

**BAIL IN  
AUSTRALIA**

by  
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Australian Institute of Criminology

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## **INTRODUCTION**

This study is a comparison of selected topics in the bail laws of all Australian jurisdictions as of 1 December 1988. Although in most jurisdictions several statutes and their amendments have some bearing upon bail, the relevant laws consist principally of the: *Bail Act 1977* (Vic), *Bail Act 1978* (NSW), *Bail Act 1980* (Qld), *Bail Act 1982* (WA), *Bail Act 1982* (NT), *Bail Act 1985* (SA), *Justices Act 1974* (Tas), and the *Magistrates' Court Ordinance 1930* (ACT). Section citations given in the text refer to the Bail Act of the respective jurisdiction except that Tasmanian references are to the Justices Act and Australian Capital Territory references are to the Magistrates' Court Ordinance. New bail legislation is under consideration in the latter two jurisdictions.

The focus of the study is pre-trial bail as it pertains to the lower courts. Thus, bail in the higher courts, police bail, and bail during or after trial are considered only peripherally where necessary for perspective on the topic. The term "magistrate" is used generically for a lower court judge regardless of its usage in particular jurisdictions.

## **FEDERAL CONSIDERATIONS**

### **Constitutional Issue**

One provision of the Australian *Constitution* has been applied to a bail matter in two states. In *R v. Loubie* (1985) 19 A Crim R 112 the Supreme Court of Queensland declared invalid a provision of that state's Bail Act which prohibited granting bail to a person ordinarily residing outside Queensland, unless cause was shown why it should be granted. This amounted to reversing the normal burden of proof to the disadvantage of the out-of-state resident. The Court found that such a reversal violated s. 117 of the Australian Constitution, which requires that a subject resident in any state not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a resident of the other state. Both distance of residence from the court in which the defendant is to appear, and intent to leave the state of jurisdiction, are accepted by the Court as relevant considerations in granting bail. However, the Court reasons, the problem with the provision at issue is not its purpose. The problem is that, by selecting residence as the criterion for applying the statutory disadvantage, the legislation chooses the exact standard prohibited by s. 117, residence in another state. It is therefore contrary to the Australian Constitution and hence invalid.

This provision for non-residents in the Queensland law [s. 16(3)(b)] was virtually identical with a comparable provision of the

Victorian Bail Act [s. 84(b)]. The Supreme Court of Victoria in *DPP v. Spiridon* (unreported, 7 September 1988), agreeing with the reasoning in the Queensland case, declared the Victorian provision constitutionally invalid as well. It was correspondingly repealed by the *Magistrates' Court (Consequential Amendments) Act 1988*.

### **Federal Jurisdiction**

Section 68 of the *Judiciary Act 1903* (Cwlth) provides that bail matters in cases of offences against the laws of the Commonwealth shall be handled according to the procedure of the state within which the offence was committed. Thus no federal bail procedure separate from that of the states exists.

The High Court of Australia has held that it lacks jurisdiction in most bail matters. According to that Court, in *R v. Clarkson* [1985] 18 A Crim R 231 at 232, "A person who is committed for trial on a criminal matter and whose application for bail is refused, or whose application is granted subject to onerous conditions, has no right of appeal to this Court." The Court explains further that it has a limited jurisdiction regarding bail in very exceptional cases where it is appropriate to preserve the substance of a right to appeal or to seek special leave to appeal. However, the Court continues, even if an appeal on an interlocutory matter were pending before the High Court, for it to grant bail to a defendant awaiting trial in a state supreme court would be extraordinary.

The Federal Court has been argued to have some limited jurisdiction to review a magistrate's decision in cases of offences against Commonwealth laws, although this has not been decided. Such a jurisdiction, if it exists, would apply only in cases presenting exceptional circumstances which affect the interest of justice (*R v. Cornelius* [1984] 12 A Crim R 219). This would include reviews based on claims that a breach of natural justice occurred in the making of the decision; the procedures required by law were not observed in making the decision; the decision was made in an improper exercise of power, including taking irrelevant considerations, or not taking relevant considerations, into account, or not considering the merits of the particular case; the decision involved an error of law; no evidence exists to justify the decision; or the decision was contrary to law (*Administrative Decisions [Judicial Review] Act 1977*, s. 5).

## **ELIGIBILITY FOR BAIL**

Most Australian jurisdictions have some form of right to bail or presumption in favour of bail. However, these differ considerably in extent and forcefulness.

The bail laws in two jurisdictions, New South Wales and the Australian Capital Territory, create certain nearly unqualified rights to bail for lesser offences. The New South Wales Bail Act [ss. 8 and 51] creates a right to bail for all offences not punishable by imprisonment and any other summary offence specified by regulation. The only pre-conviction exceptions to this right pertain to individuals who have failed to appear when required or who have violated some other condition of bail, and those who, whether by intoxication, drug use, injury, or otherwise, are in danger of injury or need of protection. Section 99 (1)(b) of the Australian Capital Territory Magistrates' Court Ordinance provides for the mandatory granting of bail to those committed for trial for an offence for which the possible imprisonment upon a first conviction does not exceed six months. However, whereas the New South Wales legislature [s. 8(2)(b)] requires the bail granted to be either unconditional or conditional on terms which are reasonably and readily able to be met by the accused, the Australian Capital Territory legislation [s. 99(1)] contemplates the possibility that the terms of bail may not be immediately met or indeed met at all.

In addition to the right to bail for minor offences, New South Wales [s. 9(1),1A,(2)] creates a presumption in favour of bail being granted for all other offences except those of failing to appear to answer bail for other than certain minor offences, robbery with violence or an offensive weapon, serious drug charges, and domestic violence charges. This presumption is removed [s. 9(1)-(2); s. 32] if the court is satisfied that it is justified in refusing bail based on the specified criteria (examined below) which are to be considered in assessing bail applications.

The combination of right and presumption of bail in New South Wales has contributed to a fairly constant rate of release on bail over the three calendar years 1984-1986. The NSW Bureau of Crime Statistics and Research (1985-87) data reveal that based on the bail status at final appearance in local courts for general offences, about 7 per cent of defendants remain in custody (7.1 per cent, 7.1 per cent, and 6.9 per cent respectively), just over 64 per cent are released on bail (64.4 per cent, 64.9 per cent, and 64.4 per cent respectively), and about 28 per cent are allowed at large without bail (28.5 per cent, 28.0 per cent, and 28.7 per cent respectively).

The law in the Australian Capital Territory [s. 9(1)(a)] creates no comparable presumption of bail. Non-capital cases not covered by the right are treated in purely discretionary terms. However, a common law presumption of bail applies. As stated in *Burton v. The Queen*

(1974) 3 ACTR 77 at 78, "In any ordinary case bail should be granted and it is for the prosecution to make a clear and positive case for refund of bail." Those charged with capital offences may be admitted to bail only by a judge of the Supreme Court [s. 98]. No presumption of bail exists in capital cases.

The combination of right and presumption in the Australian Capital Territory contributed to a result at final appearance in the Court of Petty Sessions during the calendar year 1986 whereby bail was denied to 2 per cent (74 of 3741) of the defendants for whom it was considered (Australian Bureau of Statistics 1988a).

The legislation governing bail in four additional jurisdictions provides what is variously termed a prima facie right, or a presumption. Regardless of the terminology used, the legislation is cast to direct that the accused shall be granted bail unless specified conditions apply. In Victoria this is conceptualised as a prima facie right. In South Australia and the Northern Territory it is viewed as a presumption. Both concepts have been applied in Queensland.

