Assisting the Court: Bail Assessment Developments

Brenda Smith[1]
Program Manager
Probation and Parole Service
Department of Corrective Services
New South Wales

Prior to the Bail Act 1978

In New South Wales, the *Bail Act 1978* took effect from March 1980. This Act was developed following recommendations of a Bail Review Committee established to examine the system of bail in New South Wales. Prior to the introduction of the Bail Act 1978, the granting of bail in New South Wales was almost entirely based on money, either by lodgement of money by the accused or a surety, or an agreement to forfeit such money on default. The criteria relevant to bail determination had never been codified and were confusing and ambiguous. Also, there was no clear authority for defendants to be released on conditions other than financial.

The Bail Act enacted following the recommendations of the Bail Review Committee discouraged the emphasis on money bail and sureties, and in broad terms contained the following features:

- An entitlement to bail in respect of minor offences not punishable by a sentence of imprisonment and offences punishable summarily, subject to certain specified exceptions.

- A presumption in favour of bail for all other offences, except those of armed and otherwise violent robbery or previous failure to appear in accordance with a bail undertaking. Subsequently, drug trafficking was included in this category. Persons charged with these offences are not automatically refused bail, but will have more difficulty in securing it.

- For offences for which a presumption in favour of bail exists, the Act specifies the factors to be considered in the determination of bail. Briefly these are

  - the probability of whether a person will appear in court—this is linked to: the person's background and community ties; any previous failure to appear;

[1]. Ms Brenda Smith is now Executive Director, Community Corrections, Department of Corrective Services.

circumstances of the offence including seriousness and severity of probable penalty.

- the interests of the person, having regard to length of time likely to be spent on remand and the conditions thereof; needs of the person to be free and whether the person is incapacitated by intoxication, injury or drug use or in need of protection.

- the protection and welfare of the community, having regard to previous failure to observe a bail condition; likelihood of the person interfering with evidence, witnesses or jurors and likelihood that the person will commit an offence while on bail.

A 'bail test' is provided for use in rating the accused's background and community ties to assist in determining probability of appearance in court, but the use of that test is not compulsory.

- Bail may be granted unconditionally or subject to limited conditions.

Thus, the Bail Act makes provision for the use of information about the background and community ties of the accused in assessing the likelihood of appearance at Court. A prescribed form is provided for specific use in developing an objective rating to assess background information regarding the accused. It can be seen, then, that the Bail Review Committee borrowed some of the features of the well-known Manhattan Bail Project, which has been operating for over two decades in the United States.

The Manhattan Bail Project operates on the philosophy that a person's community ties are an indicator of the probability of appearance at Court by an accused, and for those persons with high ratings a financial bond may be unnecessary in securing Court appearance. Therefore, the aim is to provide as much verified information as possible to the Court about the accused to assist in rational decision-making regarding bail. Evaluations of the Manhattan scheme lend support to its philosophy in finding that provision of verified information about the accused is associated with a higher rate of pre-trial release and a lower incidence of failure to appear at court (Zander 1967; Sturtz 1965).

Under the New South Wales Bail Act, the background and community ties of an accused are one of a number of factors to be considered in bail determination, where possible, in those matters where the offence committed does not carry a right to bail. However, the legislation does not specify who is responsible for administering the questionnaire which, in practice, means that this task has been left entirely to the police. In reviewing the impact of the Bail Act, the Bureau of Crime Statistics and Research in New South Wales found that because of staffing resources a decision was made by the New South Wales Police Department that the community ties questionnaire would only be used in limited circumstances (Stubbs 1984). This, in effect, meant that the form was used in only a small number of cases and in those cases it seems that little attempt was made to verify the information.

