THE LEGAL BASIS OF PROBATION

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I.L.P.

CONTENTS

INTRODUCTION

There is no specific power in the Commonwealth Constitution which enables the Federal Government to directly control the whole field of probation in Australia. Probation is, and is likely to remain under separate control of the respective States and Territories.[1] The primary aim of this paper is to examine the legal bases upon which Australian courts exercising criminal jurisdiction are empowered to place offenders on probation. It is to a large extent a comparative study, which it is hoped will provide a useful insight into some aspects of probation and provoke further thought and debate on this topic.

With the exception only of the fine, probation orders and bonds are the non-custodial measures most frequently used by the courts. This fact alone ensures the importance of studying these measures as tools in the administration of justice in this country. The topic however, is large, and it has been found necessary to omit some important areas in this study. For example, a consideration of Child Welfare legislation has been omitted. Also excluded is the important topic of the efficacy of probation in the criminal justice systems of the various Australian jurisdictions.[2] Consideration is given however, to some of the fundamental concepts underlying probation, even if, at times, more questions are raised than answered.

The most common form of probation order is where an offender, who has had a case proved against him for an offence punishable by imprisonment, is permitted to remain at large subject to certain conditions, one of which is that he submit himself to the supervision and guidance of the Probation Service. Originally probation meant, and in some jurisdictions still means, that the offender is discharged on conditions which need

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1 There are of course limited areas within the general field of probation in Australia which are, or may fall within the umbrella of Commonwealth powers, especially those which relate to the Territories, to federal offences, and to interstate aspects of probation. See Kelly and Daunton-Fear, *Probation and Parole, Interstate Supervision and Enforcement* Australian Institute of Criminology (1975) especially at pp. 23-27.

2 For some empirical studies on the effectiveness of probation see the report of the Cambridge Department of Criminal Science *The Results of Probation* 1958; D. Biles 'Some Results of Probation Orders and Bonds' (1972) A.N.Z. J. Crim. 220; and also Adams and Vetter 'Probation Caseload Size and Recidivism Rate (Oct 1971) Brit. J. Crim. 390.

not necessarily include a condition of supervision.[3] However, this paper is about supervisory probation, and unless otherwise indicated the term 'probation' should be taken to mean 'supervised probation'.

The paper is divided into three parts. Part I looks at the relationship of the common law bind-over power to probation. In Part II the key legislative provisions which empower courts to make probation orders are compared and contrasted. In Part III consideration is given to some problems involved in the concept of probation. In the course of this paper certain problems are singled out for discussion and some suggestions made for reform.

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3 In South Australia for example, 'probation order' means an order made under s.4 of the *Offenders Probation Act* 1913-1971 for the conditional discharge of an offender: *ibid* s.2. See also comments made by the Mitchell Committee, South Australia: *Criminal Law and Penal Methods Reform Committee First Report, Sentencing and Correction*, July 1973 (Mitchell Committee Report) at p.136.

PART I - COMMON LAW AND STATUTORY BONDS

Broadly speaking, the jurisdiction of the courts to place offenders on probation may be divided into two categories:

(1) legislative provisions which are specifically aimed at empowering courts to make probation orders and

(2) legislative and common law provisions which are not specifically aimed at empowering the courts to make probation orders, but which may incidentally empower them to do so.

Although this paper is concerned primarily with the first category, it is appropriate to say something of the second.

Practice in New South Wales

Sometimes supervised probation may be a condition of a bond. In New South Wales for example, McKimm refers to the common law bond as being 'by far the most commonly used form of recognizance' and says it 'is based on a judge's inherent power to defer the passing of sentence'.[4] The usual form of such a bond is in the following terms:-

> Sentence deferred on the accused entering into a recognizance himself in the sum of $ ...[reference may also be made to the taking of sureties which McKimm observes is not a common requirement] to be of good behaviour for ... years and to appear and receive sentence if called upon to do so at any time during that period.

It is also common practice to impose other conditions depending on circumstances such as the requirement that the offender pay compensation, seek medical treatment, seek and remain in employment and the like. More in point however, is the requirement, commonly imposed, that the offender place himself under the supervision and guidance of the Adult Probation Service and obey the directions of the Service.[5] The same kind of conditions may in some cases be attached to statutory bind-overs which in many jurisdictions supersede, reinforce or qualify the common law power.[6] Although not the case in New South Wales, in some

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4 K. J. McKimm *Criminal Procedure and Practice* 2nd edition (1972) p.61.

5 *Ibid. p.61-2.*

6 A statutory bind-over in strict legal parlance is known as a recognizance. See for example *Crimes Act* 1900-1974 (N.S.W.) s.556A and s.588; *Crimes Act* 1900-1974 (N.S.W.) as applicable in the A.C.T. s.566B; *Criminal Code* 1959-74 (Qld.) s.19(9); *Criminal Code* 1963-1971 (W.A.) s.19(8), s.656 and s.669(1)(b); *Criminal Code* 1973

jurisdictions the type of conditions whch are permissible, or are required to be included in a probation order are given legislative expression.

Thus s.5(1) of the *Offenders Probation Act* 1913-1971 (S.A.) reads:

> 5(1) A recognizance to be entered into under section 4 [the empowering section] shall if the court so orders, contain -
>
> (a) a condition that the probationer shall be under the supervision of a probation officer during the period specified in the order, and
>
> (b) such other conditions for securing such supervision as are specified in the order, and
>
> (c) such additional conditions with respect to residence, abstention from intoxicating liquor, and any other matters, as the court may, having regard to the particular circumstances of the case, consider necessary or desirable for preventing a repetition of the same offence or the commission of other offences.[7]

In contrast, the N.S.W. *Crimes Act* does not spell out the kind of conditions which may attach to a probation order. It merely specifies that a recognizance 'shall be conditioned upon and subject to such terms and conditions as the court shall order'.[8] Further, although the Governor is empowered to make regulations relating to the supervision of offenders no such regulations have been made.[9] Accordingly, guidelines for the type of conditions attaching to probation orders, and for the operation of the Adult Probation Service are found exclusively in the practices of the courts and of the Adult Probation Service themselves. Although further reference will be made to the legislative provisions of the *Crimes Act* 1900 (N.S.W.) it is now proposed to consider the jurisdiction of Australian courts to grant common law bind-overs.

(Tas.) s.386(1)(c); *Crimes Act* 1914-1973 (Cth.) s.19B(1)(d), which are examples of statutory bonds. The nature of a recognizance is briefly discussed at p. 18.

7 See also: *Offenders Probation and Parole Act* 1959-1974 (Qld) s.8 and *Offenders Probation and Parole Act* 1963-1971 (W.A.) s.9.

8 See *Crimes Act* 1900 (N.S.W.) s.556A(1A); s.558(2).

9 *Crimes Act* 1900 (N.S.W.) s.560A.

Jurisdiction of Superior Courts to Grant Common Law Bind-overs

The presumption so far has been that superior courts possess an inherent power to bind an offender over to come up for sentence when called upon. Indeed the development of the probation system has been attributed to the existence of this power in the English common law. For example a Departmental Committee in the United Kingdom has reported as follows:-

> To understand the probation system it is necessary to distinguish between the principle of 'binding-over', which is deeply embedded in English law, and the principle of supervision, the new element which added to 'binding-over' produced probation. Long before probation was thought of Courts made use of their powers to bind offenders to come up for judgment if called upon; the idea of placing these offenders under supervision flowed naturally though gradually from this practice.[10]

Whether the power exists in the Australian context is not beyond dispute, although the better view appears to be that the power does exist - at least in common law jurisdictions.

The English position was considered in *Spratling*.[11] In that case it was argued that where an offender was bound over by a court of summary jurisdiction under the terms of the *Probation of Offenders Act*, 1907 (U.K.) and the offender subsequently breached the conditions of his bond, with the result that he was called up for conviction and sentence at Quarter Sessions, the Court had no power to sentence him. This argument was based on the assumption that the power to sentence the defendant had been conferred by s.6 of the U.K. Act on courts of summary jurisdiction only, and the Court of Quarter Sessions therefore did not have the requisite authority to do so. The Court of Quarter Sessions held however, that assuming it had no power under the statute - an assumption it thought was probably correct - it always had as part of its inherent jurisdiction, power to order a convicted person to be bound over to come for judgment when called upon.

Although the United Kingdom's position was definitively considered in *Spratling*, the matter is less certain in other jurisdictions.[12] For

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10 Report of the Departmental Committee on the Social Services in Courts of Summary Jurisdiction (1936) at para 49. See also *Devine v. R* (1967) 119 C.L.R. 506 per Windeyer J. at p.516

11 [1911] 1 K.B. 77.

12 One would have thought that the inherent jurisdiction of the English courts would have been imported to the Australian Colonies by the Charter of Justice (act 4 Geo. IV, c. 96) and by 9 Geo. IV c.83. But as will be seen below the existence of the inherent jurisdiction of the Supreme Court of the A.C.T. to bind over the offender to come up for judgment when called upon has been questioned.

example an Australian penologist has observed that Canadian courts have been unsure of their inherent power to grant common law bind-overs but have nevertheless proceeded occasionally to do so.[13]

The High Court of Australia in *Devine v. The Queen*[14] had an opportunity of deciding whether the Supreme Court of the Australian Capital Territory had the requisite inherent jurisdiction but was content in determining the case on other grounds. Nevertheless, as it illustrates the manner in which the question of inherent power may be raised, and gives some insight into the relationship of statutory to common law powers, it will be considered in some detail.

Devine's Case

Devine was charged and convicted in the Supreme Court of the Australian Capital Territory of carnally knowing a girl below the age of consent. Instead of sentencing him, the trial judge dealt with him under the terms of s.20 of the *Crimes Act* 1914-1960 (Cth) and ordered that Devine be released on condition that he enter into a recognizance upon conditions *inter alia* that he be of good behaviour for a period of three years and appear for sentence when called upon.[15] It transpired that the conditions of his recognizance were not observed. Details of the breach are for present purposes irrelevant. Proceedings were commenced by way of notice upon an application by the Crown requiring Devine to appear before the Supreme Court for a hearing to consider whether the recognizance should be forfeited and 'for any other order which the Court may think fit to make'. Section 20 of the *Crimes Act* (Cth) provides:

> 20(1) If the Court thinks fit to do so, it may release any person convicted of an offence against the law of the Commonwealth without passing any sentence upon him, upon his giving security ... by recognizance or otherwise, to the satisfaction of the Court that he will be of good behaviour for such period as the Court thinks fit to order and will during that period comply with such conditions as the Court thinks fit to impose, or may order his release on similar terms after he has served any portion of his sentence.
>
> (2) If any person who has been released in pursuance of this section fails to comply with the conditions upon which he was released, he shall be guilty of an offence.

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13 See Fiori Rinaldi *Suspended Sentences in Australia*, Paper No. 3 1973 (Law School, Australian National University) p.8ff.

14 (1967) 119 C.L.R. 506.

15 Sections 19B, 20 and 20A of the *Crimes Act* 1914-1973 (Cth) have now only limited application to laws of the Territory. See *Crimes Ordinance* 1971 (A.C.T.) s.9; s.10.

> Penalty: Imprisonment for the period provided by law in respect of the offence of which he was previously convicted.
>
> (3) The penalty provided by the last preceding sub-section may be imposed by the Court by which the offender was originally convicted or by any court of Summary Jurisdiction before which he is brought.
>
> (4) In addition, the recognizance of any such person ... shall be estreated, and any other security shall be enforced.

As a result of the hearing in the Supreme Court, Devine was sentenced to three years' imprisonment for the original offence and his recognizance was forfeited. From this decision Devine sought leave to appeal to the High Court upon the ground that the sentence imposed was excessive.

The case was complicated by the fact that the record of the trial was unclear as to whether Devine had been punished for breach of the condition of the recognizance (which is an offence under s.20(2)) or for the original offence of carnal knowledge. However for the purposes of considering whether the court had an inherent jurisdiction to sentence Devine, an important distinction was made. Although by s.20(1), the court is given power to bind over a convicted person to be of good behaviour and to comply with such other conditions as it thinks fit, it does not expressly give the court power to bind a convicted person over to come up for sentence. In the words of McTiernan A.C.J.:

> Section 20 sub.-s.(1) gives the Court power to bind over a convicted person to be of good behaviour and to comply with such other conditions as it thinks fit to impose. The sub-section does not expressly give power to bind over to come up for sentence. It is said in Archbold, *Criminal Pleading Evidence and Practice*, 36th Ed. (1966), p.207, that binding over to be of good behaviour is not to be confused with binding over to come up for judgment if called on to do so. The difference between these two things is no doubt of importance in deciding whether on the true interpretation of s.20, sub.-s.(1), the Court may under these provisions bind over to come up for judgment if called upon. If the Court may not do this it would seem that the remedy for failure to comply with a condition of the recognizance would be a prosecution under s.20 sub.-s.(2).[16]

And further on McTiernan A.C.J. said:

> If the true view of s.20, sub.-s.(1), is that power to bind over to come up for sentence is not conferred by s.20, sub.-s.(1), and the Supreme Court of the Australian Capital Territory has no inherent power to do so, it is obvious that the sentence under consideration cannot stand.[17]

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16 *Op. cit.* at p.510-11.

17 *Ibid.*

Unfortunately his Honour required further argument before he was prepared to decide the question of inherent power and allowed the appeal on the simple ground that the sentence was demonstrably excessive. Mr Justice Windeyer also avoided the question of inherent power when he said:

> I do not say that it is beyond the power of a court of the Territory to bind a person over to come up for sentence if called upon. I do not have to decide whether that is so or not.[18]

Mr Justice Owen went further than the other members of the Bench when he made the following observation:

> ... I feel considerable doubt whether a convicted person who, pursuant to s.20(1), is ordered to be released without any sentence being passed upon him can later be called up and sentenced for the offence of which he has been convicted. The sub-section seems to contemplate that if he is so released but fails to comply with the conditions upon which the order for release is made, he thereby commits the offence created by sub.s.(2) and incurs the penalty for which it provides and it would seem strange that in such circumstances it was intended that he should be liable to be sentenced for the original offence and at the same time subjected to the further penalty for which sub.s.(2) provides. If that cannot be done, it would follow that a condition that he come up for sentence for the original offence if called upon to do so could not be imposed under s.20(1). I do not find it necessary, however, to express a concluded opinion on that question...[19]

If this argument is correct, it does not necessarily follow that the Supreme Court does not possess an inherent power to bind over the offender to be called up for sentence. Rather, it is submitted that in the case where power is exercised under s.20 sub.-s.(1) there is an implied presumption that the remedy is limited to that provided for by the section, namely penalty for breach of the recognizance. Although the penalty would be imposed because of the breach of the recognizance, the maximum penalty would be equal to that which is provided under the original offence together with the power to estreat any security as provided by s.20(4).[20]

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18 *Ibid.* at p.516.