The exceptions to the prima facie right to bail in Victoria [s. 4(2)(a)] and Queensland [s. 13(a)] have large areas of similarity. Both reserve treason and murder cases for Supreme Court judges only. Queensland [s. 13] adds to this reservation piracy with violence or wounding, aggravated demands upon government agencies with menaces and specified drug offences. However, it provides an exception when both the prosecutor and the court are satisfied that the case can be dealt with summarily. Victoria [s. 4(2)(aa)] also creates an exception for specified drug offences, but rather than reserving them for the Supreme Court the relevant provision directs that bail shall be refused unless exceptional circumstances justify bail. In both Victoria [s. 4(4)(a),(c),(ca)] and Queensland [s. 816(3)] further exceptions to the presumption of bail apply to persons who have been charged with an indictable offence while at large awaiting trial on an indictable offence, or who have been charged with an indictable offence involving the use or threatened use of firearms, offensive weapons, or explosives. In these instances the court is to refuse bail unless the accused can show cause why detention in custody is not justified. Victoria [s. 4(4)(c)] specifically mentions aggravated burglary in this context.

Similarly under the Victorian law [s. 4(2)(c)] bail is to be refused to persons in custody for failing to answer bail unless they can satisfy the court that the failure was beyond their control, while Queensland [s. 16(3)(d)] applies the same approach to all Bail Act offences.

The Victorian [s. 4(2)(d)] and Queensland [s. 16(1)] Bail Acts additionally direct that bail shall be refused if the court is satisfied that release of the accused would entail an unacceptable risk of one of the situations resulting which are explained in the next section on considerations in granting bail.

South Australia [s. 10] handles the exceptions to its presumption of bail with a less detailed statement, which combines elements of both the exceptions and the considerations in granting bail. The result is a statement which leaves courts more discretion either to grant or deny bail in the circumstances covered. According to the South Australian statute, bail is to be granted unless, in light of the factors given below as considerations in granting bail, the court considers it should not be granted. No crimes are specifically exempted from bail.

The South Australian presumption of bail has contributed to the following result for 1986: of defendants who were dealt with in courts of summary jurisdiction regarding bail (that is, those with two or more court hearings), 92.2 per cent were granted bail while 7.3 per cent were remanded in custody; of those committed for trial, following the final committal hearing, 85 per cent were released on bail, 3.4 per cent had been refused bail, and 11.6 per cent were otherwise in custody (South Australian Office of Crime Statistics 1986-87a; 1987-88).

In the Northern Territory a presumption of bail is created [s. 8(1)-(2); s. 24] in terms very similar to the presumption section of the New South Wales legislation. In contrast to New South Wales, no right to bail is provided for minor offences. However, only murder and treason are exempted from the presumption. In murder cases, because of the gravity of this offence and its punishment, if the evidence is such that the accused might be convicted, bail is rarely to be granted. In this situation the presumption is reversed. Unless the accused can show special or unusual circumstances indicating that it should be granted, it will be refused (*McKinlay v. Young* (1983) 68 FLR 66 at 67).

Tasmania and Western Australia have no statutory presumption regarding bail being granted. However, in *R v. Fisher* [1964] Tas SR 318, the Tasmanian courts adopted the reasoning of *R v. Light* [1954] VLR 152 regarding bail applications. That case states that, "if there is any presumption here, it is a presumption in favour of the granting of the bail." It goes on to find a prima facie right to be at liberty until convicted, and concludes, therefore, that the burden of showing that this right should not be given effect rests on the Crown.

In reviewing Tasmanian bail law, the Tasmanian Law Reform Commission (1977, p. 12) recognised this presumption as being among the principles which should be judicially applied in considering bail. Although the Commission favoured properly instructing law justices in these principles, it thought the fettering of judicial discretion by a statutory statement of them unwise. As with other jurisdictions, admission to bail for capital offences is limited to Supreme Court judges [s. 67]. The Tasmanian presumption of bail contributed to a result in 1986 in which defendants who were dealt with in courts of summary jurisdiction (measured at the final appearance on the most serious offence) were remanded in custody in

less than 1 per cent (110 out of 12,322) of the cases (Australian Bureau of Statistics 1988b).

Proclamation of the Western Australian Bail Act of 1982 (which is the basis for discussion of Western Australia in this work) is expected within the year. It contains no prima facie right to bail or presumption of bail, although the Law Reform Commission of Western Australia (1979) had recommended that a qualified right (though not a presumption) be introduced. An accused in Western Australia [ss. 5-7] has only a right to be brought before a court as soon as practicable after arrest (unless granted police bail), and to have bail considered. This applies whether or not the defendant makes an application for bail. The statute [Schd., Pt. C(1)] explicitly states that, "the grant or refusal of bail to a defendant, other than a child, who is in custody awaiting an appearance in court before conviction for an offence shall be at the discretion of the judicial officer ...".

Considerations to guide the exercise of this discretion are stated (see below). However, these are in more negative terms than in those jurisdictions having a right or presumption. Where a right or presumption exists, the format is typically that bail shall be granted unless there are reasonable grounds to believe that a specified condition applies. The Law Reform Commission of Western Australia (1979, s. 4.3) recommended a format creating a discretion to refuse bail if substantial grounds exist to believe a specified condition applies. In contrast, the Bail Act's format [Schd. Pt. C(1)] is that discretion shall be exercised having regard to whether, if the defendant **is not kept in custody**, a specified condition **may** apply.

In Western Australia, as in other jurisdictions, bail for certain offences including treason, piracy with violence, and murder, is reserved [s. 15] for a judge of the Supreme Court.

## **CONSIDERATIONS IN GRANTING BAIL**

As indicated when considering eligibility for bail, certain specified considerations are to be reviewed in the granting or denying of bail. In most jurisdictions these factors, where present, will defeat any existing presumption of bail. In all instances they are intended to guide decisions about bail.

Australian jurisdictions can be grouped into four clusters based on similarity in the way these considerations are conceptualised and expressed in their respective bail laws. The first group consists of New South Wales and the Northern Territory. The second group is comprised of Victoria, Queensland and Western Australia. South Australia forms a unit in itself. Finally, Tasmania and the Australian Capital Territory depend upon case law to establish their

considerations. Within clusters there are some noteworthy differences as well as similarities.

New South Wales [s. 32] and the Northern Territory [s. 24] have very similar presentations of the considerations which may be influential regarding bail and what can be used to evaluate the operability of each. The considerations named are intended to be the exclusive factors governing the decision, and the establishment of whether the consideration is operative. In both jurisdictions the presence of the specified considerations can defeat any presumption of bail which might otherwise exist.

Three considerations govern the determination of the granting of bail: the probability of the accused's appearance in court to answer bail; the interest of the accused; and the protection and welfare of the community [NSW s. 32; NT s. 24].

The first consideration, **appearance**, is based on four factors:

- the accused's background and community ties as indicated by residence, employment and family history, and by criminal record;
- any previous failure to appear to answer bail;
- the circumstances (including nature and seriousness) of the offence, the strength of the evidence, and the severity of the probable penalty; and
- specific evidence indicative of the defendant's probable appearance.

The second consideration, **the accused's interest**, specifies four factors;

- the likely period of pre-trial custody;
- the need to be free to prepare for appearance in court or obtain legal advice;
- other lawful needs to be free; and
- any incapacitation by intoxication, injury or drug use or other danger of physical injury.

