THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 64

Review of Bail Procedures

WORKING PAPER

NOVEMBER 1977

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972.*

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TERMS OF REFERENCE

The Commission has been asked to review the law and procedure relating to bail.

Bail is the procedure whereby a defendant[1] who is in custody, otherwise than by sentence of a court, can be released from that custody conditionally upon his undertaking to attend the court to answer the charge and be dealt with according to law.

A comprehensive examination of bail might be considered incomplete if it failed to consider the possibility of alternative criminal procedures designed to reduce the need for bail or to reduce the harm caused by a failure to grant bail. For example, the summons procedure could be reviewed to see whether greater use should be made of this method of securing attendance in court in lieu of arrest. Reduction in the number of arrests would in itself reduce the need for bail at least in the early stages of the criminal process. The introduction of field citations[2] could also be considered. Speedier trials and compensation provisions might help to reduce injustice if bail were refused and the defendant were ultimately acquitted. However, the Commission believes that even if reforms in these areas were introduced, bail would still have a fundamental place in the criminal justice process. Consequently, having drawn attention to the desirability for consideration of these other matters, the Commission does not propose to deal in detail with them in this working paper.

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1 A person charged with an offence can be referred to as "the offender", "the accused" or "the defendant". In this working paper the term "defendant" will be used to describe a person in all circumstances regardless of the stage reached in the criminal justice process.

2 Field citations are commonly used in the United States. They are an on-the-spot summons issued by a policeman to a defendant, requiring him to appear in court at a time notified to answer charges.

PREFACE

The Commission having completed its first consideration of bail 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 31 January 1978.

Copies of the paper are being sent to the –

Aboriginal Legal Service of Western Australia
Alcohol and Drug Authority
Associated Banks in Western Australia
Australian Narcotics Bureau
Bureau of Customs
Chief Justice and Judges of the Supreme Court
Chief Probation and Parole Officer
Citizens Advice Bureau
Civil Liberties Association
Commissioner of Police
Commonwealth Banking Corporation
Commonwealth Bank Officers Association
Commonwealth Police
Community Welfare Department
Department of Corrections
Department of Immigration and Ethnic Affairs
Institute of Legal Executives
Judges of the District Court
Judges of the Family Court
Law School of the University of Western Australia
Law Society of W.A.
Magistrates' Institute
Mental Health Services
Royal Association of Justices of Western Australia

Salvation Army

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.

CHAPTER 1
PRELIMINARY SUBMISSIONS AND INQUIRIES

1.1 The Commission was asked to examine the law and practice relating to bail as a matter of high priority. By means of advertisement in *The West Australian*, members of the public were invited to make preliminary submissions on this subject to the Commission. In response, submissions were received from the persons listed in Appendix I to this paper.

1.2 In addition to inviting preliminary submissions from the public, the Commission has had discussions with a number of relevant officials involved in the criminal justice process in Western Australia, namely the police, justices of the peace, magistrates and judges of the District Court and Supreme Court. [1]

1.3 The Commission is grateful to all concerned, and views expressed have been taken into account or incorporated where appropriate in this paper.

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[1] See also paragraph 2.20 below.

CHAPTER 2 - INTRODUCTION

2.1 Between the apprehension of a defendant and his eventual sentence if convicted, it is inevitable that there will be a lapse of time. For example, time is needed to allow administrative arrangements to be made and to enable the prosecution and the defendant to prepare their respective cases. The trial itself may last for a number of days and even after conviction the defendant may not be sentenced immediately. A pre-sentence report may be required. Further time will elapse if there is an appeal.

2.2 Pending conviction, sentence, or the outcome of an appeal, the question arises as to whether the defendant should be kept in custody or allowed to go free. Resolution of this question places society in a dilemma. On the one hand, Anglo-Australian criminal law is founded on the principle that a person is presumed to be innocent until proven guilty. Strict adherence to this tradition, which dates back to the Magna Carta 1215, would mean that every person should be allowed to go free until he is convicted, and even then, if he is not sentenced immediately, he should not be imprisoned until it is clear that this is the most fitting punishment.

2.3 On the other hand, society has an interest in seeing that defendants are brought before the courts and dealt with. If every person were allowed to go free during necessary intervals in the criminal justice process, there would be a danger that many of them would not appear at their trial. In England, prior to the 1820's, when there was no effective police force, the apprehension of those persons who did not appear at their trial would have been difficult. For different reasons it is still difficult today. Greater affluence and the availability of modern transport facilities permit a person to travel vast distances in a short time. The most effective way of ensuring the attendance of the defendant at his trial is to keep him in custody throughout the entire process.

2.4 Bail represents a compromise between these two conflicting interests. It is a form of conditional release in the discretion of the person making the decision. The defendant is given his freedom, but on conditions designed to ensure his appearance at his trial. In Western Australia, bail may be granted in respect of any criminal offence, provided this is appropriate

in the circumstances. The decision to grant bail, depending on the nature of the offence[1] and the stage reached during the criminal justice process, may be made by the police, a justice of the peace, a magistrate or a judge of the District Court or Supreme Court.[2]

2.5 Some might argue that bail is available in too many cases; that the compromise is imbalanced in favour of the defendant. In particular there are certain types of offenders such as drug dealers and bank robbers who, it might be thought, ought to be denied bail in all circumstances. A distinction between bailable and non-bailable offences would not be novel. For example, such a distinction was made in 1275 in the *Statute of Westminster 1st* (UK).[3] The view might also be expressed that the presumption of innocence is a doubtful basis for granting bail in cases where the defendant has been caught in the process of committing a serious offence.

2.6 On the other hand, others might argue that there are too many persons being detained in custody unnecessarily. It might be thought, for example, that sureties are required on too many occasions, or that a requirement to deposit cash as a condition for bail discriminates unnecessarily against the poor. Another suggestion, which may have particular relevance to Western Australia, might be that the police could make greater use of the summons procedure rather than arrest. Available statistics for eight country areas in Western Australia in 1976[4]

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1 In respect of some crimes bail may be granted only by a Judge of the Supreme Court. On the other hand, the police have authority to grant bail for a limited range of offences only.

2 For convenience, these various persons are referred to collectively in this paper as bail-decision-makers.

3 3 Edw Stat 1 C 15. Offenders who were not bailable included outlaws, approvers (that is persons taken into custody for an offence who agreed to give Queen's evidence against others), those caught with stolen property on them, known thieves, and those accused of arson, counterfeiting or treason or of open misdeeds (as for instance if A dangerously wounded B).

4 For the Western Australian country police districts, the following ratio of arrests/summonses for offenders appears in the Police Department's Annual Report for 1976. For some reason figures for the Perth Metropolitan area were not included.

District	Arrests		Summonses		*Arrests as % of total	
	Adults	Juveniles	Adults	Juveniles	Adults	Juveniles
Albany	966	273	1,129	469	46.10	36.79
Broome	3,132	297	183	111	94.47	72.79
Bunbury	1,028	238	1,527	472	40.23	33.52
Geraldton	2,824	623	2,120	641	57.11	49.28
Kalgoorlie	3,268	780	341	146	90.55	84.23
Karratha	5,164	606	1,377	515	78.94	54.05
Narrogin	955	115	738	219	56.40	34.43
Northam	768	103	1,114	255	49.80	28.77

* These percentages have been calculated by the Commission.

show that, on average, 64.23% of adults appearing in court were arrested.[5] The need to consider bail before the defendant's appearance in court would be obviated if he were summoned to appear rather than arrested.

2.7 Any suggestion in favour of a reduction in the occasions when bail ought to be allowed might be supported by arguments that injustice resulting from detention during the trial process could be reduced if there were speedier trials and compensation for those who were detained in custody and who were ultimately acquitted.[6] However, no matter how desirable these innovations might be, they could not reasonably be regarded as a substitute for bail for persons in custody. The value society places on personal freedom is too great. An arrest can be made on reasonable suspicion; a conviction and resulting imprisonment follows only if the charge is proved beyond reasonable doubt.

2.8 Consequently, even if there were greater use made of the summons procedure, and provision for speedier trials and compensation for persons ultimately acquitted, the Commission still sees a fundamental place for bail in the criminal justice system. The aim of the Commission in this working paper, therefore, is to ascertain whether the bail procedure in Western Australia represents a satisfactory balance in reconciling society's competing interests[7] when dealing with a defendant during an interval in the procedures for the disposition of his case.

2.9 In recent months in Western Australia, there has been a number or well publicised occasions where defendants charged with drug offences have been granted bail and have

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5 These figures for Western Australian country areas may be compared with the following figures published in *The Australian Criminal Justice System* (2nd ed. 1977) at 254.

		Arrests	Summonses	Total	Arrests as % of total
Cwth Police	(1974-75)	2,938	6,392	9,330	31.48
A C T	(1974-75)	3,520	15,984	19,504	18.05
N T	(1973-74)	15,753	2,982	18,735	84.08
S A	(1973-74)	26,148	75,495	101,643	25.72

However, before any conclusions can be drawn, it should be noted that the figures for the Commonwealth Police, A.C.T., South Australia and the Northern Territory are for the whole jurisdiction and may include juvenile offenders. Furthermore, there is no indication in any of the figures published as to whether traffic offences were included or as to whether the arrests were made with or without a warrant.

6 The question of compensation is currently being considered by the Commission and a working paper has been issued: see Western Australian Law Reform Commission, *Compensation for Persons Detained in Custody who are Ultimately Acquitted or Pardoned* (1976) Project No.43.

7 See paragraphs 2.2 to 2.3 above.

absconded. No doubt these cases will have caused many persons to question why these defendants were released on bail in the first place and whether the bail system is working as well as it should.

2.10 Although the Commission has considered the question whether there should be some offences where bail should never be granted,[8] its review of the bail system is by no means restricted to this problem. In the course of its research the Commission has discovered many difficulties in the existing legal provisions relating to bail, and in the bail procedure itself. Some of the more important questions raised in this paper are -

(1) Is there clear legal authority for bail to be granted at all stages of the criminal justice process?

(2) Should there be a legislative guide as to the factors which ought to be taken into account when making a bail decision?

(3) Is there a need for more information to be made available to the person making a decision whether or not to grant bail and if so how could this be implemented in practice?

(4) Is a requirement for sureties desirable in modern conditions?

(5) Is there any legal authority for special conditions to be attached to bail and for their enforcement?

(6) Should facilities for persons refused bail in Western Australia be improved and should they be separate from prisons?

(7) Should the police or the prosecution have a wider right to challenge a decision to release a defendant on bail?

(8) Are there groups in the community such as Aborigines, children and migrants, with problems regarding bail which require special consideration?

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8 See paragraphs 4.2 to 4.3 below.

2.11 The answers to these questions and to many more which are raised in this working paper may give rise to a need to rewrite and modernise the law relating to bail in Western Australia. At this stage, the Commission is of the view that the law relating to bail should be consolidated and reformed by enactment of separate bail legislation. It may well be that such legislation should be incorporated as a new chapter of the *Criminal Code*.

2.12 In any review of the criminal law, statistical information can be of considerable benefit in the detection and illustration of particular problems. A review of bail procedure is no exception. In England, government statistics relating to persons detained in custody, and private surveys, have proved to be useful in illustrating faults in the bail system in that country. In the United States, the work carried out by the Vera Institute of Justice in New York[9] demonstrates the value of statistics for bail law reform.

2.13 In Australia there are no comprehensive national statistics kept relating to bail, and the Commission has had difficulty in obtaining statistics relevant for Western Australia. The Commonwealth Bureau of Statistics, which acts as a collecting agency for various State records, including criminal statistics, commenced collecting statistics relating to bail in Western Australia in February 1977. Unfortunately, collated details are not yet available from the Bureau.

2.14 Various State bodies in Australia have carried out research into bail. For example, the Victorian Statute Law Revision Committee prepared a report on bail procedures in that State in 1975 and a Bail Review Committee in New South Wales completed a project on bail in 1976. Some statistical information is available from these sources. The most recent and most comprehensive publication of statistical information relating to bail was made by the New South Wales Bureau of Crime Statistics and Research which, in association with the Bail Review Committee, issued its first research report on bail in May 1977.[10] Statistical information relating to bail practice in other States has been incorporated into this working paper where appropriate, but only to support a suggestion as to the possibility of a similar pattern in Western Australia. There can be no substitute for information directly relevant to the practice in this State.

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9 See also paragraphs 5.87 to 5.93 below where the work of the Institute is discussed in greater detail.

10 Department of the Attorney General and of Justice, New South Wales Bureau of Crime Statistics and Research, *Bail* (1977) Research Report No. 1.

2.15 One of the main areas of concern in Western Australia in recent years has been the incidence of defendants absconding while on bail. In this respect, figures made available to the Commission by the Police Department,[11] though helpful in a number of respects, provide only a partial picture. In 1976, of the sixty-nine defendants who were charged with drug trafficking offences, nine (that is, 13%) failed to appear in court in accordance with the terms of their bail. However, this figure relates only to the ratio between those charged and those who absconded. As a proportion of those released on bail, the figure could be higher. From 1 January 1977 to 5 May 1977 a further eight defendants on similar charges absconded out of a total of thirty-eight. This indicates an absconding rate of 21% of those charged and once again, the figure could be higher if expressed as a proportion of those released on bail.

2.16 For "serious offences handled by the Criminal Investigation Branch" it has been indicated by the Commissioner of Police that there were sixty-seven absconders from bail during the year ended 30 June 1977.[12] However, it is not clear whether this figure relates to separate persons or to separate charges. If the latter is the case, then the figure for the number of persons who absconded could be lower, depending on how many of those who failed to appear had been the subject of multiple charges. Furthermore, the Commissioner did not give the total number of persons charged with serious offences dealt with by the Criminal Investigation Branch during the year, so that the proportion of absconders to those who were tried is not apparent. Appendix 2 to the report gives a total of 5,601 defendants involved in "selected crime"[13] during the year, but it is not clear whether this figure represents the number of serious offences dealt with by the Criminal Investigation Branch. If it did, the absconding rate would be 1.2% of those charged, and the rate possibly would be higher if expressed as a percentage of those who were released on bail.

2.17 Although the figures are not strictly comparable, it is interesting to note that, according to the New South Wales Department of the Attorney General and of Justice, the absconding rate for people due to appear before the superior courts in that State rose from

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11 These figures have also been published: see *The West Australian*, 5 May 1977 and Police Department Western Australia, *Annual Report* 1977.

12 Police Department Western Australia, *Annual Report* 1977 at 3.

13 This includes homicide, serious assault, robbery, rape, breaking and entering, motor vehicle theft and fraud.

1.2% of committals in 1968 to 6% in 1974.[14] However, these figures disclose only the ratio of absconders to those committed for trial, and not to those committed and released on bail.

2.18 The Western Australian Police Department also supplied the Commission with information regarding the number of persons who in 1976 failed to appear in accordance with the terms of their bail at the East Perth Court of Petty Sessions. The total number of such persons was 276. It has been estimated that the East Perth Court deals with about 12,000 persons annually[15] and, if this figure were accepted, the absconding rate would be about 2.3%. Here again, no figures are available as to the proportion of those released on bail who failed to appear.

2.19 The Police Department described defendants who did not appear as "absconders", but it may be inappropriate to describe all of them in this way. The figure of 276 included defendants on gaming and drunk charges, who may have deposited cash as a condition of bail in the expectation that they would not in fact be required to stand trial, and that instead their deposits would simply be forfeited.[16] It is also not unknown for persons to forget the date of the hearing, or to attend at the wrong court. Such persons would be classed as "absconders" even though they had no intention of evading trial.

2.20 In other areas, to provide a factual account of practice in Western Australia, the Commission has had to rely on its own resources in an endeavour to overcome the lack of statistics. Consequently, it conducted a survey of defendants in the remand yard of Fremantle Prison in December 1976. The results of this survey are shown in Appendix II[17] In addition, members and research staff of the Commission have interviewed many bail-decision-makers. The Commission wishes to express its appreciation to all concerned. The information from the survey and the interviews has been of great value to the Commission and has been incorporated in the working paper where appropriate.

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14 Department of The Attorney General and of Justice, New South Wales. Bureau of Crime Statistics and Research, *Bail* (1977) Research Report 1 at 3.

15 Figures kept indicate a total of approximately 18,000 charges per annum at this court, but allowance has to be made for defendants who are charged with more than one offence.

16 See paragraphs 3.20, 3.48 to 3.49, 6.25 to 6.27 below.

17 See also paragraph 3.39 below. The survey consisted of a series of informal interviews with twenty-three defendants awaiting trial and fourteen awaiting sentence or the outcome of an appeal. One of the more significant matters to emerge was the fact that all of the defendants awaiting trial, except for four charged with murder, had actually been granted bail. In most cases they were in custody only because they could not obtain sureties. Another significant discovery was that, on average, the defendants interviewed who were awaiting trial had, at the time of the survey, spent sixty-two days in custody. The Commission understands that this period is not exceptional.

2.21 This paper is confined to a consideration of the provisions of Western Australian law relating to bail. There are Commonwealth provisions[18] which are relevant and which apply in Western Australia as they do in other Australian States. In addition, the Australian Law Reform Commission published a report in 1975[19] dealing with the activities of the Commonwealth Police, which included proposals to amend the law relating to bail in so far as this was relevant to the Commonwealth Police. Most of the Australian Law Reform Commission's proposals relating to bail have been incorporated in a Bil1[20] which is currently before the Commonwealth Parliament. However, it is outside the Commission's terms of reference to propose alterations and reforms to existing or proposed Commonwealth legislation. Consequently, apart from referring to Commonwealth provisions for comparative purposes,[21] the Commission's consideration of bail is restricted to Western Australian law.

2.22 Chapter 3 of the paper contains a summary of the law and practice relating to bail in Western Australia throughout the criminal justice process from arrest to final determination of the case. Some specific problems which might require legislative attention are listed at the end of the chapter.

2.23 Chapters following the summary deal with some of the wider problems in bail reform and in each case are concluded by a summary of issues. In chapter 4, after affirming the importance of bail, the Commission considers the introduction of measures to improve custodial conditions for defendants who are not able to be released on bail. Chapter 5 deals in Part A with the criteria relevant to a bail decision, and, in Part B, with the provision of information relevant to the criteria for the bail-decision-maker. Chapter 6 deals with the types of conditions which might be attached to a grant of bail and chapter 7 considers particular difficulties associated with a requirement for a surety as a condition for release on bail. Chapter 8 deals with appeals and other methods of review of bail decisions. Chapter 9 deals with groups in the community such as children, Aboriginals and new arrivals in Western Australia, who may present special problems in relation to bail. The paper is concluded by a summary of the Commission's tentative views in chapter 10.

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18 See for example *Crimes Act 1914*, s.15; *Crimes (Aircraft) Act 1963*, s.24 and *Crimes (Protection of Aircraft) Act 1973*, s.19.

19 Australian Law Reform Commission, *Criminal Investigation* (1975) Report No. 2 Interim.

20 Criminal Investigation Bill 1977.

21 This relates particularly to the Criminal Investigation Bill and see paragraph 5.32 below.

CHAPTER 3 - BAIL AND THE CRIMINAL JUSTICE SYSTEM IN PRACTICE

INTRODUCTION

3.1 There is a dearth of information regarding the operation of the criminal justice system in Western Australia. This is particularly so in relation to bail. To most members of the community it is a mystery. The aim of this chapter is to explain how the criminal justice system operates with particular reference to bail. In the interests of simplicity, the discussion has been restricted to a factual narrative of the practice without any detailed consideration of the difficulties.