19 *Ibid.* at p.524.

20 Despite the observation in the course of the judgment that the meaning and effect of s.20 requires legislative clarification no amendment has yet been made. See observations by Kitto and Taylor, in *Devine Ibid.* at p.512.

What, then, can be said of the common law power to bind-over the offender to come up for sentence when called upon? It appears to have been a common practice in the superior courts of New South Wales to exercise this power. The Mitchell Committee also was of the view that the superior courts (at least in South Australia) possess this power, although it pointed out that it was more usual to rely on statutory powers.[21] From an historical perspective, it would be no surprise to find that the superior courts of the Australian Colonies inherited the common law bind-over power which was recognized to exist in England. Although it is true the question of the existence of the inherent power has been raised in the Australian context, it is submitted that the better view is that the power does exist in Australian common law jurisdictions.[22]

Jurisdiction of Summary Courts to Grant Common Law Bind-overs

Whatever may be the correct view with regard to the common law power of superior courts and despite a Tasmanian decision to the contrary, the source of power of courts of summary jurisdiction to bind over an offender to come up for sentence when called upon is, it is submitted, based on statute.

The Tasmanian case which challenges the more commonly held view that only superior courts have common law bind-over powers is *Fletcher v. Chatters*.[23] In that case the question was whether a Stipendiary Magistrate was empowered, upon recording a conviction against a defendant, to order the defendant to enter into a recognizance to be of good behaviour subject to probationary supervision, without also imposing (as was required by s.3(2B) of the *Probation of Offenders Act* 1934) a fine or term of imprisonment. In the course of his judgment Burbury C.J. said:

> I am not persuaded, however, that the learned Stipendiary Magistrate was without jurisdiction. I think that the order can be supported as an exercise of the common law powers of justices preserved by s.4 of the Justices Act 1959. In Devine v. R. 41 A.L.J.R. 200, Windeyer J. in his judgment at pp.203 referred to the common law powers of justices to bind over offenders to be of good behaviour, and expressed the opinion that, independently of s.20(1) of the Commonwealth Crimes Act 1914-1960 (conferring jurisdiction on Federal Courts to release offenders upon a recognizance to be of good behaviour without passing sentence), a Judge of the Supreme Court of the A.C.T. has at common law power to bind over an offender to be of good behaviour either in substitution for, or in addition to, a term of imprisonment.

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21 *Op. cit.* at p.137.

22 For example see *R. v. Prior* [1966] V.R. 459, *Cromb v. Warne* [1958] V.R. 468. The latter case is discussed below at p.11, and the former case at pp.40 ff.

23 Decision of Burbury, C.J., 17 March 1972, No. 18/1972.

His Honour considered therefore that s.3 of the *Probation of Offenders Act* did not supplant the common law jurisdiction to order convicted offenders to enter into recognizances to be of good behaviour and said:

> ...although it may be arguable whether conditions as to supervision by probation officers may be validly inserted in a common law recognizance a Court has inherent power to insert any conditions fairly related to the objective of restraining the offender from offending again.

It is submitted however, that although the justices have at common law the power to place an offender on a bond to keep the peace and be of good behaviour, this power does not extend to the power which does reside in superior courts, to bind over the offender to come up for sentence when called upon. Indeed it is to the latter power that conditions of supervision have traditionally been attached. Accordingly it is respectfully submitted that his Honour erred in suggesting that conditions of supervision might be attached to a recognizance of good behaviour imposed by a Magistrate. It is further submitted that this error may have been brought about by relying on the decision in *Devine's* case which was concerned primarily with the inherent power of the Supreme Court of the Australian Capital Territory.

The following views indicate that courts of summary jurisdiction do not have the common law bind-over power.

McKimm does not completely exclude the possibility of a Magistrate imposing a common law bond in New South Wales, when he refers to the power to release on recognizance in these terms:

> As magistrates consider their jurisdiction to be limited by statute, it is not the practice for a magistrate to award a common law bond.[25]

It is unclear however, whether the power referred to by McKimm is that of binding the offender over to keep the peace and to be of good behaviour, as well as that of binding the offender over to come up for sentence. The former powers were considered in the South Australian case of *R. v. Wright; Ex Parte Klar*,[26] in which it was held by a majority of the Full Court that the powers given by s.70ab of the *Justices Act* 1921-1969 were cumulative upon, and did not abrogate, the powers previously possessed by Justices of the Peace at common law.[27]

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24 The problem in *Fletcher v. Chatters* is now resolved by s.6(1) of the *Probation of Offenders Act* 1973 (Tas.). That section permits a probation order to be made containing a provision that the offender submit to supervision in circumstances which were questioned in that case.

25 *Op. cit.* at p.91.

26 [1971] 1 S.A.S.R. 103.

27 S.70ab of the *Justices Act* extends the power of courts of summary jurisdiction by enabling a convicted person to enter into a bond and provides a penalty, not exceeding that provided for by the offence, for failure or refusal to enter into the bond.

Chief Justice Bray took a contrary line by holding that the common law bond power was abrogated by s.70ab because it applied a limitation as to the amount which could be attached to a bond - a limitation which did not apply at common law. Therefore his Honour considered it unlikely that the legislature intended the courts should still retain the unrestricted power to bind over under the common law.[28] Mr Justice Chamberlain, however, considered that s.70ab applied 'only in the case of a conviction' and that it was only in effect 'a variation of the form of order to be made by way of, or in substitution for, the penalty for a proved offence'.[29]

The case is of particular interest in relation to the origin of the common law power of the justices to authorise sureties of good behaviour and sureties of the peace. These powers are said to be derived from the *Justices of the Peace Act* 1361 (34 Edw. iii c.1.) and from the justices' commission. In view of the antiquity of these powers, and particularly of the statute, it was considered that they were merged in the common law of England and thence introduced into South Australia upon the foundation of the province in 1836.

According to the Mitchell Committee, the Magistrate's power to bind over the offender to come up for sentence is clearly based on statute. It said:

> Although the superior courts still have this common law power to bind over, it is more usual to rely on statutory powers. Courts of summary jurisdiction have statutory powers only.[30]

Although the last sentence may appear to be in conflict with the majority decision in *Wright's* case (*supra*), it is submitted that both views are compatible if it is considered that the Mitchell Committee was concerned with the power of justices to place offenders on bonds to come up for sentence when called upon, with conditions that they keep the peace and be of good behaviour, whereas *Wright's* case concerned itself solely with the powers to impose peace and good behaviour bonds on persons likely to breach the peace.

Perhaps the strongest statement of the position is found in *Cromb v. Warne*[31] in which Chief Justice Herring, in reference to the power of the Court of Petty Sessions in Victoria to grant a common law bind-over, said:

> [The] power is peculiar to courts of common law. It has been possessed by them for many years. It is a power to interrupt the proceedings before sentence and release the accused person on a bond. See *R. v. Nicholson* [1951] V.L.R. 273, at p.274. A court of petty sessions is not in the position of a common law court. Its powers are conferred by Statute and it has only such powers as are thereby expressly conferred by statute upon it - see *Gregory v. Murphy* [1906] V.L.R. 71, at p.76. It

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28 *Op. cit.* at p.111.

29 *Ibid.* at p.121.

30. *Op. cit.* at p.137.

31. [1958] V.R. 468.

can only act if there is some statutory warrant.[32]

Statutory Bond v. Common Law Bond

Unless statutory provisions are in extremely wide terms it may not be possible to attach a condition of probation to the type of bond chosen under a particular section.[33] Although it is true that orders for conditional or absolute discharge, and probation orders are relatively new statutory devices which have taken away much of the area previously occupied by the common law bond, nevertheless it is often found that such devices tend to be restrictive. In some instances the restriction may work in favour of the offender, as in the case of *McCartan*,[34] wherein the English Court of Criminal Appeal quashed a sentence on the ground that the absence of a probation service in Northern Ireland destroyed the validity of a condition attached to the original probation order made under statutory authority. The court might have achieved the end it sought by binding over the offender on condition he return to Ireland and not return to England for a given period.[35] In Australia although a deportation order may be considered not to be valid unless supported by specific legislative authority, Rinaldi has cited two instances where this purported power has been used in the Australian Capital Territory.[36]

A common law bind-over presupposes that a sentence has not been imposed. Thus where a sentence of imprisonment has been imposed it is not then possible to release the offender on a common law bind-over, requiring him to comply with certain conditions.[37] In such circumstances alternative statutory provisions must be found such as those which authorise a split sentence, or suspended sentence.[38] Being creatures of statute however, they may nevertheless be subject to the limitations of statute, and as such may fall short of the width of the discretion

32 *Ibid.* at p.469. For a more recent case where a superior court has imposed a common law bind-over see *R. v. Prior* [1966] V.R. 459 at 462.

33 See for example s.99 of *Justices Act* 1921-1974 (S.A.) under which the power of courts of summary jurisdiction is restricted to placing an offender on a bond to be of good behaviour and to keep the peace. The section does not even require that the offender enter into a recognizance. See also section dealing with priorities between probation and recognizances at pp.18 ff.

34 [1958] 3 All E.R. 140.

35 Whether such a broad power should be retained by a court is certainly questionable.

36 Rinaldi, *Essays in Australian Penology*, A.N.U. Law School 1976 at p.80. Compare this with *Koon Wing Lau v. Calwell* (1949) 80 C.L.R. 533, a decision which would indicate the invalidity of a deportation order as a condition attaching to a bond.

37 See AYU [1958] 3 All E.R. 636. Also see A.J. Chislett 'Recognizances and Conditions' [1958] Crim. L.R. 734.

38 An example of the latter type of provision may be found in s.556B(b) *Crimes Ordinance* 1971 (A.C.T.). Note also that in Tasmania the *Parole Act* 1975 (Tas.) amended the *Justices Act* and *Criminal Code* to authorise split sentences when persons are not authorised to be placed on parole, i.e. if the term is for less than 12 months.

encompassed by the common law bind-over power.[39]

A further distinction is that the sanction for breaching conditions of a recognizance imposed by statute may be restricted (depending on the terms of the section) to forfeiture of the sum specified in the recognizance whereas the penalty for breach of a common law bind-over includes the sanction of sentencing the offender for the original offence as well as the liability of estreatment of the recognizance.

The value of the common law bond is reflected in the recommendation of the Amsberg Committee which said:

> We are convinced that the 'common law bond' system of dealing with convicted persons is superior in many ways to the suspended sentence. The present section 558 [of the *Crimes Act* 1900 (N.S.W.) prior to Act No. 50 of 1974] even though it applies only to first offenders, frequently has a harsher operation than does a 'common law bond', and is much less flexible in its provisions respecting breaches of recognizance. We recommend that section 558 be replaced by a section extending the bond system to all courts.[40]

As a result of these recommendations s.558 was amended embodying and extending the principles of the common law bind-over in exceptionally wide terms.[41]

If there can be any criticism of this section (and this criticism also applies to the common law bind-over) it is that the power appears to be too wide. Apart from the broad discretion conferred upon 'a court before which a person comes to be sentenced', sub.-s. (2) of s.558 provides that 'a recognizance mentioned in sub.-s.(1) shall be conditioned upon and subject to such terms and conditions as the court shall order.' Further, as if to leave nothing to chance, sub.-s. (7) reads:

> 558(7) Any power conferred upon a Court by the operation of this section shall be in addition to, and not in substitution for, any power conferred upon the court otherwise

It appears therefore that at least in New South Wales the common law bond lives on even if it must now live in the shadow of s.558.

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39 For example, under s.556B(4) of the *Crimes Ordinance* 1971 (A.C.T.) a court is not authorized to require a person to give security for the payment of a penalty when imposing a suspended sentence. Refer also to *Devine's* case *(op. cit.)*

40 Report of the Criminal Law Committee on Proposed Amendments to the Criminal Law and Procedure. 27 Sept., 1973 at p. 15.

41 Amended by s.13(b) *Crimes and Other Acts (Amendment) Act* 1974, No. 50 (date of commencement 2nd Aug. 1974). S.558(1) reads:
s.558(1) A Court before which a person comes to be sentenced for any offence may if it thinks fit defer passing sentence upon the person and order his release upon his entering into a recognizance, with or without sureties, in such amount as the Court directs, to be of good behaviour for such period as the Court thinks proper and to come up for sentence if called upon.

PART II - THE LEGISLATION

Occasionally probation is related to certain other dispositions which are alternative to imprisonment, such as the deferred or suspended sentence, fines, periodic detention, dismissal on the ground of triviality, conditional discharge, disqualification and so on. It is not the aim of this paper to consider the relationship of all these measures to probation, nor the problem faced by the sentencer in deciding which one, or which combination of the main sentencing options open to the court in a particular case, is appropriate. Rather it is proposed to focus on the legislative provisions which directly authorize the imposition of probation orders and in so doing, compare the provisions and discuss some of the problems inherent in the legislation.

The grounds upon which a person may be liable to be placed on probation are set out in the legislation to be considered. It is a sound principle of law that in construing criminal statutes the courts are concerned with the strict literal interpretation of the words used with any benefit of doubt going to the defendant.

In considering the jurisdiction of the courts to make probation orders therefore, the words contained in the relevant provisions are of prime concern.

The Key Provisions

The following provisions which are relevant to the power of the courts to place offenders on probation, are the main sections to be considered in this paper.

Crimes Act, 1900-1974 (N.S.W.)
s.556A(1)

Crimes Act, 1958-1973 (Vic.)
s.508(1)

Offenders Probation and Parole Act, 1959-1974 (Qld)
s.8(1)

Offenders Probation Act, 1913-1971 (S.A.)
s.4(1); s.4(2)

Offenders Probation and Parole Act, 1963-1971 (W.A.)
s.9(1)

Probation of Offenders Act 1973 (Tas.)
s.7(1); s.7(3); s.7(3).

