A View from the Magistracy

Nick Manos
Chief Magistrate
South Australia

(These comments compiled from notes taken of Mr Manos'address - Ed.)

In most Magistrate's Court cases, the issue of bail does not arise. It is only where a magistrate considers that a defendant may abscond or commit further offences that a bail decision has to be made. That is a very serious matter, and the following problems make a decision more difficult:

- An offence usually looks worst when it has just been committed here may be a lot of community or victim anger that can affect decision-makers;
- In cases where bail is an issue, there is frequently little time between the offence and the bail application - often too short a time for in-depth consideration;
- Invariably, the arresting officer, who is most familiar with the facts of the case, may not be in attendance at the court;
- Any subsequent bail applications may be handled at court by different prosecutors, defence counsel or magistrates;
- No assessment is possible of suggested guarantors who are seldom in attendance at court for the bail hearing; and
- There is very limited, and often fairly shallow, material or information available to assist a magistrate make a bail decision.

Despite those difficulties, we of course continue to release people on bail. Indeed, the South Australian *Bail Act 1985* is a good piece of legislation in many ways; for instance, its requirement under section II (9) that a person who cannot meet bail conditions must be returned to court each five days for a review of his or her position.

While there are problems with the bail process, they do not exist exclusively within the court process. That is why South Australia has moved to the establishment of a Bail and Custody Analysis Committee. It will comprise two magistrates, two police representatives, two Correctional Services representatives, two Court Services representatives and one officer from the Attorney-General's Department. It will not only consider matters such as better ways of dealing with people leading an alcoholic lifestyle who may therefore not answer bail, but also try and generate accurate statistics of the problem.

Not long ago, the media reported that there were seventy prisoners remanded at the City Watch-house. I visited and checked. There were actually fourteen, twelve of whom had been refused bail, the other two failing to meet bail conditions that had been set.

Accurate statistics with respect to the numbers of people who commit further offences while on bail are also needed. At the moment, the South Australian community, as well as judicial officers, are simply left in the dark about the true situation.

Remanded in Custody

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My brief is to compare rates of remand in custody in Australia's states and territories and discuss the implications of the marked differences which are evident.

Rates of Remand in Custody

The remand rate is defined as the number of unsentenced prisoners in custody (on the first day of the month) per 100,000 of the general state population. Using as a source the Australian Institute of Criminology's monthly *Australian Prison Trends* (Biles 1978-1988), comparative remand rates among the states from January 1978 to September 1988 can be calculated. They show that the remand rate for Australia and most states has increased, particularly over the past three years. The Australian rate on I September 1988 is 11.5, compared with 10.0 on the same day in 1986, 8.0 in 1983 and 7.5 in 1978. South Australia has a higher rate of remand than the Australian average, the respective figures being 13.4, 13.2, 9.8 and 10.4. New South Wales and the Northern Territory had the highest rates of remand in Australia at 1 September 1988, being 17.7 and 27.5, respectively.

Percentage of Remandees in the General Prison Population

When the percentage of remandees in the general prison population is considered, South Australia has frequently had the highest percentage of remandees among the states. Over the last five years, an average of about 23 per cent of South Australia's prisoners have been held on remand. In recent months New South Wales has now overtaken South Australia, after having very similar figures for the whole time period.

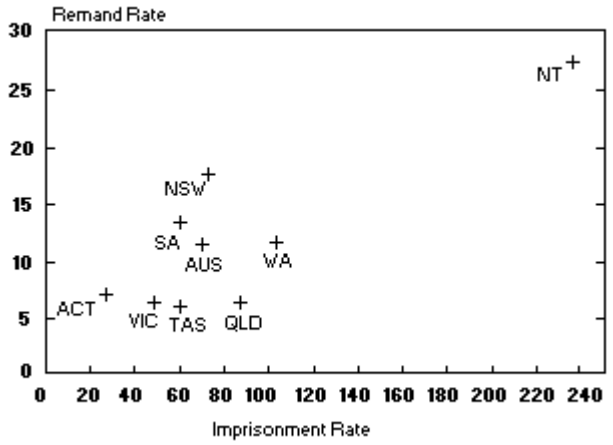
The percentage of remandees has increased over the past ten years indicating that the remand population in Australia has increased faster than the general prison population. At many points, the South Australian remand percentage has been more than double the Australian average.

Remand Rate versus General Imprisonment Rate

Figure 1 shows the remand rate for all jurisdictions plotted against the general imprisonment rate. 'ne graph shows that there is very little relationship between the remand rate and the general rate. A group of low remand rate jurisdictions (Australian Capital Territory, Victoria, Tasmania, Queensland) have widely differing imprisonment rates. South Australia and New South Wales have high remand rates with moderate imprisonment rates while the Northern Territory is extremely high in both rates.

Figure I

Remand Rate v. Imprisonment Rate
All States and Australia



Factors Affecting South Australian Remand Numbers

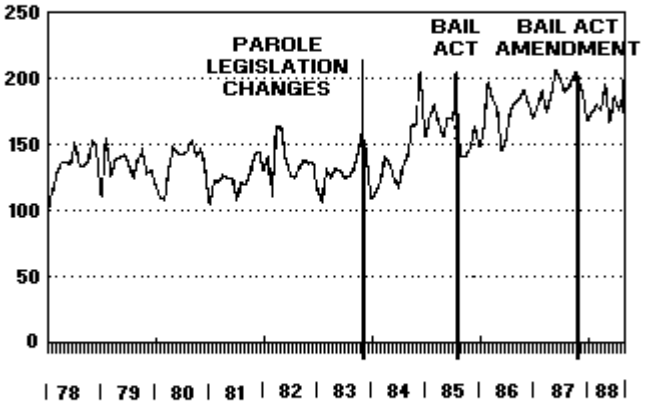
Figure 2 shows South Australian remand numbers over time together with the dates of several legislative changes. The change in parole legislation seems to have had a greater impact on the number of remandees than the introduction of bail legislation in 1985 or amendments to bail legislation in 1987. A possible mechanism for this effect is that more released offenders (and therefore recidivists) had parole status after December 1983. Judges and magistrates may be less willing to grant bail to parolees accused of a fresh offence than to alleged offenders who were released unconditionally.

Time Spent on Remand by South Australian Remandees

Figure 3 indicates the time spent on remand by all prisoners admitted on remand to South Australian prisons in 1986. The survey followed through an cases to the end of September 1987.

Figure 2

South Australian Remand Numbers 1978-1988



The distribution is highly skewed with large numbers of remandees spending from 0 to 7 days in custody but a small number of prisoners spending very long terms in custody before finalisation of the case. The mean time in custody was 39.3 days while the median time was 13 days. (Half the prisoners spent less than 13 days in custody while half spent more than 13 days.) Seventeen prisoners had spent more than 12 months in custody - prisoners charged principally with serious offences such as murder and armed robbery. There is evidence that the time spent in custody of these more serious cases is increasing.

Questions Arising from these Differences

It would be extremely valuable to understand the dynamics of these very large differences in remand practices among the various jurisdictions. It may be that some jurisdictions are far better at reconciling the competing objectives of the various sectors within the criminal justice process. Some of the questions which are worthy of consideration are as follows:

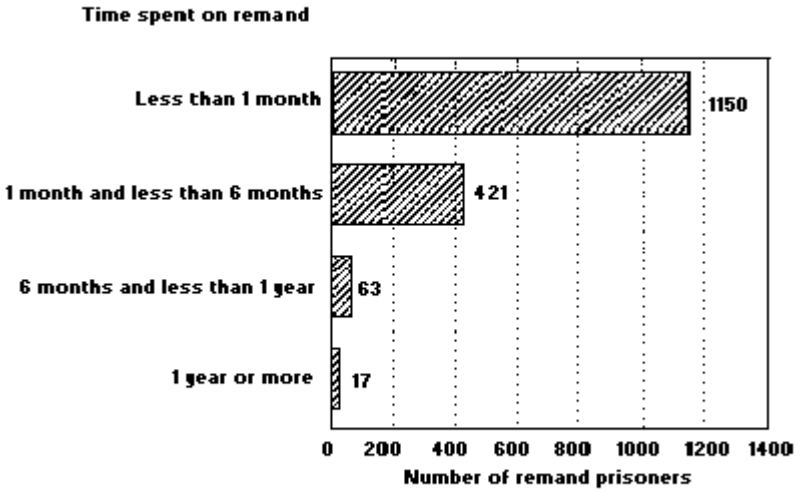
- Are these differences due mainly to the number of individuals remanded in custody or to the length of stay?

- What would the impact be of improving court waiting times by, say, 10 percent?

- What are the priorities of defence lawyers in this process? Does the time for defence preparation lead to unduly long periods of remand?

Figure 3

Time Spent on Remand: Prisoners admitted in 1986 followed through until end of September 1987, South Australia



- How extensive is the alleged practice of giving prisoners a 'taste of imprisonment' prior to a non custodial sentence? There is no research evidence which would support the effectiveness of such a practice.

- Do some jurisdictions take a closer look at offenders before sentencing? What are the costs and benefits of this and how could the process be made more efficient?

- Is there too much reliance on monetary conditions of bail? A recent survey or remandees in the Adelaide Remand Centre indicated that over 10 per cent were in custody because they were unable to meet monetary conditions of bail and/or obtain a guarantor.

- What difference does parole status make to the likelihood of obtaining bail?

References

Biles, D. 1978-88, *Australian Prison Trends,* Australian Institute of Criminology, Canberra.

Research, Policy and Bail

Adam Sutton
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For many years, the rate at which adults have been imprisoned in South Australia has been lower than for the country as a whole. However, the state's figures on unsentenced prisoners (that is people awaiting a final court hearing or for a sentence to be imposed) consistently have been higher. In September 1988, South Australia had the third highest rate in Australia for remand prisoners and the percentage of its total prison population not under sentence also is significantly higher than in many other parts of the country.

That South Australia tends to have more unsentenced prisoners per head of population is not, by itself, reason to conclude that bail practices need to change. It might well be the other states that are wrong. Nonetheless, such figures do provide prima facie grounds, at least, for assessing whether there is a case for reform. Since 1983 the Office of Crime Statistics has been involved in a number of projects and working groups aimed at identifying whether, in fact, aspects of this state's bail procedures should be changed and how improvements could be effected. The following comments outline some of the lessons we have learned.

Lessons from Bail Research

No evidence of overt or systematic bias by bail authorities

Despite occasional argument to the contrary, there is no convincing evidence that the administration of bail in South Australia is arbitrary or unfair. In 1983, the Office made an extensive study of bail decisions by police, Summary and Higher Criminal Courts, and also conducted a census of prisoners in custody on remand. The published conclusion was that 'generally speaking, both police and courts put emphasis on such factors as offence charged, previous record and defendant's community ties-factors which always have been accepted as relevant' (Attorney General's Department 1984). However, bail authorities did at times tend to use financial conditions, or a requirement for guarantors, as a way of 'further safeguarding' their decisions. This could unintentionally disadvantage defendants who were poor or socially isolated.

Legislation, by itself, is not the answer

Legislation, by itself, cannot resolve all difficulties. Often, in Australia, people tend to see the law as some 'magic wand' which only needs to be waved at a problem for it to go away. One of the Office's first tasks, in researching bail, was to compare Australian states' provisions and try to find the relationship between their laws and rates of custodial remands. We could find none. Some

states whose legislation seemed designed almost to persuade authorities not to grant bail had low rates of remand, while others with relatively 'liberal' legislation were among the highest.

We also noted that one of the most successful experiments in pre-trial releas6-New York's Manhattan Bail Project-initially had involved m legislative reform. When this initiative was launched in the early 1960s the emphasis simply was on ensuring that courts were provided with comprehensive and verified information on defendants who would be good bail risks. It was access to this information, not to legislative guidelines, that enabled courts both to reduce the numbers of defendants remanded in custody and to lower breach-rates by those granted bail.

Problems not resolved, simply by blaming one agency or authority

Problems with bail never will be resolved simply by searching for 'scapegoats'. Very often, when a problem occurs in the criminal justice system, the instinct is to find someone **to** blame. Recently, for example, sections of South Australia's media have been trying to hold magistrates responsible for overcrowding in the Remand Centre and the City Watch-house. Whenever the Office has looked at these issues, we have tended to find that they are system problems, rather than the fault of any particular agency or group. Magistrates can hardly be blamed for being conservative in granting bail if they are not being given access to sufficient information about some defendants. However, police and legal Aid bodies in tum can't be blamed for failing to provide such information if they lack the resources or the powers to collect it; and so on. Generally, the Office's research has convinced us that there are few problems in the bail system that can be resolved through unilateral action by one agency.

Effecting bail reform not a 'one off process

The final major lesson from bail research and reform in this state is that change will be effected incrementally, rather than on a 'one off basis. Along with other representatives of the Attorney-General's Department, the Office of Crime Statistics now has been associated with quite a series of bail reviews, committees and working parties. From the research and statistical data it seems clear that each one of these initiatives starting with South Australia's first *Bail Act,* in 1984- has had some effect. However, the criminal justice system can be remarkably resilient, and not all changes have been lasting.

Any state that wants to bring about lasting improvement to its bail procedures will have to be prepared to make this a long ten-n commitment, and not become disillusioned immediately one or two of the most 'obvious' reforms prove ineffective.

Reference

Attorney-General's Department and Office of Crime Statistics 1984, *Review of Bail in South Australia,* Attorney-General's Department, Adelaide.

Practical Problems with Bail and Remand

John Murray
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South Australia Police

In the first letter received to come to this seminar, we were induced to link the difficulties of bail or remand, to overcrowding in remand centres. Overcrowding by itself does not demonstrate a problem in the bail process. it is not a logical premise since many other conclusions could be drawn. They include the extra vigilance of police, magistrates taking the sentencing process more seriously or, that there are insufficient facilities.

It is doubtful whether any one of these by themselves, or even collectively, reflects the true situation. There are many people in custody who should not be. It is also true that there are many people who have been given bail who proved by absconding that they should not have been given bail. A balance has to be struck. Last September, 115 people did not respond to bail. Fifty-six of those were given police bail. That is a significant figure when you consider police culture and attitude which you might expect to give rise to a cautious approach. The remaining fifty-nine were court bail.

These non-appearance figures might demonstrate that given the 1985 *Act,* its educational component, and the accompanying media attention, that magistrates have become more cautious than ever before in keeping people in custody.

The old common law position rested on a primary consideration of whether or not that person would appear in court. Section IO of the South Australian *Bail Act* has many more considerations. Indeed, the presumption of innocence or the presumption to bail tend to be engulfed in other considerations from the gravity of the offence; whether or not the person would abscond or offend again; down to the very broad and encompassing provision, 'any other relevant mattee. Now what that Act does, in effect, is give the magistrate or judge, or bail authorities (including police), much more discretion than they ever had before. And if these provisions are so broad as to allow that wide discretion, what happens thereafter is that you have to have efficient, progressive, enlightened policy within departments. If the statutes are not tight, or the criteria imprecise, you have to rely on the department's themselves to make up for the deficiencies. In effect, you have to rely on the departments policy, but, more importantly, the players in the field, the legal services people who respond to the bail applications, the police prosecutors and the crown prosecutors who make applications for bail. You have to rely on these people and these organisations to make sure that the job is done properly.

Recently, the newspapers carried a story which, if true, reflects my concern. It seems a man who had been charged with a simple offence of larceny (shop-lifting) was granted, quite properly in the circumstances, bail with one surety, because he lived interstate. But what happened thereafter Seems unfair because he remained in custody, as he was unable to meet the surety condition. He languished there for some day before it was brought to anyone Is attention. The Act itself allows for review. But what the situation there lacked was someone with due sensitivity to pick up the fact

that there was a man who was, in effect, serving a sentence for a crime that would probably attract a fine or a bond. That is simply not fair.

There is a real need for more sensitivity in systems within departments. There is something about a police culture that provides a perspective that probably no other department has. This becomes significant where police are bail authorities. If you are involved for eight hours of a shift, forty hours a week, chasing law breakers, writers on policing say it is quite natural for police to expect punishment at the end. Otherwise, police from this one dimension would see it as wasting their time. Police attitude, many say, includes a high degree of cynicism and authoritarianism. If that is true, and there is probably a tendency towards this in operational police, how valid are the submissions made by police in relation to bail? This is a critical issue when you consider that one of the bail authorities within the Act is the sergeant of police at a police station, who has the information before him to decide whether or not police bail will be granted. A clue to their attitude is contained in the figures of that one month in Adelaide Magistrate's Court, mentioned before, where fifty-six people were given police bail and they did not tum up. These figures, in fact, suggest quite a liberal approach.

There are two broad checks within the Police Department to try to cure that tendency towards authoritarianism and cynicism. One is the sergeant himself: it would be fair to say that ten years ago, the attitude of the Watch-house was typically one of, 'You're really going to have to prove you deserve bail before you do get it', reversing that common law basis of the presumption of entitlement to bail . What has happened with the enactment of the 1985 Act, and certainly the growing change towards bail generally, is that sergeants of police have become better educated and more amenable to applications for bail. Another very good reason is a further check which takes place. There is entitlement, as there was before, to have a Justice review and even a magistrate in appropriate circumstances.

Another check is internal, at the police prosecutor level. While the field operator might give many different reasons why the person should not be granted bail, the police prosecutors provide that final filter before the matter is put before the court. As in every walk of life, there are some unfair and heavy-handed comments made by field operators as to why a person should not be given bail. I try in my capacity, to sort that out, to present a more objective appraisal to be put before magistrates through the police prosecutors. And you might say again, well police prosecutors are only former operators from the field and while that may be, true, it does not take long for a police prosecutor under the scrutiny of magistrates to be compelled to be candid, frank and open in court, for they will not last there unless they meet these criteria. Bail should definitely not be left to the police alone.

My recent experience is that there are undue delays in the process before the court, sometimes brought about by police prosecution. Forensic evidence is required more and more often in serious cases nowadays and the Forensic Science Centre is unable to meet the demand promptly. There have been cases in the past where a person has spent too long in gaol while the police prosecutors get together a brief, awaiting forensic evidence which can take many months. That, quite simply, is not fair. One of the benefits of inter-departmental liaison is that we will talk about these things. We now intend to give priority to analysis of forensic evidence related to persons remanded in custody.

It is of concern that people, given the presumption of innocence, do remain in prison for long times while waiting for the prosecutor to get his brief together. The problem is compounded by a Full Court decision which says that the police prosecutors must present aU the relevant facts before the matter is placed at committal stage. It may @ell be in this interdepartmental committee that some sort of compromise is reached there where we 'can commit, short of the full evidence,

especially where a person is in custody but only with the undertaking that evidence will be available in due course.

A second main concern lies in the bureaucratisation of the system given the broad and very subjective criteria in Section 10 (and its equivalent in other states). It could appear that once the machine starts, it is impersonal and insensitive, allowing, for example a person to remain in custody for the regulatory time of five days where bail has been given with a surety that cannot be met. Within the Process, it needs someone or some process to be adapted, to give due sensitivity to these people who do not make use of the provisions the Act In some cases, they do not know what provisions are available, even though the Act requires that they are given pamphlets, for example, which explain these matters. I have given my concerns about police attitude: if there is police cynicism, it can arise from the fact that of the people they arrest, 90 per cent plead guilty and of the matters that go to trial, over 90 per cent are found guilty. Now they might argue, perhaps correctly, that it's not so much cynicism as a hard realisation that people they put before the court tend to be guilty. Consequently, from the hundred or so people who did not answer bail in that month in the Adelaide Magistrate's Court, there can be a criticism of the bench of naivety.

In conclusion, these are the issues of most concern. There is need for continuing and better education within the police about the principles of bail and the sensitivity that should be afforded individuals within the bail system. There should be an introduction of a system to recognise delays in getting matters before the court-a situation which is known to be chronic in Magistrate's Courts throughout this country. Legal service authorities come there with ten, twelve or twenty cases, and the magistrates believe when they hear the facts, that they've heard it all before. The cases do not appear individualised, and the police prosecutors, on the other hand, appear to be repetitive or stereotyped themselves. Bail, it seems needs more room, more time, and consideration. There is also a very real need for prompt revision of cases where conditions have not been met. The inter-departmental committee must consider issues which can be cured through liaison between departments. I join with those magistrates, who express the view that the listings in the Magistrate's Court are too busy. Due consideration needs to be given to that very important issue of whether a person will be given liberty or will remain in custody. Because insufficient time is given to that question, we're not doing it at all well. If it is extra personnel, judiciary or prosecutors who are required, so be it. It has to be addressed.

Bail or Remand-The Civil Libertarian Perspective

Russell Jamison
Barrister and Solicitor
President South Australian Council
for Civil Liberties

This presentation will describe the procedures that follow arrest in South Australia, to point out certain aspects Of this procedure which violate fundamental civil liberties, and to recommend changes that the South Australian Council for Civil Liberties believe are needed.

Arrest And Detention

In South Australia a person is not entitled to apply for bail immediately upon arrest. Arrested persons may be detained pursuant to s.78(2) (b) of the *Summary Offences Act 1953* or if not detained may be held in a police lockup before being transferred to a watch-house. Once in the watch-house a prisoner is entitled to apply in writing to the officer in charge or a police officer of the rank of sergeant or above, but once refused the prisoner may be held in the watch-house up until noon of the next working day before he has to be brought before a justice when he may apply for bail. If this ' also impossible a procedure for an appeal by telephone to a magistrate is provided for. Is Even once bail has been granted the police can defer releasing -the person for up to 72 hours by stating to the bail authority that a review will be applied for.

- We believe that this procedure takes far too long and that two justices or one magistrate should be 'on call' at all times to adjudicate bail applications independently, and that a prisoner should be entitled to so apply at any time following arrest.

- We believe that detention is a fundamental breach of civil liberty.

Eligibility For Bail

There is no law guaranteeing citizens the right to be at liberty - it is the custom, but there is no law or Constitutional guarantee, only a rebuttable presumption in favour of bail being granted after liberty is lost. Section 10 of the *Bail Act 1985* states 'the bail authority should, subject to this Act, release the applicant on bail unless, having regard to (any relevant matter) the bail authority considers that the applicant should not be released'.

- We believe that liberty should be the right of every person.

- We believe that no bail authority should deny that right except in specified circumstances proved on the balance of probabilities.

Reasons For Refusal

Section 10 of the Bail Act sets out a selection of reasons for refusing bail to which the bail authority can have regard: namely, the gravity of the offence, the likelihood of absconding, reoffending or interfering with evidence, witnesses or police enquiries, protection of the victim, need to protect the applican4 medical requirements of the applicant, prior contravention of terms or conditions of bail and 'any other relevant matter'.

The Third Report of the Criminal Law and Penal Methods Reform Committee of South Australia (Mitchell Committee) in 1975 adds to the list of other relevant matters the probability of conviction, the likelihood of the liability to severe punishment, the character and behaviour of the accused and the nature of his abode and ties in the state.

- The Mitchell Committee recommended that a court not refuse bail in order to facilitate police enquiries (instead it recommended detention provisions). The legislation includes both the detention laws and bail refusal on the grounds that the accused might hinder police enquiries. We believe that continuing enquiries should not be a factor in determining bail.

- We believe that the gravity of the alleged offence, per se, is no measure of whether a person will appear for trial and should not be a consideration in determining bail.

- In our experience the 'likelihood of absconding' has been held to mean 'likely to leave the state' and this should not be a determining factor. Instead the automatic provision in every bail agreement not to leave the state (s.11(6)) should be abolished, the fact that a person has no fixed address, residence, or family ties in South Australia should not determine whether a person is granted bail. Surrender of passports should be sufficient reply to evidence of intention to leave the country.

- We believe that the need which the applicant may have for physical protection or medical or other care should not be grounds for refusing bail but may be the subject of special conditions on bail.

- We believe that the failure to comply with terms or conditions of bail on any previous occasion should not be a factor unless the breach is substantial and fundamental and that a similarity of circumstances exists that makes it probable that such a breach is likely to reoccur.

- We believe that bail should never be refused in offences where prison is not a prescribed penalty or is unlikely to be applied or would be likely if applied not to exceed the time for which the prisoner is likely to be held until trial.

Conditional Bail

The bail authority can impose one or more conditions upon granting bail. These are that the applicant agree to reside at a specified address, not to approach victims or witnesses, to be under the direction and supervision of the Department of Correctional Services, to report to police at a specified time and place, to surrender his passport and to any other conditions as to conduct.

Further, the bail authority may require the applicant to give written assurances from a number of acceptable persons that he or she will comply, as well as requiring the applicant and guarantors to be liable to pay a specified sum upon breach to pay such sum into court as a precondition to being released.

- We believe that requiring that a fixed sum be paid either as a precondition or promise whether by an applicant or a surety as a condition of bail should be abolished. No person should be denied release once bail has been granted because of his inability to meet pecuniary conditions. The penalty for breach of bail should be determined by reference to the seriousness of the breach and the effect, including the cost to the public of such breach. The penalty should be determined at the time of sentencing or discharge.

The Bail Act and more recent home detention provisions deny the bail authority power to impose conditions of supervision, including home detention, except upon the Crown's application or consent. In practice the justice indicates his willingness to release the applicant on supervision or home detention. The prosecutor, who has already opposed bail, is then asked if that is all right with him. The answer is predictable

- We believe that the prosecutor should not have the power to deny supervision or home detention.

Further Considerations

Availability of Facilities

Currently the Remand Centre is full and all persons denied bail in South Australia can expect to spend on average 3 to 7 days in a police lockup or watch-house before being removed to gaol. The lockups are generally exposed to the weather. Most remandees will spend their initial time in the Angas Street Watch-house where there are minimal facilities.

- We believe that no prisoner should be remanded in custody unless the bail authority is assured that basic human requirements will be met. Police lockups and the Angas Street Watch-house do not meet these requirements at the present time.

Court and Prosecution Delays

Before a committal proceeding can commence the prosecution must produce statements of witnesses. Inordinate delays have been evident in cases where bail has been refused.

- We believe that in cases where bail is refused witness statements must be served on the accused or his representative not more than 14 days from the date of arrest.

Waiting times for trial vary from court to court. An accused who can have his charges disposed of summarily can usually get a trial within two to five months depending on which Magistrate's Court he or she is charged in. 'Me waiting time for a trial in the District Criminal Court and the Supreme Court of South Australia can exceed 12 months from the date of arrest.

- We believe that an early trial date should be the right of every remandee and that except in exceptional circumstances persons should be entitled to bail if a trial cannot be commenced within six months of arrest.

Reference

Criminal Law and Penal Methods Reform Committee of South Australia 1975, *Court procedures and evidence, Third Report,* (Chair, Justice Dame Roma Mitchell), Government Printer, Adelaide.

The Victim's Second Injury-Bail instead of Remand

Kate Hannaford
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South Australia

Many victims of personal crime experience a loss of equilibrium, things start falling apart, their sense of trust has been destroyed; their belief that the world is a safe, predictable place has been eroded. The victim's injury was not an accident: it was the direct result of a conscious and malicious intent of another human being.

Initially, victims are very vulnerable and do not function in their normal coping manner. They are frightened and fear is one of the most difficult emotions for victims to control. Being the victim of a personal. crime is extremely stressful - often beyond the stress level of most people. When the offender goes to court to apply for bail the victim is in an extremely stressful state.

At this stage a victim often suffers a 'second injury'; that is a real perceived rejection and lack of support from the community, welfare agencies and the courts. Because of the victim's heightened vulnerability this second wound is a further violation and delays the healing process.

For the past nine months I have been working with victims at the Victims of Crime Service (VOCS) and the agency has been approached by many victims who are dissatisfied with the outcome of bail applications. It is not my intention to comment on the question 'bail or remand'. My presentation is confined to a personal perspective based on my recent experiences with distressed victims.

Twenty-two years old Susan, a single mother of two, came into VOCS in July. She had been a recent victim of an armed hold-up in which two masked and armed bandits had broken into her house at 2 am demanding money for drugs.

One man had sat on her with a loaded gun pointed at her head demanding the names of drug dealers and some cash. She knew no dealers but gave the telephone numbers of some of her friends in the hope her assailants would go. As they were leaving the kitchen, one of the intruders shot a bottle of whisky to smithereens. These juvenile offenders were given bail, with a condition that they were not to approach Susan. However, Susan was terrified for her own and her children's safety. She was convinced that they would want revenge; firstly, because she was responsible for their arrest and secondly, because she had given them bogus telephone numbers on the night of the assault. Susan's parents contacted me because they were so worried about their daughter's safety and it was decided that she should apply for a Housing Trust transfer. A transfer was granted but in a suburb far away from her present location. A move would have adversely affected her children's education and the close contact she has with her parents. Susan remained in her house and purchased a home security system for $1200. She hopes to pay for this from her criminal injuries compensation claim.