3.2 Because there are different procedures for indictable offences and simple offences, it is desirable to begin with an explanation of the legal distinction between these two terms and the operation of the criminal courts in respect of offences in each category. Indictable offences are offences triable on indictment before a jury[1] in the District Court[2] or the Supreme Court. They comprise all offences described as crimes and misdemeanours.[3] Simple offences, on the other hand, are triable summarily in a Court of Petty Sessions before a magistrate or two justices of the peace,[4] or, with the consent of all parties, by one justice.[5] All offences which are not indictable are simple offences.[6] They include offences under the Police Act 1892 and all offences described in Western Australian legislation as simple offences. There is a hybrid category of offences which are indictable, but which are triable summarily at the defendant's election. These include assault,[7] burglary,[8] stealing[9] and dangerous driving causing death.[10] If the defendant elects summary trial, he is dealt with in the Court of Petty Sessions[11] and may benefit from reduced penalties.

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1 *Criminal Code*, s.1.

2 The District Court can deal with all indictable offences except those punishable by over fourteen years imprisonment or death; *District Court of Western Australia Act 1969*, s.42.

3 *Criminal Code*, s.3.

4 Hereafter referred to as "justices".

5 *Justices Act 1902*, s.29.

6 *Criminal Code*, s.3.

7 Ibid., s.319.

8 Ibid., s.407A.

9 Ibid., s.426.

10 *Road Traffic Act 1974*, s.59.

11 Presumably s.29 bf the *Justices Act 1902* which operates "notwithstanding the provisions of any other Act" would allow a defendant to choose to be dealt with by one justice, although in this respect it would be in conflict with s.3 of the *Criminal Code*.

3.3 If the defendant pleads guilty to a simple offence, including an indictable offence where he has elected summary trial, the Court of Petty Sessions may, subject to any statutory provision to the contrary,[12] sentence the defendant. If the defendant pleads guilty to an indictable offence, he is committed to the Supreme Court or District Court for sentence.[13]

3.4 If the defendant pleads not guilty to a simple offence, including an indictable offence where he has elected summary trial, he will, in due course, be tried and, if found guilty, with the exception of those cases where he may be sent to the District Court or Supreme Court for sentence,[14] he may be sentenced by the Court of Petty Sessions. If the defendant does not plead guilty to an indictable offence, he may elect to have a preliminary hearing[15] in the Court of Petty Sessions.[16] The object of the preliminary hearing is to determine whether there is a prima facie case against the defendant. If there is, the defendant is committed for trial on indictment to the District Court or Supreme Court.[17] If the defendant elects not to have a preliminary hearing, he is immediately committed for trial without consideration by the Court of Petty Sessions of the case against him.[18]

3.5 The accompanying table (Table I) may help to explain the operation of the criminal trial process. Each vertical line indicates an interval in the disposition of the case and, consequently, represents an occasion when bail becomes relevant. For comparative purposes within the chart, the length of the lines is intended to indicate the length of each interval. The actual times shown in parenthesis are only an approximate indication of the period involved.

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12 Such as *Police Act 1892*, ss.94B(2) and 94B(5)(b)(i) dealing with certain drug offences whch require the defendant to be committed for sentence by the District Court. Section 426 of the *Criminal Code* enables a defendant charged with the indictable offence of stealing to elect summary trial, but pursuant to s.427(b)(ii) he may be sent to the Supreme Court for sentence.

13 *Justices Act 1902*, s.114.

14 See footnote 12 above.

15 Also known as committal proceedings.

16 *Justices Act 1902*, s.101B.

17 Ibid., s.107.

18 Ibid., s.101C(b)(iii).

BAIL ON ARREST

The arrest

3.6 There are three procedures for bringing a defendant before the Court of Petty Sessions to answer charges. They are –

(1) Summons
(2) Arrest on warrant
(3) Arrest without warrant.

The *Justices Act* appears to favour the issue of a warrant in the first instance for persons charged indictable offence,[19] and a summons in the first instance for persons charged with a simple offence.[20] However, in a great many situations, neither a warrant for arrest nor summons is appropriate, and the most suitable procedure is the third one referred to, namely arrest without warrant. For example, where the defendant is observed by a policeman committing an offence, and where his name is not known, or where he refuses to discontinue the commission of the offence, or is violent, or endeavours to escape, the policeman's duty would be to effect an arrest. Figures relating to eight of the main country areas in Western Australia[21] show that, on average, 64.23% of all adult defendants in the areas concerned were arrested.[22]

3.7 Any officer or constable of the police force may arrest without warrant "all persons whom he shall have just cause to suspect of having committed or being about to commit any offence, or of any evil designs"[23] In addition to this general power, there are specific

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19 *Justices Act 1902*, s.58.

20 Ibid., s.59.

21 See paragraph 2.6 n.4 above. Figures are not published for the Perth Metropolitan area. The percentage of arrests as against summonses in rural areas may, however, be affected by the larger Aboriginal population in the country. If so, the percentage of arrests for adult offenders in Perth may be substantially lower.

22 The figures published do not indicate whether the arrest was with or without warrant. However, the view has been expressed to the Commission that generally the police in Western Australia are inclined to prefer the use of their power to arrest without warrant even perhaps when not required by the occasion.

23 *Police Act 1892*, s.43. The extent of the power to arrest under this section is not clear. The word "offence" is not defined in the Act and the Commission's research to date has not revealed any guidance as to the meaning to be given to the expression "having evil designs". It might be thought that the words "offence" and "having evil designs" must be restricted to an offence in the *Police Act* itself. However, such an argument was rejected by the South Australian Supreme Court (In Banco) in *Samuels v Hall* [1969] SASR 296 where it was held that the equivalent South Australian provision entitled the police to arrest without warrant a person distributing pamphlets in breach of a local authority by-law.

provisions enabling the police to arrest any person who offends against the *Police Act* within view of the police and whose name and address are unknown and not readily ascertainable,[24] and any person who is found committing any offence punishable in a summary manner.[25] Unless otherwise stated, the definition of an offence as a crime means that the offender may be arrested without warrant.[26] In the case of a misdemeanour, the police have power without warrant to arrest any person found by night committing an offence[27] or where there is a breach of the peace.[28] Otherwise, the power to arrest without warrant for a misdemeanour must be expressly provided in the Code.[29]

3.8 Following arrest, the defendant is taken to the nearest lock-up. In the Perth metropolitan area this may be the Fremantle, Midland or East Perth lock-up. The East Perth lock-up is the principal lock-up and has approximately 12,000 arrested persons passing through it each year.[30] In rural areas, the defendant is taken to the nearest police station.

3.9 At the lock-up the defendant's particulars such as his name and address are taken and he is fingerprinted.[31] Particulars of the alleged offence and of any items taken from the defendant during a search are entered into police records. A charge is then prepared. The duty of the officer making an arrest is to bring the arrested defendant before a justice forthwith.[32] However, there is usually some delay while the defendant's particulars are taken and cases might occur where the delay might be extended and the defendant placed in a cell. This might be done, for example, to enable the police to carry out further investigation or to enable a violent defendant to cool down, or an intoxicated defendant to sober up.

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24 Ibid., s.46

25 Ibid., s.49.

26 *Criminal Code*, s.5.

27 Ibid., s.567.

28 Ibid., s.237.

29 For example, an offence relating to the holding of an election, *Criminal Code*, s.109 and counterfeit offences, *Criminal Code*, ss.157-164.

30 See paragraph 2.18 above.

31 Section 50AA(1) of the *Police Act 1892* (added by *Police Act Amendment Act 1974*, s.2) entitles the police to take such particulars as are thought necessary or desirable for the identification of the defendant.

32 *Criminal Code*, s.570, but see *Justices Act 1902*, s.64 which provides that a person taken into custody for an offence without a warrant shall be brought before a justice "as soon as practicable after he is taken into custody".

Police bail

3.10 The police have power to release a defendant on bail who has been "apprehended as aforesaid", [33] or who has been charged with any offence punishable in a summary manner and is brought without warrant into police custody. [34] The Commission understands that following arrival at the lock-up, the defendant is informed by the police in general terms what is happening, but he is not necessarily informed in every case specifically of the power of the police to grant bail, of his right to be taken before a justice forthwith, or as to the advisability of his consulting a solicitor. The decision whether to grant bail is made, as required by law, by the officer or constable who is in charge of the lock-up "if he shall deem it prudent". At the East Perth lock-up the decision is made by the sergeant-in-charge on the recommendation of the policeman making the arrest. This decision might be critical for a defendant, as the fact that the police have granted or denied bail might influence later decisions by justices and magistrates.

Justices bail at the lock-up

3.11 If the police refuse to grant bail or do not have power to grant bail, [35] and if the defendant wishes to have bail, he may ask to see a justice. The police are not obliged to inform the defendant that he may see a justice, but in practice they do so if the defendant seems to be unfamiliar with the procedure at the lock-up. Justices assume a jurisdiction to grant bail for all offences, except capital crimes and murder, [36] but their legal authority to do so appears to be obscure. [37]

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33 *Police Act 1892*, s.48. Presumably this refers to ss.41 and 43-47 of that Act. If so, it could include serious offences. For example, s.43 permits apprehension of a defendant on suspicion "of having committed or being about to commit any offence, or of any evil designs". Section 45 allows a police officer to "take into custody …any person whom he shall have reasonable and probable cause for believing has committed any felony or misdemeanour".

34 *Police Act 1892*, s.48. See also *Justices Act 1902*, s.64 which requires bail to be granted if it is not practicable to bring the defendant before a justice within twenty-four hours and the offence is not serious.

35 For example, if the defendant has been charged with an indictable offence or has been brought in on a warrant.

36 *Justices Act 1902*, s.115.

37 Under s.86 of the *Justices Act 1902*, in the case of "a simple offence or other matter, ... one Justice may adjourn the hearing ..." and grant bail. Similarly, s.79 permits a justice to defer the hearing of an indictable offence if this becomes necessary by reason of "the absence of witnesses, or from other reasonable cause" and the defendant may be granted bail. However, it is doubtful whether justices at the lock-up when they grant bail, actually regard themselves as adjourning the hearing.

3.12 If the police do not think that a particular defendant ought to be released on bail, or if they have granted bail on conditions which the defendant cannot meet, it would be possible for the defendant to remain in a cell until his appearance in the Court of Petty Sessions without a justice being aware of the fact. However, the Commission has been advised that this does not occur in practice, at least not at the East Perth lock-up. The procedure there is for an inspector to make regular rounds of the lock-up to see who is still in custody, and to see if anything can be done to enable defendants who are still in custody to be released on bail.

3.13 Furthermore, at the East Perth lock-up, a justice is in attendance on roster in an honorary capacity from 9 am to 5 pm and from 7 pm to 11 pm each day. In some cases, justices on duty will check with the sergeant-in-charge towards the end of their shift at 11 pm to see if there is a defendant still in custody. If there is a defendant remaining in custody because he has been unable to meet a condition of bail (if, for example, he cannot obtain a surety), the justice may vary the terms of bail to permit the release of that person.[38] However, the Commission has been informed that justices are reluctant to interfere where the police do not consider bail to be desirable.

3.14 At the East Perth lock-up, outside the hours when a justice is available on roster, and at all times at other lock-ups, a justice, if available, may attend on call to consider the question of bail. It may, however, be impracticable for a justice to be brought to the lock-up at unreasonable hours during the night unless there are special circumstances.

Factors affecting the bail decision at the lock-up

3.15 The factors taken into account by the police and by justices if called upon to make a bail decision at the lock-up vary, depending on the particular circumstances of each case. However, there appear to be a number of common questions affecting the decision. These matters are considered in more detail in Part A of chapter 5 below.[39] However, by way of summary they are –

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38 There is no express power given to justices to vary or modify the terms of bail either as set by police, or as set by themselves, but, presumably, they are granting bail on a fresh application: see paragraphs 8.2 to 8.3 below.

39 The factors to be taken into account by the police in deciding whether or not to grant bail and the police obligations generally regarding bail are set out in some detail in the Police Manual: see *Western Australian Police Manual*, 1960 and see Appendix V.

(a) Whether the defendant would be likely to appear for his trial. The answer may be influenced by the nature and seriousness of the offence charged and the evidence available; whether the defendant was a local resident; whether he was employed, married and owned his own home and whether he was a known criminal.

(b) Whether it would be in the defendant's own interests to keep him in jail, for example, if he were drunk, or if there were a danger that he may be the victim of reprisals.

(c) Whether the defendant, if released from custody, would be likely to commit further offences or interfere in any way with witnesses.

3.16 The information which is the basis for the decision whether or not to grant bail is, in most cases, provided by the policeman responsible for the arrest and by the defendant himself. At this stage, it is rare for a bail application to be supported by independent evidence, or for the defendant to be represented by a solicitor.

Conditions imposed upon a grant of bail at the lock-up

3.17 Under the statutory authority which is assumed to be applicable to bail at the lock-up, justices have an express power, to release a defendant from custody pending his appearance in court, without requiring bail in a case where he is charged with "a simple offence or other matter".[40] In most cases, however, the defendant will be required to enter into a written personal undertaking to appear in the Court of Petty Sessions or, in default, forfeit a sum of money. This undertaking is called a recognizance and the amount of money is fixed having regard to the seriousness of the offence and the penalties involved. The defendant's ability to pay is not taken into account.

3.18 In addition to the defendant's recognizance, it is common for further conditions to be imposed for his release on bail. He may, for example, be required to produce one surety or two sureties.[41] A surety is a person who is prepared to forfeit a certain sum of money if the

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40 *Justices Act 1902*, s.86. The defendant is said to be allowed to go "at large" on the informal understanding that he will appear as required.

41 The law and practice relating to sureties is discussed in more detail in chapter 7 below.

defendant fails to appear in answer to his bail recognizance. This sum is usually, but not necessarily, the same as that fixed for the defendant.

3.19 A surety is interviewed, usually by the police, before he or she is accepted.[42] There is no requirement that the surety have any demonstrable control over the defendant, but the police do make some enquiries to see that the surety would be able to pay the amount involved if it should fall due, and there is a reluctance to accept as surety a person who does not own land. Another common disqualifying factor for a surety is a criminal record. There is, however, little opportunity, especially on a weekend, for the police to check the credentials of a person who is willing to go surety.

3.20 Other conditions commonly imposed include a deposit of cash by the defendant and possibly by the surety. A cash deposit by the defendant is a common condition for release on bail in the case of drunkenness and gaming offences and may become a substitute for a fine if the defendant fails to appear.[43] In addition, the defendant may be required to surrender his passport to the police. In one case, [44] in spite of objections by counsel for the Commonwealth, a condition was also imposed that the defendant must agree to his photograph being displayed in passport issuing offices throughout Australasia and such offices were to be informed that the defendant was prohibited from obtaining a new passport. In some cases it may be appropriate to require an undertaking not to contact a particular person such as a witness.[45] A condition that the defendant report periodically to the police is not often necessary in the case of police bail or justices' bail at the lock-up because of the short duration of such bail. It is, however, a common condition imposed by the court when granting bail for a longer period.[46]

Release on bail from the lock-up

3.21 If the defendant is granted bail, and if he satisfies all conditions, he and his sureties, if any, sign the recognizance book. Juveniles are given a copy of their recognizance which

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42 By refusing to accept a surety, the police could frustrate bail set by a justice if they disagree with his decision to grant bail: see paragraphs 7.60 to 7.65 below. However, in practice, if the defendant is unable to produce an acceptable surety he may be invited by the police to return to the justice and have the conditions for bail reviewed.

43 See paragraphs 3.48 to 3.49, 6.25 to 6.27 and 6.38 to 6.39 below.

44 See paragraphs 6.45 to 6.46 below.

45 With the exception of a condition requiring sureties and other exceptions of a minor nature, there does not appear to be any legal authority for these additional conditions to be imposed for release on bail, or for the variation, dispensation or enforcement of conditions: see paragraphs 6.42 to 6.44 below.

46 See paragraphs 3.38 and 7.33 below.

contains details of their obligations. Adults are told, often several times, when and where they must appear in answer to their bail. On completion of the formalities, the defendant is released conditionally on his appearance in the Court of Petty Sessions.[47] In Perth this will normally be the following morning at 10 am. In rural areas, where the court may sometimes sit only once a month, the period concerned may be considerably longer.[48] Normally the defendant's freedom will last until his next appearance in court but there is provision for the surety to apprehend the defendant at any stage, with or without the assistance of the police,[49] and there is provision for a magistrate to revoke bail if this is considered to be in the interests of justice.[50]

BAIL IN THE COURT OF PETTY SESSIONS

3.22 Following arrest, the next occasion for consideration of bail arises when the defendant first appears in the Court of Petty Sessions if the case cannot then be determined. If already bailed, the appearance of the defendant discharges his existing bail obligations and those of any surety. If in custody, the defendant is taken to the court from the police lock-up. If the defendant is answering a summons, his appearance marks the first occasion when bail may become relevant. However, normal procedure on an adjournment is to enlarge the summons. It would be unusual for a defendant appearing on a summons to be remanded in custody.

3.23 Although the Court of Petty Sessions has power to grant bail for indictable offences[51] (with the exception of capital offences and murder)[52] and simple offences[53], the procedures vary and it is more convenient to consider them separately.

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47 It is not essential that the surety appear in court with the defendant, but he normally will attend so that if bail is renewed on the same terms and conditions he will be able to sign the recognizance as surety and enable the defendant to be released without delay: see paragraphs 7.67 to 7.72 below.

48 Section 48 of the *Police Act 1892*, permits the police to grant bail only until the hour of ten in the forenoon next after bail is granted with extensions should that day be a Sunday or public holiday. However, carrying out their duty to bring the defendant before a justice forthwith (*Criminal Code*, s.570) , normal practice is for the police to call in a justice to grant bail for the longer period. If a justice is not available within twenty-four hours, s.64 of the *Justices Act 1902* entitles a clerk of court or the police officer in charge to grant bail unless it is a charge "of a serious nature".

49 *Justices Act 1902*, s.94.

50 Ibid., s.94A. There is provision for the police to obtain a warrant for arrest if a defendant, having entered into a recognizance, appears to be about to abscond. However, the provision seems to apply only where the defendant is appealing from a decision by the Court of Petty Sessions: *Justices Act 1902*, s.217 and see paragraph 3.43 below.

51 Ibid., ss.79, 82, 116 and 121.

52 In Western Australia wilful murder in a capital offence, murder is punishable by life imprisonment: *Criminal Code*, s.282. The power to grant bail for murder and capital offences is reserved for the Supreme Court: *Justices Act 1902*, s.115.

53 *Justices Act 1902*, s.86.

Simple offences

(a) *Bail if the defendant pleads guilty*

3.24 If the defendant has been charged with a simple offence, which includes an indictable offence for which he can and does elect summary trial,[54] he may be asked to plead. If he pleads guilty he may be sentenced immediately following a summary of the facts by the police prosecutor in court. However, if a sentence of imprisonment is being considered, the defendant may be remanded for a pre-sentence report from the Chief Probation Officer. In practice, the defendant is remanded for this purpose for up to twenty-one days. During the period of any remand the defendant may be granted bail.[55] If not granted bail, the powers of the court and the length of time during which the defendant may remain in custody are obscure.[56]

3.25 The legal authority to grant bail to a defendant who is tried summarily, convicted and committed for sentence to the Supreme Court or District Court may be doubtful. One such case occurred where a defendant was charged with certain drug offences under the *Police Act*. The absence of any authority to grant bail in such a case has been remedied by an amendment to that Act in 1976.[57] However, in other cases, for example where a defendant is convicted summarily for stealing but is to be sentenced in the Supreme Court, doubts may remain.[58] Where a defendant has been convicted, there is no inherent jurisdiction for a Supreme Court Judge to grant bail,[59] and it may not be clear whether the defendant has a right of appeal. [60] In this situation, the defendant would be unable to obtain a writ of *habeas corpus*.[61]

3.26 Following sentence the question of bail will rarely arise, but it may do so if a warrant is issued for the sale of the defendant's property for non-payment of a fine or other order for

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54 See paragraph 3.2 above.

