THE LAW REFORM COMMSSION
OF WESTERN AUSTRALIA

Project No 43

Compensation for Persons Detained in Custody who are Ultimately Acquitted or Pardoned

WORKING PAPER

NOVEMBER 1976

PREFACE

The Law Reform Commission has been asked to consider the question of compensation for persons detained in custody who are ultimately acquitted or pardoned.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms on individual issues raised in the working paper, on the paper as a whole or on any other aspect coming within the terms of reference, are invited. The Commission requests that they be submitted by 14 January 1977.

Copies of the paper are being sent to the –

Chief Justice and Judges of the Supreme Court
Chief Secretary and Minister for Justice
Chief Probation and Parole Officer
Citizens Advice Bureau
Civil Liberties Association
Commissioner of Police
Community Welfare Department
Department of Corrections
Institute of Legal Executives
Judges of the District Court
Law School of the University of Western Australia
Law Society of W.A.
Magistrates' Institute
Solicitor General
Under Secretary for Law
Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting anyone interested to obtain a copy of the paper and to submit comments.

The research material on which the paper is based is at the offices of the Commission and will be made available there on request.

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TERMS OF REFERENCE

1.1 The Commission has been asked to consider whether compensation should be granted to persons who have been detained in custody and who are ultimately acquitted or pardoned.

INTRODUCTION

Scope of paper

2.1 This working paper deals with two aspects of the administration of the criminal law which may warrant consideration for compensation.

These are –

(a) where a person is detained in custody pending final disposition of his case and he is acquitted (either at the trial or on appeal);

(b) where a person has been convicted and has served part or all of his sentence before his conviction is quashed or he is pardoned.

The first of these aspects broadly covers the day to day operation of the system of criminal justice as it affects persons accused of crimes. The second covers those unusual circumstances where a special reference to the Court of Criminal Appeal under s.21 of the *Criminal Code* results in an acquittal or where the Governor-in-Council has issued a pardon to that person.

General principles

2.2 From the time of Magna Carta in 1215 it has been a fundamental principle of the English common law that a man should not be imprisoned without a fair trial: see Magna Carta clause 39. This principle has found further expression in the "golden thread" of English criminal law that a man is presumed innocent until proven guilty: see *Woolmington v D.P.P.* [1935] AC 462 at 481. Having regard to these principles it might be thought that an accused person should not ordinarily be imprisoned or otherwise prejudiced before he is tried (see paragraphs 7.1 to 7.10 below), and that if he is acquitted he should not suffer as a result of the proceedings. This does not always happen, however, and the question then arises whether the

State should compensate the accused person, and if so, in what circumstances and to what extent.

2.3 In the pre-trial situation there has been a conflict between the principles mentioned in paragraph 2.2 above and the administrative necessity of ensuring that the accused person does not abscond before he can be tried. Accordingly, a person who is arrested and charged with an offence can be remanded in custody pending trial - a process described by Lord Hailsham as the solitary exception to Magna Carta in peace-time (noted in *Bail or Custody*, published by the Cobden Trust at 90).

2.4 The expectation of society to have the law enforced in an effective manner must be balanced against the rights of the individual. Detention in custody pending trial may in many cases involve substantial hardship to the individuals concerned and their families. For example, an accused who is detained in custody may well lose his income and possibly his employment.

2.5 It has been suggested that detention may also result in an increased likelihood of being convicted, and if convicted, being imprisoned: see *Bail or Custody* at 71-75. While it is difficult to analyse the precise reasons why this should be so, there does appear to be statistical evidence to support this conclusion from a number of studies in different jurisdictions: ibid. This may reinforce the commonly held impression that an accused person suffers some prejudice by reason of detention pending trial.

Bail

2.6 In Australia, as in England, the legal system has attempted to ameliorate such hardships and make the system more flexible by providing that after a person is arrested he must be brought before a justice as soon as possible: see *Justices Act 1902*, s.64; *Criminal Code*, s.570. The justice can then, with certain exceptions, either release him on bail or remand him in custody: see *Justices Act 1902*, ss.116-117. In the case of offences triable summarily certain police officers may admit the accused to bail: see *Police Act*, s.48. In the case of other offences unless the offence is of a "serious nature" certain police officers may bail the person if it is not practical to bring him before a justice within twenty-four hours: see *Justices Act*, s.64.

2.7 In Western Australia bail is generally not granted by Courts of Petty Sessions to those people the magistrate considers are likely to -

(a) abscond before trial;
(b) intimidate witnesses;
(c) hinder their investigation of the alleged offence;
(d) commit further offences pending trial.

The Commission understands that bail in Western Australia is also refused on a wide variety of other grounds including "further enquiries to be made", "previous convictions", "the seriousness of the offence" and "no fixed abode": see also Brown, *Bail: An Examination* (1971) 45 ALJ 193. For the English position which is similar, see Michael Zander, *A Study of Bail / Custody Decisions in London Magistrates' Courts* (1971) Crim LR 191.

2.8 The manner of granting and refusing bail is under consideration by the Commission in Project No. 55 (review of the *Justices Act*) and Project No. 64 (review of bail procedures), and will be considered in detail in relation to those projects. However, bail also has some relevance to this project, since it is arguable that one effective way of dealing with the problems arising out of the acquittal of persons detained pending trial is to minimize the incidence of unnecessary detention in custody. This could be done by reforming the rules relating to bail and by changing the law and practice with regard to the manner in which proceedings are started - viz: a greater use of summonses and a lesser use of arrests would tend to reduce the problem. This has been suggested by the Australian Law Reform Commission in its Report, *Criminal Investigation* (ALRC 1975), paragraphs 62-63. If this were done it would in many cases avoid the need for a bail decision altogether.

2.9 The problem of determining whether a person is a good or bad bail risk, is not that magistrates lack sufficient legal powers but rather that the system is not geared to ensure that the appropriate facts are gathered, verified and then placed before the magistrate in such a way that the bail decision can be made in the light of them. It appears from the Commission's enquiries that magistrates in Western Australia are very much aware of the difficulties in this field and of the need for relevant information to be obtained and placed before them before they make a bail decision. While the lack of information may not matter in minor summary

charges where bail is granted by Courts of Petty Sessions almost automatically, it could make a difference in more serious cases.

2.10 The present bail system operates in such a way that some persons subsequently found not guilty have been remanded in custody before trial. It also operates so that many guilty persons who subsequently receive a non-custodial sentence have been detained in custody pending trial.

The American experience with bail

2.11 This shortage of relevant information about the accused has occurred in other jurisdictions. In New York it was overcome by a project initiated by the Vera Foundation, which is a private foundation set up as a result of the interest of Louis Schweitzer, a New York industrialist, in the protracted pre-trial detention of penniless youthful offenders. The project involved gathering and verifying certain simple yet appropriate items of information about the accused, such as family background, residence, prior convictions and employment, and placing it before the magistrate. This information was collated and graded on a points system according to a formula. Subsequent use of the system over a three year period from 1961 to 1964 indicated the reliability of the formula in assessing bail risk. The scheme thus had two desirable effects. The first was that it verified and placed the relevant information before the magistrate in a coherent manner. The second was that if the accused met the threshold requirement (that is if he scored the necessary points) he was statistically a good bail risk. Hence in the absence of some countervailing fact the magistrate could release the accused on bail with considerable confidence that he would appear at his trial. Full details of the scheme are set out in Appendix V.