Another victim, 76-years-old Anna was knocked down in the street where she had lived for 28 years and her handbag was snatched. Three of her teeth were broken and lacerations to her face required twenty stitches. These offenders were apprehended and Anna had to identify one in a

police identification line up. Similarly, Anna was terrified when these offenders were released on bail. She was not informed by the police whether the offenders were on bail or remanded in custody. In my experience, many victims are not notified of the outcome of bail proceedings.

My third example involves an erstwhile colleague of mine, Mr. C., a former probation and parole officer, who awoke one night to hear his old, beloved Volvo being started in the driveway. Displaying great courage, Mr. C. raced outside and pulled the offender from the driver's seat. At the same moment he felt something cold and hard pressed against his stomach-a pistol. Previous army experience stood Mr. C. in good stead and he disarmed the would-be felon before making a citizen's arrest. The pistol was a toy replica.

When this offender was released on bail Mr. C. was angry as he considered that such an offence warranted the offender's remand in custody. Mr. C. was fearful for his family's safety and slept with a pistol under his pillow for some months. Mr. C. was concerned that the victim would want revenge and that he would return either alone or with mates to inflict further damage.

In this particular case I knew the offender. As his probation officer I was supervising him for a previous offence. When spoken to about the incident he had no recollection of the house location; it was a spur of the moment drunken decision to take the car as his initial stolen car had run out of petrol and he had thirty kilometres to get home. Mr. C.'s car was visible and the keys were in the lock!

From my experience I consider that victims worry unduly but understandably when they have been victimised by an unknown offender who is granted bail. Their fear of further crime far outweighs the actuality. However, when the victim is known to the offender, he/she is often in danger. Such was the case of a woman in the North Adelaide Women's Shelter whose defacto husband had been bailed after an assault on her. She was advised to stay locked inside the shelter for some days because the offender knew her whereabouts and could have inflicted further physical damage. He, on the other hand, was at large and free of concern for his personal safety.

The South Australian Government has recently adopted seventeen rights of victims of crime. Two of these are:

> The victim should be entitled to have his/her need or perceived need for physical protection put before a bail authority ...

and that

> The victim should be advised of the outcome of all bail applications and be informed of any conditions of bail which are designed to protect the victim from the accused.

The universal enforcement of these principles will help the victims. However, victims are traumatised by personal crime and with few exceptions continue to suffer when the offender is released on bail. The real or perceived fear continues to exist whatever the conditions of bail determined by the court.

As the first of the seventeen principles states,

> Victims are to be dealt with at all Times in a sympathetic, constructive and assuring manner.

In conclusion, victims want to feel safe, we must all endeavour to ensure this basic human right.

Bail in Australia[1]

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This paper is a comparison of selected topics in the bail laws of all Australian jurisdictions as of 1 December 1988. Although in most jurisdictions several statutes and their amendments have some bearing upon bail the relevant laws consist principally of the: *Bail Act 1977* (Vic.), *Bail Act 1978* (NSW), *Bail Act 1980* (Qld), *Bail Act 1982* (WA), *Bail Act 1982* (NT), *Bail Act 1985* (SA), *Justices Act 1974* (Tas.), *Magistrates Court Ordinance 1930* (ACT). New bail legislation is under consideration in the latter two jurisdictions. The focus of the paper is pre-trial bail as it pertains to the lower courts.

A Constitutional Issue

One provision of the Australian Constitution has been applied to a bail matter in two states. In *R v. Loubie* (1985) the Supreme Court of Queensland declared invalid a provision of that state's Bail Act which prohibited granting bail to a person ordinarily residing outside Queensland, unless cause was shown why it should be granted. This amounted to reversing the normal burden of proof to the disadvantage of the out-of-state resident.

The Court found that such a reversal violated s117 of the Australian Constitution, which requires that a subject resident in any state not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a resident of the other state. Both distance of residence from the court in which the defendant is to appear and intent to leave the state of jurisdiction are accepted by the Court as relevant considerations in granting bail. However, the Court reasons, the problem with the provision at issue is not its purpose. The problem is that, by selecting residence as the criterion for applying the statutory disadvantage, the legislation chooses the exact standard prohibited by s117, residence in another state. It is therefore contrary to the Australian Constitution and hence invalid.

Later the Supreme Court of Victoria in *DPP v. Spiridon* (1988), agreed with the reasoning in the Queensland case and declared the existing Victorian provision constitutionally invalid. It was subsequently repealed by the *Magistrates Court (Consequential Amendments) Act 1988*.

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[1]. This is a greatly condensed version of Professor Devine's major monograph *Bail in Australia* published by the Australian Institute of Criminology in 1989 and written while Professor Devine was a Fulbright Scholar at the Institute.

Eligibility For Bail

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

The bail laws in two jurisdictions, New South Wales and the Australian Capital Territory, create certain nearly unqualified rights to bail for lesser offences. The New South Wales Bail Act [s8, s51] creates a right to bail for all offences not punishable by imprisonment and any other summary offence specified by regulation. In the ACT the Magistrates Court Ordinance [s99(1)(b)] provides for the mandatory granting of bail to those committed for trial for an offence for which the possible imprisonment upon a first conviction does not exceed six months.

In addition to the right to bail for minor offences, New South Wales [s9(1),1A,(2)] creates a presumption in favour of bail being granted for all other offences except those of failing to appear to answer bail for other than certain minor offences, robbery with violence or an offensive weapon, serious drug charges, and domestic violence charges. This presumption is removed [s9(1)-(2); s32] if the court is satisfied that it is justified in refusing bail based on the specified criteria (examined below) which are to be considered in assessing bail applications.

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

The law in the ACT [s9(1)(a)] creates no comparable presumption of bail. Non-capital cases not covered by the right are treated in purely discretionary terms. However, a common law presumption of bail applies. As stated at page 78 in *Burton v. R* (1974), 'In any ordinary case bail should be granted and it is for the prosecution to make a clear and positive case for refund of bail'. Those charged with capital offences may be admitted to bail only by a judge of the Supreme Court [s98]. No presumption of bail exists in capital cases.

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

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

The exceptions to the prima facie right to bail in Victoria [s4(2)(a)] and Queensland [s13(a)] have large areas of similarity. Both reserve treason and murder cases for Supreme Court judges only. Queensland [s13] adds to this reservation piracy with violence or wounding, aggravated demands upon government agencies with menaces and specified drug offences. However, it provides an exception when both the prosecutor and the court are satisfied that the case can be dealt with summarily. Victoria [s4(2)(aa)] also creates an exception for specified drug offences but rather than reserving them for the Supreme Court the relevant provision directs that bail shall be refused unless exceptional circumstances

justify bail. In both Victoria [s4(4)(a),(c),(ca)] and Queensland [s816(3)] alike, further exceptions to the presumption of bail apply to persons who have been charged with an indictable offence while at large awaiting trial on an indictable offence, or who have been charged with an indictable offence involving the use or threatened use of firearms, offensive weapons, or explosives. In these instances the court is to refuse bail unless the accused can show cause why detention in custody is not justified. Victoria [s4(4)(c)] specifically mentions aggravated burglary in this context.

Similarly under the Victorian law [s4(2)(c)] bail is to be refused to persons in custody for failing to answer bail unless they can satisfy the court that the failure was beyond their control, while Queensland [s16(3)(d)] applies the same approach to all Bail Act offences.

Both Bail Acts [Vic. s4(2)(d) and Qld s16(1)] additionally direct that bail shall be refused if the court is satisfied that release of the accused would entail an unacceptable risk of one of the situations resulting which are explained below as considerations in granting bail.

South Australia [s10] handles the exceptions to its presumption of bail with a less detailed statement, which combines elements of both the exceptions and the considerations in granting bail. The result is a statement which leaves courts more discretion both to grant and deny bail in the circumstances covered. According to the South Australian statute, bail is to be granted unless, in light of the factors given below as considerations in granting bail, the court considers it should not be granted. No crimes are specifically exempted from bail.

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

In the Northern Territory a presumption of bail is created [s8(1)-(2); s24] in terms very similar to the presumption section of the New South Wales legislation. In contrast to New South Wales, no right to bail is provided for minor offences. However, only murder and treason are exempted from the presumption. In murder cases, because of the gravity of this offence and its punishment, if the evidence is such that the accused might be convicted, bail is rarely to be granted. In this situation the presumption is reversed. Unless the accused can show special or unusual circumstances indicating that it should be granted, it will be refused.

Two states, Tasmania and Western Australia, have no statutory presumption regarding bail being granted. However, in *R v. Fisher* (1964), the Tasmanian courts adopted the reasoning of *R v. Light* (1954) regarding bail applications. That last case states that, 'if there is any presumption here, it is a presumption in favour of the granting of the bail' (p. 157). It goes on to find a prima facie right to be at liberty until convicted, and concludes, therefore, that the burden of showing that this right should not be given effect rests on the Crown.

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

Considerations to guide the exercise of this discretion are stated. However, these are in more negative terms than in those jurisdictions having a right or presumption. The format where a right or presumption exists is typically that bail shall be granted unless reasonable grounds exist to believe that a specified condition applies.

As in other jurisdictions, bail for certain offences in Western Australia is reserved [s15] for a judge of the Supreme Court. These include treason, piracy with violence, and murder.

Considerations in Granting Bail

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

Australian jurisdictions break down into four clusters based on similarity in the way these considerations are conceptualised and expressed in their respective bail laws. The first group consists of New South Wales and the Northern Territory. The second group comprises Victoria, Queensland and Western Australia. South Australia forms a unit in itself. Finally, Tasmania and the ACT depend upon case law to establish their considerations. Within clusters there are some noteworthy differences as well as similarities.

New South Wales [s32] and the Northern Territory [s24] have very similar presentations of the considerations which may be influential regarding bail and what can be used to evaluate the operability of each. The considerations named are intended to be the exclusive factors governing the decision, and what can be used in establishing whether the consideration is operative. In both jurisdictions presence of the specified considerations can defeat any presumption of bail which might otherwise exist.

Three considerations govern the determination of the granting of bail:

- the probability of the accused's appearance in court to answer bail;
- the interest of the accused; and
- the protection and welfare of the community [NSW s32; NT s24].

With regard to the first consideration, appearance, four factors may be taken into account:

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

Regarding the second consideration, the accused's interest, four factors are specified for consideration:

- the likely period of pre-trial custody;

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

In assessing the third consideration, the community protection and welfare, three factors may be considered:

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

For this last factor to apply in New South Wales, the likelihood, plus the violence or other serious consequence of the offence, must outweigh the accused's general right to liberty. This restriction is not specified in the Northern Territory [NSW s32; NT s24].

The Northern Territory [s24(1)(c)(iv)] adds one factor to the assessment of the community protection not specified in New South Wales. If the alleged offence was committed against a child, the likelihood of injury or danger to the child may be considered. In both jurisdictions [NSW s32(3); NT s24(2)] all evidence or information which the court considers credible or trustworthy may be considered. The Northern Territory law specifically includes hearsay.

The statements of the considerations governing bail in Victoria, Queensland, and Western Australia are substantially similar. However, their status in Victoria [s4(1)-(2)] and Queensland [s9, s16] differs from that in Western Australia [Sched. Pt. C(1)]. Whereas in the two former states these considerations are in the context of a presumption of bail which they may countervail, in the latter they are principles governing discretion. A further difference is that while Victoria and Queensland require a court to be satisfied before denying bail that an unacceptable risk exists of one of the considerations eventuating, Western Australia only requires that such a consideration may eventuate.

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

A third consideration added to the basic two in Victoria [s4(2)(ii-iii)] and Queensland [s16(1)(b)] is that the acquisition of sufficient information to decide about any of the considerations in granting bail has not been practicable. Queensland specifies that this consideration is to be used with a view to getting the requisite further information.

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

Victoria [s4(3)], Queensland [s16(2)], and Western Australia [Sched. Pt. C 4,63] additionally specify four similar factors to be used in evaluating the considerations for granting bail. Western Australia adds additional components to two of these. The first common factor concerns the nature and seriousness of the offence. Western Australia appends to this the probable method of dealing with the offender if convicted. The second factor to be used concerns the character, antecedents, associations, home environment, and background of the accused. Western Australia supplements this factor with the defendant's place of residence and financial position. The third factor is the history of any previous grants of bail to the accused, and the fourth is the strength of the prosecution's evidence.

In *R v. Sanghera* it was held that to be used in bail determinations evidence needs only to be credible or trustworthy under the circumstances. It need not be admissible under the rules of evidence. Virtually identical provision is made by both the Victorian [s8(e)] and the Queensland Bail Act [s15(e)]. The Western Australian statute [s22] provides for the use of evidence which would not normally be admissible.

The South Australia Bail Act [s10(1)] specifies as considerations for granting bail a mixture of what elsewhere are treated as bail considerations and factors to be used in assessing these. Included are provisions similar to those seen in other jurisdictions regarding the gravity of the offence, the likely conduct if released of the accused, the accused's need for protection or care, and the bail history of the individual. One consideration which deserves particular comment in South Australia is that if the offence had a victim, the victim's need or perceived need for physical protection from the accused should be regarded in the bail decision.

The considerations in the bail decision in Tasmania are systematically stated in *R v. Light*, which is adopted by the Tasmanian courts in *R v. Fisher*. The considerations thus established are generally similar to those established in the New South Wales legislation. The first of these is the likelihood of the accused's presence for trial. Subsidiary factors in this assessment are the nature of the crime, the probability of conviction or strength of the evidence, the severity of the possible punishment, and the bail history of the defendant. The second consideration is the safety of the public and the security of its property. Subsidiary to this are the character and antecedents of the accused, including any record generally, and, particularly, any record of offences whilst on bail. If the offence presently charged would have been committed whilst on bail the strength of the case becomes a factor in this assessment. The final consideration is any prejudice to the accused's defence if not free to prepare it, and perhaps if not free to legally earn money to pay for it.

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

Terms of Bail

Probably the single most important element in defining any bail system is the form that bail takes. In other words, what incentives or controls are relied upon to assure that the accused will appear when required and will behave as directed in the meantime? With regard to the principal form of bail employed, four types of systems can be identified in common law based countries, although completely unmixed examples of any form are rare.

- Bail may rely for its incentive on a financial recognizance, a pledge of money which if the accused defaults the accused and/or his sureties will forfeit.

- It may rely upon the imposition of non-financial conditions of bail to control the defendant's conduct so as to reduce the chances that the accused will fail to appear or otherwise engage in misconduct while on bail.

- It may rely upon imposing a criminal penalty upon absconding.

- A cash deposit may be required of the defendant and/or sureties for the defendant which is forfeited if the accused fails to appear. Each of these approaches is employed in a primary or secondary capacity in some Australian jurisdictions.

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

Though by no means totally unmixed, probably the purest example of the recognizance system to be found in Australia exists in the ACT. However, legislation to restructure bail in the territory is currently being prepared.

If a defendant fails to appear in answer to bail under the current ordinance, the recognizance of any surety is also forfeited. An arrest warrant can be issued for the accused. If a security has been given either by the accused or by a surety, it is forfeited. In each instance the court has the authority to forfeit in whole or in part. Subject to certain limitations, the court may thereafter adjust or revoke the forfeiture on the application of the person against whom it was levied if cause is shown why this should be done. If the accused violates a non-financial condition of conduct while on bail or the magistrate is satisfied that reasonable grounds exist for believing that the accused will violate the condition, a warrant for the accused's arrest may be issued. The defendant may then be remanded in custody or released on the same or altered terms of bail [s77; s78; s80; s248B; s248C; s253; s254].

Three Australian jurisdictions have generally similar principally recognizance-based bail systems: Victoria, Queensland, and Western Australia. Each of these states provides a listing of the forms bail may take, graduated by the severity of imposition created by the form. Each then directs that no more onerous form shall be imposed on the accused than is warranted by the public interest considering the nature of the offence and the circumstances of the accused. In all three jurisdictions release of the accused on his own recognizance, or undertaking to forfeit a sum of money if he absconds, is the first and basic alternative. Second in Victoria and Queensland is the accused's undertaking supplemented by a deposit of money or other security of stated value, whereas in Western Australia the second alternative is that a surety or sureties enter into a recognizance-type undertaking for the

accused's appearance. This surety alternative becomes the third option in Victoria and Queensland. The final option in those two jurisdictions is the accused's undertaking plus a deposit of money or other security of fixed value plus a surety or sureties. The Queensland statute provides for a monetary deposit by a surety to demonstrate the sufficiency of his means. In Victoria this deposit may be in cash or asset and may be required by the court. The third option in Western Australia is the defendant's undertaking plus sureties, either or both with a monetary deposit. The fourth option provided is like the third but permits substitution of a passbook or its equivalent for cash. The final option in Western Australia is the possibility of the accused and sureties, either or both, entering into a mortgage, charge, assignment, or other transaction to secure bail with other property. In all three jurisdictions the financial provisions mentioned are supplemented by the possibility, where necessary, of non-financial conditions regarding conduct being imposed (Vic. s5(2); Qld s11(2); WA s17; Sched. Pt. D s2]. As with the financial components of bail, the imposition of these conditions regarding conduct and residence generally are similar in the three states.

When a defendant fails to appear as required by his bail, the court may in all three states issue a warrant for his arrest. In addition, any recognizance or security deposit by either defendant or surety is subject to forfeiture although some procedural differences exist among jurisdictions on this point.

In all three states conditions of bail regarding conduct and residence are enforced by the threat of arrest and revocation of bail. If the police have reasonable grounds to believe that the accused has broken or is likely to break the conditions of bail they may arrest that individual without a warrant. The accused must then be brought before a magistrate within 24 hours. The magistrate, if convinced that the defendant has broken or is likely to break a condition of bail, may revoke bail or alter its terms. For the accused to change his residence or occupation without notifying the court is a separate offence punishable by three months' imprisonment or $500 fine in Victoria. The other two states raise the maximum imprisonment to six months, and Western Australia specifies that both may be imposed. An additional sanction against a defendant's failure to appear when and where required is provided in all three jurisdictions by creating an offence of absconding.

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

In New South Wales the Bail Review Committee (Parliament of NSW 1976) explicitly set out to reduce the reliance on monetary bail by providing for release on a variety of non-financial conditions which must be considered before monetary bail can be employed. This preference emerges in the legislation. The New South Wales law [s37] and that of the Northern Territory [s28] are identical in this respect. In both jurisdictions bail is to be unconditional unless the court is of the opinion that one or more conditions should be imposed to promote effective law enforcement or the protection and welfare of the community. No more onerous conditions are to be imposed than the nature of the offence and the circumstances of the accused warrant. Conditions are listed in order of their burdensomeness and no condition is to be imposed unless no prior condition or combination of conditions is likely to secure the objective sought. Upon the accused's request, however, any condition can be imposed.

Conditions available [NSW s36; NT s27] begin at the least burdensome, from specified non-financial requirements as to the conduct of the accused while on bail. They then escalate to providing one or more acceptable acquaintances who will state that the accused is a responsible person who is likely to comply with the terms of bail. Financial conditions then follow. These begin with the accused's own recognizance at the least burdensome level. They can then progress through one or more sureties by recognizance, the accused's deposit of security, and the sureties' deposit of security. At the most burdensome end of the schedule come the accused's cash deposit, and finally the sureties' cash deposit. The clear effect is to force preference to be given to non-financial considerations over financial.

The South Australian Attorney-General's Department's report (1984) prior to the legislation in that state similarly states that legislation 'should place emphasis upon non-financial conditions of bail'. This is reflected in the South Australian Act [s2(a)-(b)] which specifies in greater detail than the others what some of the non-financial conditions could be. These include, but are not limited to, residence at a specific address, not to leave that address except for specified purposes such as employment or treatment (to be used with Crown consent only), conditions relating to protection of the crime victim, supervision by a Department of Correctional Services Officer (with Crown consent), reporting to the police, and surrendering a passport.

Although no mandatory priority listing is given, no financial condition is to be imposed unless the bail agreement cannot be properly secured by a non-financial condition or combination of them. Moreover, no condition other than one as to the accused's conduct while on bail may be imposed unless it is reasonably necessary to ensure compliance with the terms of bail.

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

Provisions in all three jurisdictions for forfeiture of recognizances or deposits are similar to those in the jurisdictions which rely principally on recognizance, with a few noteworthy variations. The provisions for arrest of the accused, either with a warrant issued upon failure to appear or without a warrant by the police in cases of violation of other conditions of bail, are also similar, as is the power of the courts to deny or restructure bail in those instances. The most important variations in this area of the law are found in South Australia where conditions of bail can be enforced by forfeiture of any recognizance or security deposit that may have been in force [s11, s15]. This is in contrast to the other jurisdictions where arrest and alteration of bail status are the only sanctions provided. Like forfeitures elsewhere, the court may at any time for sufficient reason reduce the forfeiture or rescind it completely.

As in the primarily recognizance jurisdictions, New South Wales and South Australia supplement their non-financial conditions approach by creating an offence of absconding. The Northern Territory lacks such a provision. The New South Wales provision [s51] is worded so that an accused who fails to appear without reasonable excuse is guilty of the offence. The burden of proving the reasonable excuse rests on the accused. The absconding is punishable by up to the same penalties as the primary offence with, however, a maximum of three years imprisonment or $3,000 fine.

The criminalisation provision in South Australia [s17; s17a] differs from that in New South Wales and elsewhere in that the penalty is worded so as to apply not only for failure to appear but also to violation of conditions of bail. Although a guarantor (or surety) is not directly liable to punishments for the principal's failure to adhere to conditions of bail, a guarantor who knows or has reasonable cause to suspect that the principal has failed to comply with a condition included in his guarantee is obliged to take reasonable steps to inform the police. Failing to do so subjects the guarantor to a $1,000 penalty. These provisions give South Australia a unique range of alternatives with which to enforce non-financial conditions of bail.

In spite of the emphasis in these statutes on non-financial conditions, the limited and somewhat dated evidence available suggests questions as to the extent to which these systems do actually function principally as non-financial condition systems. A 1980 study by the New South Wales Bureau of Crime Statistics and Research (1984) of combined police and court bail indicates that bail is granted unconditionally in about 65 per cent of cases where a bail determination is made. It is refused in about 7 per cent of the cases and conditional bail accounts for 26 per cent of the determinations. Financial conditions (mostly recognizances), account for 70 per cent of conditional, or about 19 per cent of the total, bail determinations. Non-financial conditions of conduct were employed in only about 4 per cent of the conditional, or 1 per cent of the total, bail decisions. In the remaining 26 per cent of conditional bails, non-financial acknowledgement of the accused's responsibility by an

acceptable person was employed. This equals 7 per cent of the overall bail decisions. Clearly, non-financial conditions, particularly non-financial conditions regarding conduct, cannot be said to be the principal control.

Some indication that the criminal penalty for absconding is ultimately being relied upon is given by figures from the New South Wales Bureau of Crime Statistics and Research (1987) for persons appearing in the lower courts for the offence of failure to answer their bail. In 1986, over 73 per cent of non-appearance cases received a fine or imprisonment. Figures are given for only the most serious offence charged.

The low percentage of cases in which non-financial conditions are used suggests that, in spite of the fact that the law seems to favour this category of control, the New South Wales bail system is not in practice a non-financial conditions system. Conversely, the high percentage of unconditional bails combined with the indications of use of fines and imprisonment for absconding from trial on those less serious offences adequate to warrant bail suggests that in practice the criminalisation of absconding may be the operative part of the law. If this is so, then the New South Wales bail system may well be functioning as a criminalisation system where bail is extensively granted without conditions, but the threat of criminal punishments are chiefly relied upon as the motive to prevent absconding.

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

Based on the law itself, the primary form of bail in the lower courts in Tasmania is difficult to determine. The magistrate considering bail is given a general power to make orders relating to it [s35(2), (3)(ab)(b)(e)] which clearly permits broad discretion. Only some of the alternative possible orders provide controls to motivate the accused's appearance. No preferences or priorities are established among these. Pursuant to a 1986 amendment, after the order to be present itself, the first listed of these controls is the accused's cash deposit. This is followed by one or more sureties by recognizance. Finally, after two possible orders not directed to controlling appearance, the non-financial conditions controlling the conduct of the accused are listed, such as reporting requirements, or limitations on movements and social intercourse. The accused's own recognizance is not listed as an alternative, presumably to discourage its use after the 1974 amendment which de-emphasised it. However, it could be imposed under the general power to impose orders.

Insofar as any conclusion is possible as regards classification of Tasmanian bail, the law appears on its face to establish a principally cash deposit system. Since no priorities are indicated, this appearance is created in part by the primacy of place among the devices to compel attendance of the accused which is given to this alternative. The appearance is further confirmed by the much greater elaboration of the option [s35(3)(ab), (3A)-(3F)] when compared to that for the other alternatives. The deposit required is limited to an amount sufficient to ensure the presence of the defendant at the specified time and place. In addition, details of the forfeiture procedure are specified. If the accused does not appear as required the court is authorised to declare the deposit forfeited, although the possibility that this will not be done and that it will be refunded to the accused is also provided for. If the deposit is forfeited, a two-month period is allowed within which the accused can show cause to the court why it should be returned in whole or part.

Sureties: Duties and Rights

The possibility of sureties being required as a condition of bail exists in all Australian jurisdictions, although they are no longer routinely required in any. Some indication of the frequency of use of sureties can be derived from figures in the New South Wales Bureau of Crime Statistics and Research (1984) study where sureties were required in about 6.9 per cent of the cases examined. However, in spite of the relative infrequency of the use of sureties when they are employed a whole area of bail laws not previously discussed becomes involved. These are spelled out in full in Devine (1989) and not further discussed in this paper.

Recent Developments and Trends in Bail Laws

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

Additional factors to be considered in the bail decision according to this amendment are not only given but are stressed. Courts considering bail for such offences are to have particular regard in domestic violence cases to two factors. The first is the protection and welfare of the alleged victim of the offence. The second is any previous conduct of the accused which affects the likelihood that the defendant will commit a further domestic violence offence on the particular victim if granted liberty on bail.

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

The Bail Act in South Australia [s11(2)(a)(ii)] does not focus on domestic violence but does make provision for all victims of offences. Under the Bail Act 1985 itself, where an offence has a victim, conditions may be imposed on the bail of one accused of the offence relating to the protection of the victim. The 1987 Bail Act Amendment provides that, in deciding what conditions to impose, a bail granting authority should give special consideration to submissions made by the Crown on behalf of the alleged victim.

Bail provisions pertaining to domestic violence have also been added in the ACT. Since these pertain to police bail, however, they are outside the scope of this work.

A second category of offences where recent legislation has tended to restrict the granting of bail is that of serious drug offences. A 1986 amendment to the New South Wales Bail Act exempts from the presumption of bail various indictable offences under the *Drug Misuse and Trafficking Act (Bail Amendment Act 1986*). Several years earlier a 1981 amendment to the Victorian Bail Act had removed a variety of serious drug offences from that state's prima facie right to bail (*Bail Amendment Act 1981*). A 1986 amendment extended this to comparable drug offences under Commonwealth law. In Queensland the *Drug Misuse Act* of 1986 (s60 Sixth Sched.) updated the restrictions on bail in specified drug cases contained in the original 1980 Bail Act.

The only complete bail act enacted since 1985 is that of South Australia. Several provisions of that act should be singled out in the present context. One such provision [s17(1)-(2)] is the use of sanctions beyond arrest to enforce non-financial conditions of bail.

With regard to the accused, criminal penalties are available. In addition [s7(1)], a surety can be required to guarantee any specified terms or conditions subject to forfeitures. A surety under the 1987 Amendment [s17a] is also required under penalty to notify the police when the accused is known or reasonably suspected to have violated a term or condition of bail. Finally, one condition of bail specifically listed [s11(2)(a)(ia)] is noteworthy. This permits the accused to be required to reside at a specific address and to remain there and not leave except for specified purposes. On the one hand this is clearly highly restrictive. On the other, it might permit pretrial release in some cases that would be dubious otherwise. It might also lend itself to being monitored with electronic technology.

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Bail Legislation: Objectives and Achievements

Jeffrey Miles
Chief Justice
Supreme Court of the
Australian Capital Territory

Taken from the county jail
By a set of curious chances;
Liberated then on bail
On my own recognizances.

W.S. Gilbert 1885

We do not know the 'curious chances' that resulted in the liberation on bail of the prisoner who subsequently became Lord High Executioner to the Mikado. The law and procedures relating to bail have, at least until recently, always been something of a mystery. Terms like recognizance, remand, respite and estreat are not understood by everybody in the community, including lawyers, and probably least by those most closely affected by them.

This paper is not an exposition of the law on bail. It attempts to identify some of the problems that arose out of the old law on bail, examines how they have been tackled in recent Australian legislation, notably in New South Wales and Victoria, and looks at possible approaches for bail legislation in the future.

