this (see below).

The interaction between bail and sentence, and the shifting boundary lines, is not a completely new phenomenon and bail has often been the precursor to new forms of sentencing. For example, in the United States, probation began through the bail process in the 1840s when John Augustus posted bail for offenders in the Boston Police Court on condition that he report back to the court on the offence and the offender, effectively deferring sentence for the period (Petersilia 1998). Eventually the process evolved its own separate statutory basis. In Australia, the origins of probation are in common law bonds and in the common law practice of 'binding over' to keep the peace (Fox & Freiberg 1985:290)

as well as in the bail mechanism. In the nineteenth century courts were willing to release offenders into the care of voluntary supervisors, whose power to supervise stemmed from their acting as sureties for bail. Later, supervision became a condition of a recognisance that was entered into on discharge of the offender after conviction or on adjournment. Later probation legislation permitted release on supervision following conviction for a fixed period of time.

At the lower end of the sentencing scale, sentencing has always been flexible. Most jurisdictions have had a variety of options which do not require official supervision such as adjournments, absolute and conditional discharges, dismissals, deferred sentences, conditional releases, good behaviour bonds, common law bonds and others. They are usually dependent upon a finding of guilt and commonly require offenders to enter into a recognizance to be of good behaviour and to observe other conditions laid down by the courts (Fox & Freiberg 1985:252). Justices had the power to 'bind over' persons not of good fame as a form of preventive justice. This did not depend upon a criminal conviction nor did it amount to a sentence. Breach of the conditions in the various orders carried its own consequences, depending upon the nature of the order, whether the trial had been finalised or adjourned, whether or not a conviction had been recorded and whether sentence had been imposed. However, considerable confusion has often existed around the precise scope and operation of such measures (Morgan 1993:314).

Perhaps the most ambiguous of these interstitial dispositional options is the deferred sentence, which allows a court to delay the sentencing of a convicted offender for a specified period for purposes such as receiving information which would assist it in assessing an offender's capacity and prospects of rehabilitation, receiving reports from treatment providers and allowing for diversion programs or mediation or restorative justice processes during the deferral period.

Conditions unrelated to the primary purposes of bail

We have previously noted that, in theory, bail is 'process-oriented' (aiming to ensure the smooth running of the criminal process) and is not, in theory, 'performance-based', punitive or preventative. The protean and flexible nature of bail has, however, allowed courts to craft a variety of schemes that, on their face, appear to serve quite a different purpose. The courts' powers in this respect have been rarely challenged and in many respects the limits of bail are difficult to determine.

Exclusion conditions

In the early 1980s, when the Tasmanian government proposed the building of the Gordon below Franklin dam, protesters converged on the area and many were arrested and charged with trespass and other offences. Many were released on bail but one of the conditions attached by some magistrates was that the person bailed should not remain in a specified area, or leave the area until the hearing. A number of protesters refused to abide by such conditions, withdrew their applications for bail and had to be remanded in custody. They argued in the Supreme Court that the conditions exceeded the powers of the court to make orders relating to bail particularly if the orders were being used to punish or impose restrictions on lifestyle (Warner 1983). The outcome of a number of cases in the Supreme Court was ambivalent, some holding that such conditions were proper if they were related to matters such as ensuring that the offender did not commit offences in the future. However, Warner argued that bail conditions which affect the liberty of the subject or restrict common law rights should be read down (Warner 1983:127).

Curfews

In the early 1990s, Heilpern noted the increasing practice in New South Wales of imposing bail conditions with home curfews on young offenders appearing in the Children's Court (Heilpern 1991). Again, such conditions were not process-oriented but avowedly preventative. They included keeping young people off the streets, reducing the risk of re-offending, isolating them from negative influences and seeking to re-establish family networks (Heilpern 1991:294). Though these conditions were well-intentioned, Heilpern argued that home curfews amounted to a form of incarceration. In many cases, such sanctions were likely to be more intrusive than any sentence which was likely to be imposed by the court. Heilpern argued that bail on such conditions amounted to a back door form of a sentence of periodic detention.

The *Justice Legislation Amendment (Non-association and Place Restriction) Act* 2001 (NSW) has provided New South Wales courts with new powers to attach conditions of non-association and place restrictions on bail, parole, custodial leave and home detention (*Law Society Journal* 2002). The legislation is directed at 'gang' members who might be likely to commit criminal acts.

Home detention

Home detention is available as a sentencing option, as a means of release from imprisonment in New South Wales, as a form of conditional suspended sentence in the Northern Territory and as a condition of bail in South Australia and Western Australia, where it has also been a 'back end' (i.e. release from prison) option. Where it is used as a condition of bail, it is used as a form of modified remand in custody where the court might be concerned about the offender's likelihood to appear at trial or possible interference with witnesses. The offender's performance on bail may also provide an indication of their suitability for home detention as a sentencing option (Richards 1988). In South Australia, after the introduction of the *Bail Act* 1985 correctional services staff became involved in the bail process in the preparation of bail suitability reports, by supervising offenders on bail through the introduction of home detention. The line between bail and sentencing is that jurisdiction is very blurred.