55 *Offenders Probation and Parole Act 1963*, s.9(la).

56 There seem to be only two provisions (ss.79 and 86) in the *Justices Act* relating to this question. However, s.79 which empowers the court to remand in custody for only 8 days at a time, only applies to indictable offences. Section 86 applies to simple offences (which would include indictable offences where the defendant has elected summary trial (*Harris v Markham* [1975] WAR 93) but gives power to "adjourn the hearing", and imposes no time restrictions.

57 *Police Act 1892*, s.94B(5) (b) (ii).

58 The only sections possibly relevant seem to be ss.79, 82, 86, 114 and 121 of the *Justices Act 1902*. Sections 79, 82 and 86 do not seem to apply as the justice is not purporting to "adjourn" the hearing. The other two sections relate to indictable offences and are linked with the preliminary hearing procedure.

59 *Re Edwards* [1975] WAR 161.

60 See paragraphs 3.51 and 8.1 to 8.9 below.

61 cf. paragraph 8.3 below.

the payment of money. In this situation, while the warrant is issued and pending its return, the defendant may be kept in custody or released on bail.[62] However, this procedure is rare. The problem is normally avoided by allowing the defendant time to pay. [63]

(b) *Bail if the defendant pleads not guilty*

3.27 If the defendant pleads not guilty, or if he seeks an adjournment without any plea,[64] the hearing may be adjourned till a later date and the defendant admitted to bail. [65]

3.28 If the defendant is remanded in custody, there do not appear to be any statutory limits to the period of such a remand. In practice, however, the maximum single period of remand in custody is the same for defendants charged with a simple offence as for defendants charged with an indictable offence, that is, eight days.[66] In Perth, a defendant who pleads not guilty is remanded to the Beaufort Street Court of Petty Sessions for his trial. The East Perth Court has a high volume of work and normally deals only with guilty pleas and sentencing. The period of adjournment depends on the number of cases awaiting consideration and the time it takes for the prosecution and defendant to prepare their cases. In some cases, the absence or illness of witnesses may result in a further adjournment.[67] The practice, however, is to give priority to defendants in custody. It would be possible for a defendant to have his trial within approximately fourteen days of his appearance to plead not guilty.

3.29 If the trial is likely to be lengthy, the question of bail during the trial will arise. In practice, bail will be continued if the defendant has already been granted bail. Otherwise he will normally remain in custody.

3.30 If the defendant is acquitted the question of bail will no longer arise. On the other hand, if the defendant is convicted the question of bail may arise both before and after sentence in the same circumstances as it may if the defendant had pleaded guilty.[68]

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62 *Justices Act 1902*, s.156.

63 Ibid., s.144

64 For example to enable him to consult a solicitor.

65 *Justices Act 1902*, s.86.

66 Ibid., s.79 and see paragraph 3.34 n.73 below.

67 There does not appear to be any provision to enable a witness who is dangerously ill and unable to travel to give evidence by way of sworn statement where the defendant is charged with a simple offence. Cf. *Justices Act 1902*, s.110 which applies only to indictable offences.

68 That is, where the defendant is remanded for a pre-sentence report or pending the return of a warrant of execution: see paragraphs 3.24 to 3.26 above.

Indictable offences

3.31 If the defendant appears in the Court of Petty Sessions on an indictable offence, the hearing is adjourned; whether or not this is desired by the defendant.[69] This means that the defendant cannot plead guilty at the outset even if he wishes to do so. During the period of adjournment, the police obtain statements from the witnesses for the prosecution and serve copies on the defendant. At least four clear days later,[70] the defendant is asked to make his election whether or not he wishes to have a preliminary hearing. If he elects not to have a preliminary hearing, he is required to plead[71] and may then, for the first time, plead guilty and have his plea recorded.

(a) *Bail if the defendant pleads guilty*

3.32 If the defendant pleads guilty to an indictable offence he is committed for sentence in the Supreme Court or District Court and may be granted bail.[72]

(b) *Bail if the defendant does not plead guilty*

3.33 If the defendant elects not to have a preliminary hearing he is committed to the Supreme Court or District Court for trial. If the defendant elects a preliminary hearing a date will be set accordingly for the hearing in a Court of Petty Sessions. At the conclusion of the preliminary hearing the defendant is either committed for trial in the appropriate court (Supreme Court or District Court) or discharged. It is normal practice for the defendant to elect to have a preliminary hearing.

3.34 During this rather complex procedure, bail may become a relevant issue on several occasions. In practice, the defendant may obtain bail on any of these occasions, but the statutory power to grant bail might in some cases be obscure.[73]

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69 *Justices Act 1902*, s.101A(i) (b) (iv).

70 Ibid. , s.101A(b)(ii).

71 Ibid., s.101C(b)(i).

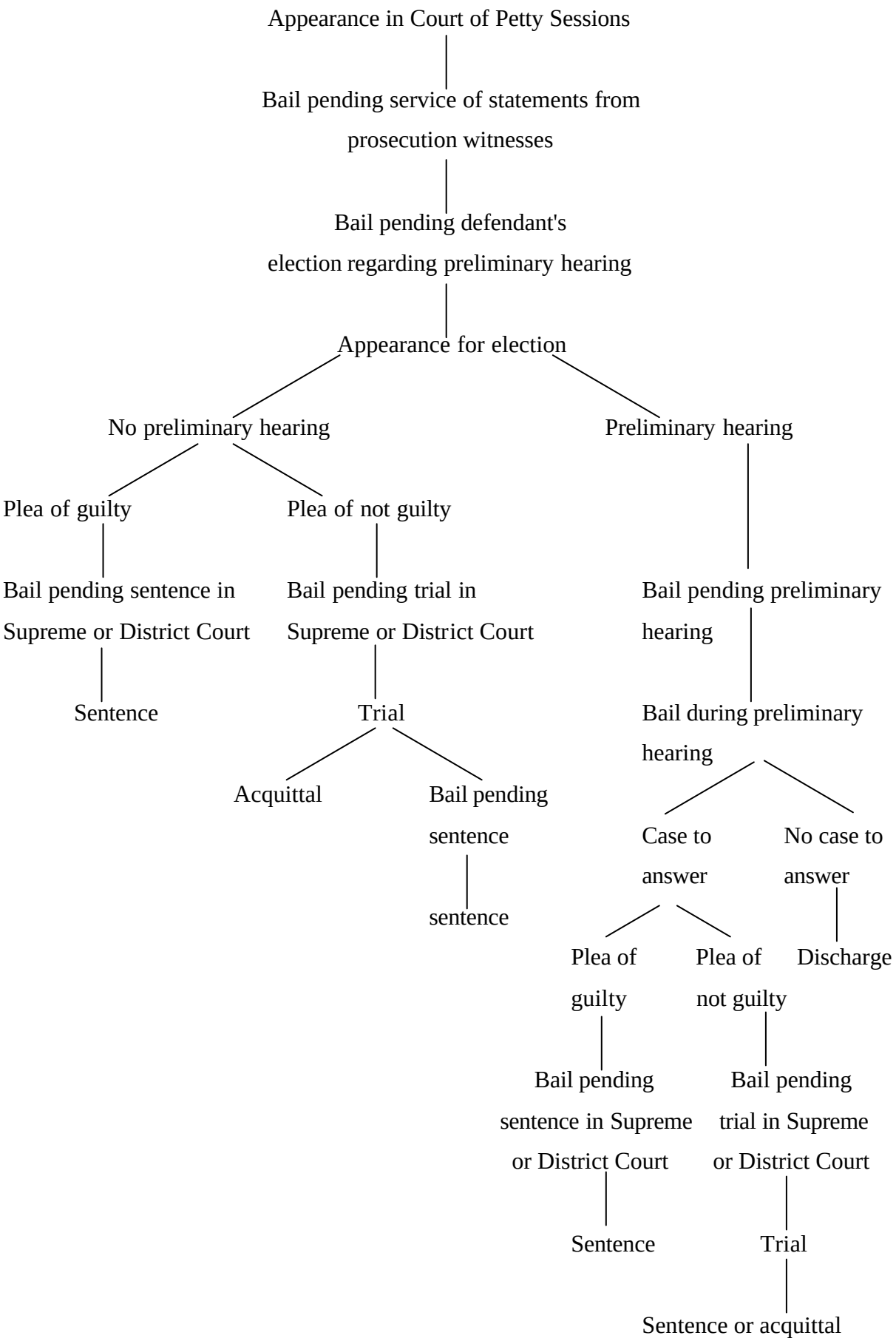
72 Ibid., s.114.

73 The main problem would seem to be that there is no general power to grant bail for indictable offences. The statutory provisions appear to be too specific and too narrow. The main provisions are *Justices Act 1902*, s.79 which permits both an adjournment of the hearing of an indictable offence and the remand of the defendant in custody for up to eight days; s.82 which instead of a remand in custody permits a

The following table, (table II), may assist to illustrate the relevant occasions when bail may be granted in respect of an indictable offence.

defendant to be bailed; s.114 which allows bail to be granted to a defendant pending sentence; s.116 which allows bail to be granted to a defendant pending trial in respect of crimes and certain misdemeanours and s.121 which requires bail to be granted to a defendant pending trial for misdemeanours other than those specified in s.116.

TABLE II


Appearance in Court of Petty Sessions
Bail pending service of statements from prosecution witnesses
Bail pending defendant's election regarding preliminary hearing
Appearance for election
No preliminary hearing
Preliminary hearing
Plea of guilty
Plea of not guilty
Bail pending sentence in Supreme or District Court
Bail pending trial in Supreme or District Court
Bail pending preliminary hearing
Sentence
Trial
Bail during preliminary hearing
Acquittal
Bail pending sentence
Case to answer
No case to answer
sentence
Plea of guilty
Plea of not guilty
Discharge
Bail pending sentence in Supreme or District Court
Bail pending trial in Supreme or District Court
Sentence
Trial
Sentence or acquittal

Factors affecting the bail decision

3.35 Bail granted by justices or a magistrate in the Court of Petty Sessions is granted on the same principles as justices' bail at the lock-up.[74] However, the duration of custody is likely to be longer pending trial or a preliminary hearing than between the time of arrest and appearance in court, and, consequently, a refusal of bail would have a correspondingly greater adverse effect on the defendant, his family and his employment. The police at this stage normally have details of the defendant's criminal record including any record of absconding or of escaping from custody. If so, the information would be made available to the court.[75] The Court may also take into account whether the defendant would have a sufficient opportunity to prepare his defence if bail were refused.

3.36 The only other significant difference in practice between justices' bail at the lock-up and bail in the Court of Petty Sessions is that in the latter case, bail applications are heard in public and in an adversary context. The defendant, even if he has not consulted his own solicitor, has at least had the opportunity of consulting the duty solicitor in Court. Although the defendant ought to make application for bail, the Court, when ordering an adjournment, generally gives consideration to the question of bail as a matter of course. In this respect, the police may be asked if they have any objection to bail. The police may sometimes not object to bail even though they have had power to release the defendant on bail from the lock-up but have not done so. This may be explicable in some cases on the basis that the defendant was drunk or violent but has since recovered his composure.

3.37 If the justices or the magistrate require further information relevant to the decision whether or not to grant bail, this is usually obtained from the defendant or the police in the form of unsworn statements from the floor of the Court. Where the defendant is represented by a solicitor or counsel, information is provided by him on defendant's behalf without the defendant being called give evidence. Although rare in practice, there have been occasions when formal evidence has been given in support of an application for bail.

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74 See paragraph 3.15 above. In fact, the power of the justices to grant bail at the lock-up is only explicable in terms of the statute if they are considered to be hearing the case: *Justices Act 1902*, ss.79, 82 and 86.

75 There may be a possibility of prejudice if the justice granting bail subsequently hears the charge against the defendant on a plea of not guilty: see paragraphs 5.21 to 5.22 below.

The bail decision

3.38 Bail may be granted in the Court of Petty Sessions on the same conditions and with the same requirement for a surety as for bail granted in the lock-up.[76] In some rural areas, the surety may be approved by the Court itself. In Perth, however, the normal practice is for the surety to be interviewed and approved either by a police officer or by the clerk of the Court of Petty Sessions. In some cases, the magistrate may direct that the surety be approved by the police. Having regard to the length of time the defendant might be released on bail, a condition is imposed in many cases for the defendant to report periodically to the police.

3.39 If bail is not granted, or if the defendant is not able to meet the conditions imposed, he may be remanded in custody in the nearest prison. In Perth this is the Fremantle Prison. A defendant in custody at Fremantle in such circumstances is kept in the separate remand yard and his daily schedule is shown in Appendix IV. The physical conditions do not differ greatly from those relating to convicted prisoners.[77] The average time spent by defendants in custody awaiting trial may be at least sixty-two days.[78]

BAIL IN THE SUPREME COURT OR DISTRICT COURT

3.40 When the defendant appears in the Supreme Court or the District Court, he appears either for sentence, having been convicted, normally of an indictable offence, or he may appear for his trial on indictment. In both cases, the Supreme Court and the District Court[79] have express powers to admit the defendant to bail or reduce the terms of bail.[80] These powers are presumably exercisable in addition to the judge's inherent jurisdiction over unconvicted defendants.[81]

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76 See paragraphs 3.17 to 3.20 above

77 See paragraphs 4.11 to 4.13 and 4.19 to 4.29 below for a more detailed discussion.

78 This was the average period that defendants interviewed by the Commission at Fremantle had spent in custody at the time of the interview: see paragraph 2.20 above and Appendix II. One defendant interviewed had actually spent a total of 155 days in custody awaiting trial as at the date of the interview.

79 The practice and procedure of the District Court are the same as that of the Supreme Court: *District Court of Western Australia Act 1969*, s.44. Practice and procedure is defined in s.6 to include matters relating to bail. In addition, s.42 of the *District Court of Western Australia Act 1969* gives that Court all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence. However, in spite of these wide provisions, the view is held among some practitioners, that the powers of the District Court arise only after an indictment has been presented: see paragraph 8.4 below.

80 *Criminal Code*, s.573. See also s.611 for the power to grant bail on adjournment and Order VI of the *Criminal Practice Rules 1914*, particularly Order VI rule 9.

81 It is not clear whether s.42 of the *District Court of Western Australia Act 1969* gives the District Court the Supreme Court's inherent jurisdiction in respect of bail.

3.41 With regard to the factors taken into account, and the conditions imposed in respect of bail, there seems to be little difference in the principles and practice applied in the Court of Petty Sessions, the District Court or the Supreme Court. The only difference of any significance is that there may be different views between judges of the Supreme Court and of the District Court as to the desirability of granting bail to the defendant during his trial. One view is that bail during the trial period should not be granted unless there are special circumstances, for example where there is a long and complicated trial and the defendant needs to be in consultation with his counsel. Even in this situation, limited bail only may be granted, tailored specifically to the purpose for which it is granted.[82] The other view is that the defendant should normally be granted bail during his trial unless there are special reasons why he should not.[83] There have been no cases reported to the Commission where the defendant has absconded while on bail during his trial.

BAIL ON APPEAL

Appeal from Court of Petty Sessions

3.42 A defendant who does not plead guilty but who is summarily convicted and imprisoned without the option of a fine, may appeal as of right to the Supreme Court. This is referred to as an ordinary appeal.[84] As a condition of his appeal, the defendant must enter into a recognizance with or without sureties.[85] However, once he enters into this recognizance and meets the conditions imposed, he must be released on bail.[86] The decision of the judge on the appeal is final between the parties.[87]

3.43 In all other cases, the defendant can only appeal by way of order to review. This procedure is available to both the defendant and the prosecution if they can show by affidavit to a Judge of the Supreme Court a prima facie case of error or mistake in law or fact on the part of the justices or that the justices had no jurisdiction in giving the decision appealed

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82 See the unreported decision of Burt J. in *R. v Cutler* [1972] Supreme Court of Western Australia No. 193/72 and paragraphs 5.37 to 5.39 below.

83 This may occur in some rural areas where the release of the defendant would mean that he would have to stay in the same hotel or other accommodation as the judge, witnesses and jury.

84 *Justices Act 1902*, s.183.

85 There is power to dispense with sureties but, unless exercised by a magistrate, they cannot be dispensed with unless the defendant deposits cash or other security of at least $50 in value.

86 *Justices Act 1902*, s.188.

87 Ibid., s.190.

from.[88] In practice, the Judge may hear this application in chambers on the same day as the justices' decision was made. If the Judge is satisfied that a *prima facie* case has been made out for an appeal, he grants the order to review. This is normally heard some time later by a Judge of the Supreme Court or in some cases by the Full Court of the Supreme Court. The procedure in so far as it relates to bail is the same as for ordinary appeals. However, there is a further right of appeal to the Full Court of the Supreme Court against any refusal by a Judge to grant an order to review.[89] There is provision for the police to obtain a warrant for the arrest of a defendant who having entered into a recognizance, appears to be about to abscond.[90]

3.44 There have been occasions when an accused person has appealed, obtained bail, and the hearing of the appeal has taken so long that it has been considered unjust to recommit the defendant to prison on the eventual failure of his appeal.[91] The problem relates to the keeping of records of outstanding appeals, where the defendant is released on bail. A recent amendment to the *Justices Act* remedied the problem in the case of an appeal by way of order to review.[92] However, the problem may still arise in the case of an ordinary appeal.[93]

3.45 If the result of the appeal is a retrial, there are no express statutory provisions regarding bail pending the retrial. However, there appears to be nothing to prevent the Court of Petty Sessions from granting bail in such circumstances as if this were the first occasion when the defendant was appearing before it in answer to the charge.

Appeal from the District Court or Supreme Court

3.46 In the case of an indictable offence, the defendant or prosecution have certain rights to appeal to the Court of Criminal Appeal.[94] In this case the defendant may be admitted to bail pending the hearing of the appeal.[95] If he remains in custody he is treated as an unconvicted prisoner.[96] Depending on the decision of the Court of Criminal Appeal, this period may or

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88 Ibid., s.197(1)(a).
89 Ibid., s.204.
90 Ibid., s.217. Presumably this applies to a recognizance in respect of ordinary appeals and appeals by way of order to review.
91 See for example, the case of John King reported in *The West Australian* on 13 October 1976.
92 *Justices Act 1902*, s.201 as amended by s.8 of the *Justices Act Amendment Act (No.2) 1976*.
93 The *Justices Act 1902* is currently being reviewed by the Commission as Project 55 and this matter will be dealt with in more detail in that Project.
94 *Criminal Code*, s.688.
95 Ibid., s.700(2).
96 Ibid., s.700(1).

may not be taken into account in computing the defendant's eventual sentence.[97] The powers of the Court of Criminal Appeal in respect of bail may be exercised by a single Judge of the Supreme Court, but, if the Judge refuses to exercise such powers in his favour, the appellant is entitled to have his application determined by the Court of Criminal Appeal.[98] If the result of the appeal is a retrial, either the Court of Criminal Appeal, or the Court where the defendant is to be tried again, has power to admit the defendant to bail.[99]

Appeal to the High Court of Australia

3.47 The Australian Constitution gives appellate jurisdiction to the High Court of Australia in respect of all judgments, decrees, orders and sentences of any Supreme Court of any State.[100] Acting under this power, the High Court may grant special leave to appeal in respect of any judgment of the Supreme Court in a criminal matter[101] If leave to appeal to the High Court is granted, the High Court or a Justice of that Court may admit the defendant to bail upon such terms or conditions as appear just.[102]

CONSEQUENCES IF THE DEFENDANT FAILS TO APPEAR IN ANSWER TO HIS BAIL

3.48 If the defendant has been released on his personal recognizance the consequences of absconding are that, upon apprehension, he may face not only the penalty for the offence for which he was charged, but also forfeiture of the amount fixed for his bail.[103] This could lead to further[104] imprisonment if he is unable to pay. In practice, when the defendant does not appear, the police also obtain a warrant for arrest. However, there are two exceptions to this practice which arise where the defendant has been charged with an offence relating to

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97 Ibid., s.20.