Background to the Bail Acts

Lord Devlin wrote of the right to bail that it was 'indeed curious that fundamental questions concerning bail have never been settled' (Devlin 1960, p. 71). McClemens J, a Judge greatly experienced in the criminal law and procedure of New South Wales, remarked that 'the lack of a history of bail is reflected in the lack of written practice as to the exercise of jurisdiction in the Supreme Court' (McClemens 1969, p. 43).

For whatever reason, it may be taken that the Supreme Courts of the Australian states and territories have an inherent power to grant bail (although it may be argued that where the law on bail has been codified as in New South Wales the inherent power has been abolished). The power of all other courts, relating to bail, derives from statute, including the power of the High Court to grant bail to a prisoner committed to prison in execution of a sentence pending appeal or application for special leave to appeal (*see Chamberlain v. R* (1983) 46 ALR 608).

In the *Queen v. Rochford; ex parte Harvey* [1967], Fox J., as he then was, sitting in the Supreme Court of the Australian Capital Territory, said at p. 141:

> The Supreme Court of New South Wales originally had the same jurisdiction in relation to bail as was possessed by the superior common law courts at Westminster (19 Geo. IV c. 83, s.3). As to the jurisdiction of those courts, Stephen, History of the Criminal Law of England (1883), vol. I p. 243 says:
>
> > 'The power of the superior courts to bail in all cases whatever, even high treason, has no history. I do not know, indeed, that it has ever been disputed or modified. It exists in the present day precisely as it has always existed from the earliest times . . .'

However, as Roulston points out (1972, p. 469) legislation on bail in England in 1826 and 1835 superseded all previous legislation on the subject and resulted in a sole criterion of the risk that the accused will not appear to take his trial.

These statutes were never regarded as part of the inherited law which, according to Roulston, was not surprising 'if one reflects on the conditions of the colony of New South Wales in 1835'—another reminder of the origins of the Australian criminal justice system in the penal colony.

Classic definitions of bail fail to accord with the reality. According to Halsbury (4th edn):

> The effect of granting bail is not to set the defendant free, but to release him from the custody of the law and to entrust him to the custody of his sureties who are to produce him to appear at his trial at a specified time and place. (para 166)

According to Archbold (24th edn):

> If the terms of the bail require a surety or sureties, the defendant is placed in custody of such sureties, who at common law, could re-sieze him. (para 291)

The idea that a capable adult person may be held in the custody of another person, apart from where the detention is pursuant to the established powers of a police officer or prison authority, is quite contrary to notions of civil liberties and human rights. Uncertainty on this aspect of the law is said to have been one of the matters which led to the reform of bail law in Victoria (Lynch 1987).

Whatever the precise state of the law before the Bail Acts, the situation had been reached where defendants who could, at least in some situations, be released on bail were released without the need for a surety. A person who acted as surety simply stood to forfeit a sum of money if the person bailed did not appear at the hearing at the required time and place, and was not expected to exercise the power of a true custodian.

The reason for bail reform legislation in recent years in Australia derives from a number of sources. There has been general recognition of the disadvantages facing an accused person who has to remain in custody until determination of the charges. There has been recognition that the incarceration of a person unconvicted runs contrary to the fundamental principle of the presumption of innocence. There has been concern that persons to whom bail had been granted nevertheless remained in custody because they were unable to meet the financial conditions imposed as terms of the grant of bail, which meant that the existing bail system discriminated against the poor (*see* generally Stubbs 1984).

Mr Justice Roden of the New South Wales Supreme Court wrote, shortly after the introduction of the New South Wales *Bail Act 1978*:

> It has long been a matter of grave concern to many that the system now replaced, with its strong emphasis on means, frequently offered to serious offenders the opportunity of purchasing a chance to abscond, whilst many persons charged with trivial offences were deprived of their liberty before trial because of their inability to find a surety in some paltry sum. The greatest achievement of the legislation, in my view, lies in the considerable downgrading of means as a relevant factor and of money or surety as a bail condition. The consequence of failure to appear is now, as it always should have been, that the absconder has committed a punishable criminal offence.
>
> The presumption in favour of bail, subject to stated exceptions, is now formally recognised as a natural concomitant of the presumption of innocence. The s.9 presumption can, of course, be displaced, and frequently is; but it serves as a valuable reminder that, subject only to the circumstances specified in s.32(2), refusal of bail is no longer available as a disguised form of preventive detention. Preservation of the rights of those who come before the courts unconvicted and protection of the community from unacceptable risk of serious crime, are the prime goals of the legislation (Donovan 1981, ix).

The NSW Bail Act 1978 was enacted after the presentation to the Government of a report by a Bail Review Committee constituted by Mr K.S. Anderson S.M., and Ms Susan Armstrong some two years previously. The passage of the Act was expedited by the fatal shooting of a bank manager during a bank robbery by a person then on bail on a charge of armed robbery and the final legislative product bears witness to those events surrounding the latter period of its gestation. By contrast the impetus behind bail reform legislation in Victoria seems to have come mainly from the Victorian Statute Law Revision Committee and certain academic writers, with a particular concern about the uncertain state of the law (Lynch 1987). This led to the Victorian *Bail Act 1987*. The principal difference between the two Acts is that the New South Wales Act is a codification of the law relating to bail (*R v. Hilton* (1986) 7 NSWLR 745) whereas the Victorian Act is not, and some common law principles survive.

Bail legislation has been enacted in all the Australian states (except Tasmania) and in the Northern Territory. In Tasmania the subject of bail is treated, although not comprehensively, in a number of statutes. To some extent the situation in the Australian Capital Territory is similar to that in Tasmania. Apart from common law, the law on bail in the ACT is to be found scattered through the *Australian Federal Police Act 1979*, the *Children's Services Ordinance 1986*, the *Domestic Violence Ordinance 1986*, the *Magistrates Court Ordinance 1930*, the *Crimes Act 1914*, the *ACT Supreme Court Act 1933*, and probably elsewhere.

No one would argue that bail legislation in Australia has solved all the problems, and whilst a number of significant achievements have been recognised, major problems remain. One is that whilst the reforms have facilitated the granting of bail, prison overcrowding in Australia, particularly New South Wales, is worse than ever. The delay between charge and hearing by the court has become greater, contributing to the overcrowding. The other main cause for concern is that, again whilst the reforms have shifted the emphasis away from money bail, substantial numbers of persons remain incarcerated pending trial because they cannot meet the financial conditions of bail.

These two particularly acute problems have led to further efforts to ensure that fewer persons are kept in custody on remand. On the other hand, because of public perception of an increase in serious crime, countervailing measures have been taken to restrict the granting of bail, at least to persons charged with certain categories of offences and to appellants.

Is there a Need for Bail Legislation in the ACT?

A consideration of the matters just mentioned leads to the preliminary question whether bail legislation for the ACT would simply provide a solution in search of a problem. The delay in reaching a date for hearing of a criminal matter is not as great as in most other parts of Australia. Prisoners on remand are, generally speaking, not held in the overcrowded conditions of the New South Wales prisons (where ACT offenders are sent in order to serve terms of imprisonment after conviction). Conditions in the ACT Remand Centre at Belconnen are not ideal, but are generally regarded as reasonably satisfactory. Canberra legal practitioners have easy access to persons on remand in custody. Bail is granted comparatively readily both in the Magistrates Court and the Supreme Court of the ACT, and if a magistrate refuses bail or imposes conditions that cannot be met, an application to the Supreme Court may be made speedily and easily. The draft Criminal Investigation Bill recommended by the Australian Law Reform Commission (1975) in its report, *Criminal Investigation*, included provisions for police bail. These would have applied to the Australian Capital Territory if the Bill had been enacted, and similar provisions were contained in the *Domestic Violence Ordinance 1986*. Hence some of the provisions which would be expected to be contained in general bail legislation for the ACT are already in place.

A matter which does cause some concern, however, is the percentage of ACT prisoners made up by persons on remand. Figures compiled by Biles of the Australian Institute of Criminology for September 1988 show that while the ACT remand rate is low (7.1 per cent), the percentage of remandees is the highest in Australia (25 per cent). This suggests that a significant number of persons granted bail are unable to meet the conditions imposed. The statistics, however, do not disclose the proportion of the total number of persons granted bail constituted by persons who nevertheless remain in custody.

Given that the Australian Law Reform Commission has already addressed many of the problems relating to bail which have been dealt with by bail legislation in the states (and its recommendations have to some extent been written into the ACT Domestic Violence Ordinance 1986), and given that some at least of the uncertainties of the law which were believed to exist in Victoria still presumably exist in the ACT, it is unlikely that the ACT will remain forever the bastion of the common law relating to bail.

An initial decision needs to be made whether bail legislation should be a codification as in New South Wales or a vehicle to deal with particular questions only, as elsewhere in Australia. As there does not appear to be any particularly acute problem in the ACT, except insofar as an inordinate proportion of persons granted bail seem unable to meet the conditions imposed, it appears that legislation might as well address all the problems rather than only some of them, and codification is, in effect, the preferable course.

This means that the legislation would deal with the question of bail at all stages of the criminal process, from police bail pending appeal. For that reason, during the course of this paper, the reference to a court should be taken to include a police officer authorised to grant bail. It may be that constitutional questions prevent a bail ordinance making provision for bail pending appeal beyond the ACT system, for instance to the Federal Court of Australia or the High Court of Australia.

A 'Right' to Bail?

Bail legislation in Australia generally does not recognise a 'right' to bail. Given, however, that one of the aims of bail reform legislation was, consistent with the due recognition of the presumption of innocence, that persons ought not be detained in custody pending trial unless there was reason, the New South Wales legislation introduced the concept of a presumption in favour of bail, a presumption which, however, does not apply in all cases and a presumption which may be rebutted. In contrast, the approach of the Victorian Bail Act

was to impose on the court, in effect, a prime facie duty to grant bail; thereby conferring a correlative 'right' to bail on the applicant. At the same time there were prescribed criteria against which an accused person could be assessed to constitute an 'unacceptable risk', so that not only was the 'right' lost but a reverse onus was placed on the defendant to prove circumstances which justified his release (Lynch 1987).

For minor offences as defined in s.8 of the NSW Bail Act 1978 a person is entitled to be granted bail except in certain defined circumstances, and such bail is to be granted either unconditionally or subject to the imposition of such bail conditions as are reasonably and readily able to be entered into to the extent that the person shall be released as soon as possible after giving the necessary bail undertaking. This is as close as the NSW Act goes to creating a 'right' to bail.

Under s.9(1) of the NSW Bail Act 1978 the presumption of bail is excluded in cases of certain specified serious offences which were, initially, confined to the offence of failing to honour a bail undertaking (which offence was introduced into the law by the NSW Bail Act itself) and armed robbery. In 1986 the section was amended so that offences of drug trafficking, as defined, also fell outside the scope of the presumption in favour of bail.

Under s.9(4) of the New South Wales Bail Act 1978 the presumption of bail is also removed where the prisoner is in custody serving a sentence of imprisonment in connection with some other offence and is likely to remain in custody for that offence for a longer period than that for which bail would be granted.

Subject to those exceptions, the presumption in favour of bail operates to the advantage of an unconvicted person unless the court is satisfied that it is justified in refusing bail upon a consideration of a number of matters set out in s.32 of the Act, and only those matters.

In contrast, the approach of the Victorian Bail Act 1977 under s.4 is to require the court, generally, to grant bail. Notwithstanding that general provision the court is required to refuse bail in the case of a person charged with treason or murder or certain offences of drug trafficking, unless the court is satisfied that exceptional circumstances exist which justify the grant of bail. The court is also bound to deny bail to an accused person in custody pursuant to another sentence or pending a charge of failing to answer bail, unless the person satisfies the court that the failure was due to circumstances beyond his control. Further, the Victorian Bail Act 1977 (s.4(2)(d)) removes the right to bail in cases of 'unacceptable risk', that is to say, if the court is satisfied that the accused would fail to answer bail, or would commit an offence whilst on bail or would endanger the safety or welfare of members of the public, or interfere with witnesses or otherwise obstruct the course of justice.

The right to bail is further denied to a person whom the court is satisfied should remain in custody for his or her own protection or welfare or where the court is not in possession of sufficient information for deciding any matter relating to bail. There is further provision in the Victorian Bail Act 1977 (s.4(4)) that where the accused is charged with an indictable offence alleged to have been committed whilst on bail for another indictable offence, or where the accused charged with an indictable offence is not ordinarily a resident in Victoria or is charged with an offence of aggravated burglary and similar offences involving the use of a firearm or charged with certain offences of drug trafficking, then the court shall refuse bail unless the accused shows cause why his detention in custody is not justified.

Lynch (1987) offers the criticism of the provisions in the Victorian Bail Act 1977:

> That there are not one but three sets of criteria upon which bail can be refused: where an accused person is an 'unacceptable risk' within the meaning of ss.4(2)(d) and 4(3); when an accused person is in a 'reverse onus situation' under s.4(4); and when the accused person comes under one of the exceptions to the general presumption in favour of bail found in ss.4(2)(a)-(c) (Lynch 1987, p. 1126).

It would certainly appear arguable that whilst the Victorian legislation provides for a 'prime facie right' to bail, that right is so hedged in by exceptions and the reverse onus

provisions, that the result emerges with less clarity than is desirable. The provisions with regard to the criteria for bail are enmeshed with the provisions relating to the curtailment of the 'right' to bail and this does not assist to clarify the position. In contrast the provision in the New South Wales legislation that there be a presumption in favour of bail enables the question of the presumption and exceptions to it to be dealt with separately from the question of the application of criteria.

Rowland (1979) writes of the differences between the two approaches:

> The basic difference lies in s.4(4) of the Victorian Act where use of a reverse onus has the effect of taking away the fundamental presumption which the New South Wales Act is at great pains to maintain. As soon as a person is charged with an offence coming within s.4(4)(c), the onus is reversed and the nature of the offence allegedly committed becomes the sole criterion for refusing bail. It would appear that such a provision is enacted as a means of preventive detention. As such, it has no place in a Bail Act and is contrary to one of the basic presumptions of our (NSW) Act. It is considered that the criteria of the New South Wales Act more accurately reflect the proper concerns of a Bail Act, namely the probability of a person released on bail appearing in court, the interest to the accused himself and the interests of the community. Preventive detention is not a proper function or purpose of bail. If preventive detention is to be countenanced, it should be provided for specifically by preventive detention legislation as such (Rowland 1979, p. 144).

Leaving aside Rowland's contention that legislation having the effect of preventive detention should be enacted separately, there is merit in the argument that a Bail Act should not have the effect of authorising preventive detention unless it is clearly intended to do so. One of the three major criteria for bail to be considered pursuant to s.32 of the NSW Bail Act 1978 is 'the protection and welfare of the community'. In deciding whether or not an alleged offender is dangerous to the extent that bail should be refused to him or her on that ground, a consideration of the specified criteria is, it is suggested, sufficient to meet that test. That is a more appropriate method for assessing the alleged danger of the person concerned than by categorising the type of offence he or she is alleged to have committed.

The same objection is available with regard to the denial of the right of bail under the Victorian legislation to a person ordinarily resident outside the state. Again, if the criteria to be applied in deciding whether or not bail should be granted are directed towards the probability of whether or not the person will appear in court then residence outside the state is a relevant matter and normally one which would be expected to be weighed against the person concerned being granted bail. But it is not, it is suggested, a matter which of itself should take away a right to bail otherwise conferred.

Furthermore the question may be asked whether, even under the New South Wales legislation, it is necessary to remove the presumption in favour of bail to persons charged with specified offences. The report of the Bail Review Committee in 1976 (Parliament of NSW) did not recommend the removal of the presumption in such cases. Rather, it appears that the contemporary political climate was such that it was expedient to deny the presumption in favour of bail to persons charged with armed robbery, and that decision having been made it was expedient further to deny the presumption to persons charged with failing to answer bail. The decision to amend the New South Wales Act in 1986 removed the presumption in favour of bail for persons charged with possession or supply of commercial quantities of prohibited drugs. The amendment came at the same time as a new *Drug Misuse and Trafficking Act 1987* which itself followed royal commissions into drug trafficking. The history of these matters is traced by Weatherburn and others, who after examining statistics from the NSW Bureau of Crime Statistics and Research, came to the conclusion that persons charged with drug offences were amongst the least likely of defendant groups to abscond. They concluded:

> No reliable evidence of a relationship between type of drug charge and likelihood of absconding was found. Nor was any evidence obtained suggesting that those allegedly found in possession of large quantities of a drug were more likely to abscond. (Weatherburn et al. (1987, pp. 107-8).

The authors go on to comment:

> The consequences of an inadequate system of bail are plainly unsatisfactory, both for the defendant and for the administration of justice. For the defendant the results of the present study confirm those of earlier studies in showing that persons for whom bail is refused are more likely to be convicted than those granted bail as well as being more likely (if convicted) to suffer a longer sentence. It is true that these effects may not flow from bail refusal per se but may stem from factors relating to bail refusal. Nevertheless, as long as the possibility exists that bail refusal itself may increase the risk of conviction or of a more severe sentence, bail decisions are inextricably linked with the defendant's prospect of a fair trial (p. 108).

The authors also emphasised the rapid increase in the New South Wales remand population with consequent prison overcrowding between July 1984 and June 1985, an increase from a total prison population of 3,000 to nearly 4,000. The figures compiled by Biles (1988) for 1 September 1988 show a total of 4,182 prisoners in New South Wales of whom 1,001 were on remand, which represents 23.9 per cent.

It is to be noted that the New South Wales legislation did not make provision for removing the presumption of bail in cases of persons charged with murder. Bail in murder before the Act was granted only in cases involving special circumstances (see *R v. Walters*). In this respect it may be noted that even in the present state of law in the ACT, bail is granted in murder cases in appropriate circumstances. As Weatherburn et al. point out (1987, p. 95), persons charged with armed or violent robbery are not known to be more likely to abscond or commit further offences while on bail than persons charged with other offences, and under the NSW Bail Act offences which are more serious, such as murder, carry a presumption in favour of bail. Of course the presumption may be removed by proper application of the criteria under s.32, such as the seriousness of the charge, the number of previous convictions, and evidence of prior bail absconding, because the application of the criteria points to the perceived likelihood that the defendant will not attend to stand trial or may present such a danger to the community that the defendant should remain in custody until the question of guilt is determined.

The removal of the presumption in favour of bail in the case of a person who has been convicted of another offence and is serving a term of imprisonment for that other offence is another question that deserves consideration. Clearly as a matter of law a person is not relieved from serving a sentence of imprisonment because of a subsequent decision that he is entitled to bail for a separate offence. However, a term of imprisonment must come to an end some time and may come to an end for a variety of reasons. The question is whether when a sentence of imprisonment does come to an end, the person should be immediately and automatically entitled to release on bail for another offence in accordance with a bail decision already made, or whether the person should remain in custody after the termination of sentence until the question of bail for any outstanding offence may be dealt with. The question is, of course, answered to some extent by s.9(4)(b) of the NSW Bail Act which removes the presumption of bail from a person in custody serving a sentence of imprisonment in connection with another offence only if the person is likely to remain in custody for the other offence for a period longer than that for which bail would be granted.

Criteria for Bail

Once it is accepted that bail legislation will make provision for the entitlement, even if in certain circumstances only, to release on bail, or that bail should be refused in certain circumstances, the criteria for granting or refusing bail need to be defined. This is done in the New South Wales Act under s.32, and there are similar provisions in s.52 of the Criminal Investigation Bill and 2.23 of the ACT Domestic Violence Ordinance. The approach of the Victorian Act with its 'unacceptable risk' criteria has already been indicated.

All examples divide the criteria into three main groups:

- Matters related to the probability of the person appearing in court in respect of the offence;
- Matters related to the interests of the person; and
- Matters related to the protection of the community.

Within the first group, the probability of answering bail, requires consideration by the court of the following:

- The background and community ties of the person having regard to the nature of his residence, employment and family situation and to his police record, if known; and
- The circumstances in which the offence was committed, the nature and seriousness of the offence, the strength of the evidence against the person and other information relevant to the likelihood of his absconding.

In relation to the second group of criteria, those concerned with the personal interests of the defendant, the Criminal Investigation Bill requires consideration of:

- The period that the person may be obliged to spend in custody if bail is refused and the conditions under which he would be held in custody;
- The needs of the person to be free to prepare for his appearance before the court, to obtain legal advice and for other purposes; and
- The need of the person for physical protection, whether the need arises because he is incapacitated by intoxication, injury or the use of drugs or arises from other causes.

In relation to the third group, concerned with the protection of the community, the Criminal Investigation Bill requires consideration of the likelihood of the person interfering with evidence, intimidating witnesses, or hindering police enquiries.

The detail of the provisions under s.32 of the NSW Bail Act 1978 go beyond those in the Criminal Investigation Bill. Some of the apparent differences would appear to have little substance. For instance, the New South Wales legislation requires consideration, on the question of the probability of the person appearing to answer bail, of 'any previous failure to appear in court pursuant to a bail undertaking' and of 'any specific evidence indicated whether or not it is probable that the person will appear in court'. These matters would

appear to be covered by the provision in the Criminal Investigation Bill of 'other information relevant to the likelihood of his absconding'.

Section 32 of the NSW Bail Act 1978 also makes provision that the court take into consideration a rating obtained in accordance with a prescribed test intended to provide an assessment of the person's background and community ties. The test derived from procedures devised in New York and known as the Manhattan Bail System (Donovan 1981, p. 114). It is understood that the time and expense involved in administering the test was not justified by its utility, and it is apparently no longer being applied or taken into account. One significant difference, however, between the New South Wales legislation and the Criminal Investigation Bail is that under the former the court is required to take into account 'the likelihood that the person will or will not commit an offence while at liberty on bail', but may do so only if satisfied that the person is likely to commit it, satisfied that it is likely to involve violence or otherwise be serious by reason of its likely consequences and satisfied that the likelihood that the person will commit it, together with the likely consequences, outweighs the person's general right to be at liberty. The NSW Bail Review Committee recommended strongly against the 'further offences' test, arguing that it conferred a power of preventive detention. It may be, however, that the present provisions make, or should make, proof of likelihood of committing a further offence on bail, so difficult that it is of little practical importance as one of the criteria to be taken into consideration.

It may also be observed that s.32 of the NSW Bail Act 1978 provides that the matters referred to, and only those matters, should be taken into consideration. There is no similar provision in the Criminal Investigation Bill and this leaves open the question as to whether the court may, in the exercise of its discretion under the provisions of the Bill, take into account factors other than those expressly set out. It may be desirable to avoid this ambiguity by appropriate provision in the legislation.

Conditions of Bail

Although the NSW Bail Act under s.36(1) provides that bail may be granted unconditionally or subject to conditions imposed by instrument in writing, the effect of s.34(1) is that a person is not to be released on bail unless he or she undertakes in writing to appear at such time and place as may be specified. There may be some advantage in conferring a power to grant verbal bail, at least for short periods.

While s.36(2) of the NSW Bail Act 1978 provides that one of the conditions may be 'that the accused person enter into an agreement to observe specified requirements as to his conduct while at liberty on bail, other than financial requirements (whether for the giving of security, the depositing of money, the forfeiture of money or otherwise)' the substantial number of persons in custody awaiting trial suggests strongly that it is the imposition of financial conditions that is preventing such persons from being released. This conclusion is supported by the Australian Institute of Criminology Report, *The Outcomes of Remand in Custody Orders* (Walker 1985) which analysed the results of a survey of almost 1,200 persons Australia-wide whose periods of remand terminated in October and November 1984. The report found that in New South Wales 37.2 per cent of people remanded in custody were so remanded because they were unable to meet their bail conditions. Section 36(2)(b) provides that one of the conditions may be 'that one or more than one acceptable person (other than the accused person) acknowledge that he is acquainted with the accused person and that he regards the accused person as a responsible person who is likely to comply with his bail undertaking'. The only other available conditions under the legislation are in fact conditions which impose financial requirements. A person who is accepted for

the purpose of depositing money or providing security is in a position really very little different from that of a surety in New South Wales prior to the NSW Bail Act, or a surety under the Victorian Act.

The ACT Domestic Violence Ordinance (s.24(2)) makes express provision for a number of specific conditions of conduct that may be attached to a grant of bail. There is, however, very little about them which is novel. They include refraining from contacting or approaching a particular person (usually the alleged victim) and reporting to a police station at specified times or intervals. Those sorts of conditions were commonly imposed upon a person granted bail even before the state Bail Acts and may still be and are imposed under those Acts under the general powers to attach conditions as to the bailed person's conduct. There would appear to be little point in making the legislation as specific as it is under the Domestic Violence Ordinance.

The counterpart provisions in the Victorian Bail Act 1977 retain the requirement of sureties and in that respect are more restrictive. There is, however, provision under s.5(2) that where the court considers that the imposition of 'special conditions' is necessary to secure that the accused appears in accordance with his bail, does not commit an offence whilst on bail, does not endanger the safety and welfare of members of the public, or does not interfere with witnesses or otherwise obstruct the course of justice, the court shall require the accused person to comply with such conditions as the court imposes for all or any of such purposes.

Under s.5(4) the court is given express power to grant bail on condition that the accused undergo medical examination, if necessary at an institution.

Although it was hoped that with the passing of the legislation, financial consideration would be of diminishing importance in the granting of bail and the securing of release in accordance with bail, the results have not been entirely satisfactory. Whether the problem lies in the legislation itself or is due to other causes is a matter for consideration.

Extension of Bail

A small but notable contribution of the bail legislation both in New South Wales and Victoria was that the courts were given the power to extend or continue bail, which avoided the time-consuming processes of lengthy documents having to be re-drawn and executed by the defendant and persons acting as sureties. This did not affect the right of the surety to decline in advance to agree to extensions or to apply for a discharge of the surety obligation.

Under s.10 of the NSW Bail Act 1978, it was provided that where no specific order or direction is made by the court in respect of bail, the court shall be deemed to have dispensed with the requirement for bail. If bail is dispensed with or deemed to have been dispensed with, it appears that the accused has the unconditional, and immediate, right to liberty. Experience suggests that it is not unknown for a court to remand a person already in custody and overlook mentioning that bail has been refused or that bail has been continued on the same terms as previously, when it is perfectly obvious to everybody concerned that such was the court's intention. Such is sometimes the case during the course of a lengthy trial, or where the defendant comes before the court on a number of occasions, or where there are a number of charges and the court overlooks to mention the matter of bail in relation to one or other of them. It may be preferable to provide that where the court makes no mention of bail and where bail has previously been granted, the bail is deemed to be continued on the same terms and conditions as previously. Whether bail should be deemed to have been refused when it was refused previously, is a matter for consideration, as is the question whether the omission to grant or refuse bail on the occasion when a person first comes before a court should be deemed to be a refusal or a dispensing with bail.

Review of Bail Decisions

The NSW Bail Act makes provision for written reasons to be given for the refusal of bail or the imposition of bail conditions. This requires the court to formulate its reasons for reaching a decision in relation to bail and also assists in bringing all relevant matters forward in any fresh application or review, reducing the need for repetition of presentation of evidence and argument. Provision is also made in the NSW Bail Act (Part VI) for review of bail decisions to be by way of re-hearing without the necessity of having to show any error in the decision being reviewed. Apart from review, a prior bail decision may be affirmed or varied or another decision substituted for it. An application for review can be brought about at the request of the accused, a police officer or the Attorney-General. A magistrate has the power to review a prior decision by him or her but, except as provided by regulation, no power to review a bail decision by another magistrate. Whether a magistrate should have the power to review the decision of another magistrate relating to bail may be open to question. It is understood that regulations extending this power of review by magistrates were proposed in New South Wales in order to relieve the load on the Supreme Court of applications there to review bail decisions by magistrates, but the proposal has, apparently, not been put into effect.

The Supreme Court has power to review all bail decisions although a single judge has, in the absence of a Rule of Court, no power to review a bail decision of the Court of Criminal Appeal. What amounts to old supervisory jurisdiction of the Supreme Court thus continues. Consideration often needs to be given also to whether an applicant should be able to make repeated applications for bail in the Supreme Court without a change of circumstances. Repeated applications by unsuccessful applicants for bail in the Supreme Court have been a cause of concern in New South Wales. As the judge refusing bail is required to give reasons for that decision, it may be sufficient to provide that any subsequent application may be dismissed on the ground that no change in circumstances has been shown.

Provision of a right of review would appear to be preferable to the right of appeal provided for in the Victorian Bail Act 1977 which, in addition to providing for the appeal preserves 'any right of application or appeal to the Supreme Court or county court which any person may have apart from the provisions in this section'. Presumably the latter was considered to be necessary because of the restriction of the right of appeal to an applicant who was not represented or who proves new facts or circumstances which have arisen since the decision appealed against. A right of review, as distinct from a right of appeal, would not be so circumscribed.