2.12 A similar scheme could perhaps be considered for Western Australia. The method proposed by the Vera Foundation was considered and recommended by the Australian Law Reform Commission in its Report, *Criminal Investigation* paragraph 179. Its adoption on an experimental basis was also recommended by the English Working Party on *Bail Procedures in Magistrates' Courts* (HMSO 1974) but has not been included in the Bail Bill currently before the English Parliament.

2.13 In the United States following the success of the Vera Foundation's project the scheme has now been embodied in legislation in a number of jurisdictions, including New York and the District of Columbia.

2.14 If the courts could predict bail risk with greater accuracy, it is likely that the administration of bail would change. It may well be that more persons would be released on bail than at present; and it is likely that some who are now released would no longer be granted bail. It is conceivable, however, that the overall effect would be that fewer people who are subsequently found not guilty would be detained in custody pending trial.

Conviction quashed or pardoned

2.15 Apart from the pre-trial situation there will always be cases where an accused person has been tried and wrongly convicted and has served part or all of his sentence before his conviction is set aside. In Western Australia one such case has been that of Gouldham where his conviction was set aside following a special reference to the Court of Criminal Appeal several years after he had completed serving a prison sentence: see *R. v Gouldham* [1970] WAR 119. Such situations have more frequently occurred in England. Examples known to the Commission include the cases of Beck (convicted in 1904 and served ten years), Slater (convicted in 1908 and served eighteen years) and the more recent cases of Latimore (served three years of a life sentence for murder), Meehan (served seven years of life sentence for murder) Virag and Dougherty: see Appendix IV. The ordinary appeal processes do not always deal effectively with wrongful convictions, particularly where the evidence on which the accused was convicted was principally that of identity: see the Report of the Devlin Committee, *Evidence of Identity in Criminal Cases* (HMSO 1976).

2.16 Following the Devlin report and in view of the number of persons found to have been wrongly convicted in England on the basis of identity evidence, five senior judges sat in July 1976 as a special Criminal Appeal Court to review the cases of four people convicted on such evidence and currently serving sentences, who it was believed ought not have been found guilty: *The Times*, 10 July 1976. The Court quashed the conviction of two of these people.

2.17 In England the court of Criminal Appeal has been criticized in the editorial of the New Law Journal 6 May 1976 for its restrictive view its role on appeal which has resulted in miscarriages of justice not being corrected.

The powers of the Court of Criminal Appeal in Western Australia are contained in s.689 of the *Criminal Code*, the relevant part of which reads as follows:

> "(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: ...".

This provision was recently discussed in *Conroy, Warn and Sisson v R.* [1976] WAR 91. In that case the Chief Justice (at page 94) said the Court would be entitled to allow an appeal if "in its opinion, it would be dangerous or unsafe in the administration of the criminal law to allow a verdict of guilty to stand". However, no matter how widely its power is construed, the Court could not be expected to conduct a complete retrial and there is therefore always the possibility of a person who has been wrongly convicted failing to succeed on appeal.

WESTERN AUSTRALIA: SITUATIONS IN WHICH PEOPLE CAN BE DETAINED IN CUSTODY IN THE COURSE OF THE ADMINISTRATION OF JUSTICE

Pending trial

3.1 In Western Australia there are no comprehensive figures available on the number of persons detained in custody pending trial who are ultimately acquitted. The Western Australian Department of Corrections has produced some figures (see Appendix I) which are a by-product of a study and evaluation of the Duty Counsel Scheme: see M. Martin, *A sample of Custodial Remands Extracted from the Duty Counsel Scheme Evaluation Study* (unpublished, Western Australian Department of Corrections, 1975). These figures show that one person in twenty-three of those detained in custody was found not guilty (4.3 percent). While the sample is in itself too small to be reliable the figures derive some interest from the

fact that they closely resemble the English statistics which show that approximately four to five percent of persons remanded in custody are acquitted.

3.2 For Australia as a whole it has been estimated by Mr. D. Biles, Assistant Director (Research) of the Australian Institute of Criminology, that of the 9,000 people in Australian jails at anyone time over 1,000 of these are remanded in custody pending trial: see Australian Institute of Criminology Information Bulletin (1974) Vol. 1 No. 3 at 9. As far as Western Australia is concerned the most recent statistics available show that there were sixty-eight persons in custody awaiting trial or on remand pending sentence on the night of 30 June 1975. When regard is had to the length of time a person may be detained (for which see Appendix I) and the fact that it costs over $160 per week to keep a person in custody, a significant cost to society can be seen to be involved.

During trial

3.3 Persons, even though granted bail pending trial, are sometimes detained in custody during trial. Since the case of *R. v Cutler* (1972) (Western Australian Supreme Court case No. 193/72) the practice has been to release the accused if exceptional circumstances exist for doing so. It appears that courts are now tending to be more readily satisfied that such circumstances exist, with the consequence that more people are being released during trial. However, some accused are still detained during trial and it must be presumed that some of those persons are subsequently acquitted.

Pending appeal

3.4 Persons may also be detained in custody after conviction and pending appeal even though there is power for bail to be granted: see *Criminal Code*, s.700; *Justices Act*, s.187. The Commission understands that bail is not infrequently granted under the latter provision. In those cases in which bail is not granted a successful appeal could mean that an accused person has spent time in jail for a crime of which he has been ultimately acquitted. For example, in *R. v Cross* the Court of Criminal Appeal of Western Australia quashed both convictions against Cross and entered a verdict of acquittal: case No.55/ 1972; Supreme Court Library Case No. 1152. By the time this happened Cross had been in custody for thirteen months.

Until conviction quashed or pardoned

3.5 There have been a number of cases of people convicted in Western Australia who have served part or all of their prison sentence and who have either had their conviction quashed or received a pardon. The case of Gouldham referred to in paragraph 2.15 above is a case in point. The accused was convicted of an offence and served a prison term of almost a year. Subsequently the conviction was quashed as a result of fresh evidence. The State Government made an ex gratia payment to him of $12,500.

3.6 In a recent case Morse, Blackman and Antonovich were convicted of assault and sentenced to three months imprisonment. After a day's detention they were released on bail pending appeal. Before the appeal was heard it subsequently appeared that this was a case of mistaken identity. The men were pardoned and set free: see *The West Australian*, 25 and 29 October 1975 and the *Weekend News*, 25 October 1975.

REMEDIES AVAILABLE TO PERSONS IN WESTERN AUSTRALIA WHO HAVE BEEN DETAINED IN CUSTODY AND ULTIMATELY ACQUITTED OR PARDONED

Legal remedies

4.1 Whilst Western Australian law is comparatively well developed to assist acquitted persons with their legal costs particularly in the inferior courts (see generally *Official Prosecutions (Defendants' Costs) Act 1973* and the *Suitors' Fund Act 1964*), for the most part no remedy is available to compensate persons for loss caused to them by detention in custody. Officers of the State, such as magistrates and police officers, enjoy a wide measure of immunity from tort actions for wrongful arrest or imprisonment: see *Justices Act*, ss.230 and 232; *Police Act*, s.138. Apart from this, the vast majority of detentions do not, of course, occur as a consequence of misuse of authority by such persons: but cf. *Leutich v Walton* [1960] WAR 109; *Trobridge v Hardy* (1955) 94 CLR 147.

Ex gratia payments

4.2 Consequently, the only source of compensation which may be available is an ex gratia payment by the Crown. There are no official figures available as to how many ex gratia

payments have been made. The Commission understands, however, that there have been no ex gratia payments for detention pending final disposition of a case and only one in the case of a person wrongly convicted: Gouldham.