Bail supervision and support schemes

In the United Kingdom and elsewhere, bail supervision, treatment and support schemes have been developed over the past two decades. 'Bail support' is the provision of services designed to facilitate the granting of bail where bail might not otherwise be granted. The purposes of such schemes are to assist defendants to comply with bail conditions, help to ensure that they do not re-offend whilst on bail and to help ensure that they return to court as required. There is a subsidiary aim of minimising remand in custody, so reducing the pressure on scarce custodial resources. In the UK these services are mainly focused on young offenders who appear before Children's Courts.

In 1983, the New South Wales government introduced a Bail Assessment and Supervision Program to 'provide verified information to enable a court to make an informed decision' (Smith 1988:93). This service had no legislative basis, but was considered appropriate under the *Bail Act* 1978 (NSW), s32 which allowed a court to take into account any evidence or information which the officer or court considers credible or trustworthy in the circumstances. The scheme petered out in the late 1980s or early 1990s.

The nature of the support and supervision provided under such schemes varies. It may involve providing or checking on accommodation, testing for drug use, monitoring

compliance with curfews, providing, or ensuring that defendants attend programs providing social and life skills, dealing with anger management or assisting with reducing drug and alcohol misuse.

Supervision may be provided by volunteers or probation officers. The United Kingdom has developed a set of National Standards for Bail Supervision and Support Schemes: <http://www.northyorks.gov.uk/websites/yot/docs/NatStanbail.pdf>.

Currently, Victoria is piloting a Bail Advocacy and Support Services Program in a small number of Magistrates' Courts. The aim of the program is to 'enhance the likelihood of a defendant being granted bail and successfully completing the bail period by providing appropriate accommodation, supervision and access to treatment programs' (Hearity 2003:5). It operates by providing respite services, links with support agencies, accommodation and medical referrals for drug and alcohol problems. The primary purpose of these 'traditional' support schemes is to ensure that the primary purposes of bail are fulfilled. Theoretically, they have no purposes that stretch beyond the end of the bail period, however the Victorian program is part of a wider diversion strategy in the Magistrate's Court which moves beyond bail and aims to reduce re-offending generally and avoid net-widening.

South Australia has specific provision for 'supervised bail', with supervision undertaken by the Department for Correctional Services. An offender may be required to report regularly to a Community Correctional Centre, or be intensively case managed by a community corrections officer. Other possible conditions include participation in a domestic violence or other treatment programs. In 2001/2 courts made 993 orders for supervised bail.

Diversion schemes

Bail is frequently used as the legal basis for court-based diversion schemes. Some schemes are relatively informal while others have been established through rules of court or legislation. In Victoria, the Magistrates' Court created a Criminal Justice Diversion program which was intended to provide an opportunity primarily for first offenders to avoid a criminal conviction by undertaking programmes which might benefit the community, victims and the offender (Barrow nd). As the scheme originally developed, a defendant who was charged and bailed (or summonsed) could be recommended for a diversion program by the police or the court, or the defendant may propose such a program. The program requires an offender to apologise to the victim by way of a letter or in person, compensate the victim, attend for counselling and treatment, perform community work, abide by a curfew, live at home, not associate with certain persons, make a monetary donation to a charitable organisation, local community project or the like or attend a defensive driving course.

Successful completion of the program would result in the matter not proceeding to court, though the program was to be recorded in police files in a similar manner to cautions. Unsuccessful completion resulted in the matter proceeding to court in the normal manner. In 2003, the Diversion Scheme was placed on a statutory footing (*Magistrates' Court Act* 1989, s128A) and now, rather than being founded on the bail power, it is a formal condition of a magistrate's power to adjourn the hearing of the case.

Although there are strong arguments for retaining relatively informal diversion processes which do not result in a formal record being created, the quasi-punitive nature of some of these conditions provide grounds for arguing that sanctioning and sentencing powers should ultimately lie with the courts; that where a program is effectively a sentence

substitute, a finding of guilt should be required; and that bail should not be used as a substitute for the court's sentencing powers. It is still possible, even if a matter has proceeded to sentence, to relieve a person of the consequences of a criminal record.

Drug diversion/treatment schemes

Diversion schemes for drug offenders have commonly been based on an expanded use of bail provisions. In Victoria, the CREDIT program [Victorian Court Referral and Evaluation for Drug Intervention and Treatment] is a bail scheme created by the magistracy in 1998. Under this scheme, arrestees are brought before a magistrate and, if assessed as committing drug-related non-violent indictable offences and as being suitable for treatment, are released on bail for periods of up to four months or more. The average length of an order is about 8 – 12 weeks. To be eligible, an alleged offender must have a drug problem and must not already be on a community-based disposition. The program is not targeted at any particular groups of offenders and deals with young first time offenders as well as those with significant criminal histories.