Crimes Act, 1900 of the State of New South Wales as amended in its application to the A.C.T. by Ordinances of the Territory (A.C.T.)
s.556A(1); s.556B(1)

Criminal Law (Conditional Release of Offenders) Ordinance, 1971 (N.T.)
s.4(1); s.5(1)

Crimes Act, 1914-1973 (Cth)
s.19B 42

On comparing these provisions (which are reproduced in the Appendix) it can be seen that a degree of uniformity exists in all jurisdictions for the granting of probation.[43] The explanation lies largely in the fact that Australian legislation owes its origin to the early legislative provisions of the United Kingdom and particularly to those of the *Probation of Offenders Act*, 1907 and the *Criminal Justices Act*, 1948.[44] Section 4(1) of the *Offenders Probation Act* of South Australia, for example, is in the same terms as the original United Kingdom Act of 1907 except that the words 'without proceeding to conviction' in the original Act read in South Australia as 'without convicting the person charged.'[45] A close comparison of the Australian legislation dealing with probation will reveal both minor and substantial differences.

In some Australian jurisdictions power to impose probation orders is contained in a single section whilst in others separate sections are provided. South Australia, Tasmania, the Australian Capital Territory and the Northern Territory, have separate provisions applying to courts

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42 These provisions do not reflect the only references to the power of the courts to grant probation in the respective jurisdictions and consequently a great deal of relevant material is omitted e.g. power under Child Welfare legislation is not included. To reproduce all the relevant legislation in full is thought to detract from the main purpose of comparing the key issues.

43 In addition to reproducing these sections, a comparative table (Table A) is included in the Appendix and should be referred to before reading further.

44 The current U.K. legislation is now found in the *Powers of Criminal Courts Act*, 1973, in particular at s.2 and 3. Although this paper is not intended as an historical study, note that Stephen White, Research Fellow at the Australian National University is currently undertaking a detailed historical study of the migration of legislative provisions relating to probation to different parts of the world including Australia and New Zealand, with special reference to pre-sentence reporting.

45 This amendment appears to have no practical consequence. Note from Table A in the appendix that the phrase 'without proceeding to conviction' is retained in N.S.W. (s.556A(1)); Tas. (s.7(1)); A.C.T. (s.556A(1)); N.T. (s.4(1)); Cth. (s.19B(1)). The significance of 'conviction' is discussed at pp.38 ff.

of summary jurisdiction and to courts generally.[46] The same is true of offences which fall under the provisions of the Commonwealth Crimes Act. New South Wales, Victoria, Queensland and Western Australia on the other hand each possess legislative provisions by which jurisdiction to place offenders on probation is conferred on all courts.

In the case of New South Wales it was not until 2nd August 1974 that statutory power to release offenders on probation under the absolute discharge provision of s.556A was extended from courts of summary jurisdiction to all courts.[47] This reform followed hard upon the Amsberg Committee's report which, *inter alia*, stated as follows:

> We received several suggestions, particularly from the District Court Judges, that s.556A, presently confined to magistrates' courts should be available in all courts, that the discretion of the court to apply the section should be wider, and that the court should be able to make its application of the section conditional in the same way as a bond. We recommend that these suggestions be followed, and that other amendments, consequential on the extension of the section to indictable offences, be made.[48]

The effect of the amendment under s.556A is to confer upon all courts of New South Wales a very wide discretion, whereby offenders may be placed on probation upon being charged and upon having had a case proved against them but before the court is required to proceed to conviction. In most other jurisdictions, superior courts are required to proceed to conviction when the power to place offenders on probation is being exercised.[49]

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46 It should be noted however, that ss.4(1) and 4(2) of the *Offenders Probation Act* (S.A.) are mutually exclusive in that summary matters may not be dealt with under s.4(2) (the conviction must be by a court other than a court of summary jurisdiction) whereas a condition precedent for the exercise of jurisdiction under s.4(1) is that the person must be charged before a court of summary jurisdiction.

47 *Crimes and Other Acts (Amendment) Act* 1974 s.12(s)(i).

48 *Op. cit.* at p.14.

49 See Table A in the Appendix and note particularly: *Crimes Act* (Vic.) s.508(1): *Offenders Probation and Parole Act* (Qld) s.8(1); *Offenders Probation Act* (S.A.) s.4(2) and s.4(2a); *Offenders Probation and Parole Act* (W.A.) s.9(1); *Probation of Offenders Act* (Tas.) s.7(2) and s.7(3); *Crimes Act* (A.C.T.) s.556B(1); *Criminal Law (Conditional Release of Offenders) Ordinance* (N.T.) s.5(1).

Probation as a Condition of a Recognizance

Blackstone described a recognizance as 'an obligation of record, which a man enters into before some court of record, or a magistrate duly authorised, with condition to do some particular act, as, to keep the peace'.[50] The party bound in effect admits that he owes money to the Crown unless he fulfils the condition and the Crown may estreat the recognizance if the condition is not fulfilled.

In South Australia and New South Wales, probation is in the form of a condition attached to a recognizance which may be 'with or without sureties'.[51] In the Northern Territory, the Australian Capital Territory, and for offences which fall under the jurisdiction of the Commonwealth Crimes Act probation is usually granted as a condition of a recognizance but need not necessarily be so. The requirement of security is still explicit in the legislation of these three jurisdictions, the common form of expression being: '...upon his giving security, with or without sureties, *by recognizance or otherwise*, to the satisfaction of the court, that...'[52] It appears that the expression 'by recognizance or otherwise' relates solely to the manner of giving security, and the court has power to impose by order conditions of supervision other than as a condition attaching to the recognizance. Nevertheless a recognizance appears to be a usual requirement to the imposition of a probation order.

In the remaining States (Victoria, Queensland, Western Australia and Tasmania) probation is expressed not as a condition of a recognizance but simply as an order. For example, the relevant part of s.508(1) of the Victorian Crimes Act reads: 's.508(1)...the court may instead of sentencing him make a probation order requiring him to be under the supervision of a probation officer...'[53]

Probation Order or Recognizance?

Victoria, Queensland and Western Australia have provisions which require the courts to use probation orders in preference to bonds. Thus, s.509 of the Victorian Crimes Act reads:

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50 See A.J. Chislett, *Recognizances and Conditions* [1958] Crim. L.R. 734 at 735. See also *Fisher v. Chambers* [1972] 4 S.A.S.R. 105 at pp.110-112 where Bray C.J. makes some observations upon the contractual nature of a recognizance.

51 *Crimes Act* 1900 (N.S.W.) s.556A(1), *Offenders Probation Act* 1913-1971 (S.A.) s.4(1); s.4(2).

52 Italics added - see *Criminal Law (Conditional Release of Offenders) Ordinance* 1971 (N.T.) s.4(1), s.5(1); *Crimes Ordinance* 1971 (A.C.T.) s.556A; s.556B; *Crimes Act* 1914-1973 (Cth) s.19B, s.20. Where security is taken 'otherwise' this is usually in the form of payment of a sum of money into court, or by lodging other security e.g. title deeds or bank pass books.

53 The relevant part of s.8(1) of the *Offenders Probation and Parole Act* 1959-1974 (Qld) and of s.9(1) of the *Offenders Probation and Parole Act* 1963-1971 (W.A.) are in identical terms. Section 7 of the Tasmanian *Probation of Offenders Act* 1973 although worded differently also refers to the power of the court to make a probation order.

> s.509 A person convicted of any indictable offence shall not be released upon his entering into a recognizance to receive and undergo sentence when called upon if in the opinion of the court he could properly and conveniently be released on probation pursuant to this Division.

Similar provisions which spell out the relationship of the probation order to that of releasing the offender on recognizance as provided by the provisions of the respective Criminal Codes are contained s.9 of the *Offenders Probation and Parole Act* 1959-1974 (Qld) and s.10 of the *Offenders Probation and Parole Act* 1963-1971 (W.A.).

That difficulties may arise when courts purport to exercise these two powers simultaneously is illustrated in the Queensland case of *R. v. Walker, ex parte The Minister for Justice and Attorney-General.*[54]

In that case the Minister for Justice and Attorney-General appealed to the Court of Criminal Appeal against an order that the respondent should be discharged upon his entering into a recognizance pursuant to s.19(9) of the Criminal Code, and also upon his being made subject to a probation order in pursuance of s.8 of the *Offenders Probation and Parole Acts* 1959-1968.[55]

Reliance was placed on s.9(1) of the last named Act which reads:

> A person convicted of any offence shall not be released upon his entering into a recognizance pursuant to the provisions of sub-section 9 of section 19 of 'The Criminal Code' if in the opinion of the Court he could properly and conveniently be released on probation pursuant to this Act.

Section 8 of the Act deals with the Court's jurisdiction to make probation orders and s.19(9) of the *Criminal Code* enables a court instead of passing sentence, to discharge the offender upon recognizance to appear and receive judgment at some future time.

The Court unanimously held that although it could exercise power under either section, it could not exercise power under both sections simultaneously.

Reasons for the decision given by Hanger J. (as he then was) are summarised as follows:

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54 [1969] Qd R. 39

55 A probation order is included in the definition of a 'sentence' and therefore is an order in respect of which the Attorney-General may appeal under s.669A of the Criminal Code (Qld). See *R. v. Williams, ex parte The Minister for Justice and the Attorney-General* 1965 Qd R. 86. The relationship of a probation order to a sentence is discussed at p.38 ff.

(1) the language of s.8 authorizes the making of a probation order 'instead of sentencing' the prisoner. Similarly, discharge on the recognizance under s.19(9) of the Code takes the place (for the time being) of a sentence. The language of neither of these two provisions appears to permit of there being two matters substituted for passing sentence.

(2) The language of s.19(9) of the Code connotes that the offender enter into a recognizance on the conditions set out in the sub-section - the Court has no power to impose others.

(3) Under s.9(1) of the *Offenders Probation and Parole Acts* the offender is not to be released on recognizance pursuant to s.19(9) of the Code if in the opinion of the Court he could properly and conveniently be released on probation. Section 9(2) of the *Offenders Probation and Parole Acts* refers to s.19(7) of the Code and makes reference to a condition of supervision being included in an order made under s.19(7). Had the legislature intended to permit the court to attach a condition of probation to s.19(9) it would have provided this in terms similar to those applying to s.19(7).[56]

Accordingly his Honour held that there was a strong indication that the legislature did not intend a prisoner to be the subject of a probation order when he was released pursuant to s.19(9) of the Code.

In the result the appeal was allowed and that part of the trial Judge's order which related to probation was struck out.

Although difficulties of the type referred to in *Walker's* case may occasionally present themselves, it is submitted that legislative provisions which help to specify priorities, or the manner in which certain conflicting or concurrent powers may be exercised, are of great assistance to sentencers. This is particularly true in times when increasing numbers of sentencing alternatives are becoming available to the courts. By providing guidelines in the manner indicated by s.509 of the *Crimes Act*, (Vic.), s.9 of the *Offenders Probation and Parole Act* (Qld) and s.10 of the *Offenders Probation and Parole Act* (W.A.), courts are given some grounds for choosing one rather than another dispositional form. However it is curious to note that the priorities are such that the courts are obliged to consider whether the offender should be placed on probation before considering the question of a recognizance. It is submitted that the priorities should be reversed, and that offenders should be placed on recognizances to be of good behaviour and come up for sentence when called upon in preference to being considered for supervisory probation. It is only where special circumstances prevail which warrant that the offender be placed under supervision that probation ought to be considered as a viable option.

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56 Section 19(7) has since been repealed.

Despite this criticism it is considered that provisions which specify priorities should be extended not only to other jurisdictions which do not contain such provisions but to other sentencing options. In this way the objection inferred by D. H. Thomas in his article 'Developments in Sentencing 1964-1973'[57] that too many sentencing alternatives confine rather than aid the sentencer might be overcome. Meanwhile, sentencers must be content to follow the guidelines set by case law as to which sentencing alternative is appropriate in the circumstances of the particular case.

The Pre-requisites for Making Probation Orders

The pre-requisites for making probation orders are set out in the legislative provisions referred to above, and may broadly be divided into two categories, depending upon whether they were modelled upon the *Probation of Offenders Act* 1907 (U.K.) or the *Criminal Justices Act* 1948 (U.K.), i.e. those which require and those which do not require, that the offender enter into a recognizance.

Of those which require that the offender enter into a recognizance, a common formula enumerating the pre-requisites is contained in s.4 of the South Australian *Offenders Probation Act* 1913-1971. In that State, all courts have to be satisfied that a consideration of the following matters renders it expedient that the defendant be discharged conditionally upon his entering into a recognizance:

(a) the character, antecedents, age, health or mental condition of the person charged;

(b) the trivial nature of the offence; or

(c) the extenuating circumstances under which the offence was committed.

Ordinary principles of statutory interpretation would indicate that these pre-requisites are alternatives and this view has been held to be correct in *Re Stubbs*,[58] a New South Wales decision of the Court of Criminal Appeal. In that case, Mr Justice Davidson adverted to the historical basis of the legislation when he said:

> In an Irish case it was decided that the various conditions precedent to the exercise of the discretion specified in the Probation of Offenders Act were alternative as expressed, and not cumulative: *McClelland v. Brady*.[59] It was mentioned also that this legislation had its origin in the Summary Jurisdiction Act (42 and 43 Vic., c. 41, s.16) but that the latter Act substituted the word 'or' for 'and' thereby negativing any cumulative construction.[60]

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57 [1974] Crim. L. R. 685, at 690-691. See also Sir Rupert Cross *The English Sentencing System* 2nd Ed. (1975) at pp.20-22.

58 (1947) 47 S.R. (N.S.W.) 329. See also *Cobiac v. Liddy* referred to at p.25 below.

59 [1918] 2 I.R. 63 at 70.

60 *Op. cit.* at p.337.