98 Ibid., s.702.

99 Ibid., s.691.

100 *Commonwealth of Australia Constitution Act 1900*, s.73(ii).

101 *Judiciary Act 1903* (Cwth), s.35(1)(b).

102 See Order 70 rules 12(4) and 32(3) of the rules of the High Court.

103 It is not clear in the legislation whether forfeiture is mandatory or whether magistrates have a discretion in the matter. Section 154A of the *Justices Act 1902*, dealing with the enforcement of recognizances, provides that on a complaint an order forfeiting the recognizance *may* be made. However, some magistrates take the view that a forfeited recognizance becomes a debt owing to the Crown and it simply remains to levy execution. The question is made more complex by s.48 of the *Police Act 1892* which provides that a memorandom of forfeiture of a recognizance *shall* be drawn up if a defendant fails to appear in answer to police bail.

104 For a more detailed discussion of the consequences of absconding and of the machinery for enforcing recognizances see paragraphs 6.19 to 6.41 below.

drunkenness or gambling. If he has deposited cash,[105] this is in some cases estreated and paid into Consolidated Revenue in substitution for a fine and no further action is taken against the defendant for the offence alleged. This practice raises complex legal issues. In particular there seems to be no express provision authorising a justice to make an order estreating cash paid by the defendant. The only relevant provision in the *Justices Act*[106] deals with enforcement of recognizances, and, on a complaint being made, empowers the court to make an order for the payment of the sum of money in which the person in default is bound.

3.49 Consequently, the view has been taken by some magistrates that the court has no power to make any order relating to the money paid in by the defendant unless he is present or has had an opportunity to state his side of the case. This means that the police must then take action, whether or not by means of a warrant, to bring the defendant before the court. This matter is further considered later in this paper.[107] It is questionable whether the practice of estreating bail is not a misuse of the bail procedure and this point is also discussed below.[108]

3.50 A failure by the defendant to appear means that the surety, if any, becomes liable to pay to the Crown the amount agreed in the recognizance. There is no express power for sureties to be waived, but a reasonable view is taken if the defendant is simply late, or has mistaken the date for his appearance, or where he has taken all steps possible to see that the defendant does not abscond. In these cases the recognizances may not be enforced, or may be enforced in part.[109] In one or two special cases the Attorney General has granted a surety full or partial relief against forfeiture. The Commission has been informed, however, that few applications are granted. The amount forfeited is treated simply as a debt owing to the Crown which may be wholly or partially waived by the Attorney General as the Crown's representative.[110]

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105 Usually $20.

106 s.154A.

107 See paragraphs 6.25 to 6.27 below.

108 See paragraphs 6.38 to 6.39 below.

109 There does not appear to be any legal authority for reducing the amount of the forfeiture. See also paragraphs 6.33 to 6.37 and 6.40 to 6.41 below.

110 On the other hand the procedure could be seen as an example of executive power overriding judicial authority if the amount forfeitable is regarded as being payable under a Court order. This would seem to be the case if an order is made under s.154A of the *Justices Act 1902*, but that section operates without prejudice to any other method of enforcement: see paragraphs 6.40 to 6.41 below.

CHALLENGING THE BAIL DECISION

3.51 Fresh applications for bail and the law and practice relating to appeals against bail decisions are considered in chapter 8. The defendant appears to have no right of appeal against a decision made by the police[111] but may be able to appeal against a bail decision made by a justice if he can show a mistake of fact or law or that the justice exceeded his jurisdiction.[112] There appear to be no statutory provisions relating to appeals from bail decisions made by the Supreme Court or the District Court. It would be unusual, however, for a defendant to want to appeal against a bail decision because at any time, notwithstanding a refusal of bail by one or a number of bail-decision-makers, he may in fact make a fresh application for bail. Such application may be made to another justice or magistrate exercising his statutory powers, or it may be made to a Supreme Court Judge in his inherent jurisdiction.[113] In either case, such applications may be made because of a change in the defendant's circumstances, or simply because the defendant wishes his application to be heard by another bail-decision-maker. In the latter case, the practice could lead to "bail shopping"[114] but there is no evidence that this causes any problem in Western Australia.

3.52 The prosecution may appeal against a bail decision made by a justice or magistrate if a mistake of fact or law is shown or if it can show that jurisdiction has been exceeded,[115] and it may apply to have bail revoked by a magistrate[116] if he is satisfied that this is in the interests of justice.[117] However, the prosecution does not appear to have any right of appeal in respect of bail granted in the Supreme Court or District Court, and, unlike a defendant, is unable to make repeated applications for a bail decision to be reconsidered.

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111 Because police bail relates to the short interval between arrest and appearance in the Court of Petty Sessions (normally one day) an appeal would often be impracticable.

112 *Justices Act 1902*, s.197(1) (a).Such a right depends on whether the word "decision" would also include by implication a "denial" of bail: see *Justices Act 1902*, 5.4 and paragraph 8.1 below.

113 *Re Edwards* [1975] WAR 161.

114 A procedure whereby a defendant may make repeated applications to bail-decision-makers on the same judicial level (e.g. from justice to justice, magistrate to magistrate or from judge to judge) in the hope that one will grant bail: see paragraphs 8.7 to 8.8 below.

115 *Justices Act 1902*, s.197(1) (a).

116 Quaere whether the power should be exercisable by a justice: see paragraph 6.21 below.

117 *Justices Act 1902*, s.94A but the power to revoke bail would not appear to apply in respect of a defendant who is remanded to appear before the Supreme Court or the District Court for sentence: see paragraph 7.73 below.

SUMMARY OF ISSUES

3.53 Many of the issues raised in this chapter outlining the bail decision at all levels in the criminal justice process are dealt with specifically in later parts of this paper and need not be mentioned here. However, there would appear to be some anomalies or defects in the existing law which could be rectified in any review of bail legislation. These are listed as follows –

(1) There may be situations where the power to grant bail is unclear. For example this may apply –

(a) to bail granted by justices at the lock-up;

(paragraph 3.11)

(b) where a defendant is convicted of a simple offence in the Court of Petty Sessions and is awaiting sentence in the Supreme Court or District Court.

(paragraph 3.25)

Enactment of a general power to grant bail for all offences, or, where appropriate, for specified offences, during any interval in the determination of the defendant's case would cure any such defects. It might also simplify the provisions relating to bail in respect of indictable offences.

(paragraph 3.34, n.73)

(2) The extent of police power to grant bail could be clarified and the power could possibly be extended.

(paragraph 3.10)

(3) In some cases, for example, where the defendant is remanded in custody by the Court of Petty Sessions pending his trial for a simple offence and pending sentence, there are no statutory provisions relating to the length of time any such remand may continue. Legislation limiting such a remand to eight days at any one time would cure the defect and would be consistent with the practice and law applicable to indictable offences.

(paragraphs 3.24 and 3.28)

(4) The jurisdiction of the District Court in respect of bail could be clarified.

(paragraph 3.40, nn.79 and 81)

(5) Measures might be considered to ensure that ordinary appeals instituted by a defendant who is released on bail are expedited.

(paragraph 3.44)

(6) Three matters not directly relevant to bail but arising incidentally could be considered. They are –

(a) Whether defendants should be able to plead guilty to an indictable offence when they first appear in the Court of Petty Sessions.

(paragraph 3.31).

(b) Whether the conflict between s.29 of the *Justices Act 1902* and s.3 of the *Criminal Code* dealing with the permitted constitution of the Court of Petty Sessions when considering indictable offences triable summarily should be resolved.

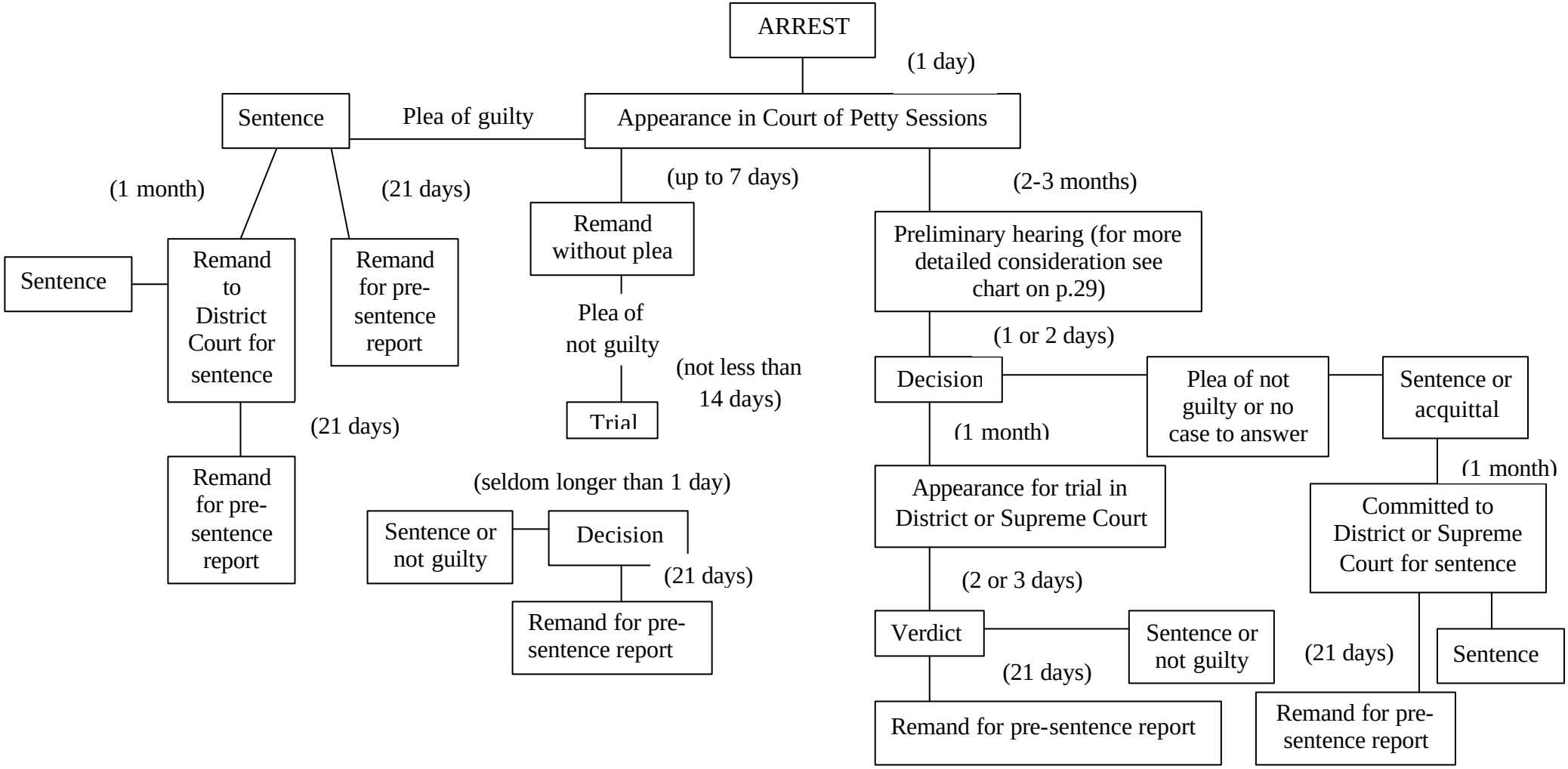
(paragraph 3.2, n.11)

(c) Whether provision should be made enabling evidence in a summary matter to be obtained by way of sworn statement from a witness who is ill and unable to travel.

(paragraph 3.28, n.67)

TABLE I

Simple offences including indictable offences triable summarily **Indictable offences triable by jury**



CHAPTER 4
BAIL: A RE-APPRAISAL

4.1 There is no constitutional right to bail in Australia, and no general statutory right to bail applicable in Western Australia.[1] However, a defendant has a right to apply for bail to a bail-decision-maker having authority to grant bail in respect of all offences in Western Australia. The application may be made either to a Supreme Court Judge in the exercise of his inherent jurisdiction or to a bail-decision-maker on the basis of a specific statutory provision.[2] Supreme Court Judges and, with four exceptions, all other bail-decision-makers who are given statutory power to grant bail, have a discretion to grant or refuse bail, or they may grant bail subject to conditions. The exceptions are ss.64, 121 and 188 of the *Justices Act 1902*, and s.608 of the *Criminal Code*. In these cases the bail-decision-maker is directed to grant bail.[3] Section 64 applies whenever a defendant is charged with an offence which is not "of a serious nature" and where he cannot be brought before a justice within twenty-four hours after he is taken into custody. Section 121 applies to a defendant who is charged with a misdemeanour (not being one of the nine specified in the sixth schedule to the *Justices Act*).[4] Section 188 applies to a defendant who has brought an ordinary appeal against a decision of a Court of Petty Sessions. Section 608 of the Code enables a defendant who is charged with an indictable offence to have his case brought on for hearing during the next sittings of the Supreme Court[5] and, in the meantime, unless the delay is caused by the temporary absence of material evidence, he must be granted bail.

4.2 Some persons might argue that bail should be restricted to minor offences such as simple offences. For more serious offences likely to involve a term of imprisonment it might be thought that bail over emphasises the importance of freedom for the individual. It might

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1 A general right to bail in non-capital cases has been enacted in the American *Bail Reform Act* of 1966 PL 89-465, s.3(a) (see now s.3146 in the United States Code). A similar right to bail for all offences has been enacted in England and Victoria: see *Bail Act 1976* (UK) s.4(1) and *Bail Act 1977* (Vic), s.4(1). The eighth amendment to the American Constitution provides that "Excessive bail shall not be required", but it has been said that this falls short of providing a general right to bail in that country: Hess, 'Pre-trial Detention and the 1970 District of Columbia Crime Act - The Next Step in Bail Reform', (1971) *Brooklyn LR* No. 2, 277 at 304-314.

2 These are detailed in Appendix III.

3 It does not necessarily follow however, that a defendant will always be released on bail. The bail-decision-maker has a discretion to require sureties and, if a defendant cannot comply with this requirement, he may remain in custody. A requirement for sureties and other conditions may therefore be imposed as an indirect but effective way of denying bail, but see the comments in paragraphs 6.47 to 6.52 below relating to the offence of requiring "excessive bail".

4 See paragraph 7.3 n.8 below.

5 In Perth the Supreme Court sittings begin on the first Tuesday of each month.

therefore be argued that for serious offences such as capital offences, murder, rape, offences involving dangerous drugs, burglary and housebreaking, a defendant, having been arrested, ought to remain in custody until his trial. This at least would ensure that he is eventually tried, and it would prevent him from committing further offences if released on bail.

4.3 The Commission believes however, that the existing right for a defendant in Western Australia to apply for bail in all cases[6] ought to continue. Although there might be an argument that for certain offences the bail decision should be made only by a judge,[7] the Commission's tentative view is against going so far as to create a category of non-bailable offences. For the following reasons bail is a desirable feature in criminal justice procedure.

REASONS FOR BAIL

Presumption of innocence

4.4 The most fundamental argument for bail is that it avoids the injustice which results if an innocent man is held in custody. The criminal law in Western Australia, as in other countries with laws based on English law, is structured on the principle that a man is innocent until he has been proven guilty. It is totally consistent with this principle that a defendant ought not to be kept in custody before the question of his guilt or innocence arises. It has been suggested to the Commission by a Judge of the District Court that approximately one-third of the trials in that Court result in an acquittal.

Disruption of the defendant's life

4.5 Another important reason for granting bail, is to avoid disruption to a defendant's life at a time when he is still presumed to be innocent. Admittedly, in many cases, a defendant might have no job to lose, no house to keep up and no family to support, but in those cases where he does have commitments such as these, the consequences of a remand in custody can be quite disastrous. The Cobden Trust in England illustrated the problem using the following case:[8]

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6 See paragraph 4.1 above.

7 At present this applies to capital offences and murder: *Justices Act 1902*, s.115. It may be argued however that the same should apply to offences involving the importation of drugs, rape, burglary and housebreaking offences.

8 The Cobden Trust, *Bail or Custody* (1971) at 79.

"The problems caused by remands in custody can reach alarming proportions, as was revealed in the case of Mr. F.E. Stalham (*Times*, 26 November 1970). 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 £500 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 arrear. 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 benefits 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 fromwhich he or his family can seek compensation for the financial and other hardships they have suffered."

4.6 In another case, also referred to by the Cobden Trust report,[9] the defendant:

" . . . 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 £35 to £40 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

9 Ibid., at 81.

> magistrates continued to refuse bail on each occasion that he appeared before them, and his application to a judge in chambers through the Official Solicitor's 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 M. 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 £20. He had spent over three months in custody."

Effect on outcome of charge

4.7 There are many other prejudicial effects of a remand in custody which might not be as obvious as the intrusion on the freedom of a defendant who is presumed to be innocent and the disruption to his life. It has been shown in surveys carried out in America,[10] England[11] and in some States of Australia other than Western Australia,[12] that a refusal of bail might affect the outcome of the case. For example, there have been indications from these surveys that defendants who are denied bail are more likely to plead guilty, or more likely to be found guilty, and, in either case, more likely to be sentenced to imprisonment, than a defendant released on bail. There may be several explanations for this. For example, one explanation might be that only those defendants who would appear to be guilty and who would be sentenced to imprisonment were being denied bail. It would be natural to expect these persons to plead guilty or be found guilty, and the sentence may be influenced by the same factors which led to a denial of bail, that is, the seriousness of the offence and the defendant's record.

4.8 Other explanations, however, may not be consistent with the proper functioning of the bail process. Although no Western Australian statistics are available, one might speculate that the outcome of the case could be affected by the defendant's own attitude reflecting his low morale, his appearance, the difficulty he may have had in locating and seeing his defence witnesses and in preparing his defence generally. The point is illustrated in the following reference to a case in Western Australia -[13]

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10 See Armstrong & Neumann, 'Bail in New South Wales' (1976) 1 *UNSW Law Journal* 298 at 302-303 where American sources are summarised.

11 The Cobden Trust *Bail or Custody* (1971) at 72-75.

12 See Armstrong & Neumann, 'Bail in New South Wales' (1976) 1 *UNSW Law Journal* 298 at 308-321 and Australian Government Commission of Inquiry into Poverty, *Unconvicted Prisoners: The Problems of Bail* (1977) at 3-10.

13 Extract from an address by Judge D.C. Heenan to the Conference of District and County Court Judges, Sydney 1977.

> "In December 1970 'The Independent' newspaper published the case of a man who was acquitted after trial by jury of attempting wilfully and unlawfully to destroy a motor car. The evidence showed clearly that someone had placed a petrol bomb under the car in question. The only real issue was the identity of the offender. The trial commenced on a Friday and concluded on the following Monday. An application for bail during trial was refused and the accused spent the weekend in the lock-up at East Perth Police Station in conditions which were less than congenial. He had no prior convictions, he was a man of some prominence in the community and, as he pointed out, he was not only innocent but at all times deemed to be innocent. He complained that he had been treated as a common criminal, being obliged to share the lock-up with drunks and others 'making night hideous' and that the experience had prevented him from performing as well as he might have done otherwise before the jury".