Establishing the Trial BASS Program

Following the implementation of the Bail Act in 1980, Probation and Parole Service Court Duty Officers working at Sydney's busy Central Court observed that the new bail procedures were not always operating in accordance with the expectations of the Bail Review Committee. It was apparent that there were still defendants in custody, either bail refused by the police or bail set with conditions unable to be met, who may have been released by the Court if objective and verified information had been available to the Court,

or if alternative accommodation, welfare assistance or supervision by the Probation and Parole Service had been offered. This observation, of course, was later supported by the Bureau of Crime Statistics and Research study (Stubbs 1984). Some magistrates had, in fact, already encouraged involvement by Court Duty Officers in the bail area by requesting verified information in relation to some bail applicants.

Resulting from these observations, one Court Duty Officer, Ms Judy Law (now Johnston), applied for and successfully obtained a Justice Administration Travel Grant to observe first hand bail or pre-trial programs in the United States and Europe. She observed programs operating in New York, Washington DC, Paris and London. All programs had been established with the assistance of the Vera Institute of Justice, who were responsible for the establishment of the original Manhattan Bail Project.

Armed with the information from these overseas programs, on her return to New South Wales a proposal to establish a pilot Bail Assessment Service and Supervision Program (BASS) was submitted and subsequently approved. To facilitate effective implementation of the pilot program, a committee comprising representatives from the New South Wales magistracy, Public Solicitor's Officer, Police Prosecuting Branch and the Probation and Parole Service was established for the effectiveness and functioning of the program. The following objectives for the program were established by the committee:

- to provide verified information to the court to enable the court to make a decision in relation to bail based on more objective information;
- where indicated, to offer social welfare assistance, etc. to the bail applicants which may increase their bail rating and secure their release on bail;
- to reduce the numbers of defendants held in custody, bail refused or unable to meet the conditions of bail, where the penalty for the alleged offence is unlikely to result in a sentence of imprisonment;
- to reduce the number of defendants held in custody, charged with serious offences where the time between arrest and trial is likely to be lengthy;
- to reduce the number of multiple bail review applications to Courts of Petty Sessions, District Courts and the Supreme Court;
- to provide supervision of the bailee in the community.

The committee considered that the proposed BASS program, while not covered by legislation, could be justified under Section 32 of the Bail Act which provides that:

> . . . the authorised officer or Court may take into account any evidence or information which the officer or the Court considers credible or trustworthy in the circumstances.

The program commenced operation in January 1983 for a trial period of six months. It had been intended to trial the program at Central Court, but due to its closure for renovations custody matters in the city area were transferred to two other inner city courts. This did create some logistical problems due to the lack of interviewing facilities in these courts, which meant that bail applicants in police custody had to be interviewed in police station cells very early in the morning prior to their removal to court. Thus a lot of time was lost travelling between various police cells and the office for report preparation ready for court at 10.00 am.

The program also covered the Supreme Court (Bail Review) applications for defendants in custody seeking bail reviews after having bail refused by the lower court. As this Court generally only sat once per week, applicants could be interviewed at the remand centres in a more leisurely fashion.

The program covered two busy inner city courts and the Supreme Court dealing with bail review applications. Typically the daily procedures were as follows:

- early telephone calls to relevant police cells to determine whether there were any bail applicants in custody;
- attendance at police cells to conduct interviews with applicants. This usually commenced between 7.00—7.30 am. Prior to interview, each applicant was required to read and sign a document explaining the BASS process which also acted as a caution regarding the use of information obtained;
- interviews were then conducted using a standard data collection form covering the areas of family ties, employment, financial, medical and legal situations and also canvassed possible acceptable persons in the community for bail purposes;
- return to office base to make telephone calls for verification of the information obtained and write the report for court. All reports were handwritten to save time, except for the Supreme Court where time was not such a pressing factor;
- attendance at court to present report, answer any questions and process any applicants released on bail. It was decided that BASS reports would not include a recommendation relating to the suitability or otherwise of the applicant to be released on bail. This decision was made after consultation with representatives from other areas of the criminal justice system who felt that, for the pilot program, recommendations for or against release should not be made.