The third consideration, **the community protection and welfare**, specifies three factors:

- any failure (or arrest for an anticipated failure) by the accused to observe a condition of bail for that offence;
- the accused's likelihood of interfering with evidence, witnesses, or jurors; and
- the accused's likelihood of committing an offence while on bail.

For this last factor to apply in New South Wales, the likelihood, plus the violence or other serious consequence of the offence, must outweigh the accused's general right to liberty. This restriction is not specified in the Northern Territory [NSW s. 32; NT s. 24].

The Northern Territory [s. 24(1)(c)(iv)] adds one factor to the assessment of the community protection not specified in New South Wales. If the alleged offence was committed against a child, the likelihood of injury or danger to the child may be considered. In both jurisdictions [NSW s. 32(3); NT s. 24(2)] all evidence or information which the court considers credible or trustworthy may be considered. The Northern Territory law specifically includes hearsay.

The statements of the considerations governing bail in Victoria, Queensland, and Western Australia are substantially similar. However, their status in Victoria [s. 4(1)-(2)] and Queensland [s. 9, s. 16] differs from that in Western Australia [Sched. Pt. C(1)]. Whereas in the two former states these considerations are in the context of a presumption of bail which they may countervail, in the latter they are principles governing discretion. A further difference is that while Victoria and Queensland require a court to be satisfied before denying bail that an unacceptable risk exists of one of the considerations eventuating, Western Australia only requires that such a consideration may eventuate.

Two considerations form the basis of similarities among Victoria, Queensland, and Western Australia. The first area of consideration concerns the likelihood that the accused would fail to appear to answer bail, commit an offence while on bail, endanger the safety or welfare (or property, in Western Australia) of members of the public, or interfere with witnesses or otherwise obstruct the course of justice with respect to himself or another. The second consideration is the need for the accused to remain in custody for his own protection.

In Victoria and Queensland [s. 16(1)(b)] a third consideration [s. 4(2)(ii-iii)] is whether the acquisition of sufficient information to decide about any of the considerations in granting bail has not been practicable. Queensland specifies that this consideration is to be used with a view to obtaining the requisite further information.

Western Australia [Sched. Pt. C] adds three considerations of its own to the basic two. Its third consideration is whether the prosecutor has put forward grounds for opposing bail. Its fourth consideration is whether during the period of trial there are grounds for believing that, if the accused is not kept in custody, the proper conduct of the trial might be prejudiced. The final and clearly desirable consideration is whether any condition of bail which might be imposed could eliminate a possible grounds for denying bail under the considerations already mentioned.

Victoria [s. 4(3)], Queensland [s. 16(2)], and Western Australia [Sched. Pt. C 4,63] additionally specify four similar factors to be used in evaluating the considerations for granting bail. Western Australia adds additional components to two of these. The first common factor concerns the nature and seriousness of the offence. Western Australia appends to this the probable method of dealing with the offender if convicted. The second factor concerns the character, antecedents, associations, home environment, and background of the accused. Western Australia supplements this factor with the defendant's place of residence and financial position. The third factor is the history of any previous grants of bail to the accused, and the fourth is the strength of the prosecution's evidence.

A Victorian case holds that, to be used in bail determinations, evidence needs only to be credible or trustworthy under the circumstances: it need not be admissible under the rules of evidence (*R v. Sanghera* (1982) [1983] VR 130). Virtually identical provision is made by both the Victorian [s. 8(e)] and the Queensland Bail Act [s. 15(e)]. The Western Australian statute [s. 22] provides for the use of evidence which would not normally be admissible.

The South Australia Bail Act [s. 10(1)] specifies as considerations for granting bail a mixture of what, elsewhere, are treated as bail considerations and factors to be used in assessing these. Included are provisions similar to those seen in other jurisdictions regarding the gravity of the offence, the likely conduct if released of the accused, the accused's need for protection or care, and the bail history of the individual. One consideration which deserves particular comment in South Australia is that if the offence had a victim, the victim's need or perceived need for physical protection from the accused should be regarded in the bail decision.

The considerations in the bail decision in Tasmania are systematically stated in *R v. Light* [1954] VLR 152, which is adopted by the Tasmanian courts in *R v. Fisher* [1964] Tas SR 318. The considerations thus established are generally similar to those established in the New South Wales legislation. The first of these is the likelihood of the accused's presence for trial. Subsidiary factors in this assessment are the nature of the crime, the probability of conviction or strength of the evidence, the severity of the possible

punishment, and the bail history of the defendant. The second consideration is the safety of the public and the security of its property. Subsidiary to this are the character and antecedents of the accused, including any record, particularly any record of offences whilst on bail. If the offence presently charged had been committed whilst on bail the strength of the case becomes a factor in this assessment. The final consideration is any prejudice to the accused's defence if the accused is not free to prepare it, and perhaps not free to earn money legally to pay for it (*R v. Light* at 155-60).

The considerations given in *R v. Light* would also apply to bail in the Australian Capital Territory. In addition, a discussion of bail considerations by the Supreme Court of the Australian Capital Territory is provided in *Burton v. The Queen* (1974). This case begins from the premise that, "The principal consideration, and in many cases the sole consideration, should be whether, if granted bail, there is a reasonable likelihood that he will be present at the hearing of the charge." The opinion goes on to explain that the fact that the accused may possibly commit a crime while on bail is not normally a factor of great weight adverse to bail. It should not be readily assumed that a defendant might commit a further offence. Moreover, if an offence is committed, it can be dealt with by the normal criminal law. However, where the consequence of the crime that may be committed while the accused is on bail is sufficiently serious and of sufficiently widespread effect, the possibility can become an important consideration. The protection of the public overcomes the presumption of liberty on bail of the defendant (*Burton v. The Queen* [1974] 3 ACTR 77).

## **TERMS OF BAIL**

Probably the single most important element in defining any bail system is the form that bail takes. In other words, what incentives or controls are relied upon to ensure that the accused will appear when required and will behave as directed in the meantime? In common law based countries, the bail system can take one of four principal forms (although completely unmixed examples of any form are rare). Bail may rely for its incentive on:

- a financial recognizance, a pledge of money which if the accused defaults the accused and/or his sureties will forfeit;
- the imposition of non-financial conditions of bail to control the defendant's conduct so as to reduce the chances that the accused will fail to appear or otherwise engage in misconduct while on bail;

- the imposition of a criminal penalty upon absconding; or
- a cash deposit may be required of the defendant and/or sureties for the defendant which is forfeited if the accused fails to appear.

Each of these approaches is employed in a primary or secondary capacity in some Australian jurisdictions.

Based on the provisions of the laws themselves, four Australian jurisdictions present predominantly recognizance-based systems: Victoria, Queensland, Western Australia and the Australian Capital Territory. However, all contain varying degrees of mixture with other forms of bail. The recognizance system is the original common law system which existed in England from at least the seventeenth century until the 1970s. Because of its export with the common law in English areas of influence, it remains the most frequently encountered bail form in common law influenced countries.

Though by no means totally unmixed, probably the purest example of the recognizance system to be found in Australia exists in the Australian Capital Territory. However, legislation to restructure bail in the territory is currently being prepared. The Magistrates' Court Ordinance [s. 77; s. 248A; s. 249] provides for the discharge from custody of defendants upon their entering into a recognizance for their appearance at the required time and place. Sureties may be required if the court believes them necessary to secure the defendant's appearance. If required, they too, must enter into recognizances for the defendant's appearance. Alternatively, a security in the form of a cash deposit or other asset can be required from either an accused or surety where additional incentive for appearance is necessary. A further supplementary control can be exercised over the defendant's conduct by the imposition of non-financial conditions. Those conditions may be imposed which appear to the court likely to result in the appearance of the accused, or to be necessary in the interest of justice or the prevention of crime.