Abuse of the right to review by unwarranted, repetitive applications, may be avoided by giving the Supreme Court power to order that no further applications for review be made without leave and that such leave be granted only upon proof of change of facts or circumstances.

The present situation regarding the power of the Federal Court of Australia to entertain an appeal against a refusal of bail by the ACT Supreme Court needs to be clarified. There appears to be little point in allowing such appeals even by leave.

Bail Pending Appeal

It was uncertain whether, at common law, there was a truly inherent power to grant bail pending an appeal to a person serving a sentence after conviction. However, such a power came to be regarded as incidental to the powers of the court constituted to determine the appeal. If bail was to be granted to such a person then it was granted only upon proof of special exceptional circumstances sufficient to justify the grant of bail. The principle depends upon the basis that the presumption of innocence applicable to unconvicted persons can no longer be advanced by a convicted person when considering a bail application; (*R v. Hilton* (1986) 7 NSWLR 745 at p. 746 per Street C.J.). However, s.32 of the NSW Bail Act provides a code 'which defines exclusively, exhaustively and with precision the only matters

which may be considered by a court when determining an application for bail, whether the application be made prior to conviction . . . or whether it be made pending the hearing of an appeal against conviction or sentence' (per Hunt J. at p. 751). Hence neither conviction for the offence in respect of which bail is sought nor the imposition of a term of imprisonment consequent to that conviction is relevant except as one of the matters to which regard may be had in considering whether or not the applicant is likely to appear upon the hearing of the appeal. In those circumstances the New South Wales Court of Appeal decided that in the state of the Bail Act as it then was, the previous law was displaced and an applicant for bail pending appeal was not obliged to prove special or exceptional circumstances. Later in 1987 the NSW legislation was amended to provide that when an appeal against conviction or sentence is pending in the Court of Criminal Appeal or an appeal from the Court of Criminal Appeal is pending in the High Court, bail shall not be granted by the Court of Criminal Appeal unless it is established that special or exceptional circumstances exist justifying the grant of bail. It may be observed that as far as appeals from the Court of Criminal Appeal to the High Court are concerned then the legislation brings an application for bail to the Court of Criminal Appeal into line with the situation where the application for bail is made in the High Court (*see Chamberlain v. R* (1983) 46 ALR 608).

The amending legislation was criticised by Brown (1987b) who referred to the 1976 Bail Review Committee recommendation that the presumption in favour of bail apply at all stages in the criminal justice system, including the stage between conviction and the determination of an appeal. The recommendation was rejected and the final position as expressed in the 1986 Act was that although there was no presumption in favour of bail for an appellant, a convicted person who otherwise satisfied the criteria of the Act should be granted bail.

The Victorian Act appears to make no provision at all for bail after conviction. The relevant section (s.4(1)) confers the right to bail upon 'any person accused of an offence and being held in custody'. A person convicted of an offence would not be regarded as a person 'accused of an offence'. (It should also be noted that in restricting the scope of the Act to persons being held in custody, the Victorian Bail Act 1977 is to be contrasted with its New South Wales counterpart under s.15(1) which extends the provisions of the Act to a person 'notwithstanding that he is not in custody'.)

Assuming that the Victorian Act is not a code and does not affect the inherent powers of the Supreme Court, it is presumably the case there that the inherent power of the court is sufficient to grant bail, but the common law principle that bail will be granted after conviction only in exceptional circumstances will be applied (*see Re Kulari* (1978) VR 276).

Miscellaneous Matters

There are several provisions in the NSW and Victorian Bail Acts which should be included in any statutory bail system. They include abolition of the common law power of the surety to arrest the bailed person upon breach or suspended breach of bail conditions or for fear that the bailed person will not attend court as required. At the same time the surety has the right to apply to be discharged from the obligation entered into. Whether a police officer should have the right to arrest the bailed person without warrant for reasons such as those just mentioned deserves consideration: the question is bound up with the right of a police officer or prosecuting authority to apply for revocation of bail or variation of bail conditions.

It is desirable that bail legislation provide that a person refused bail or granted conditional bail be given written notification of the decision and an effective opportunity to contact a lawyer or relative/friend within a reasonable or specified time.

Procedures to enable the enforcement of an undertaking to forfeit money upon failure to honour a bail undertaking should be simplified and clarified. A separate question is the creation of an offence of failing to answer bail or breach conditions of bail. Procedures for

reversing forfeitures and recovering money or property forfeited should also be simplified and clarified.

Developments in the United States

As the ability to raise money bail or surety bail still appears to be the reason why many persons are in custody on remand, recent developments with regard to pre-trial detention and release in the United States may be of interest. Although the systems vary from state to state and as between the state system and the federal system, there have been some cohesive developments in the federal judicial system in the United States with regard to bail.

The early American bail system followed the traditional English practice whereby in order to prevent prolonged detention in primitive gaols, the sheriff released the defendant into the custody of a friend or neighbour who was responsible for ensuring that the defendant would appear at trial (Wanger 1987). In time, however, the system evolved to permit the surety, who was usually a property owner, to forfeit a promised sum of money instead of himself if the defendant failed to appear at trial. Bail, or conditional release, under the surety system was referred to as 'the living gaol' and was considered more secure than turning the defendant over to the sheriff and holding the defendant in crowded and unsafe gaols.

While finding an acceptable personal custodian was easy in the small communities of the early 19th century (the judge would usually know both defendant and the surety) the increasing urbanisation of society during the late 19th and early 20th century made this task more difficult. The system developed whereby commercial bondsmen accepted financial risks for a fee; although the bondsmen may never have met the defendant previously, he was paid the fee by the defendant and was usually indemnified by contract or collateral by the defendant or the defendant's family in exchange for agreeing to forfeit the amount of the bond in the event of the defendant's non-appearance in court. The courts initially welcomed these commercial relationships between bail bondsmen and the defendants, as they prevented over-crowding of gaols and relieved the courts from enquiring into the relationship between the surety and the defendant. The excesses of the system, however, became notorious: a defendant may have no real financial stake in complying with the conditions of bail, and a higher amount of bail did not provide a greater incentive to answer bail. Further, a surety's vouching for a defendant was seen as a testimonial to the defendant's character and reliability (the sort of testimonial that may now be provided under s.36(2)(b) of the NSW Bail Act); a bail bondsman by contrast may prefer taking responsibility for the career criminal because if the suspect pays the money and shows up in court, his continual engagement in crime means that there will be more business for the bail bondsman.

In 1966 the Bail Reform Act revived emphasis on custodial supervision to facilitate safe release. It authorised release on one or more of a number of release conditions, of which a bail bond was only one option. It further provided a presumption in favour of release on personal recognizance and only when the court determined that such a release would not assure the appearance of the accused could further conditions be imposed. The 1966 Act however was seen not to work because the courts did not know enough about the circumstances of the persons accused and were unable to ensure that conditions of bail were met, except in the District of Columbia where a special agency was created with the task of supervising bail conditions for defendants released prior to trial.

In 1974 Congress passed the Speedy Trial Act which, amongst other things, directed the Administrative Office of the US Courts to set up demonstration pre-trial service programs in several specified federal judicial districts. Where this was done there was a significant drop in defendants held in custody. In particular a greater number of drug offenders were released, but failure to appear and arrest for breach of bail conditions rates did not rise.

In 1982 the Pre-Trial Services Act sought to expand pre-trial services in all federal judicial districts, but for the first time required the potential dangerousness of the defendant to be a factor considered for pre-trial enquiry and report. The 1982 Act has been seen as seeking to both maximise the number of defendants on bail and minimise the amount of crime committed by persons on bail (Wanger 1987, p. 329). The objectives are not necessarily consistent and the 1982 Act is not regarded as having achieved success. The chief reason appears to be the variable quality of the pre-trial services agencies, and the overall lack of resources provided for their effective working. The potential cost of effective pre-trial services is, however, believed to be less than that of detention pending trial

The latest development is the 1984 Bail Reform Act which imposes restrictions upon pre-trial detention on the ground of dangerousness. There must be strict compliance with procedural requirements and a finding that no conditions of release can reasonably assure the appearance of the defendant for trial and the safety of the community.

Whilst social considerations and legal traditions in the United States vary tremendously from those in Australia, the United States experience may be of some relevance, in that it has occurred in a climate where the legislative effort has been directed towards avoiding persons being kept in custody pending trial for failure to meet financial conditions of bail. The Australian experience to date seems to be that despite substantial procedural reforms and the freeing up of the conditions which might be imposed by courts when allowing bail, an unacceptable number of persons remain in custody pending trial because they cannot meet the financial conditions of bail. There appears to be very little that can be done in this regard by further legislative amendment, at least beyond what has been done in New South Wales.

The system of pre-trial detention services now being developed in the United States could not be repeated here unless there was substantial injection of government funds, which is not very likely in the present political and economic climate. Furthermore there is the danger that courts may authorise the supervision and control of a defendant on bail to the extent that the person really does become a prisoner in the open community, and this raises civil liberty questions which need to be examined.

Finally, as Brown (1987a) observes it may be that 'the problems lie less in the Act than in police, legal and judicial practices, attitudes and interpretations which have combined to restrict its reformist potential—the reluctance of some magistrates to scrutinise critically police objections to bail and the specific problems of unrepresented defendants being cases in point' (p. 186).

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Distinguishing Meaningful Signals from Background Noise

A DISCUSSION OF THE ACTIVITIES OF THE MEDIA INSOFAR AS THEY IMPACT UPON, AND INFORM THE PUBLIC OF, DECISIONS TO REMAND ACCUSED PERSONS IN CUSTODY

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Overview: The Theoretical Problem

This paper is designed to explore the influence of the media upon the way in which we think about criminal justice issues, and more specifically, the way in which we make bail and remand decisions. It begins with the assumption that no amount of bail 'reform' will change existing discriminatory and unjust practices while there persists a problem with the dissemination of information concerning the operation of bail laws and the conditions of those remanded in custody. At the moment, most of this information emanates from the various media outlets to which we are attuned every day. The public image of how the bail laws operate, then, are fashioned by the transitory stories that fleetingly pass before us when a 'newsworthy' incident occurs. Are the media fairly placing these issues before the public? If not, what are the implications for the law and the administration of our criminal justice system?

We have always assumed that the broadest possible dissemination of knowledge is the key to a well informed citizenry and a foundation of democracy. But the assumption falls into disrepute if the channels of dissemination fall into disrepute. Canadian science media doyen David Suzuki (1987) used the phrase that forms the title of this paper when describing the way in which we consumers of media should attempt to be more discerning about the information which we hear and see. He was speaking of information about science, but his remarks are equally apposite in the legal field. Only when intelligent discernment occurs, he said, will we be in the best position to make decisions about problems which confront us, that is to discern the 'meaningful signals from background noise'.

On legal and political matters, however, because most of us do not read Hansard or listen to parliamentary broadcasts, we rely upon the media for our information. There are no laws, nor conventions nor pressure of any kind which demand that the media provide balanced coverage of events, although most purport to do so. 'Given this freedom to be committed or uncommitted, biased and propagandist, it is clear that the media can be very potent in the political process in Australia.' (Solomon 1984, p. 133). A major difficulty is the concentration of media ownership in very few hands, particularly when the major media owner is an American citizen, for it is highly likely that the editorial policies will follow American justice issues, and favour American solutions. Such a path is highly suspect in the Australian context. 'A real democracy would ensure that control of the print and electronic media did not rest entirely in the hands of those individuals rich enough to purchase them as playthings—who naturally have a vested interest in resisting social change.' (Simon 1988, p. 15).

We are constantly assailed by the media. Only the most diligent can avoid it. But we are not necessarily better informed. The information flies at us. Some of it drifts by us. Some of it sticks, usually that which happens to have struck a responsive chord. So we watch and hear inattentively. Not only that, but there is a real difficulty concerning the selectivity of news before it even reaches our own imperfect selection processes. There is the very old story of the Gods arriving on the top of Mt Olympus to discover another pair of Gods laughing out loud. When asked for the cause of their mirth, the Gods replied, 'We just pushed the glass ball of truth over the brink of the mountain and it shattered into a million pieces. Millions of people have run in to collect the shards, each claiming that they now have all wisdom and truth.' In other words, random sprinkling of news stories is unlikely to convey a true and accurate appraisal of an incident.

Another analogy depicts the 'truth' behind a high and wide wall. The media merely poke holes in that wall at random, revealing little truth, and often distorting it in the process. They determine, for example, which 20 seconds of an entire incident we will see, read of or hear. Indeed, with the growing monopolisation of media interests, we now have to question seriously whether the punching of holes does indeed happen at random. The focus of this paper will be to explore the extent to which the media orchestrate the consciousness of their readers, define 'news' according to their own self-interest, and prioritise their own hidden agenda towards social change or social stagnation. Such agenda items may include, consciously and subconsciously, the building of corporate strength, or the support of the political and legal systems which in turn support the media. In rallying the readers to a particular cause, or bonding the community to a particular viewpoint, the issue becomes one of the potential for social control in the newsroom.

The print media, despite the enormous market of television and radio, according to Robin Handley, remain the most important source of information and ideas. The figures indicate that the number of people who read 'quality' newspapers, that is, ones that are not designed to be a tabloid (while not necessarily criticising the tabloids—they serve their own particular market), is still very high despite the barrage of other forms of far more 'entertaining' media sources, such as television and radio.

These other media forms, in contradistinction to the printed word, have to communicate quickly, fit within absolute time frames, and entertain. The potential for distortion can be just as widespread and just as effective as the printed word, if not more so, because of the way in which editorial practice clips events within twenty seconds, or five minutes, give or take a few commercials. It is not necessarily a deliberate distortion. The mere fact that a piece of news has to be selected and presented within a specific framework, or a specific time slot or in order to meet professional objectives often militates against impartiality and objectivity. In the days leading up to the recent Seoul Olympics, for example, any television observer

would have thought that the entire city was ablaze with anger and violence, because the cameras were turned towards it. Within moments of the broadcasts of the Games themselves, and the selective commentary which accompanied the visual images, an observer would have perceived Seoul as the most peaceful haven in the Far East. It is all subject to the masterful editorial work of the network. There is no doubt that the same phenomenon was enormously significant in shifting public opinion to and from in the Vietnam conflict of the 60s and 70s and is significant today in media presentations of the situation in any politically sensitive arenas such as Nicaragua, South Africa and Israel.

Another example is the impact of one Willie Horton upon the November 1988 USA presidential race. Horton was the black man convicted of murder who, upon release under a Massachusetts prison 'furlough' program supported by Michael Dukakis, raped a white woman. The innuendo, effectively exploited by the George Bush handlers, was that a Dukakis presidency would leave our homicidal rapists and murderers on the streets, to attack citizens on their way to the polling booths. 'All the murderers and rapists and drug-pushers and child molesters in Massachusetts vote for Michael Dukakis' announced the commercial. It was a not-so-subtle 'vote Bush for law and order' campaign. Totally misleading, totally distorted, subliminally racist, yet totally effective. People read it and thus believed that it had to be true. It was the most effective advertisement of the campaign.

What Sort of Reporting are We Talking About?

Some media commentators have isolated certain 'professional imperatives' which appear to play a role in the media's selection and dissemination of information. These imperatives play a definitive role in the definition of 'newsworthy' items. If, for example, the reporting of a matter of social or criminal justice policy goes awry, it is far more likely that the distortion can be traced to one of the factors listed hereunder than because of a breach of, say the journalist's code of ethics.

These factors are expanded from Chibnall's (1977) work.

- *Immediacy*: The reporting of an event often carries with it the innuendo that it erupted out of nowhere. Such a report ignores the often long build-up of events which culminate in the 'newsworthy' item. Within 24 hours the matter is then ignored by the media although they will publish the often predictable responses without necessarily referring back to the original stimulus, although one would think that to be appropriate in the interests of 'balance'.

- *Dramatisation:* To sell the medium, the news must have an impact. One act of violence in an otherwise peaceful crowd will form the centre of the media's attention, and thus present a distorted view of the overall picture.

- *Simplification:* Items are reduced to their lowest common denominator for easy consumer cognizance, and, in the process, a superficial and shallow image of the real event emerges. The complex issues are ignored. To a large extent, this typically involves showing that the root cause of the ill is not the system itself but an individual in that system.

- *Stereotyping and pre-judging:* Participants are reduced to images created by the stereotype into which they are cast. Orthodoxy is the safe approach to take and therefore the rule.

- *Titillation:* Images are created in the media in a way which will pander to the more salacious and prurient minds of the consumer. This approach, too, relies upon, and is a sop to, conventional prejudices.

- *Structured access:* When the media retain a panel of 'experts' on a given topic, it gives the impression of credibility and objectivity. Too often, however, particularly where 'official spokespersons' are asked to contribute, there is too often the danger of uncritical acceptance. The limitations of the questions are rarely addressed. The questioner sets the agenda. The experts must confine their remarks to the questions posed, and the limitations of the time in which they have agreed to operate.

- *Misdirected social criticism:* Editorial selectors gain mileage by portraying certain people as reaping unjust rewards while the rest of us toil and sweat for little recognition. It is an image that can be repeatedly and successfully exploited by media, because they know that everyone harbours some resentment of any other person who appears to be getting a better deal. It uses the criminal justice system as a scapegoat for more profound social injustices, which the media do not want to tackle. An example would be the blaming of the prison system for allowing a person parole when that person commits other offences. No attempt is made to address the numerous other factors which may have influenced the person's anti-social behaviour, and the role of law enforcement and justice agencies which dealt with him or her previously and subsequently.

- *Plebeian editorial policy:* The appeal to the conservative in all of us. We assume that consumers prefer orthodoxy to bold new initiatives. The particular views of the media proprietor are of importance in this regard.

Does this Style of Reporting exist in the Australian Setting?

Ask any journalists why they report issues and they will say that it is part of the relentless drive of the free press to bring to us factual information which impacts upon our daily lives without fear, favour or partisan influence. But that type of stock response avoids the real questions. Does the Australian press take the view, for example, when reporting crime issues, that they have a duty to alert us to the dangers of crime, or to make the community stronger in its joint endeavours to bind us all together against crime? Those are the standard responses, but there are two factors which make a cynical observer somewhat uneasy about this approach.

The first is that we are relying, for factual information, upon persons untrained in the sensitive issues of criminology and criminal justice, untrained in the art of interpreting criminal statistics, and untrained in the ability to question certain theories and perspectives. The second factor is the ubiquitous issue of profits. Crime and punishment issues guarantee readership. People respond to outrage by purchasing the newspaper or watching the television news. Outrage sells newspapers and lifts television and radio ratings. The more outrage that the media can stir up, the more customers will come to the media marketplace.

Furthermore, it is not an appropriate response to assert glibly that the media are merely reflecting and representing public attitudes, particularly if the media have had a direct role to play in the shaping of those attitudes in the first place. Consider the letters columns of newspapers. Editors regularly publish letters from self-appointed spokespersons of the citizenry who typically head their letters with the pretentious 'We, the public . . .' usually expressing their condemnation of criminal justice policy. Unchallenged, the letter then becomes a pseudo-editorial. In the words of Stuart Hall, the media are airing:

> the social interpretations of the indicators they produce . . . [whereupon] the press assumes the public voice and, by incorporating the administratively 'neutral' accounts into more fulsome and vigorous accounts and explanations of its own, calls in the name of the nation for measures of constraint and control, frequently bringing in another distinguished spokesman from some other area, who reads the social signs in the same way just to close the circle (Hall 1976, p. 234).

Does the Suspect Style of Reporting exist in the Context of Bail, and, if so, What are its Manifestations?

It would be tempting to continue this paper on the subject of media and criminal justice reporting generally. But the emphasis that follows places the above thoughts in the context of bail, although I do return to the wider issues in due course. On matters of remand decisions, and using some examples from the Australian print media, it is possible to see some examples of the above 'imperatives' emerge.

- *Immediacy:* Issues of bail appear often, to the public, to arise from nowhere, usually in circumstances where there is an immediate fear that a named person, who is likely to be a danger to the public, has been granted bail, either pending hearing, pending appeal or pending sentence. In that immediate public debate, little is made of research that indicates that delays within the criminal justice system have reached unacceptable and unjust levels, that the conditions under which remand prisoners are held are often so crowded or inappropriate as to be unacceptable, that caprice, inconsistency, discrimination and socioeconomic prejudice rather than the presumption of innocence are the hallmarks of bail 'policy' or that an unacceptable number of persons on remand in custody for months on end finally receive non-custodial sentences. (*See* for example, SA Office of Crime Statistics 1986)

- *Dramatisation:* A huge headline in the *Melbourne Sun* of 30 July 1988 proclaimed, 'ARMS CASE: KILLER BAILED'. The report of the *Sun* was quite factual. The accused, it stated, was facing numerous charges arising out of a foiled armed hold-up, and a car chase that followed. He was granted bail on the strength of his counsel's submission that on a previous charge of manslaughter (resulting in a series of hung juries) he had answered bail through seventy days of Supreme Court trials. The accused had made no admissions in the current matter, and has suffered serious injuries in the car crash which ended the incident. The article was quite balanced. The headline was not. The 'killer' tag, a dramatic yet most unfortunate eye-catching title, arose out of the fact that the accused had been convicted of murder at age 16, 23 years earlier, for which he had served 20 years in custody. It was hardly appropriate in the circumstances of the case. It did not serve the interests of greater public understanding of the intricacies and difficulties of the bail process.

- *Simplification:* Nothing could be simpler than the 2 October 1988 *Sunday Press* (Melbourne) headline, 'ON BAIL, ON HOLIDAY'. The story followed the granting of altered bail conditions to a man accused of drug trafficking. The court allowed the man to take a holiday in the USA rather than report daily to the police. Nothing in the report put the case for the alleged dealer, nor were any of the accompanying remarks of the magistrate who granted the request mentioned. Nor was there any mention made of the fact that the case had been adjourned for four months. The report did not say how long the man had been on bail already. It was a shallow and superficial report. The report portrayed the villain in all of this to be the accused trafficker. Nowhere did the report place any

blame at the feet of the system that perpetuated inordinately lengthy remand periods and allowed this person, still presumed innocent, of course, to languish in uncertainty for months prior to trial.

Furthermore, in Adelaide, our own *News* provides an example of its contribution to misunderstanding. 'ALARM OVER HOLD-UPS BY MEN ON BAIL' was the headline for an article on 18 July 1988. Twelve hold-ups in two years, it appears, have been linked to six men while they were on bail. The Opposition spokesman on correctional services, Mr Becker, is quoted as saying; 'I am livid to think anyone who appears in court on armed hold-up charges can get bail . . . It should be mandatory for them to be kept in custody. When police oppose bail it is because they know these people will re-offend. Their intuition has been proved right time and time again. It's time they were listened to.' But where are the figures on the numbers of successful bail candidates? Where is the discussion of the full range of issues that ought to accompany such a limited report? Where is the evidence that the police prosecutor's allegedly successful and infallible 'intuition' would be the steady foundation of a general policy on bail? Furthermore, the rather dramatic and ill-considered pronouncements of Mr Becker have been given undue and undeserved prominence.

- *Stereotyping and pre-judging:* The *Sydney Daily Telegraph* headline: 'BIKIES ON SEX CHARGES GO FREE' (1 August 1988) provides a good example of the way in which the media re-reinforces stereotypical images. The men, who were all members of a motorcycle club, were facing charges of sexual assault. They were released on cash bail of $36,000 and ordered to appear three weeks hence. There appears little doubt that the intended effect of the story was to polarise public opinion against these men by citing the three things that typically arouse suspicion, fear and anger in the minds of the reader community: motorcycle 'gangs', sex, and the appearance of certain undeserving members of society unjustly 'getting away with it'.

- *Titillation:* What could be more salacious and therefore (sadly) appealing to the buying public (and therefore sales and advertising contracts) than a headline 'Bikies on sex charges go free'?

- *Structured access:* An article in the *Melbourne Sun* of 1 July 1988 provides an example of the way in which reporting of an expert's finding can give a somewhat misleading picture. The article was headed 'ROBBERS 'HIT' IN BAIL TIME' and provided a plethora of statistics tending to the view that the granting of bail means greater hold-up numbers and increased cause for alarm for society generally. Closer reading of the paper's report of a study by academic Dr Andros Kapardis reveals he had provided qualifications to, and acknowledged limitations upon, his 'pilot survey'. It stated his ultimate conclusion that 'drugs [are] the most important cause of armed robbers of financial institutions'. The key issue involved in the study was the treatment and punishment of drug offenders. The bail issue was, then, peripheral, and the findings of the 'expert' thus did not necessarily bear out the strength of the headline. The fact of the matter is that although a high number of armed robbers in Victoria were on bail at the time (44 per cent according to Dr Kapardis) this figure represents only those people arrested, and persons on bail are the easiest suspects to track down.

- *Misdirected social criticism:* A brief sentence or two in a report (Sydney *Sun Herald*, 10 April 1988) of a grant of bail in London illustrates this point. What are we to think of bail, the paper appears to be alleging, when a wealthy

stockbroker facing fraud charges has 'returned to his prestigious London job' . . . and '. . . was driven back to work in a dark blue limousine' after having had his bail paid. The innuendo is obvious. What sort of criminal justice system do we have, the paper is asking, when it can allow these forms of injustice to exist? The law is an ass. Unfortunately the criticism is misplaced. The bail provisions are being made the scapegoat for the socioeconomic inequality that exists in our communities. They ought to be addressed first.

- *Plebeian editorial policy:* The Sydney *Sun Herald*, in its editorials of 14 February 1988, 'TIGHTEN THE RIGHT TO BAIL' and 3 April 1988, 'END THE BAIL FARCE' had complained that the NSW *Bail Act* (1985) was badly in need of reform for being too lax, that is, too many undeserving felons were being released on bail. Notwithstanding the evidence that only a small percentage of subscribers ever read editorials, and thus are unlikely to be influenced by them, such editorials do tend to re-reinforce one's suspicions of the manner in which bail issues are being reported and debated when the editorial writer, having cited examples of bail failures, comments: 'When crooks make a laughing stock of bail conditions it is outrageous because it damages the morale of police officers and harms the judiciary and magistrate system' (3 April). The *Sun Herald* is asking its readers to follow it down the path of the fallacy of composition, that is, to take three examples and apply them to make generalisations about the situation as a whole. 'Something appears to have gone dreadfully wrong in the bail procedures [in NSW]. Too many defendants seem to be walking the streets on bail after being charged with serious criminal offences. And they are committing fresh crimes or simply vanishing. Public concern is being fed by widely circulating reports that members of the criminal fraternity are able to commit bail rorts by retaining certain lawyers who in turn make applications in carefully selected courts. In our opinion no alleged rapist should be freed, nor should any person with a record of criminal violence—unless police advice is to the contrary.' (14 February). The reasons behind such editorials are unclear. What is clear is that the community is galvanised against any issue that smacks of a departure from the conservative status quo, and suspicious and fearful of any person charged with a criminal offence.

Of course, there are other stories and editorials which present a more balanced view of this very difficult area. Kathryn Whitfield's INNOCENT AT LAW BUT IN JAIL IN FACT' (a report on the Belconnen Remand Centre dated 3 September 1988 in *The Canberra Times*) is a good example. Furthermore *The Age* editorial of 9 April 1988, 'CASE TO END BAIL DISCRIMINATION' proved to be a worthy summary of the issues that had arisen out of the Victorian Law Reform Commission's discussion paper released two days earlier by Commissioner Dr David Neal. The editorial concluded:

> For reasons of community concern, the government would be wise to proceed cautiously if the commission formally recommends a change in the *Bail Act*, but there do seem to be reasonable grounds for removing the present discrimination. Meanwhile it must do its utmost to speed up the creaking wheels of justice and improve the conditions or remand, which are so bad that some judges have begun to grant bail to people who, on the prescribed criteria, ought not to be let loose before trial.

Unfortunately these more balanced views are all too rare.

Is there any Suggestion that this identified Style of Reporting has an Effect upon the Public, Politicians and Bail Authorities?

Of course, this is a difficult question to answer. To what extent does the media's treatment of a subject influence the public's response? To what extent do expressions of outrage influence politicians, and to what extent does the media treatment of an issue effect bail authorities in their deliberations over remand issues? One suspects, as is the case with much psycho-social scientific research, that we'll never know. Not only are the scientific surveys which have been carried out flawed by their inevitable failure to reconstruct the real world, and not only are there dozens of permutations and a multiplicity of factors involved, but there is a grave reluctance of some judicial officials to participate in such social science research. While some attempts have been made to gauge the public's view on matters legal in a scientific forum, such research is necessarily artificial and can never test every nuance of thought of every member of the public or every bail authority, who may or may not, of course, be the 'typical' model (*see* for example, Doob 1976).

