Aphra Green, Harkness Report 2016

Evidence to Action in the criminal justice system: lessons from the USA

1. Recommendations

It is recommended that the Justice Sector Leadership Board:

A. **Note** that successful implementation of the investment approach rests upon broad system ownership and collaboration with partners and stakeholders not ordinarily part of discussions about the performance of the whole criminal justice system.

B. **Establish** a national Criminal Justice Coordinating Council (or something similar) as a steering group for the criminal justice system, responsible for the operation of the justice system and driving performance improvements.

C. Building on the success of the BPS Flagships Initiative, **consider** the reinvigoration/expansion of the local BPS groups, with improved support and technical assistance.

D. **Review** the Justice Sector Fund and consider its deliberate use for collaborative projects initiated at the local level, supported by and aligned with Investment Approach analytics.

E. **Establish** more formal relationships with the universities, for mutual research benefit, both at National Office and local levels.

F. **Host** a Disrupting Justice Symposium, with invited guests from the technology, academic, private, government and NGO sectors, and use the Justice Sector Fund for seed investment in the best ideas arising from the Symposium.

2. summary

The success of the Investment Approach to Criminal Justice will rest on the extent to which justice sector leaders can transform the culture of their respective organisations (and thus, the Sector), to become a 'learning sector'. That is, a group of organisations – and related individual decision-makers – whose every activity, from the big investments down to individual decisions, are informed by evidence, and decision-makers have the tools they need to make these decisions. The above recommendations represent a set of structure and incentive changes to begin to support the culture change needed, focusing on deliberate collaboration and supporting innovation.

3. Comparison of three federal criminal justice evidence-based investment programs

There are three large, national reform programmes in operation in the US. Each has very similar characteristics, and to a greater or lesser degree place an emphasis on:

- Broad collaboration across stakeholders (all through a formal structure such as a Criminal Justice Collaborating Council)
- Technical assistance and capability building
- Examining each criminal justice decision point (or specified points) and/or investments for evidence-based improvement.

The Justice Reinvestment Initiative has more of a focus on examining cost-effectiveness of particular programs, and reinvesting the cost savings arising from reprioritizing savings. All of the programs also rely to some extent on competition as a mechanism to encourage participation and excellence. The newest program, the MacArthur Foundation's Safety and Justice Challenge, sought bids from local sites for funding and technical assistance, and awarded grants of up to $1.5M to some sites. Progression through the phases of EBDM has also been a competitive process, and though there is still friendly competition between sites, there is now also a degree of mutual information exchange and strategy sharing. The State-County partnership model means that the State teams are expected to provide leadership and support to the local county teams.

The particular aspects of the EBDM model that I observed as being crucial to its success included:

- **Collaboration:** system stakeholders working together as partners
- **Capacity-building:** not everyone comes to the EBDM table with knowledge of evidence-based practices – technical assistance providers, trained capacity builders, and other individuals who have been through the EBDM process before, have disseminated knowledge and assisted local teams with their plans – these people also ensure forward momentum on plans
- **Courageous leadership:** it takes leadership at all levels of the organisation – and from people around the EBDM table – to actively move away from the status quo and to look for a better way of doing things
- **Competition:** there is friendly competition between sites – this has encouraged sites to move forward
- **Culture change:** new ways of doing things challenge established practices and organisational culture
- **Commitment:** reorienting a whole system takes time and effort – it won't happen overnight, but it will happen if everyone commits to the vision, attends and participates in the meetings, and gets things done in between
- **Creativity:** sometimes a bit of creative thinking is needed to work around current barriers
- **Co-development:** system changes that are developed in partnership with other justice system stakeholders will be better than those developed alone
- **Change champions:** these are the tireless individuals who go the extra mile, who promote EBDM at every opportunity, who see the vision and the excitement, and can bring people along with them

- **Conversation, conversation, conversation:** trust between justice system stakeholders is built on long and detailed conversations that allow everyone to see the system from all angles
- **Constructive conflict:** a necessary ingredient for any functioning team – and the facilitators are brilliant at ensuring the discussions continue to have forward momentum
- **Challenging the status quo:** at every step being able to ask "why do we do that? Is it necessary? Can we do it differently?"
- **Continuous improvement:** making improvements as we go, picking off the low-hanging fruit
- **Community support:** many teams have the support of county administrators and state governors, and some have broader community involvement and support – and many county-level teams have the support of local media, who are eager to promote what they are doing
- **Communication:** tell them what you're going to tell them, tell them, tell them what you told them, and do it all again.

Name	Key reform/implementation strategies
Safety & Justice Challenge http://www.safetyandjustice-challenge.org/ Aim: Reduce over-incarceration in US jails. $75M over 5 Years 1 State 3 cities 16 counties	- Targets 6 decision-points for improvement - Significant funding and technical assistance for site (up to $1.5M) - 10 Steps to System Change: o Collaborate – to understand the system o Lead – to commit agencies to change o Analyse – all the data o Engage – all affected groups o Plan – articulate goals and how to achieve them o Implement – and monitor implementation o Innovate – try new approaches o Align – business practices to support new goals o Reflect – on whether targets are being met o Improve – evaluate and continue to evolve
Evidence-Based Decision-Making Program http://www.ebdmoneless.org/ Aim: To provide a framework for justice systems that will result in improved system outcomes through true collaborative partnerships, systematic use of research, and a shared vision of desired outcomes.	- Framework articulates core principles - Roadmap provides process for implementation: o Build a genuine, collaborative policy team. o Build individual agencies that are collaborative and in a state of readiness for change. o Understand current practice within each agency and across the system. o Understand and have the capacity to implement evidence-based practices. o Develop logic models.

~$1M/year (21 sites) 3 States 18 counties	○ Establish performance measures, determine outcomes, and develop a system scorecard. ○ Engage and gain the support of a broader set of stakeholders and the community. ○ Develop a strategic action plan for implementation. - Technical assistance and capacity building
Justice Reinvestment Initiative https://www.bja.gov/programs/justicereinvestment/index.html Aim: A data-driven approach to improve public safety. 27 States	- Process: ○ Establish bi-partisan working group ○ Analyse data ○ Develop policy options ○ Adopt new policies ○ Implement new policies ○ Reinvest ○ Measure performance - An important component is encouraging the adoption of evidence-based practices. The four emphasized: ○ Monitoring for effectiveness ○ Immediate, swift and certain responses ○ Risk and Needs Assessments ○ Problem-Solving Courts

Effectiveness and success stories

The challenge for these large scale programs is attributing improvements in justice outcomes to the program, especially at a time when crime rates are generally falling. The two programs established the longest (JRI and EBDM), both have success stories, largely shown through significant reductions of jail and prison populations. In addition, at a local level, I heard many anecdotes about the simple benefits of cross-system collaboration and trust – where just by virtue of the relationships having been built:

- there was a unified approach to sentinel events (whereas previously departments might have publicly blamed each other or allowed each other to take the blame)
- small (but significant) changes were achieved through a friendly hallway conversation
- a ~30% drop in a local jail population was attributed to collaboration and discussion about evidence-based practices alone (the county had only recently joined EBDM and had not yet begun to implement any changes.

In addition, local level reforms and a groundswell of support had encouraged lawmakers to table State-level law reforms, such as the 27 bills proposed by Senator Evan Goyke in the State of Wisconsin.

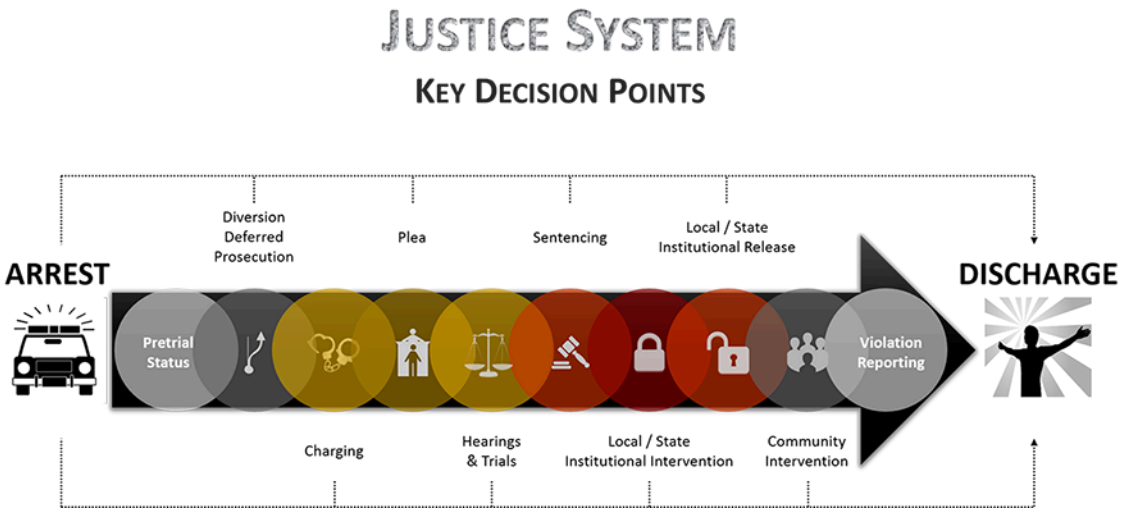
Finally, the need for criminal justice reform having hit the public consciousness, the media seems largely to have moved away from hyperbolic sensationalism of crime and the 'tough on crime' rhetoric. Individual stories of peoples' mistreatment in the criminal justice system or at the hands of Police (eg, Ferguson, Missouri or Khalief Browder's story) have been instrumental in creating a shift in the public consciousness, and criminal justice stories in the media are largely focused on the need for reform, rather than the opposite.