If a defendant fails to appear in answer to bail under this approach, the recognizance of any surety is also forfeited. An arrest warrant can be issued for the accused. If a security has been given either by the accused or by a surety, it is forfeited. In each instance the court has the authority to forfeit in whole or in part. Subject to certain limitations, the court may thereafter adjust or revoke the forfeiture on the application of the person against whom it was levied if cause is shown why this should be done. If the accused violates a non-financial condition of conduct while on bail, or the magistrate is satisfied that reasonable grounds exist for believing that the accused will violate the condition, a warrant for the accused's arrest may be issued. The defendant may then be remanded in custody or released

on the same or altered terms of bail [s. 77; s. 78; s. 80; s. 248B; s. 248C; s. 253; s. 254].

A principle element of mixture in this recognizance-based system was introduced in October 1988 by the *Crimes (Amendment) (No. 2) Ordinance*. This legislation creates an offence of failing without reasonable excuse to appear before a court when required to answer bail. This offence is punishable by a fine of up to \$5,000, imprisonment of up to 2 years, or both. It applies to both bail under a recognizance with or without sureties and to bail under an unconditional undertaking.

Statistical information confirms the recognizance orientation of this system. Financial components are found in 65 per cent (2418 of 3741) of the bail matters in Magistrates' Court for 1986. These are principally by recognizance, though no breakdown is available. Exclusively non-financial conditions are found in only 3 per cent (113 of 3741) of these cases. Unconditional bail was granted or bail was dispensed with in 15 per cent (578 of 3741) of the cases (Australian Bureau of Statistics 1988). Thus a recognizance-based system exists in practice as well as in law.

Victoria, Queensland, and Western Australia have generally similar principally recognizance-based bail systems. Each of these states provides a listing of the forms bail may take, graduated by the severity of imposition created by the form. Each then directs that no more onerous form shall be imposed on the accused than is warranted by the public interest, considering the nature of the offence and the circumstances of the accused. The lists provided by the Victorian [s. 5(1); s. 9(3)] and Queensland [s. 811(2)] statutes are identical. The Western Australian [s. 17; Sched. Pt. D s. 1-2] format is generally similar. In all three, release of the accused on his own recognizance, or undertaking to forfeit a sum of money if he absconds, is the first and basic alternative. Second in Victoria and Queensland is the accused's undertaking supplemented by a deposit of money or other security of stated value, whereas in Western Australia the second alternative is that a surety or sureties enter into a recognizance-type undertaking for the accused's appearance. This surety alternative becomes the third option in Victoria and Queensland. The final option in those two jurisdictions is the accused's undertaking plus a deposit of money or other security of fixed value plus a surety or sureties. The Queensland statute provides for a monetary deposit by a surety to demonstrate the sufficiency of his means. In Victoria this deposit may be in cash or asset and may be required by the court. The third option in Western Australia is the defendant's undertaking plus sureties, either or both with a monetary deposit. The fourth option is like the third but permits substitution of a passbook or its equivalent for cash. The final option in Western Australia is the possibility of the accused

and sureties, either or both, entering into a mortgage, charge, assignment, or other transaction to secure bail with other property.

In all three jurisdictions the financial provisions mentioned are supplemented by the possible imposition, where necessary, of non-financial conditions regarding conduct (Vic s. 5(2); Qld s. 11(2); WA s. 17; Sched. Pt. D s. 2]. As with the financial components of bail, the imposition of conditions regarding conduct and residence are generally similar in the three states. Queensland and Western Australia apply the proviso that this class of conditions be no more burdensome than necessary. The Victorian wording to this end is less clear. Conditions controlling conduct and residence can be imposed in each state in order to ensure that the accused appears in accordance with the bail requirements, does not commit an offence while on bail, does not endanger the safety or welfare (or property, in Western Australia) of members of the public, and does not interfere with witnesses or obstruct the course of justice with regard to himself or another. Western Australia adds the provision for imposing conditions to ensure that the accused does not prejudice the proper conduct of the trial during the trial period.

When a defendant fails to appear as required by his bail, the court in all three states may issue a warrant for his arrest. In addition, any recognizance or security deposit by either defendant or surety is subject to forfeiture. Some procedural differences exist among jurisdictions on this point. In Victoria [s. 25(2); s. 32] and Queensland [s. 28; s. 31; s. 32], the forfeiture is ordered upon non-appearance, but application can be made at any time within three months to vary or rescind the forfeiture, on the grounds that payment of the full amount would be unjust. In the case of sureties, comparable recourse exists.<sup>1</sup>

In Western Australia [s. 49; ss. 56-58] forfeiture by a defendant is linked to conviction for the offence of failing to appear, except that one year after non-appearance forfeiture is automatic. During the one-year period, this provides a forum to argue against forfeiture before it occurs. Excessive hardship to the defendant or dependants is specified as the basis for the court's not forfeiting in whole or part. Western Australia's Act also provides for a hearing for sureties before forfeiture.

In all three of these states [Vic s. 25; Qld s. 29; WA ss. 54-55] conditions of bail regarding conduct and residence are enforced by the threat of arrest and revocation of bail. If the police have reasonable grounds to believe that the accused has broken or is likely to break the conditions of bail they may arrest that individual without a warrant.

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<sup>1</sup> See *Crown Proceedings Act 1958* (Vic) ss. 5-6. *R v. Condon* [1973] VR 427. *R v. Baker* [1971] VR 717. *Crown Proceedings Act 1980* [Qld] s. 15.

The accused must then be brought before a magistrate within 24 hours. The magistrate, if convinced that the defendant has broken or is likely to break a condition of bail, may revoke bail or alter its terms. For the accused to change his residence or occupation without notifying the court is a separate offence [Vic s. 29(a); Qld s. 27(2); WA s. 60]. In Victoria it is punishable by three months imprisonment or a \$500 fine. The other two states raise the maximum imprisonment to six months, and Western Australia specifies that both may be imposed.

An additional sanction against a defendant's failure to appear when and where required is provided in all three jurisdictions by creating an offence of absconding. The Victorian Bail Act [s. 30(1)] provides that an accused who, without reasonable cause, fails to appear as required is guilty of an offence punishable by up to twelve months imprisonment. Queensland and Western Australia add another provision to the basic failure to appear without cause. In the Queensland [s. 33(1)] version a defendant who has reasonable cause for failing to appear when and where originally specified has a duty to surrender to custody as soon thereafter as practicable. Under the Queensland Act either failing the original appearance obligation or, if that was reasonably caused, failing to surrender subsequently is punishable by up to two years imprisonment or a \$1,000 fine. Sentences thus imposed are to be cumulative upon other sentences [s. 33(8)].

The Western Australian [s. 28, s. 51] requirement is basically similar to that of Queensland but it is worded to permit prosecutions on both points. The defendant who fails initially to appear as required is obliged to appear at the specified court when it is sitting as soon as is practicable. Both the initial failure and the subsequent one are punishable by three years imprisonment or a \$3,000 fine, or both. Moreover, in addition to any penalty imposed under these provisions, a court convicting a defendant under this section of the Act may order that he pay whatever sum it fixes towards defraying the cost and expenses attributable to his apprehension.