Recently, New South Wales introduced a similar scheme on a pilot basis called MERIT [Magistrates Early Referral Into Treatment] which started in Lismore on the North Coast and now operates in 24 courts around New South Wales. It is a court based diversion program that allows arrested defendants with illicit drug use problems to undertake treatment and rehabilitation under bail conditions. Amendments to the *Bail Act* 1978, s36A in 1999 allowed a court to impose specific bail conditions requiring the accused person to undergo drug or alcohol treatment or rehabilitation rather than forcing the courts to rely upon the general bail conditions (Johns 2002:16). The MERIT programs can operate for up to 6 months. Breach results in the withdrawal of bail.

In Western Australia, a bail diversion scheme, the Court Diversion Service (CDS), has been operating since 1988 under the *Bail Act* 1982 (WA) for persons with drug dependency problems (Rigg and Indermaur 1996). The CDS now has a very limited role, following the development of the Drug Court (see below), but the basic model has been that a person with a drug dependency problem who has been charged with a criminal offence has been able to apply to the court for inclusion in the CDS program. The program, run by the Department of Justice and non-government drug treatment agencies, requires the person on bail to undertake treatment, with regular reports back to the court that bailed the offender. The bail condition attached is one which requires that the person 'obey all lawful instructions of the CDS' for the period of remand, which is usually four to eight weeks. The conditions are considered to be precise enough to fall within the terms of the bail legislation, but flexible enough to enable the supervisory agency to work with the offender (Rigg & Indermaur 1996:249). On completion of the program, the person's performance on the program has been taken into account in the final disposition of the case.

Semi-coercive forms of disposition such as the CDS are problematic for a number of reasons. One of the ostensible purposes of the CDS was to operate as an alternative to imprisonment, but this implies that those who participated in the program (a) would have received a sentence of imprisonment and (b) were less likely to receive such a sentence because of their participation. Yet bail is not a sentencing option, nor should it be an alternative to sentence. At best it should be a means of providing sentencers with information that may influence their sentencing decision. The evidence from Western Australia is that the program was only moderately successful, partly because it lacked a legislative basis and partly because its aims and purposes were confused (Rigg & Indermaur 1996:259).

Drug Courts

Drug courts are a relatively new innovation in Australia (Freiberg 2001; Freiberg 2002). A Drug Court has been defined as:

> a court specifically designated to administer cases referred for judicially supervised drug treatment and rehabilitation within a jurisdiction (National Association of Drug Court Professionals in the United States; s2, Articles of Association; Tauber 1994:3; Inciardi et al: 1996; Hora et al 1999).

Drug courts have been established in most Australian jurisdictions. The two basic options are pre-adjudicative (bail or deferred prosecution) or post-adjudicative (deferred, suspended or imposed sentence following a plea or finding of guilt). A recent survey of 97 drug courts in the United States found that 30% were pre-trial, pre-plea schemes (Makkai 1999:3; Swain 1999:8). 42% had a combination of options.

Three Australian states have provided their drug courts with a separate legislative foundation, one as a special Act effectively establishing the drug court as a separate entity, (*Drug Court Act* 1999 (NSW)) and two as sentencing dispositions available in special divisions of the Magistrates' Court (*Drug Rehabilitation (Court Diversion) Act* 2000 (Qld); *Sentencing Act* 1991 (Vic) as amended by the *Sentencing (Amendment) Act* 2002).

South Australia operates under its general bail legislation (*Bail Act* 1985 (SA)), which provides judicial officers with wide discretion in dealing with offenders brought before the courts. In South Australia, after arrest and screening for eligibility, a person may be brought before the Drug Court whether on bail or after being remanded in custody. Appearance before the Drug Court may result in a process of assessment, which may or may not result in acceptance into the program. Entry into the treatment program is a condition of bail and these conditions can be altered throughout the program. Failure to comply with the requirements of the program amounts to a breach of bail. In the normal course of events, a formal plea will be entered. If the defendant pleads not guilty, or wishes to plead guilty to a charge that is not acceptable to the prosecution, the person's participation in the program is terminated. However, if a plea of guilty is entered, sentencing may be delayed for up to twelve months on a conditional bond basis (a Griffiths remand) during which period the treatment program will continue. At the expiration of the bond, the Drug Court Magistrate will take into account the defendant's progress and impose the appropriate sentence. Termination of the program, voluntarily or otherwise, results in the defendant being returned to the normal court processes.

Western Australia's Drug Court and the Pre-Sentence Order: a case study

Western Australia's Drug Court provides a particularly good example of the blurring of boundaries in the criminal justice system. For the sake of argument, it may be conceded that it was justifiable to have initiated a pilot Drug Court regime and that there would have been undue delays if it had been necessary to draft and enact enabling legislation beforehand. Further, the outcome of the pilot program should have paved the way for the development of more comprehensive, targeted and well-founded legislation. However, the legislation that has now been enacted gives rise to some unfortunate consequences. These include uncertainty (both procedural and substantive), potential net widening and a reduction in procedural safeguards.