4.9 Although defendants in custody awaiting trial may be in the most need of good legal advice, they might be seen by a solicitor's clerk or young inexperienced lawyers. It might be uncommon for a senior partner in a legal firm to undertake the inconvenience of a trip to the prison to visit a defendant. Furthermore, the cost of securing legal assistance of this quality in a prison could be considerably greater than if the defendant were able to call at the solicitor's office personally.

4.10 Defendants released on bail have an opportunity to show their trustworthiness by appearing for their trial. They also have the opportunity of maintaining their family and employment ties and of looking after their appearance. All of these things could count in their favour when it came to sentencing them if they were convicted.

Custodial conditions

4.11 Another reason for granting bail is to prevent the possibility of the defendant's character being influenced by a short term of imprisonment. In Perth, defendants on remand are sent to Fremantle Prison. They are kept in the remand centre which keeps them separate from convicted prisoners. However, being part of the prison premises, the atmosphere of prison conditions prevails and there is no separation of first offenders from hardened criminals awaiting trial. Morale among remand prisoners is understood generally to be low. They may have additional privileges but they have no better facilities than convicted prisoners.[14] The only major difference is that they are not required to work. However, this privilege may have its disadvantages. It means that defendants who do not work have nothing to do but ponder on the uncertainty and frustration of their position. This might have

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14 A schedule of daily events for prisoners on remand in Fremantle Prison is contained in Appendix IV.

detrimental effects on morale.[15] On the other hand, if defendants on remand do participate in prison work parties,[16] they become in a very real sense prisoners, working and conversing with them. A defendant in this environment may be adversely affected. Furthermore, there is no guarantee of the safety of a defendant on remand.[17]

4.12 Defendants on remand in country areas are normally kept in the police lock-up. If the term is likely to be long, they may be sent to the nearest main prison. The Commission has been informed that conditions in these prisons for example, in Albany, Bunbury and Geraldton are generally better than conditions in Fremantle. However, some of them do not have adequate facilities, particularly for female defendants.

4.13 Although prison regulations regarding visits by solicitors and controls as to correspondence and interviews with solicitors impose additional obstacles upon defendants in other States in Australia, it appears that conditions in Western Australia in this respect are more lenient.[18]

Excessive penalty

4.14 Surveys in other jurisdictions have shown that some defendants are denied bail for offences which are unlikely to carry a term of imprisonment if a conviction is entered. Once again no such survey has been conducted in Western Australia, but as far as the Commission is aware this does not occur in this State. Pre-trial or pre-sentence custody in these circumstances is clearly undesirable. It has been suggested[19] that –

> "Release should in no circumstances be refused to defendants charged with offences that do not carry a penalty of imprisonment.[20] Defendants held in custody should have an absolute right to release on expiration of the minimum period of imprisonment specified for the offence with which they are charged. Unless a danger to public safety is established by the prosecution, it should be possible to waive this requirement only

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15 This was drawn to the attention of members of the Commission's staff during the survey carried out at Fremantle: see paragraph 2.20 above.

16 The Commission has been informed that prisoners on remand normally work so that they can earn extra money for comforts: see paragraph 4.15 below.

17 The Commission has been informed of one case where a defendant on remand in custody overnight was assaulted.

18 Australian Government Commission of Inquiry into Poverty, Law and Poverty Series, *Unconvicted Prisoners: Problems of Bail* (1977) at 5-10

19 Armstrong & Neumann, 'Bail in New South Wales' (1976) 1 *UNSW Law Journal* 298 at 324.

20 This may appear to be a far reaching principle but the Commission has been unable to conceive of a case where remand in custody would be appropriate.

if the defendant applies for an adjournment and agrees in writing at the court hearing that time should not run until the set date".

Public expense

4.15 It was estimated in Western Australia in 1975 that it cost over $160 per week to maintain a prisoner in Western Australia.[21] The cost of keeping defendants on remand in custody is likely to be much higher when trips to the court and the surveillance required on these trips are taken into account. In addition, they might receive a special benefit from the Department of Social Security. This is equivalent to unemployment benefit and is payable in the discretion of the Director General. Payment may be made in part to persons who are dependent on a defendant. Defendants who work in prison receive about $1 per day in addition to any social security benefit. There are also indirect costs to the community. Each trip under guard to and from court uses valuable police resources. Keeping defendants on remand in custody also clogs prisons which might already be overcrowded.[22]

SUGGESTED REFORMS

4.16 The arguments referred to above in favour of bail are not necessarily intended to create the impression that bail ought to be granted more readily in Western Australia. It has been observed in other jurisdictions that some bail-decision-makers do not give sufficient consideration to the desirability of release on bail when making a bail decision.[23] However, from its interviews with bail-decision-makers in Western Australia, the Commission is left with the impression that bail-decision-makers in this State are generally sympathetic towards defendants when granting bail and are well aware of the problems caused when bail is denied.

4.17 Two conclusions might be drawn from the various arguments in favour of bail. The first is that bail is an essential feature of the criminal justice system, which ought to continue to be viewed sympathetically in favour of every defendant. It might be desirable to create an initial statutory presumption that bail ought to be granted to every defendant during a lapse in

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21 In New South Wales it is estimated that the cost is $15.27 per day: Commission of Inquiry into Poverty, Essays on Law and Poverty, *Unconvicted Prisoners: The Problems of Bail* (1977) at 9.

22 It has been reported that the Western Australian Department of Correction's Annual Report 1977 is highly critical of the standard of many of the State's prisons .

23 The Cobden Trust, *Bail or Custody* (1971) at 84 (England) and in New South Wales: Armstrong & Neumann, 'Bail in New South Wales', (1976) 1 *UNSW Law Journal*, 298 at 302 and 313. A typical bail decision in New South Wales is said to involve no discussion of the need for a grant of bail.

time in the disposition of his case whether or not he applies for it,[24] unless the bail-decision-maker is satisfied, after considering the criteria discussed in Part A of chapter 5, that a grant of bail would be contrary to the interests of justice in a particular case.

4.18 The second conclusion is that consideration ought to be given to improving conditions for defendants who are denied bail. Although they cannot expect to have the same benefits as a defendant on bail, there might be several ways of reducing the undesirable consequences of custody.

Improved remand facilities

Bail hostels

4.19. First and foremost, consideration could be given to the need to improve remand facilities. Although there is often confusion between the two, the improvement of custodial conditions for unconvicted defendants[25] is a separate issue and serves a different purpose from bail hostels. Bail hostels were introduced to fill a special need in England where bail is readily refused if a defendant has no fixed abode. Data from a study of bail decisions made by courts in 1970-71 showed that this objection to bail was raised by the police 77 times in 247 cases.[26] This number included many alcoholics and "down-and-outs". The refusal of bail was regarded as being for the good of these defendants, to give them somewhere to go out of harm's way. However, in some cases the remand in custody was having harmful effects.

4.20 A working party of the Howard League for Penal Reform in 1971 submitted a memorandum to the Home Office recommending the increased use of voluntary hostels to accommodate young people on remand and the utilisation of the Probation and Parole Service to arrange such accommodation. The Field Wing Bail Hostel, which opened in November 1971 was the first such hostel to operate in England. It is a charitable hostel run by the

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24 In England and New South Wales there is said to be some evidence that a grant of bail may in some cases depend on whether the defendant asked for it: see Armstrong & Neumann, 'Bail in New South Wales' (1976) 1 *UNSW Law Journal* 298 at 311-312. As to the desirability of such a statutory presumption see paragraph 5.76 below.

25 See paragraphs 4.26 to 4.29 below.

26 The Cobden Trust, *Bail or Custody* (1971) at 19.

Salvation Army in Whitechapel. In 1975, three more bail hostels were opened in London and Sheffield, and planning for others was in progress.[27]

Provision has been made for public funds to be used to provide and carry on bail hostels.[28]

4.21 The use of bail hostels in England varies from court to court, but common procedure is for a magistrate to raise the suitability of a defendant for a bail hostel. The case might then be adjourned while a probation officer makes inquiries to see whether a bail hostel has a vacancy, whether the defendant would be acceptable and whether the defendant agrees to stay in the hostel. The officer then reports back to the magistrate and, if the criteria have been met, the defendant might be granted bail on condition that he lives in the bail hostel and abides by the rules. The defendant is then expected to report at the hostel. Board[29] is payable in advance during the period of residence.

4.22 A Research Unit for the Home Office has released a report detailing the operation and success of the Field Wing Bail Hostel in its first nine months.[30] Its aims are stated as follows:[31]

> "1. to enable the courts to release on bail men charged with comparatively minor offences who would otherwise have to be remanded in custody simply, or mainly, because they had no fixed abode;
>
> 2. to enable and help the men to make constructive use of the remand period in Field Wing. In particular it was hoped that if an offender could show the court that he had used the time to obtain work and accommodation, this would increase his chances of avoiding a custodial sentence".

4.23 The hostel caters for twelve defendants at a time and is selective. To qualify for acceptance into the hostel a defendant must be a male, seventeen years of age or more, and have previously served no custodial sentence. Those who are addicted to alcohol or drugs or who are mentally sick or are on sex charges or have a history of sex offences are excluded. Defendants on committal to higher courts are also excluded to avoid blocking places for long periods. Because supervision of defendants is minimal, any defendant who is required to report to the police is also not eligible. Some of these criteria, particularly the requirement of

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27 Home Office Research Unit Report No.30, *Field Wing Bail Hostel: The First Nine Months* (1975).
28 *Powers of Criminal Courts Act 1973* (UK), s.51.
29 At Field Wing Hostel in 1972 the weekly charge was £5.60 for bed and breakfast and £8.95 for full board.
30 Home Office Research Unit Report No.30, *Field Wing Bail Hostel: The First Nine Months* (1975).
31 Ibid., at 2.

no previous custodial sentence, have been criticised by magistrates in England as being too restrictive.[32]

4.24 In Western Australia, a number of persons appear before the courts who have no fixed abode. This is particularly so in the case of defendants who are Aboriginals or migrants. In addition, such defendants on many occasions may have difficulty in understanding the operation of the criminal justice system. Nevertheless, the Commission has been informed that such factors are not given the same weight in Western Australia as a ground for denying bail as they seem to be given in England. There may be a social problem in accommodating these defendants, but it has not apparently led to a situation where they are being denied bail unjustly. It is common practice to release defendants in these circumstances upon their own recognizances.

4.25 With regard to the possible application of bail hostels in Western Australia the Commission considers that the following comment is pertinent:[33]

> "Although the idea of hostels is receiving increasing attention as a possible solution to the problem of remands in custody, remarkably little thought seems to have been given either to the nature of 'bail hostels' or to the type of prisoner who will live in them. It is clear enough that the great advantage of hostel accommodation is that it allows a person to carry on working and does not shut him off from the remainder of the community. Yet the man with 'no fixed abode' is unlikely to have a regular job, nor will his commitment to society or his roots in the community be particularly strong. In short, it is this type of remand prisoner who is least likely to benefit from temporary hostel accommodation. Bail hostels run along the lines of existing voluntary hostels would be ideal only for the man who has a job, but nowhere to live. Instead of vegetating at some prison or remand centre, he could be living a normal useful existence in conditions that would help to secure his attendance at his trial. But the number of remanded prisoners of this category must be very small indeed. The majority of homeless defendants, particularly the young ones, need more help than mere accommodation.
>
> Yet, even if the number of voluntary hostels increases substantially and the Home Office decide to experiment with bail hostels, the bulk of defendants who are refused bail would still have to be kept at prisons or remand centres. The most urgent need is not for hostels, but for a complete reform of the conditions under which untried prisoners are remanded".

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32 Ibid., at 9-11.

33 The Cobden Trust, *Bail or Custody* (1971) at 85.

Improved custodial facilities for unsentenced defendants

4.26 The Commission, as at present advised, does not believe that social conditions in Western Australia are such as to warrant the expenditure of public funds in establishing bail hostels in the way that these operate in England. Furthermore, bail-decision-makers in Western Australia do not appear to place as much importance on the absence of a fixed abode as a reason for denying bail. The problem in so far as it is relevant to this project may not be to provide temporary homes for the homeless, but to improve the facilities available to defendants who are remanded in custody. In this respect, the most desirable improvements might be as follows:

(a) separation of remand centres from prisons;
(b) improvement of legal services;
(c) provision of facilities to enable defendants to wash and shave and obtain clothing suitable for a favourable appearance in court;
(d) provision of counselling and advisory services;
(e) provision of training to develop skills or a trade;
(f) introduction of varying security measures for defendants who are less likely to abscond.

The separation of remand centres from prisons would keep unconvicted defendants away from convicted prisoners and would provide a less formidable environment. This might lift the morale of defendants on remand and help them to adopt a more positive outlook towards their future and not feel that they are doomed to a term of imprisonment. Legal services might be improved if the remand centres were located closer to courts and legal offices. This might also reduce the cost of arranging transport for defendants remanded in custody to and from the court. Information regarding the availability of legal aid and a list of solicitors who are prepared to give assistance might be posted at each remand centre.[34] The Australian Law Reform Commission recommended that defendants held in custody for more than four hours should be given the opportunity to wash, shave and obtain a suitable change of clothing prior to appearance in court.[35]

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34 Such a procedure is envisaged by the Australian Law Reform Commission (*Criminal Investigation*, (1975) Report No. 2 Interim at 48-49 paragraphs 110-111) when the police notify a defendant as to his rights.

35 Ibid., at 59 paragraph 135.

4.27 The provision of counselling and advisory services and the provision of the opportunity to develop skills might help the defendant to make valuable use of the remand period. He would have an experienced person to listen to his existing problems and offer helpful advice. He might be encouraged to take active steps to secure for himself a better future. His time could be spent usefully thinking about his defence, if any, to the charges, or any mitigating factors, and he could be learning skills which might make it easier to obtain employment. As a result he might avoid a prison sentence.

4.28 Provision of minimum security might be desirable for some defendants. This would apply particularly to defendants who were not regarded as being suitable for release on bail, but who have steady employment which they could be allowed to continue during week days. Generous visiting privileges might also be possible to enable defendants to maintain family ties. The object would be to maintain an institutional check on a defendant, yet minimise the disruption to his everyday life. It would be a further alternative to release on bail and strict custodial supervision. If such facilities were to be introduced, and a defendant wished to take advantage of these, it might be reasonable to expect him to pay board.

4.29 Undoubtedly, improvements to custodial conditions for defendants on remand would involve additional cost to the community, but accurate assessment of these costs is beyond the power of the Commission. It may not simply be a question of calculating the actual cost of establishing suitable premises, obtaining the necessary equipment and paying salaries. The true cost to the community might not be known until the beneficial effects were known. The extent to which the community should pay for the rehabilitation of defendants is a matter of policy which might not be capable of an answer simply by adding and subtracting figures.

Diversion schemes

4.30 There are many other alternatives known as "diversion schemes" which might also be considered. [36] These are common in American and Canadian jurisdictions. The essence of these schemes is to take certain types of defendants out of the criminal justice system altogether, and give them advice and training with a view towards their rehabilitation without

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[36] An equivalent body in Western Australia would be the Juvenile Panel. This operates a counselling service and corrective process as an alternative to criminal proceedings for defendants under the age of eighteen years.

the stigma or trauma of criminal proceedings. The Manhattan Court Employment Project is such a scheme.[37] Devised by the Vera Institute of Justice in New York, it is aimed at defendants between 16 and 45 years of age, who have not been charged with a serious offence,[38] have no drugs or alcoholism record, and have not served more than one continuous year previously in prison. If the defendant and the prosecution agree, the case may be adjourned for three months and the defendant may be released to the project. Specialists may then help him find accommodation, employment, and medical help. At the end of the three month period, if the defendant is showing signs of rehabilitation, a report may be submitted to the court recommending either that charges should be dropped or that an extension of time should be granted. If the defendant is showing no signs of rehabilitation, his participation in the scheme may be terminated and he may be dealt with before the court in the normal way. It has been said that:[39]

> "The main advantages of this sort of scheme are three fold. In the first place, it allows the welfare agencies to operate free from the stigma of a criminal conviction, which often hampers their efforts to find employment for their clients, and free also from the problems caused by the attitude of many offenders who regard probation after a finding of guilt as a form of punishment. Secondly, it offers to the participant a real incentive to co-operate with those who are trying to help him, namely the dropping of the charge against him. The third, and from the point of view of this Report, the most important advantage, is that it makes the fullest, most constructive use of the period of remand. Instead of a long period of idleness and boredom awaiting trial with the threat of a prison conviction hanging over his head, the participant is offered immediate practical help to enable him to overcome his present problems".

4.31 After more than three years of operation to 1 July 1971, 1,684 defendants had participated in the scheme. Dismissals of charges were recommended and accepted during the first year for 39%, in the second year for 46% and for 61% during the third year for defendants in the scheme. Job placements totalled 624, and of those who had charges dropped, unemployment was virtually nil. Surveys also showed a significant drop in re-arrest rates. For example over a twelve month period it was round that the re-arrest rate for those who had charges dismissed was 15.8%, to be compared with 30.8% for those terminated from the project and 46.1% from a group drawn from general court population. It was also noticed that the cost of keeping a defendant in the scheme was less than if he were remanded in custody.

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37 See *Vera Institute of Justice Ten-Year Report 1961-1971* at 79-91.

38 Homicide, rape or other sex offences, kidnapping or arson.

39 The Cobden Trust, *Bail or Custody* (1971) at 87.

4.32 The Manhattan Court Employment Project is only one of a number of similar diversionary projects. For example other schemes operating in America include schemes to deal with alcoholics, drug offenders and mental defectives.[40] The advantages and disadvantages of diversion programmes were considered recently by the Law Reform Commission of Canada. Its conclusion was in favour of the implementation of such schemes whenever possible.[41]

4.33 Much has been written and could be said about the desirability of diversion schemes. The Cobden Trust expected some objection by traditionalists who believed all offenders should be brought to trial. It also expected objections from some civil rights campaigners on the grounds that persons should not have to embark on such rehabilitation programmes until they have actually been found guilty.[42] The latter objection may be met in that participation in these schemes would be voluntary and is intended to avoid altogether the question of guilt or innocence.

4.34 Further elaboration of the desirability of such programmes in Western Australia, however, would appear to be undesirable in a project on bail. Bail is a part of the criminal justice system. Its purpose is to see that a defendant stands trial for the offences for which he has been charged, but, at the same time, giving consideration to the rights of those presumed to be innocent. Diversion schemes on the other hand involve the complete removal of the defendant from the criminal justice system. A detailed consideration of their introduction into Western Australia would be more appropriate in a review of the criminal justice system.

Effect of a remand in custody on sentence

4.35 At present in Western Australia the time spent by a defendant in custody during a remand may be taken into account when fixing his sentence.[43] In some cases, the period spent

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40 For a discussion of these schemes see National Advisory Commission on Criminal Justice Standards and Goals, *Corrections* (1973) at 73-97.

41 Law Reform Commission of Canada, *Diversion*, (1975) Working Paper 7 at 25 refers:

> "Despite the risks involved, the advantages of a pre-trial diversion or settlement mechanism from the point of view of society, the victim and the offender alike warrant encouragement. A pre-trial program, based upon the consent of the parties, operating according to stated policies and express guidelines for decision, and run under the supervision of the prosecution by competent administrators supported by community service programs is recommended."