The evidence available supports the belief that at least Queensland functions in practice as in law as a recognizance-based system. Herlihy and Kenny (1984) state that a requirement for sureties is rare in Queensland and Western Australia. When this is combined with the substantial number of bail estreatments in Queensland, indications of a recognizance system are clear. Even after a generous allowance for nominal bail in drunkenness cases, the number of bails estreated annually between 1981-82 and 1986-87 remains substantial, ranging from 26,792 to 29,661 and averaging 28,523. Even if these figures are inflated by ten to twelve thousand due to the nominal bails, the results still demonstrate a recognizance-based system (Australian Bureau of Statistics 1978 and 1988c).

The relevant legislation in three Australian jurisdictions - New South Wales, the Northern Territory, and South Australia - would be classified as predominantly within the non-financial conditions form of bail. In fact, in spite of mixtures of elements of other forms, these statutes are among the best examples of that form to be found in any country.

In New South Wales the Bail Reform Committee explicitly set out to reduce the reliance on monetary bail by providing for release on a variety of non-financial conditions which must be considered before monetary bail can be employed (Parliament of New South Wales 1976). This preference emerges in the legislation. The New South Wales law [s. 37] and that of the Northern Territory [s. 28] are identical in this respect. In both jurisdictions bail is to be unconditional unless the court is of the opinion that one or more conditions should be imposed to promote effective law enforcement or the protection and welfare of the community. No more onerous conditions are to be imposed than the nature of the offence and the circumstances of the accused warrant. Conditions are listed in order of their burdensomeness and no condition is to be imposed unless no prior condition or combination of conditions is likely to secure the objective sought. Upon the accused's request, however, any condition can be imposed.

Conditions available [NSW s. 36; NT s. 27] begin at the least burdensome, from specified non-financial requirements as to the conduct of the accused while on bail. They then escalate to providing one or more acceptable acquaintances who will state that the accused is a responsible person who is likely to comply with the terms of bail. Financial conditions then follow. These begin with the accused's own recognizance at the least burdensome level. They can then progress through one or more sureties by recognizance, the accused's deposit of security, and the sureties' deposit of security. At the most burdensome end of the schedule come the accused's cash deposit, and finally the sureties' cash deposit. The clear effect is to force preference to be given to non-financial considerations over financial.

The Attorney-General's Department's (1984) report prior to the legislation in South Australia similarly states that legislation "should place emphasis upon non-financial conditions of bail." This is reflected in the legislation [s. 4; s. 5] here as well. Although no mandatory priority listing is given, no financial condition is to be imposed unless the bail agreement cannot be properly secured by a non-financial condition or combination of them. Moreover, no condition other than one as to the accused's conduct while on bail may be imposed unless it is reasonably necessary to ensure compliance with the terms of bail.

The South Australian Act [s. 2(a)-(b)] specifies in greater detail than the others what some of the non-financial conditions could be.

These include, but are not limited to, residence at a specific address, not to leave that address except for specified purposes such as employment or treatment (to be used with Crown consent only), conditions relating to protection of the crime victim, supervision by a Department of Correctional Services Officer (with Crown consent), reporting to the police, and surrendering a passport.

One non-financial condition not applying to conduct is provision of acceptable acquaintances who will state their confidence that the accused will comply with the terms of bail. Financial conditions that then follow are the accused's recognizance, the accused's deposit of security, third-party guarantee, and a third party guarantee with security.

Provisions in all three jurisdictions [NSW s. 50; s. 53; NT ss. 38-41; SA s. 18; s. 19] for forfeiture of recognizances or deposits are similar to those in the jurisdictions which rely principally on recognizance, with a few noteworthy variations. The provisions for arrest of the accused, either with a warrant issued upon failure to appear or without a warrant by the police in cases of violation of other conditions of bail, are also similar, as is the power of the courts to deny or restructure bail in those instances. The most important variations in this area of the law are found in South Australia (*see also Fines and Forfeited Recognizances Act 1954* (NSW) s. 4(3); s. 4A(1)).

Under the South Australia Bail Act [s. 11; s. 19], conditions of bail can be enforced by forfeiture of any recognizance or security deposit that may have been in force. This is in contrast to the other jurisdictions where arrest and alteration of bail status are the only sanctions provided. Like forfeitures elsewhere, the court may at any time for sufficient reason reduce the forfeiture or rescind it completely.

As in the primarily recognizance jurisdictions, New South Wales and South Australia supplement their non-financial conditions approach by creating an offence of absconding. The Northern Territory lacks such a provision. The New South Wales provision [s. 51] is worded so that an accused who fails to appear without reasonable excuse is guilty of the offence. The burden of proving the reasonable excuse rests on the accused. The absconding is punishable by up to the same penalties as the primary offence with, however, a maximum of three years imprisonment or \$3,000 fine.

The criminalisation provision in South Australia [s. 17; s. 17a] differs from that in New South Wales and elsewhere in that the penalty is worded so as to apply not only for failure to appear but also to violation of conditions of bail. Although a guarantor (or surety) is not directly liable to punishments for the principal's failure to adhere to conditions of bail, a guarantor who knows or has reasonable cause to suspect that the principal has failed to comply with a condition included in his guarantee is obliged to take reasonable steps to inform

the police. Failing to do so subjects the guarantor to a \$1,000 penalty. These provisions give South Australia a unique range of alternatives with which to enforce non-financial conditions of bail.

In spite of the emphasis in these statutes on non-financial conditions, the limited and somewhat dated evidence available suggests questions as to the extent to which these systems do actually function principally as non-financial condition systems. In New South Wales a study of combined police and court bail conducted in 1980 indicates that bail is granted unconditionally in about 65 per cent of cases where a bail determination is made. It is refused in about 7 per cent of the cases. Conditional bail accounts for 26 per cent of the determinations. Within that 26 per cent financial conditions (mostly recognizances), account for 70 per cent, or about 19 per cent of the total bail determinations. In contrast, non-financial conditions of conduct were employed in only about 4 per cent of the conditional bails, or 1 per cent of the total bail decisions. In an additional 26 per cent of the conditional bails non-financial acknowledgement of the accused's responsibility by an acceptable person was employed. This equals 7 per cent of the overall bail decisions. Clearly, non-financial conditions, particularly non-financial conditions regarding conduct, cannot be said to be the principal control exhibited here (NSW Bureau of Crime Statistics and Research 1984).

The figures reported for persons appearing in the lower courts for the offence of failure to answer their bail indicate that the criminal penalty for absconding is ultimately being relied upon. Figures are given for only the most serious offence charged. Therefore, bail violations would be under-reported in cases where the main offence is relatively serious. Since these more serious cases are likely to be the ones where financial conditions would have been imposed, an indication is provided of what is in fact relied upon to secure appearance in that large percentage of unconditional bails. Of 508 non-appearance cases in 1982, about 65 per cent received a fine or imprisonment. In 1983, for 498 similar cases about 71 per cent received a fine or imprisonment. Of the 631 cases reported for 1984, over 70 per cent received a fine or imprisonment. For 1985, with 817 reported, more than 73 per cent received fine or imprisonment sentences. Of the 831 such cases in 1986, again over 73 per cent received a fine or imprisonment.

The low percentage of cases in which non-financial conditions are used suggests that, in spite of the fact that the law seems to favour this category of control, the New South Wales bail system is not in practice a non-financial conditions system. Conversely, the high percentage of unconditional bails combined with the indications of use of fines and imprisonment for absconding from trial on those less serious offences adequate to warrant bail suggests that in practice the criminalisation of absconding may be the operative part of the law. If

this is so, then the New South Wales bail system may well be functioning as a criminalisation system where bail is extensively granted without conditions, but the threat of criminal punishments are chiefly relied upon as the motive to prevent absconding.