The Drug Court Pilot Scheme

The WA Drug Court originally had no statutory basis but derived its authority from a complex – and not immediately obvious — interplay between two quite disparate pieces of legislation. The pilot scheme only applied to people who pleaded guilty. The court adjourned sentencing for up to six months under the *Sentencing Act* 1995 (WA). Then, as there was no statutory basis for imposing conditions when deferring sentence, the *Bail Act* 1982 (WA) has been invoked to justify the imposition of conditions during the period of deferral. These conditions included drug counselling, regular monitoring and regular reviews by the Drug Court Magistrate. A key feature of the Drug Court regime has been the use of a 'points system' where offenders are penalised a number of points for negative factors (such as dirty urine tests), but can also 'win back' points for positive factors (such as attendance at counselling). In the event that the person breaches the conditions or exceeds the points limit, it has been possible for bail to be revoked and/or for the person to be sentenced under the *Sentencing Act* 1995.

There were significant problems in bail being used in this way to support the Drug Court. As we have argued, the general purpose of bail is to ensure that a person attends at future court hearings and to ensure the integrity of court processes. On occasions, the person may also be remanded on bail, after conviction, for sentencing or (very rarely) pending an appeal against conviction or sentence. Again, however, this is essentially a procedural mechanism. The purpose of bail is not to impose stringent drug counselling and monitoring requirements or to embrace judicial case management of a 'points system' for offenders who have already pleaded guilty and who could simply be sentenced. Nor does the points system have any legislative sanction.

It has been assumed (but never fully tested) that the *Bail Act* 1982 (WA) allowed such a process. However, this is open to question as a mater of law and the *Bail Act* 1982 (WA) itself imposes restrictions on post-conviction bail. Schedule One Part C of the Act discusses the principles governing the grant or refusal of bail. In terms of defendants who are awaiting sentence, it states that, in considering bail, the judicial officer must consider two factors:

- Whether there is a 'strong likelihood that he (sic) will impose a non-custodial sentence'; and
- Whether there are 'exceptional reasons why the defendant should not be kept in custody'.

The Western Australian District Court Protocol governing referrals to the Drug Court notes these limitations and states that 'it is *assumed*' that the *Bail Act* 1982 (WA) provisions do permit a grant of bail because:

- The Protocol states that the Drug Court should not be used where imprisonment is inevitable; and
- 'The Drug Court must surely qualify as exceptional circumstances.'

Both of these assumptions are open to debate. First, as a matter of law, the phrase 'exceptional circumstances' is one that causes great difficulty and which varies to some degree according to context. However, it is often said that 'exceptional circumstances' must be matters that arise infrequently; the circumstances do not need to be unique, unprecedented or very rare, but they must not involve regular, routine or normal events.[2] Serious questions therefore arise as to whether the Drug Court does satisfy the 'exceptional circumstances' clause. Sadly, given the prevalence of drug related offending, many of the cases that reach the Drug Court are all too familiar and routine.

Secondly, in many borderline cases, it may be that imprisonment is not 'inevitable' but is still a distinct possibility. In such circumstances, it would not be correct to say that there is a '*strong* likelihood' of a non-custodial sentence; at best, a non custodial sentence might be characterized as 'possible' or 'likely'.

The use of onerous conditions on drug court programs raises further issues relating to dispositional ambiguity, neither of which has been clearly resolved. The first is whether the Drug Court is conceived primarily as a lower end option (i.e. as an alternative to non-custodial sentences) or as a top end measure (i.e. as an alternative to imprisonment). The Court appears hitherto to have been used mainly as an alternative to non-custodial options.

The second issue, which flows from the first, is whether the Drug Court offers something of value that the usual non-custodial sentences (such as Intensive Supervision Orders (ISOs) and Community Based Orders (CBOs)) do not. In Western Australia, Drug Court programs have involved conditions that are very similar (or identical) in content to those that can be imposed in a CBO or ISO — such as drug counselling and urinalysis testing. The key difference is simply that Drug Court offenders have been monitored and managed by the court itself.

Further questions then arise in terms of the relationship between the different parts of the process once the person moves onto the 'sentence'. Most offenders who successfully complete the Drug Court program have been sentenced to a CBO or an ISO. These orders tend, of course, to involve conditions that are very similar to those that apply during Drug Court — such as substance abuse counselling and urinalysis testing. The obvious intention is that there should be continuity of treatment and monitoring but there have been significant problems arising from the transition. These reflect, in part, structural changes in the management regime. At the end of the deferral period, case management is no longer a matter for the Drug Court because the administration of community sentences is a matter for Community and Juvenile Justice Services (CJS) not the courts.