COMPENSATION SCHEMES AND PROPOSALS IN OTHER JURISDICTIONS

Other Australian states

5.1 There are no formal compensation provisions in other Australian states and ex gratia payments are rare. There have been no cases in which ex gratia payments have been made in Tasmania and, as far as the Commission is aware, none in Victoria in the twenty years prior to 1970: see opinion of Sir Marcus Gibson relating to the Gouldham case tabled in the Western Australian Legislative Assembly on 11 August 1970.

Nor does there appear to have been any case in Queensland in which an ex gratia payment was made.

5.2 In New South Wales there appears to have only been the case of McDermott, who in the 1940's served some years of a life sentence for murder. A Royal Commission found the evidence against him to be unsatisfactory and he was released and given an ex gratia payment of £1,000.

South Australian proposals

5.3 The Criminal Law and Penal Methods Reform Committee of South Australia has recommended that compensation should be paid to persons who are acquitted after having been detained in custody pending trial: see the Third Report of Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (1975) at 62, paragraph 4. The Committee recommended that compensation should be assessed by the trial judge after acquittal if he considers that, on the balance of probabilities, the defendant is innocent and has suffered loss amounting to hardship. The Commission has been informed that no decision has yet been taken by the South Australian Government on whether to implement this aspect of the report.

England

Detention pending trial

5.4 In 1808 Sir Samuel Romilly introduced a Bill into Parliament for granting compensation in certain cases to persons tried for felonies and acquitted: see Cobbett's Parliamentary Debates Vol. XI at 395-403. The question of whether the accused was to be compensated, and if so for how much, was to be left to the trial court. The Bill was withdrawn after strong opposition.

5.5 There has been considerable pressure in England in recent times for reform in this area from the Cobden Trust, from Dr. Glanville Williams, *The Proof of Guilt* (London, 1963) at 133 et seq, Professor Street, *Governmental Liability* (Cambridge, 1953) at 44, and others. However, as far as the Commission is aware, no legislation has been introduced into Parliament.

5.6 Thus, as in Western Australia, the only remedy is by way of ex gratia payment. Very few acquitted persons have been recommended for such payments by the Home Secretary. For example, of the 2,186 persons acquitted in 1972, only five were awarded ex gratia payments: see M. King, *Bail Reform: The Working Party and the Ideal Bail System* (1974) Crim LR 451 at 455.

Until conviction quashed or pardoned

5.7 Even where a person has been wrongly convicted and served part or all of the sentence it is difficult to get an ex gratia payment; moreover where one is granted it is rarely adequate. For example, of the seventy people who between 1950 and 1970 were either pardoned or had their convictions quashed very few received ex gratia payments: see Brandon and Davies, *Wrongful Imprisonment* (London, 1973), at 200.

5.8 However, there have been some famous cases in England involving miscarriages of justice in which ex gratia payments were made. For example, Adolf Beck who was awarded £5,000 spent ten years in prison for a crime he did not commit - a case of mistaken identity in which the real culprit was later apprehended. Another case was that of Oscar Slater, who was

awarded £6,000. Slater spent eighteen years in prison for a murder of which he was innocent. There have also been such recent cases as Virag and Dougherty who received ex gratia payments. These last two cases led to the setting up of the Devlin Committee: see paragraph 2.15 above.

Other countries

5.9 Many jurisdictions operate schemes to compensate people who have suffered as a result of the inappropriate functioning of the system of criminal justice. These schemes differ widely as to the scope of compensation available and the way in which such compensation is assessed.

5.10 Some jurisdictions compensate only for erroneous conviction and subsequent imprisonment. These include Italy, Portugal, Spain, Mexico, Brazil, California, North Dakota, Wisconsin, New York and the United States in its Federal jurisdiction: see Appendix III for the text of the statute relating to the United States in its Federal jurisdiction.

5.11 Other jurisdictions go further and also compensate for detention in custody pending final disposition of the accused's case. These include Sweden, Norway, Denmark, Austria, France, West Germany, Hungary, Holland, Belgium and some of the Swiss Cantons.

5.12 Paragraphs 5.13 to 5.31 below set out the details of some of these schemes. The information is derived from inquiries made from the Ministers of Justice in the countries concerned.

West Germany

5.13 Compensation in West Germany is available from the State Treasury in three broad situations in which an individual may have been inappropriately dealt with by the system of criminal justice. These are -

(a) where a person has received a sentence which on appeal is subsequently quashed or reduced;

(b) where a person has been damaged by being detained in custody pending trial, or by some other prosecution measure and the person is acquitted or the proceedings against him are discontinued;

(c) where the pre-trial criminal process is discontinued at the discretion of the court or the State Attorney's office.

5.14 In each of the above situations the accused person has a right to compensation, but only insofar as it is equitable in the circumstances of the case. Compensation is barred where the accused person has by some action of his caused the prosecution either deliberately or through gross neglect.

5.15 Compensation may also be refused if the accused kept silent about mitigating circumstances or had made a confession which was subsequently found to be false, or if the proceedings were discontinued because of the accused's unfitness to plead or because of some technicality.

5.16 Compensation is available for both pecuniary and non-pecuniary loss and is assessed by the trial court either at the conclusion of the proceedings or at some later date. There is no limit on the amount of compensation which can be awarded. Any person who is maintained by the accused person has a claim for compensation as well as the accused. There is a full right of appeal from the compensation decision.

5.17 In 1974, the last year for which figures are available, 1,300 people received compensation in West Germany under this legislation. The total sum expended was DM2.5 million (A$ 818,598).

Sweden

5.18 In Sweden a person who has been detained in custody pending trial can claim compensation from the Government if -

(i) he has been found not guilty at his trial;

(ii) the charges are withdrawn at his trial;

(iii) the preliminary investigations are concluded without legal proceedings being instituted.

A person who has served a prison term is also entitled to compensation from the Government if his conviction is quashed on appeal without a new trial being ordered or if a reduced sentence is imposed.

5.19 A person has no right to compensation if he has caused the custody situation, destroyed evidence, or in some other way made investigation of the crime more difficult. Compensation is not paid if it is unreasonable to do so having regard to the circumstances of the case. However, compensation cannot be refused merely because the question of guilt or innocence has not been resolved.

5.20 Compensation covers both pecuniary loss and non-pecuniary loss and there is no limit on the amount of compensation which can be paid. Any amount of compensation which a claimant has a right to claim from some other source is deducted from the compensation otherwise payable. The compensation scheme is administered by the Attorney General who decides whether there is to be compensation and, if so, the amount. If the claim is in excess of 100,000 Swedish crowns (A$18,730) then compensation is decided by the Government instead of the Attorney General.

5.21 In 1975, the last year for which figures are available, approximately 160 people were acquitted after being detained in custody pending trial and a further 72 persons had their conviction quashed on appeal. Of these 232 persons 55 received awards of compensation totalling 120,743 Swedish crowns ($A 22,615).

France

5.22 Under French law compensation may be granted to persons detained in custody pending trial and subsequently acquitted and to those recognised as innocent after being convicted. In the case of detention pending trial the person charged does not have to prove his innocence. In fact the accused may have escaped being convicted merely by receiving the benefit of the doubt. However, he must show that detention in custody has resulted in "obviously abnormal damage of particular severity". This qualification greatly restricts the

number of people to whom compensation is paid. For example in 1973, 54,000 people were detained in custody pending trial and of these 1,037 were acquitted. However only about four acquitted persons per year receive compensation.