In South Australia such figures as are available suggest a quite different pattern than that of New South Wales, but nevertheless not one compatible with a system of bail based principally on non-financial conditions. No indication exists of a reliance on the criminalisation of absconding such as may be the case in New South Wales. Between July 1985 and March 1986, 35 prosecutions for non-compliance with bail occurred, for July-December 1986 30 occurred, and for 1987 20 occurred (SA Office of Crime Statistics and Research 1986).

The principal published figures directly indicative of what is being relied upon pertain to bail status following the final committal hearing on the offences being sent to the District Court or the Supreme Court. These would, of course, be the more serious offences. Therefore, cases appropriate for non-financial conditions would be under-represented. Nevertheless, of the 438 defendants on bail in this context in the second half of 1985, 96 per cent were on recognizance with no cash deposit, leaving only 4 per cent in all other categories. Some of that 4 per cent may have been released on non-financial conditions, but cash or security deposits or guarantors (sureties) are at least as likely to be included. For the first half of 1986, of 467 individuals released on bail, the comparable percentages are 97 per cent on recognizance without cash deposit and 3 per cent other (SA Office of Crime Statistics and Research 1986-87a and 1986-87b). The South Australian Office of Crime Statistics study of 1986 bail results finds that for all bail cases in magistrates' courts, 48 per cent employed monetary recognizance as the basis for release. Of those released on bail by the police prior to appearing before a magistrate 76 per cent were released on a recognizance by either themselves or a surety (Gardiner 1988, pp. 7-8). Thus the available data suggest that recognizance, not non-financial conditions, is the principal form of bail in South Australia.

Based on the law itself, the primary form of bail in the lower courts in Tasmania is difficult to determine. The magistrate considering bail is given a general power to make orders relating to it [s. 35(2), (3)(ab)(b)(e)] which clearly permits broad discretion. Several alternative possible orders are listed. Only some of them provide controls to motivate the accused's appearance. No preferences or priorities are established among these. Pursuant to a 1986 amendment, after the order to be present itself, the first listed of these controls is the accused's cash deposit. This is followed by one or more sureties by recognizance. Finally, after two possible orders not directed to controlling appearance, the non-financial conditions

controlling the conduct of the accused are listed, such as reporting requirements, or limitations on movements and social intercourse. The accused's own recognizance is not listed as an alternative, presumably to discourage its use after the 1974 amendment which de-emphasised it. However, it could be imposed under the general power to impose orders.

In so far as any conclusion is possible as regards classification of Tasmanian bail, the law appears to establish a principally cash deposit system. Since no priorities are indicated, this appearance is created in part by the primacy of place among the devices to compel attendance of the accused which is given to this alternative. The appearance is further confirmed by the much greater elaboration of the option [s. 35(3)(ab), (3A)-(3F)] when compared to that for the other alternatives. The deposit required is limited to an amount sufficient to ensure the presence of the defendant at the specified time and place. In addition, details of the forfeiture procedure are specified. If the accused does not appear as required the court is authorised to declare the deposit forfeited, although the possibility that this will not be done and that it will be refunded to the accused is also provided for. If the deposit is forfeited, a two-month period is allowed within which the accused can show cause to the court why it should be returned in whole or part.

Provisions [s. 35(3F), (3G), (6)] for forfeiture of a surety's recognizance are generally similar to other jurisdictions. Also similar are provisions for the issuance of a warrant for an accused who fails to appear. Similar also are the powers of the police to arrest when there are reasonable grounds to believe that an accused has contravened or is about to contravene an order relating to bail. This provision for arrest would cover absconding as well as conditions of conduct. The power of a justice before whom the defendant then appears to alter the terms of bail or cancel bail is likewise similar to other jurisdictions (*R v. Jordon* (1966)[1966] Tas SR esp. 184-5; *R v. Rooke* (1974) [1974] Tas SR 115).

An alternative candidate for the primary form of bail in Tasmania is the criminalisation of absconding. As in South Australia, an offence is created in Tasmania [s. 35(7)] which covers not only failure to appear but also violation of other conditions of bail. The Tasmanian provision imposes a relatively modest maximum penalty of three months imprisonment or \$500 fine.

Such indicators as exist do not support a conclusion that cash deposit is the principal form of bail in Tasmania in practice. The most recent year for which figures are available is 1986. In that year seven months (less three days) were under the amended law containing the prominent provision for cash deposit, five months having passed before it came into effect. During the entire year (measured as the court appearance at which the most serious offence was finalised in the lower courts) 65 per cent of 12,322 defendants were at large on

unconditional bail and 33 per cent were at large on conditional bail (Australian Bureau of Statistics 1988b). This is suggestive of a bail system in which the sanction of a criminal penalty is relied upon to prevent absconding. However, without information on prosecutions for violations of bail and more details on the specific conditions employed in the conditional bails, no definite conclusion about Tasmanian practice is possible.

## **SURETIES: DUTIES AND RIGHTS**

The possibility of sureties being required as a condition of bail exists in all Australian jurisdictions, although they are no longer routinely required. Some indication of the frequency of use of sureties can be derived from figures in the New South Wales study where sureties were required in about 6.9 per cent of the cases examined (NSW Bureau of Crime Statistics and Research 1984). However, in spite of the relative infrequency of the use of sureties, when they are employed a whole area of bail laws not previously discussed becomes involved.

Basically, sureties agree to forfeit a sum of money if the accused fails to appear. They are expected to take all reasonable steps to secure that appearance. If the accused fails to appear the surety is liable to forfeit the sum agreed to. In two jurisdictions - South Australia [s. 7(1)] and Tasmania [s. 35(3)(b)] - the surety can be required to guarantee conditions of bail other than appearance. Conversely, two jurisdictions - New South Wales [*Justices Act* s. 49(2A)(a)] and the Australian Capital Territory [s. 248A(3)] - explicitly prohibit requiring sureties for conditions of conduct other than appearance.

Jurisdictions vary widely on the specificity with which they detail eligibility to serve as a surety. Victoria [s. 9], Queensland [s. 21], and Western Australia [s. 38; s. 39] provide detailed statements of the requirements for approval as a surety. Each requires that a proposed surety has reached majority and that that individual has adequate financial assets to cover the liability incurred as surety. Western Australia specifies that this be assessed after provision for debts and liabilities, and adds that the result should not impose undue hardship upon the surety or upon any dependants. Other considerations for approval are character and antecedents. Queensland substitutes previous convictions for antecedents. Finally, each considers the proposed surety's proximity in kinship, residence, or otherwise to the accused. An insightful exclusion from suretyship is provided in Western Australia. Any proposed surety is excluded if reasonable grounds exist to believe that he might be indemnified by anyone against a possible forfeiture.

In contrast to these three jurisdictions, New South Wales [s. 36(3),(4); s. 56] and the Northern Territory [s. 27(3)-(4); s. 44] make a broad grant of discretion to the court considering bail as to which persons, or class or description of persons, will be acceptable as sureties. Provision is made for an acknowledgement by the proposed surety detailing his circumstances of acquaintance with the accused. False statements are punishable as an offence.