Although some of these difficulties may be reflective of different organisational philosophies and resources, the problems are also structural: the Drug Court works within one part of the Justice framework while corrections works within another.

The Pre-Sentence Order

The scheme

The Pre-Sentence Order (PSO) came into effect on 31 August 2003 pursuant to the *Sentencing Legislation (Amendment and Repeal)* Act 2003 (WA). The PSO applies to imprisonable offences (other than offences that carry mandatory imprisonment or offences against the *Prisons Act* 1981 (WA)).[3] Section 33A states that a court may make a PSO if it considers that:

(a) the seriousness of the offence warrants a term of imprisonment;
(b) a PSO would allow the offender to address his or her criminal behaviour and the factors that contributed to it; and
(c) if the offender were to comply with a PSO, the court might not impose a term of imprisonment.

---

2 For recent High Court decisions in the criminal justice area, see *Cabal v United States* [2001] HCA 42 (on the grant of bail to a person who is subject to extradition) and *Eastman v The Queen* [2000] HCA 29 (on the admission of new evidence). For UK cases in the context of mandatory sentences, see *Kelly* [1999] 2 Cr App R (S) 176, Lord Bingham CJ 182; *Williams* [2001] 2 Cr App R (S) 2; and *Turner* [2000] 2 Cr App R (S) 472.

3 *Sentencing Act* 1995 (WA), s33A(1).

The PSO is therefore a generic order open to all courts. However, with the Drug Court and other possible 'alternative' regimes in mind, reference is also made at times to the role of 'speciality courts'.[4]

The PSO involves the court adjourning sentence[5] for a maximum of 2 years from the date that the PSO is made.[6] The offender must then reappear for sentencing at the time and place specified by the court (the 'sentencing day'). During the adjournment period, the offender must comply with a range of standard obligations; namely, to report to a Community Corrections Officer (CCO) within 72 hours; to notify a CCO of any change of address; and not to leave WA without permission.[7] In addition to these standard obligations, every PSO must contain one or more 'primary requirements'.[8] The three primary requirements are a 'supervision requirement'; a 'programme requirement' and a 'curfew requirement'.

The conditions are spelt out in some detail[9] but will not be repeated here; the basic point is that they largely mirror the terms of such conditions when they are imposed when a person is sentenced to a CBO or an ISO. The only condition that may be imposed in an ISO / CBO but not in a PSO is community work.[10] The legislation also permits courts to require, as a condition of a PSO, that the person comply with the directions of a 'specialist court' such as the Drug Court. When the case comes up for sentence, the court is to sentence the offender taking account of the person's performance on the PSO.[11] This assessment is to be based on a performance report from a CCO or on such other information as the court thinks fit.[12] The expectation is that good performance will lead to the court imposing a sentence other than imprisonment.

Onerous conditions that are not part of a sentence

The PSO is not a sentence but is an order that is imposed prior to the 'real' sentence. However, it has all the hallmarks of a sentence in terms of its long potential duration, the conditions that can be imposed and the consequences of breach. In principle, it is our view that onerous conditions (such as curfews, supervision requirements and programmes) should be part of a formal sentence and not part of a conditional non-sentence. Furthermore, the nature of the PSO will make data collection and evaluation difficult. Data are collected, at present, on 'outcomes'; and the outcome is the ultimate sentence. Unless alternative mechanisms are developed, this means that sentencing data will provide a distorted picture in cases of successful PSOs. For example, if a drug-addicted burglar or robber is placed on a PSO and then, having successfully completed its onerous requirements, is given a minimal 'sentence', it is that minimal sentence that will appear as the outcome. The realities of the court orders will not be clear and the courts will appear weak.

The sentencing hierarchy and the sentencing process

Section 39 of the *Sentencing Act* 1995 (WA) lays down a clear hierarchy of sentences. The court must not impose any particular sentence unless satisfied that it is not appropriate to

4 Ibid s 4(1); see also below on the Drug Court.
5 Ibid s33C.
6 Ibid s33B(2).
7 Ibid s33D.
8 Ibid s33E.
9 Ibid ss33F–33H.
10 The original Bill also allowed for community work obligations in a PSO but this was subsequently removed.
11 *Sentencing Act* 1995 ss33J–K.
12 s33K.

use any of the earlier listed sentences. The ranking is: *No sentence – Fine – Conditional Release Order (CRO) – Community Based Order (CBO) – Intensive Supervision Order (ISO) – Suspended Sentence – Immediate Imprisonment.*

It is obviously important to ask where the PSO fits in terms of the process of sentencing. The problems of principle and logic are immense. Since the PSO is not a sentence but an order imposed *before* sentencing, it would appear logically to arise *before* the court considers the sentencing options under section 39. This accords with its placement in the *Sentencing Act* 1995 (WA) where it appears in the Part dealing with 'matters preliminary to sentencing.'