Although these pre-requisites are alternatives it is usually a consideration of a number of them which motivates a court to exercise its discretion in the offender's favour.[61]

Prior to the commencement of the *Crimes and Other Acts (Amendment) Act* 1974, which amended s.556A of the New South Wales *Crimes Act* (referred to above), the power to place offenders on probation under s.556A was limited to courts of summary jurisdiction only. The pre-requisites were the same as those applying in South Australia. However as already discussed, the recent amendment has meant not only an extension of power to superior courts, but also an additional pre-requisited, widening the courts discretion, has been added, namely ' any other matter which the court thinks it proper to consider'. This couches the discretion of New South Wales courts to place offenders on probation in very wide terms.[62]

In Tasmania, both courts of summary jurisdiction and the Supreme Court are restricted by pre-requisites similar to those applying in South Australia when exercising their powers under S.7(1) or S.7(2) of the *Probation of Offenders Act* 1973. However it appears that such restrictions do not apply if courts, having proceeded to conviction, exercise their powers under s.7(3), which empowers imposition of split sentences:

> 7(3) where a defendant has been convicted of an offence, the court before which he has been convicted may, whether or not it imposes a fine or a term of imprisonment upon, or makes a work order against, him, make a probation order against him in which it shall include a provision in accordance with paragraph (b) of sub-section (2) of section six.[63]

It would appear therefore, that where a conviction which may or may not include a penalty of the type referred to in s.7(3) is imposed, the court has a wide and unfettered discretion to impose a probation order.

If this interpretation is correct the rationale for such a provision is difficult to follow. It must be thought that where the defendant has been inflicted with one form of punishment of the type referred to in

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61 See particularly the section below subtitled "Matters going to the Exercise of the Discretion," wherein some concrete illustrations in relation to the manner in which the courts exercise their discretion are given.

62 Provided the courts do not proceed to conviction, in which case the appropriate section is s.558 of the *Crimes Act* (N.S.W.) under which the courts are free from considering the pre-requisites specified in s.556A. However, in view of the width of s.556A it is unlikely that freeing the courts from having to consider these pre-requisites would be of any significance, because of the width of the pre-requisites specified in s.556A, and because in practice it may be found that the sort of considerations under s.558 would be similar to those prescribed in s.556A.

63 Section 6(2)(b) merely refers to a requirement that, the person subject to the probation order shall submit to the supervision of a probation officer or other person named in the order. The split sentence may be used less often as a result of the *Parole Act* 1975 (Tas.) which will mean that more persons will be released on parole and probably less on probation under s.7(3).

s.7(3), the imposition of a second form (probation) in addition to the first would be subject to the same, if not more stringent, pre-requisites as prescribed in the preceding subsections of s.7. An explanation for not specifying pre-requisites may lie in the concept of a probation order as being a rehabilitative rather than a penal measure and intended to benefit the offender.[64] It may also be thought that where the court has not proceeded to conviction and proposes to impose a probation order, some restrictions in the form of pre-requisites should be satisfied before subjecting the offender to a measure which will interfere with his liberty. On the other hand, where the court has proceeded to a conviction and, all things being equal, the nature of the case is more serious, and *prima facie*, the court is entitled to interfere with the offender's liberty, it may be considered less justifiable to impose restrictions on the court's power to order probation. The difficulty with the last argument is that the legislature has seen fit to impose restrictions in the form of pre-requisites in terms of s.7(2) of the Act where the court is required to proceed to conviction as a pre-condition to the exercise of the probation power.

It may also be argued that where a probation order is sought to be made under the terms of s.7(3), the pre-requisites specified in the preceding subsection must first be satisfied. If such an interpretation is intended, it is not clearly reflected in the terms of s.7(3) which, *prima facie*, appears to be self-contained. If the pre-requisites are intended to apply it is submitted that s.7(3) should be re-drafted so that this intention is clearly indicated.

In the Australian Capital Territory, the Northern Territory and in courts dealing with Commonwealth offences, similar pre-requisites to those applying in South Australia prevail where the offender has been charged in a court exercising summary jurisdiction. However, in cases where courts have proceeded to conviction, (and this includes superior courts), the formula referred to above is no longer applicable, and subject to specific limitations only, a wide discretion to place offenders on probation is substituted.[65] The main criteria for exercising the discretion is 'if the court thinks fit to do so' or words of similar import - a very wide discretionary power indeed.

Victoria, Queensland and Western Australia comprise the States which do not require offenders to enter into a recognizance as a condition for probation but which also share a common formula slightly different from the type applicable to the South Australian legislation. All courts in Queensland and Western Australia must be satisfied that it is expedient to make a probation order having regard to the circumstances including the nature of offence, character and personal history of the offender, his home surroundings and other environment. In Victoria all courts have to be satisfied a probation order is expedient having regard to the circumstances including the nature of the offence and the character and antecedents of the offender.

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64 The nature of a probation order is discussed below.

65 *Crimes Ordinance* 1971 (A.C.T.) s.556B; *Criminal Law (Conditional Release of Offenders) Ordinance* 1971 (N.T.) s.5; *Crimes Act* 1914-1973 (Cth) s.20.

The formulae considered, particularly those of the latter group, provide broad guidelines for the exercise of the court's discretion, The pre-requisites are in a sense restrictions, as well as guidelines for the exercise of the courts discretion and it is now proposed to consider some cases where the court has taken into account such pre-requisites.

Discretion of the Court

The word 'discretion' is defined in *Webster's Third New International Dictionary* (Merriam edition) to mean, *inter alia*, 'power of free decision or choice within certain legal bounds', and more particularly 'the latitude of decision within which a court or judge decides questions arising in a particular case not expressly controlled by fixed rules of law according to the circumstances and according to the judgment of the court or judge (as in suspension of a sentence or the amount of a fine)".

The court may exercise its discretion to release an offender on probation if it is expedient to do so, upon consideration of the pre-requisites contained in the relevant provisions. Thus the discretion is not meant to be exercised merely at the whim of the court. Indeed it has been held that the court has a duty to consider

> such of the various matters referred to in the section as to the circumstances of the particular case it is reasonable to consider in exercising that discretion.[66]

In *Stone v. Hughes*[67] it was submitted on behalf of the offender that unless the Magistrate undertook to question the offender about his 'character and personal history (inclusive of home surroundings and other environment)' he did not discharge his duties under the *Offenders Probation and Parole Act* 1959-1971. In rejecting this submission, Denmack J. said:

> But that Act does not require a magistrate to exclude the possibility of ordering probation before he can impose a fine. Section 8 simply enumerates the circumstances in which probation may be ordered. The actual sentence imposed remains in the discretion of the magistrate.[68]

This view may in some respects be contrasted with that of *Maurer v. Gorman*[69] where it was said that particularly in the case of undefended youthful first offenders, the courts have recognized a need to ensure full enquiries are made, usually in the form of pre-sentence reports,

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66 *Re Stubbs* (1947) 47 S.R. (N.S.W.) 329 per Jordon C.J. at p.333. Note that in England the Judge is under a statutory obligation to ask himself whether he can avoid sending an offender to prison if he has not been sentenced previously; *Power of Criminal Courts Act* 1973, s.20(1); *ibid* s.19(2).

67 [1974] 2 QL 268.

68 *Ibid* at 271.

69 [1973] QL 330.

so that their discretion may be exercised on adequate information.[70] As McCracken J. said:

> if all the relevant facts are not adequately placed before any particular sentencing court it is obvious that injustice may result.71

Nevertheless, although there are cases in which the court has seen fit to order further enquiries, the onus is generally upon the offender to place before the court the considerations upon which the court can exercise its discretion. The time for placing this kind of evidence before the court is at the end of the case.[72]

If upon appeal it is found that a court has not abused its discretion, an appellate court will not substitute its discretion even though it would have exercised the discretion differently. In considering this point in *Cobiac v. Liddy*[73] Windeyer J. said:

> The question is not whether any of us in this Court, or any of their Honours in the Supreme Court, would himself have taken the course that the magistrate took. The question is not what we would do, but what could he lawfully do. The discretion was his.[74]

On the question of what constitutes sufficient grounds for the exercise of the court's discretion under s.4 of the *Offenders Probation Act* (S.A.) Windeyer J. said:

> One of these [statutory pre-requisites] by itself, or several of them taken together, must provide a sufficient ground for a reasonable man to hold that it would be expedient to extend the leniency which the statute permits. The Act speaks of the court exercising the power it confers 'having regard to' the matters it states. I read that as meaning more than merely noticing that one or more of them exists. Its, or their, existence must, it seems to me, reasonably support the exercise of the discretion the statute gives. They are not mere pegs on which to hang leniency dictated by some extraneous and idiosyncratic consideration. But they are wide words. None of the matters they connote is necessarily to be regarded in isolation from the others, or apart from the whole of the circumstances of the offender and the offence.[75]

Matters Going to the Exercise of the Discretion

Unless there are sufficient facts on which a court may base its decision, the court will be precluded from exercising its discretion. Thus in *Aitken v. Wilson*,76 the Full Court the Supreme Court of Western Australia

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70 Where pre-sentence reports are obtained it may nevertheless be desirable that the offender be legally represented in order to be in a position to challenge the material contained in the pre-sentence report - see Mary W. Daunton-Fear 'Social Inquiry Reports. Comprehensive or Reliable?' Vol. 15 No. 2 Brit. J. Crim 128. Also see *R. v. Webb* [1971] V.R. 147 at pp.150-151 and *Lahey v. Sanderson* [1959] Tas. S.R. 17.

71 *Maurer v. Gorman* [1973] Q.L. 330 at 332.

72 *R. v. Timms* [1921] V.L.R. 503.

73 (1969) 43 A.L.J.R. 257.

74 *Ibid* at 264.

75 *Ibid.*

76 Unreported judgment 6 May, 1974 (Appeal 18/1974).

held that discretion could not be exercised in favour of the offender under the terms of s.669(1) of the *Criminal Code* (W.A.). Section 669(1) does not relate directly to probation, but is relevant for present purposes because it requires the court to have regard to

> the youth, character, or antecedents of the offender, or the trivial nature of the offence, or any extenuating circumstances under which the offence was committed.[77]

The facts before the court indicated that the nature of the offence was not trivial (he was charged with driving under the influence under s.32 of the *Traffic Act* (W.A.)), nor were there extenuating circumstances[78] under which the offence was committed. The appellant was 44 years of age and therefore not a young person. There was no relevant evidence regarding his character except that he had been driving since 1950 and had never been convicted. Burt J. considered that the facts merely amounted to saying that he was a first offender, a fact which was a condition precedent to the exercise of power under s.669, but which of itself, did not amount to authorising the exercise of the court's discretion.[79]

On the other hand the court is not empowered to exercise its discretion on matters extraneous to those expressed or implied by the legislation. Thus for example the domestic circumstances of the offender are not normally treated as a relevant consideration.

In *Cobiac v. Liddy*[80] the question of whether there was material relevant to justify the exercise of the Magistrate's discretionary power under s.4(1)I of the *Offenders Probation Act* (S.A.) was considered. The factors taken into account were that the offender was a man of good character, although his driving record was far from good, that he was 72 years of age, and that he had to care for his 87 year old sister who lived with him.

Although the High Court considered that the above factors did constitute sufficient grounds upon which the Magistrate could exercise his discretion, there was some questioning as to whether the care of his 87 year old sister constituted a relevant factor upon which the court might base the exercise of its discretion.

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77 Section 669(1) of the *Criminal Code*(W.A.) is based on the *Probation of First Offenders Act* 1887 of the U.K., but for the purposes of discussing the discretion of the court it is assumed that the same principles apply as under statutes authorising probation generally.

78 'Extenuating circumstances' was considered in *O'Sullivan v. Wilkinson* (1952) S.A.S.R. 213 to mean circumstances which excuse, in an appreciable degree, the commission of the offence charged.

79 *Op. cit.* at p.4.

80 *Op. cit.*

Barwick C.J., Kitto and Owen JJ. in a joint judgment, considered that there was 'room to doubt' whether such a consideration was relevant on the question of character or antecedents.[81] However, Windeyer J. considered that the position of the aged sister could be legitimately included in the offender's antecedents. Upon the meaning of the word 'antecedents' his Honour said:

> The word 'antecedents' was said by Davidson J. in *Re Stubbs* (1947), 47 S.R. (N.S.W.) 329, at p.338, to be 'an ambiguous word, which may refer either to previous history or to the parents of the offender and their conduct in his upbringing'. I would not say anything to suggest any restriction of the breadth of meaning of a word which is commonly used today by social workers and probation officers. As used in s.4(1), it refers I think primarily to the offender's previous history and past record. It is a word which it seems came into use in English in this sense from its use in French law. A person's antecedents in that sense may tell for or against him. In *R. v. Vallet*, [1951] 1 All E.R. 231, Lord Goddard C.J. said (at p.232):
> '...the word 'antecedents' is as wide as can be conceived. On considering the appellant's antecedents it was found that she was a married woman living with a man who was not her husband, that she had been put in a position of trust, and that she had used the information she had so obtained to carry out persistent and wholesale thefts.' If bad behaviour of that kind can count for ill as a person's antecedents, I cannot see that the present offender's good behaviour to his sister should not count in his favour as among his antecedents.[82]

However, as Windeyer J. was in the minority on this point, it is submitted that the view of the majority must prevail so that there is at lease 'room to doubt' whether the fact that the offender took care of his aged sister was a relevant consideration within the meaning of 'character or antecedents' under the terms of s.4(1) of the *Offenders Probation Act* of South Australia. Nevertheless it is difficult to reconcile the view of the majority with the logic of the passage just quoted unless the meaning of the word 'antecedents' is not 'as wide as can be conceived'.

The same kind of problem would not have arisen in some of the other jurisdictions because the considerations to be taken into account are specified in more vague (hence wider) terms. For example, s.556A of the New South Wales *Crimes Act* 1900 includes the catchall phrase of 'any other matter which the court thinks it proper to consider'. In Victoria s.508(1) of the *Crimes Act* 1958 requires the court to have regard to the 'circumstances' including *inter alia* the character and antecedents of the offender. Originally the word 'circumstances' referred to the 'circumstances of the offence'. The word now standing unqualified would appear to extend beyond this and include also the 'circumstances of the offender'. Whatever the word 'circumstances' does mean it would perhaps be desirable to use a more precise expression which would

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81 *Ibid.* at p.260.

82 *Ibid.* at pp.264-265.

delineate the field which the word 'circumstances' is intended to encompass. However, courts of Queensland and Western Australia are also required to consider the 'circumstances' including *inter alia* the offender's 'home surroundings and other environment'.[83] Thus although it is not usual for the domestic situation of an offender to be treated as relevant, at least in the latter four jurisdictions it is submitted that a circumstance that the offender cares for his aged sister would constitute a proper consideration for the court to take into account in exercising its discretion.