South Australia [s. 7(6)] takes a different approach to eligibility to stand as a surety. Only majority of age is required by statute. In *R v. Barrett* (1985) 16 A Crim R 123 the Supreme Court of South Australia, following principles of the English common law, held that the character or opinion of the proposed surety cannot be considered. Only the financial sufficiency of that individual to answer for the appearance of the accused is relevant. Presumably this principle applies in the remaining jurisdictions - Tasmania and the Australian Capital Territory - which do not provide any statutory requirements for sureties.

Since just after the turn of the century any agreement to indemnify a surety has been a common law crime, providing a major defence against American-style commercial bail bonding. Such agreements are illegal whether the indemnification is to be in whole or part, and whether the accused or another is to indemnify (Devine 1987). Several Australian cases have considered the activity<sup>2</sup>. New South Wales [s. 58], Queensland [s. 26], Western Australia [s. 38(c); s. 50], Victoria [s. 31], and the Northern Territory [s. 45] have statutory provisions making it an offence. The penalties range from a maximum of three years imprisonment or a \$3,000 fine in New South Wales and the Northern Territory to three months imprisonment or a \$500 fine in Victoria. Queensland and Western Australia provide for up to 12 months imprisonment or a \$1,000 fine, with Western Australia additionally disqualifying those reasonably thought to be indemnified from suretyship. Tasmania, while not having an explicit provision against indemnification, has one against obstructing, perverting, or defeating the due course of justice or the administration of the law. This is the category in which indemnification of a surety

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<sup>2</sup> *Re Doueih* (1986) 20 A Crim R 375 at 381-3. *R v. Freeman* (1985) 17 A Crim R 273. *R v. Titterington* [1954] QWN 6.

has been held to fall<sup>3</sup>. In this context a provision in the Australian Capital Territory [s. 252] appears incongruous in providing that:

any sum paid by a surety on behalf of his principal in respect of a security . . . together with all costs, charges and expenses incurred by the surety in respect of the security, shall be deemed to be a debt due to him from the principal, and may be recovered ... by the surety.

Protections for sureties are built into the various laws. In all of the bail acts passed since the mid-1970s provision is made for the discharge from liability of a surety. The procedure specified in all cases is similar. The surety applies for discharge. Upon the appearance in court of the accused the surety may be discharged. Wording implying discretion in ordering the discharge varies. The Western Australian statute [s. 48] says that the judicial officer shall cancel the surety's undertaking. In New South Wales [s. 42] and the Northern Territory [s. 31] the court shall direct the discharge unless satisfied that it would be unjust to do so. The Victorian wording [s. 23] is that the court may direct the discharge, while in Queensland [s. 23] the court may enter such orders as it thinks fit, including a discharge order. In South Australia the guarantee may be revoked for any sufficient reason.

On the issue of the surety's power to arrest the accused, a radical range of differences is found. On one hand, in Victoria [s. 21], Queensland [s. 24], Tasmania [s. 36(1),(2)] and the Australian Capital Territory [s. 81], the traditional power of a surety to arrest their principal and bring him before a court is explicitly retained. The police in these jurisdictions are directed to assist the surety in the arrest if asked. On the other hand, New South Wales [s. 46] and the Northern Territory [s. 48] have abolished this authority in their statutes. A middle position has been taken by Western Australia [s. 46] which keeps the power in a qualified form. Although surety arrest is retained, the surety may exercise the power only if the accused is not likely to comply with an appearance requirement or is or has been in breach of some other condition of bail, and invoking the assistance of a police officer would occasion delay which would defeat the purpose of preventing the breach of bail.

A supplementary alternative is provided for sureties in Queensland [s. 29(1)(b)], Victoria [s. 24(1)(b)], and Western Australia

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<sup>3</sup> *Criminal Code (Tas)* s. 105. *Director of Public Prosecutions v. Withers* (1974) 3 ALL ER 984. *R v. Head and Head* 1978 Crim LR 427. *R v. Freeman* (1985) 17 A Crim R 273.

[s. 54(1)(a)]. In these jurisdictions a surety may notify a member of the police force in writing of the belief that the accused is likely to fail to appear, and of the surety's wish to be relieved of the obligations of suretyship. The member of the police may then arrest the accused without a warrant and the court, if persuaded, may deal with the accused accordingly. A provision having roughly the same effect is included in the South Australian legislation [s. 17a] with the notable qualification that a surety's failure to notify the police of a breach or impending breach of any condition of bail is made punishable by a \$1,000 fine.

All jurisdictions provide an opportunity for a surety either before or after a forfeiture to show cause as to why the forfeiture should be remitted in whole or in part. Typically, the standard applied is whether the surety took all reasonable steps to prevent the breach of bail. A secondary consideration is whether forfeiture will result in extreme hardship for the surety<sup>4</sup>. Western Australia [s. 49(1)(c)-(d)] differs in focussing on reasonable cause for the accused's failure to comply with the bail order instead of the effort of the surety. The factor of hardship is limited to that attributable to changed conditions since the undertaking was entered into.

## **RECENT DEVELOPMENTS AND TRENDS IN BAIL LAWS**

Developments in the law of bail since 1985 provide an insight into recent trends in this legal area. One of the most important such developments deals with the matter of domestic violence. The *New South Wales Bail (Personal and Family Violence) Amendment Act 1987* deals with the problem. One who is accused of an offence of domestic violence and who has previously failed to comply with a condition of bail imposed for the protection and welfare of the alleged victim of the offence loses the presumption in favour of bail. Instead, Sched. 1, s. 2 of the Act stipulates that such an individual is not entitled to bail unless the court can be satisfied that the accused will comply with such bail conditions in the future.

Additional factors to be considered in the bail decision according to this amendment are stressed. Courts considering bail for such offences are to have particular regard in domestic violence cases to

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<sup>4</sup> *Fines and Forfeited Recognizances* (NSW) s. 4 (3). *Bail Act* (Qld) s. 32. *Crown Proceedings Act* (Qld) s. 15. *Bail Act* (SA) s. 19 (3). In *Re McKinnon* (1986) 40 SASR 326. *Justices Act* (Tas) S. 35 (sF). *R v. Rooke* (1974) [1974] Tas SR 10. *R v. Jordan* (1966)[1966] Tas SR 178. *Crown Proceedings Act* (Vic) s. 5 (3).

two factors. The first is the protection and welfare of the alleged victim of the offence. The second is any previous conduct of the accused which affects the likelihood that the defendant will commit a further domestic violence offence on the particular victim if granted liberty on bail [s. 3 of the Act].

In justifying the level of onerousness of bail conditions, the interests of the victim are to be considered. In addition, in imposing conditions in domestic violence cases, the protection and welfare of the alleged victim and the previous conduct of the accused indicative of the likelihood of domestic violence against the victim are to receive particular consideration. The alleged victim also receives some standing to seek review of a bail decision in domestic violence cases [ss. 4 and 5 of the Act].

The Bail Act in South Australia [s. 11(2)(a)(ii)] does not focus on domestic violence but does make provision for all victims of offences. Under the Bail Act 1985 itself, where an offence has a victim, conditions relating to the protection of the victim may be imposed on the bail of one accused of the offence. Section 9(b) of the 1987 *Bail Act Amendment Act* (SA) provides that, in deciding what conditions to impose, a bail granting authority should give special consideration to submissions made by the Crown on behalf of the alleged victim.

Bail provisions pertaining to domestic violence have also been added in the Australian Capital Territory. Since these pertain to police bail, however, they are outside the scope of this work (Part III of the *Domestic Violence Ordinance* 1986).