However, the PSO is only to be imposed in lieu of a sentence of immediate imprisonment. This means that it should not be imposed unless the court has already traversed section 39, ruled out the fine, CRO, CBO, ISO and Suspended Sentence, and yet concluded that it can impose a PSO with substantially the same conditions as it could have imposed in a community based sentence. To impose a PSO when following the law to the letter would therefore involve sophistry of the worst sort. Not only that, we have also reached the extraordinary state of affairs that a 'non-sentence' is the *toughest* disposition other than immediate imprisonment!

What do we get that we don't already have?

The existing non-custodial sentences (CRO, CBO and ISO) all entail the court imposing conditions: and, if the person breaches those conditions, the court may resentence that person. At first sight, it is therefore difficult to identify what the PSO adds to the existing array of sentencing options. The main point of difference is that the legislation anticipates the courts taking a far more active role in monitoring conditions than is the case with the CBO / ISO. Importantly, this is the case whether or not a 'specialist court' is involved. Specific provision is made for 'performance reports' to be given by the CCO to the court[13] and for the court to order the person to return to the court at a future date in order to ascertain whether the offender is complying with the conditions.[14] The offender or a CCO may also apply to the court for the order to be amended.[15] It remains to be seen how different judicial officers will respond to this new power / responsibility and how it can be practically accommodated within court schedules and workloads.

Subverting time limits on community orders

The PSO also effectively provides a means of imposing a four year CBO or ISO without legislation having formally altered the maximum periods of such sentences. The net widening potential is obvious.

Appeals

Since the PSO is not a sentence, there cannot not be an appeal on the normal grounds of a manifestly excessive or inadequate sentence. The *Justices Act* 1902 (WA) may be broad enough to permit an appeal from the Court of Petty Sessions by either the prosecution or the defence provided there is 'some reason sufficient to justify a review.'[16] In terms of appeals from the higher courts, the prosecution can appeal against any 'sentence or order'[17] and this seems to embrace a PSO. However, defence appeals are limited to 'sentences' — and there

13 s33I.
14 s33C(2).
15 s33M.
16 *Justices Act* 1902 s 186(1)(b).
17 *Criminal Code* s 688.

seems to be no scope for defence appeals against a PSO. This is despite the fact that defendants can appeal against all other sentences and the fact that the PSO is the toughest option other than immediate imprisonment .

Thus, the new order — the most severe option other than immediate imprisonment — does not afford traditional legal protections. It is no answer to say that the offender must 'consent' to the order; of course a person will consent when the alternative is immediate imprisonment for a substantial period.

Who does the sentencing?

In principle, it would seem desirable for the deferring Judge or Magistrate[18] to consider the performance reports and to sentence the person on sentencing day. However, this cannot necessarily be guaranteed; for example, the deferring judge may be serving as a royal commissioner, on leave, on circuit or in retirement. The most obvious problem is that, where a different judge (Judge 2) presides on sentencing day, he or she may have no idea of the prison term that the 'deferring' judge (Judge 1) had in mind. In this sense, the PSO is quite different from a suspended sentence, where the term is spelled out. It may therefore be desirable, in practice, for Judge 1 to spell out the prison term that was otherwise contemplated at the time the PSO is imposed.

Enforcement and performance reports

It is clear that the integrity and value of CBOs are undermined if there are inconsistent enforcement practices, a point that was forcefully made by the Auditor General in Western Australia.[19] It should be noted that, in the case of PSOs, *performance reports by CCOs will have a direct influence on the actual sentence imposed on the sentencing day (not merely on breach proceedings).*

The PSO and the Drug Court

In Parliament, the Attorney-General stated that the main 'driver' for the PSO was the Drug Court.[20] However, the development of the PSO predated the formal evaluation of the Drug Court's operations and there was little prior consultation with key parties. The view of most people who have worked around the Drug Court is that specific rather than generic legislation is required and that Drug Court dispositions should be sentence-based, not based on some form of pre-sentence order.

If the PSO is used as the Drug Court's basis of operations, the role of that Court will change significantly (but without clear recognition of this fact in most of the debates that have taken place). The evidence is that the Court has, to date, operated mainly in lieu of non-custodial options. The PSO regime changes the Court's standing as it can only be imposed in cases that would otherwise attract immediate imprisonment. Indeed, given that the legislative package also abolishes six month sentences and requires courts to reduce sentences by one third to take account of the abolition of remission, the PSO should only apply where the person would, hitherto, have received at least 9 months imprisonment. [21] The position is made even more confusing by the fact that the previous avenue to the Drug Court (the 6 month deferral and use of bail conditions) remains in place. This avenue can operate in addition to the new PSO regime. At best, this is highly confusing.

---

18 For stylistic reasons, the title 'judge' will be used to denote both judges and magistrates in the rest of this paper.

19 Auditor General for Western Australia, *Implementing and Managing Community Based Sentences: Performance Review* (Perth 2001).