EBDM: Eau Claire Case Study

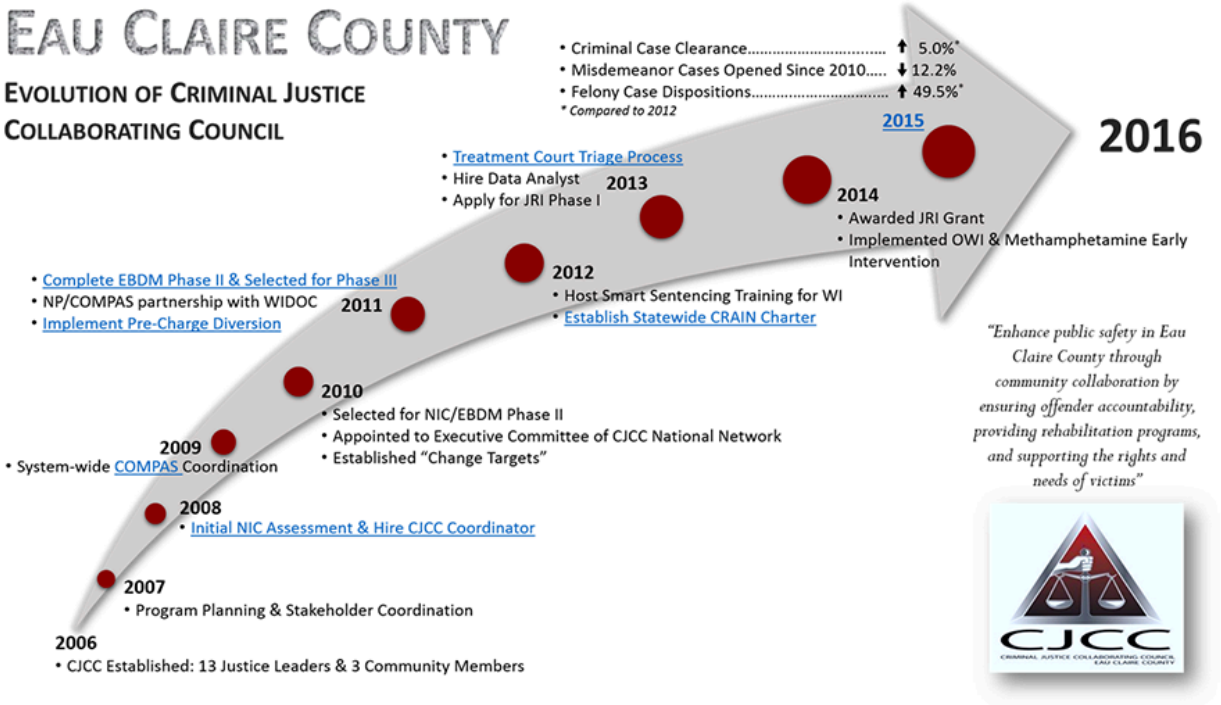
In the early 2000s, Eau Claire County officials agreed to four crime and community safety goals:

- Improve public safety.
- Create system-based approaches to justice issues.
- Reduce duplication of effort and conflicting practices.
- Better allocate limited justice system resources.

In 2006, officials formed a Criminal Justice Collaborating Council (CJCC) with their sights set on building success through a data-driven, evidence-based justice system all the way from arrest through final offender outcome.



Around this same time, the Wisconsin Department of Corrections was implementing their own evidence-based practice (EBP) in the state system, with a primary goal of better identifying and classifying juvenile and adult offenders for housing, community corrections, and parole supervision. A collaboration using a recognised risk assessment tool allowed both state and local agencies to ultimately recognize the value of risk assessment for evidence-based decision making (EBDM) at all phases of the criminal justice process. In 2010, Eau Claire County were successful in being accepted to participate in the National Institute of Correction's (NIC) EBDM Initiative (one of seven jurisdictions). Existing collaborative and trusting relationships across the county meant that they were able to move quickly to rollout their EBDM initiative across all agencies and departments.



Embracing "what works"

One of the founding principles of the EBDM Initiative is that *decisions are best made if they are based on research*. It is becoming widely understood and accepted that policy makers and criminal justice practitioners must *"get outside the box that defines punishment and rehabilitation as an either/or proposition"*. [1] Research on "what works" coming from many academic fields has shown that punishment, incarceration, and other sanctions do not reduce recidivism – and more often even exacerbate it. Their findings include:

- Treatment and rehabilitation can "work" to reduce recidivism.
- For appropriate offenders, alternatives to imprisonment can be both less expensive and more effective in reducing crime.
- Even where alternatives to incarceration do not decrease recidivism, they often do not increase it either, thereby providing a cost-effective alternative to imprisonment without compromising public safety.

Based on this research, Eau Claire County's CJCC implemented a continuum of risk assessment services so that law enforcement could quickly screen an offender's risk level at the point of arrest, with subsequent decisions about community release, pretrial diversion, sentencing, and probation supervision to assess the existence of criminogenic factors and how best to address them at every step. In addition, the Board of County Commissioners depends on evidence to make its funding decisions in support of risk-reducing programs and to eliminate ineffective ones.

[1] Judge Roger Warren, *Evidence-Based Pr[illegible]e Recidivism: Implications for State Judiciaries.*

US jurisdictions make a distinction between evidence-based decision-making and evidence-based practice. Evidence-based practice in the criminal justice system is the partnership between research and *practice*, with research used to determine how effective a practice is at achieving positive measurable outcomes – including reduction of recidivism and increasing public safety. A common evidence-based practice is the use a of risk/needs tool to determine the appropriate amount of intervention, rather than the use of professional judgment alone. Evidence-based decision making represents a systemic approach that uses research to inform decisions at all levels throughout the criminal justice system.

Results

Since first implementing the EBDM program in Eau Claire, recidivism rates have fallen by nearly half while felony case filings have increased as prosecutors, judges, and others have been able to focus on serious crime as a result of the diversion of low-risk, first-time offenders. Even with an increasing caseload, the clearance rate has improved from 96% in 2012 to 101% in 2015 for total criminal cases – meaning that the DAs Office is closing more criminal cases than they are opening, despite a shift to a higher volume and percentage of felony cases. A key contributor to the increase in dispositions is their Pre-Charge Diversion Program that redirects hundreds of low-risk, first time offenders out of the criminal justice system and has proven to preserve resources while reducing recidivism.

Justice Reinvestment Success Stories

Kentucky

In Kentucky, the prison population had increased from 14,919 to 21,638 inmates from 2000 to 2009. With an average increase of 4.2 percent per year, Kentucky had the fifth fastest growing prison population in the nation, despite steady crime rates.

In March 2011, Kentucky passed sweeping Justice Reinvestment Initiative legislation focused on three goals: improve public safety, lower costs, and reduce recidivism while still holding offenders accountable. At the time of passage, state leaders estimated the policy package would save Kentucky $422 million dollars over the next decade and reduce the number of prison inmates by 3,824 by 2020. The JRI State Assessment Report notes that Kentucky's pretrial release rates have increased since JRI enactment: comparing rates from the year before and the year after enactment, five percent fewer defendants were held in jail prior to disposition, with no harmful effects on public safety. Because of this one aspect of the legislation, counties have saved roughly $25 million.

North Carolina

North Carolina's prison population was expected to grow by 10 percent, or about 3,900 people, by 2020. Analyses indicated that more than half of prison admissions were people who had failed on probation. Only a small percentage—around 15 percent— of the people released from prison first underwent a period of community

supervision, resulting in many high-risk offenders returning to the community without supervision or services.

The North Carolina JRI working group, with the support of OJP's Bureau of Justice Assistance (BJA) technical assistance, developed a set of policy options designed to address gaps in the state's sentencing, supervision and treatment systems. North Carolina's Justice Reinvestment Act passed with near-unanimous bipartisan support in both houses and was signed into law on June 23, 2011. As a result, North Carolina projects that its prison population in 2017 will be reduced by 5,000 inmates compared to previous projections, which translates into $560 million in averted costs and cumulative savings. Early indications are that Justice Reinvestment Act is having the intended impact: the prison population decreased almost 5.6 percent between December 2011 and June 2013, in part due to the state's Justice Reinvestment Act. This allowed five prisons to close.