A second category of offences where recent legislation has tended to restrict the granting of bail is that of serious drug offences. A 1986 amendment to the New South Wales Bail Act exempts from the presumption of bail various indictable offences under the *Drug Misuse and Trafficking Act (Bail Amendment Act 1986)*. Several years earlier a 1981 amendment to the Victorian Bail Act had removed a variety of serious drug offences from that state's prima facie right to bail (*Bail Amendment Act 1981*). A 1986 amendment extended this to comparable drug offences under Commonwealth law.<sup>5</sup> In Queensland the Drug Misuse Act of 1986 [s. 60 Sixth Sched.] updated the restrictions on bail in specified drug cases contained in the original 1980 Bail Act.

The only complete Bail Act enacted since 1985 is that of South Australia. Several provisions of that Act should be singled out in the present context. One such provision [s. 17(1)-(2)] is the use of sanctions beyond arrest to enforce non-financial conditions of bail. With regard to the accused, criminal penalties are available. In addition [s. 7(1)], a surety can be required to guarantee any specified

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<sup>5</sup> *Bail (Amendment) Act* (NSW) 1986. *Bail (Amendment) Act* (Vic) No. 9690 of 1981. *Bail Amendment Act* (Vic) No. 89 of 1986.

terms or conditions subject to forfeitures. A surety under the 1987 Amendment [s. 17a] is also required under penalty to notify the police when the accused is known or reasonably suspected to have violated a term or condition of bail. Finally, one condition of bail specifically listed [s. 11(2)(a)(ia)] is noteworthy. This permits the accused to be required to reside at a specific address and to remain there and not leave except for specified purposes. On the one hand this is clearly highly restrictive. On the other, it might permit pretrial release in some cases that would be dubious otherwise. It might also lend itself to being monitored with electronic technology.



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## ELIGIBILITY FOR BAIL

<b>Jurisdiction</b>	<b>Statutory Right to Bail</b>	<b>Statutory Prima Facie Right to, or Presumption of Bail</b>	<b>Case Law Prima Facie Right to, or Presumption of Bail</b>
NSW	Offences not punishable by imprisonment	All other offences except failure to appear for bail, aggravated robbery, serious drug offences, domestic violence offences	
Vic		All offences except treason, murder, and specified drug offences	
Qld		All offences except treason, murder, piracy with violence or wounding, specified drug offences and aggravated demands upon government with menaces	
WA *			
SA		All offences	
Tas			Ordinary non-capital offences
NT		All offences except treason and murder	
ACT	Offences punishable by less than six months imprisonment		Ordinary non-capital offences

\*Right to have bail considered only



## CONSIDERATIONS IN GRANTING BAIL

NSW and NT common considerations	I	Probability of accused's answering bail <ul style="list-style-type: none"> <li>A. Accused's background</li> <li>B. Previous failure to answer bail</li> <li>C. Circumstances of the offence, strength of the evidence, severity of probable penalty</li> <li>D. Specifically relevant evidence</li> </ul>
	II	The interest of the accused <ul style="list-style-type: none"> <li>A. Likely period of pre-trial custody</li> <li>B. Need to be free to prepare case</li> <li>C. Other lawful needs to be free</li> <li>D. Incapacitation by intoxication, injury or drugs or other anger of physical injury</li> </ul>
	III	Community protection and welfare <ul style="list-style-type: none"> <li>A. Failure to observe a condition of bail</li> <li>B. Likelihood of interference with evidence, witnesses or jurors</li> <li>C. Likelihood of committing an offence while on bail</li> <li>D. Likelihood of danger to a child victim</li> </ul>
NT Additional Consideration		
Vic, Qld, WA common considerations	I	Likelihood that the accused will <ul style="list-style-type: none"> <li>A. Fail to answer bail</li> <li>B. Commit an offence while on bail</li> <li>C. Endanger members of the public*</li> <li>D. Interfere with witnesses or obstruct the course of justice</li> </ul>
	II	Need for accused to remain in custody for own protection <p><u>Factors to be used in evaluating considerations</u></p> <ol style="list-style-type: none"> <li>1. The nature and seriousness of the offence</li> <li>2. The character, antecedents, associations, home environment and background of the accused</li> <li>3. The history of any previous grant of bail</li> <li>4. Strength of the prosecution's case</li> </ol>
Vic and Qld additional consideration	III	Impracticality of acquiring sufficient information to make any bail related decision
WA additional considerations	*I	C. ... or their property
	III	Prosecutor has advanced grounds to oppose bail
	IV	During trial there are grounds to believe that the accused might prejudice the proper conduct of the trial if free
	V	Could a potential condition of bail eliminate a possible grounds to deny bail
		<u>Additions to factors</u> <ol style="list-style-type: none"> <li>1A. The probable method of dealing with the offender if convicted.</li> <li>2A. The defendant's place of residence and financial position</li> </ol>
SA considerations	I	The seriousness of the offence
	II	The likelihood that if released the accused would <ul style="list-style-type: none"> <li>A. Abscond</li> <li>B. Offend again</li> <li>C. Interfere with evidence or intimidate witnesses or hinder police inquiries</li> </ul>
	III	The need a victim of the offence may have or perceive for protection from the accused
	IV	The accused's need for physical protection
	V	The accused's need for medical or other care
	VI	Previous failures of the accused to comply with terms or conditions of bail
	VII	Other relevant matters
Tas and ACT common considerations	I	Likelihood of the accused's presence for trial <ul style="list-style-type: none"> <li>A. The nature of the crime</li> <li>B. The probability of conviction or strength of the evidence</li> <li>C. The severity of the possible punishment</li> <li>D. The bail history of the defendant</li> </ul>
	II	The safety of the public and its property <ul style="list-style-type: none"> <li>A. The character and antecedents of the accused, including any record and particularly any record while on bail</li> <li>B. If the present offence would be an offence while on bail, the strength of the prosecution's case</li> </ul>
	III	Any prejudice to the accused's defence if not free to prepare it.



FORMS OF BAIL  
AS APPEARING IN THE LAW ITSELF

<b>Jurisdiction</b>	<b>Primary Form</b>	<b>Alternate Primary Form</b>	<b>Secondary/or Supplementary Sanctions</b>
NSW	Non-financial conditions Witness to accused's suitability for bail	Criminalisation of absconding	Recognizance Sureties Accused's deposit of security Sureties' deposit of security Accused's cash deposit Sureties' cash deposit
Vic	Recognizance	Accused's cash deposit Accused's security deposit	Sureties Deposit plus sureties Deposit plus sureties with deposit (to demonstrate means) Non-financial conditions Criminalisation of absconding
Qld	Recognizance	Accused's cash deposit Accused's security deposit	Sureties Deposit plus sureties Deposit plus sureties with deposit (to demonstrate means) Non-financial conditions Criminalisation of absconding
WA*	Recognizance	Sureties	Cash deposit by accused or sureties or both Other security by accused or sureties or both Non-financial conditions Criminalisation of absconding
SA	Non-financial conditions Witness to accused's suitability for bail	Criminalisation of absconding or violating conditions	Recognizance Accused security deposit Sureties Sureties with security deposit
Tas	Unclear, appears to be cash deposit*	Non-Financial condition Criminalisation of absconding or violating conditions	Sureties General power to make orders regarding bail
NT	Non-financial conditions Witness to accused's suitability for bail		Recognizance Sureties Accused's deposit of security Sureties' deposit of security Accused's cash deposit Sureties' cash deposit
ACT	Recognizance	Sureties	Accused's security deposit Sureties' security deposit Non-financial conditions Criminalisation of absconding

\* See text for discussion.