A recent illustration of a court taking into account the domestic circumstances of an offender is that of *Brien*.[84] The appellant had been convicted of stealing $1914.98 in money from the Commonwealth and had been sentenced to three years' imprisonment with a non-parole period of twelve months. On appeal against severity of sentence the Court of Criminal Appeal paid particular attention to the fact that the appellant's eight dependant children would be gravely affected by his imprisonment and that the appellant's wife was not in a position to contribute to the maintenance of the children. Accordingly the Court quashed the sentence and substituted a good behaviour bond of three years.

Two interesting cases recently reported in the 'Canberra Times' illustrate some considerations upon which courts have exercised their discretion to release offenders on probation.

In one case the offender (Andrevski) pleaded guilty in the County Court of Victoria to assaulting with intent to rape a girl under the age of 16. According to the newspaper report, the offender was 18 years old, unemployed and had contracted sclerosis of the spine and at the time of the trial permanently used crutches. Judge Wright offered the offender two years on probation, saying that he did this mainly because of the youth's medical situation and because proper medical care was unavailable in jail.[85]

In another case, the offender (Donaldson), pleaded not guilty in the Central Criminal Court of New South Wales to having murdered her six day old daughter but pleaded guilty to infanticide. Apparently the offender had thrown her baby into the sea at Maroubra and returned home without the child. The prosecution accepted the plea of guilty in discharge of the indictment and the evidence tendered indicated that the offender had been suffering a mental illness aggravated by the birth of the baby. Mr Justice O'Brien said that in view of her character, age (she was 24 years old) and mental condition, he did not think it necessary to inflict any punishment and ordered her to be discharged without a conviction being recorded. She was placed on a good behaviour bond of three years and ordered to place herself under the supervision of a probation and parole service officer and to continue undergoing

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83 See *Offenders Probation and Parole Act* 1959-1974 (Qld) s.8(1) and *Offenders Probation and Parole Act* 1963-1971 (W.A.) s.9(1). See Table A in Appendix.

84 Unreported decision of the N.S.W. Court of Criminal Appeal, No. 127 of 1974.

85 'Canberra Times' 31 Oct., 1975.

psychiatric treatment as considered necessary.[86]

Sometimes, of course, the Court will refuse to exercise its discretion in the offender's favour even though, prima facie, he would appear to be eligible for release on probation. Such was the case in R. v. *Aitken*[87] which was an application for leave to appeal against a sentence of 18 months for larceny of a motor car. It was the offender's first offence. He was only 22 years of age and of good character. He had been educated up to the age of 17 years at two great public schools. He came from a good home, and the Court of Criminal Appeal described his parents as being 'estimable citizens' for whom it had 'great sympathy'. The Court said that 'perhaps the applicant was over indulged by his parents, and lacked some elements of discipline as is so often the case today'. He was described as being 'weak enough to give way to the temptation to help in stealing and stripping a car because of his false sense of loyalty to his fellows'.

In the course of the judgment the Court of Criminal Appeal said:

> We have, since this appeal was argued, so earnestly and capably by Mr Samuels, given every consideration to the extenuating circumstances pressed upon us; and it is with some regret that we feel compelled to conclude that the application must be dismissed. We say with regret because we do not overlook that the applicant is being sent to prison for the first time and for his first offence. But this court is bound to consider not only the interests of the applicant himself and his family, but the community. The retributive aspect of punishment must be given full weight. Perhaps this would be met in this case by the exposure of the crime, the arrest of the applicant the disgrace with which it is accompanied, and the disruption of his life of previous good character. We do not think that the applicant is likely to be led or to fall again into a crime of dishonesty. His school and family background should be a guarantee of this. But there remains the question of the deterrent aspect. A sentence such as this is imposed to deter others as much as to deter or punish the individual. For many years judges at Quarter Sessions have taken a serious view of car stealing, owing to its prevalence and serious loss of property involved, and have frequently imposed sentences of two or three years' imprisonment on young offenders and this court has consistently supported them.'[88]

It may be seen from the above extract that the philosophical grounds for imposing sentence may play an over-riding part in the court's refusal to exercise its discretion in the offender's favour even though the

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86 'Canberra Times' 10 Dec. 1975.

87 [1961] N.S.W.R. 914.

88 *Ibid* at p.915.

the offender's background itself would appear to qualify him for probation.

Duration of Probation

The legislation which directly authorizes the courts to place offenders on probation also contains provisions which effectively restrict the length of time that an offender may be placed on supervisory probation. Consider the following table:

Permissible Statutory Duration of Probation in Years

Jurisdiction	Minimum Period	Maximum Period
N.S.W.		3
Vic.	1	5
Qld	0.5	3
S.A.		3
W.A.	1	5
Tas.		3
A.C.T.		3 (but may be longer in certain circumstances)
N.T.		3 (but may be longer in certain circumstances)
Cth		3

Some explanation of this table is required. As can be seen in New South Wales, Queensland, South Australia and Tasmania the maximum term of supervision is three years.[89] Similarly, courts of summary jurisdiction exercising power under s.19B of the *Crimes Act*, 1914-1973 (Cth) are restricted to imposing a maximum term of probation of three years.

In the Australian Capital Territory and the Northern Territory courts of summary jurisdiction are also restricted to imposing a maximum term of three years where such courts have not proceeded to conviction. However, where such courts do proceed to conviction the period appears to be limited to that which is specified in the order to be of good behaviour.[90] As there does not appear to be any restriction on the length of time that a court may order an offender to be of good behaviour,

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89 See *Crimes Act*, 1900-1974 (N.S.W.) s.556A(1); *Offenders Probation and Parole Act*, 1959-1974 (Qld) s.8(1); *Offenders Probation Act*, 1913-1971 (S.A.) s.4(2c), *Probation of Offenders Act* 1973 (Tas.) s.6(3).

90 *Crimes Act* 1900 (N.S.W.) as applicable to the A.C.T.; s.556B(1) *Criminal Law (Conditional Release of Offenders) Ordinance* 1971 (N.T.) s.5(1).

in theory at least, there appears to be no maximum length of time that an offender may be placed on probation in these two jurisdictions.

It is of some interest to note that in some jurisdictions minimum periods are also specified. Thus in Queensland a period of not less than six months duration of probation may be imposed, whilst in Victoria and Western Australia the courts are empowered to place offenders on probation provided that the effective duration of the order is not less than one year nor more than five years.

Duration and Rehabilitation

It is generally recognized that excessively short periods of supervision are insufficient to achieve the aim of rehabilitating the offender. This to some extent is reflected in the legislation of those States which provide minimum periods of probation. Indeed in those jurisdictions where no minimum period is specified, where supervision is ordered for a period of less than six months, it may be inferred (unless special circumstances prevail) that the wrong disposition has been imposed, and that the imposition of a non-supervisory disposition would have been more appropriate. It may be that those jurisdictions which do not have minimum periods specified in their legislation ought to consider the desirability of adopting such a course.

Probation officers are often overworked with heavy case-loads. This is not surprising when it is remembered that the incidence of crime is ever increasing both in numbers and seriousness and that the courts are becoming reluctant to imprison offenders where other viable alternatives offer to the offender equal, if not better prospects of rehabilitation at a more economical cost. Further, probation officers themselves are generally required to be qualified people who supervise parolees as well as probationers and who are also the persons responsible for the gathering of information and making pre-sentence reports. A reduction of overly long periods of probation therefore would have the effect of substantially reducing the case-load burden, and should as a general policy be employed unless there are good grounds for imposing long terms.

A perennial problem with probation is the difficulty at the time of trial to determine what length of supervision is required to achieve rehabilitation. A possible solution to the problem is the adoption of a suggestion made by Nigel Walker that all probation orders should be of a standard length, but be subject to termination, if in the opinion of the Probation Service it is deemed justified.[91] Most States do have provision for early termination, but by application to the court. A method used by Australian courts, albeit rarely, but which has an effect similar to that proposed by Walker, is to place an offender under supervision 'for such period as the Chief Probation Officer deems necessary', or words of similar import.

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91 Nigel Walker *Sentencing in a Rational Society* Pelican (1972) at p.162.

The most common form of termination however, is *de facto* termination which is achieved by simply phasing out supervision.

The author believes that the latter practice should be given statutory recognition along the lines suggested by Walker, i.e. by empowering the Probation Service, upon proper guidelines, to have the power to formally terminate probation orders. Walker suggests that a term of two years might be the standard length of a probation order - this being in England the most commonly imposed period of supervision. Figures available in Australian jurisdictions also appear to indicate that the two year period is the most commonly imposed.[92]

A possible objection to this system is that it tends to take out of the hands of the courts, the power to determine when offenders should be released. It is submitted however, that the advantages of such a scheme would far outweigh such a criticism. In any event a similar objection might be levied at the current practice of *de facto* termination.

Such a scheme would be beneficial not only to the Probation Service and to the courts, but also to the offender. The Probation Service contains experienced personnel who may best be in a position, after a period of supervision, of deciding when the offender is ready for release. The decision to release the offender would be made by the Chief Probation Officer upon recommendation of the supervising officer. The cumbersome procedure of applying to court for release would be eliminated. Rather than retain the informal procedure of phasing out probation when the Service feels such a course is warranted - a course which is not strictly authorised by legislation - The Probation Service would be authorised to terminate the order and therefore legitimately reduce the case-load. Furthermore, under this scheme the court would no longer be concerned with attempting to determine the appropriate length of probation to be imposed but merely whether such a disposition was justified. If, however, the court felt that a minimum period of supervision was desirable in a particular case it could still make recommendations which in the normal course of events would be given due weight by the Probation Service. The offender would also gain benefit because he would be given positive incentives to co-operate fully with the Probation Service in the hope of obtaining an early release from the order.

Walker also suggests that if it were found justified, a probation order could be extended, but only with the court's approval. Although it is agreed that such a power is desirable in those cases where two years' probation is found to be inadequate, it is submitted that the court should not be authorized to approve more than one extension of two years' duration in order to avoid the possibility of effectively subjecting the offender to an indeterminate period of supervision. The ordinary provisions relating to breach of conditions, would of course be retained and be effective for the duration of the period that the probation order is extant.

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92 The majority of probation orders are for a period of two years or less. The highest proportion of all orders made appears to be for two years' duration, and second highest for one year's duration. Figures taken at random from recent Annual Reports indicating the high proportion of orders of two years' duration are as follows:
In Victoria the two year period represented 48.9% of all orders (see Annual Report 1974, of the Social Welfare Department, Victoria - Table 44 at page 95).
In Queensland the two year period represented 44.6% of all probation orders (see Sixteenth Annual Report of the Qld Adult Probation and Parole Service 1 July 1974 to 30 June 1975 Table 1 at page 6).
In Western Australia a similar pattern emerged, the two year period represented 43.99% of all orders made (see Western Austra;ia's Parole Board Report for the year ended 30 June 1974, Table 5 at page 8).

PART III - THE NATURE OF PROBATION

In this part some elements involved in the concept of probation are considered and analysed. Central to the analysis is the belief that probation should not be based on the consent of the offender, that probation should not be viewed as a lenient measure, or 'let off', but that probation should be treated as a penalty in its own right. Time and usage has given to probation the status of a sentence even if, *de jure* probation is not a sentence and it is argued that the *de facto* position should be given legislative recognition. However, to more fully appreciate the function which probation is intended to serve in the criminal justice system, some of the aims and advantages of probation are briefly considered.

Aims and Advantages of Probation

It is now generally accepted that imprisonment holds little prospect of rehabilitating offenders, and there appears to be a growing policy, at least in higher courts, to seek alternatives to imprisonment wherever practicable.

The remarks of Hoare J., with which Hart and Kneipp JJ. agreed in *R. v. Draper*, is a single instance of the many where this policy is overtly expressed. His Honour said:

> It is now generally recognized by penologists that it is far better both in the interests of reformation of the offender and in the interests of the community that the court should, if possible, avoid sending an offender to prison.[93]

Probation is one of the main tools employed by the courts to keep offenders out of prison in the hope that they may be rehabilitated. Indeed, sometimes a probation order containing a condition that the offender submit to hospitalisation for treatment may be the only practical way to provide hope of rehabilitation.[94]

The aims of probation are to some extent reflected in the criteria for deciding when it is considered appropriate to place an offender on probation. According to the Report of the Interdepartmental Committee on the Probation Service[95] there is an *a priori* case for probation when the following four conditions are fulfilled:

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93 [1970] Q.W.N. 20. See also *McGregor v. Steel* (1973) 5 S.A.S.R. 222 at 223-224.

94 *R. v. Cass* (1972) 66 Q.J.P.R. 142 at 144.

95 Published in 1962. Although this was a United Kingdom Committee looking at the English position, it is submitted that the considerations listed are equally applicable to Australian Courts.

(a) The circumstances of the offence and the offender's record are not such as to demand, in the interests of society, that some more severe method be adopted in dealing with him;

(b) the risk, if any, to society through setting the offender at liberty is outweighed by the moral, social and economic arguments for not depriving him of it;

(c) the offender needs continuing attention (otherwise, if condition (b) is satisfied, fine or discharge will suffice);

(d) the offender is capable of responding to this attention while at liberty.

Whether such conditions should be set out in legislation for the guidance of sentencers is open to debate.[96]

The advantages of probation are summed up by the American Bar Association Project on Standards for Criminal Justice,[97] as follows:

> (1) It maximizes the liberty of the individual, while at the same time vindicating the authority of the law and effectively protecting the public from further violations of law.
>
> (2) It affirmatively promotes the rehabilitation of the offender by continuing normal community contacts.
>
> (3) It avoids the negative and frequently stultifying effects of confinement which often severely and unnecessarily complicate the reintegration of the offender into the community.
>
> (4) It greatly reduces the financial costs to the public treasury of an effective correctional system.
>
> (5) It minimizes the impact of conviction upon innocent dependants of the offender.