South Carolina

Since South Carolina enacted its justice reinvestment legislation in 2010, the total number of state prisoners is down 8.2 percent. Recidivism rates have declined as well—the percentage of prisoners who return to prison has dropped from over 31 percent to 27.5 percent; and 49 percent fewer people on supervision are revoked for violations of supervision conditions, and 6 percent fewer are revoked due to a new crime. Another of South Carolina's goals was to reserve prison for those convicted of violent and serious crimes. By this measure, the State has been successful as well: before the reforms, over half of state prisoners were low-level, nonviolent offenders; only 37 percent of prisoners are in this category now. Crime has dropped by 14 percent over the last 5 years. In all, the state has saved $12.5 million while increasing public safety.

Application to NZ: what can we learn?

New Zealand is similar in size to a small state in the US. Of the EBDM sites, it is most comparable to Wisconsin, which has a population of 5.5M people and a current incarcerated population of around 22,000.

In 2012, the Hutt Valley Innovation Pilot and Flagship Initiatives were established. Based on collective impact theory, the four flagships brought together local justice sector managers to collectively develop and deliver a programme of initiatives to address crime in the community and improve local justice services. The flagships are similar in structure and characteristics to the local EBDM teams, albeit on a much smaller scale, and without explicit reference to evidence and data as the basis for reform. The flagships were not expanded to other sites in NZ, largely due to competing priorities. However, the teams formed at the local level continue to meet to progress local improvements, and new, informal groupings have been established in some other locations. Because they were only formally supported for a relatively short period, the flagships were not able to be evaluated for their impact on crime and reoffending. However, a review of the flagships conducted in 2013 reinforced their importance as a collaboration and system improvement mechanism. Critical success factors for the flagships included:

- Common agenda – a shared vision for change
- Shared measurement systems – agreement on how success will be measured and reported
- Mutually reinforcing activities – actions that coordinate with and support other actions
- Communication and trust among local groups
- Backbone support from national office
- A clear mandate from justice sector leaders
- Effective and active chairs
- Access to data and policy support to enable problems to be clearly defined.

Building on what NZ has already learnt through the Flagship Initiatives, the EBDM Framework is one that we can draw from for future developments, as well as to support the implementation of the investment approach.

Structural innovations from the US: Criminal Justice Coordinating Councils

Criminal Justice Coordinating Councils were originally established in US jurisdictions in the 1970s as a means to enable systemic responses to justice issues. In recent years, they have become important decision-making and stakeholder-engagement structures in criminal justice reforms. Membership of CJCCs generally includes representatives of:

- the three branches of government
- multiple levels of government through city, county and state agencies
- allied stakeholders from other government agencies such as health and human services, community based organisations, service providers and citizens.

By way of example, the CJCC membership for Wisconsin includes:

- the Attorney-General
- Secretary for the Department of Corrections
- A local county Administrator
- Secretary for Department of Children and Families
- Reverend of the Living Word Christian Church
- Executive Director of The Women's Community
- Sheriff of a local County
- Secretary for the Department of Workforce Development
- Chair of the Homicide Review Commission
- Secretary for the Department of Health Services
- A County medical centre representative
- State Public Defender
- Chief of the Tribal Police Department
- A circuit court judge
- Director of State Courts
- Police Chief

All members are appointed by the Governor. The CJCC in Wisconsin meets quarterly, and establishes subcommittees to progress particular pieces of work.

It has appointed an EBDM Subcommittee, consisting of:

- District Attorneys

- State Public Defender and a Deputy State Public Defender
- Senators and Assembly Representatives
- Court Administrators
- County Sheriff's Department Chief
- Director of Research and Policy for a County Policy Department
- Department of Corrections officials
- Department of Justice officials
- County Representatives
- NAACP Chapter President
- Victims Services Provider
- Judges
- Behavioural Health Director for the Department of Health
- Professor at the Helen Bader School of Social Welfare

The large membership of these committees make them seem unwieldy, but my observation of the Wisconsin meeting is that through careful facilitation and back office support, the meetings run smoothly and the Committee is effective. The EBDM Subcommittee itself has five subcommittees, which are focused on Wisconsin State's change targets.

The broad participation and commitment of many stakeholders from across the criminal justice system is crucial to the success of the EBDM program, as the process relies on facilitating a mutual understanding between decision-makers to move to collaboration for improvement. The EBDM Subcommittees that I observed in action had clearly gone through significant team building, and had moved on to having some challenging conversations about significant systems changes. Everyone at the table clearly had a voice, and a stake in the ownership of and operation of the criminal justice system.

I am therefore recommending that NZ consider establishing a similar structure, perhaps starting small at first, but gradually adding stakeholders to the table.

Supporting incentives and structures

My additional recommendations in this area relate to:

- the use of the justice sector fund to encourage innovation and competition
- enhancing our evidence ecosystem through deliberately building stronger relationships with NZ universities
- fostering innovation by hosting a Disrupting Justice Symposium, with participants from the private, philanthropic, social enterprise, technology and academic sectors, with seed funding to test the best ideas.

I make these recommendations as they are key to encouraging broader collaboration and innovation on justice matters in NZ. The availability of funding, as well as having some coordinated relationships with universities, was key to US successes in the area of EBDM.

Harkness Fellowship Report, 2016

A RISK-BASED APPROACH TO PRETRIAL DECISION-MAKING: RECOMMENDATIONS FOR NEW ZEALAND

Aphra Green, Harkness Fellow

4. EXECUTIVE SUMMARY

Since 2009, New Zealand's custodial remand population has been the main driver of prison population increases. Like the United States, the primary area of growth is in the number of people incarcerated while awaiting trial. In NZ, the pretrial population has roughly doubled in last 15 years, and now makes up 18% of the total incarcerated population. There are around 9,000 entries to pretrial custody in NZ every year.

In the US, close to 30% of the total incarcerated population comprises those awaiting trial. This number has also doubled in the last 15 years. This growth – during a time of falling crime rates – has caused officials and decision-makers in both countries to look for options to safely reduce the pretrial population.

A body of evidence (mostly from the US) is now emerging to suggest that – in general – those who spend time in pretrial custody have worse case and reoffending outcomes than matched counterparts who are not detained prior to their trial. The outcome is marked for low and moderate risk defendants, and studies show that even more than one day in pretrial custody for this group has deleterious reoffending and sentencing outcomes.

Many jurisdictions in the United States have introduced actuarial risk assessment tools to inform bail decisions and bail supervision. Increasingly, judges in New Zealand are demanding improved support for decision-making, including risk-based tools to support bail decision-making.

This report concludes that a properly developed, implemented and validated pretrial risk assessment tool could improve the basis for, and consistency of, bail decision-making in NZ. By providing a more transparent and consistent basis for bail decisions, it could enhance the public conversation on pretrial risk and risk acceptability. Further, risk assessment could inform custody decisions by Department of Corrections in providing pretrial custody and assist NZ Police in monitoring those on pretrial release. However, an incremental approach to any

introduction of formal risk assessment is needed to understand the system's current tolerance of risk, and to achieve the culture change required. A poorly implemented tool could elevate the system's sensitivity to risk, having the effect of detaining more people rather than the same or less.

Finally, with 9,000 entries to pretrial custody every year in NZ, and the likelihood that even a short stint in custody worsens a person's criminal justice outcomes – not to mention their social and employment outcomes – this decision-making point should be optimised to ensure that simple contact with the justice system does not make a person worse. Ideally, the system should function to improve their situation.

5. Recommendations

It is recommended that the Justice Sector Leadership Board:

1. **Note** that a properly developed, implemented and validated pretrial risk assessment tool could:
    - improve public safety
    - improve court appearance rates
    - provide a more consistent basis for bail decision-making
    - enhance the public conversation on, and understanding of, pretrial risk
    - improve resource allocation for both Corrections (in providing pretrial detention) and Police (in monitoring bail conditions)
    - in the long term, reduce reoffending.

2. **Note** that the development of such a tool is a significant commitment of time and money, and requires an ongoing commitment to validation, training, quality assurance, reporting and review.

3. **Note** that a poorly developed or implemented risk assessment tool carries significant risks, in that it may import or confirm pre-existing bias in the system, and could lead to increased use of inappropriate pretrial custody.

4. **Agree** to an incremental approach to incorporating risk and evidence into bail decisions, as follows:

    a. **commission** research to:

        i. identify the risk factors for NZ's pretrial population, as they relate to pretrial success

        ii. estimate the justice system's current tolerance of pretrial risk.

    b. **commission** two research summaries, which could be made available to judges and other decision-makers and updated as the NZ research results are available:

        i. Factors (both prejudicial and protective) that have been shown to be predictive of pretrial success/failure in terms of failure to

appear, offending while on bail, and violent offending while on bail, weighted for predictive value.

ii. Evidence-based bail conditions and monitoring practices for low, moderate and high risk defendants.

c. **establish** regular reporting on pretrial release and failure rates, as well as lengths of stay in custodial remand and reasons for bail being declined/granted, for a number of variables down to court or police district, to form the basis for ongoing analysis and discussion.

d. As the profile of the NZ pretrial population emerges through research and analysis, NZ's current risk tolerance profile emerges, and justice sector stakeholders and decision-makers become comfortable with a risk-based approach to bail, **consider**:

i. the development of one or more risk assessment tools for pretrial decision-making, taking into account the implementation challenges inherent in such a tool

ii. whether pretrial services (addressing criminogenic and other needs) should be systematically offered (on a voluntary basis) to NZ's pretrial population, especially those in custody.