Difficulties Encountered During the Pilot Program

Difficulties were sometimes experienced during the process of verification in obtaining information from Probation and Parole Service records in relation to bail applicants who were also under Service supervision. Due in part to the early hour, supervising officers were not always available to provide or verify information which meant that another officer had to extract the necessary details and this was more time consuming. Service records have now been computerised and case histories revamped and streamlined so this problem should not exist in future.

A surprising amount of resistance was experienced from officers within the Probation and Parole Service towards BASS. Many officers who had traditionally worked with offenders only after conviction felt that bail applicants were outside the traditional sphere of the Probation and Parole Service and were unwilling to accept Service involvement with bail. As it turned out, over 50 per cent of the bail applicants interviewed were either current, or had been previous, clients of the Probation and Parole Service. Thus as the trial progressed some officers at least were able to see the important role that the Service could play by being able to supply reliable information to courts in the process of bail setting.

Much of the resistance came from middle management of the Service which created very real difficulties for the co-ordinator of the BASS program who was, at the time, a base grade Probation and Parole Officer. She, therefore, required the support of senior management on many occasions in order to obtain necessary co-operation. As the pilot period progressed there was generally greater acceptance of the Service's involvement in

BASS, but the resistance experienced was sufficient to obstruct the original plan to introduce BASS to other courts outside the inner city area.

Another problem was the time restraints on the two officers involved in the trial in interviewing bail applicants, conducting enquiries and writing reports in time for the 10.00 a.m. commencement of daily sittings at the court. This was, of course, exacerbated by defendants being held in police cells some distance away from the courts. Depending on the number of defendants to be interviewed the time factor is still a potential problem area and it may well be necessary to negotiate, in busier courts, to have bail matters considered after the morning tea adjournment to allow more preparation time for reports.

Results of the Trial

During the six-month trial period, 326 bail applicants were interviewed. Of these, 61 per cent were granted bail, 30 per cent were refused bail and 9 per cent did not have a report submitted to the court. Of those granted bail, 24 per cent were placed under supervision of the Probation and Parole Service as a condition of bail.

In addition, the following characteristics of the sample group emerged:

- over 51 per cent of those interviewed were either current or previous clients of the Probation and Parole Service;
- 54 per cent of those interviewed were suffering from a significant medical/social problem;
- 33.5 per cent of those interviewed were involved with hard drugs;
- 40 per cent of those refused bail were declared drug or alcohol abusers;
- 6.4 per cent of the total group had no fixed place of abode;
- 46 per cent of the total group had been at their current address for three months or less;
- 36.5 per cent were aged twenty-two years or less;
- 65 per cent were unmarried;
- 71 per cent were either unemployed or in receipt of Social Security pensions.

Thus, the emergent profile is of a young, single, unemployed, transient, drug involved group of defendants who had bail refused by police during a six-month period in specific inner city locations.

Given the above profile of the sample group, even if police had used the community ties questionnaire to determine a rating it is possible that they would still have refused bail. Nevertheless, courts obviously took a different view, as evidenced in their granting of bail for almost two-thirds of the applicants who had been refused bail by the police. While it is tempting to attribute the granting of bail by the courts to the intervention of the trial BASS program the limitations of the trial were such that we really do not know just how many applicants would have been granted bail if BASS had not been operating. However, feedback from judges and magistrates, limited though it was, indicated that they did find the

objectives and verified information contained in the BASS reports helpful in reaching a decision regarding bail. Of value also was the service provided by the BASS officer at court, who could clarify or obtain further information, arrange accommodation or provide other welfare assistance and arrange bail supervisions. It was felt by the two BASS officers involved in the trial that these additional services sometimes tipped the scales in favour of bail in uncertain cases.

Some factors that appeared to be of significance to the refusal of bail by courts during the trial were seriousness of the alleged offence, prior escape from custody and previous breach of bail.