Although it is somewhat optimistic, if not inaccurate to suggest that probation 'effectively [protects] the public from further violations of law, the other points listed are, as a general rule, accurate reflections of the advantages of probation, even if they may also be shared with other non-custodial dispositions.[98]

The Consensual Nature of Probation

In theory, it is always open to an offender to refuse to accept a

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96 See Sir Rupert Cross *The English Sentencing System* 2nd Ed. (1975) at p.21. The author also refers to and quotes Article 7.01 of the American Law Institute's Model Penal Code, entitled *Criteria for Withholding Sentence of Imprisonment and for placing Defendant on Probation* at *ibid.*

97 See *Standards Relating to Probation* 1970 at p.10.

98 For further discussion on the relationship of probation to imprisonment see M. B. Hoare, C. R. Bevan and W.D. Simpson 'Alternatives to Imprisonemnt and Progressive Variations in Current Practice' (1972) A.N.Z. Crim. at p.15.

probation order.[99] This is especially true of probation which is a condition of a recognizance because a recognizance itself is based on the acquiescence of the offender. In those jurisdictions which do not require the offender to enter into a recognizance (i.e. Victoria, Queensland and Western Australia) the order operates only if the probationer has expressed his willingness to comply with its terms and conditions. Further to ensure that the order is understood Victoria, Queensland, South Australia, Western Australia and Tasmania all have legislative requirements that the order shall be explained to the probationer (in 'simple language' in South Australia and Tasmania, in 'ordinary language' in Victoria and Queensland, and in 'language likely to be readily understood by the offender' in Western Australia).

In view of the consensual nature of probation is it proper to consider that it is also a penalty? It has been submitted that the main aim of probation is rehabilitation, that probation is a non-penal method of dealing with offenders, and that it is on a number of grounds generally preferred to imprisonment. Nevertheless it should not be treated or used as a 'let-off'. Probation ultimately is a form of punishment, not an act of judicial grace.

Although on one view probation might be considered to be a 'lenient' method of dealing with offenders, it should be remembered that the legislature has seen fit to provide the courts with specific factors to consider for placing offenders on probation, that courts therefore have a duty to consider whether an offender is eligible for probation, and that in exercising their discretion correctly courts are required to act judicially, not capriciously, and keep within the bounds stipulated.

Ultimately a court's duty is to apply the appropriate penalty for the appropriate offence in the light of all the relevant circumstances before it. If the appropriate dispositional measure is 'probation' because of the considerations involved, it is perhaps misleading to say that the court is being lenient because it did not impose a more harsh alternative. If on the other hand the appropriate dispositional measure is imprisonment and the court imposes a non-custodial sentence then it may be said (but not necessarily) that the court is being lenient.[100] In the latter case however, it may also be said that the court has acted upon wrong principles. Choosing the 'appropriate sentence' is of course both the aim and the art of good sentencing.

In her report *Sentencing in Western Australia*,[101] Mary Daunton-Fear

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99 The same option is open to an offender faced with any bind-over. The following discussion however, is addressed solely to the consideration of probation, and the views to be expressed should not necessarily be taken to apply to bind-overs.

100 Some offenders may prefer to go to prison for a short time and 'get it over with' than be placed on probation for a substantial period of time. What the courts view as 'lenient' may not be seen by the offender as such.

101 In press.

discusses the case of *Satchell v. Cross*[102] in which Mr Justice Burt held that there could be no right of appeal in relation to a probation order because of its 'consensual nature'. Burt J. said:

> a penalty one understands as being something penal in nature which is imposed upon somebody whether they like it or not in the sense that there is no option given to the person as to whether he is going to suffer it. That ... is inconsistent with the idea of a probation order which should never be made and can never be made unless the person to be placed on probation agrees to it being made. In that sense it is a consensual sort of thing and leads one, I think, to say as a matter of policy (altogether apart from the specific words of the statute) that there should not be an appeal from an order placing somebody on probation. It would seem to me to be odd that a judge, instead of sentencing somebody, should say, 'I will place you on probation on these conditions provided you agree to abide by them' and the accused person having so agreed and been placed on probation could then come to a court and say that the terms were unreasonable. I would have thought that if they were unreasonable then he should not agree to abide by them, but if subsequent facts or circumstances change so as to make the conditions of the order unworkable or inappropriate (and that may well happen) then the solution is to be found within the [*Offenders Probation and Parole*] Act itself and specifically within s.14 of it which permits the probationer or the probation officer to go to the Supervising Court to have the terms of the probation order re-formulated to meet changed circumstances. So for that reason I would say that the appeal in so far as it seeks to vary the conditions of the probation order is simply incompetent...[103]

There appear to be three main grounds for holding that a probation order should not be subject to appeal:

(1) because 'it is a consensual sort of thing' and is not penal in nature[104]

(2) because the section states that probation is 'instead of sentencing' the offender and

(3) because the probationer has a remedy to seek re-formulation of the order for changed circumstances.

With respect to the consensual nature of probation, Daunton-Fear writes:

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102 Unreported decision of the Supreme Court of W.A., No. 121/1972.

103 See also *R. v. Prior op. cit.* where the Full Court of the Supreme Court of Victoria said at p.462...
> it would seem unlikely that the legislature intended that probation orders should be appealed against. The probation provisions were introduced into the legislation as remedial provisions intended to be for the benefit of convicted persons, and it seems unlikely that Parliament intended that probation orders should become the subject of appeals.

104 Note however that the fact that probation is consensual is probably not a ground for denying the Crown's right to appeal against leniency of sentence.

> It is open to argument that a probation order can hardly be regarded as consensual when the offender probably has an understandable suspicion that if he expresses dissatisfaction about the terms of it, the court will find a less congenial manner of disposing of his case.[105]

Put another way, it may be argued that it is not the acceptance of the probation order, but the rejection of other alternatives (particularly imprisonment) that pre-disposes the offender to 'consent' to probation. The offender is, in a sense obliged and expected to accept probation as the only viable alternative before him. It is submitted that to assert that probation is not a penalty is being unrealistic.

Problems connected with conceiving probation as consensual may be illustrated in the following two examples. Firstly, suppose in a particular case the offender is confronted with a choice between probation and imprisonment, and he chooses the latter. In such a case it would be absurd if the offender were not permitted to appeal against the length of the prison sentence on the ground that he 'consented' to go to prison.[106] Secondly, in many instances, an offender may be confronted with an alternative or 'choice' between paying a fine and going to gaol.[107] When such an 'option' is open to an offender, it is generally expected and intended that he will pay the fine rather than to to gaol. Suppose that in a particular case an exceptionally high fine is imposed. Should he then be precluded from appealing against the excessiveness of the fine on the ground that he 'chooses' to pay it rather than go to prison? Yet this is precisely the kind of 'choice' facing the offender when he 'consents' to a probation order and he ought to be given the right, in a proper case, to appeal against the severity of the conditions imposed.

It is true that as a general policy the courts require the consent of the offender to a probation order but the rationale for this, it is submitted, is to ensure the offender's willingness to co-operate with the Probation Service. It is a different matter however, to assert that the offender freely consents to the terms of a probation order, when in a particular case he may consider the terms of the order to be unduly oppressive but is obliged to abide by them in preference to less congenial alternatives. Ultimately the offender's desire for freedom must dictate an acceptance of the terms offered and consequently reduce the requirement of consent to little practical value.

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105 See note 101.

106 Incidentally note that in *Stone v. Hughes* [1974] 2 Q.L. 268 it was held that where provision is made for an appeal where sentence is excessive or inadequate, that does not empower the court to allow an appeal on the ground that the wrong type of sentence has been imposed.

107 An alternative sentence of this kind is prohibited in Tasmanian Courts of Summary Jurisdiction. See *Justices Act* (Tas.) s.78(1). It appears to be the only State to have such a provision.

Probation, Conviction and Sentence

When probation is considered the layman's definitions of 'conviction' and 'sentence' are not quite accurate. The finding of a case against the offender does not necessarily imply that the offender is or will be convicted, nor does the decision of the court to place the offender on probation mean that he has been sentenced.

Technically a probation order is not a sentence and it is partly for this reason that Burt J. in *Satchell v. Cross* considered it inappropriate for the offender to be permitted to appeal against the probation order.[108] When it is remembered that if an offender fails to comply with the requirements of a probation order he is liable to be sentenced for the original offence it does make sense to say that probation is not a sentence. Further, there can be only one sentence of the court, thus the use of the probation order is a method of suspending a sentence to be imposed if the offender does not behave himself as required by the terms of the order.

In some jurisdictions, particularly at summary court level, power is conferred upon courts to place offenders on probation once an offence is proved, but prior to proceeding to conviction.[109] From this it can be inferred that a finding of guilty is not synonymous with a conviction.[110]

In *Oaten v. Auty*[111] a Divisional Court considered whether an order made under the *Probation of Offenders Act* (U.K.) dismissing an information 'without conviction' after a charge had been proved was 'a conviction order or determination'.[112] The majority of the court were of the view that there was no conviction.[113] In the course of the judgment however, Darling J. criticised the language of the Act by saying:

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108 In the English case of *R. v. Marquis* [1974] 1 W.L.R. 1087 it was held that an appeal lies if the probation order itself is defective e.g. where the offender is not given an opportunity to make a free and willing choice.

109 See table A in Appendix. In England since the *Criminal Justices Act*, 1948, Justices can no longer refuse to convict when they think a charge is proved. See Halsbury, 3rd ed. Vol. 10, at p.498, vol. 25 at p.226.

110 In *R. v. Harris* 101 E.R. 952 Kenyon C.J. quoted Wilmot J. in *R. v. Vipont* 97 E.R. 767 as saying: 'a conviction is in the nature of a verdict and judgment' and '...the judgment is an essential point in every conviction, let the punishment be fixed or not.' Unless authorized by statute a court is obliged to impose a sentence upon conviction. See *Carter v. Kitto* [1975] 1 N.S.W.L.R. 234.

111 [1919] 2 K.B. 278.

112 There are a number of authorities which refer to the meaning of the word 'conviction' when used in varying contexts. Yeldham J. has recently considered a number of these authorities in *Dixon v. McCarthy* [1975] N.S.W.L.R. 617 at 622-625.

113 Although it is submitted that there would be a conviction for the purposes of *autrefois convict*. See *R. v. Tonks* [1963] V.R. 121 at p. 127.

> The words are unscientific, thoroughly illogical, and are merely a concession to the modern passion for calling things what they are not; for finding people guilty and at the same time trying to declare them not guilty.[114]

Where courts are not required to proceed to a conviction, it becomes desirable, usually in the interests of the victim but sometimes also in the offender's interest to treat an order as a conviction. To this end additional legislation provides that an order will have the effect of a conviction for certain purposes.[115] Conversely, in some jurisdictions where courts are required to proceed to a conviction before they are empowered to make probation orders, a conviction is deemed not to be a conviction for certain purposes.[116]

Further, even where an offender has had the benefit of a dismissal of complaint which has been proved against him, if he is again charged with having committed the same offence, it would properly be called his second offence of the same kind.[117] Thus even a dismissal may amount to a conviction in one sense. Technically however, one matter is certain - if the court does not proceed to a conviction, it may not validly proceed to sentence the offender.

Where courts are required to proceed to conviction in order to impose probation, it is usually expressed to be 'in lieu of' or 'instead of' a sentence.[118] This means that unless special provisions are provided the right to appeal against sentence does not entail the right to appeal against a probation order. An example of such a special provision may be found in Chapter LXVII of the *Criminal Code* (Qld) which says that the term 'sentence' includes 'any order made by the court of trial on conviction with reference to the person convicted or his property'. The Queensland Court of Criminal Appeal has held that a probation order under the *Offenders Probation and Parole Act 1959* is an order in respect of which the Attorney-General may appeal under s.669A of the Code.[119]

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114 *Op. cit.* at p.282.

115 The purposes usually relate to the power of the court to order compensation and restitution of property, or the right to appeal against the finding of guilt, for example see *Crimes Act* 1900-1974 (N.S.W.) s.556A(2); s.556A(3), *Offenders Probation Act* 1911-1971 (S.A.) s.4(5), *Probation of Offenders Act* 1973 (Tas.) s.7(5), *Crimes Ordinance* 1971 (A.C.T.) s.556A(3), *Criminal Law (Conditional Release of Offenders) Ordinance* 1971 s.4(3).

116 See for example *Offenders Probation and Parole Act* 1959-1974 (Qld) s.19, *Crimes Act* 1958 (Vic.) s.520, *Criminal Justices Act* 1948 (U.K.) s.12.

117 *Pring v. Woolacott* [*1966*] *S.A.S.R. 6.*

118 See Table A in Appendix.

119 See *R. v. Williams, Ex parte The Minister for Justice and Attorney-General* [1965] Qd. R. 86.

Consequently, although a probation order is imposed 'instead of sentencing' it is nevertheless an appealable order.

In *Prior*[120] the appellant appealed against the imposition of a sentence of two years' imprisonment for housebreaking on the ground that the sentence was inappropriate in the circumstances of the case, and sought to substitute a probation order. Although from the judgment it is clear that a probation order would have been considered appropriate in the circumstances of the case, the Full Court of the Supreme Court of Victoria held it did not have jurisdiction to order that a convicted person be released on probation.

The difficulty for the Court arose mainly out of the provisions of s.568(4) of the *Crimes Act* 1958 (Vic.) which empowered the Full Court on an appeal against sentence to 'quash the sentence passed at the trial and substitute a sentence warranted by law which it thinks ought to have been passed.' By s.556 of the Act the word 'sentence' is defined as including 'any order of the court ... made on or in connection with a conviction with reference to the person convicted or any property or with reference to any moneys to be paid by him'.

It was submitted therefore that the court had the requisite jurisdiction under s.568(4) to substitute a probation order for the sentence of imprisonment because a probation order

> is an order of the Court... made on or in connection with a conviction with reference to the person convicted, and therefore is a sentence within the meaning of Part VI of the Act.

The Court rejected this argument because

(1) the provisions of s.508(1) provide *inter alia* that where a person is convicted and certain other prerequisites contained in the section are satisfied, the Court is empowered to make a probation order instead of imposing a sentence.[121]

(2) S.508(5) requires the Court to explain *inter alia* that if the offender fails to comply with the order he will be liable to be sentenced for the original offence.[122]

(3) S.520(1) provides *inter alia* that except for three specified exceptions a conviction for an offence in respect of which a probation order is made under the section 'shall be deemed not to be a conviction for any purpose'. Incorporating the only relevant exception (s.520(1)(a)), the effect of s.520(1) is that except in relation to the making of the order, 'a conviction in respect of which a probation order is made, shall

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120 [1966] V.R. 459.