5.23 If compensation is granted it is not limited to financial loss but covers all non-pecuniary loss suffered by the accused as well. There is no limit on the amount of compensation which can be awarded. The average sum awarded is about 56,000 francs per person(A$9,162). In respect of people who claim to have been wrongly convicted the conditions are so restrictive that out of approximately sixty applications per year only one or two are successful.

5.24 Compensation for detention pending trial is awarded by a special commission of three judges, whereas compensation for a wrongful conviction is awarded by a court other than the one which tried the convicted person, but of the same status.

5.25 In respect of a person who has been wrongly convicted, his spouse, ancestors or descendants may claim compensation as well as the wrongly convicted person. If the applicant so requests, the decree declaring his innocence will be displayed in the place where he lived and advertised in five newspapers chosen by the court. Legal aid is available for a person to pursue a claim of this nature.

Holland

5.26 Holland provides compensation for persons detained in custody who are ultimately acquitted and for persons whose sentence is annulled after having been wholly or partly served. Compensation is also available where a case is disposed of without any punishment having been imposed.

5.27 Compensation is provided for both pecuniary and non-pecuniary loss and there is no limit on the amount of compensation which can be awarded. Compensation is provided for arrest by the police as well as actual detention in custody. An application for compensation must be submitted within three months after the close of the case. The applicant has a right to be heard and is entitled to be represented on such a hearing by counsel. Insofar as it is

possible, the court deciding compensation is composed of the same members of the court who presided at the trial. A full right of appeal is allowed from all compensation decisions.

5.28 Compensation is awarded provided the court is of the opinion that taking all the circumstances into account it is fair and reasonable to do so. The law does not require the applicant to prove his innocence, but on the other hand does not lay down that compensation must be awarded automatically in every instance.

5.29 A claim for compensation for damage suffered by a person wrongly detained may alternatively be submitted by his dependants and the compensation paid to them. In that event no compensation is awarded for any non-pecuniary loss suffered by the person wrongly accused.

5.30 If the accused person dies after having submitted his application or after having lodged an appeal, compensation is awarded to his heirs.

5.31 In 1973, the last year for which figures are available, 7,177 persons were detained in custody pending trial and of these 134 were ultimately acquitted. Of these only six were awarded compensation, the total amount awarded being FLS 8,541 (A$ 2,672). The average number awarded compensation for 1969 to 1973 was fifteen persons per year. There are no figures available for compensation awarded on an annulment of sentence. Such cases are apparently very rare.

United Nations

5.32 The United Nations adopted, as part of the United Nations Covenant on Civil and Political Rights, a clause stating that where a person has been erroneously convicted by final decision he should be entitled to compensation: see Article 14(6), reproduced in Appendix III. Australia signed this Covenant in 1972. However, while this binds the Commonwealth of Australia internationally, legislation to give effect to the Covenant within Australia would require to be enacted by the appropriate Parliament or Parliaments: see Wynes, *Legislative Executive and Judicial Powers in Australia* (5th ed) at 89 and 296-301. No legislation to ratify or give effect to the Covenant has been passed.

SHOULD THERE BE A SCHEME OF COMPENSATION IN WESTERN AUSTRALIA?

General

6.1 In paragraphs 7.1 to 9.9 below, the Commission discusses the categories of loss that might be covered by any statutory scheme to compensate those who are detained in custody and subsequently acquitted or pardoned, and possible alternative procedures for determining such claims. These questions, of course, only become relevant if the decision is made to introduce a statutory scheme. The Commission has come to no conclusion on this basic question and would welcome comment. In order to elicit considered views on the matter, the Commission has set out in the following paragraphs of this section what it considers to be the principal arguments for and against the introduction of a statutory scheme of compensation. In considering the question it should be borne in mind that although no statutory scheme exists elsewhere in Australia or in the United Kingdom, the notion is not without precedent, for such schemes have operated successfully in a number of countries for many years: see paragraphs 5.9 to 5.31 above.

6.2 The argument for introducing such a scheme is simply that the State, through the direct action of its officers, has caused loss to persons who are subsequently found not guilty of the charges against them or who are pardoned, and it is better that the State should bear the loss (that is, pay compensation) than that the unfortunate individual should be forced to bear it. The kinds of loss that may be suffered in particular cases by persons detained in custody are outlined in paragraphs 7.1 to 7.10 below. The principle that the State, rather than the individual, should bear the loss is already accepted in the *Official Prosecutions (Defendants' Costs) Act 1973* in the context of the legal costs of an accused who is acquitted. Until the passing of that Act, the general rule was that costs were not awarded against the Crown unless it was shown to have been at fault in bringing the prosecution. However, under the legislation, costs to acquitted defendants are awarded as of right (subject to certain limited exceptions): see *Official Prosecutions (Defendants' Costs) Act 1973*, s.5.

6.3 In reply, it could be argued that compensation should be payable only if the officials concerned were at fault, and that, if they were, the proper course is for the person suffering loss to commence proceedings against them. However, officials at present enjoy a wide

measure of immunity from tort actions (see paragraph 4.1 above) which was given them so that they could proceed with the efficient discharge of their duties without undue harassment. To reduce or remove this immunity may therefore not be in the public interest. Further, the relief offered to persons detained in custody would be of a very uncertain nature if their only recourse was against individual officials. Cases where officials involved in the administration of justice act in bad faith are rare. In the overwhelming proportion of cases, those charged with the responsibility of administering criminal justice carry out their duties in a proper and reasonable manner. The argument in favour of a statutory scheme of compensation (as distinct from giving a right of action against an official) does not depend on the assumption that the State or its officers were at fault: see paragraph 6.2 above.

6.4 It might also be argued that the notion of a statutory scheme of compensation for persons who have been detained in custody and ultimately acquitted is misplaced, since it assumes that those who are acquitted are in fact innocent of the charge, whereas the precise question before the trial court is whether the offence has been proved beyond reasonable doubt. To obtain acquittal, it is not necessary for the accused affirmatively to show his innocence.

6.5 It is of course true that in the case of acquittals the question of the accused's innocence has not necessarily been settled. In common with most other jurisdictions, no more detailed verdict is obtainable from the jury which would reveal whether it considered that the accused was innocent of the charge against him. Even where a conviction is quashed or a pardon given (see paragraph 2.1 above), the question is not "Has the innocence of the prisoner been affirmatively shown?" but "Was the conviction so defective that it cannot properly be sustained?".

6.6 Some persons might feel that most of those who are acquitted are in fact guilty and "get off" because of luck or technicalities. For example Sir Robert Mark, the Commissioner of the London Metropolitan Police, stated in a public lecture that "only a small proportion of those acquitted by juries are likely to be innocent in the true sense of the word" and under the present system it was the professional criminal who was "the very man most likely to escape society's protective net" (see Robert Mark, *The Disease of Crime, Punishment or Treatment* (1972) Royal Society of Medicine at 6 and 13). This view was strongly criticised by Michael Zander in *Are too many Professional Criminals Avoiding Conviction? - A study in Britain's*

two busiest Courts, Modern Law Review Vol. 37 (1974) at 28. Of particular interest in Zander's article was a statement of a senior prosecuting counsel who pointed out that a large number of those acquitted should never have been tried in the first place because there was insufficient evidence: op. cit. at 48.

6.7 However, even if some guilty persons are in fact acquitted (and it would seem likely that this is the case), it should not be concluded that a statutory scheme of compensation should not be introduced at all. Such an argument would seem to be relevant only to the question of what the claimant should be required to prove in order to obtain compensation. It does not seem to be an argument against a compensation scheme as such.