6. Introduction

The bail decision is arguably one of the most crucial decisions in the criminal justice process. It determines whether a person will be held in custody to await trial, or whether they will await their trial in the community. Research shows that those remanded in custody are more likely than their matched counterparts to be convicted, receive a sentence of imprisonment, and reoffend after release. New research shows recidivism effects for low and moderate risk defendants for every additional day spent in custody after an initial 24-hour window. In addition, the cost of detaining someone in custody is much higher than maintaining a defendant in the community.

In the last 10-15 years, faced with overcrowded jails, a number of jurisdictions in the US have begun to use actuarial risk assessment tools to support pretrial decision-making. The goal of pretrial risk assessment is to provide an objective assessment of a person's risk of failing to appear in court or their risk of offending while on bail, or both. Most of the tools in use have been shown to have predictive validity, and are likely to be more accurate than an individual alone (Andrews et al, 2006, Levin 2007, Summers and Willis, 2010). The risk assessment is used as the basis for recommendations on bail conditions and pretrial supervision.

This report is a brief overview of lessons learnt during my Harkness Fellowship in the United States in early 2016. It is therefore not exhaustive and does not attempt to review all of the relevant literature (though where possible I have included references and a resource list). This report is divided into four parts:

- **Part 1: an overview of the context -** the purposes of bail and key statistics, a short history of bail in the United States and New Zealand, as well as the

statutory basis for, and current bail decision-making practices in both countries.

- **Part 2: pretrial risk assessment** - an outline of the key elements of a high functioning justice system, what we know about pretrial risk assessment, an overview of pretrial risk assessment tools and their use in the US, as well as lessons learnt from their development, implementation and use.
- **Part 3: the role and functions of a pretrial supervision agency** - considerations for New Zealand
- **Part 4: a suggested approach** to incorporating risk and needs assessment to pretrial decisions in New Zealand.

A note on comparing the US and NZ criminal justice systems

A short note on comparing the US and NZ criminal justice systems. Were this a comprehensive research project, this report would likely also canvass other, comparable criminal justice systems, such as Australia, Canada and the United Kingdom. But the focus here is on what we can learn from the US. Despite their common origins, the NZ and US criminal justice systems operate somewhat differently. Even our terminology is different. For example, the word "jail" is commonly used in the US to describe a pretrial and short sentence incarceration facility (often run by counties), whereas "prison" is for people serving sentences of beyond 1 year (usually run by the State). In NZ, the terms “jail” and “prison” are used interchangeably, and NZ’s pretrial prisoners are held in high security facilities (usually part of a prison) and are mixed with those awaiting sentence. We describe these facilities and prisoners as “remand”. In addition, my observation is that there is generally less discretion at the front end of the system in US jurisdictions than in NZ (which operates a unified system, with a single Police force). In many US jurisdictions, Police often operate under mandatory arrest policies, even for quite minor offences (of course this differs state to state), and charging decisions are the responsibility of District Attorneys. In NZ, Police have greater discretion as to their arrest and charging decisions, and a wider range of options to divert people away from the criminal justice system through a series of warnings, formal warnings, adult pretrial diversion, and (in some locations) referral to community justice panels. This means that the proportion of people initially detained pretrial in the US is higher than in NZ. This means that it is not overly meaningful to compare our pretrial release rates, as the US is likely to have a higher arrest and detention rate to start with, as well as differences in what is considered criminal/not. And finally, NZ does not use any form of cash bail or secured money bonds within its bail system, so the decision-making incentives and considerations are different.

7. CONTEXT

A. The purpose of bail

The presumption of innocence underlies the bail decision. As noted by VanNostrand and Keebler (2007), “it is the primary attempt to balance the rights of a person

awaiting trial, with the need to protect the community, maintain the integrity of the court process, and assure court appearance."

The pretrial decision therefore has four primary purposes. These are to:

i. Maximise appropriate placement of defendants (either in the community, or in custody)
ii. Maximise court appearance
iii. Maximise public safety
iv. Maximise the integrity of the court process (by preventing interference with witnesses or evidence).

A short history of bail

The legal systems of both New Zealand and the United States of America have their origins in English Common Law. In short, the development of a public criminal justice system – and "crimes of Royal concern" – has its roots in the Norman invasion in 1066. This, along with the establishment of travelling justices and the ability of a "presentment jury" to initiate arrests, ran parallel to the creation of jails to hold arrestees. The presentment jury led to a significant increase in the number of arrests, and the itinerant justice system led to long delays before cases could be heard. This resulted in sheriffs beginning to rely on personal sureties – typically (and preferably) landowning persons known to the sheriff who could take responsibility for an accused before trial, and who promised to pay the required financial condition if the accused absconded. In the early 1800s, both the English and American systems began to run out of sureties.

It was at this point that the US bail system diverged from the English system in one key respect[2] – that of the use of secured financial conditions. Financial conditions at bail have long been a part of pretrial release decisions, but their use on a secured basis – requiring the payment upfront of money before release – has only been in place in the US since the early 1900s. The result has been an increase in the number of bailable defendants over the last 100 years. Even as early as the 1920s, there was the recognition that the introduction of secured financial conditions into the US system was not working as intended.[3] The US pretrial system has undergone at least two generations of reform, each of which has been inconsistently adopted by States (some States have adopted all reforms, others very little or only some of the reforms). As a result, jurisdictions across the US differ in relation to how bail is set. Some are able to use money bail but do not do so (DC), some use it rarely (Kentucky), some are only able to consider whether the defendant will return for his or her court date and not whether he or she is a risk to public safety (New York), while others rely heavily on money bail as a proxy for public safety and reappearance reassurance, using bail schedules to guide decision-making.

New Zealand has a bail system that still closely resembles the British system. Bail decisions in New Zealand are governed by the Bail Act 2000, which was last

[2] There are of course, many other differences, but these are too many to enumerate here.
[3] First Dean of Harvard Law

substantially amended in 2013. In New Zealand, unlike the US, there is no opportunity to use secured financial conditions (there is the option for Police to use a cash bail option, but this is never used). In short, a court has four options:

- *To remand a defendant at large*: this is a release without conditions, to return to the future court hearing.
- *To bail a defendant:* the defendant signs a bail bond promising to come back on a set date.
- *To bail with conditions:* the defendant signs a bail bond promising to come back and to abide by the conditions set by the court (including electronic monitoring).
- *To remand a defendant in custody.*

In both NZ and US, the primary bail decision-maker is the judge or magistrate. In NZ, the judge makes an assessment of risk based on information provided by the prosecution (Police) and defence counsel. Police Prosecutors have a standard bail report that outlines:

- Whether bail is opposed on the basis of statutory factors (ie, sections 9A, 10, 12, 15, 16, 17 of Bail Act 2000)
- The number of previous convictions the accused has
- The number of previous sentences of imprisonment
- Offences committed on bail
- New charges
- Active charges
- Next court appearance date.[4]

Police will oppose bail if indicated by reverse onus provisions, and will also oppose bail in other circumstances if indicated by previous criminal history, offending on bail, the type or circumstances of the offending, the views of the victim, previous breaches of bail, and in family violence cases, repeated breaches of Police Safety Orders.

A duty solicitor will not usually make an application for bail if it is opposed by Police. Instead, the duty solicitor would make a legal aid application, and seek a date for a bail hearing so assigned counsel can make full and considered submissions addressing the Bail Act criteria and the Police opposition. This practice, combined with the standard adjournment period of 7 days, means that the majority of people initially remanded in custody spend over a week there.

In the last 10-15 years, faced with significant pressure on their jail populations, various US jurisdictions have begun to incorporate formal actuarial risk assessment into their bail decision-making process (some jurisdictions have used risk assessment tools for even longer). The judge or magistrate continues to be the primary decision-maker, but in addition to submissions from the prosecution and

[4] A bail report package is currently being trialled in two courts for family violence cases. This package gives judges additional information on the defendant related to previous family violence incidents.

defence counsel, in many jurisdictions they are also provided with a report from a pretrial services agency, usually a government agency whose mission is twofold:

- To reduce pretrial incarceration through advice to the court about the risk posed by the defendant
- To supervise the non-custodial pretrial population.