20 *Hansard*, Parliament of Western Australia, Legislative Assembly, 6 November 2002, p 2686–2687.

Potentially, of course, individual judges could even run their own form of Drug Court under the PSO — not by referring the case to the Drug Court but by developing their own criteria and monitoring regime.

Domestic Violence Courts

South Australia runs a Family Violence Court as part of its Magistrates' Court jurisdiction. It deals with matters relating to applications for restraining orders and domestic violence-related offending. Under this program, men charged with criminal offences are remanded on bail for two weeks, with specific conditions relating to assessment and supervision by court workers. If found suitable for treatment programs, bail is extended for another 12 weeks, the length of the anti-violence program. Specific conditions are attached to this extended bail period, breach of which brings the offender back into court to face the charges. Western Australia has a similar scheme. Both of these schemes raise issues that are very similar to those raised by bail-based Drug Court regimes.

Criminal Justice Interventions: New South Wales

The *Crimes Legislation Amendment (Criminal Justice Interventions) Act* 2002 (NSW) was introduced to replace or regularise a number of diversionary options which appeared to lack a clear legal foundation (Johns 2002). Though the aim is to create a legal framework which will promote consistency, accountability and confidence in the programs, these measures appear to be problematic and profoundly ambiguous in terms of their place in the dispositional hierarchy in the same way as the Western Australian PSO.

The Act creates an 'intervention program', which is a rehabilitation, treatment or restorative justice program that is described in the regulations (*Criminal Procedure Act* 1986 (NSW), s3(1)). It purposes are to promote the treatment and rehabilitation of offenders, respect for law and community safety, allow for remedial actions by offenders towards victims, promote acceptance by offenders of responsibility for their behaviour and the reintegration of offenders into the community (Johns 2002:26). An intervention program order may be imposed:

- As a condition of bail where the authorised officer or court to whom an application for the granting of bail is of the opinion that the person would benefit from undergoing assessment for participation in an intervention program or other treatment or rehabilitation program or participating in an intervention program or rehabilitation (*Bail Act* 1978 (NSW), s36A(1) and (2));
- As a condition of a dismissal of charges without conviction (*Crimes (Sentencing Procedure) Act* 1999 (NSW), s10(1)(c));
- As a condition of a deferral of sentencing (*Crimes (Sentencing Procedure) Act* 1999 (NSW), s11(1)(b2));
- As a condition of a good behaviour bond (*Crimes (Sentencing Procedure) Act* 1999 (NSW), s95A(1)).

Intervention programs are ostensibly intended to replace short terms of imprisonment. Section 5(2) of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) now provides that:

---

21 Under the terms of the *Sentencing Legislation Amendment and Repeal Act* 2003 (WA), the abolition of six month sentences cannot come into effect until at least six months after the rest of the Act. When it is in force it should generally have the effect of abolishing what have, hitherto, been 9 month sentences. This is because the courts are required to reduce sentences by one third to take account of the abolition of remission. A one third reduction on a nine month sentence would produce a prohibited six month sentence.

> A court that sentences an offender to imprisonment for 6 months or less must indicate to the offender, and make a record of, its reasons for doing so, including:
>
> (a) its reasons for deciding that no penalty other than imprisonment is appropriate, and
>
> (b) its reasons for deciding not to make an order allowing the offender to participate in an intervention program or other program for treatment or rehabilitation (if the offender has not previously participated in such a program in respect of the offence for which the court is sentencing the offender).

However, they will not be applicable to post-sentence options.

Conclusion

Across Australia, we are seeing the creation of new forms of disposition, many of which are highly ambiguous in theory, scope and content. In New South Wales, the 'criminal justice intervention' appears to be a Jack of all Trades: it is both a sentence and a bail condition; it is semi-coercive and makes significant intrusions into a person's liberty; it is intended to be both an alternative to imprisonment and a lower end dispositional option; and it can be a final or deferred sentence.

Our analysis of Western Australia's experience with the Drug Court and the new Pre-Sentence Order has shown similar problems. The use of bail conditions for the Drug Court pilot project was problematic. The PSO is very confusing in theory and does not fit within a rational and principled decision-making process; it is not a sentence but it is the toughest option other than immediate imprisonment; it imposes conditions that are, in all but name, equivalent to a sentence; it undermines procedural rights in that defendants have no right of appeal from higher courts; it may serve, in effect, to extend the period of a community 'sentence' without Parliament having specifically authorised this; and it creates a confusing set of procedures for Drug Court access. We believe that courts will be confused as to the appropriateness of the use of options such as the Criminal Justice Intervention and the PSO; and that these orders will therefore not meet the expectations of those who framed the legislation authorising them.