6.8 A further argument against introducing a scheme is that if reforms were made to the bail system and to the procedure for dealing with more cases by summons instead of arrest (see paragraphs 2.6 to 2.10 above), the number of persons likely to suffer compensable loss or damage would be so reduced as to make it unnecessary to have any formal scheme of compensation. It may be suggested that any cases that did arise could be satisfactorily dealt with by way of ex gratia payments. On the other hand there will always be a hard core of exceptional cases which warrant compensation as a matter of right and not at the discretion of the Government. In other words, it might not be sufficient to deny a statutory right to compensation merely because the criminal justice system was working well over all. It is little consolation to the individual who has been detained in custody, to know that there are few others who have been similarly dealt with.

6.9 There are two other arguments that may be advanced against a statutory scheme of compensation - one based on the supposed attitude of the police, and the other on the supposed attitude of injuries. The first is that the police might be less likely to prosecute suspected persons. However, the police when arresting a person would never know whether that person would become liable to be compensated or not. There do not appear to have been any justifiable complaints of this nature arising out of the *Official Prosecutions (Defendants' Costs) Act 1973*.

6.10 The second argument is that juries would be more likely to convict if they knew the accused would receive compensation on acquittal. However, the jury would rarely know whether the accused had been remanded in custody or on bail, or had suffered any loss which

would entitle him to compensation on acquittal. It is therefore unlikely that the jury would be influenced by the possibility or otherwise of a claim for compensation.

Criteria

6.11 If it is assumed that a statutory scheme of compensation is desirable in some circumstances, the question arises as to precisely what those circumstances should be. Perhaps the most important question in this context is whether compensation should be payable only to those who satisfy the determining authority that they are in fact completely innocent of the charge.

6.12 At first sight, to impose a requirement that the applicant prove affirmatively that he is innocent seems reasonable. Nevertheless, there appear to be difficulties in this notion. Firstly, it would often require separate proceedings to determine the question. The criminal trial is, as pointed out in paragraph 6.5 above, concerned solely with the question whether the charge was proved beyond reasonable doubt, and sufficient evidence may not have been produced to prove innocence affirmatively. Guilt and innocence are sometimes uncertain concepts, involving the ascertainment of the state of mind of the accused and the witnesses. If evidence of the accused's innocence is not overwhelming, it would probably be necessary to institute full scale proceedings as to the question of his innocence, and to give opportunity to the Crown to produce evidence in rebuttal and to cross-examine the applicant and his witnesses. In other words, it might be necessary to traverse again all the issues that were involved in the criminal trial, this time from the point of view of the accused's innocence.

6.13 A further argument against requiring proof of innocence is that, if the applicant is denied compensation on this ground, his reputation may be compromised, and his acquittal at the trial converted into a "second class acquittal". This would particularly be so if determination of the question of compensation was in the hands of the trial judge (see paragraph 9.4 below), and could also be so if that question were decided by a separate tribunal. A similar point was made by the Commission's predecessor, the Law Reform Committee, in its working paper on the payment of the legal costs of acquitted persons: see the Working Paper on Project No. 12, *Payment of Costs in Criminal Cases*, paragraph 31.

6.14 It may therefore be preferable not to treat innocence as the determining criterion. It is significant that none of the European schemes described above requires affirmative proof of innocence.

6.15 Although there may be good reasons against introducing a requirement that the applicant prove his innocence, it does not follow that compensation should be awarded as a matter of course in every case. In paragraph 8.5 to 8.6 below the Commission discusses the question of other possible bars to compensation. These parallel the bars enacted by the legislature in the *Official Prosecutions (Defendants' Costs) Act 1973*: see s.6.

6.16 The Commission has no final views on the question of the criteria for determining whether in a particular case compensation should be paid, should a statutory scheme be introduced. The Commission would welcome comment.

POSSIBLE COMPENSABLE LOSSES

Pecuniary loss

7.1 There are several possible categories of pecuniary losses which could be incurred by a person eligible for compensation under a statutory scheme. Legal costs have already been mentioned: see paragraph 4.1 above. Other possible losses are –

(i) loss of income;
(ii) loss of employment;
(iii) loss of accommodation, loss of goods on hire purchase, and so on;
(iv) economic losses generally.

(i) Loss of income

7.2 A significant loss which may be incurred by an accused who is remanded in custody is loss of income. This loss may lead to a chain reaction of other losses as the accused will become unable to keep up repayments on accommodation and other commitments. In the case of an employee, loss of income will usually be easy to ascertain but may be more difficult in the case of a self employed person.

7.3 Since 1973 the Commonwealth Government has paid a discretionary special benefit to people detained in custody pending trial at a rate equivalent to unemployment benefits. Formerly, as such people were not available for work they did not come within the qualifications for unemployment benefits. However, the special benefit would be of only marginal assistance to the average wage earner who would have house repayments, hire purchase and other commitments to meet. Nevertheless, it should be taken into account in assessing compensation if the persons have actually received them.

(ii) Loss of employment

7.4 Detention in custody on a criminal charge frequently results in loss of employment: see *Bail or Custody* at 79-80. This would be compensable if liability were based in tort, i.e. on the principles applicable to ordinary civil actions. A different way of dealing with the situation might be to provide appropriate employment protection measures. This is a familiar Australian legislative concept: see e.g. *National Service Act 1951* (Cwth) s.54B. There are obvious practical difficulties with such an alternative. The Commission has no concluded view on this aspect and welcomes comment.

(iii) Loss of accommodation, loss of goods on hire purchase and so on

7.5 One consequence to a family, if the breadwinner is in custody, is that due to the loss of income default may be made on the normal outgoings in respect of mortgage repayments, rent or hire purchase commitments: see *Bail or Custody* at 81. Such losses would be compensable if compensation were assessed on a tort basis. On the other hand, it might be better to prevent or restrict the sort of action which can be taken against an accused person prior to his conviction. An analogy for this sort of provision is to be found in s.36A of the *Hire Purchase Act 1959*, whereby a consumer can apply to have his obligations suspended under a hire purchase agreement during illness or unemployment. Such a moratorium would prevent some of the more unfortunate situations from arising and thus tend to reduce the amount needed to be paid to adequately compensate the accused. However, it is difficult to assess whether such a scheme would be feasible in the context of accused persons.

(iv) Economic losses generally

7.6 If the compensation were based on normal tort liability, then all reasonably foreseeable economic losses would be compensable. These could include business losses due to absence from the business, failure to carry out a contract requiring personal service or even loss of or damage to the business.

Non-pecuniary loss

7.7 This is a further area which could be compensable if compensation were to be assessed on a tort basis. This would cover such matters as loss of enjoyment of life, emotional distress, loss of leisure time and so on: see discussion J.M. Jackson, *The Costs of Prosecution to the Acquitted*, New Law Journal (1975) at 1158. It might have particular relevance to a person who was not in employment and therefore had no claim for financial losses as such, for example, a mother looking after a house and family. The compensation schemes of those countries discussed earlier (see paragraphs 5.9 to 5.31 above) all provide compensation for non-pecuniary loss.

7.8 An instance of the way in which such matters can arise and the distress which can be caused is provided by the English case of F.E. Stalham which was reported in *The Times* on 26 November 1970 and in *Bail or Custody* at 79. Stalham was accused of a crime he did not commit and was detained in custody. He lost his home and his wife had a nervous break-down. His father-in-law who had been living with them had to be placed in a hostel. One year after Stalham was acquitted, the family circumstances had still not been restored. The facts of the case are set out in Appendix IV below.