121 This section is set out in the Appendix.

122 Although the reason for the inclusion of this provision in the argument is not clear, it is submitted that it is intended to reinforce the view that a probation order is not a sentence.

be deemed not to be a conviction for any purpose'. As no probation order can be made except where a person has been convicted it appears that s.520(1)(a) refers back to s.508(1). 'It would therefore, be necessary to preserve under s.520 the making of the order itself, and to exempt the making of the order from the provision that the conviction should not be deemed a conviction for any purpose.'[123]

(4) S.520(3) provides: 'The foregoing provisions of this section shall not affect any right of an offender to appeal against his conviction or the revesting or restoration of any property in consequence of the conviction'. Not only does this section reinforce the last argument, but it is significant that the section does not refer to an appeal against sentence, yet expressly saves an appeal against conviction. This implies that an appeal against sentence has not been preserved.

(5) However under s.567(d) of the Act, a person convicted on indictment has a right (with leave) to appeal against a sentence on conviction. This means that the only appeal against sentence that is authorized is an appeal against sentence passed on conviction.

(6) For the reasons already given there is no conviction for the purposes of an appeal where a probation order is made, nor therefore can there be a sentence passed on conviction within the meaning of s.567(d).

(7) Therefore the submission that the Court has jurisdiction under s.568(4) to quash the sentence and substitute a probation order fails 'because if the making of the probation order is not a sentence, the Court has no power if it quashes a sentence to do the only other thing that sub-section 4 requires, that is to pass such other sentence warranted by law as it thinks ought to have been passed.'[124]

In the result, the Court imposed a good behaviour bond, pointing out that although there was no legislative authority to do so, it had been the practice of the Court to exercise this power for many years.[125]

Shortly after *Prior's* case, s.568(4) was amended by the *Crimes Act* 1967 (Vic.) and now reads:

> s.568(4) On an appeal against sentence the Full Court shall, if it thinks that a different sentence should have been passed or a different order made, quash the sentence passed at the trial and pass such other sentence *or make such other order*

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123 *Op. cit.* at 461.

124 *Ibid* at 462.

125 *Ibid.*

> warranted in law (whether more or less severe and *including an order for probation*) in substitution therefor as it thinks ought to have been passed or made, and in any other case shall dismiss the appeal.'[126]

The Attorney-General is empowered in the terms of s.567A to appeal against sentence passed on a person convicted on indictment. To avoid any doubt that the word 'sentence' includes a probation order and an order binding over the offender to come up for judgment when called upon, sub-s. (1A) was inserted into s.567A by s.19 of the *Crimes (Amendment) Act* 1972 (Vic.). It now reads:

> 567A(1A) For the purposes of this section 'sentence' in relation to a person convicted on indictment includes a probation order made under Division 1 of Part VI and an order that the person be released upon his entering into a recognizance to receive and undergo sentence when called upon.

It is significant that these amendments do not empower an offender to appeal against a probation order and because s.567(d) of the Act has not been amended the reasoning in *Prior's* case to that extent still applies.

Probation as a Sentence

Although broadly speaking, a probation order is often considered as a non-penal rehabilitative measure requiring the formal consent of the offender, and is expressed to be 'without proceeding to conviction' or 'instead of sentencing' the offender, it is submitted that the realities of the matter are somewhat different. From the offender's point of view, and all technicalities aside, the offender is convicted and sentenced when the case is proved against him, and the punishment of probation is imposed. The requirement of consent or entry into a recognizance is a formality technically required but for the reasons already given is not a consent unencumbered by coercion. Upon being found guilty, the offender's punishment as part of his sentence includes the restrictions placed on his freedom as manifested by the terms of the probation order. As already mentioned, probation orders form part of an offender's antecedents, so on this ground also probation may be viewed as a form of punishment. Part of the sentence includes the liability of the offender to be sent to prison for the original offence if he fails to comply with the conditions imposed. It is in many ways a fraud to suggest that despite the applicability of the restrictions, in some jurisdictions the offender has not been convicted, and in all jurisdictions that he has not been sentenced when the offender is placed on probation.

An English commentator has recently said:

> The fundamental distinction in the criminal law between conviction and sentence is clear, readily understood and workable. Yet for probation the conviction is not a conviction and a sentence is not a sentence. This is

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126 Emphasis added.

> confusing, not to say absurd, and leads to mistake in practice.[127]

A similar criticism might be equally applicable in Australia. If, however, probation were to possess the status of a sentence which followed upon and only upon conviction, a less complicated system might evolve. The system would imply a departure from the idea of probation as 'a consensual sort of thing', and possibly also a departure from the view that the court in imposing probation is being lenient. Further, the legislation itself might be considerably simplified. For example, it would no longer be necessary to provide special provisions so that probation could for limited purposes be treated as having 'like effect as a conviction'. This would automatically apply. Similarly, appeals might be entertained upon the same grounds as applicable to sentences generally, including the right of the offender to appeal, without special empowering legislation.

In *Satchell v. Cross* Burt J. pointed out that under s.14 of the *Offenders Probation and Parole Act* (W.A.), the probationer, or the probation officer may go the Supervising Court to seek reformulation of the probation order to meet changed circumstances. Although this power is desirable under the present system, it is not, it is submitted, a viable alternative to appealing on the merits of the case against the severity or unreasonableness of the order imposed. Indeed the basis for the exercise of this power lies mainly in establishing changed circumstances since the trial, whereas an appellate tribunal is more concerned with the appropriateness of the sentence imposed at the trial itself.

Perhaps the prime disadvantage of proceeding to conviction before the offender is placed on probation is that it labels an offender a criminal and brings with it the civil consequences associated with a criminal record.[128] A conviction may also place an offender into a new legal category as illustrated in *Re Stubbs*[129], a judgment of the New South Wales Court of Criminal Appeal which held that a Magistrate who found a case proved against the offender charged with driving under the influence could dismiss without convicting, and in such a case the automatic disqualification from holding a driving licence as provided by statute for the commission of that offence could not take place.

It is not proposed that the power to discharge the offender without proceeding to conviction should be totally abandoned. This procedure serves a useful purpose and is apposite in those cases which do not warrant, usually because of the trivial nature of the offence, that the offender be placed on probation. However, if it is realised that

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127 Alec Samuels 'Probation Neither a Conviction nor a Sentence' 125 N.L.J. 912.

128 See F. Rinaldi *Civil Consequences of Convictions in Australia* a paper prepared for a seminar 'The Changing Pattern of Corrections', held at A.N.U. 12-13 Oct. 1974.

129 (1947) 47 S.R.(N.S.W.) 329. See also *Cobiac v. Liddy. Op. cit.*

probation is a penalty, it seems fitting it is submitted, that conviction should, in all cases precede it. If on the other hand, it is considered that in a particular case the offender should not be punished and therefore the court should not convict for the commission of the offence, it would be wrong in principle to require the offender to be placed on probation.

It is seen that in at least two Australian States a conviction is deemed not to be a conviction for certain purposes.[130] The aim of such legislation is to reduce to a minimum the stigma that attaches to a conviction for an offence in respect of which a probation order is made. If the side-effects of a conviction are reduced there may be better prospects for the offender to rehabilitate himself. However, the method of deeming a conviction not to be a conviction except for certain purposes, lends itself to complications.[131] Perhaps a simpler solution would be to treat a conviction as a conviction for all purposes until the expiration of the probation period. Once the period is expired (and therefore the offender has paid the penalty) it could then be provided that the conviction be expunged from his record. Until such time the offender, as part of his penalty, would be obliged to suffer the stigma and other legal consequences of conviction as normally prevail in the community.

It may be argued that carrying the burden of a conviction during the probationary period militates against the offender's rehabilitation. For example, prior convictions are often barriers in the path of the offender obtaining employment in the public service. Although this is true, the indictment rests not so much with the concept that probation should follow a recorded conviction, but with the regulations of public institutions which provide that persons with criminal convictions are prohibited from obtaining employment. Surely the solution lies in looking beyond the conviction, not by denying its existence, but by looking also at the type of offence and type and quantum of the punishment imposed as a result of the conviction. Where courts have indicated that the offender requires rehabilitation in the form of probation, public institutions should assist by encouraging rather than restricting the employment of such persons.

It is submitted that the scheme proposed is consistent with treating probation as a sentence, a penalty in its own right, and also with the object of affording an opportunity for the offender to rehabilitate himself. Remedies such as orders for restitution of property and orders to make criminal compensation payments would all be required to be commenced during the probationary period. Appeals against probation would also be required to be commenced whilst the conviction is on foot. Finally, at the successful termination of the probationary period, the offender could be given a

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130 See footnote 116.

131 See D. G. Taylor 'When is a Conviction not a Conviction' Vol. 5 No. 3 July 1975 Q.L. Soc. Journal 81, in which the author asserts that by s.19 of the *Offenders Probation and Parole Act* 1959-1974 (Qld) an offender has a limited right to deny having been convicted. See also *Prior's* case discussed above.

fresh start with a clean record along the lines already discussed.[132]

Perhaps in the interests of public policy it will be considered desirable to preserve an offender's conviction record. If such be the case, the fact that the court has taken an indulgent view of the offence and imposed probation rather than a more drastic alternative is, (or ought to be) a consideration to be weighed by the court when imposing sentence upon the offender for a subsequent offence.

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132 An alternative solution to that of expunging the conviction at the expiration of the probationary period is that suggested by J. I. Wall in the U.K. *Departmental Committee Report* (*op. cit.*) at p.147, *viz.* that the original charge be dismissed on the offender's completing satisfactorily his term of probation. However, this suggestion is not in keeping with the author's view that probation should be treated as a penalty following conviction and sentence and that dismissals should be retained for trivial offences only where no form of punishment is warranted.

CONCLUSION

In this paper some attempt has been made to distinguish between common law bonds which empower the courts to release offenders on condition that they be of good behaviour and keep the peace and those which in addition to these powers, also authorize the courts to bind offenders over to come up for sentence when called upon. It is under the latter power, possessed by superior courts, that offenders may be placed on supervisory probation at common law. However, the common law bind-over power is overshadowed by statutory provisions which have largely replaced their use and to that extent, the study of probation which is authorized under the common law is academic.

However, of all the jurisdictions studied, there emerges a common denominator - *viz.* that for all probation orders, proceedings are interrupted prior to sentence being imposed. The proceedings are interrupted on conditions *inter alia*, that the offender submit to the supervisory control of the Probation Service. This is the basis upon which probation as a condition of a common law bind-over operates, it is the basis upon which probation as a condition of a statutory bind-over operates, and it is the basis upon which probation as a direct order of the court operates. Theoretically, all these measures require for their valid operation the consent of the offender.

In this paper, however, a number of arguments have been advanced which aim at substantially changing this view of probation. A number of the main points are summarised as follows:

* That probation orders be given the status of a sentence. This requires that the offender be convicted and sentenced to a period of probation.
* That probation be for a fixed period of two years with discretion vested in the Probation Service, to release the offender prior to the expiration of that period, or to seek an extension of that period and in the latter case by application to the court only.
* That the consent of the offender should not be a condition precedent to the exercise of the probation power.
* That rehabilitation of the offender be facilitated by authorizing the expunction of the criminal record after and only after the successful completion of the probationary period.
* That offenders be permitted to appeal against probation on the ground that the conditions imposed are unreasonable.
* That courts should not be empowered to release offenders without proceeding to conviction and at the same time require that the offender be placed on probation.

APPENDIX

New South Wales	*Crimes Act* 1900-1974	50
Victoria	*Crimes Act* 1958-1973 s.508(1)	51
Queensland	*Offenders Probation and Parole Act* 1959-1974 s.8(1)	52
South Australia	*Offenders Probation Act* 1913-1971 s.4(1); s.4(2); s.4(2a)	53
Western Australia	*Offenders Probation and Parole Act* 1963-1971 s.9(1)	55
Tasmania	*Probation of Offenders Act* 1973 s.7(1); s.7(2); s.7(3)	56
A.C.T.	*Crimes Act* 1900 as amended in its application to the A.C.T. by Ordinances of the Territory s.556A(1); s.556B(1)	57
Northern Territory	*Criminal Law (Conditional Release of Offenders) Ordinance* 1971 s.4(1); s.5(1)	59
Commonwealth	*Crimes Act* s.19B(1)	61
Table A	Comparative Table of Jurisdiction to Make Probation Orders	62

NEW SOUTH WALES

Crimes Act, 1900-1974 (N.S.W.) s.556A(1)

556A (1) Where any person is charged before any court with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, or to any other matter which the court thinks it proper to consider, it is inexpedient to inflict any punshment, or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, without proceeding to conviction, make an order either -

(a) dismissing the charge; or

(b) discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for conviction and sentence when called on at any time during such period, not exceeding three years, as may be specified in the order.

VICTORIA

Crimes Act, 1958-1973 (Vic.) s.508(1)

508 (1) Where any person is convicted by the Supreme Court or The County Court or any Magistrates' Court of any offence for which a term of imprisonment may be imposed otherwise than in default of payment of a fine and the court is of opinion that having regard to the circumstances including the nature of the offence and the character and antecedents of the offender it is inexpedient to do so, the court may instead of sentencing him make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for such period (herinafter called the "probation period"), being not less than one year and not more than five years, as is specified in the order.

QUEENSLAND

Offenders Probation and Parole Act, 1959-1974 (Qld) S.8(1)

8. (1) *Power to make probation orders.* Where any person is convicted by the Supreme Court, or any District Court, or any Magistrates' Court of any offence punishable by a term of imprisonment otherwise than in default of payment of a fine and the Court is of opinion that having regard to the circumstances including the nature of the offence and the character and personal history (inclusive of home surroundings and other environment) of the offender it is expedient to do so, the Court may instead of sentencing him make an order requiring him to be under the supervision of a probation officer for such period being, not less than 6 months and not more than 3 years as is specified in the order:

Provided that the provisions of this subsection one shall not apply to or with respect to any offence which is a crime the punishment for which cannot be mitigated or varied under section nineteen of "The Criminal Code".