However, in a seminal work, John Hogarth (1971) set about attempting to determine what it was about certain socioeconomic processes that influenced the sentencing process. Sentencers are reluctant to reveal their thought processes, he determined. For what it was worth, he isolated certain factors which may have a bearing upon judicial matters: the beliefs and attitudes of sentencers, their loyalties; the legal and structural confines, social constraints, public opinion, media opinion, submissions of counsel, patterns of crime (perceptions), availability of secure accommodation, the facts of the case, and the personality of the accused. (The same sorts of conclusions might hold for bail authorities.) But we have not come very far since then.

A conclusion that an observer could draw is that while there is no actual pronouncement by bail authorities that their decisions are so influenced, it is always arguable that there is some impact upon them by the media persuasion or 'outrage', if not personally, certainly by their response to the public pressure. The psychological suspicion would be that bail authorities are not totally oblivious to media and public pressure, and are just as irrational and subjective as the rest of us, despite their protestations to the contrary. The concept of the judge being purely apolitical and impartial is not only illogical, but at best purely a romantic notion.

A suspicion that that is the case arises out of the perceived failure of the South Australian legislation to achieve its full range of objectives. The Bail Act 1985 grants a presumption in favour of bail and although bail decisions are underpinned by the presumption of innocence, a paradox emerges, for the numbers of remand prisoners in SA, after the legislation came into force, actually rose to their pre-1985 high after the initial downturn which followed the publicity of the new guidelines. There is not an attempt in this paper to find conclusively a causal link between the level of media reporting and the rise in remand numbers. Indeed, there is probably more truth in the assertion that administrative problems undermine and subvert the effectiveness of the legislation. This is possibly because the bail determination is not one that demands more than 'a fleeting and impressionistic consideration rather than a properly systematic one' (ALRC 1975, para 180) or because our judicial authorities do not understand or properly use the legislation. By the same token, it is clear that the style of reporting of bail issues, and criminal justice issues generally, should have some bearing upon the paradox which can be seen in the figures.

But I have little doubt that it is possible, although I put it no higher than that, in the absence of statistical evidence, that the style of reporting of bail issues, and criminal justice issues generally and the prejudices that flow therefrom would not have an insignificant bearing upon the paradox which can be seen in the figures.

This is not to imply, however, that the above is the only conclusion one can draw. There are studies which indicate that media consumers, bail authorities and the public alike, are discriminating in their reading and viewing where issues of crime and criminal justice are presented.

> [T]here is little evidence to suggest that [media bias] is very influential on public perceptions of, and opinions about, these phenomena . . . [for such a view] grossly underestimates the abilities of the recipients to differentiate and interpret the information they receive. Not only do they not confuse media fiction with reality but nor . . . do they take media presentations of real events to be necessarily representative of reality (Roshier 1973, p. 39).

It is of concern, however, that we cannot be discriminating when we are not aware of other possible interpretations. Nor are we all equally gullible.

What are the Implications of these Effects?

Be that as it may, it is possible to suggest ways in which bail authorities, in their deliberations in the exercise of their discretion granted to them by the legislation, may be influenced by the media's 'hype', or the 'outrage' of the public. Listed below are some tangible examples:

(a) Judicial notice of likely bail absconders

It is not inconceivable that the bail authority may take 'judicial notice' of matters upon which they have formed personal views, shaped and clouded by media reports of the issue. Atkinson J in *R v. Phillips* commented that '[m]agistrates who release on bail young housebreakers [should] know that in 19 cases out of 20 it is a mistake.' Any time bail authorities or sentences use the not uncommon phrases, 'there's too much of this sort of thing going on', or 'it's likely that a person who has no ties in this State will abscond', they are taking judicial notice of a phenomenon more than likely fed to them by media or public pressure or both. It is not impossible to think of other covert prejudices of bail authorities manifesting themselves in bail decisions. Prejudicial views harboured by bail authorities, and fanned by media reporting, may give rise to the (unexpressed) view that Aboriginal accused persons, for example are unlikely to meet bail, or that defendants of other ethnic origins are more likely than not to attempt to tamper with evidence, become excitable or seek revenge.

(b) Attitudes to ultimate sentencing

The 'short, sharp shock' approach to punishment is rife in our judicial sentencing practices. Doubtless in the minds of many judicial officers, the idea that a night or five in the remand centre might just be the impetus for the person concerned to turn to the straight and narrow is not uncommon, notwithstanding the fact that, (and perhaps precisely because) there is little chance that the ultimate sanction will be a custodial one. (Only 4 of 90 remanded prisoners in the South Australian Office of Crime Statistics Study (1986) eventually received prison sentences.)

> The ['taste of prison'] practice is an improper use of sentence remands, a direct threat to the jobs of defendants who are not sentenced to imprisonment, and an unnecessary burden on the prison system. Moreover, for those who suggest that custodial sentence remands improve the deterrent effect of suspended sentences, it should be pointed out that research conducted by the SA Department of Correctional Services has shown not only that the suggestion is unfounded but also that defendants remanded in custody prior to receiving a suspended sentence are more likely to be imprisoned subsequent to receiving the suspended sentence than those with no experience of imprisonment before receiving the suspended sentence (Cole 1980, pp. 108-9).

It would not be inconceivable that, in some circumstances, bail authorities refuse bail to suit their own purposes or salve their consciences in light of a media or public campaign knowing that a higher appeal court will overturn the decision in any event. By contrast, the Australian Law Reform Commission (1975) expressly opposes this form of punishment.

(c) The possibilities of mistake

Any research designed to elicit overt bail authority prejudice is doomed to failure. The suggested effect upon bail authorities described above is hardly a conscious prejudice manifesting itself openly. It has a more subtle effect. It is the fear of making a mistake which causes bail authorities to go into 'conservative' drive. A bail matter which is out of the ordinary causes the bail authority to be immediately uneasy. A mistake in favour of the public receives minor condemnation from the relatives of the accused. A mistake in favour of the accused releases universal condemnation and disapprobation by the press and the electronic media.

There may even be a newsreel of the 'offending' magistrate walking from the court. Faced with that alternative, who would react otherwise, especially with a press hungry for a sensational story?

Journalism, Autonomy and Conspiracy Theories

I have avoided to date any detailed discussion of the conundrum which clearly rears its head whenever the power of the media is under scrutiny. How can there be any danger for the consumers of media when there is a free and autonomous press? The answer is twofold. Firstly it is necessary to reiterate the statement that bias emerges merely from the fact of reporting alone. Secondly, and perhaps more importantly, it must be stated that although there are fine examples of firebrand journalism scattered throughout the Western world (witness the style, zeal and depth of investigative reporting which brought about the Watergate hearings or the Fitzgerald Enquiry), for the most part we, in Australia, have come to accept media mediocrity. Mediocrity, in turn, finds willing accomplices in compliant journalism. There is no intended conspiracy. It is an innocent conspiracy, but a conspiracy nonetheless. On this subject, however, there are few substantive findings. There is no empirical evidence. But there are working hypotheses worth exploring. I do not want to labour this point, other than to quote from Graham Murdock's thoughts on the subject of press 'autonomy'.

It is all too easy to look for a conspiracy. Certainly newspapers are enmeshed in the present economic and political system both directly through interlocking directorships and reciprocal shareholdings, and indirectly through their dependence upon advertising. They therefore have a vested interest in the stability and continuing existence of the present system. However, the links between this general framework and the day-to-day business of gathering and processing news material are oblique rather than direct. Journalists, in fact, explicitly define themselves in terms of their autonomy, and independence of vested political and economic interests, and stress the role of the press as the tribune of the people. Neither is this argument entirely without foundation. Newspapers frequently do expose corruption, graft and miscalculation among the powerful and rich. Nevertheless, despite this element of autonomy, the basic definition of the situation which underpins the news reporting of political events, very largely *coincides* with the definition provided by the legitimated power holders. In order to explain how this coincidence comes about it is necessary to examine the process through which events come to be selected for presentation as 'news' and the assumptions on which this process rests.' (his emphasis) (Murdock 1973, p. 158).

Stanley Cohen has written widely on this subject, explaining that media manipulation (towards a preservation of the status quo) occurs in a milieu where news is required to be

created, and is manufactured by 'the selective and inferential structure of the news-making process' (Cohen 1973, p. 239) in which the media are willing accomplices notwithstanding that they purport to adjudicate between competing definitions of the situation. In the final analysis there is little public pressure upon political and economic power elites to change the social agenda, indeed there is an amplification effect which further aligns the media consumers with the formal agents of social control.

What is the Appropriate Response?

Listed below are a number of ways in which the problems addressed in this paper may be alleviated.

- Alerting the public to the dangers of an unswerving allegiance to the information contained in media sources. The public ought to be better informed, to be sceptical of media 'beat-ups', and to look behind the news for hidden agendas. We must better equip our society to distinguish meaningful signals from background noise. It behoves us to be more discriminating with what we see, hear and read. We should recognise that the 'domination of banner headline news in the press, and the thirty-minute blockbuster news bulletin in television has worn out its usefulness (Smith 1978, p. 139).

- Alerting the public to the dangers of a concentration of media ownership in the hands of a few, because there is more likelihood of media distortion where there is a lack of alternatives. Such is the case today in Australia. The fact that the largest proprietor in Australia, Rupert Murdoch, is an American citizen should give great cause for concern if not alarm. The federal government ought to have the temerity to stand up to media proprietors and regard Australian citizenship as a prerequisite to media ownership in Australia. For the entire period of the Murdoch power grab, the federal government has remained docile and sycophantic, and ignored its responsibilities under, inter alia, section 50 of the *Trade Practices Act 1974* (Cwlth).

- Pressing for a continuing legal education program designed to alert the bail authorities to the working of the various pieces of legislation impacting upon bail and remand decisions in Australia, and the possibility of their learning more about the sentencing and bail processes. There is a Judicial Commission in NSW designed for that very purpose. The instruction of judges and magistrates on criminological matters should be an integral part of their continuing education. This may have the effect of reducing the incidence of misinformed 'judicial notice', judicial prejudice, the 'short sharp shock' policy of punishment, and the more subtle effects of falling victim to the risks of mistake. Informed public awareness of that on-going judicial training program should be a high priority. Of course such training would be valuable also for lawyers, police and remand staff alike, tackling difficult issues such as electronic bracelets and the net-widening effect of certain 'reform' initiatives.

- Pressing for a continuing legal education for journalists, concentrating on criminology, the sociology of the production of news, and the way in which social science impacts upon the law. This may have the effect of reducing the incidence of simplification, dramatisation and titillation of the sensitive matters of justice in our communities. Instead, stories would emerge which would describe, debate and explain the difficult questions associated with justice policy, for example, the

values and dangers of risk-taking in bail matters. In short, journalists should be challenged to view their role as one of encouraging meaningful and popular participation by the community in justice issues, rather than one which emphasises their role as lackeys pandering to the voices of vested interests. Of course, that is not as easy as it sounds, for challenging the power entities in society carries with it the potential to lose access to information, authoritative sources and political kudos (Rubin 1977, p. 101).

- Initiating open forums such as those presented by the Australian Institute of Criminology and the discussion papers and reports of the Law Reform Commissions at State and Federal level. These serve a function in alerting the public to the issues and serving to stimulate the discussion of issues of legal theory and criminal justice policy, and therefore ought to be encouraged. A pressing need in such an agenda is to pursue the themes of the sociological theorists mentioned above, themes which appear to have become lost in the current wave of New Right economic thinking and social policy. These forums ought to focus upon the way in which society's self-appointed moral guardians and the media work to reinforce each other 'to promote a tightening circle of social control, a solidifying of the traditionalist world view, a moral back lash and populist crusades—all in the form of an escalating moral panic . . .' (Hall 1976, p. 236).

- Giving greater attention to the role of the Australian Press Council in providing regulation of media excesses. At the moment the Press Council has no disciplinary power. There is no requirement that media interests be members. Notably, for example, the Murdoch News Corporation resigned in 1980, claiming that the Press Council had attempted to gain too much control. There is a growing disquiet about the current emphasis upon regulation by persuasion, and there has been a call for greater reliance upon the use of coercion and penalty to curb media improprieties.

- Giving further thought to the question of reducing the publication of bail matters by the wider use of suppression orders. Indeed there are specific legislative provisions specifically restricting the reporting of bail matters in Queensland and Tasmania.

Conclusion

The production and dissemination of media information involves selection and interpretation of news. The power of the media comes from their ability to select what information is going to become news and what is not, the latter material falling well away from the public purview. How well the media perform their role of information transcribes is certainly open to question. Some forms of media do it better than others. Some proprietors do it better than others, and the fewer proprietors there are, of course, the less the chance that competition will force standards and responsibilities higher. The current concentration of media ownership in Australia encourages many journalists to pander to the political prejudices of their masters.

On criminal justice issues, and the issue of bail, there is an added dimension and an added danger of sensationalism at the hands of the media. I have identified some of the ways in which the power of the popular media has been misguided on some of the issues, and created unnecessary fear and outrage in their consumers. Whether or not that outrage has an effect upon the public and hence upon bail authorities is a matter of conjecture, and the evidence is anecdotal.

I have avoided the temptation, however, of concluding that poor media performances necessarily lead to bad justice policy and implementation. I have therefore avoided the temptation to place the blame for the perpetration of wrongs and distortions squarely at the feet of the media. But unless they can act to alert us to the trends, dangers and warning signs which appear from time to time to frustrate the objectives of legitimate legal and social reform, then they are failing in their duty. 'The mass media have a profound responsibility: they must be sensitive and responsive to social problems while endeavouring to avoid creating problems themselves'. (Rubin 1977, viii)

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Case

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To Bail or not to Bail–A Police Perspective[1]

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The purpose of this paper is to raise your awareness of some serious shortcomings which exist in relation to the question of bail in Canberra. In addition it is proposed that the ease with which offenders are granted bail is perceived by police as a contributor to the crime problem itself.

It is not my intention to denigrate the criminal justice system of the Australian Capital Territory. In fact the liaison between police and the courts is excellent. There are frequent discussions held between the magistrates, court staff, the office of the Director of Public Prosecutions and the legal profession to consider problems and develop improved procedures. However, the examples which are quoted later in this paper are documented from police records and are factual.

Without delving into statistics, it is sufficient to say that the rate of serious crime in the Australian Capital Territory is not decreasing. It is the firm opinion of police that a considerable number of serious criminal offences can be traced in some degree to the presence of drugs in the community and the need for users to obtain funds to support their individual habits.

There is also the view within the police that a disproportionate volume of the crime in the Australian Capital Territory is committed by persons already charged with serious offences who are free on bail, despite the fact that their propensity to continue to offend was evident when bail was granted. The knowledge that such persons are admitted to bail time after time, even after failing to answer previous undertakings, does nothing to assuage the feeling of police that the criminal has the inside running. While hard statistics are difficult to produce, such assertions can only be said to be 'gut feelings'. The four case histories included in this paper, however, support these assumptions.

To set the scene for the ensuing discussions it will be useful to outline briefly the law in relation to bail and the facilities for containing remand prisoners within the Australian Capital Territory.

Pending the introduction of the long awaited Bail Ordinance (now expected early next year) there are no general statutory guidelines governing the admission to bail of persons arrested in the Australian Capital Territory. The general principle is that of the common law

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1. The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the AFP.

- the likelihood, all things taken into consideration, that the person concerned will, if granted bail, appear before the court to answer the charge.

When it comes to the consideration of whether a person before the court should be admitted to bail, it is realistic to expect that the court will be aware of the available facilities to contain that person should bail be refused. There is only one adult remand centre in the Australian Capital Territory and no prison. By gazettal, the cells at some police stations may be utilised, but lack of facilities precludes this as a long ten-n option. The remand centre can only accommodate 25 males and 3 females. At present it is almost at full capacity.

Quite clearly the lack of facilities to hold a great many remand prisoners must impact upon the mind of the court when considering bail. Furthermore, I should also point out that the courts of the Australian Capital Territory are finding it difficult to cope with an ever increasing workload and this in itself means that it is currently taking well in excess of nine months for even minor defended matters to be heard. Committal matters face similar delays.

On the credit side, the time between committal and trial of persons in custody is a little over three months. Nevertheless, if the committal delay is added to the time between committal and trial, a person refused bail can expect to spend over twelve months under incarceration. Some may say that this compares more than favourably with other jurisdictions, however it is the police view that the knowledge of such delays must also influence the granting of bail.

As the Australian Capital Territory is surrounded by New South Wales, a bail absconder arrested after travelling only a few kilometres interstate must be extradited back to face the Court in the ACT. Yet another administrative hurdle to impinge upon the scarce resources of the Police and court systems.

The police in the Australian Capital Territory do not themselves prosecute case before the courts. The legal Services Branch of the Australian federal Police submits all briefs of evidence to the Office of the Deputy Director of Public Prosecutions and legal officers from that office appear in court. The police therefore rely heavily upon those officers to place the factual situation in relation to the granting of bail before the court. Advice from the prosecutors is that they do place all available facts before the court, however in the vast majority of cases bail is granted. Investigating police are sometimes remiss in not providing comprehensive particulars as to why they consider an accused should not be bailed. It must also be acknowledged that in some serious cases where bail is refused in the lower court an application to the Supreme Court is usually successful in having the decision reversed.

It is acknowledged that the deprivation of liberty of any individual is probably the most serious sanction, apart from capital punishment that a court can impose on any human being. However, somewhere between the total deprivation of liberty of all criminal offenders and the situation which now exists in the Australian Capital Territory, there must be a compromise which better accommodates the obligations of the prosecution, the rights of the accused and the well-being of the public in general.

After this fairly pragmatic and simplistic view of the whole problem of bail in the Australian Capital Territory, it is now time to turn to the promised examples which have been extracted from the many similar cases and which clearly indicate the reluctance of the courts to refuse bail to persistent offenders.

Offender 1

Between November 1985 and April 1988 this person was arrested eight times for offences ranging from offensive behaviour to the use/posse Of drugs. He also had some fourteen offences which related directly to the illegal use of motor vehicles.

Over the three year period of study this offender was never refused bail, irrespective of the fact that on each occasion when arrested it was for offences committed whilst he was on bail. He was also released on bail on one occasion after being arrested for breaching earlier bail conditions.

Offender 2

Between January 1985 and February 1988 this offender was arrested four times including twice for breach of bail conditions. it is clear from the number of offences with which he has been charged that he continued his unlawful activities with impunity whilst enjoying the privilege of bail.

Eventually, in September 1987 he again failed to answer bail and two months later was arrested in Queensland from whence he was eventually extradited to the Australian Capital Territory. After being remanded in custody several times, he was again allowed bail in his own recognizance to appear again in October this year.

He did not turn up in October for good reason. Whilst on bail from the Australian Capital Territory he journeyed to New South Wales where his good fortune ran out. He is expected to be released from a New South Wales prison in August 1989.

Offender 3

This Offender since being released from gaol after serving time for offences including armed robbery, has been bailed a total of seven further times and is presently free on bail to appear in Court on 2 February 1989 to answer multiple fraud offences. He has breached his bail conditions six times and then arrested on warrant. On most occasions he was immediately bailed again and on the occasions when he was remanded in custody it was only a few days before he was again bailed. During this period he also underwent a further Prison sentence.

Offender 4

Another example of an offender who, since 1986 has continued to commit serious crime whilst on bail or on a bond to be of good behaviour. It is pleasing to note that on being arrested on warrant for breach of bail in March 1988 this person was remanded in custody until his matters were solved later that month.

Let me Provide a further incident to impress upon you the reason why Police feel a deal of concern about the whole issue of bail. Within the suburban area covered by the Woden Police Station car thefts were usually very frequent. Recently one, of the constant offenders was arrested and remanded in custody for a period of some six weeks. In that period the

incidence of car theft in the area all but ceased. However, two other car thieves recently appeared before the court having been arrested for multiple offences. Despite the fact that both persons were already on bail for similar offences they were again released. Needless to say, the incidence of car thefts has not
this time slackened off. In fact, one of those offenders had been arrested three times within five weeks and on each occasion had received bail from the court.

To conclude on a lighter, if still serious note, there have been two recent incidents where separate offenders have stolen a vehicle in order to attend court to answer charges of car theft, and upon being bailed, stolen vehicles on two occasions to drive home from the court. It would appear that this might be an indictment of the efficiency of Canberra's public transport system!

There do not appear to be any immediate solutions to the problems illustrated in this paper. Incarceration of every accused pending disposition of the charges preferred against him is not an acceptable solution. Nor, of course is the totally frustrating system which presently exists within the Australian Capital Territory. Hopefully, this Conference might produce some appropriate solutions to this delicate problem.

The Police (Prosecutors') Perspectives on Bail

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This paper is presented from the perspective of a police prosecutor of 18 years' experience. From that position, far from seeing that too many persons are remanded in custody, it seems custodial remands are invoked too infrequently. Unfortunately though there is a lack of reliable statistics upon which any conclusions can be based. The Correctional Services Department can provide figures for persons placed into custody, but these include defendants granted bail but unable, at that time, to meet the requirements.

It is necessary also to have available total numbers of persons appearing before courts in the various jurisdictions charged with criminal offences; statistics available from both the Courts Services Department and the Police Department. To arrive at any firm conclusion, it is necessary to go further and examine the reasons for refusal of bail on each occasion.

Procedures

The very first task of the police prosecutor each morning is to collect the briefs for the 'overnight arrests', process them, determine the appropriate charge(s), if any, and lay the complaint/information before a justice. Part of the process involves ascertaining the situation regarding bail and, where it has not been granted, determining the prosecution attitude should bail be applied for at court.

The *Bail Act 1985* (SA) provides a comprehensive code for the grant and refusal of bail. It also provides for the first time in this state a statutory right to bail.

It creates a member of the police force as a bail authority with the same responsibilities and authority in a determination of bail as a justice or a court (except to take evidence on oath). Previously, a police officer's duty was to grant or refuse 'police bail' to ensure the apprehended persons appearance before court; thereafter the question of bail was the responsibility of the court.

The procedures under the *Summary Offences Act 1953* (since repealed) placed no statutory fetters upon the exercise of that discretion to grant or refuse bail. Accordingly, it is understandable (and acknowledged) that in doubtful cases the tendency was to 'err on the side of caution' and leave it for the court to decide.

Such a situation is no longer possible; if a member of the police force determines not to grant bail, that decision must be justified in writing and is subject to the apprehended person's right to apply to a justice for bail or to seek a review of the decision to refuse bail

by a magistrate (by telephone if the person will not appear before court on the day following arrest).

The Act also gives the prosecuting authority the right for the first time to seek a review of a decision to grant bail.

Where a defendant is in custody (either because bail has not been applied for or has been refused) the prosecutor must be prepared for an application for bail to be made to the court, and must assume that it may be granted. As well as determining whether the application is to be opposed, the prosecution attitude if bail is granted must be established as the Act requires an 'immediate indication' if a review is to be sought.

At the direction of the Attorney-General and as a means of formalising and standardising procedures in respect of bail reviews, very stringent guidelines, agreed to by the Deputy Commissioner of Police and the Crown Solicitor's Office, have been adopted as Prosecution Services Policy no. 36.

In all other cases, where full and proper objections to bail have been made but nevertheless the court grants bail, a bail review will not be sought.

The Practical Reality

At least 90 per cent of persons arrested, are released on bail by a member of the police force acting as a bail authority. In those cases, the duty of the prosecutor is to determine whether the conditions imposed (if any) are adequate. It is extremely rare for a prosecutor, where a defendant appears on bail, to ask for a remand in custody.

Of the 10 per cent who are placed in police cells, more than 50 per cent are there for no other reason than the existence of a warrant of apprehension (in addition to any charges for which the person was arrested) which precludes any release upon bail until appearance before court.

At least 50 per cent of defendants before court on a warrant of apprehension (with or without additional charges) are released upon a fresh bail agreement with more stringent conditions; generally with a requirement to provide one or more guarantors.

Of defendants in custody in respect of any charge(s) for offence(s) without warrant, about 50 per cent are bailed by the court. A large percentage of persons remanded into custody are itinerants, resident in another state and often only passing through this state. Experience has shown that this class of person is an extremely poor bail risk, with invariably no social support system to obtain guarantors.

Reasons for opposition to bail are generally based upon:

- the seriousness of the offence, coupled with fears for the safety or intimidation of witnesses;
- other offenders are at large and there is a real possibility of hindrance to police investigations and/or the destruction of evidence;
- the commission of (a number of) other offences whilst released on bail;
- an indication, on the basis of past experience, that (he/she is unlikely to appear as required by a bail agreement, or to comply with any conditions imposed. (This is relevant in situations with or without a warrant of apprehension.)

The above figures show that the percentage of defendants remanded into custody is small, and that most of them have histories of prior non-appearance on bail or breach of conditions. It is appropriate at this stage to make the following observations:

- It is normal practice, where a justice issues a warrant of apprehension following failure to comply with a summons, to endorse the warrant directing the release of the defendant upon bail when arrested.

- A significant proportion of defendants granted bail with guarantor(s) are conveyed to a correctional institution if the guarantor(s) are not available, but are released within a short time upon the attendance of the guarantor(s).

- Occasionally a defendant granted bail with guarantor(s) remains in custody if he is unable to secure any person(s) to provide the guarantee(s). In such cases the matter must be brought back before the bail authority within the prescribed time for a review of the condition (*see* section 11(9)). Normally, the prosecutor's attitude is: if not one person known/related to the defendant trusts him/her sufficiently to guarantee compliance with the bail agreement, the person is obviously a poor bail risk.

- The option of home detention on bail (section 11(2)(ia)) which has been an alternative since 4 October 1987 has not so far been imposed in a summary court.

- The conditions of supervision or home detention require an adjournment for at least 24 hours for reports to be obtained by the Correctional Services Department, but delay is invariably opposed by the defence who want the issue determined on the spot, claiming the prosecution objections are nothing more than unsubstantiated allegations.

- No procedural guidelines for home detention with respect to children have been provided by the Department for Community Welfare.

- Protracted bail applications disrupt the listings in summary courts as, with the exception of the Adelaide Magistrate's Court, no court has the luxury of a court available to spend the time required on fresh matters. Adelaide No. 1 Court is kept free as a remand court each morning.

- Police records systems are currently inadequate to detect persons committing offences on bail, a defect that will be cured by introduction of the Justice Information System next year. This will become known in due course but by then there is often a number of pending offences before various courts which result in a custodial remand for all matters to be brought together.

When the Bail Act first came into operation, there were numerous anomalies contained in the legislation but these were cured by the substantial amendments operative from 4 October 1987. There are still, however, some deficiencies in procedures as follows:

- A condition requiring forfeiture of a monetary amount is still widely regarded as a 'financial condition' which is not to be imposed unless necessary to ensure compliance (see section 11(5)). Such is not the case: a 'financial condition' is defined in section 3 to be lodgement of cash, a requirement for one or more guarantees, or lodgement of cash by any guarantor(s).
- Written assurances assurances as mentioned in section 11(2)(b) are never invoked as no procedures are available in the event of non-compliance.

- It is not currently the practice to charge defendants/guarantors for offences under section 17/17a in addition to applying for estreatment pursuant to section 19.

- There is no right of appeal (or review) of an order rescinding or revoking a bail agreement or guarantee (or refusal to do so). On far too many occasions the liability is either substantially reduce, or revoked, providing a further disincentive to comply with conditions of bail.

- There is currently a defect in the format of the prescribed Form 5 relating to guarantors. This form (which replaced the earlier form on 30 July 1987) must again by redesigned and reprinted.

- There is a need for a pamphlet to be produced to inform guarantors of their obligations.

- If a condition is imposed requiring an eligible person to reside at a particular address as a condition of bail, it should necessitate enquiries to be made with the occupants to ensure that he or she can stay there.

- The issue of after-hours bail applications to a justice pursuant to section 13(2) has not been resolved. How far do police have to go to obtain a justice so an apprehended person may exercise this right? It is contended that the Act does not envisage after-hours applications as, if the person will not appear before court on the following day they are entitled to a telephone review to a magistrate. If they are to appear, there is no entitlement to a telephone review in the case of a refusal by a police officer bail authority, but if a justice refuses bail, there is an entitlement. A magistrate would justifiably be annoyed to receive a telephone call in the early hours of the same morning that a defendant was to appear before the court.

- A witness arrested on a warrant is not an eligible person to apply for bail pursuant to section 4, and the machinery enabling release on bail previously contained in the *Justices Act 1921* has been repealed.

In conclusion, it is submitted that the vast majority of persons remanded in custody are there not because they are perceived to be a poor bail risk, but rather because they have demonstrated by their past behaviour that they will not comply with bail conditions imposed or will continue to commit further offences. In conclusion, it is the police prosecutors' perspective that it is not the case that too many persons are remanded in custody, rather too many poor prospects are granted bail.

A Police Perspective on Bail in South Australia

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Traditionally police officers have viewed the granting of bail to alleged offenders with reservation, particularly where serious charges are involved. It is true to say that as a rule, they have been less sympathetic to the reasons given by accused persons in bail applications than have members of the Judiciary.