The form that this advice takes varies by jurisdiction. Some agencies provide a simple risk classification (ie, low, moderate, high), some provide a full report on the defendant on the basis of an interview with a risk classification, and in addition to a risk classification, some make recommendations on bail and bail conditions. Some use a risk/response matrix to guide recommendations, some do not. Of the agencies I was in contact with during my time in the US, their practices were all different. However, in general, pretrial services interview all defendants (or as many as they can get to in the time available), use a risk assessment tool on the information gathered through the interview and from databases, and provide a report to the court with recommendations on release and associated conditions. Where jurisdictions differ is in their reliance on the risk assessment and risk/response matrices and the extent to which they circumscribe the discretion of the pretrial officers in their recommendations to the court. For example:

- Federal Pretrial Services view the risk assessment as a support to their own recommendations and to the judges' decisions. They do not use a risk/response matrix, and the risk classification (between 1-5) is provided directly to the judge, along with tailored supervision recommendations.
- DC Pretrial Services' risk assessment process is fully automated, with 70 factors going into the assessment, and the tool providing standardised supervision conditions for each risk level. The conditions are reviewed by the Pretrial Officer before the final report is signed off by the supervisor and provided to the court, but the risk level is not made visible to the judge.
- The New York Criminal Justice Agency (New York City Pretrial Services) do not use a formal risk/response tool, but recommendations made to the court are determined by risk level, so that level 1 (low risk) = release on own recognisance (93% appearance rate), level 2 (moderate risk) = release with conditions (85% appearance rate), level 3 (high risk) = not recommended for release (75% appearance rate for those released). NYC law does not allow risk of offending on bail to be formally taken into account.

B. Key statistics: NZ

Of those going through the NZ criminal justice system in any one year, around 9% (12,000 people[5]) spend some time in remand (either pretrial or awaiting sentence).

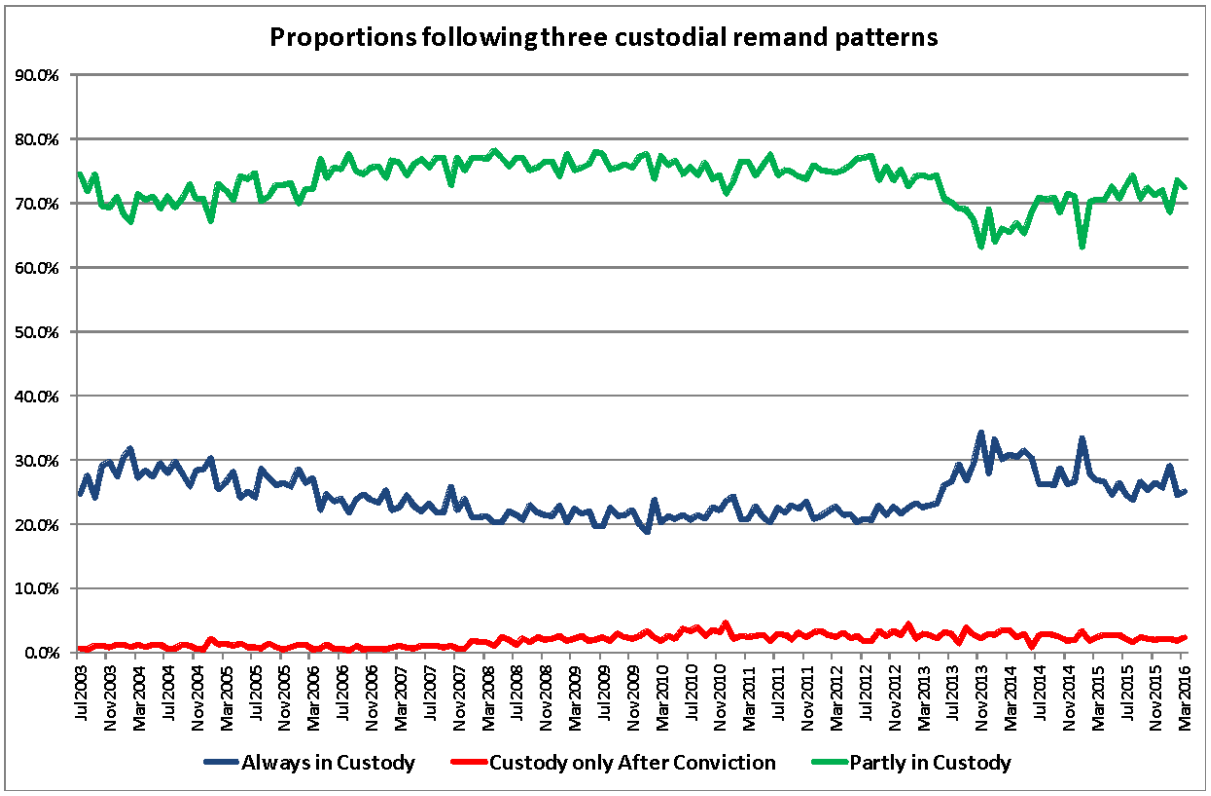
As at mid April 2016, New Zealand's pretrial prisoner population was at 1675, making up 18% of the total prison population (which at the same time was around 9400). The pretrial population has roughly doubled since 2001, while the sentenced

[5] Note that some of these will be readmissions to custody, so the number is not 12,000 different individuals.

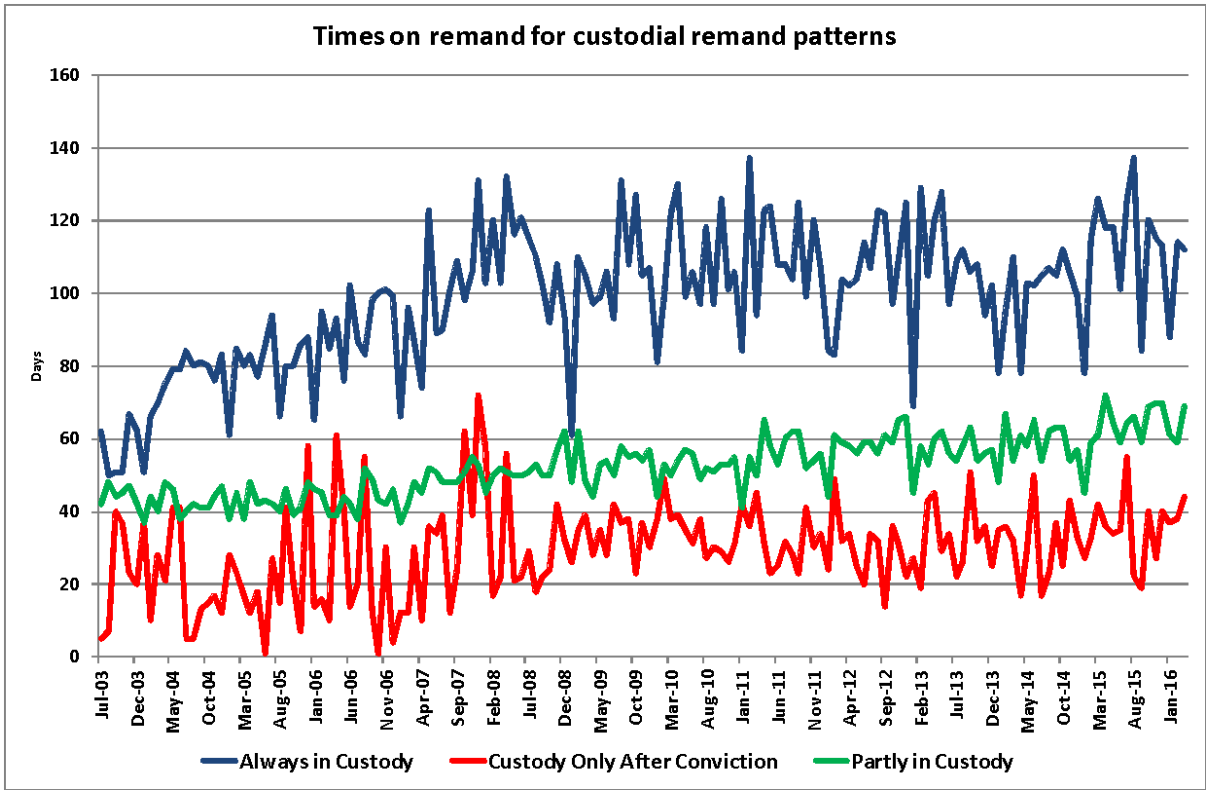
prison population has been relatively stable throughout that period (and flat since 2009).

Of those who spend any time in remand, 31% spend their whole case time (ie, until sentencing) in custody. And of those who spent some time in remand in 2015, 89% spent more than 1 week in remand.[6] This has grown from 81% in 2006.

There has been an increase in the proportion of those who spend all of their pretrial time in custody, and an increase in the time spent by this group (likely due to longer case processing times).