What Has Happened Since

Management of the Probation and Parole Service considered that despite the limitations of the trial the results were sufficiently promising to warrant proposals for an ongoing BASS program. A proposal was prepared to provide BASS officers in all major courts in Sydney and major outlying areas and to provide a BASS officer in each of the remand gaols to service bail appeal applications to the Supreme Court for those defendants remanded in custody bail refused or unable to be met. However, an exercise conducted during August 1985 assisting remandees with bail appeals proved to be so inconsequential the Service concluded that greater impact was likely to be made by intervention at the initial point of bail determination by the court, rather than involvement in a bail appeal that seeks to have a court decision reversed. The Service, therefore, decided that as a first priority BASS should be established at the busiest courts.

The proposal involved establishing full-time Court Duty Officers who would, as part of their role, provide a BASS service. The Probation and Parole Service has for a number of years been operating a Court Duty Officer program, which is generally valued by sentencers for its ability to provide relevant information and advice on offenders and on-the-spot assessments to assist in sentencing. This court duty officer service has substantially reduced the number of requests to District Officers for written pre-sentence reports. However, as the program is predominantly part-time, the provision of a BASS service cannot be effectively offered from existing resources.

The resources requested to establish BASS have, for a variety of reasons, never been forthcoming and the BASS program has therefore, never been actively promoted with the judiciary.

While, in theory, courts may request a bail assessment at any time, in reality this occurs infrequently. Over the past three years only 118 requests have been received from courts and these are primarily from the inner city locations where the trial BASS program operated.

In the meantime, the remand population continues to grow. Prison census details from June 1985 to June 1987 indicate the remand populations shown in Table 1, excluding those held in custody awaiting appeal outcome.

Further, an examination of remand figures conducted on 23 November 1988 showed a total of 742 remandees representing 17.2 per cent of the total prison population. Of these, 71 (9.5 per cent) have had bail granted but have, presumably, been unable to meet the conditions set.

Table 1

Remand Populations, New South Wales 1985-87

	Number in remand	Percentage of total gaol population
June 1985	462	11.2
June 1986	610	14.4
June 1987	660	14.5

The Probation and Parole Service has identified a small number of staff positions to establish Court Duty/BASS officers and has reviewed other Court Duty Officer resources with a view to establishing a BASS program at strategic locations. As well, the present Minister for Corrective Services is anxious to reduce the remand population and has requested that a bail hostel proposal be developed to dovetail with the proposed BASS program.

Activities for implementation of the BASS program are currently underway: program objectives are being reviewed; an officer training program is being established; and a program evaluation plan is being developed to enable the effectiveness and viability of BASS to be evaluated.

Some of the issues currently being addressed for the proposed BASS program are:

- What are the needs of the magistracy in relation to:
  - the kind of information contained in the report;
  - whether a recommendation should be made in the report regarding the grant or non grant of bail;
  - whether the reports should be prepared unsolicited by the court or not until a request is received.
- What is our target group for the BASS program:
  - eligibility criteria needs to be determined;
  - will BASS be offered to individuals regardless of whether they have legal representation.
- Which courts take priority for the BASS program in view of the limited resources at present available.

Consultation with the magistracy and relevant others will occur and it is the hope of the Probation and Parole Service that if a small BASS program is effectively operating and proves viable, a stronger campaign can be mounted to gain the resources necessary to provide BASS statewide.

References

Law, J. 1984, Bail Assessment and Supervision (Pilot) Program (unpublished), NSW Probation and Parole Service.

Stubbs, J. 1984, *Bail Reform in NSW*, NSW Bureau of Crime Statistics and Research, Sydney.

Sturtz, H. 1965, 'The Manhattan Bail Project and its Aftermath', *American Journal of Correction*, vol. 28, pp. 14-17.

Zander, M. 1987, 'Bail: A re-appraisal', *Criminal Law Review*, pp. 25-39.