The risks mentioned are that there might be a tendency for cases which at present would not go to trial, to be referred to diversion programmes.

42 The Cobden Trust, *Bail or Custody* (1971) at 87.

43 See paragraph 5.53 below.

in custody during the remand might be regarded as sufficient penalty. However, the practice is not, and is not required to be, uniform or consistent.

4.36 Some persons might argue that consistency and certainty in this area would be desirable. For example, legislation might provide that each day spent in custody during a remand period should be equivalent to one day's imprisonment for a defendant and should be deducted accordingly from his prison sentence.[44]

4.37 On the other hand, if a defendant who is remanded in custody were to be provided with better facilities and given more substantial privileges than prisoners, any provision requiring remand periods to be deducted from the sentence might be undesirable. It could lead to delaying tactics by the defendant before his trial, so that he could enjoy the privileges attached to remands in custody. It might therefore be argued either that periods of remand in custody ought never to be taken into account when fixing sentences or, preferably, that the existing discretion given to the court ought to be retained.

Compensation

4.38 It might be desirable to enact legislation providing compensation for defendants who are kept in custody and who are ultimately acquitted. The Commission has already considered this matter in another project and has issued a working paper.[45]

SUMMARY OF ISSUES

(1) Is there a need in Western Australia for bail hostels serving the same purposes as they do in England?

(paragraphs 4.19 to 4.25)

(2) Is there a need in Western Australia for improvement to custodial conditions for unconvicted defendants who are not released on bail?

(paragraphs 4.26 to 4.29)

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44 See for example *Criminal Justice Act 1967* (UK), s.67 and Armstrong & Neumann, 'Bail in New South Wales' (1976) 1 *UNSW Law Journal* 298 at 324 recommendation No. 13.

45 Western Australian Law Reform Commission, *Compensation for Persons Detained in Custody who are Ultimately Acquitted or Pardoned*, (1976) Working Paper, Project No.43.

(3) Should further consideration be given to the desirability of diversion schemes to remove certain defendants from the criminal justice system?

(paragraphs 4.30 to 4.34 and see also paragraph 5.47 below)

(4) If the defendant is convicted of the offence for which he has been charged, should the court continue to have an unfettered discretion whether or not to take into account the period the defendant has spent in custody?

(paragraphs 4.35 to 4.37)

CHAPTER 5 - THE BAIL DECISION: CRITERIA AND INFORMATION

5.1 This chapter is concerned with two questions underlying the exercise of a bail-decision-maker's discretion when making a bail decision, Part A considers the criteria which ought to be taken into account by a bail-decision-maker when making a decision in a particular case. Part B deals with the problem of providing the bail-decision-maker with sufficient information as to the relevant criteria.

PART A - CRITERIA

LAW AND PRACTICE IN WESTERN AUSTRALIA

5.2 There are no statutory provisions in Western Australia for the guidance of a bail-decision-maker as to the factors which ought to be taken into account in making his decision. There are, however, a number of principles to be found in reports of decided cases relating to bail, and some of these have been incorporated in the Western Australian Police Manual[1] and Routine Orders.[2] Relevant extracts from the manual and routine orders are attached in Appendix V to this paper.

Initial assumption

5.3 As a result of discussions with bail-decision-makers the Commission has observed that in Western Australia there is a strong view amongst these persons that the defendant charged with a simple offence should normally be granted bail.[3] In the case of capital offences such as wilful murder and including murder it has been suggested[4] that the bail-decision-maker begins with an assumption that bail ought not to be granted unless there are exceptional circumstances. For all other offences, there is no established practice. Depending on the seriousness of the offence, the bail-decision-maker may or may not begin with an assumption that he ought to grant bail. However, in practice, bail is usually granted to a defendant charged

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1 *Western Australian Police Manual* (1960) at 51-52.

2 See *Western Australian Police Gazette* 1975 No.34 at 737

3 This is supported by Wickham J. in *Sinclair v Wick* (1975) Supreme Court of Western Australia No. 29 of 1975.

4 See D. Brown, 'Bail: An Examination' (1971) 45 *ALJ* at 194.

with a serious offence other than a capital offence, unless objection to bail is made by the police or prosecution.

The criteria

5.4 When deciding whether to depart from his initial assumption, a bail-decision-maker might take into consideration a number of criteria relevant to a bail decision which have evolved over a period of time on an ad hoc basis. They have not been placed into any particular groups and they have not been given any particular weight one against another. They have instead been used as justification for granting or refusing bail having regard to the facts of a particular case. Consequently, they are useful in other cases, not to provide a systematic approach to the problem, but to provide the bail-decision-maker with a selection of matters which have previously operated in favour of or against a grant of bail.

5.5 It is possible to distil from the various criteria three main interests which they are designed to protect. For discussion purposes in this paper the relevant criteria have been grouped under each of the three interests. They are -

(a) *Probability of appearance of the defendant*
   (i) Nature of the offence and the potential penalty
   (ii) Probability of conviction
   (iii) Previous convictions
   (iv) Defendant's background and community ties

(b) *Other interests of the community*
   (i) Prevention of further offences
   (ii) Possible interference with the trial process
   (iii) Further inquiries to be made.

(c) *Interests of the defendant*
   (i) Protective custody
   (ii) Preparation of the defendant's defence
   (iii) Lapse of time before trial
   (iv) Personal circumstances of the defendant.

5.6 These three groups may not be exhaustive. For example, the Commission was informed by one justice that in favour of granting bail he might, in some cases, take into account custodial conditions. This would be particularly important in some Northern rural lock-ups where, because of the heat and the general conditions, he thought it would be inhuman to keep a defendant locked up.

5.7 The application or these criteria may depend on the stage of the criminal justice process reached at which bail is being considered and the person who is making the decision. For example, it may be questionable whether the police ought to make a decision on the basis of the likelihood of a conviction. However, subject to these qualifications, which are referred to in the discussion of the relevant criteria, the following matters have general application.

(a) *Probability of appearance of the defendant*

5.8 It is generally agreed that the probability of the defendant appearing at his trial is at the very nub of a decision regarding bail. The difficulty is to make an accurate prediction as to the defendant's future conduct. The following factors have been regarded as being relevant to the likelihood of the defendant answering to his bail, that is, appearing in court in accordance with the terms of his bail.

(i) The nature of the offence and the potential penalty

5.9 The nature of the offence and the potential penalty are relevant to the likelihood of the defendant's appearance on the basis that the more severe the penalty he faces, the more likely may be his temptation to abscond.[5] It is on the basis of this principle that the initial assumption is that bail should be denied in cases where the defendant is charged with murder and capital offences.[6] The defendant's previous convictions,[7] and the circumstances in which it is alleged that the offence for which he is charged was committed are also relevant indirectly, as they might affect the potential penalty.

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5 *R. v Lythgoe* [1950] QSR 5.
6 See paragraph 5.3 above.
7 *R v Pascoe* [1960] NSWR 481.

5.10 On the other hand, the nature of the offence and the potential penalty may operate in favour of a grant of bail. If the penalty is likely to be a fine, this may justify a grant of bail, even if all other factors suggest to the contrary.[8]

5.11 Although there does not appear to be any authority on the matter, it may be argued that there is a class of offences which lend themselves to an extra-territorial element, and that defendants charged with offences falling within this category are likely to abscond. There have been several cases recently in Western Australia where defendants on drug charges have failed to appear in answer to their bail,[9] and it has been suggested to the Commission that armed robbery cases fall into the same category. If comprehensive statistics were available to show such a pattern, it could be desirable to take the nature of an offence falling within this category as a factor against granting bail irrespective of the likely penalty.

5.12 One criticism of the relevance of the nature of the offence and the likely penalty might be that it rests on the assumption that the defendant is guilty, and is therefore inconsistent with the principle that every person is presumed to be innocent until proved guilty. The presumption of innocence applies equally to all offences. However, as one writer has said:[10]

> "But the presumption of innocence is not really the focal point when deciding whether an individual has a right to bail. It would appear that it matters less if the suspected shop-lifter absconds than if the suspected bank robber does. A greater risk can be taken in respect of minor offences".

5.13 There may, however, be a valid criticism that a more accurate indication of a defendant's likelihood of appearing in answer to his bail is his family or community ties. This has been demonstrated by bail studies in America, and arising out of those studies it has been suggested that less emphasis should be placed on the nature of the offence and the severity of the punishment, and more emphasis placed on the defendant's community ties.[11] It is difficult to make any general comment on the practice in Western Australia. Many bail-decision-makers who were interviewed by the Commission were aware of the work carried out in America and the relevance of community ties, but there may not be a consistent view as to the weight which ought to be given to this matter.

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8 See paragraph 4.14 above.
9 See paragraph 2.15 above.
10 D. Brown, 'Bail: An Examination' (1971) 45 *ALJ* 193 at 195.
11 See paragraphs 5.23 to 5.25 below.

(ii) The probability of a conviction

5.14 Bail has been refused because the "chance of conviction ... is very real".[12] On the other hand, bail has been allowed where the case for the prosecution is weak.[13]

5.15 There may be practical difficulties in making a prediction as to conviction prior to the defendant's trial. For example, the court may only hear the prosecution's version of the facts, the defendant wishing to reserve his version until he is in a position to defend the charge. Any information given either by the prosecution or by the defendant is not usually given under oath. It may consist mostly of hearsay and, consequently, it may be unreliable.

5.16 It could be argued that the only occasion when a court ought to take into account the likelihood of a conviction is when a defendant has been charged with an indictable offence and has been committed for trial, after evidence is given at the preliminary hearing. However, in a practical sense it would be difficult to exclude the likelihood of a conviction as a relevant factor in other cases. If the defendant has been caught in the process of robbing a bank, for example, the court might well take this into account and in the Commission's view would be justified in doing so.

5.17 The likelihood of a conviction might be an inappropriate criterion for the police to take into account. For example, it might be difficult for the police to make a decision as to the likelihood of the defendant's conviction. It might also appear to be anomalous if, having made an arrest, the police released the defendant on the basis that he was not likely to be convicted. It has been held judicially that the probability or possibility of a conviction ought to be irrelevant when the bail-decision-maker considers bail during the course of a trial.[14]

(iii) Previous convictions

5.18 Previous convictions have been held to be relevant to the question whether or not bail should be granted, since they relate to the severity of the penalty and therefore to the likelihood of the defendant appearing in answer to his bail.[15] However, a criminal record may

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12 *R. v Montgomery* [1958] 75 WN (NSW) 233.
13 *Re R.* [1944] NZLR 19.
14 *R. v Cutler* [1972] Supreme Court of Western Australia No. 193/72.
15 *R. v Pascoe* [1960] NSWR 481.

relate more directly to the bail decision if it shows either that the defendant has on previous occasions failed to answer bail or that he has escaped from custody. On the other hand it could also be said that the fact that the defendant has been granted bail and has appeared as required on earlier occasions ought to be a factor supporting a grant of bail.

5.19 Although the Commission is not aware of any difficulties in practice, there is a possibility that information as to the defendant's previous convictions may give the bail-decision-maker an indication that the defendant is an undesirable person and that he is likely to have committed the offence for which he has been charged, particularly if this is consistent with his earlier offences.

5.20 This raises an ethical question as to whether a defendant's application for bail ought to be affected in this way by his record. It is not suggested that a defendant's record should be irrelevant and, like the question of his guilt or innocence, that his application for bail should be treated as if this were his first appearance in a criminal court. A bail decision involves a prediction as to a defendant's future conduct and should be supported by as much relevant information as possible. However, there may be a need to clarify why a defendant's record should be relevant to the question whether he should be granted bail.

5.21 The practice of referring to a defendant's criminal record when making a decision as to bail raises a further difficulty, namely the possibility of a defendant being prejudiced at his trial if this is before the same person who considered his application for bail. If no submissions are made on the matter the Commission understands that there is a mixed view among justices and magistrates as to whether they ought to regard themselves as being disqualified from hearing the case. In Perth, where there is no shortage of justices or magistrates, one who considers the defendant's record in relation to bail could be prohibited by legislation from hearing the case.[16] However, this may cause problems in rural areas where there may not be another justice or magistrate conveniently available to hear the case. The delay before his trial may be more harmful to a defendant in custody than the risk of prejudice at his trial by reason of his criminal record being known.

5.22 Perhaps the best solution is to leave the question of disqualification to the discretion of the justice or magistrate concerned. The problem is only likely to arise in rural areas and the

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16 This is the case in England: *Criminal Justice Act 1967* (UK), s.19 and there is case law to the same effect in Ireland: *People v O'Callaghan* [1966] IR 501.

Commission has been advised that because of the small close-knit population in these areas, local justices or a visiting magistrate frequently know the defendant and his record irrespective of any earlier bail application.[17] Furthermore, the *Justices Act* requires two or more justices to hear a charge unless all parties concerned consent to it being heard by one justice.[18] Consequently, without such consent there is no possibility of the same justice acting alone, hearing a defendant's application for bail and the charge against him.

(iv) The defendant's background and community ties

5.23 As a result of research in America it has been suggested that a defendant's background and community ties are the most important indication of the likelihood of his appearance in answer to his bail.[19] It is said that:[20]

> "When the court has evidence that the defendant has lived in New York City for fifteen years, has a family dependent upon him, has been employed with some regularity, has no serious criminal record, and can make bail only in a very small amount, it is possible to put the apparent weight of the evidence and the possible penalty in proper perspective and to make a balanced judgment."

5.24 On the basis of this research, a procedure has been implemented in some American courts to ensure that sufficient information on these matters is brought to the attention of the court and that due weight is given to them when a bail decision is made. The detailed operation of the project is considered in Part B of this chapter. However, it is relevant for present purposes to note that a questionnaire form, used in the American project to obtain information about a defendant, sought details as to his employment, family, residence and other factors such as illness, which tended to restrict his movements.

5.25 Although bail-decision-makers in Western Australia are aware of the relevance of community ties to a bail decision, there is no commonly accepted view as to the weight which ought to be attributed to this factor. For example, some magistrates take the view that in Western Australia there are many recent arrivals to the State who would be denied bail if too much emphasis were placed on community ties.

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17 It has been suggested to the Commission that rotation of magistrates, and possibly justices, perhaps every three years in rural areas would, as a general policy, be desirable to retain an element of objectivity.

18 s.29.

19 See paragraphs 5.87 to 5.93 below.

20 'The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole', (1963) *New York University Law Review*, Vol. 38: 67 at 89.

(b) *Other interests of the community*

5.26 Obviously the community has an interest in seeing a defendant brought to justice to face his trial and this is the basis of the question just considered - that is, is the defendant likely to appear in answer to his bail? However, the community may have other interests which may be relevant to the problem whether or not to grant bail. These are –

(i) Prevention of further offences;
(ii) Possible interference with the trial process;
(iii) Further inquiries to be made.

(i) Prevention of further offences

5.27 A difficulty arises as to whether the likelihood of the defendant committing further offences while on bail ought to be taken into account in making the decision whether or not to grant bail. There have been cases where bail has been denied on this ground to persons who have been charged with breaking and entering offences.[21] An English working party appointed by the Home Office to review practice and procedure relating to bail in Magistrates' Courts reported that:[22]

> "The Court of Criminal Appeal ... has on a number of occasions drawn attention in strong terms to the danger of granting bail to persons charged with ... burglary, if there is any likelihood of similar offences being committed. We would respectfully agree with that view, and the figures collected by the Metropolitan Police ... would seem to indicate that there is a significantly greater risk of offences being committed on bail by persons charged with robbery and burglary than by those charged with other offences".

5.28 Similar views have been expressed in Australia. In *R. v Appleby and McMahon* it was said:[23]

> "This case is one of a kind that has recently emerged which has alarmed the community and which is all too prevalent, namely of a person being already on bail in

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21 See *R. v Alexander* [1956] VLR 451 where the likelihood of the defendant committing further shop breaking offences to pay solicitor's fees outweighed factors such as the defendant's need to locate witnesses to establish an alibi and his desire to support his wife who was three months pregnant.

22 *Bail Procedures in Magistrates' Courts, Report of the Working Party* (1974) at 21.

23 [1966] 1 NSWR 35 at 36.

> respect of serious charges committing further similar offences and even worse, in a desperate effort to have a last fling before sentence, secure in the knowledge that the law can only impose limited cumulative sentences. The public lives in terror daily of burglaries committed by day and by night, armed hold-ups of businesses and banks and pay-roll snatching with or without violence and these anxieties must be allayed.
>
> The public interest requires and demands adequate protection against these depredations and a curbing so far as the courts can of the opportunities of those whose evil minds contemplate the commission of these types of offences. The public interest has to be weighed by the court against the inconvenience to the individual of being temporarily deprived of his liberty pending his trial, and the courts would be failing in their duty if they let people like the applicant Appleby loose again upon the public in the present situation, and in the circumstances that the instant alleged crime was committed whilst he was already on bail in respect of the other serious charges both of a like and different character.
>
> Legislative provisions to provide automatic denial of bail to persons arrested on charges similar to those on which they are already on bail, as well as automatic termination of the earlier bail, might well prove a salutary measure, thus denying such persons the opportunity of committing further offences between such second arrest and the time when the charge in respect thereof can be properly heard and determined by magistrates, as well as affording a measure of protection for the public".

5.29 The Western Australian Police Department has suggested that there is a similar tendency in this State for defendants on breaking and entering and burglary charges to offend again if released on bail. It indicated to the Commission that some of these defendants are prepared to go to considerable lengths to commit further offences during the bail period. Some may even use the bail conditions to establish an alibi. For example, the Commission has been informed that there have been cases in the Eastern States of Australia where a defendant granted bail with a condition to report daily to the police has managed to travel by air from one major city to another, committed another breaking and entering offence, and has returned in time to report to the police in the city of his origin. This could conceivably occur in Western Australia.

5.30 There may be other occasions when it is feared that a defendant might commit further offences if released on bail. For example, such a fear could be justified by the defendant's record, or there might be psychiatric evidence to show that a particular defendant might have a compulsive tendency to offend again, or there might be evidence to show that a defendant intends to "finish the job".

5.31 Outside the context of breaking and entering and robbery charges, there is no clear view as to whether the possibility of further offences being committed by a defendant while

on bail ought to be taken into account in refusing bail. In *R. v Fraser*,[24] where the victim of an attempted murder feared a further attack by the defendant, it was held that this was not a ground for refusing bail.[25] However, the view has been expressed that this is, in practice, one of the major factors taken into account.[26] The Commission has been informed of at least two recent unreported cases in Western Australia involving serious cases of destruction of property where the magistrates concerned denied bail because they were apprehensive that the defendants would commit further similar offences while on bail. In at least one of these cases there was evidence to show that the defendant was mentally unbalanced.

5.32 Although some American States have introduced legislation specifically permitting preventive detention,[27] this has been criticised.[28] The view has been expressed that the likelihood of a defendant committing further offences when released on bail ought to be irrelevant in all cases.[29] These views have also been held by the Australian Law Reform Commission. In its report on Criminal Investigation[30] it said:

> "It was proposed that another criterion should be added, namely the likelihood of the defendant committing further offences should he be released. This proposal raises more difficult questions. On the one hand there is the concern that persons released on bail might commit further serious offences, particularly of the crimes against property type (Submission on behalf of the Commonwealth Bank Officers Association by Mr. K. Walsh…: submission on behalf of Mayne Nickless Ltd. by Mr. J. Mullett ...).[31] This attitude found judicial favour with Atkinson J. who said in *R. v Phillips* (1947) 32 Cr App R 47) ... that "Magistrates who release in bail young housebreakers (should) know that in nineteen cases out of twenty it is a mistake". The contrary point of view is, simply, that preventive detention is not a part of the rule of law.
>
> The Commission's opposition to preventive detention in any form has already been stated above (paragraph 41) in the context of powers of arrest. If the accused on release proceeds to commit another offence he should be dealt with then. He should

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24 (1900) 25 VLR 365.