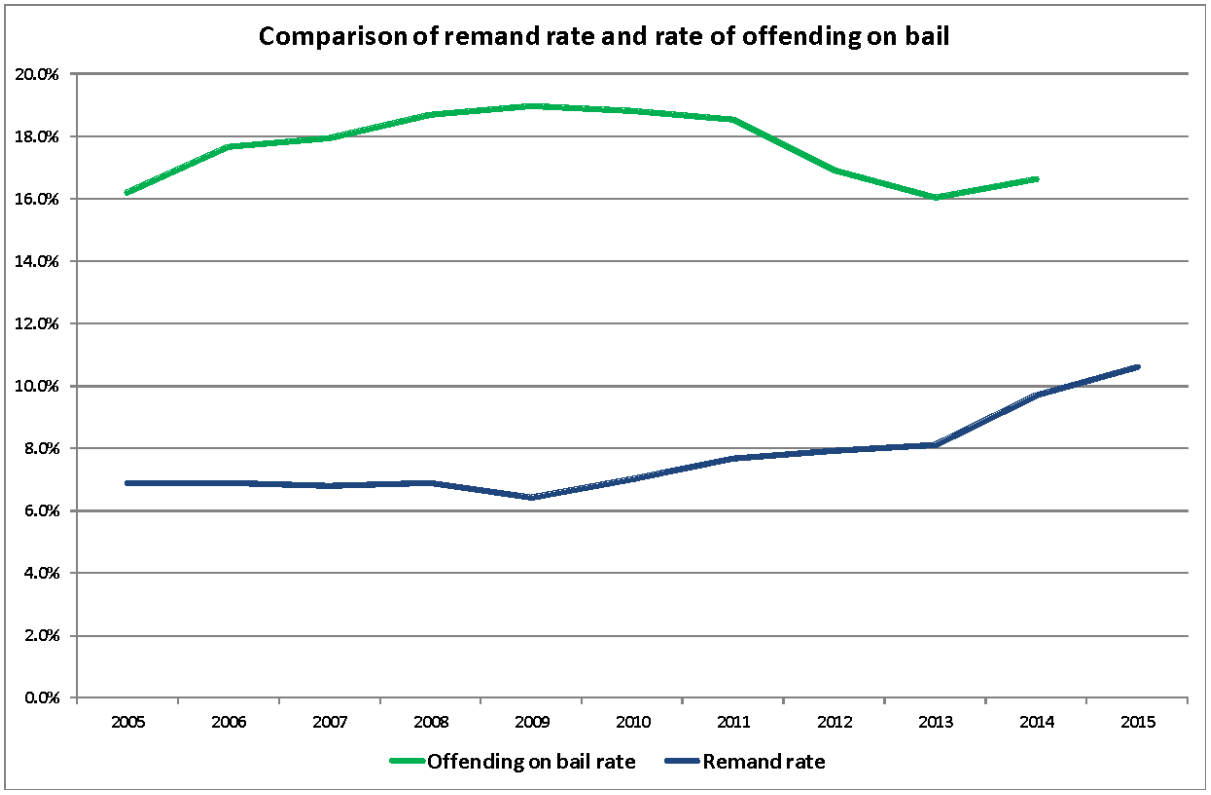
[6] This is likely due in part to court scheduling practices, which means that cases which need to be reheard are automatically scheduled for 7 days later.



In NZ in 2014, 10% of those who spent time remanded in custody received no conviction. Of those who received a conviction, 58% of those people initially remanded in custody received a sentence of imprisonment. Thirty percent of people remanded in custody received a non-custodial sentence.

NZ's rate of failure to appear in court has hovered between 8-10% since 2005.

The rate of offending on bail rose from 16% in 2005 to 19% in 2009, before falling back to 16% in 2013. In 2014 it was 16.6%.



C. The research: outcomes for those detained in custody pretrial

Recent research into the outcomes for those detained pretrial has been instrumental in demonstrating the negative – and ongoing – impacts of pretrial incarceration. Using matched US datasets, researchers have shown that:

- those without legal representation at their bail hearing are more likely to be remanded in custody (Colbert et al 2002)
- low and moderate risk defendants held in custody pretrial are more likely (than their matched counterparts) to:
    - plead guilty[7]
    - be convicted
    - receive longer sentences
    - have worse reoffending outcomes (Pretrial Justice Institute 2012)
- defendants detained for their entire pretrial period are over four times more likely to be sentenced to a term of imprisonment than defendants released at some point, with the results being even more pronounced for low risk defendants (Lowenkamp et al 2013)

[7] It would appear that in NZ, the inverse is true for this factor. For those who spend at some time in remand in 2015, the guilty plea rate averaged 73%. For those who did not spend any time in remand, the guilty plea rate averaged 83%. There is a relationship between seriousness of charges and likelihood of being remanded (ie. more serious implies more likely to be remanded). It is also likely that there is a relationship between seriousness of charges and likelihood of guilty plea (ie. more serious charge implies less likely to plead guilty). The combination of these two relationships likely explains why those remanded have a lower guilty plea rate.

- that more than 24 hours in custody for low or moderate risk defendants makes them more likely to reoffend than matched counterparts (Pretrial Justice Institute, 2012; Laura & John Arnold Foundation 2013).
- pretrial decisions tend to exacerbate racial/ethnic disparities (Wooldredge 2012; Lowenkamp, VanNostrand et al 2013; Arnold Foundation 2013).

This research has been fundamental to shifting the conversation in the US. As Judge Truman Morrison put it:

> "No experienced judge in America was aware of these numbers and the extent to which we shoot ourselves in the foot by keeping low and medium risk people in jail for even one day."

8. Risk assessment – a Key element of a high functioning pretrial justice system

In the US, validated and well-implemented risk assessment is seen as a key element of a high-functioning pretrial justice system. The other key elements are:

- ✔ Guiding principle of decisions based on risk
- ✔ Release options following arrest
- ✔ Statutory presumption of nonfinancial release and availability of preventive detention
- Speedy prosecutorial case screening
- Defence counsel at initial appearance
- Dedicated pretrial services agency

While the two systems are different, it is worth considering whether the NZ system has many of the 'ideal' aspects articulated by federal agencies in the US. Other than not having formal actuarial risk assessment, NZ also does not have a dedicated pretrial services agency – recommendations on bail and supervision of bail conditions in NZ is carried out by NZ Police. We do not have data on the speed of prosecutorial case screening (though we know that of those in remand, 89% spend more than one week in there), and whether defendants have defence counsel at initial appearance (though in most cases there should be no barrier to this, with the availability of duty solicitors in most courts nationwide).

A. The purpose of pretrial risk assessment

The purpose of risk assessment at the pretrial stage is twofold:

i. to guide the court in its decision to release or detain a defendant prior to trial;

ii. to inform the setting and monitoring of bail conditions, if pretrial release is the preferred option.

Further, some jurisdictions in the US have begun to use the pretrial risk assessement as the basis for their supervision and monitoring practices. Once a person is released into the care of the supervision agency, they will often undertake a more comprehensive risk and needs assessment, informed by the original risk assessment.

B. The research about pretrial risk assessment

The research tells us that structured risk assessment tools predict pretrial misconduct and risk of re-offence *for groups of people with like characteristics* more effectively than professional judgment alone (Andrews et al 1996, Levin 2007), and that actuarial pretrial risk assessments outperform subjective or qualitative assessments (BJA 2010). In addition, a well-implemented risk assessment tool has the effect of improving consistency of outcomes across courts. Where risk assessment has been implemented in the US, many jurisdictions have found that it improves public safety and court appearance rates.

Case study: Mecklenburg County, North Carolina (pop. 990,000)

In 2008, Mecklenburg County was facing the possibility of building a new jail, at a cost of $360M. Its average daily jail population was 1,953, and they were projecting a daily jail bed capacity in 2020 of 5,111. The County convened a Safety and Justice Taskforce to understand the jail population. One of the key initiatives undertaken by the County was to introduce a pretrial risk assessment tool, for use by its pretrial services agency. The County used the Laura & John Arnold Foundation Public Safety Assessment – Court Tool, to predict risk of failure to appear, risk of new criminal offending and risk of new violent criminal activity (see http://charmeck.org/mecklenburg/county/CriminalJusticeServices/Documents/MecklenburgCountyPretrialRiskAssessmentPraxis.pdf).

As at 2016, the County had avoided having to build a new jail, had closed its Work Release centre, and halved its daily pretrial population to 817. Mecklenburg's data showed the following improvements in court appearance and public safety:

This data has been pivotal in reassuring the public, county administrators and justice decision-makers that the risk-based changes have been effective, and consistent with public safety outcomes.

C. The research about pretrial supervision

The research shows that differential supervision can improve outcomes for people and improve resource allocation, thereby saving money. The research also shows that defendants respond to pretrial conditions differently – for low-risk defendants, pretrial conditions have no impact on recidivism (VanNostrand, 2003 & 2009). This research therefore supports universal risk screening – even after bail has been determined – as this could reduce supervision needs in NZ context and assist Police resourcing decisions. In general, pretrial supervision improves the pretrial appearance rate, especially for higher risk defendants (Lowenkamp & VanNostrand 2013). However, over-supervision of lower risk defendants (low risk categories 1-2) is correlated with an increase in failure rates:

- 27-41% higher failure rate if drug testing is added as a condition (than those without a drug testing condition)
- 30-56% higher failure rate if third party monitoring is required
- 46-112% higher failure rate if location monitoring is required (VanNostrand & Keebler 2009).