7.9 The above heads of loss, both pecuniary and non-pecuniary, would fall with even greater impact in the case of a man who has served part or all of his sentence before his conviction is quashed or he is pardoned.

7.10 It is, therefore, arguable that compensation should be awarded under the usual tort basis for both pecuniary and non-pecuniary damage. The Commission invites comment.

Other benefits to be taken into account

7.11 As a matter of principle it would seem that any compensation scheme should be designed to compensate only for losses actually incurred. Any benefits obtained by the accused (e.g. special benefit under the *Social Services Act*) should be taken into consideration. Such a provision is to be found in the Swedish scheme: see paragraph 5.20 above.

Limit on compensation

7.12 It could be argued that detention of an innocent person in custody pending trial or the punishment of an innocent person is such a grave invasion of civil liberties that the State should **fully** compensate such persons. The State does not, for example, place a limit on compensation for resumption of a person's property: see *Public Works Act 1902*, s34.

7.13 Alternatively, it could be argued that for practical reasons there should be some limit on compensation so as not to create too great a drain on the public revenue. However Sweden, France, Germany and Holland have no limits on compensation: see paragraphs 5.13 to 5.31 above.

7.14 If there is to be any limit on compensation, from the point of view of certainty it might be desirable to prescribe a maximum amount, such amount operating as a cut-off point. Opinion will obviously differ as to the appropriate upper limit, particularly as actual losses in this area can be very substantial. Possibly a cut-off point analogous to that in the *Criminal Injuries (Compensation) Act* could be appropriate: the *Criminal Injuries (Compensation) Act Amendment Act 1976* has increased that sum to $7,500. However, the effect of such a limitation would be that some people would be fully compensated and others would not. In fact, the more the accused was damaged the less adequately in proportionate terms would he be compensated. Thus if it were thought desirable to have a limit it could possibly be either a percentage of the full damages as assessed or alternatively compensation could be restricted to certain heads of loss. For example, compensation could be restricted to loss of income and legal costs.

7.15 It might be argued that detention pending final disposition of a case warrants a different limit on compensation than the case of a person who has been wrongly convicted

and subsequently imprisoned. It might be thought that in the latter case a person should have a claim to more generous compensation than in the former. Alternatively, it could be argued that as a person suffers an injustice in both cases the limit on compensation should be the same, if indeed a limit were to be imposed.

CLAIMS FOR COMPENSATION

Who should be able to claim?

8.1 In deciding who should be able to claim, there are two distinct issues involved –

(a) Should compensation be payable not only to the accused person but also to others who have suffered as a result of the detention of the accused?

(b) Should the claim for compensation survive the death of the accused so as to vest a right of action in his personal representative?

Compensation for persons other than accused

8.2 When an accused person is held in custody pending trial not only may he be damaged but other persons who are dependant on him may likewise be damaged as was the Stalham Family: see Appendix IV. This may extend not only to his immediate family but to his employers and other persons who are in a business relationship with him. The damage may be particularly aggravated where the accused has been convicted and served part of his sentence. If the accused's dependants have suffered damage in addition to those suffered by the accused then it is arguable that they should have a claim in damages. All the European schemes outlined above except Sweden allow such a claim: see paragraphs 5.16, 5.25 and 5.29.

8.3 On the other hand, it might be said that to allow persons other than the accused to have a claim would be to extend the scheme too widely. It might prove difficult to draw the line if compensation was not restricted to the accused.

Survival of the claim

8.4 There have been a number of cases in various jurisdictions where a convicted person subsequently found to have been innocent has been either executed or died of natural causes while in custody. The question then arises whether his claim for compensation should survive so that it can be pursued by his dependants or personal representative. It would seem arguable that at least his dependants should be able to claim in such cases. Whether his estate should be able to maintain a case is more debatable. The Commission has no concluded view on this aspect, and welcomes comment.

Bars to compensation

8.5 The question whether the accused should be barred from obtaining compensation if he does not prove his innocence affirmatively has been discussed earlier: see paragraphs 6.11 to 6.14 above. This paragraph and the following paragraph discusses whether there should be a bar of any other sort. It is arguable that an acquitted person should either be barred from recovering compensation altogether or that the determining authority should have a discretion to refuse compensation in the following circumstances: where the accused -

(a) is discharged even though the offence is proved (for example under s.669 of the *Criminal Code* as a first offender or under s.26 of the *Child Welfare Act*);
(b) is acquitted through incapacity, either insanity or infancy;
(c) is acquitted of major offences but convicted of a lesser offence;
(d) has contributed to his own misfortune - for example, by bringing about the prosecution by voluntarily signing a false confession, by hiding the guilt of another or by failing to disclose an alibi until the actual trial.

Certain overseas jurisdictions make provision for both bars and discretions: see paragraphs 5.13 to 5.31 above. There are also bars in Western Australia under the *Official Prosecutions (Defendants' Costs) Act 1973*: see s.6.

8.6 Frequently, people are charged with a number of offences at the same time, ranging from the principal offence to various minor offences. It could be that a person was held in custody because he was accused of a major offence and would have been released on bail if

he had only been charged with the minor offences. An example taken from *Bail or Custody* (at 81) is that of Gibson, which illustrates that point, as well as the general predicament faced by people remanded in custody. Gibson was charged with a number of offences and acquitted of all charges except one of possession of two rounds of ammunition. He had spent three months in custody. For the full facts see Appendix IV.

PROCEDURE FOR DETERMINING CLAIM

Tribunal

9.1 The question as to who should decide compensation claims may permit of a variety of possible answers. However, determination of claims by an appropriate tribunal seems the most satisfactory means as such a tribunal would be independent of the trial system. This would be particularly important if a claim for compensation were to involve a consideration of whether the accused was innocent or not.

9.2 If the tribunal were involved merely with an assessment of losses, this could be done in an informal way so as not to create a further trial on the question of damages. The tribunal could be constituted by a single judge of the District Court, as is now the case under the licensing provisions of the *Hire Purchase Act*. A similar proposal was made by this Commission for the setting up of a Criminal Injuries Compensation Tribunal: see *Report on Criminal Injuries Compensation*, paragraphs 27-28. The enlargement of the jurisdiction of the District Court by enabling a single judge to act as a compensation tribunal would avoid the disadvantage which may arise if an entirely separate tribunal was established.

Other alternatives

(a) Jury

9.3 It might be argued that the jury should decide the compensation. However, this would confuse the question of guilt or innocence with that of compensation. A jury should not be distracted from the real question at issue in the trial, which is whether the accused is guilty. Moreover, an accused person who is acquitted may wish to bring further evidence of the losses he has suffered before compensation is assessed. This could be done by allowing the

accused to bring further evidence after the verdict of not guilty has been given but to do so would be very inconvenient in practice. It may also be impossible to accurately estimate the losses suffered by the accused at that stage. Moreover, except occasionally for claims for defamation, juries are not used in this jurisdiction for determining damages.

(b) Judge

9.4 It might be argued that the trial judge (or Magistrate in a Court of Petty Sessions) should assess compensation as he will have heard the evidence and be experienced in assessing damages. However, as with the jury, the issues at the trial should not be confused with those of compensation. Moreover, the trial judge may not agree with the jury's verdict and it might seem difficult for him to assess compensation impartially. Also, it may not be possible to assess accurately the damages suffered by the accused immediately after the trial even if he were allowed to call further evidence. This could be overcome by allowing the accused to make separate application at a later date, but there may be practical difficulties if the application has to be made before the same judge who presided at the trial.