To appreciate why this is so it is necessary to understand that the police officers role is 'the protection of life and property, preserving the peace, and detecting and apprehending offenders.'

Police officers are, and historically have been, the de facto representatives of the interests of victims of crime and of witnesses. This relationship has been reinforced by current Government initiatives regarding victims of crime, especially Section 10 of the *Bail Act 1985* (SA) which enshrines two of the seventeen principles in relation to the rights of victims of crime and takes into account concerns of witnesses.

It is with these concerns in mind that this paper has been prepared in relation to the police perspective on bail.

It is too simplistic to expect police to have the same cool, calm, objectivity of the Judiciary, Lawyers and indeed Police Prosecutors and Bail Authorities. Factors such as the type of crime, the circumstances of the victim, his relationship with the offender, and the emotional state of all the parties involved will influence the response of police at the bail application.

Victims of crime are always witnesses when it comes to the resolution of the Court hearing. Conversely it is true to say that witnesses (in some instances) could (depending on circumstances) be classified as quasi victims. For the purposes of this paper witnesses are classified under the heading of victims.

In the investigation of crime, police officers very often develop close relationships with victims. Whilst not affecting the ability of officers to conduct investigations, either immediate or protracted, these relationships lead to identification with the victims and his interests.

There is little wonder, given all of these circumstances that investigators empathise with victims of crime and as such will attempt to represent their interests at bail hearings.

One of the primary concerns of an investigating officer is to ensure that the interests of victims and witnesses are maintained. It is the experience of police officers today that many members of the public do not want to get involved in criminal matters (particularly where they are not directly concerned, for example witness to a crime). Whatever motivates the thoughts of the witness the majority of responses from them is to 'not get involved' and not assist in investigations if it can be avoided. Two reasons (amongst others) for this appear to be:

- Fear of some sort of reprisal by the accused (either real or otherwise); and
- Apprehension concerning court proceedings.

The investigator must help to ease these fears (whether they are based on a false premise or not) in order to convince victims of crime to participate in the legal process, in other words to give evidence in any Court proceedings. If he fails to do so and the victim refuses to give evidence, the case may well be lost and the offender go free without the matter going to trial.

One of the primary functions of the Police Department is to investigate. In order to achieve the ultimate goal of any investigation, that is to bring the offender to justice, investigators must have the co-operation of victims of crime.

Bail, and the conditions imposed therein can greatly affect a victim's state of mind, particularly where they perceive their personal safety (or that of family/friends) is involved.

Police are of course aware of the presumption of innocence, and that bail is important to the accused as it affects his liberty. These two factors are not taken lightly.

It comes down to a matter of balance. The rights of the victims of crime, the interests of society as a whole, and in some instances the welfare of the alleged offender, all have to be given careful consideration to achieve the right balance where there is a dispute between the prosecution and the accused as to whether bail is granted or denied.

Let us know turn to the role taken in a bail application by an investigating officer. A common scenario for police is that a crime occurs which necessitates immediate investigation. It requires, on many occasions, police officers to become involved in situations which are very stressful for victims. It is vital for investigating officers to remain calm and objective when confronted with this situation. Reassurance has to be imparted to victims. If not forthcoming, their confidence in the police (and for that matter, the entire legal system) is lost and possibly along with it, their co-operation. This would of course be highly undesirable under any circumstances.

The resultant impact on police attitudes to bail applications is fairly predictable. If there are real fears held by victims for their safety (this includes intimidation by threat or implied threat) it will be imparted to the investigating officer by the victim.

Police General Orders require substantiation of any opposition to Bail. Section 9 of the Bail Act 1985 allows for a Bail Authority (not being a member of the police force) to take evidence on oath from the applicant or any other person who may be able to furnish information relevant to the determination of the application. This evidence may be subject to cross examination. Under these circumstances it is unacceptable for police to indulge in unwarranted opposition to bail.

It is not unknown for the Police Prosecutor to override an investigator's reasons for objection to bail. This occurs where the prosecutor views the reasons for objection to bail as insufficient to warrant opposition at the bail application.

Whilst it is accepted that prosecutors do not act for victims as does a lawyer for a client, they should be in a position to put forward any relevant matter where the interests of victims are concerned.

In order to be able to fulfil that requirement, all relevant information concerning the victim must be gathered by the investigating officer. Taken in that context, the investigating officer acts as a representative of the victim/s.

Section 10 of the Bail Act 1985 allows Bail Authorities to consider a variety of factors when assessing the unsuitability of an applicant for bail. Subsection (c) specifically requires the authority to consider 'any need that the victim may have, or perceive, for physical protection from the applicant'.

The importance of this is reflected in the following incident of an attempted murder incident in South Australia. The circumstances of the incident were:

During the evening a dispute occurred between neighbours over the level of noise coming from a house. During the dispute a person was shot. At a subsequent bail hearing bail was opposed on the grounds of the seriousness of the offence.

Bail was granted, and restrictive conditions were set. These included where to reside, with whom, and where not to go. In essence it was akin to incarceration at the guarantor's home. In the bail hearing the accused (represented by his Solicitor) agreed to the conditions of bail.

Two witnesses were present. Both were female and both made allegations of a sexual nature against the accused and were in great fear for their lives if the accused was granted bail. They felt that their views were not presented to the Bail Authority forcefully enough and subsequently felt abandoned when bail was granted.

This example has not been cited to judge the merits of the Bail Authority's decision. What it does demonstrate however, is the requirement to strike a balance between the rights of the accused and those of the victim. The Declaration of Rights of Victims has been implemented to assist victims of crime. Insofar as the victims in this particular case were concerned their rights had been ignored. The potential for diminished co-operation then became a real factor in the investigation.

Aside from the aspect of the rights of victims of crime with respect to bail, it is pertinent to make some remarks in relation to the Bail Act.

First and foremost it is generally noted by all police officers to be one of the 'better Acts'. A point worthy of mention, is that there has been little controversy with respect to its operation.

Police officers generally accept all legislation as necessary, but rarely provide any accolades as to its worth. In this instance it has been recognised as an improvement over the procedures in existence and flexible enough to deal with most circumstances.

Examples of this are:

- the process of bail is now considered less controversial for police;

- the process developed for bail is formalised. It is necessary to record each step in the process, requiring each decision to be justified. In this age of accountability it reduces the likelihood of criticism of police as reasons for opposition to bail have been reduced to writing. If bail is refused the accused is at least provided with defined reasons as to why;

- there are guidelines for opposition to bail as mentioned previously the Bail Act, 1985 provides guidelines for the prosecution opposing bail. The Act has collected case law principles within legislation. Previous Acts did not do so and those guidelines had to come from examining a broad spectrum of case law.

The Government, and in particular the Attorney General, adopted an approach of participation by all agencies which would be involved in the day to day administration of the Act. Prior to the proclamation of the Act a working party was convened to oversee the administrative procedures developed for its implementation. That working party examined such aspects as: design of forms for the Act; the development of a Bail Leaflet (multi-lingual) and a procedure for ensuring applicants receive it; procedures for recording reasons for refusing bail; and the mechanics of telephone reviews, amongst other matters.

The final recommendations and subsequent implementation of the administrative procedures aided the relatively smooth proclamation of the Act.

In 1986 the Office of Crime Statistics conducted a review of the Bail Act. As a consequence The Administrative Working Party was re-formed and considered the recommendations with respect to amending administrative procedures. The involvement of all of the agencies concerned with the operation of the Bail Act has provided the Police

Department with the opportunity to participate in the preparation and subsequent management of legislation.

This approach has assisted in the introduction of the Act into the day to day operation of the Police Department, enabling dissemination of information to occur at an early stage. This allowed for the development of documentation which was used to instruct police officers in the application of the Act.

A continuance of this approach by government will help to ensure the smooth implementation of further legislation in this state.

The Contribution of Correctional Services to the Bail Process

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With ever increasing crime rates the continuing search for alternative sentencing options represents both an economic and humanitarian response to the problems of prison overcrowding. This search has, during the 1980s, seen the introduction in South Australia of community service and home detention. Upon proclamation of the South Australian *Criminal Law (Sentencing) Act 1988*, on 1 January 1989, imprisonment became formally regarded as a sentence of last resort.

The South Australian *Bail Act 1985*, by virtue of its presumption in favour of bail, similarly regards a remand in custody as a remand of last resort.

Prior to the proclamation of the South Australian Bail Act the Department of Correctional Services, other than accepting those offenders who had been remanded into custody, played no part in the bail process. Since its proclamation, however, two specific options, both now administered by the Department of Correctional Services, have been introduced. The first was the option of supervision by a probation officer which marked the Department's involvement for the first time with persons as yet unconvicted. The second, following amendments to the Act in 1987, saw the introduction of home detention whereby the person on bail is obliged to remain at a specified address for the period of bail. The condition is monitored by Correctional Officers and involves intensive 24-hour surveillance.

The introduction of these options has caused the South Australian Department of Correctional Services to become much more active and interested in the bail process and it has the potential to make a further valuable contribution to the bail process particularly at the decision making stage.

In July 1986 the Department of Correctional Services established the Courts Unit, now comprising two probation officers, who are permanently located in the Adelaide Magistrates Court.

The Unit provides a range of on-the-spot assessments, principally oral pre-sentence reports and Community service assessments. Until recently requests for information in bail matters have been comparatively few. In recent months, however, the number of requests has increased significantly. A bail program modelled on the New South Wales Bail Assessment Service and Supervision program commenced in the Adelaide Magistrate's Court on 14 November 1988 following consultation with each of the magistrates in that court, police prosecutors and Legal Services Commission solicitors. The program received the unanimous support of the magistrates and both Legal Services Commission solicitors and police prosecutors indicated their support.

The History of Bail Reform

Historically, calls have been made around the world since the 1920s for courts to be more informed about bail applicants' current circumstances and community ties and for there to be less reliance on the nature of the criminal charge when considering a bail application.

In the United States as early as 1927, Beeley recommended that bail decision making would be improved significantly if a defendant's social background was considered more often during bail hearings.

In 1954, Foote's influential study of pre-trial decision making called for bail reform to address bail policy and judicial bail decision making. That pioneering work served to mobilise the Vera Institute in New York to develop the Manhattan Bail Project in the 1960s. This decade saw a plethora of similar programs evolve across the United States providing what Goldkamp (1979) described as 'fact finding mechanisms' whereby courts were provided with information about defendants which was considered relevant to the bail decision.

The aim behind the Manhattan Bail Project was to influence bail practice in such a way that Judges would release more defendants on non-financial pre-trial release, known as release on recognizance (ROR). The Manhattan Bail Project developed an instrument which summarised a defendant's social background into specified dimensions and accorded each of these a rating. The ratings, obtained on dimensions such as family contacts, employment and residential stability, all formed the basis for a recommendation for release on recognizance.

The outcome of the Manhattan Bail Project was far reaching and a study by Thomas (1976) showed an increase in the use by courts of release on recognizance agreements. Further studies by Ares, Rankin and Sturz (1963) and Schaeffer (1970) found the failure to appear rates and re-arrest rates for defendants had not increased with the more widespread use of the release on recognizance option.

In 1983 the New South Wales Department of Corrective Services established the Bail Assessment Service and Supervision Program (BASS) and among its objectives was the provision of verified information to courts on bail applicants' social backgrounds and current circumstances.

Whilst the South Australian Bail Act has been as significant as many other similar pieces of legislation in its presumption in favour of bail, it is not as explicit as others in listing the criteria to be considered by the court.

In recognition of the many bail reforms which have taken place in some countries, the United Kingdom, Queensland and New South Wales Acts for instance, require the courts to be fully informed and to consider such matters as the character, background, employment and associations of the applicant. Chatterton (1986) in commenting on the British 1976 Bail Act (United Kingdom) stated:

> Statutory guidance is given to the courts in considering the factors to be taken into account when deciding whether bail should be granted or refused. In essence consideration should be given to the gravity of the offence, the strength of the evidence, the accused's character, antecedence, community ties, record of compliance or non-compliance with any previous granted bail and any other relevant matters (Chatterton 1986, p. 42).

That that information gathering can take some time is reflected in Section 16 (1) of the Queensland *Bail Act 1980* which states:

> Where it has not been practical to obtain sufficient information for the purpose of making a decision in connection with any matter specified in this sub section due to lack of time since the institution of proceedings against a defendant the court before which the defendant appears or is brought shall remand him in custody with a view to having further information obtained for that purpose.

Further section 16 (2) of that Act requires the court:

> In assessing whether there is an unacceptable risk with respect to any event specified in sub section (1)(a) [risk of re-offending, absconding etc.] the court or member shall have regard . . . to such of the following considerations as appear to be relevant.

Included in the list of considerations are ' the character, antecedents, associations, home environment, employment, background and place of residence of the defendant'.

The 1978 New South Wales *Bail Act*, also requires the courts to consider specified matters (as far as they can be reasonably ascertained) and appears to be a much better balanced Act in terms of the criteria to be considered.

Broadly these are:

- **The probability of whether or not the person will appear in court in respect of the offence for which bail is being considered having regard to:**

  The persons background and community ties as indicated by the history and details of residence, employment and family situations and his prior criminal record (if known). (four other sub sections)

- **The interests of the person having regard only to:**

  The period that the person may be obliged to spend in custody if bail is refused and the conditions under which he/she would be held in prison. (three other sub sections)

- **The protection and welfare of the community having regard to:**

  Whether or not the person has failed, or has been arrested for anticipated failure to observe a reasonable bail condition previously imposed in respect of the offence. (two other sub sections)

One commentary on these provisions of the NSW Act reads:

> The requirement to look at the three head criteria or the twelve sub criteria, whichever is the correct view, is binding on the court (subject to their being reasonably ascertained) even where bail is consented to by the prosecution. The Act may, therefore, demand of the court a more searching and independent enquiry into bail than was required under the previous law (Donovan 1981, p. 36).

The Prosecution and Defence Roles

It is important to recognise the respective adversarial and opposing roles of the police prosecutor and the defence lawyer, with respect to bail decisions. Police prosecutors regard their roles in very much the same way as their colleagues who perform other police

duties, that is, they are concerned first and foremost with the protection of life and property and the prevention of crime.

The prosecutors' priority is clearly the protection of the community and particularly victims of crime. There is no requirement for prosecutors to consider the interests of the defendant and they are not required to look beyond the criteria set out in Section 10(1) of the 1985 South Australian Bail Act. In opposing bail the prosecutor can refer to:

- the gravity of the offence;
- the likelihood of the applicant absconding;
- the likelihood of the applicant re-offending;
- other relevant reasons for refusing bail (for example interfere with evidence, intimidate or suborn witnesses, hinder police enquiries, physical protection).

Consequently the prosecutor is interested only in information which would indicate the applicant should not be released on bail (even though in the majority of cases there is no opposition to bail).

The information presented to the court by a prosecutor is invariably that which they have obtained from the arresting officers by endorsement of the prosecution file. The information is not always updated and questions have been raised from time to time as to the reliability and the lack of the information presented. In a letter to the *Adelaide Advertiser* dated 9 July 1988 the Chief Magistrate stated that the lack of information provided to Police Prosecutors was 'one of the many matters making bail applications difficult to resolve'.

The defence, on the other hand, is principally concerned with the interests of the applicant and acts largely on instructions. Counsel rarely have the opportunity to verify the substance of those instructions nor do they have the time to seek out other information which might be relevant.

Given that there seem to be more reasons in the Bail Act for not granting bail than there are for granting it, the task of showing cause why bail should be granted is often a difficult one, despite the presumption in favour of bail.

The presiding magistrate has the responsibility of deciding on the application, sometimes without the benefit of a balanced picture. On a number of occasions in recent months local magistrates have commented on the difficulty they have in determining some bail applications. They cite the lack of objective and reliable information as the main cause of this.

The Purpose of a Bail Report

A bail report, prepared by a probation officer can, to a large extent, overcome many of the problems sometimes encountered by the courts and can be instrumental in providing the magistrate with as complete a picture as can be reasonably obtained.

Such a report will contain objective, reliable and verified information in accordance with the specific request of the court and, where appropriate, will include comments about the feasibility of supervision by a probation officer and/or home detention in the event of bail being granted.

The Philosophy of the Department of Correctional Services in the Provision of Information and Reports to The Court

The credibility of every report prepared by a probation officer, be it a pre-sentence report or a bail report, will depend largely on the impartiality and objectivity of the content of the report and the realistic nature of its conclusions.

While an impartial position is necessary in the preparation of such reports, they will nevertheless promote Department of Correctional Services programs such as probation and community service, and bail supervision. This is in keeping with the Department's philosophy that imprisonment is a sentence of last resort.

Whilst it is true that overcrowding in the prison system did highlight the issue of bail, the overriding concern must be the provision of a service which ultimately leads to the right people being remanded in custody and to the release on bail of those who should be so released. If the remand rate should drop as a result of this then that should be regarded as a bonus and not the objective of the exercise.

Why the Department of Correctional Services is best placed to provide Bail Reports

The South Australian Department of Correctional Services has been providing courts with pre-sentence reports and assessments for over thirty years and has established a state-wide network of district officers to which the courts have access. By virtue of the nature of these reports the probation officers have a well-established network of communication and have ready access to records both within this state and to interstate probation, parole and institutional records.

The Department also administers two programs covered by the Bail Act, namely supervision and home detention and is therefore well placed to comment upon the likely response of the candidate to those options.

A probation officer could also obtain information regarding the applicant's previous response to recognizance in South Australia or interstate. Neither the prosecutor nor the defence solicitor have the time and means to obtain this kind of information.

Offenders from interstate often present with such histories and enquiries of these offenders often reveal facts of particular relevance including details of convictions not known to the local police, the existence of outstanding warrants, pending court cases, and breaches of existing bounds.

It is also apparent that a significant proportion of those who have been subject to a Bail Report have either been previously imprisoned within South Australian institutions or are currently, or have recently been, supervised by a probation officer.

There is a strong possibility that the offender will, in due course, again become subject to the same sentencing options and, in the latter instance, the Department's earlier contact during the bail process could be very useful in any ongoing involvement with the Department.

The officer can comment on the availability of accommodation if the applicant has no fixed address. The Department has well-established links with organisations such as Offenders Aid and Rehabilitation Services who are able to cater specifically for bail applicants when necessary. Perhaps most importantly of all probation officers are located in the Adelaide Magistrate's Court and are able to obtain information virtually on the spot.

Problems With the South Australian Bail Act 1985

Section 11(3) of the South Australian Bail Act requires the consent of the Crown before a court can include in a Bail Agreement conditions of supervision of a probation officer and/or Home Detention. What should arguably be the overriding discretion on the part of the court, is removed by this requirement.

This situation arises occasionally in South Australia where the prosecutor, having opposed bail, will, as a matter of policy, decline to consent to the inclusion of these conditions thus preventing the magistrate from granting bail under those terms. The police prosecutor, in fairness, is merely exercising a discretion provided in the Act; the Act, however, appears to be shooting itself in the foot. It provides options introduced specifically to encourage the courts to consider alternatives to a remand in custody and then gives the final word to the police prosecutor, who having opposed bail from the outset is not likely to consent to those alternatives. This provision of the Act is not in keeping with the intentions of the Act as a whole and requires urgent attention.

To further complicate the situation sub section 11(3a) states that:

> a bail authority should not impose a condition under section (2)(ia) [home detention] without first obtaining a report (whether oral or in writing) from the Crown on the appropriateness of such a condition being imposed in the applicant's case.

The report referred to in this section is that which is provided by an officer of the Department of Correctional Services and which addresses the appropriateness of home detention in a particular case. This involves a visit to the nominated address by the home detention officer and obtaining the permission of the occupier of the nominated address before such a condition can be included in the bail agreement. The authority of the Crown in this instance appears to be vested in the Department of Correctional Services. The situation might therefore arise where the Crown representative will report that a condition of home detention is appropriate in the case, whilst another representative will then decline to give consent to the inclusion of that condition.

Conclusions

The Department of Correctional Services has a vested interest in the bail process by virtue not only of its custodial responsibility of those remanded in custody but also by virtue of the options of supervision and home detention for which the Bail Act makes provision. Through its longstanding practice of providing the courts with pre-sentence reports and the like, the Department has the expertise and experience to assist the courts in its determination of bail applications.

The value of such a service lies in the Department's impartiality, its provision of reliable, objective and verified information, and its ready access to relevant sources of information both locally and interstate. Such a service would assist in overcoming some of the shortcomings which appear to emanate from the adversarial roles of the prosecutor and defence solicitor.

In view of the impact which the bail decision is likely to have upon the individual and upon the community it is important that such decisions are made on the basis of relevant information, and that full consideration is given to community-based bail programs whenever possible.

Whilst the remand rate and prison overcrowding are factors which should not be ignored these factors should not in themselves be considered in the final bail decision. The overriding concern must always be that whatever the outcome the decision itself has been a

fully informed decision. Only then will the interests of both the community and the individual have been fully considered.

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Assisting the Court: Bail Assessment Developments

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Prior to the Bail Act 1978

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Establishing the Trial BASS Program

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

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

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

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

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

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

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

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

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

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

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

Difficulties Encountered During the Pilot Program

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

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

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

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

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

Results of the Trial

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

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

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

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

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

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

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

What Has Happened Since

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

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

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

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

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

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

Table 1

Remand Populations, New South Wales 1985-87

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

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

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

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

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

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

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Bail—Post-Committal and Post-Conviction

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Bail Post-Committal and Pre-Trial

This paper deals only with the law of South Australia. It may be, however, that many of the substantive matters mentioned are of more general application. The *Bail Act* (SA) has been amended twice since 1985 and, though there is in my view still some room for improved clarity, it may be of interest even in its present form to any other state considering such an Act, or amendments to an existing Act.

In South Australia, persons committed for trial are usually granted bail by the committing magistrate. If not granted bail, they can request a 'review' of the decision by the Supreme Court. A magistrate can review bail decisions of a police officer or a Justice of the Peace. These hearings are by way of re-hearing and must be held as expeditiously as possible.

If bail is refused, further applications to the same court are not precluded and may be successful if new material has become available. Conditions of bail which are felt to be unjustified can be varied on application by the person bailed or the Crown, or on the bail authority's own motion.

Applications for variation of conditions can be made to the court imposing them. Once arraigned, and pending trial, the court of trial will hear such applications. Most applications have been for permission to leave the state temporarily, or for permission to change place of residence.

Guarantors may apply for discharge from the guarantee, usually because they have become afraid that accused will abscond. If discharged, and if no suitable alternative can be provided by the person on bail, it is necessary to consider whether a guarantor is still necessary, or whether bail should be revoked and the accused arrested. Guarantors may also apply to have their guarantee varied.

In South Australia, section 10 of the Bail Act directs that bail should be granted unless the bail authority considers that one or more of a list of criteria, 'or any other relevant matter' precludes bail. This seems to be a codification of the existing practices of the courts.

After arraignment the court of trial becomes the bail authority, even though the accused is further remanded. Formerly, the court of trial dealt with all questions of bail which arose after committal.

Bail during the trial had formerly to be expressly granted, and was sometimes refused in serious cases or if the prisoner had a bad record. Now bail continues throughout the trial, without any further application.

Post-Conviction

The court of trial has, subject to the Act, an unfettered discretion in respect of release on bail 'where the applicant has been convicted of the offence in respect of which he has been taken into custody'. The Act also provides that where a person who is on bail is sentenced, the bail agreement is terminated. I assume that this is not intended to affect the court's unfettered discretion.

It seems, however, that bail is granted after verdict but before sentence more often than formerly, when the practice was that bail was granted only in unusual circumstances. Delay in sentencing may be caused by several reasons. For example, counsel may not be ready to make a plea in mitigation, or may wish to call evidence, for instance, as to character. The court may want time to consider the submissions made, or may wish to order a pre-sentence report, or a medical report, or a report previously sought by the accused may not be to hand.

In respect of some of the above, it may be convenient and will expedite the proceedings if the person to be interviewed or examined is immediately available in custody.

In some cases, a judge may be uncertain as to whether or not to imprison an offender, and will wish to have the requested reports before deciding. In respect of a young first offender who may possibly be given a suspended sentence, is it proper to keep him in custody for a short time so that he can get an idea of what awaits him if he offends again? There is some evidence that this may be salutary, and a considerable deterrent against further offending, which is, after all, the most important consideration in sentencing. It would not be proper, however, for even a well-intentioned judge who thinks that there is little or no prospect of an offender being sentenced to an unsuspended term of imprisonment to keep him temporarily in custody purely as such a warning.

Drugs and Bail ¾ The Queensland Experience[1]

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The *Bail Act 1980* (Qld) commenced operation in Queensland on 1 July, 1980, and replaced the previous common law situation with a codification of the entire law with respect to bail. The Act introduced a general principle that courts should grant bail, subject to the various specific provisions of the Bail Act.

The Bail Act, in setting out a positive duty to grant bail, specifically empowers a watch-house keeper to investigate whether or not bail should be granted and to grant such bail if it is not practicable to bring the person charged before a court within 24 hours of being taken into custody (section 7).

However, section 13 of the Bail Act, as originally introduced provided that bail for the crimes of treason, murder, piracy and offences defined in sections 130(2) and (2A) of the Health Act could only be granted by the Supreme Court. The Bail Act went on to provide that, where the offence was a drug offence under the Health Act section 130(2) or (2A), if the prosecutor indicated to the court that the charge was to proceed summarily, then bail could be granted by the Magistrates Court (which was where the defendant would finally be dealt with).

The drug offences contained in sections 130(2) or (2A) (for which watch-house bail was not available under the Bail Act as it was originally introduced), included the more serious drug offences such as producing dangerous drugs, cultivating prohibited plants, selling or supplying dangerous drugs or prohibited plants, permitting premises to be used for any such serious offence concerning dangerous drugs or prohibited plants, or having in one's possession money or property obtained from any such serious offence. Those offences (relatively minor) for which watch-house bail was available were the offences of possession of dangerous drugs or prohibited plants, or possession of utensils (for example, pipe, needle, syringe).

After some years of discussion, the Queensland Government introduced the Drugs Misuse Bill on 10 December 1983. This Bill, which was the first attempt to introduce new legislation covering drugs, was withdrawn in the face of severe criticism from many sections of the community, including the Queensland Law Society, the Bar Association and the Queensland Council for Civil Liberties.

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1. The opinions expressed in this paper are the personal views of the author, and do not necessarily reflect the views of the Legal Aid Office (Queensland).

The Queensland Government's second attempt at legislation in this area, again called the Drugs Misuse Bill, was introduced on 5th August, 1986 (Parliamentary Debates (Qld) 19 August 1986, pp. 353-4) and was finally approved on 19 August 1986.

At no time in either the second reading speech of the Minister for Police, the Minister responsible for introducing the bill, the Hon. W. Gunn (Parliamentary Debates (Qld) 5 August 1986, pp. 277-80), nor in any of the speeches of the Government or Opposition members debating the bill was there any discussion about the effect of the new legislation on the question of bail for drug offences (Parliamentary Debates (Qld) 19 August 1986, pp. 351-460.

In fact, as both the legal profession and the community in general discovered immediately after the Act commenced pursuant to proclamation on 27 October, 1986, bail was no longer available from a watch-house keeper for any drug offence whatsoever.

With the introduction of the *Drugs Misuse Act 1986*, bail on any drug offence was to be available only from a Magistrates Court (in certain circumstances) or the Supreme Court.

The Magistrate's Court has the power to grant bail with respect to a particular drug offence only if the prosecutor is able to elect summary jurisdiction and, in fact, does so (Drugs Misuse Act ss 13(1) and (2); Bail Act s 13(2). The only offences for which the prosecutor can elect summary jurisdiction are those offences for which the maximum penalty is 15 years. In addition, the 'possession of a utensil' charge can only be dealt with by the Magistrates Court and bail is therefore available from that court.

The Drugs Misuse Act provides penalties for various serious indictable drug offences ranging from 15 years to life and in some circumstances, mandatory life (*see* Dearden 1988, p. 149). It is only those offences providing for a maximum 15 year imprisonment in which a prosecutor can elect, in certain circumstances, to proceed summarily, subject to the right of the Magistrate to over-ride that election (Drugs Misuse Act, s 45(4).

Where there is no summary election, either because the prosecutor has elected not to proceed summarily, or because such an election is not available, bail is only available from the Supreme Court. It is interesting to note that there are no guidelines in the Drugs Misuse Act for the exercise of the prosecutor's election and a prosecutor can elect to have the possession of even the smallest quantity of marijuana proceed in the Supreme Court. In practice, of course, such a course of action is most unlikely, but would be entirely legitimate within the scheme of the Act.