This research therefore advocates for the judicious and evidence-based use of bail conditions, and that these conditions will be most effective when tailored to the criminogenic needs of the defendant. NZ Police in requesting bail conditions have generally taken a "less is more" approach, and only apply for conditions that are relevant to the circumstances of the offending. A risk-based approach is taken to bail condition monitoring, in that resources will generally be allocated to a small number of higher-risk defendants, who will receive more intensive monitoring, with the remainder receiving fewer checks. This approach still relies on the professional judgement and experience of Police alone, and is not informed by any decision-making tool or risk assessment. This is made easier by NZ's small population and the strong links Police officers have with the community. More likely than not, officers know their "high priority" offenders. However, risk assessment would support this decision-making and resource allocation, and remove any suggestions of bias and inconsistency.

D. An overview of pretrial risk assessment tools in use in the US

The University of Saskatchewan recently published a review of pretrial risk assessment instruments and risk factors predicting pretrial release failure.[8] That study identified eighteen instruments currently in use in the US that met its standards for adherence to empirical risk prediction, recency of development and accessibility. These include the Federal Pretrial Risk Assessment Instrument, city and county instruments, and State instruments, many of which can be found, along with their validation studies, on the National Criminal Justice Association's Centre for Justice Planning website.[9] The nineteen factors identified by those pretrial risk assessment tools and their validation studies are likely to represent the starting point for New Zealand. It is worth noting that most tools use only 8-10 factors to calculate the risk score, though they might also collect other information. The nineteen factors identified by the University of Saskatchewan include:

- Individual factors:

[8] http://www.usask.ca/cfbsjs/documents/ReviewOfPTRAandRiskFactorsPredictingPretrialReleaseFailure.pdf

[9] http://www.ncjp.org/pretrial/risk-assessment-instruments-validation

    - Age
    - Ethnicity
    - Gender
    - Mental health status/history
    - Substance abuse
    - Concurrent substance abuse and mental health disorder
- Social factors:
    - Residential stability
    - Residence arrangements
    - Marital status
    - Availability of guarantors
- Economic factors:
    - Employment status/history
    - Education level
    - Financial resources
    - Home ownership
    - Transportation
    - Has a phone
- Criminal factors
    - Criminal history (prior arrests, convictions, incarceration)
    - Past release failures (FTAs, absconding, revocations)
    - Current criminal involvement.

It is useful to note that these factors are predictive of both success and failure on pretrial release, and on some instruments are scored in that way. For example, having a phone and having lived at the same address for more than one year are considered to be predictive of pretrial success, and operate in favour of the defendant in the final scoring and recommendations to the court. In addition, most tools are relatively simple scoring devices, allowing 1-3 points to be added for various factors, for a final score, placing the defendant into a risk category (usually between 3-5 risk categories).

Individually, many of these factors – as well as others – would be canvassed (or at least available) in an ordinary NZ bail hearing. The fundamental difference is that the weighting given to the factors – by the judge, the prosecution, and the defence – differs in every case, and is not necessarily made explicit.

Interestingly, the DC Pretrial Services Tool uses 70 factors to calculate a person's risk score. It seems to be one of the most complex tools currently in use in the US. An algorithm running within the program provides the score to the pretrial services officer, and also provides the officer with a list of suggested conditions if the person is released. If the person is very high risk, the report will state "No conditions or combination of conditions can reasonably assure the defendant's appearance or safety to the community".

To take a more simple example, Virginia's pretrial risk assessment (VPRAI), one of the longest-standing risk assessment tools in the US, uses 8 factors to provide a risk prediction of pretrial success or failure. These factors do not differ significantly from those already provided by Police (and likely also by defence counsel), but the key difference is that they are weighted, and the score indicates a level of risk along a five point scale: low, below average, average, above average, high. These 8 factors compare as follows to the Police report provided for NZ bail decision-making:

Virginia Pretrial Risk Assessment	NZ Police Bail Report
Charged with felony (1 point)	Current charges Bail Act exclusions
Pending charges (1)	Active charges
Criminal history (1)	Prior convictions Bail Act exclusions Prior sentences of imprisonment
2 or more failures to appear (2 points)	Previous failures to appear Offences committed on bail
2 or more violent convictions (1)	Prior convictions Bail Act exclusions
Length at residence <1yr (1)	
Not employed/primary caregiver (1)	
History of drug abuse (1)	

E. Lessons learnt from development, implementation and use of actuarial risk assessment tools in the US

In my discussion with US stakeholders, the following factors have come up as important to the successful development, implementation and use of a pretrial risk assessment tool:

- **Determine the purpose of the tool:** Is the tool neutral, intended to simply validate the existing system settings, or is its purpose more active, intended to increase pretrial release rates, while ensuring public safety and reappearance? While not directly articulated, the purpose of risk assessment in most US jurisdictions is twofold: (1) to maximise appropriate release; and (2) to inform pretrial supervision conditions and monitoring. Most people I spoke to advocated for a tool being seen as active. Whether a tool is "neutral" or "active" is linked with questions about current system practices and outcomes, which agency administers the tool, how judges view recommendations arising from the tool, and how pretrial supervision is undertaken. Most pretrial services agencies in the US have an organisational goal to safely increase pretrial release rates.
- **Culture change is needed:** a pretrial risk assessment tool should not be viewed as a technocratic solution – you cannot just drop a risk assessment tool into a functioning pretrial justice system – a much wider conversation about risk and risk acceptability is needed – and it will likely take a culture change among criminal justice practitioners and agencies, as well as broad acceptance from the public and politicians.
- **Co-development and broad ownership:** those who had gone through tool development processes early on suggested that if there was one thing they could do differently it would have been to bring practitioners along – especially the workforce likely to be administering the tool, as well as defence and prosecution. I heard of at least one example where a tool had been poorly implemented because of lack of acceptance by pretrial supervision officers. In another example, a local Police force had not been involved in the development of the tool, and began to stack charges in order

to make defendants appear more dangerous. In addition, among the defence counsel I spoke to, there seemed to be varying levels of trust for a pretrial risk assessment tool – in some areas not all parties are provided with the report – which raises suspicions.

- **A tool needs to be validated for the local population and control for bias:** while the 19 factors above provide a starting point, there are likely to be other factors that are predictive of pretrial success/failure. Colorado went through an open and collaborative process to develop its tool. As described by Tim Schnacke (Executive Director for the Centre for Legal and Evidence Based Practices), they convened a group who brainstormed all possible relevant risk factors – they came up with a list of around 300. They then tested each of those factors using existing and new data. Interestingly, they found that prior failures to appear were not predictive (possibly to do with how they are recorded in Colorado) – so these were excluded from the tool.[10]
- **Regular retesting and validation is necessary:** risk factors for a population change over time, so regular revalidation is needed. For example, DC has removed marijuana use from its risk assessment tool – not because it recently became legal – but because their own testing showed that marijuana use was not predictive of failure to appear.[11] New York City is finding in its most recent revalidation that living at the same address is just as predictive as living in the same general area – so it is likely to use the more general factor in the next iteration of its tool. Different States conduct revalidation at different frequencies. It appears that the general rule is that for tools that are well-established, less frequent validation is required.
- **Implementation and administration fidelity is important:** the majority of tools in the US combine static and dynamic risk factors in the assessment, meaning that they generally require a person to carry out an interview, verify the information gathered (usually by calling people), and to write up a short report to the court. This means that training, ongoing quality assurance, and data monitoring for consistency is important – both for the defendants, and for the ongoing validity of the tool itself. That is, if a tool has been poorly implemented/used, the data it creates will be less reliable. Many jurisdictions have implemented performance monitoring of their tools. Virginia's "Measuring for Results in Pretrial Services" is a good example of what might be required.[12]
- **Emphasising that decision-makers still have discretion:** some might have concerns that a risk assessment tool removes discretion. The clear message in the US was that empirical risk assessment should be seen as enhancing individual judgement, rather than removing it. As an example of this, a senior pretrial services officer in one of the pretrial services agencies I spoke to was using the tool to validate her officers' own judgement, rather than imposing it on them. The team had an existing risk classification system, and had only been seriously using the tool for 18 months. She would treat it like a game with some officers – "I think this guy's going to be a 3 on the tool –

[10] National Institute of Corrections Pretrial Executives Training, Aurora, Colorado, March 2016.

[11] Judge Truman Morrison, National Institute of Corrections Training for Pretrial Executives, March 2016.

[12] https://www.dcjs.virginia.gov/corrections/pretrial/Virginia%20Pretrial%20Performance%20Measures%20Document.pdf

what do you think?" Departures from the usual recommendations expected at particular risk levels required commentary and senior sign off. It should be noted that greater discretion in the system means that later validation of the tool is more difficult.