(c) Treasurer

9.5 If the compensation scheme were limited to, say, legal costs and loss of income the Treasurer might be considered a suitable person to assess and pay out on claims. However, the Treasurer might not wish to become involved in a formal compensation scheme.

9.6 A practical objection to the Treasurer filling the role would be that his decision would not be subject to appeal. While this is the current position with applications for an ex gratia payment, it would not seem appropriate in the context of a formal compensation scheme.

(d) Ombudsman

9.7 It might be argued that the Parliamentary Commissioner for Administrative Investigations would be an appropriate person to decide the matter of compensation. He has expertise in investigating cases and making recommendations. On the other hand, it might well be thought that such a role would be inappropriate and in conflict with his role as a

watchdog on the administrative activities of the Government – a role in which he does not make decisions, only recommendations.

Appeal

9.8 The question arises whether an applicant should be allowed an appeal from a compensation decision and if so to what court should such an appeal lie?

9.9 It would seem clear that if compensation is to be decided on the basis of tort with its attendant complexities a full right of appeal on both fact and law should be allowed. If the tribunal was constituted by say a District Court Judge then the logical hierarchy of appeal would be to the Full Court of the Supreme Court. Even if one of the other alternatives were chosen to decide compensation it would still appear appropriate that an appeal on such a matter should be to the most authoritative court in Western Australia.

QUESTIONS FOR DISCUSSION

10.1 The Commission invites comments on the issues raised in this paper or on any other matters within the terms of reference. In particular the Commission invites answers to the following questions. It would be helpful if reasons were given, where appropriate, for the views expressed.

(1) In Western Australia should there be a scheme to provide compensation -

(a) where a person is detained in custody pending final disposition of his case and he is acquitted (either at the trial or on appeal);

(b) where a person has been convicted and has served part or all of his sentence before his conviction is quashed or he is pardoned?

If the answer to question 1 is yes:

(2) Should the scheme provide full compensation on the normal basis of damages in tort or should it only provide compensation for certain specific losses, e.g. loss of income and legal costs?

(3) Should other benefits such as unemployment benefits be taken into account when assessing compensation?

(4) Should there be a limit on compensation and if so what should that limit be or how should it be calculated?

(5) Should compensation be claimable by other persons as well as the acquitted or pardoned person?

(6) Where an acquitted or pardoned person has died, should his dependants or personal representative be able to claim?

(7) Should the claimant have to prove his innocence to obtain compensation or should it be sufficient that the claimant has been acquitted or pardoned as the case may be?

(8) Should there be any bars to compensation and if so what should these be?

(9) Who should decide the claim - a special tribunal, the trial court (either judge or jury) or some other body?

APPENDIX I

Survey of remand prisoners

The following table refers to the actual length of imprisonment experienced by the twenty-three remand prisoners in the survey before sentence was passed or they were acquitted or the charge withdrawn.

Number of days in custody	Number of People
1	1
3	1
15	1
20	1
21	8
22	1
27	1
29	1
30	1
42	1
84	1
110	1
112	1
123	1
145	1
208	1
	Total 23

APPENDIX I (cont.)

Outcome of court hearing	Number of Charges	Relative Frequency
Charge withdrawn	2	1.9%
Acquitted on charge	1	.9%
Bench warrant issued	4	3.7%
Fine	2	1.9%
Probation	9	8.4%
Imprisonment	89	83.2%
TOTAL	107	100.0%

Note: Each number refers to one charge. Thus there were 107 charges laid against 23 persons in the survey. It can be seen that on 14 charges the defendant was either acquitted, the charge withdrawn or he received a non-custodial sentence. An examination of the actual cases discloses that these 14 charges were against 8 people. One who was detained for 208 days, only had one charge (murder) against him, and was acquitted.

APPENDIX II

Extracts from Justices Act, Police Act and Interpretation Act

Sections 230 and 232 of the Justices Act 1902 (W.A.)

230. In an action against a Justice for any act done by him in the execution of his duty as such Justice, it must be expressly alleged in the statement of claim or plaint that the act was done maliciously and without reasonable and probable cause, and if such allegations are denied, and at the trial of the action the plaintiff fails to prove them, judgment shall be given for the defendant with costs.

232. When the plaintiff in an action against a Justice is entitled to recover, and he proves the levying or payment of any penalty or sum of money under a conviction or order as parcel of the damages which he seeks to recover, or proves that he was imprisoned under such conviction or order, and seeks to recover damages in respect of such levying or payment or imprisonment, then, if it is proved that he was actually guilty of the offence of which he was so convicted, or that he was liable by law to pay the sum which he was so ordered to pay, and, in case of imprisonment, that he has undergone no greater punishment than that assigned by law for the offence of which he was so convicted, or for non-payment of the sum which he was so ordered to pay, he shall not be entitled to recover the amount of the penalty or sum so levied or paid, or any sum beyond the sum of a farthing as damages for such imprisonment, or any costs of suit whatsoever.

Section 138 of the Police Act 1892 (W.A.)

138. Sections A, D, G, and H of "The Shortening Ordinance, 1853", shall be incorporated with and taken to form part of this Act to all intents and purposes, and in as full and ample a manner as if the said section had been introduced and fully set forth in this Act.

Paragraph H of the Second Schedule to the Interpretation Act 1918 (W.A.)

No action shall lie against any Justice of the Peace, Officer of Police, Policeman, Constable, Peace Officer, or any other person in the employ of the Government authorised to carry the provisions of this Act, or any of them, into effect, or any person acting for, or under such

persons, or any of them, on account of any act, matter, or thing done, or to be done, or commanded by them, or any of them, in carrying the provisions of this Act into effect against any parties offending or suspected of offending against the same, unless there is direct proof of corruption or malice; and if any such person shall be sued for any act, matter, or thing which he shall have so done, or shall so do, in carrying the provisions of this Act into effect, he may plead the general issue and give the special matter in evidence; and in case of judgment after verdict, or by a Judge sitting as a jury, or on demurrer being given for the defendant, or of the plaintiff discontinuing, or becoming non-suit in any such action, the Court before which the action was brought may award treble costs to the defendant or such portion of those costs as the Court thinks fit.

APPENDIX III

Extracts from United States Code Annotated and United Nations Draft Covenant on Civil and Political Rights

United States Code Annotated

Title 28 Part IV S.1495

"Damages for unjust conviction and imprisonment - Claim against United States.- The Court of Claims shall have jurisdiction to render judgment upon any claim for damages by any person unjustly convicted of an offence against the United States and imprisoned. (June 25, 1948, c.646. s.l, 62 Stat. 941.)"

Title 28 Part VI S.2513

"Unjust conviction and imprisonment.- (a) Any person suing under section 1495 of this title must allege and prove that:

(1) His conviction has been reversed or set aside on the ground that he is not guilty of the offence of which he was convicted, or on new trial or rehearing he was found not guilty of such offence, as appears from the record or certificate of the court setting aside or reversing such conviction, or that he has been pardoned upon the stated ground of innocence and unjust conviction and

(2) He did not commit any of the acts charged or his acts, deeds, or omissions in connection with such charge constituted no offence against the United States, or any State, Territory or the District of Columbia, and he did not by misconduct or neglect cause or bring about his own prosecution.

(b) Proof of the requisite facts shall be by a certificate of the court or pardon wherein such facts are alleged to appear, and other evidence thereof shall not be received.

(c) No pardon or certified copy of a pardon shall be considered by the Court of Claims unless it contains recitals that the pardon was granted after applicant had exhausted all recourse to the courts and that the time for any court to exercise its jurisdiction had expired.