The legal foundation of a sanction or 'intervention' is also relevant to the kind of 'leverage' which a court might have over an offender (Longshore et al 2001:13). By 'leverage' is meant the nature and seriousness of the consequences faced by offenders who may fail to meet the requirements of a program. Whereas post-conviction, or sentencing schemes will signal the likely outcome to the offender through an imposed or suspended sentence or an indicative sentence, a bail or deferred prosecution scheme will not carry a similar fear, unless the court somehow indicates the sentence it proposes to impose when it moves to the sentencing stage of proceedings. A favourable outcome may result in the charges being withdrawn or reduced, while a negative outcome will result in a sentence being imposed some time in the future. Furthermore, indicated sentences and the like should, in our view, form part of a formal sentencing process and a formal sentencing hearing — and should not be relegated to a pre-trial or pre-sentence format to which lesser evidential and procedural standards may apply.

Last, but not least, we adhere to the quaintly old-fashioned notion that legal structures matter. Although bail-based schemes have the benefit of flexibility and do provide an opportunity for innovation on a pilot basis, the primary purpose of bail should not be lost. Bail should be seen as essentially process oriented rather than performance based. Its main role is to ensure that the offender appears in court, either to face charges or to be sentenced. Bail and the new interstitial options such as the PSO distort legal structures by imposing de facto sentences that may be of considerable severity and serve to undermine traditional legal protections.

References

Barrow, B (nd) *Criminal Justice Diversion Program (Magistrates' Court)*, Law Institute of Victoria, Criminal Law Newsletter, iss 20, p 2.

Brignell, G (2002) *Bail: An Examination of Contemporary Issues*, Judicial Commission of New South Wales, Sentencing Trends and Issues, no 24, Judicial Commission, Sydney.

Challinger, D (ed) (1988) *Bail or Remand?*, Australian Institute of Criminology, Canberra.

Fox, RG (2002) *Victorian Criminal Procedure*, Monash Law Book Co-Operative, Melbourne.

Fox, RG & Freiberg, A (1985) *Sentencing: State and Federal Law in Victoria*, Oxford University Press, Melbourne.

Fox, RG & Freiberg, A (1989) 'Sentences Without Conviction: From Status to Contract in Sentencing', *Criminal Law Journal*, vol 13, p 297.

Fox, RG & Freiberg, A (1999) *Sentencing: State and Federal Law in Victoria*, 2nd ed, Oxford University Press, Melbourne.

Hearity, S (2003) *Discussion Paper on Proposed Model for the Bail Advocacy and Support Services Program 2003/4*, Unpublished Paper, Office of the Correctional Services Commissioner, Department of Justice, Victoria.

Heilpern, D (1991) 'Curfews: Bail Gone Mad', *Legal Service Bulletin*, vol 16, p 294.

Johns, R (2002) *Bail Law and Practice: Recent Developments*, NSW Parliamentary Library, Sydney.

Law Society of New South Wales (2002) 'New Powers to Restrict Association and Movement', *Law Society Journal* (Law Society of NSW), vol 40 no 7, pp 62–65, 67–69.

Morgan, N (1993) 'Imprisonment as a Last Resort: Section 19A of the Criminal Code and Non-Pecuniary Alternatives to Imprisonment', *University of Western Australia Law Review*, vol 23, p 299.

Morgan, N (1996) 'Business as Usual or a "New Utopia"? Non Custodial Sentences Under Western Australia's New Sentencing Laws', *University of Western Australia Law Review*, vol 26, p 364.

Morgan, PM & Henderson, PF (1998) *Remand Decisions and Offending on Bail: Evaluation of the Bail Process Project*, Home Office Research Study 184, Home Office, London.

Parliament of Western Australia (2002), *Hansard*, Legislative Assembly, 6 November 2002, p 2686– 2687.

Petersilia, J (1998) 'Probation and Parole' in Tonry, M (ed), *The Handbook of Crime and Punishment*, Oxford University Press, New York.

Raine, JW & Willson, MJ (1996) 'The Imposition of Conditions in Bail Decisions: From Summary Punishment to Better Behaviour on Remand', *The Howard Journal*, vol 35, p 256.

Richards, J (1988) 'The Contribution of Correctional Services to the Bail Process' in Challinger, D (ed), *Bail or Remand?,* Australian Institute of Criminology, Canberra.

Rigg, J & Indermaur, D (1996) 'Issues in Drug Offender Diversion: A Review of the Court Diversion Service in Western Australia', *Australian and New Zealand Journal of Criminology*, vol 29, p 247.

Simpson, B & Simpson, C (1993) 'The Use of Curfews to Control Juvenile Offending in Australia: Managing Crime or Wasting Time?', *Current Issues in Criminal Justice*, vol 5, no 2, p 184.

Smith, B (1988) 'Assisting the Court: Bail Assessment Developments' in Challinger, D (ed), *Bail or Remand?,* Australian Institute of Criminology, Canberra.

Warner, K (1983) 'The Dam Blockade: Bail Conditions and Civil Liberties', *Legal Service Bulletin*, vol 124.