25 On the other hand in *Forrest v Huffa* [1968] SASR 341 but without reference to any authority, it was said that the likelihood of further offences being committed was relevant.

26 Commission of Inquiry into Poverty, Essays on Law and Poverty, *Unconvicted Prisoners: The Problems of Bail* (1977) at 17.

27 For example, District of Columbia *Court Reform and Criminal Procedure Act 1970*.

28 Borman, 'The Selling of Preventive Detention 1970' (1971) 65 *North-western University Law Review* 879.

29 In *Williamson v United States* (1950) 184F 2d 280 at 282-283 Jackson J. said:-

> "Imprisonment to protect society from predicted but unconsummated offences is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offences as those of which the defendant stands convicted".

30 Australian Law Reform Commission, *Criminal Investigation* (1975) Report No. 2 Interim at 84-85 paragraph 182.

31 The Associated Banks in Western Australia and the Commonwealth Bank Officers Association also made similar submissions to this Commission in response to its advertisement for preliminary submissions.

> not be punished in advance by the loss of his liberty because of speculation as to what he might do if he secures it".

The Commission's report is now the subject of a Bil1[32] which is currently being considered by the Commonwealth Parliament. The Bill applies only to bail decisions made by the Commonwealth Police, but the Australian Law Reform Commission's hope was that its provisions might be accepted by State police officers when dealing with Commonwealth offenders[33] and that it might promote the drawing up of uniform guidelines for court bail.[34]

5.33 Clause 51(1)(c)(ii) of the Bill provides that it is relevant to a bail decision that the defendant has been convicted of an offence and is likely, having regard to that conviction, to commit an offence while on bail. The effect of this provision is to depart from the Australian Law Reform Commission's recommendation and to recognise that there may be situations where bail can be refused for the purpose of preventing further offences. However, it has limited application. For example, if the Bill were enacted a different conclusion might result from the facts of *R. v Appleby*[35] if they were to recur, as the defendant in that case had only been committed for trial for a previous breaking and entering offence; he had not been convicted. A defendant appearing on a charge of arson for the first time could be granted bail under the Commonwealth proposals even if medical evidence indicated that he was possibly a pyromaniac. Even if a defendant has previous convictions, it appears that there must be some correlation between his earlier offence and the type of offence it is feared he may commit if released on bail.

5.34 It may be argued that the Australian Law Reform Commission's proposals and the provisions in the Bill are too restrictive. While recognising the inherent undesirability of confining a defendant not for what he has done, but for what he might do, there may be cases involving a risk of serious injury to person or property where the practical and wisest course would be to deny bail. This step should not be taken on a mere suggestion of further offences. Strong and persuasive evidence would be needed. Courts should also be wary of refusing bail because of the likelihood of a further offence being committed where the defendant is unlikely to be imprisoned for the offence charged. However, subject to these safeguards, the

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32 Criminal Investigation Bill 1977 (Cwth).

33 Australian Law Reform Commission, *Criminal Investigation* (1975) Report No. 2 Interim at 20 paragraph 46.

34 Ibid., 79 paragraph 173.

35 [1966] 1 NSWR 35.

Commission considers that in exceptional cases the likelihood of a further offence being committed by the defendant when on bail ought to be relevant in each such case.

(ii) Possible interference with the trial process

5.35 The view has been taken that bail should be refused if there is evidence to suggest that the defendant might interfere with witnesses for the prosecution.[36] However, it has been suggested that a mere fear or apprehension by the Crown of a defendant interfering with a witness is insufficient; that the Crown must show some grounds for its suspicion.[37] It is interesting to note that although the Australian Law Reform Commission sees problems in keeping a person in custody on a suspicion of his committing further offences if released on bail, it does not see such problems in keeping a defendant in custody if he is regarded as being likely to interfere with witnesses for the prosecution. Interference with witnesses may also amount to a criminal offence in Western Australia[38] and in this situation the Australian Law Reform Commission's proposals might appear anomalous.

5.36 A particular problem can arise in country districts with regard to bail granted during the course of a trial where there is only one place of accommodation for visitors to the town. In this situation, if the defendant is granted bail during his trial, he may be obliged to stay at the same place of accommodation as the witnesses, magistrate, or judge and jury. This may raise doubts as to the integrity of the trial process, and it may be considered to be a relevant factor to be taken into account in respect of bail during the trial.

5.37 A difference in approach appears to have arisen amongst Judges in the Supreme Court and District Court of Western Australia as to whether bail ought to be granted to a defendant during the course of a trial. In *R. v Cutler*,[39] Burt J. (as he then was) in the Supreme Court held that bail during the course of a trial ought to be refused unless there were special circumstances personal to a defendant to suggest otherwise. The Judge went on to find that in this particular case, because of its complexity, there were circumstances which justified

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36 *R. v Fraser* (1892) 13LR (NSW) 150: *R. v Harrison* [1950] VLR 20.

37 D. Brown, 'Bail: An Examination', (1971) 45 *ALJ* 193 at 197.

38 The following provisions of the *Criminal Code* may be relevant, s.321 assault; s.130 corruption of witnesses; s.133 preventing witnesses from attending; and s.143 attempting to obstruct the course of justice.

39 [1972] Supreme Court of Western Australia No. 193/72.

release of the defendant on bail for short periods from time to time, but only for the limited purpose of, consulting his solicitor.

5.38 In England Lord Widgery L.C.J. gave a practice in June 1974 on the grant of bail in the course of a trial. The direction was in these terms:[40]

> "Once a trial has begun, the further grant of bail, whether during the short adjournment, or overnight, is in the discretion of the trial judge. It may be a proper exercise of this discretion to refuse bail during the short adjournment if the accused cannot otherwise be segregated from witnesses and jurors.
>
> An accused who was on bail while on remand should not be refused overnight bail during the trial, unless in the opinion of the judge there are positive reasons to justify this refusal. Such reasons are likely to be: (1) that a point has been reached where there is real danger that the accused will abscond, either because the case is going badly for him, or for any other reason; (2) that there is a real danger that he may interfere with witnesses or jurors.
>
> There is no universal rule of practice that bail shall not be renewed when the summing-up has begun. Each case must be decided within the light of its own circumstances, and having regard to the judge's assessment from time to time of the risks involved.
>
> Once the jury has returned a verdict, a further renewal of bail should be regarded as exceptional".

5.39 Subsequent practice in Western Australia has varied. Some judges have tended to adopt the English approach that bail, even during trial, is discretionary, but there has been concern that a departure from the formula in *Cutler's case* could lead to inconsistency and uncertainty. More recently, however, in *Kenneison v R.*[41] the Court of Criminal Appeal has supported the view that bail during trial ought to be discretionary and the general policy now seems to be to deal with each case on a discretionary basis having regard to Lord Widgery's practice direction.

(iii) Further inquiries to be made

5.40 The Commission's research to date has revealed no decided cases where the matter has been discussed, but it has been informed that, in practice, the police sometimes oppose bail on

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40 [1974] 2 All ER 794.

41 (1976) Western Australian Court of Criminal Appeal file nos 69-70.

the ground that further inquiries are being made with a view to laying further charges. This is also said to be the practice in England.[42]

5.41 At first sight it may appear to be objectionable for a defendant to be kept in custody while further inquiries are made, but much may depend on the nature of the inquiries. For example, if a defendant has been charged with one offence, but the police are investigating a number of other offences he is suspected of having committed, a refusal of bail may be justified, not solely because further inquiries need to be made, but because the defendant knowing that the police are investigating other offences might be likely to abscond.[43] Alternatively, it might be suspected that the defendant would destroy evidence or tip-off accomplices if he were released on bail and in this case a denial of bail might be justified to prevent such an obstruction of the course of justice.[44]

5.42 Police may also oppose bail on the ground that further inquiries are needed to obtain information relevant to the defendant's bail decision. This is reflected in English and Victorian legislation which provides that a defendant shall be denied bail if it has not been practicable for want of time to obtain sufficient information for the purpose of making a bail decision.[45] Doubts have been expressed as to whether lack of information ought to be sufficient to deny bail.[46] The longer the delay in obtaining the information, the longer the defendant might remain in custody. This situation might lead to abuse. On the other hand, it might be undesirable to release a defendant on bail in circumstances where he has been charged with a serious offence and nothing is known about him. The fact that no information is available might indicate that he is not normally resident in Western Australia and has few ties here.

5.43 The police may also wish to make inquiries to gather further evidence to support a conviction for the offence with which the defendant has been charged or to charge him with some other offence he is suspected of having committed. This again may give rise to a controversy as to whether this should be a desirable reason to keep a defendant in custody.

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42 The Cobden Trust, *Bail or Custody* (1971) at 22-23.

43 It would thus become a matter relevant to the question whether the defendant will appear in answer to his bail: see paragraphs 5.8 to 5.25 above.

44 See paragraphs 5.35 to 5.39 above.

45 *Bail Act 1976* (UK) Schedule 1 Part 1 s.5; *Bail Act 1977* (Vic), s.4(2)(d)(iii). In the English Act this factor is relevant only in respect of an "imprisonable offence".

46 White, 'The Bail Act: Will It Make Any Difference?' [1977] *CLR* 338 at 346 where he says "Whenever a situation arises in which lack of information precludes the making of an informed bail decision the presumption [in favour of bail] should never be rebutted because it might be felt that further inquiries would reveal something prejudicial to the defendant".

Some persons may take the view that the police should have gathered sufficient evidence before the defendant was charged, and that further police inquiries ought to be possible even if the defendant has been released on bail. On the other hand, some persons may argue in favour of a remand in custody if this would be an effective way of obtaining further evidence, particularly in the case of serious offences such as rape or murder.

5.44 It might be difficult, and undesirable, to provide direct legislative provisions outlining the circumstances when further inquiries by the police ought or ought not to be relevant to a bail decision. It might be more desirable to require the bail-decision-maker to be given full particulars of the line of inquiry which the police wish to pursue, and rely on his discretion to assess the relevance of these to a bail decision having regard to the inherent dangers in refusing bail on this ground. This may give rise to a practical problem, in that disclosure by the police in open court of the inquiries they propose to make may enable others acting for the defendant to frustrate those inquiries. The Cobden Trust in England in its report on bail recognised this problem and suggested as a solution that this might be a suitable case for the bail application to be heard in private.[47]

(c) Interests of the defendant

5.45 There are several matters relating to the interest of the defendant which might be relevant to a bail decision. They are –

(i) Protective custody;
(ii) Preparation of the defendant's defence;
(iii) Lapse of time;
(iv) Personal circumstances of the defendant.

In most cases these tend to favour a grant of bail, but as an exception, the first deals with situations where it may be in the defendant's best interests if he is kept in custody.

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47 The Cobden Trust, *Bail or Custody* (1971) at 22-23.

(i) Protective custody

5.46 Situations where a defendant may be kept in custody for his own protection usually arise in relation to police bail. Common examples are where the defendant is drunk or drugged. There may be occasions however, when long term custodial protection may be desirable. One such occasion could arise if the defendant is in danger of being attacked by other persons by way of reprisal.

5.47 Two possible criticisms could be made against the use of protective custody on certain occasions. One is where the defendant is capable of making a rational decision and objects to any restraint on his freedom. The second is where a defendant is an alcoholic or drug addict. In this case the use of criminal procedures to apprehend and charge the defendant on repeated occasions for offences involving drugs or alcohol and keeping him in custody for his own protection may be considered to be undesirable. It may be more appropriate for the defendant to receive treatment from an institution such as the Alcohol and Drug Authority.[48]

(ii) Preparation of the defendant's defence

5.48 It may be argued that the prosecution has a better opportunity to prepare its case than a defendant who is not granted bail. The defendant may wish to consult at length with a solicitor, prove an alibi, locate and interview witnesses, visit the scene of the alleged offence and collect evidence. All of these become either difficult or impossible if he is obliged to remain in custody, and the preparation of his defence may be impaired.

5.49 Courts have indicated a tendency to be wary of granting too much weight to this factor. For example, in *R. v Lythgoe*[49] it was said that the fact that the defendant might be prejudiced in the preparation of his defence may have some weight, but the case would be an exceptional one. In *R. v Ryan,*[50] bail was refused to a defendant pending the hearing of an appeal which was unlikely to succeed. The defendant wanted bail so that he could search for two persons whom he knew by sight who could show that his identity had been mistaken.

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48 See the *Alcoho1 and Drug Authority Act 1974* and see the discussion in paragraphs 4.30 to 4.34 above as to the use of diversion schemes.

49 [1950] QSR 5.

50 [1930] SASR 125.

5.50 A reluctance to grant bail on this ground may be justifiable. It would, for example, be undesirable if bail were granted to every defendant who claimed that the preparation of his defence was prejudiced by his detention in custody. However, one solution may be to grant a limited form of bail. For example, if a defendant wishes to produce evidence of an alibi but knows a witness by sight only, he could be released on bail for a short period, say one day, under the supervision of the police, if necessary, for the particular purpose. In *R. v Cutler*[51] this approach was adopted in respect of an application for bail during the course of a trial, but the principle would appear to be capable of wider application.

(iii) Lapse of time

5.51 It may be a factor in favour of granting bail that there is going to be a considerable lapse of time before the matter is determined,[52] particularly so if this is not attributable to the defendant. There are insufficient statistics in Western Australia as to the length of time which may be expected between apprehension and trial. However, the Commission has been informed that in Perth, in the case of a summary matter, the police are normally in a position to proceed to trial within a few days of apprehension, and that any further lapse of time is usually caused either by the defendant seeking adjournments to enable him to prepare his defence, or, administratively, by the time taken to have the case entered in the Beaufort Street Court for hearing (approximately fourteen days). In practice the Commission understands that defendants in custody are given some priority in having their cases entered for hearing.

5.52 The situation in the case of indictable offences is quite different. The complexity of the preliminary hearing procedure contributes to the length of time which elapses between apprehension of the defendant and disposition of his case.[53] This period is understood to be at least sixty-two days.[54]

5.53 There has been some criticism in Western Australia of the length of time it takes between arrest and trial for indictable offences. For example, a man arrested on 6 March 1976 on a charge of breaking and entering had his committal hearing on 10 May 1976 and his trial was held in August of the same year. In answer to Judge Ackland's questions regarding the

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51 [1972] Supreme Court of Western Australia No. 193/72. See paragraph 5.37 above.
52 *R. v Pascoe* [1960] NSWR 481.
53 See paragraphs 3.31 to 3.34 above.
54 See paragraphs 2.20 n.17 and 3.39 above and Appendix II.

time involved, the prosecution is reported to have attributed the delay to the overload of the system. It was said that there was a recent trend for many more defendants to plead not guilty.[55] The Judge considered three years imprisonment to be the appropriate minimum period for the offence, but reduced this to two and one-half years taking into account the time already spent in custody. It appears that this approach is often taken when a defendant is sentenced for an offence after having spent some time in pre-trial custody.[56]

5.54 As a solution to the problem, various proposals have been put forward for speeding up the preliminary hearing procedure. For example, there is a suggestion that a defendant ought to be able to plead guilty to an indictable offence when he first appears in the Court of Petty Sessions or, preferably, after a short adjournment to enable him to consult a solicitor. Another suggestion is to introduce night courts to help clear the overload of defendants wising to plead not guilty. It might also be desirable to give priority to the disposition of indictable offences where the defendant is in custody. The Commission's predecessor, the Law Reform Committee, attempted to simplify and streamline the procedure by introducing an option for the defendant to elect not to have a preliminary hearing after having read statements by the witnesses for the prosecution.[57] However, with the increased availability of legal aid, it appears that most defendants still elect to have a preliminary hearing.

5.55 Further comment as to the desirability and the method of expediting trial for indictable offences is outside the Commission's terms of reference. The question is relevant to bail only to the extent that if there is any occasion where it is felt that there is an unjustifiable delay in the disposition of a defendant's case which is not the fault of the defendant, this may be a relevant factor in determining whether he ought to be released on bail. Present indications suggest that it is a factor more relevant to the trial of indictable offences. However, there may be occasions when delay is relevant also to summary offences. In some country areas, for example, a magistrate may visit the Court of Petty Sessions only once a month. If a defendant in custody has to wait for this period before trial, this may be a factor influencing a justice's decision whether or not to grant him bail. The temporary absence or illness of a witness for

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55 *The West Australian*, 27 August 1976. This may possibly be a consequence of the expansion of legal aid.

56 See paragraph 4.35 above and Halsbury, *Laws of England* (3rd ed. 1955) Vol. 10 at 489 paragraph 890 for a discussion of the power of the court to take into account pre-trial detention when sentencing a defendant.

57 Western Australian Law Reform Committee, *Report on Committal Proceedings* (1970) Project No. 4 implemented by the *Justices Act Amendment Act 1976*.

the prosecution may also give rise to a period which would warrant special consideration to be given to the defendant's release on bail.

(iv) Personal circumstances of the defendant

5.56 It would be undesirable, even if it were possible, to define exhaustively the personal circumstances which have previously led to a grant of bail and which ought to be considered to be relevant in the future. Each case must be decided on its own merits. For example, the fact that the defendant suffers from a particular illness may be relevant; it may be relevant that he is self-employed and unable to find a replacement to keep his business going in his absence and it may be relevant that he requires a short period of freedom to make suitable arrangements for his family or business if he anticipates a sentence of imprisonment on being found guilty. Apart from showing that a defendant is unlikely to abscond, it may be desirable that a bail-decision-maker is able to take into account personal factors such as these if they show that a defendant may suffer undue hardship if bail were denied.

CRITICISM OF EXISTING LAW AND PRACTICE

5.57 Some writers have been critical of the law relating to the factors relevant to a bail decision in other jurisdictions. One of the main matters for concern has been that there is no consistent approach. In America it has been said:[58]

> "...bail is manipulated to punish, to insure detention, to aid the prosecution, and to satisfy public, or at least journalistic, clamor. Magistrates continue to use the crime charged as the principal criterion in setting bail and largely ignore vital factors relating to the defendant's roots in the community."

5.58 The Australian Law Reform Commission in its report on criminal investigation said:[59]

> "The statutes on the subject do no more than hint at the kind of considerations that working policemen are likely to regard as most relevant. The innumerable common law judgments on the subject have either tended to focus on some particular criterion without putting it into any kind of perspective, or alternatively to produce a shapeless list of criteria in which first-and-second-order considerations are jostled erratically together".

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58 'The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole', *New York University L.R.* (1963) Vol. 38 at 88.

59 Australian Law Reform Commission, *Criminal Investigation* (1975) Report No. 2 Interim at 82 paragraph 178.

5.59 In Western Australia, the Commission has gained the impression from its interviews with bail-decision-makers at various stages of the criminal justice process, that they exercise a common sense approach to bail. After a period of time they develop a certain "feeling" for the problems associated with a bail decision. It is often difficult for bail-decision-makers to discover whether their assessment of the defendant's likelihood of appearing in answer to his bail turns out to be well-founded. Their only source of information in many cases may be the publicity given in the news media when it is discovered that the defendant has failed to appear as required.

5.60 The view has been expressed to the Commission that there is a need for some form of instruction as to the relevant criteria to be taken into account in making a bail decision and, perhaps, to the weight which ought to be given to these matters. The guidance to be obtained from case law, and in the Western Australian Police Manual and the Justices Manual, falls short of establishing an adequate basis for a consistent, orderly and rational approach to the actual bail decision.