- **Communication about pretrial risk and decision-making:** despite what the media would have us believe, pretrial failure rates, even for those rated as the highest risk, is actually relatively low. For one scoring tool, for those in the highest risk category, over half of them will succeed on pretrial release. It is imperative that these facts are continually communicated to decision-makers and to the public. Collaborative and trusting working relationships between justice system partners is key to responding effectively to sentinel events, when they occur.
- **Some level of guidance on responses to risk is necessary for consistent implementation:** there is little point in introducing a risk prediction tool without a discussion about what each risk level means, in terms of release and custodial remand. US jurisdictions have all taken this requirement in different directions. Many pretrial services have introduced a risk/response matrix to guide recommendations to the court. Some require departures from the matrix to have one-up sign off. Federal pretrial services take a more flexible approach, and possibly understandably so, since they are dealing with a different population of suspected offenders. The risk assessment is a guide to the pretrial supervision recommendations that are made to the court, but are not determinative of them. In addition to ensuring consistency of recommendations between areas and officers, a matrix enables the validity of the tool to be tested, and enables outcomes to be better monitored.
    - Examples include: Denver Pretrial Programme 2014, Risk and Response Matrix; Yakima County Praxis, Mesa County – SMART Praxis; Mecklenburg Praxis; Virginia Praxis etc.

9. The risks of risk assessment

There are limitations and risks to the broad application of pretrial risk assessment tools, depending on how they are developed and implemented. The primary objection to pretrial risk assessment is that it does not predict an individual's risk of pretrial failure – it only predicts the likelihood of pretrial failure of a group of people with similar characteristics. This must be made clear to decision-makers, along with emphasising that a risk assessment is a decision aid, and does not remove their responsibility to assess the individual. Other concerns include:

- **black box:** that there is often a lack of transparency as to how decision-making tools operate - this is a particular concern when they are operated by private vendors, as seems to be more common in the US.
- **mission creep:** that a tool developed for one purpose often gets adopted for use in other circumstances
- **free will:** the use of algorithms challenges our belief that people are in charge of their destiny and can choose not to commit crime
- **bias:** that risk assessment tools perpetuate racial/ethnic disparities (because they are based on data that has biases built in), and that the tools are not suited to minority populations, women, and specific offender and offence types (such as family violence and sexual offending).

- **legal prejudice:** that statements made during the assessment interview are used against the client in legal proceedings – hence the importance of a separate agency to carry out the risk assessment
- **missing datasets:** that we are heavily reliant on what is collected by those with the tools to do so - whose incentives may not be aligned to collect data that is important
- **the tyranny of efficiency:** uncertainty can make decision-making slower, but reducing uncertainty (ie, through an algorithm) can introduce bias
- **bias in visualisation and measurement:** the possibility that concepts are eventually defined by how they are measured, and the tool itself becomes self-fulfilling
- **the role of the private sector:** raises issues about ownership, transparency, responsibility, enforcement...the theme of multinational companies vs states came up repeatedly - and in particular, the idea that tech companies are seceding from traditional legal frameworks and operating outside of the influence of governments (the FBI/Apple case being an example).

Care needs to be taken to describe the limitations of pretrial risk assessment, and to ensure that the development of a tool takes account of the limitations of historic data as a basis to predict future offending.

10. Pretrial services agencies

Many jurisdictions in the US have a pretrial services agency, usually a government or non-profit entity established with the specific purpose of supervising defendants on pretrial release. It was my impression that these agencies view themselves as neutral advisors to the court, working to safely secure the pretrial release of defendants. There is no equivalent agency in New Zealand (though some social services organisations might carry out some of the same functions).

Most pretrial services officers in the US are akin to a probation officer (in fact many of them are), and they have had training and development equivalent to what a NZ probation officer would receive, and view their role similarly. They take a case planning and management approach to pretrial supervision, identifying and solving for factors that might pose a risk to pretrial misconduct or failing to appear (such as not having housing, a job or regular income, drug and alcohol issues etc). In some areas, a defendant's compliance with pretrial supervision, as well as his/her rehabilitation during the supervision period, is favourably taken into account at sentencing. In one case, I was told of charges being dropped (for a relatively serious drug importation offence) where the defendant's pretrial compliance was so exemplary.

The live discussion in the US is whether the pretrial supervision workforce should be combined with the probation workforce, or kept separate. I heard differing views on this matter, with cogent arguments for both side. One in favour of workforce flexibility and resource allocation, as well as "continuity of care" (to keep agencies together), and one more principled argument in that providing services to those presumed innocent requires a different state of mind and skillset to those who have already had a finding of guilt, and that it is easy for pretrial services to become swallowed up by their host agency, if its mission is different.

In NZ, the role of monitoring bail conditions is undertaken by NZ Police. The extent to which a risk-based approach is taken to bail conditions is likely to depend on the

conditions themselves, and Police resources at any given time. The primary role of supporting a defendant to access services while on bail is likely to fall to defence counsel, to the extent that they are able, or it relies on defendants being able to access the services themselves.

Incorporating formal risk assessment into the pretrial system necessarily raises questions:

- Who carries out the risk assessment, if it requires at least a neutral, or ideally positive, treatment of a defendant and their risk factors?
- How does the system protect the information disclosed by the defendant during the assessment, so as not to prejudice their current case or lead to further criminal justice system involvement?
- Should there be an agency-led or more systematic response to the criminogenic needs identified in the risk assessment?

These questions cannot be answered by this report. However, they are pertinent to risk assessment, and ultimately determined by how we view the pretrial population, its relative importance, cost, and whether there is a model for intervention with this population that would serve NZ better. Provided that the services are voluntary, there is no principled argument against providing the opportunity for referral. The fact that NZ has around 9,000 entries to pretrial custody every year, most of whom stay beyond one week, suggests that this is an important intervention point for a population that is likely to have very poor outcomes, and long term costs, for the criminal justice system. Further analysis as recommended and analysis currently being undertaken as part of the Investment Approach should improve our understanding of this population.

11. An incremental approach to introducing risk and needs considerations at the Pretrial decision-making point

As noted by Tim Schnacke, "we've been doing risk assessment since 400AD".[13] Incorporating an actuarial risk assessment tool into pretrial decisions would therefore not change the basis for decisions. It simply provides a framework to validate what judges – with the support of Police and defence counsel – are already doing.

A simplistic argument in favour of incorporating actuarial risk assessment at bail decisions might run along the following lines:

- The bail decision is important – we owe a duty to those accused of a criminal offence – and to victims and the NZ public – to use the best available evidence to get it right, and to ensure consistency between decision-makers.
- In addition, a tool could validate the current system settings and decisions – intuition and experience underpinned by data – and improve public confidence in, and discussions on, decision-making and risk.
- Furthermore, actuarial risk assessment and risk-based bail conditions and supervision could improve the allocation of resources – both to those in custody and those in the community.

[13] National Institute of Corrections Training for Pretrial Executives, March 2016.

However, some caution is needed. The development of such a tool, while not impossible, is likely to be difficult and expensive. It would need to be based on NZ data, follow on from broad conversations across the justice sector, integrate with current law and practise, and be supported by agreement from decision-makers on what the risk scores mean (including the possibility of a tool to guide decision-makers). Without careful planning and implementation, there is the possibility that a poorly implemented tool could elevate the system's sensitivity to risk, having the effect of detaining more people, rather than the same or less. There would also need to be an initial commitment to implementation training, as well as an ongoing commitment to data maintenance, quality assurance and monitoring. Further, there is the question of whether certain types of offences (such as family violence and sexual offending) or offenders (eg, women) should have separate risk assessment tools to take account of specific risk factors. And as noted above, we would need to work through the question of who would administer the tool. My view is that it is not as simple as incorporating it into current practice.

For these reasons, I am recommending an incremental approach to incorporating risk assessment into pretrial decision making, along the following lines:

i. As a starting point, the Justice Sector Leadership Board should commission research to better understand the risks and needs of NZ's pretrial population. This research might be an adjunct to, or informed by, the analysis currently underpinning the justice investment approach.

ii. As an interim step, the Leadership Board should commission two research summaries, which could be made available to judges and other decision-makers and updated as the NZ research results are available:
    1. Factors (both prejudicial and protective, weighted) that are known to be predictive of pretrial success/failure in terms of failure to appear, offending while on bail, and violent offending while on bail.
    2. Evidence-based bail conditions and supervision practices for low, moderate and high risk defendants.

iii. To inform the current discussion, the Leadership Board should establish regular tracking and reporting on pretrial release and failure rates, as well as lengths of stay on custodial remand, for a number of variables down to court or police district, to form the basis for ongoing analysis and discussion.

iv. As the profile of the NZ pretrial population emerges through research and analysis, and justice sector stakeholders and decision-makers become comfortable with a formal risk-based approach to bail, consider:
    1. the development of one or more risk assessment tools for pretrial decision-making, taking into account the implementation challenges inherent in such a tool
    2. whether pretrial services (addressing criminogenic and other needs) should be systematically offered (on a voluntary basis) to NZ's pretrial population, especially those in custody.

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