SOUTH AUSTRALIA

Offenders Probation Act, 1913-1971 (S.A.)
s.4(1); s.4(2); s.4(2a)

4 (1) Where any person is charged before a court of summary jurisdiction with an offence punishable by such court, and the court thinks that the charge is proved, but is of opinion that, having regard to -

(a) the character, antecedents, age, health, or mental condition of the person charged, or

(b) the trivial nature of the offence, or

(c) the extenuating circumstances under which the offence was committed,

it is expedient to exercise any of the powers conferred by this subsection, the court may -

I. without convicting the person charged dismiss the information or complaint;

II. having convicted the said person discharge him without penalty;

III. without convicting or having convicted the said person discharge him conditionally on his entering into a recognizance, with or without sureties -

(i.) to be of good behaviour, and

(ii.) to appear before a court of summary jurisdiction for conviction and sentence, or for sentence, if he fails, during the term of the recognizance, to observe any of its conditions

(2) When any person has been convicted, by a Court other than a court of summary jurisdiction, of any offence punishable by imprisonment, and the court is of opinion that, having regard to -

(a) the character, antecedents, age, health, or mental condition of the person convicted, or

(b) the trivial nature of the offence, or

(c) the extenuating circumstances under which the offence was committed,

it is inexpedient to inflict any punishment, or any other than a a nominal punishment, or it is expedient to release the person convicted on probation, the court may, in lieu of imposing a

SOUTH AUSTRALIA (Cont.)

sentence of imprisonment, make an order discharging such person conditionally on his entering into a recognizance, with or without sureties -

(i.) to be of good behaviour, and

(ii.) to appear before the Supreme Court or a Judge thereof or before a District Criminal Court, as the case may require if he fails, during the term of the recognizance, to observe any of its conditions.

(2a) Where a person has been convicted of an offence punishable by imprisonment, and the court is of opinion that, having regard to -

(a) the character, antecedents, age, health, or mental condition of the person convicted;

(b) the trivial nature of the offence;

(c) any other extenuating circumstances,

it is expedient to exercise the powers conferred upon the court by this subsection, the court may impose a sentence of imprisonment upon the convicted person but suspend the sentence upon condition that the convicted person enters into, and observes the terms and conditions of, a recognizance to be of good behaviour for the term of the recognizance.

WESTERN AUSTRALIA

Offenders Probation and Parole Act, 1963-1971 (W.A.) s.9(1)

9. (1) Subject to section five of this Act, when a person is convicted by a court of any offence punishable by a term of imprisonment otherwise than in default of payment of a fine, if the court is of opinion that, having regard to the circumstances, including the nature of the offence, the character and personal history of the offender, his home surroundings and other environment, it is expedient to do so, the court may, instead of sentencing him, make an order requiring him to be under the supervision of a probation officer for such period, being not less than one year and not more than five years, as is specified in the order.

TASMANIA

Probation of Offenders Act 1973 (Tas.) s.7(1); s.7(2); s.7(3)

7 - (1) Where a person is charged before a court of summary jurisdiction with an offence punishable by such a court, and the court thinks that the charge is proved, but is of the opinion that having regard to -

(a) the character, antecedents, age, health, or mental condition of the defendant;

(b) the trivial nature of the offence; or

(c) the extenuating circumstances under which the offence was committed,

it is inexpedient to inflict any punishment, or that it is expedient to release the offender on probation, the court, without proceeding to conviction may -

(d) dismiss the complaint; or

(e) make a probation order against the defendant in which it shall provide that the defendant appear for conviction and sentence as provided in paragraph (a) of subsection (2) of section six.

(2) Where a person has been convicted on indictment or under the provisions of section sixty-three of the *Justices Act* 1959 of an offence punishable with imprisonment, and the court is of the opinion that, having regard to -

(a) the character, antecedents, age, health, or mental condition of the defendant;

(b) the trivial nature of the offence; or

(c) the extenuating circumstances under which the offence was committed,

it is inexpedient to inflict any punishment, or that it is expedient to release the offender on probation, the court, in lieu of imposing a sentence of fine or imprisonment, may make a probation order against the defendant in which it shall provide that the defendant appear for sentence as provided in paragraph (a) of subsection (2) of section six.

(3) Where a defendant has been convicted of an offence, the court before which he has been convicted may, whether or not it imposes a fine or a term of imprisonment upon, or makes a work order against, him, make a probation order against him in which it shall include a provision in accordance with paragraph (b) of subsection (2) of section six.

AUSTRALIAN CAPITAL TERRITORY

Crimes Act, 1900 of the State of New South Wales as amended in its application to the A.C.T. by Ordinances of the Territory (A.C.T.) s.556A(1); s.556B(1)

556A. - (1.) Where -

(a) a person is charged before the Court of Petty Sessions with an offence against a law of the Territory; and

(b) the Court is satisfied that the charge is proved but is of opinion, having regard to -

(i) the character, antecedents, age, health or mental condition of the person;

(ii) the extent, if any, to which the offence is of a trivial nature; or

(iii) the extent, if any, to which the offence was committed under extenuating circumstances,

that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the person on probation,

the Court may dismiss the charge or, without proceeding to conviction, by order, direct that the person be discharged upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the Court, that -

(c) he will be of good behaviour for such period, not exceeding three years, as the Court specifies in the order; and

(d) he will, during the period so specified, comply with such conditions (if any) as the Court thinks fit to specify in the order, which conditions may include -

(i) the condition that the offender will, during the period so specified, be subject to the supervision on probation under a person, for the time being, appointed in accordance with the order; and

(ii) the conditon that the offender will obey all reasonable directions of a person so appointed;

556B. - (1.)

Subject to this section, where a person is convicted of an offence against the law of the Territory, the Court by which he is convicted may, if it thinks fit, by order -

AUSTRALIAN CAPITAL TERRITORY (cont.)

(a) release the person without passing sentence upon him upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the Court that -

(i) he will be of good behaviour for such period as the Court specifies in the order;

(ii) he will, during the period so specified, comply with such conditions (if any) as the Court thinks fit to specify in the order, which conditions may include -

(A) the condition that the offender will, during the period so specified, be subject to the supervision on probation under a person, for the time being appointed in accordance with the order; and

(B) the condition that the offender will obey all reasonable directions of a person so appointed; and

(iii) he will pay to the Commonwealth such penalty if any (being a penalty not exceeding the prescribed penalty) as the Court specified in the order on or before a date specified in the order or by specified instalments as provided in the order; or

(b) sentence the person to a term of imprisonment but direct that the person be released, upon his giving a like security to that referred to in the last preceding paragraph, either forthwith or after he has served a specified part of the sentence imposed upon him.

NORTHERN TERRITORY

Criminal Law (Conditional Release of Offenders) Ordinance, 1971 (N.T.) s.4(1); s.5(1)

4. - (1.) Where

(a) a person is charged before a court of summary jurisdiction with an offence against a law of the Territory; and

(b) the court is satisfied that the charge is proved but is of opinion, having regard to -

(i) the character, antecedents, age, health or mental condition of the person;

(ii) the extent, if any, to which the offence is of a trivial nature; or

(iii) the extent, if any, to which the offence was committed under extenuating circumstances,

that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the person on probation,

the court may dismiss the charge or, without proceeding to conviction, by order, direct that the person be discharged upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court, that -

(c) he will be of good behaviour for such period, not exceeding three years, as the court specifies in the order; and

(d) he will, during the period so specified, comply with such conditions (if any) as the court thinks fit to specify in the order, which conditions may include -

(i) the condition that the offender will, during the period so specified, be subject to supervision on probation under a person, for the time being, appointed in accordance with the order; and

(ii) the condition that the offender will obey all reasonable directions of a person so appointed.

5. - (1.) Subject to this section, where a person is convicted of an offence against a law of the Territory, the court by which he is convicted may, if it thinks fit, by order -

(a) release the person without passing sentence upon him upon his giving security, with or without sureties, by recognizance or otherwise, to the satisfaction of the court that -

NORTHERN TERRITORY (cont.)

(i) he will be of good behaviour for such period as the court specifies in the order;

(ii) he will, during the period so specified, comply with such conditions (if any) as the court thinks fit to specify in the order, which conditions may include -

(A) the condition that the offender will, during the period so specified, be subject to supervision on probation under a person, for the time being, appointed in accordance with the order; and

(B) the condition that the offender will obey all reasonable directions of a person so appointed; and

(iii) he will pay to the Commonwealth such penalty if any (being a penalty not exceeding the prescribed penalty) as the court specifies in the order on or before a date specified in the order or by specified instalments as provided in the order; or

(b) sentence the person to a term of imprisonment but direct that the person be released, upon his giving a like security to that referred to in the last preceding paragraph, either forthwith or after he has served a specified part of the sentence imposed upon him.

COMMONWEALTH

Crimes Act 1914-1973 (Cth)

19B. (1) Where -

(a) a person is charged before a Court of Summary Jurisdiction with an offence against a law of the Commonwealth; and

(b) the Court is satisfied that the charge is proved but is of opinion, having regard to -

(i) the character, antecedents, age, health or mental condition of the person;

(ii) the extent, if any, to which the offence is of a trivial nature; or

(iii) the extent, if any, to which the offence was committed under extenuating circumstances,

that it is inexpedient to inflict any punishment, or to inflict any punishment other than a nominal punishment, or that it is expedient to release the person on probation,

the Court may, without proceeding to conviction, by order -

(c) dismiss the charge; or

(d) discharge the person upon his giving security, with or without sureties, by recognizance or otherwise to the satisfaction of the Court that he will be of good behaviour for such period, not exceeding three years, as the Court thinks fit to order and will appear for conviction and sentence when called on at any time during that period.

TABLE A

JURISDICTION TO MAKE PROBATION ORDER

STATE	LEGISLATION	COURT	CONVICTED OR CHARGED	TYPE OF OFFENCE	PREREQUISITES FOR MAKING A PROBATION ORDER	ORDER MADE	RECOGNIZANCE	DURATION OF PROBATION
N.S.W.	CRIMES ACT 1900-1974 s556A(1)	By any court	Charged	An offence punishable by such court	Regard to character, antecedents, age, health, or mental condition of the person charged or the trivial nature of the offence or to the extenuating circumstances under which the offence was committed or to any other matter which the court thinks it proper to consider	Without proceeding to conviction	Required	Not exceeding three years
Vic.	CRIMES ACT 1958-1973 s508(1)	The Supreme Court or The County Court or any Magistrates' Court	Convicted	Any offence for which a term of imprisonment may be imposed otherwise than in default of payment of a fine	Regard to the circumstances including the nature of the offence and the character and antecedents of the offender	Instead of sentencing	Not Required	Not less than one year and not more than five years
Qld	OFFENDERS PROBATION AND PAROLE ACT 1959-1974 s8(1)	The Supreme Court or any District Court or any Magistrates' Court	Convicted	Any offence punishable by a term of imprisonment otherwise than in default of payment of a fine, but not any offence which is a crime the punishment for which cannot mitigated or varied under s19 of the Criminal Code	Regard to the circumstances including nature of the offence, character and personal history (inclusive of home surroundings and other environment) of the offender	Instead of sentencing	Not Required	Not less than six months and not more than three years
S.A.	OFFENDERS PROBATION ACT 1913-1971 s4(1)	Court of Summary Jurisdiction	Charged	An offence punishable by such court	Regard to character, antecedents, age, health or mental condition of the person charged or the trivial nature of the offence or the extenuating circumstances under which the offence was committed	Without convicting or having convicted	Required	Not exceeding three years (s4(2c))
"	s4(2)	A court other than a Court of Summary Jurisdiction	Convicted	Any offence punishable by imprisonment	Regard to character, antecedents, age, health or mental condition of the person convicted or the trivial nature of the offence or the extenuating circumstances under which the offence was committed	In lieu of imposing a sentence of imprisonment	"	"
"	s4(2a)	By any court	Convicted	An offence punishable by imprisonment	Regard to character, antecedents, age, health or mental condition of the person convicted, or the trivial nature of the offence, or any other extenuating circumstances	May impose a sentence of imprisonment but suspend the sentence	"	"
W.A.	OFFENDERS PROBATION AND PAROLE ACT 1963-1971 s9(1)	A court	Convicted	Any offence punishable by imprisonment other than in default of payment of a fine	Regard to circumstances including nature of offence, character and personal history of the offender, his home surroundings and other environment	Instead of sentencing	Not Required	Not less than one year and not more than five years

Tas.	PROBATION OF OFFENDERS ACT 1973 s7(1)	Court of Summary Jurisdiction	Charged	An offence punishable by such a court	Regard to character, antecedents, age, health, or mental condition of defendant; the trivial nature of the offence, or the extenuating circumstances under which the offence was committed	Without proceeding to conviction	Not Required	Not exceeding three years (s6(3))
	s7(2)	By any court	Convicted on indictment or under s63 Justices Act 1959	An offence punishable with imprisonment	" "	In lieu of imposing a sentence of a fine or imprisonment	Not Required	"
	s7(3)	Court before which he has been convicted	Convicted	An offence punishable by such a court	No pre-requisites specified	Whether or not it imposes a fine or a term of imprisonment upon, or makes a work order against him	Not Required	"
A.C.T.	CRIMES ACT 1900 (NSW) as amended in its application to the A.C.T. s556A(1)	Court of Petty Sessions	Charged	An offence against the law of the Territory	Regard to character, antecedents, age, health or mental condition of the person; the extent if any to which the offence is of a trivial nature; or the extent if any to which the offence was committed under extenuating circumstances	Without proceeding to conviction	By recognizance or otherwise	Not exceeding three years
	s556B(1)	The court by which he is convicted	Convicted	An offence against the law of the Territory	The court may make a probation order if it thinks fit	Without passing sentence	By recognizance or otherwise	For such period as the court specifies in the order to be of good behaviour
N.T.	CRIMINAL LAW (CONDITIONAL RELEASE OF OFFENCERS) ORDINANCE 1971 s4(1)	Court of summary jurisdiction	Charged	An offence against a law of the Territory	Regard to character, antecedents, age, health or mental condition of the person, the extent if any to which the offence is of a trivial nature; or the extent if any to which the offence was committed under extenuating circumstances	Without proceeding to conviction	By recognizance or otherwise	Not exceeding three years
	s5(1)	The court by which he is convicted	Convicted or sentenced	An offence against the law of the Territory	The court may make a probation order if it thinks fit	Without passing sentence (s5(1)(a)) By passing sentence (s5(1)(b))	By recognizance or otherwise	For such a period as the court specifies in the order to be of good behaviour
CTH	CRIMES ACT (1914-1973) (CTH) s.19B	Court of Summary Jurisdiction	Charged	An offence against a law of the Commonwealth	Regard to character, antecedents, age, health or mental condition of the person; the extent, if any, to which the offence is of a trivial nature; or the extent if any, to which the offence was committed under extenuating circumstances	Without proceeding to conviction	By recognizance or otherwise	Not exceeding three years