(d) The Court may permit the plaintiff to prosecute such action in forma pauperis.

(e) The amount of damages awarded shall not exceed the sum of $5,000. (June 25, 1948, c.646, S.l, 62 Stat. 978; Sept. 3, 1954, c.1263, S.56, 68 Stat. 1247.)"

United Nations Draft Covenant on Civil and Political Rights

Article 14(6)

"When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

APPENDIX IV

Selected cases

Case of F.E. Stalham mentioned in The Cobden Trust: *Bail or Custody* at 79

"Mr. Stalham was a 29 year old lorry driver with no criminal convictions, living with his wife, his retired father-in-law and a son aged eight in a council house. In March 1969 he was arrested and charged with serious offences in connection with a robbery which had allegedly been planned in his house. The magistrates at Hendon Magistrates' Court decided to remand in custody, after hearing the police object to bail on the grounds that Mr. Stalham might abscond and that two other persons in the case had still to be arrested. Altogether he appeared five times at the magistrates' court and was refused bail on each occasion, the police later altering their objection to asserting that Mr. Stalham might intimidate witnesses. Finally, when the case was committed to the Old Bailey, the police withdrew their objections and bail was granted with two sureties of five hundred pounds each. By the time he left Brixton, after almost four weeks in jail, Mr. Stalham no longer had a job to return to, and the rent of the house where he had lived for seven years, was seriously in arrears. Three weeks later he and his family were evicted. He had to live separately from his wife and child for three months, while his father-in-law was given hostel accommodation. The mental strain of the situation caused Mrs. Stalham to suffer a nervous breakdown and so disturbed their son that he had to be given psychiatric treatment "He was pining for me, while I was in prison." says Mr. Stalham.

He found it difficult to get work and could not obtain unemployment benefit because he was awaiting his trial, and was not, according to the local labour exchange, therefore "available for work". When the case was heard in July 1969, the judge directed the jury to find Mr. Stalham not guilty of all the charges against him. Over a year later, Mr. and Mrs. Stalham were still in temporary accommodation, the father-in-law was still living at a hostel, and the son was still receiving psychiatric treatment.

In this case an innocent man and his family found their lives completely shattered as the result of somewhat spurious police objections to bail - objections which do not appear to have any factual basis, and which were eventually withdrawn, although the circumstances affecting their validity had not altered in any way. Yet, unless he can prove the police acted maliciously, that is from improper motives, Mr. Stalham has no right of action under civil

law. Furthermore, there is no Government fund from which he or his family can seek compensation for the financial and other hardships they have suffered."

Case of Robert Gibson mentioned in *Bail of Custody* at 81

The facts are as follows -

"He appeared before the Acton Magistrates charged with theft of a motor vehicle, receiving and possession of two rounds of ammunition. The magistrates refused bail because of the seriousness of the charges and on the grounds that there were further police enquiries to be made and also that he might interfere with prosecution witnesses. Mr. Gibson was working as a computer progress chaser at the time of his arrest. He lost his job and with it an income of thirty-five to forty pounds per week. He had been living in furnished rooms and wrote to his landlady from prison telling her to treat the deposit he had paid her as rent for the period he was in custody. However the magistrates continued to refuse bail on each occasion that he appeared before them, and his application to a judge in chambers through the Official Solicitors' Department failed. After the deposit had been exhausted, his landlady asked him to terminate the tenancy agreement. Mr. Gibson agreed, because he could no longer afford to pay the rent. When the case next came before the magistrates, the police used the ground of "no fixed abode" as an objection to bail. He was again remanded in custody. The final outcome of the case was that Mr. Gibson, having been committed for trial, was found not guilty of theft or receiving, but guilty to possession of the two rounds of ammunition, for which he was fined twenty pounds. He had spent over three months in custody."

Case of Vincent Taylor Brown mentioned in *Bail of Custody* at 20

"A 23 year old West Indian living in London, was accused of entering a house and stealing a shirt, two bottles of beer and other small articles worth in all about one pound forty pence. At the time of his arrest he was living with friends of his parents, but when he appeared at East Ham Magistrates Court the police maintained he did not have a permanent address. He was remanded to Brixton Prison, where he spent eleven weeks before being granted bail by a judge of the North East London sessions who stated in court that he had 'never come across a case with such a lack of sense of proportion. The man has no previous convictions and he probably would not have been sent to prison anyway'."

Case of Dougherty*

Mr. Dougherty was convicted of a shoplifting offence which occurred when he was in fact on a special bus trip with fifty-four other people. Only two of these passengers were called as witnesses at the trial. The jury did not believe them and convicted Dougherty. Dougherty then appealed.

Under the rules adopted by the Court of Criminal Appeal fresh evidence cannot be called unless such evidence was unavailable at the original trial. It could not be said that the evidence of the other witnesses on the bus was of that nature and consequently the appeal was argued on another point of law and dismissed. The Court of Appeal however did advert to the evidence of the other fifty-four witnesses and said that counsel was right in not arguing the question of such fresh evidence before the Court. After a further investigation and public outcry Mr. Dougherty was pardoned and granted an ex gratia payment of £2,000.

Case of Virag*

Mr. Virag was charged with stealing from parking meters, carrying a firearm with intent to resist arrest, attempted murder and wounding a police officer. He was wrongly identified by six witnesses and was convicted and sentenced to ten years imprisonment. After five years in prison it became clear that another person had committed the crimes. Virag was pardoned and given an ex gratia payment of £17,500 in compensation for his wrongful conviction and its consequences.

* For further details see Report of the Devlin Committee:
Evidence of Identification in Criminal Cases (HMSO 1976).

APPENDIX V

Details of Vera Foundation Scheme

Vera Foundation of New York: Manhattan Bail Project

The following account of the Manhattan Bail Project is taken from paragraph 179 of the Report of the Australian Law Reform Commission, *Criminal Investigation* who in turn based its account on an article written by K.L. Milte, *Pre-trial Detention* (1968) 1 ANZJ Crim 225.

> "The basic model works as follows. The person charged is interviewed by the arresting officer, who works through a four-factor questionnaire designed to elicit information found by independent empirical research to be relevant to successful pre-trial release. The officer may seek to verify the information supplied concerning residence, family ties and employment by telephone or by field visits. Points are allocated by the police officer in accordance with the following scale. In order to meet the threshold qualification, the accused needs an address in the area and *five* points from the following categories:

A.	*Prior record*	2	No convictions
		1	One misdemeanour conviction
		0	Two misdemeanour convictions or lone felony conviction
		-1	Three or more misdemeanour convictions or two or more felony convictions
B.	*Family ties*	3	Lives with family and has weekly contact with other family members
		2	Lives with family and has weekly contact with family
		1	Lives with non-family person
C.	*Employment*	3	Present job one year or more
		2	Present job four months or present and prior job six months
		1	Current job, or receiving unemployment compensation or welfare or supported by family or savings
D.	*Residence in area*	3	Present residence one year or more
		2	Present residence six months or present and prior one year

		1	Present residence four months or present and prior six months
E.	*Time in area*	1	Ten years or more
F.	*Discretion*	1	Pregnancy, old age, poor health or attending school

In the Manhattan system, this recommendation is then communicated to the court which is free to accept or reject it. During the three year trial study of the Vera Foundation Project, 3505 persons were released on recommendation. Only 1.6% failed to reappear, as compared with a 3% absconding rate under the previous system. Follow up projects elsewhere have tended to confirm these results."