When the Drugs Misuse Act was first introduced in 1986, it provided that the offence of receiving or possessing property obtained from trafficking or supplying a dangerous drug could only be dealt with on indictment (i.e. in the Supreme Court). This meant that, no matter how small the amount of money or property obtained from the supplying or trafficking, bail was only available from the Supreme Court.

One example of the injustice involved in this provision which came to the writer's attention was a young woman who appeared in a suburban Magistrates Court on a number of charges relating to the possession and supply of a dangerous drug (cannabis) and also the alleged possession of the sum of $20.00 from the sale of a small quantity of cannabis. In the circumstances, although all parties concerned including the Duty Solicitor, the Police Prosecutor and the Magistrate were anxious for her to be granted bail, there was no power in the court to grant bail on the 'possession of money' charge (although she was granted bail on the charges of supply and possession). She therefore languished in the watch-house and then in prison until such times as she was able to apply for Public Defence to conduct a Supreme Court bail application. In these circumstances, it should be noted that it was extremely unlikely that the woman was going to receive a custodial sentence when finally dealt with, but she could not avoid spending time in custody before bail was granted.

This particular injustice was obviously recognised by the Government, and in 1987, the Drugs Misuse Act Amendment Act made provision for a maximum penalty of 15 years in certain circumstances for offences of receiving or possessing property obtained from trafficking or supplying dangerous drugs, therefore leaving open the possibility that in certain circumstances charges under this section could be dealt with summarily.

The provisions of the Bail Act and the Drugs Misuse Act apply not only to adults but to children charged with offences under the Drugs Misuse Act. Children charged under the Act can be granted bail only by a Children's Court, and consequently, until they appear before a court to be granted bail, will be locked up either in secure youth detention centres, or if outside the Brisbane metropolitan area, then in all likelihood in local watch-houses. This is, of course, a most undesirable situation but one which the Government has shown no signs of dealing with, despite calls for them to do so (*Courier Mail*, 10 November 1986, p. 9).

In certain circumstances, co-operative police officers have been prepared to side-step the provisions of the Bail Act either by proceeding by summons, with the result that the person concerned does not have to be arrested and processed through the watch-house (and find themselves in the situation of being unable to be granted bail until brought before the court), or by arresting by arrangement shortly before the commencement of court on the first available court date after the commission of the alleged offence. Such an 'arrest by arrangement' means that the person arrested is still processed through the watch-house, but is then immediately brought before the court and can apply for bail without spending time in custody.

The inability of the watch-house keeper to grant bail means that a person arrested from around mid-day Saturday onwards (or even from Friday afternoon onwards in towns where there is no Saturday session of the Magistrates Court) will be held in custody until Monday morning, being the first available session of the Magistrates Court. This applies regardless of how minor the drug offence may be, and is, in effect, a form of mandatory pre-conviction punishment which takes no account either of guilt or innocence of the person charged, nor of the likely eventual outcome of the case. Even a person eventually discharged without conviction may well have spent two nights in the watch-house before being initially granted bail.

What then is the reason for treating bail for drug offenders any differently to bail for any other offence. A recent New South Wales study suggests that 'the present results [of this study] suggest in fact that the current emphasis upon the nature of the charge in considering bail for alleged drug offenders is misplaced. No reliable evidence of a relationship between the type of drugs charge and the likelihood of absconding was found. Nor was any evidence obtained suggesting that those allegedly found in possession of large quantities of drugs were more likely to abscond.' (Weatherburn et al. 1987). The New South Wales legislation, although providing different provisions for bail with respect to the possession or supply of commercial quantities of a prohibited drug, still allows 'police bail' for a variety of drug offences, unlike Queensland.

It is possible to understand the rationale for restricting bail on what were previously 'capital' offences (murder, treason and piracy) to the Supreme Court, but it is difficult to understand why even the most minor of drug offences should be subject to the grant of bail only from a Magistrates Court or a Supreme Court, depending on the circumstances.

It is curious also to note that, although watch-house bail is not available even for the most minor of drug charges, there is no similar prohibition on watch-house bail for federal drug offences under the Customs Act. Bail on such offences is available in the normal way from a watch-house keeper and can either be granted or refused in accordance with the principles set out in sections 7 and 11 of the Bail Act.

The provisions of the Drugs Misuse Act, with its extensive series of offences providing penalties of either life imprisonment or mandatory life imprisonment, together with the instances of prosecutors electing to proceed on indictment on offences with maximum 15 year penalties, means that there is an ongoing and increasing pressure on the Supreme Court to consider bail applications from drug offences. The practical procedures involved in a Supreme Court Bail Application, requiring an application to the Supreme Court in Chambers on an Originating Summons supported by affidavits and three days notice to the Crown, mean that almost inevitably persons seeking bail from the Supreme Court will spend some period in custody either in the watch-house or in jail before being granted bail. This is occurring at a time when the Queensland Government openly acknowledges that the jail

system is bursting at the seams (three new jails are currently in the process of construction) and as a consequence, watch-houses are full to overflowing.

The Government, when it introduced the Drugs Misuse Act, made no attempt to support the concept of unavailability of watch-house bail. However, it appears prepared, despite the effects on an overcrowded penal system and an over-loaded judicial system, to continue a situation where bail is not available at the watch-house for any drug offences, and in many cases is available only from the Supreme Court.

The Queensland Government should immediately move to reform the law in this area by allowing watch-house keepers to grant bail to drug offenders in any circumstances where summary jurisdiction can be elected by a prosecutor. Such summary elections by prosecutors are generally made on the advice of the arresting officer, and there is no practical reason why a watch-house keeper should not obtain such advice from the arresting officer before considering the question of bail. To refuse to consider reform in this area will mean the perpetuation of a situation where an offender charged with the possession of even the most minute quantity or marijuana is unable to be granted watch-house bail, whereas a person who, for example, beats up little old ladies in the park, can be released by the watch-house keeper. It is a situation that calls for rational and logical reform, not continued emotional over-reaction to the ongoing problem of drugs in our community.

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Bail for Serious Offenders

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The concept of Public Defence may be unfamiliar to some people from States other than Queensland, so this paper begins by giving an outline of the duties and responsibilities of the Public Defender.

The office is presently (1988) held by Barbara Newton, who has been Public Defender for a little over twelve months. Barbara is a barrister with several years experience, with an extensive legal background, in both the private and public sectors.

The Public Defender provides, under the *Public Defence Act 1977*, legal aid in criminal matters for persons who are unable to pay for their defence, and who stand charged with serious criminal offences.

The Public Defender's Office has a staff of some seventy officers, all members of the Queensland Public Service. It is fair to say that all of the staff consider themselves to be strong and fearless fighters for the legal rights of the financially underprivileged. It is also true that the Public Defender is an integral part of the Queensland system of criminal justice.

As a result of legislation passed in the early eighties, it became apparent that bail applications before Supreme Court Judges in Chambers would become more frequent, and a position of Bail Officer was created. I was fortunate to be appointed Bail Officer.

My work consists entirely of considering, preparing, and presenting bail applications in Chambers. Admittedly there is a certain amount of monotony about the process, nevertheless it is an important public service for a deprived section of the community.

In a way, each application can be said to be for a serious offence, because for one reason or another, each client has had his proposal for bail rejected by a Court. He finds himself aggrieved, and, having acquired Public Defence, seeks the help of the Bail Officer.

Upon receipt of instructions, which can come from a barrister or solicitor in private practice, a member of the client's family or a friend, one of the staff of the Public Defender's Office, a prison Welfare Officer, or the client himself, proceedings commence. Having obtained as much information as possible from the informant, I telephone the prosecuting authority, who will be either the State Director of Prosecutions (DPP), or the Federal Director of Public Prosecutions.

Because of the volume of work, the Director of Prosecutions has one officer handling bail full time. The DPP's bail applications are handled by individual prosecutors.

Essential information is the applicant's full name and date of birth, for fingerprint purposes, and the name of the arresting police officer.

A TELEX message is sent by the prosecuting authority to the arresting officer, who replies in due course. An arrangement is then reached between the Bail Officer and the officer representing the prosecuting authority as to when, if at all, the application for bail will

be heard. It is necessary to say 'if at all', because there may be no chance that the application will be successful, in which event no application will be made.

That conclusion was reached very quickly in the case of a persistent sex offender who stood charged, on strong evidence, of bringing children into Queensland with the intention of making pornographic video movies featuring those children, and who wanted bail.

Most cases are not as clear cut as that and require earnest consideration as to their merits. There may be more to a matter than meets the eye, as in the case of a police informant who, through circumstances, has had to be charged with a serious offence to maintain his cover. There is a police interest in his retaining freedom. That has occurred a number of times.

The relevant statute, in Queensland, is the *Bail Act 1980-87*, and the predominantly relevant section is Section 16.

Section 16 provides as follows:

> Notwithstanding this Act, a court or member of the police force authorised by this Act to grant bail shall refuse to grant bail to a defendant if the court or member is satisfied -
>
> (a) that there is an unacceptable risk that the defendant if released on bail -
> (i) would fail to appear and surrender himself into custody;
> (ii) would while released on bail -
> (A) commit an offence;
> (B) endanger the safety or welfare of members of the public; or
> (C) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or another person; or
>
> (b) that the defendant should remain in custody for his own protection or, if he is a child within the meaning of the *Children's Services Act 1965-1982*, for his own welfare.
>
> Where it has not been practicable to obtain sufficient information for the purpose of making a decision in connection with any matter specified in this subsection due to lack of time since the institution of proceedings against a defendant the court before which the defendant appears or is brought shall remand him in custody with a view to having further information obtained for that purpose.
>
> (2) In assessing whether there is an unacceptable risk with respect to any event specified in subsection (1) (a) the court or member shall have regard to all matters appearing to be relevant and in particular, without in any way limiting the generality of this provision, to such of the following considerations as appear to be relevant -
> (a) the nature and seriousness of the offence;
> (b) the character, antecedents, associations, home environment, employment, background and place of residence of the defendant;
> (c) the history of any previous grants of bail to the defendant;
> (d) the strength of the evidence against the defendant.
>
> (3) Where the defendant is charged -
> (a) with an indictable offence that is alleged to have been committed while he was at large with or without bail between the date of his apprehension and the date of his committal for trial or while awaiting trial for another indictable offence;
> (b) with an indictable offence and is not ordinarily resident in Queensland;
> (c) with an indictable offence in the course of committing which he is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance; or

(d) with an offence against this Act, the court or member shall refuse to grant bail unless the defendant shows cause why his detention in custody is not justified and, where bail is granted, shall include in the order a statement of the reasons for granting bail.

In granting bail in accordance with this subsection a court or member may impose conditions in accordance with section 11.

Section 11 states:

A court or member of the police force authorized by this Act to grant bail shall consider the conditions for the release of a person on bail in the following sequence-
(a) the release of the person on his own undertaking without sureties and without deposit of money or other security;

[This section would certainly be the predominant section of the Bail Act.]

(b) the release of the person on his own undertaking with a deposit of money or other security of stated value;
(c) the release of the person on his own undertaking with a surety or sureties of stated value;
(d) the release of the person on his own undertaking with a deposit of money or other security of stated value and a surety or sureties of stated value,
but, shall not make the conditions of bail more onerous for the person than those that in the opinion of the court or member are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.
(2) Where a court or member of the police force authorized by this Act to grant bail considers that the imposition of special conditions is necessary to ensure that a person -
(a) appears in accordance with his bail and surrenders himself into custody;
(b) while released on bail does not-
(i) commit an offence;
(ii) endanger the safety or welfare of members of the public; or
(iii) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or another person,
that court or member shall impose such conditions as it or he thinks fit for any or all of such purposes.

Conditions imposed pursuant to this subsection shall not be more onerous for the person than those that in the opinion of the court or member are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.

Subsection (3) provides for medical examinations.

Other important sections are Section 8, which empowers a court to grant bail, and Section 13, which specifies certain offences as serious offences, and states that bail may only be granted in respect of those offences by the Supreme Court or a judge thereof.

The said offences are all offences which carry mandatory life sentences, and some of them are very rare.

Some Queensland cases have resulted in variations from the apparent meaning of parts of section 16. Firstly, there is the case of Loubie. Loubie was charged with a mandatory life offence under the *Drugs Misuse Act 1986*. Upon application for bail in chambers, Loubie's Counsel submitted that Section 16(3) (b) of the Bail Act was not in accordance with the provisions of the Australian Constitution, that is, it discriminated against Loubie merely because, having been charged with an offence in Queensland and normally residing in

another State, he was required to show cause why he should be admitted to bail. The necessary steps were taken, and the question fully argued before a Supreme Court Judge, who found that subsection to be not in accordance with Sections 109 and 117 of the Constitution. Section 109 states 'When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. Section 117 states 'A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State'. The Judge found that, the Constitution prevailing, Loubie did not have to show cause.

This was verified by the later, similar case of Fitzgerald and others, argued on appeal before the Full Court. The Full Court there found that Fitzgerald and his co-accused did not have to show cause. So section 16(3) (b) is no longer good law in Queensland.

The mandatory life offences which most commonly come before the Supreme Court of Queensland in chambers are murder and trafficking in hard drugs.

Many other types of offences come before judges in chambers. They are almost exclusively applications for the review of decisions of stipendiary magistrates as to bail.

The only exceptions would be applications for bail pending appeal, and the gate has virtually been shut in Queensland on those by the decision in Ex parte Maher [1986] 1 Qd R 303. A small space for escape is left, however, by the South Australian decision in *Giordano*—the case of a prisoner whose appeal cannot be heard until he has served a major part of his term of imprisonment. Some statistics might indicate the type of matters which usually come up in Chambers.

The leading Queensland case regarding bail for murder is *R v. Hughes* [1983] 1 Qd R 92. The Full Court of Queensland there found that it was not possible to say that the common law rule in relation to bail on murder charges continues to exist independently of the provisions of the Bail Act which provides an exhaustive statement of the manner in which the discretion to grant bail is to be exercised in relation to all offences in Queensland. So, when considering bail in relation to any offence in Queensland, the provisions of Section 16 are applied. The effect of that is that all relevant information becomes admissible on a bail application, and each case is entitled to be judged on its own merits.

It is usually much easier to get bail for women facing murder than for men. Women on murder more often have available the defences of provocation and or self-defence which will make manslaughter or acquittal a possibility or probability on trial. The only sentence which can be imposed in Queensland for murder is mandatory life, whereas manslaughter carries maximum life, so the likelihood or otherwise or conviction for murder is a crucial issue.

It is more common now than even only five years ago for persons accused of murder to be admitted to bail.

The mandatory life offences provided for in the Drugs Misuse Act 1986 are, as far as bail goes, largely finding their way. A recent decision of the CCA, *The Queen against Quaile* CA 121 of 1987, gives guidance as to what acts actually constitute trafficking in a dangerous drug.

In cases of trafficking in a first schedule drug, most applicants have eventually been admitted to bail, usually with a very substantial surety or cash deposit. The few who have not been given bail which they can raise have other problems, for example failures to answer bail on unexplained occasions in the past, or extensive criminal histories.

Once the Bail Officer is fully apprised of a prospective applicant's situation, the application either proceeds and is successful or proceeds and is unsuccessful (in which event the applicant is notified in writing why the application was unsuccessful) or the Bail Officer refuses to make the application (in which event the client is given a written explanation as to why his application will not be made).

In the financial year 1987-1988, I made a total of 291 bail applications, of which 44 were not successful. Of the 247 which were successful, 33 were variations of previous orders. The Public Defender has asked me to point out that my 'strike rate' in 1987-1988

was considerably better than in 1986-1987, when 224 applications were made, of which 169 were successful and 55 unsuccessful. I found a way to reduce the numbers of applications for variations considerably, by including in the draft orders for the court's approval a provision that the Director of Prosecutions be authorised to give his written consent for a bailee to change his place of residence and or reporting conditions.

On a rough estimate the number of applications for bail made by me in Chambers equals the total made in Brisbane by all other practitioners. I try to limit my court appearances to two days a week, but have had weeks when I was in court every day.

Formal bail instructions are taken on behalf of the Bail Officer from the client in prison. The Bail Officer prepares an originating summons and an affidavit for signature by the applicant. Where necessary, other affidavits for signature by such other parties as prospective sureties, are also prepared. The office is equipped with word processors, so the repetitious drudgery of affidavits for typists is largely eliminated. Where possible I check all information supplied to me before including it in affidavit material as our clients are not the most reliable people in the world. The New South Wales case *The Queen against Pascoe*, (1961) 78 WN, illustrates the need for scrupulous care in the preparation of bail affidavits.

While the affidavit must be correct, it is unnecessary and wrong to disclose information which may be used against the client later by the Crown. Such disclosures achieve nothing, and can be used to devastating effect at trial.

About three years ago, a North Queensland solicitor, acting as our agent for a man charged with murder, telephoned me and asked if I would make the application in Brisbane as the Northern Judge was on vacation, I agreed. The application was not opposed, and in due course the affidavit arrived. I found that it contained an admission that the client was guilty. I sent it back to the solicitor with the request that it be retyped without the admission. The application was successful, the client was released on bail, and was later acquitted on a trial.

Recently, I was waiting outside Court for my turn to come up, and a solicitor friend came along looking for the Crown Prosecutor, who was in court. He could not wait, and asked me if I would serve his affidavit on the Crown. I agreed, and idly read it through. His client was charged with trafficking in a first schedule drug, heroin, and had been interviewed by the police in the form of a record of interview, which was exhibited to the affidavit. The record contained admissions of the sale of heroin to an undercover policeman. The affidavit contained an admission that the record of interview was correct and true. I pointed out to my friend that admissions in the affidavit went almost to the point of a plea of guilty to a mandatory life offence. He was shocked and surprised. He had not even realised that the charge carried the maximum.

Apart from the mandatory life offences, in respect of which only the Supreme Court may grant bail, and the drug offences specified in the Bail Act and the Drugs Misuse Act which are bailable only by the Supreme Court, most of the bail matters which come to Chambers are situations where bail has been refused by stipendiary magistrates because of the requirement of Section 16 (3) that cause be shown. The onus is thrown on the defendant in cases where he stands charged with committing an offence while on bail for an indictable offence, with an indictable offence in the course of which he is alleged to have used or threatened to use a firearm, offensive weapon or explosive substance, or with an offence against the Bail Act.

It easy to understand that magistrates hearing matters on mentions have difficulty in finding that cause is shown. Judges in making that finding have the advantages of an orderly presentation of typed material, certainly from the defence, and in most cases also from the Crown, and careful submissions from both sides. It is my practice to take to court a typed draft order in a form which, hopefully, will be acceptable to the Court. Time has been taken, and material has been prepared with thought and care.

However, without in any way being critical of, or disrespectful to magistrates, they on the other hand have only verbal submissions from a police prosecutor who in all probability had not heard of the matter two days before, and verbal submissions from a defence advocate, who in all probability is less prepared than the prosecutor. An exception is the much more balanced picture in the mind of a magistrate after full consideration of evidence at a committal proceeding.

To illustrate, the following cases reveal where bail was granted and cause shown in the face of opposition by the Crown.

In February 1988 one M was charged with unlawfully wounding his wife and his mother-in-law. He was also charged with the attempted murder of his mother-in-law. The evidence was strong, and the offences serious. The Crown opposed bail. M was granted bail, and the Court gave these reason: a surety in the form of a cash deposit of $1000 and accommodation in Sydney are offered by the applicant's mother. The applicant faces a lengthy period on remand prior to committal proceedings. Contact with the complainants is forbidden. The applicant has no history of violence and the alleged offences arose out of a domestic dispute. There is little likelihood of the applicant further offending whilst on bail.

In January 1988 one B was charged with murder. B is a homosexual who stabbed the man with whom he was sharing a flat. He told the police a number of stories but issues of self-defence arose in all of them. No surety was available. He was granted bail on his own undertaking. The court gave these reasons:

> In my view the case against the accused on the charge of murder is not clear. It is more probable than not that he should be acquitted of that charge but convicted of manslaughter subject to an apparent defence of self-defence. With the conditions imposed I do not regard his as an unacceptable risk to appear in accordance with the requirements of his bail.

The incidence of failures to answer Supreme Court bail, including further offences committed, are in the vicinity of five per cent of total bail orders. Most of those who fail to answer bail have no surety. Heroin addiction is the most common feature of bail failures.

A decision not to make a bail application can be made to obtain an earlier listing in the courts, as can a refusal of bail by the Supreme Court. The Queensland system of bail is fair and effective, both from the defence and the Crown points of view. The incidence of people in Queensland being detained on remand for long periods without justification is very low, if existent at all.

Bail Research in South Australia

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For researchers, bail as a topic of investigation can be both rewarding and frustrating. On the positive side, bail is a good subject with which to examine the benefits of conducting applied criminological research. Research from other countries (most particularly the United States of America) has shown that it is possible for the bail process to be reformed, and to do so without an increase in rates of absconding or re-offending. Bail encompasses all three main agencies of the criminal justice system: the police, the courts and the prisons; thus any improvements that may eventuate from applied research cannot only be seen from within each agency, but the interactions between the agencies can also be studied. There are also good monetary incentives to find ways to reduce unnecessary remands in custody while still protecting the public from re-offenders.

Bail, however, can be a difficult topic to research. Changes to practice and legislation leave the system in a state of flux and relatively recent research is in danger of becoming outdated. Even though the latest study conducted by the South Australian Office of Crime Statistics into bail was in 1986, amendments passed in 1987 put these results in some jeopardy. Data relating to the bail process is time-consuming and sometimes difficult to collect as studies and forms specifically designed for the task need to be established. Hopefully when the Justice Information System is fully operational, data collection problems will not be as difficult as they have been in the past.

The Office of Crime Statistics has been researching bail since 1983 where, together with the Attorney-General's Office, it participated in a review of bail in South Australia. Overseas and interstate bail systems were examined and empirical evidence was collected from police, prisoners, summary and higher criminal courts to determine how bail was then being administered. One of the recommendations made by this review was for the establishment of a Bail Act and also for another research project to be undertaken to evaluate the new Act's implementation.

In July 1985, South Australia's first *Bail Act* was enacted and a research project for its evaluation began six months later. Similar data as the first study was collected to allow before and after comparisons to be made. The initial results of the 1986 study were such that it was recommended a working party be established to examine improvements that could be made. Since that time, there have been several changes, most notably amendments to the Bail Act passed in October 1987.

Review of Bail, 1983

Of particular note to researchers, both at the Office of Crime Statistics and elsewhere, was South Australia's high rate of prisoners that were on remand. In 1983, the average national remand rate per 100,000 adult population was 8.4, but in South Australia during the same period it was 9.8.

During a census conducted by the research team of unsentenced prisoners at Adelaide Gaol, a scoring system was used to try and identify defendants in custody who were good 'bail risks' and could have been recommended for release on bail. The scoring system (which covers items such as prior criminal record, employment status, residence) was similar to that developed and used successfully in the United States in their bail reform programs. On the basis of this, it was found that a third of the prisoners in Adelaide Gaol on that day had scores which could have warranted a recommendation for pre-trial release. During the course of the interviews and examination of prison records, it also emerged that 16 per cent of the prisoners were in custody due to being unable to meet conditions of their release set by the bail authority, most notably being unable to arrange sureties.

Only basic information about police bail determinations was collected from the South Australia Police Department. This involved bail decisions made for one month throughout the Adelaide metropolitan region. Police refused bail in 10 per cent of cases, one half of these were subsequently granted bail by the courts.

From the Office of Crime Statistics regular reports, bail status in Courts of Summary Jurisdiction was examined. At their final lower court hearing, 91.4 per cent of defendants in Courts of Summary Jurisdiction were on bail and 8.6 per cent were in custody. Bail conditions given to defendants varied according to the complexity of hearing. For a simple matter, that could be heard in a single appearance, 87.7 per cent of defendants were on unconditional bail. This percentage had dropped to 26 per cent for multiple hearings and for indictable offences where the defendant was committed for trial or sentence only 7.4 per cent received unconditional bail. On average, people who had more than one lower court hearing and were also in custody spent 32 days in gaol with 63 per cent of these eventually receiving non-custodial sentences. This last finding, in particular, led researchers to conclude that the majority who were refused bail received worse treatment before being found guilty than afterwards.

A main result to emerge from the analysis of Supreme and District Criminal Court data was that a half of all those appearing in the higher courts were remanded in custody for some of the proceedings—usually prior to sentencing. Like the situation in the Summary Courts, a significant proportion (40 per cent) received non-custodial sentences indicating that perhaps remand in custody was inappropriate for those cases.

The recommendations that emerged from this quantitative analysis and review of other systems indicated that although South Australia did not compare unfavourably with the other states and territories, nor was any systematic discrimination found, there were areas where improvements could be made. Basically, these recommendations were to

- improve the type of bail conditions offered to defendants, to be determined along the lines of the Australian Law Reform Commission recommendations which played down the importance of monetary conditions in favour of unconditional release;

- reduce the number of prisoners on remand who were there unnecessarily, hopefully by having more information about applications for bail made available for authorities to make informed decisions, and

- reduce pre-sentence custody if the ultimate sentence did not involve a prison term.

The central recommendation was for the creation of a *Bail Act*. This would bring together the diverse measures then contained in a variety of legislation that had evolved in a piecemeal basis over time. Researchers emphasised though that unless administrative procedures were altered to back up the intended spirit of the new legislation, any change in the practice of bail in South Australia would be minimal. It was thought, however, that at least the new legislation would be a chance to state clearly one consistent set of principles.

On 7 July 1985, South Australia's Bail Act was enacted and six months later the Office of Crime Statistics began research into the effect this legislation was having on the way bail was being given and administered in South Australia. The basic format of the study was to collect the same type of data that was collected in 1983 and make before and after comparisons. Interviews were also conducted with people who administered the new Act such as police, magistrates and judges to discover their response to the Act as well as any problems they may have experienced.

Evaluation of Bail, 1986

Remand rates were re-examined and although there was a noticeable decline in the figures shortly after the introduction of the new Act, the rates soon returned to their normally high level. Findings from the 1986 census of Adelaide Gaol's remand prisoners indicated that on the basis of scores obtained from the pre-trial release scoring system, a quarter of the remand population could have been classified as 'good risks' and recommended for release. There was a reduction by more than half of defendants in gaol through being unable to meet conditions of bail set by the authorities.

The same proportion of people arrested by police in 1986 were granted bail as were in 1983, that is 90 per cent. In examining defendant characteristics in connection with bail decisions by police the following results emerged. Unemployed defendants were refused bail 12.9 per cent of the time whereas employed people were refused bail only 4.3 per cent of the time. Those defendants who had been previously imprisoned were also refused bail at a greater rate than those who had not. As would be expected, a third of the people accused of sexual offences were refused bail compared to the one in ten average; but interestingly those accused of damage property, larceny and fraud, were also refused bail at a higher than average rate. Police were asked to give their reasons for refusing bail. The most common reasons for refusing bail were: having no fixed place of abode, the defendant being from interstate or overseas, having insufficient community ties or unable to obtain a guarantor. The above results conform roughly to predictions of good and bad bail risks as described in the research. Monetary bail conditions were popular with police bail authorities, 76.2 per cent of cases were on personal monetary recognisance or had to find a guarantor willing to go surety. Other conditions available to police established by the Act, such as residing at a specified address, non-contact with a specified person, reporting to police, or supervision by probation officers, were infrequently used.

Statistics from Courts of Summary Jurisdiction show more defendants allowed at large at their final court appearance than compared to 1983 figures. Just as in the 1983 study, the pattern of bail varies depending upon the complexity and seriousness of the case. Of cases that were finalised in one court appearance, the majority were allowed at large and only 2.3 per cent were in custody. For two or more court appearances, however, there were nearly as many defendants on some type of conditional bail as unconditional. The trend continues for those committed for trial with nearly three-quarters of this group being on some type of conditional bail and the percentage in custody increasing to nearly eight times the proportion of cases disposed of in one day, that is 16.5 per cent in custody for committal hearings as opposed to 2.3 per cent if required for only one hearing.

The types of conditions imposed by magistrates in the Courts of Summary Jurisdiction vary slightly from conditions imposed by police. There was less reliance by magistrates on

monetary recognisance, although this condition was still applied to 48 per cent of cases. Bail conditions used with greater frequency by magistrates than by police were residing at a specified address, non-contact with a specified person and reporting to police while on bail.

There were 375 cases where a defendant failed to appear at some stage in their court case. One in five defendants known to be on bail at their first scheduled court hearing absconded, while for people known to be on bail at the end of their first court hearing (and having no subsequent change of bail status) a quarter absconded before a further court hearing.

Only 22.6 per cent of people in custody at some stage of their case received a prison term as a penalty when their case was finalised. Furthermore, 17 per cent were not convicted of any charge but had their cases dismissed or withdrawn. The time spent in custody for those who were in custody from their first to last court hearing ranged from a third being incarcerated for less than a month to 12 per cent being in custody for six months to a year. Of the twenty-seven cases in custody for all their summary court case, there were ten (or over a third) who were eventually imprisoned. There were seven cases, however, which were eventually not convicted of any charge but who had spent between two and forty weeks in custody. To put such numbers in perspective, the following case, detected by researchers when conducting a census on remand prisoners in Adelaide Gaol, illustrates the problems of defendants for whom custodial remands may not be appropriate.

The case involved a pensioner aged sixty-one, arrested during January 1986 in Adelaide for shop theft. The total value of goods stolen was a dollar and five cents. At his first appearance the defendant was granted bail on his own recognisance, but then failed to appear at a subsequent hearing. According to the defendant, the reason was that he had been in hospital undergoing surgery. Indeed, a subsequent medical assessment found that he was 'an extremely ill man and required long-term care in a geriatric environment'. However, in light of the failure to appear, the magistrate set new bail conditions, requiring recognisances of $100 from both the defendant and a guarantor. The defendant was unable to find a surety, and as a result was remanded in custody until the next hearing, a month later.

Eventually, after 23 days in prison, a fellow inmate whose gaol term had expired agreed to go surety and the defendant was released. However, he then again failed to appear and an arrest warrant was issued. Nine days later, he appeared in court where $50 from his own recognisance and $100 of the guarantor's money were estreated. At this appearance, defendant was again granted bail on recognisances of $100 for himself and one guarantor. However, no guarantor was forthcoming and the defendant was returned to custody for a further month. Eventually, after spending a total of forty-nine days in gaol, he was convicted of the original charge but no penalty was imposed.

The provisions contained in the Act for supervision of defendants by the Probation Service may have been a more appropriate condition of bail for someone like the above case who had difficulty in complying with simple requirements—yet poses no real threat to the community.

One objective in reviewing the Bail Act was to ascertain whether there had been any change in the method and type of bail being granted in the higher courts. Data on the Act's first six months of operation shows that there was a different pattern of granting bail than had previously been the case. In particular, the practice of remand in custody for pre-sentence reports appears to be a less common occurrence. In the Supreme Court, remands in custody after conviction decreased from 32 per cent in 1982 to 19 per cent in 1985. District Criminal Court figures were even more pronounced with a decline from 51 per cent in 1982 to 4.7 per cent in 1985. Although we have not collected any more data since early in 1986, there has been anecdotal evidence that this change in pre-sentence remand procedures is still a current practice and possibly one of the main achievements of the Bail Act.

The length of time people who had been denied bail for all their higher court appearances in custody was analysed. In 1985, nearly half those in custody throughout all

their court case spent three months or less in prison. There were a few remandees from 1986, however, who spent up to a year in gaol. Findings from the 1983 review found that more than four out of ten (43 per cent) of the accused in gaol for all or part of the higher court proceedings did not receive a prison sentence, either because they were found not guilty (4 per cent) or a non-custodial penalty was used (39 per cent). Findings from the 1986 study show half of the accused in gaol for all or part of the proceedings did not receive an immediate prison sentence.

After their committal from a Court of Summary Jurisdiction, the majority (81.3 per cent) of defendants appearing in the Supreme or District Criminal Courts had been on bail, of these a quarter were on unconditional bail. The main conditions of bail imposed by judges were for defendants to agree to forfeit a sum of money (69.5 per cent of cases, Mode $1000) and nearly one in five were required to find a guarantor who would also agree to forfeit a specified sum. There was an increase in proportion of cases having other conditions set by judges than by other authorities, for example non-contact of a specified person was a condition of bail over 13 per cent of cases in the higher courts, only 10 per cent of cases in Courts of Summary Jurisdiction and only in 1 per cent of cases set bail by police.

Conclusion

As the first results emerged from the latest review into bail in South Australia, it was felt that not all the provisions built into the new legislation were being used to their best advantage, for example the provision for supervision of defendants by probation officers and the continued practice of setting monetary conditions. It was felt that the best way to address these problems was to reconvene a working party comprising representative administrators from the relevant justice agencies. This occurred and a new set of amendment emerged late in 1987 which hopefully corrected a few of the imbalances identified by the research. For example, there is now a provision to return a person to court within five days if they are remanded in custody due to being unable to meet bail conditions.

Recently, there have been further positive efforts by administrators of bail to tackle remaining shortcomings with bail procedures. Such initiatives will help to ensure that attempts to reform bail practices in South Australia will eventually succeed.

Pre-sentence Reports: Their Impact on the South Australian Remand Rate

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In July 1988 the issue of overcrowding of remand prisoners at the City Watch-house in Adelaide received widespread media attention and led to public debate on the subject of bail. Problems with the bail system were further highlighted by the Australian Institute of Criminology's statistics on prison trends (May 1988) which indicated that South Australia's remand in custody rate continued to exceed the national average. One of the fundamental aims of the 1985 *Bail Act* (and amendments in 1987) was to reduce the remand in custody rate by providing the judiciary with a greater range of alternatives to custody for unsentenced defendants. The new legislation enabled bail authorities to include supervision by a probation officer and home detention as conditions of bail. The quantitative research published by the Australian Institute of Criminology was quoted by some commentators in the political arena to suggest that the Bail Act of 1985 had not achieved its goals.

The Director of the Offenders' Aid and Rehabilitation Services suggested that magistrates and police prosecutors 'should be educated on the provisions of the bail reforms' (*The Advertiser*, 6 July 1988). However, no empirical qualitative evidence was produced to demonstrate that bail authorities were acting contrary to the intentions of the Bail Act. Opinions seemed to be based only on anecdotal evidence. It also seemed that some commentators were content to judge the implementation of the 1985 Bail Act merely by its impact (as measured by the remand rate) and appeared to have little interest in the implementation process. Pressman and Wildavski's (1973) seminal work on policy implementation and the myriad of subsequent studies in the past fifteen years provide ample evidence of the pitfalls of judging a policy simply in terms of its impact without having a clear understanding of what actually occurs during its implementation (*see* Palumbo & Sharpe 1980). An analysis of the implementation of the Bail Act would demonstrate the degree to which bail authorities, legal practitioners, the police, and the Department of Correctional Services affect the bail decision and process. Only then will it be possible to understand fully why South Australia continues to have a comparatively high remand in custody rate. The statistics indicate there is a problem—they do not identify the cause(s) of the problem.

The purpose of this paper is to identify a major role of the Department of Correctional Services in the bail process and to suggest that the Department can contribute to reducing

the remand in custody rate through administrative modification in conjunction with the support of the judiciary and legal practitioners.

There are two distinct periods during which defendants can be remanded in custody; the pre-trial/hearing period, and the pre-sentence period. Some defendants are detained during the former or later period, some for both periods. The Department of Correctional Services plays a particularly prominent role in affecting the pre-sentence bail period because it is frequently called upon by the judiciary to prepare pre-sentence reports which investigate the defendant's background and assess the possible impact of various community based sentencing options. In the financial year 1986-87, 1407 defendants were remanded in custody in South Australia, of which 398 (28 per cent) were the subject of pre-sentence reports. During the past financial year, 1987-88, 1338 defendants were remanded in custody, of which 269 (20 per cent) were the subject of pre-sentence reports. Those defendants were remanded in custody not awaiting trial or hearing, but waiting to be sentenced. Therefore if the time spent in custody awaiting sentence could be diminished, the overall remand rate would be reduced. It is this group of defendants who are the comparatively long-term remandees and who are repeatedly recorded in the Australian Institute of Criminology's prison census which is conducted on the first day of each month in order to calculate the remand rate. The remand in custody of these defendants for so many weeks or months contributed to the problem of overcrowding at the Adelaide Remand Centre in July 1988, which in turn led to overcrowding at the City Watch-house.

Table 1 illustrates that the Supreme Court and Central District Criminal Court remand a greater proportion of defendants in custody while a pre-sentence report is prepared than the Magistrate's Courts. This trend is not unexpected as the matters before those courts are generally of a more serious nature than those appearing in the Magistrate's Courts. Although the Magistrate's Courts remand only 14 per cent of defendants in custody for the preparation of a pre-sentence report, they order 63 per cent of all pre-sentence reports where the defendant is in custody.

Table 1

Whether Defendant is in Custody or on Bail when a Pre-sentence Report is ordered, 1 July 1987-30 June 1988

COURT	BAIL	CUSTODY	TOTAL	% IN CUSTODY
Supreme	25	45	70	64%
Central District	68	54	122	44%
Magistrate's	1039	170	1209	14%
	1132	269	1401	

A review of fifty pre-sentence reports ordered by magistrates between August and October 1988 revealed that in the Magistrate's Courts defendants are remanded in custody for an average of 30 days to allow for the preparation of the pre-sentence report. In the higher courts a date for sentencing is not arranged until the court has received the pre-sentence report. Table 2 illustrates the time that defendants are in custody from the request for the pre-sentence report until the passing of sentence. It is not representative of the time taken to prepare pre-sentence reports because, particularly in the case of the higher courts, the defendant is not always sentenced immediately upon the court receiving the report.

Table 2

Defendants in Custody subject to Pre-sentence Report: Time Taken from Request to Sentencing Date, 1 July 1987-30 June 1988

	SUPREME	CENTRAL DISTRICT	MAGISTRATE'S	TOTAL
Same day	-	-	5	5
1 week	-	-	6	6
2 weeks	-	-	7	7
3 weeks	-	3	7	10
4 weeks	-	-	19	19
1-2 Months	7	7	50	64
2-3 Months	7	8	20	35
3-4 Months	5	7	5	17
4-5 Months	68	1	15	
5-6 Months	6	1	1	8
> 6 Months	2	5	2	9
Unknown	12	15	47	74
	45	54	170	269

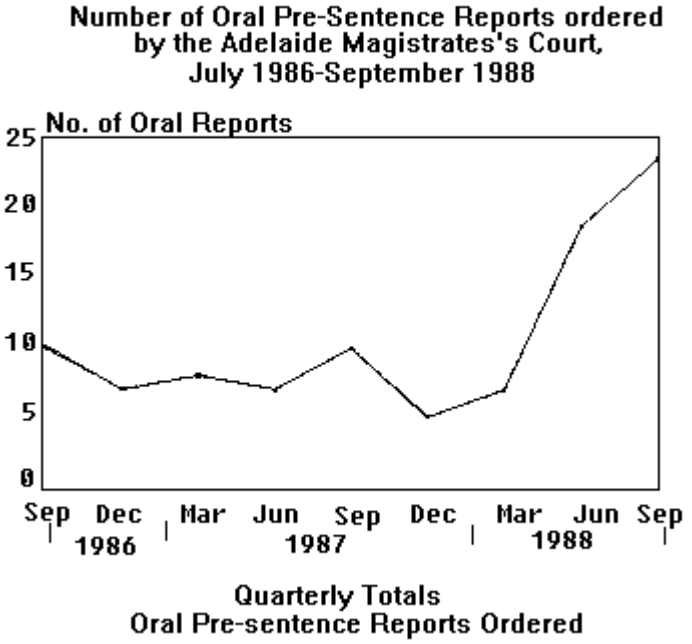
Table 2 illustrates that 44 per cent of defendants remanded in custody who are subject to a pre-sentence report spend between 4 and 12 weeks in custody between being found guilty or pleading guilty and being sentenced. The obvious question to arise is, why the delay? Two factors in particular could be significant. In some cases probation officers could be taking longer than four weeks to prepare reports, and legal practitioners, defendants, police prosecutors, or magistrates may be requesting further remands in order to consolidate other matters before the court or await the results of matters in higher courts.

Probation officers have for many years been confronted with the problem of trying to find the time between supervising a caseload, performing other duties, and preparing pre-sentence reports. For many probation officers the supervision of probationers and parolees has constantly impeded the preparation of reports and officers have often worked in a fragmented manner over a period of weeks in order to complete the report. The Department responded to this problem in April 1986 by establishing the Courts Unit. It was initially staffed by four probation officers and a supervisor. The probation officers did not have a caseload and were located at Head Office near the metropolitan courts. Their responsibility was to provide a service to the Adelaide Magistrate's Court, the Central District Criminal Court, and the Supreme Court. Duties included the assessment of defendants for community service work, bail assessments, and the preparation of pre-sentence reports. The Courts Unit was to prepare the majority of pre-sentence reports emanating from those courts and it was anticipated that the report writing duties of the probation officers at the District Officers would be significantly decreased as approximately 40 per cent of all pre-sentence reports ordered in South Australia are ordered by the Adelaide Magistrate's Court. However, although there were administrative advantages in having specialised probation officers service the courts, the courts were not provided with written pre-sentence reports any more quickly than prior to the formation of the Courts Unit. Although the Courts Unit probation officers did not have the encumbrance of managing a caseload, they were completing approximately seven reports per month which meant that they were usually working on between ten and twelve reports at any given time.

At the beginning of 1988 the Department acknowledged that while the Courts Unit had made a positive contribution to reducing the pressure on probation officers at the District

Officers, written pre-sentence reports still required four weeks to prepare. A departmental review of the Courts Unit resulted in a reorganisation of the Unit in an attempt to provide a more proficient service to the courts. A major factor to emerge from the review was that in the two-year period that the Courts Unit had been operating, the demand for oral pre-sentence reports from the Adelaide Magistrate's Court had risen dramatically. When the Courts Unit began operating in mid 1986 the judiciary had been informed that the probation officer on duty in the court could provide oral pre-sentence reports either on the day of request or within a few days, depending on the complexity of the case. In the twelve-month period prior to the formation of the Courts Unit there had been no requests for oral pre-sentence reports from the Adelaide Magistrate's Court. Figure 1 illustrates how the Adelaide Magistrate's Court responded to the provision of an oral report service following the establishment of the Courts Unit.

Figure 1



In response to the magistrates' acceptance of oral pre-sentence reports, the Department placed two probation officers in the Adelaide Magistrate's Court on a full-time basis in April 1988. Three officers remained at head office to prepare written reports. The Department hoped that the pressure of two officers in court would promote a greater demand for oral reports in place of written reports where it was appropriate, and especially in the case of defendants remanded in custody. As figure 1 illustrates, the demand for oral reports increased significantly after April 1988. In the twenty-one month period from July 1986 until March 1988 the Adelaide Magistrate's Court ordered 54 oral pre-sentence reports. In the six-month period from April to September 1988 the Court ordered forty-three oral reports. By October 1988 approximately one-third of all pre-sentence reports being ordered by the Adelaide Magistrate's Court were being requested as oral reports. Of the forty-three oral reports ordered between April and September 1988, twenty-four concerned defendants in custody. Twelve of those reports were presented on the day of request. The average time taken to prepare all the oral reports was three days. Because the Magistrate's Courts in South Australia remand defendants in custody for an average of 30 days for the preparation of a written report, it becomes clear that a considerable

reduction in time spent in custody by defendants has been achieved in the six-month period from April to September 1988. The twenty-four defendants remanded in custody for an oral pre-sentence report spent a collective total of 62 days in custody at the City Watch-house and the Adelaide Remand Centre. Had they been remanded in custody for written reports it is possible that they would have been in custody for 720 days (based on the 30 day average per defendant).

The presence of two probation officers located permanently in the Adelaide Magistrate's Court contributed to the increased demand for oral pre-sentence reports (as an alternative to written reports). Magistrates were informed of the Department's ability to provide more oral reports and they utilised the service. The use of oral reports rather than written reports may have resulted in defendants spending 658 fewer days in custody over a period of six months. As sixteen (66 per cent) of the twenty-four defendants remanded in custody did not receive a custodial sentence, the net result was that oral pre-sentence reports contributed to removing defendants from the prison system more quickly which has obvious economic benefits for the Department of Correctional Services.

Oral reports can be prepared more quickly than written reports for four main reasons. First, the probation officer is present in court and can receive direct instructions from the magistrate about the specific information that is required. The officer may have been present when the case appeared before the court and may have read various facts and submissions which would provide more information about the defendant which assists in the assessment process. Second, immediate contact is made with the defendant who is in custody. Friends and relatives are often present in court and can also be interviewed immediately, avoiding the time consuming exercise of home visits for interviews. Third, the officer has immediate access to the court file and any previous criminal record. And finally, the officer can deliver the report orally based on notes and does not need to have composed a written report which required a clerical officer to prepare into a typed format.

It would benefit the Department of Correctional Services if the magistracy ordered more oral pre-sentence reports as a proportion of all reports ordered. These reports are investigated and prepared just as thoroughly as a written report, the only difference being that they are presented orally. This presentation has further advantages in that the probation officer is present in court and can be questioned on any aspect of the report which is in dispute or needs further clarification. Due to heavy workloads in recent years probation officers who have prepared written reports have rarely attended court when their reports have been presented. If the probation officer is required to attend court due to a dispute about the contents of the report then a further remand is ordered to enable that officer to attend. Such delays do not occur when the resident probation officers are in court. The oral presentation also has benefits for many defendants who are illiterate or have problems understanding written reports.

The Supervising Magistrate of the Adelaide Magistrate's Court Mr Peter. M. St. L. Kelly, supports the expanded use of oral pre-sentence reports and recognises their value in accelerating the judicial process by enabling magistrates to remand defendants in custody for significantly shorter periods. Other magistrates have increasingly utilised the service and acknowledge that on humanitarian grounds it is desirable for defendants to be remanded in custody for the shortest possible period while awaiting sentence. The financial and emotional impact on a defendant who is remanded in custody for 30 days for a written pre-sentence report can be immense. A one, two or three-day remand for an oral report will be far less damaging.

The Aboriginal Legal Rights Movement has also acknowledged the benefit of oral pre-sentence reports. With the current concern about Aboriginal deaths in custody the Movement has welcomed the provision of oral reports which reduce the period of time that Aboriginals spend in custody. Many solicitors, in private practice and from the Legal Services Commission, have also supported the provision of oral pre-sentence reports in appropriate cases, and especially for those in custody.

Oral pre-sentence reports can have a significant impact on the remand rate. The Australian Institute of Criminology's statistics for the 1987-88 financial year showed that

South Australia had an average remand rate of the 13.29 (remandees per 100,00 population) (Biles 1988). In that twelve-month period 1338 defendants were remanded in custody, 170 (13 per cent) being remanded by Magistrate's Courts for the preparation of a pre-sentence report. Had those 170 defendants been remanded for a period of only one, two or three days for an oral pre-sentence report it is likely that most of them would not have been included in the Australian Institute of Criminology's monthly census count. The census does not take into account those defendants who are being held at the City Watch-house or various police holding cells. As most oral pre-sentence reports are completed on the day of request or within three days it is quite often the case that defendants are not transferred from police holding cells at the courts to remand facilities which are included in the census. Even those who are transferred to such facilities as the Adelaide Remand Centre, James Nash House, or Yatala Labor Prison, are there for such a short period that the possibility of them being included in the monthly census is low. The indication is that there is a possibility for the remand rate to be reduced by up to 13 per cent, based on 1987-88 statistics, and 21 per cent based on 1986-87 statistics, if magistrates ordered oral pre-sentence reports for those defendants that they remand in custody for a report. A 13 per cent reduction of the 1987-88 remand rate would have seen it fall from 13.29 to 11.56.

It should be noted that approximately 7 per cent of all defendants in custody for the period 1987-88 awaiting the preparation of a pre-sentence report, were remanded by the Supreme Court and Central District Criminal Court. The higher courts rarely order oral reports, therefore at this stage oral reports do not have any significant effect on pre-sentence bail periods set by the higher courts. This situation may change as oral pre-sentence reports gain a wider acceptance in the Magistrate's Courts.

Conclusion

The Department of Correctional Services recognises that it can contribute to lowering the remand in custody rate by reducing the time taken to prepare pre-sentence reports for those defendants remanded in custody. The use of oral pre-sentence reports prepared by court probation officers has been a common practice in other states for some years and has been accepted by the respective magistracies. There is every indication that the magistracies in South Australia will fully support the Department of Correctional Services in its efforts to provide the courts with comprehensive oral pre-sentence reports which can usually be provided within days of request. It will take time for the Department to train more of its staff to present oral pre-sentence reports, but that process has been initiated. In recent months some members of the legal profession have indicated a willingness to accept oral reports and their continued support for this style of presentation will be needed in the future.

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Intensive Supervision and Electronic Surveillance as Alternatives to Remand in Custody

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Between July 1984 and June 1988, the number of prisoners held not under sentence in New South Wales (NSW) rose by 72.2 per cent from 580 to 999; the number of sentenced prisoners increased by 33.6 per cent during the same period (NSW Department of Corrective Services 1988, pp. 5 and 6). About one in five prisoners in NSW are unsentenced with that population rising at more than twice the rate for sentenced prisoners. This inflation in the unsentenced prisoner population has not only stretched prisoner accommodation, but it has thrown into relief a range of issues in relation to bail in NSW.

Locked away in this remand population are remandees who may be potential bailees given an expansion of the strategies for managing defendants and accused persons currently persons currently denied bail. The NSW Minister for Corrective Services, Mr Michael Yabsley, has acknowledged the problems surrounding the high remand population. The lead time to an accommodation solution is more than two years, but the Minister has pointed the way to a response that could be more rapidly pressed into operation—'I suspect that much of this overcrowding could be alleviated if magistrates were ready to grant bail in appropriate circumstances' (*NSW Corrective Services Bulletin*, 22 August 1988). The search for 'appropriate circumstances' is now both urgent and justified.

This paper is an examination of the potential for an intensive supervision bail program to augment the existing regimes and strategies for the management of persons allowed conditional bail. Intensive supervision (often called home detention) is a supervisory regime adopted in recent years to manage some higher risk offenders in the community.

Gaol and Bail

There is an enormous difference in terms of identity and management between those who have been refused bail and those who are allowed it. A study of the remand system in England and Wales under the appropriate title of *Lacking Conviction* (Winfield 1984), found that 21 per cent of defendants remanded in custody by Crown courts were either acquitted or given non-custodial sentences. The figure was seen to be unacceptably high

and a 'tiered approach' to bail was proposed to break down the 'all-or-nothing approach which characterises the bail/custody question (and the need for the) imaginative use of reporting and residence conditions to enable more defendants to be released on bail' (Winfield 1984, pp. 81-2).

Before suggesting such a response, it is important to clarify a few matters that apply to defendants and bail:

- As persons on bail or refused bail are unsentenced, any regime of confinement or supervision cannot be applied as a punishment (despite the fact that a custodial sentence may be back-dated to accommodate the prior period in custody).

- Intensive supervision is a regime of social control (as prison walls exercise social control) designed to enhance the bailee's potential to comply with the expectations of bail—to return the defendant to court; to protect the community from re-offending; and to protect the defendant from injury to him or herself.

- The transference of some levels of offender management from prison to the community has been retarded somewhat by the preservation of the dichotomy between the custodial and community camps in corrections. Community-based corrections, in their attempt to preserve the rehabilitative face of their operations, have been slow to admit the social control dimension of corrections into their operations. This traditional polarity may have in fact contributed to stubbornly high imprisonment rates—an unintended consequence that may only be reluctantly admitted.

  The non-alignment of probation and parole officer roles with the expectations of the pilot Bail Assessment Service and Supervision Programme in NSW is evidence of this problem (Law 1984, p. 27).

- There has been a substantial investment of energy and effort into the assessment of bail consideration, but an unequal contribution in regard to the supervision of the bailee. While it is acknowledged that the NSW Probation and Parole Service is frequently identified as the provider of 'supervision and guidance' in relation to many bail undertakings, in most cases the regime that is applied in response to this is indistinguishable from the normal processes of probationary supervision.

  One of the assessment tests for bail was built into 'Form 4'—the Background and Community Ties Questionnaire used by police in bail assessment. This form, although given a substantial revision in recent years, seems to have fallen into disuse. In 1984, during the period of the NSW Bureau of Crime Statistics and Research study on bail (1984), Form 4 was used in only 12.3 per cent of police bail assessments; it now seems rarely used at all. Yet, unless bail assessment is sound, the practice and potential of bail supervision could be astray.

- No paper on current correctional issues can ignore the impact of HIV antibody positive and Hepatitis B offenders. The compulsory screening of remandees for AIDS poses difficult ethical and management problems. The usually unstructured remand environments, with limited work, educational and recreational opportunities, suggest that there are enormous and obvious benefits in shrinking the size of the remand population for this reason alone.

Bail and Intensive Supervision

The New South Wales *Bail Act 1978* sets provisions for the imposition of specific bail conditions. It reads:

> 37. (1) Bail shall be granted unconditionally unless the authorised officer or court is of the opinion that one or more conditions should be imposed for the purpose of promoting effective law enforcement and the protection and welfare of the community.
>
> (2) Conditions shall not be imposed that are any more onerous for the accused person than the nature of the offence and the circumstances of the accused person appear to the authorised officer or court to require.

It seems that this section of the Bail Act has created much more space for flexibility in setting bail than has been realised to date. It enables the bail adjudicator to tailor bail conditions to the particular needs of both the defendant and the community. Such things as reporting to the police, not entering licensed premises, non-association with specified persons, and Probation and Parole Service supervision usually characterise the application of this section.

However, at the time of the NSW Bureau of Crime Statistics and Research 1984 study, only one of the 198 defendants (0.5 per cent) had Section 37 conditions applied to them. The researcher indicated that the utilisation of this provision ' . . . is the least onerous of the allowable conditions' (p. 15). Such an interpretation of Section 37 appears to be much narrower than the Act both permits and intends.

The target group for a more adventurous interpretation of Section 37 is those defendants who are denied bail or unable to raise bail because of specific social deficits. The Bureau of Crime Statistics and Research demonstrated that the most common reason for bail being refused was a 'lack of community ties'. Half those refused bail in the research sample had this reason specified (1984, p. 24). The defendant's prior offence history also mitigated against bail in about half of the sampled cases.

A regime of intensive supervision would not divert all 'lack of community ties' defendants from a bail-refused situation (many so identified defendants have bail refused for more than one reason, of which only one may be a lack of community ties). However, bail may be allowed for some defendants if their accommodation and/or employment situation can be confirmed and monitored, if any non-association conditions can be supervised, if any curfew requirements can be surveyed, and if any other restrictions on movement and association are tested for compliance.

While there may be an initial welfare component in securing bail (for instance obtaining accommodation), the overriding intention of intensive supervision is to enhance the potential for the defendant to return to court and restrict the radius of social behaviour so that re-offending potential is reduced, without incarceration.

Some of the elements in such a supervisory regime could include:

- A high incidence of planned and random checks on accommodation and/or employment. Daily contact, either by way of visits, reporting, or other checking would probably be the usual routine.

- Random breath-testing and urinalysis where alcohol abuse and/or illegal drug use were of significance in the alleged offending behaviour. A 'dirty' result may activate breach proceedings.

- Checking curfew compliance. A bail condition confining the defendant to a place of accommodation between specified hours may be applied.

- The use of telephones or electronic surveillance devices may be utilised to enhance the monitoring of curfews or other restrictions on social movement.

- Elevating the significance of the 'acceptable person' nominated in support of the bail application, as a reference point for welfare type matters during the period on bail.

The specific intention of such a program is to divert appropriate defendants from a bail refused situation to a supervisory regime where they are partially rather than totally incapacitated; where there is no radical overtaking of their liberty; where there can be the maintenance of such things as accommodation, family ties, and employment.

The performance indicators for such a program of intensive supervision would be a contraction in the total remand prisoner population (the need for bail hostels could be superseded), cost savings in terms of prisoner management, reduced reoffending on bail, and a low 'fail to appear' rate.

Intensive supervision programs, by their very nature, tend to expose program violations that would be unlikely to be detected in the normal processes of bail supervision. Accordingly, a high breach of bail conditions rate (even 20 to 30 per cent) could be anticipated.

If net-widening in such a program is to be avoided, two factors assume significance. Firstly, the identification and assessment of appropriate defendants for such a program is critical. The use of an objective Form 4 type assessment (risk-need assessment instruments) may assume renewed significance. Secondly, maybe only those defendants who have been refused bail at some stage should be entitled to assessment for intensive supervision bail.

Operational Considerations

A regime of intensive supervision as a specific bail condition could harness the resources already deployed in an intensive supervision/home detention type program. The smorgasbord of design options could even see the surveillance 'leg work' undertaken by private sector security operatives or the recruitment of sessional surveillance personnel who are only pressed into service when defendants materialise for supervision. The role of the police could be expanded in respect of bail supervision or it could be contracted if responsibilities were devolved to other authorities.

Conclusion

Prison is not the 'last resort' if the application of all alternatives has not been tested. The expansion and success of home detention and intensive supervision programs overseas has moved offender management from custody into the community for many offenders. There are sound reasons for exploring its potential in the territory of bail.

Intensive supervision of defendants who may normally be refused bail has the potential to reduce the remand population, and produce a range of benefits in terms of cost-effectiveness, community protection, and defendant management.

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