POSSIBLE REFORMS

5.61 In considering the question of reform there would appear to be three main issues involved. The first is to establish the criteria which ought to be regarded as being relevant to a bail decision. The second is to determine the relative weight to be given to the various criteria. The third is to make a decision as to the most appropriate way of introducing any such reforms in Western Australia.

(a) The relevant criteria

5.62 It is suggested that the following matters are relevant to a bail decision:

(a) Matters relating to the probability of appearance by the defendant including –

(i) the nature of the offence and the potential penalty;
(ii) the probability of a conviction;
(iii) previous convictions;

(iv) the likelihood of other charges being brought;

(v) the defendant's background and community ties.

(b) Matters relating to other interests of the community including –

(i) the likelihood of the defendant causing serious harm to person or property;

(ii) the likelihood of the defendant interfering with evidence or otherwise obstructing the course of justice.

(c) Matters relating to the interest of the defendant including –

(i) detention for the defendant's own protection, subject to his consent and only after it is considered to be impracticable to refer him for treatment to a specialised body such as the Alcohol and Drug Authority;

(ii) preparation of the defendant's case;

(iii) lapse of time before trial;

(iv) personal circumstances of the defendant.

5.63 It might be arguable whether these criteria should be exclusive or whether a discretion should be allowed for a bail-decision-maker to take into account other factors which he considers to be relevant in special circumstances. The list of criteria in the Commonwealth Criminal Investigation Bill both for and against bail appears to be exclusive.[60] The English and Victorian Acts are more flexible in that both presume a defendant's right to be released on bail and list the circumstances in which bail may be refused.[61] It might not necessarily follow, however, that bail could not be refused on other grounds than those listed.

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60 cl.50(1) and 51(1) .

61 *Bail Act 1976* (UK), s.4(1) and Schedule 1 Part 1 s.2 et seq and Part II s.2 et seq; *Bail Act 1977* (Vic), s.4(2). The Victorian Act is a little more elaborate than the English Act and it is sufficient to list the criteria which may lead to a denial of bail in that legislation. They are -

(a) where the defendant is charged with treason or murder unless granted by a Judge of the Supreme Court;

(b) If the defendant is already in custody on another offence or for failure to answer bail;

(c) if the court is satisfied that the defendant would - fail to answer his bail,
commit an offence whilst on bail,
endanger the safety or welfare of the public,
interfere with witnesses or obstruct the course of justice;

(d) if the court is satisfied that the defendant ought to be left in custody for his own protection or if he is a child for his own welfare;

(e) where insufficient information for the bail decision has been obtained.

5.64 An exhaustive list of the factors relevant to a bail decision has the advantage of preventing the bail- decision-maker from taking into account any matter which the legislature has not considered to be relevant. However, it also has the effect of restricting a bail-decision-maker's discretion. The Commission considers this to be undesirable, especially in legislation applying not only to the police but also to justices, magistrates and judges who have experience and are specially trained in making bail decisions. The approach taken in the English and Victorian Acts may be preferable in that it provides a bail-decision-maker with some guidance as to what he should consider to be relevant and sufficient to justify a denial of bail, but in other respects leaves the matter to the bail-decision-maker's discretion.

(b) The relative weight to be given to the criteria

5.65 If it is helpful to provide bail-decision-makers with guidance as to the relevant criteria, it may well be argued that this goes only some way towards a consistent and rational approach to a bail decision, and that some indication of the weight which ought to be attached to these criteria should be provided. For example, it has been claimed in America that courts continue to place too much emphasis on the nature of the offence charged, and not enough emphasis on a defendant's community ties.[62]

5.66 It would be impracticable and undesirable to give greater weight to one criterion, such as the likelihood of the defendant appearing in answer to his bail, over another such as the likelihood of the defendant committing further offences if released on bail. The balancing of these factors can only be left to the discretion of the bail-decision-maker. However, it might be possible to weigh factors making up what is probably the most important criterion, namely the defendant's likelihood of appearing in answer to his bail. Thus, a defendant could be given a certain number of points if he had a permanent address in the area, and more points if he had been steadily employed for a certain time and so on.

5.67 The accumulation of a certain number of points by a defendant could be a threshold qualification before he became eligible for consideration for bail, or it might be used simply

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Section 4(3) specifies factors which may be taken into account when making a decision as to (c) above, but these are not listed exhaustively.

62 See paragraph 5.23 above and paragraphs 5.87 to 5.93 below.

as a guide for the bail-decision-maker to test his "feeling"[63] as to the defendant's eligibility for bail in a mechanical way. In the end, he might decide to grant bail to a defendant who failed to reach the necessary number of points or, alternatively, he might deny bail to a defendant who did reach the quota. In a case where his "feeling" did not coincide with the result which was suggested by the defendant's points tally it might indicate that the case was unusual and should be given careful consideration.

5.68 If a points system were used in the way as outlined it would not necessarily result in any restriction of the bail-decision-maker's discretion and it should be emphasised that the points would relate to only one criterion, namely the defendant's likelihood of appearing for his trial. Consequently, a defendant could be denied bail even if his points total indicated that he would be likely to appear in answer to his bail if there were evidence to suggest that he would commit further offences or interfere with witnesses if he were released from custody.

5.69 A points system of assessing a defendant's bail risk has been operating in New York for sixteen years and it has spread to many other American jurisdictions.[64] However, it is used in a slightly different manner than that suggested above. It is used as part of the process of providing information relevant to a bail decision to the bail-decision-maker. A more detailed account of its operation therefore appears in Part B of this chapter.[65]

5.70 The Australian Law Reform Commission in its report on criminal investigation did not advocate the introduction of a points system into legislation dealing with bail granted by Commonwealth Police, but it recommended that serious consideration should be given to its informal adoption, for example, through regulations or by instruction.[66] There is nothing in the Bill dealing with this question.

5.71 Many bail-decision-makers interviewed by the Commission in Western Australia had reservations about the introduction of a points system in this State. It was thought that it might impose intolerable administrative burdens on courts if every application for bail were to require a points assessment of the defendant's likelihood of appearing. Some bail-decision-

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63 See paragraph 5.59 above.

64 In 1967 similar schemes had been set up all over the United States in more than thirty-three States and sixty cities. Toronto was then about to start the same experiment: see Zander, 'Bail: A Re-Appraisal' [1967] *Crim. L.R.* 25 at 136.

65 See paragraphs 5.87 to 5.94 below.

66 Australian Law Reform Commission *Criminal Investigation* (1975) Report No.2 Interim at 84, paragraph 180.

makers thought that it might prejudice bail opportunities for recent arrivals to the State. Migrants for example might have difficulty in getting bail until they had been in Western Australia for long enough to establish ties here. A further criticism might be that, although not intended to restrict the bail-decision-maker's discretion, there might become a tendency for bail decisions to be made more or less automatically on the sole basis of the defendant's points tally.

5.72 In recognition of the force of these criticisms of a points system, the Commission suggests an alternative method of weighting criteria by listing them in legislation in order of importance. Thus, when assessing the defendant's likelihood of appearing in answer to his bail, the bail-decision-maker could be required to consider first the defendant's community ties before other matters such as the nature of the offence and likely penalty.

(c) Implementation

5.73 There would appear to be two ways in which guidance could be given to bail-decision-makers as to any reform to the assessment of relevant criteria for a bail decision. The simplest and most flexible way would be for the Judges of the Supreme Court and the Police Department to issue practice directions on the matter. If necessary, the relevant criteria could be simply amended and adjustments could be made to the weight to be attached to these criteria.

5.74 On the other hand, if comprehensive bail legislation were contemplated,[67] it might be more expedient to include the relevant criteria and the relative weight to be attached to them in the Act, or, preferably, make provision for this to be implemented by regulation. This might ensure consistency between the police and the judicial approach to a bail decision.

5.75 In either case, in the Commission's view care would be needed to see that a bail-decision-maker was left with a discretion. Any instructions as to the relevant criteria and the weight they were to be given, although they might be required to be taken into account, should operate as a guide. They should not present the bail-decision-maker with an inflexible formula for a bail decision.

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67 See paragraph 10.18 below.

5.76 The instruction, legislative or otherwise, could begin with an initial presumption in favour of bail. However, for certain offences such as murder and capital offences, the presumption might be against a grant of bail. There may be other offences, for example drug importing and dealing offences, and large scale breaking and entering offences, which might be added to the category of presumptively non-bailable offences because of a demonstrable tendency for defendants on these charges to commit further offences while on bail or to abscond. In deciding whether to depart from these initial presumptions, the bail-decision-maker might be required to take into account the criteria and the weight attached thereto as provided. It might be undesirable, however, to prohibit the bail-decision-maker from taking into account other factors in special cases.

5.77 When a defendant is sentenced the court is required to give reasons for its decision and to keep a record for the purposes of an appeal. It might be desirable to extend the same obligation to a bail-decision-maker. Not only would this be useful for appeal purposes, but it would also give the defendant and the prosecution a better indication of the factors which have been taken into account in the decision. It might also help to ensure that the bail-decision-maker's attention has been directed towards all of the relevant criteria.

5.78 On the other hand, care would be needed to see that this does not impose an excessive burden on bail-decision-makers. This might be the case for example if reasons were required to be given and recorded for every bail decision. A vast majority of decisions are made in favour of bail virtually without any dispute. Some assistance would be given if the relevant criteria were spelt out in legislation. However, it might only be necessary for the bail-decision-maker to provide and record reasons whenever asked to do so, or, possibly, whenever bail is denied,[68] or where it is granted in respect of a particularly serious offence.[69]

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68 See *Bail Act 1977* (Vic) , ss.12 (1) (b) and 12 (2) (b) .

69 Section 4(4) of the *Bail Act 1977* (Vic), creates a presumption against bail if the defendant is charged with an indictable offence and -

(i) this was allegedly committed while he was at large awaiting trial for another indictable offence, or

(ii) he is not ordinarily resident in Victoria, or

(iii) that offence is aggravated burglary or some other offence involving the use of firearms, offensive weapons or explosives.

If in any of these cases the defendant is granted bail, reasons must be given.

SUMMARY OF ISSUES

(1) Should there be a statutory presumption in favour of or against a grant of bail for certain offences?

(paragraphs 5.3 and 5.76 and also paragraph 4.17)

(2) Should there be statutory guidelines as to the relevant criteria for a bail decision and, if so, what should they be?

(paragraphs 5.4 to 5.62)

(3) Should any such statutory guidelines be exclusive or should the bail-decision-maker be permitted to take other matters into account in special cases?

(paragraphs 5.63 to 5.64)

(4) Should bail-decision-makers be given guidance as to the relative weight to be attached to some of the criteria for example by allocating points to them or by listing them in order of importance?

(paragraphs 5.65 to 5.72)

(5) If the defendant's criminal record is to remain a relevant criterion, should a bail-decision-maker who is informed of the record be disqualified from subsequently hearing the charge against the defendant?

(paragraphs 5.21 to 5.22)

(6) What attitude should courts adopt towards the desirability of bail during a trial?

(paragraphs 5.37 to 5.39)

(7) Should further consideration be given to the introduction of procedures to reduce unwanted delays in the determination of indictable offences?

(paragraphs 5.53 to 5.55)

(8) Should bail-decision-makers be required to give reasons for, and keep a record of, bail decisions?

(paragraphs 5.77 to 5.78)

(9) Should reforms to the law and practice relating to the criteria relevant to a bail decision be introduced by means of legislation or by means of administrative direction, for example, by the Police Department and Judges of the Supreme Court?

(paragraphs 5.73 to 5.74)

PART B - INFORMATION

EXISTING PRACTICE AND PROCEDURE IN WESTERN AUSTRALIA

5.79 After determining the relevant criteria which ought to be relevant to a bail decision and the weight, if any, which might be attached to these criteria, the next step is for the bail-decision-maker to assess the relevant information about the defendant in order to give due consideration to the appropriate criteria.

5.80 The provision of information for a bail decision varies in practice depending on whether bail is considered by the police or by a court, and if by a court, whether before or after the defendant's trial. For example, little may be known of the defendant and his background when the police are considering the question of bail.[70] Furthermore, the arrest, and the subsequent need to consider police bail, may occur at a time when it is difficult to make the necessary checks to verify whatever information the police may have gathered. In practice, the information available to the police consists of answers by the defendant, and the complainant and witnesses, if any, to questions on the point asked by the police. The defendant is unlikely to have legal representation at this stage, and he may have little idea as to the information which might be relevant. For the purposes of police bail, a criminal record check is rarely made in Western Australia or in other Australian jurisdictions.[71] Justices' bail at the lock-up[72] falls into much the same category as police bail. A justice relies mainly on information volunteered by the police and by the defendant.

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70 For the power of the police to grant bail, see paragraph 3.10 above.

71 There was, for example, a case reported in *The West Australian* on 20 July 1977 where bail was granted by the Western Australian police (and subsequently by a Court of Petty Sessions) to a person charged with stealing a radio. He failed to appear as required and it was then discovered that he was an escaped prisoner from New South Wales who had been serving a sentence for rape.

72 See paragraphs 3.15 to 3.16 above.

5.81 In Western Australia the police usually make a criminal record investigation before the defendant appears in the Court of Petty Sessions. In the metropolitan area this appearance is normally the following day. If the police object to bail because of the defendant's record, or for any other reason, they may express their objection, with reasons, in open court. The defendant, or his solicitor if he is legally represented, may then make his submissions in support of bail. It is rare for formal evidence to be called by either side to prove the information presented to the court although this does occur in some cases.[73] Consequently, the information before the court, in the majority of cases, consists of unverified statements and hearsay.

5.82 If the police do not object to bail, the defendant is normally granted bail in the Court of Petty Sessions, possibly with no information before the court other than the charge brought against the defendant and whether police bail has been granted. It is common practice however, particularly if the defendant has been charged with a serious indictable offence, for a magistrate or justice to ask questions relevant to his community ties[74] before making a bail decision. The Commission has also been informed that there have been occasions where a bail application has been adjourned by the Court of Petty Sessions, and a probation officer on duty at the Court[75] has been asked to interview the defendant and submit a recommendation as to whether he should be granted bail.

5.83 If the defendant is not satisfied with a bail decision, he may make an application for bail to a Judge of the Supreme Court in his inherent jurisdiction.[76] This sometimes occurs if the defendant's repeated applications for bail in the Court of Petty Sessions are rejected, or if bail is granted, but on conditions, for example requiring sureties, which he cannot meet. Applications to a Judge for bail are made on notice of motion or summons served on the Crown Prosecutor,[77] and they are normally supported by affidavit evidence, that is, a written statement given on oath.

5.84 Bail during the trial and after the trial pending sentence or pending an appeal, is normally considered in the presence of the prosecution and the defence. At this stage there is

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73 The Commission has been informed that evidence in support of or against bail is sometimes given in an extradition case where bail is being considered.

74 That is, where he lives, whether he has a family or relatives in the area and whether he is employed.

75 At the East Perth Court of Petty Sessions a probation officer is on duty in the Court each morning while the magistrate deals with arrest cases.

76 See paragraph 3.40 above.

77 Criminal Practice Rules, Order VI rule 1.

normally sufficient information before the bail-decision-maker as to the defendant's background, or if not, the parties are present to provide it.

5.85 There is no statutory requirement that bail applications must be heard in public[78] and bail applications are sometimes considered in areas where the public does not have access, as in the case of bail granted at a police station or by a Supreme Court Judge in Chambers. In practice, bail applications made when a defendant is in court are normally heard in public.

CRITICISMS OF THE EXISTING PRACTICE AND PROCEDURE IN WESTERN AUSTRALIA

5.86 (1) Information is given in a haphazard manner. It may be volunteered by the prosecution or the defendant, or it may be given in answer to questions by the bail-decision-maker. There is no consensus amongst bail-decision-makers as to the information which ought to be available in respect of a bail decision. In some cases bail decisions may be made with insufficient information as to the defendant's background and community ties.

(2) Information that is given is often unverified and may consist of hearsay evidence. In the case of pre-trial bail applications, apart from those made to a Judge of the Supreme Court, the information is not normally given under oath.

(3) When the police consider bail, they are in the position of providing the information and making the decision. The defendant is often unrepresented by a solicitor and may not be aware of how much information is relevant and ought to be volunteered in support of a bail application.

(4) There is no clear authority as to who is able to be heard either in support of or in opposition to a grant of bail. For example, in *R. v Fraser*[79] there were doubts expressed as to whether the victim of an attempted murder could appear and give evidence in opposition to a grant of bail.

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78 Section 65 of the *Justices Act 1902* provides that with exceptions in the interests of public morality, the actual hearing of a complaint must be in public, but this would not apply to a bail application.

79 (1900) 25 VLR 365.

(5) Public hearings of bail applications may be prejudicial to a defendant and to the prosecution. There may be occasions when bail applications normally heard in open court ought to be considered in camera.

POSSIBLE REFORMS

Information for the bail-decision-maker and its availability

5.87 The first two criticisms of existing practice and procedure relating to the provision of information relevant to a bail decision are the most fundamental and may be considered together. The problem of rationalising the criteria relevant to a bail decision, and providing the bail-decision-maker with concise and accurate information has been treated as being at the heart of bail reform. Perhaps the most influential research has been that carried out by the Vera Institute of Justice in New York in its Manhattan Bail Project.[80] Its underlying concept has been approved recently in Australia by the Australian Law Reform Commission in its report relating to Commonwealth Police bail[81], and by the Bail Review Committee in New South Wales.[82]

5.88 The Manhattan Bail Project arose out of concern that there were a number of defendants who were unable to take advantage of a grant of bail in New York because they were unable to meet the necessary financial requirements. Earlier American surveys had revealed that judges exercised little discretion when they released a defendant on bail.[83] In almost all cases a bail bond with a surety was required. Bail setting was said to be a mechanical and arbitrary process.[84] This made it difficult for a poor defendant and a defendant who has no one to act as surety for him to meet bail conditions. Rather than change the attitude of the judges, professional incorporated bondsmen became established, in many cases run by insurance companies. In return for a cash premium for the service, and usually on receipt of some collateral security as well, the bondsman might agree to act as surety.

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80 For a detailed description of the Vera Institute work see Ares, Rankin & Sturz, 'The Manhattan Bail Project: An Interim Report on the use of Pre-Trial Parole' (1963) 38 *New York University LR* 67 and Vera Institute of Justice: *Programs in Criminal Justice Reform Ten-Year Report 1961-1971*.

81 Australian Law Reform Commission, *Criminal Investigation* (1975) Report No.2 interim at 82-84, paragraphs 179-180.

82 *Report of The Bail Review Committee* (1976) at 39. The Committee recommended adoption of the project in its entirety including the points system, but dropping the need for an address in the area.

83 Beeley, *The Bail System in Chicago* (1927); 'Compelling Appearance In Court; Administration of Bail in Philadelphia', 102 *U.Pa.L. Rev. 1031* (1954): 'A Study of the Administration of Bail in New York City' 106 *U.Pa.L. Rev.* 693 (1958).

84 *Programs in Criminal Justice Reforms: Vera Institute of Justice Ten-Year Report 1961-1971*, at 22.

However, this did not make it any easier for an indigent defendant to take advantage of his bail.

5.89 The Vera Institute considered that many indigent defendants could be safely released on bail on their promise to appear if they had sufficient community ties. It endeavoured to demonstrate the validity of this proposition using statistics gathered over a three year period from 1961 to 1964 and for this purpose the Manhattan Bail Project was initiated. Defendants charged with, or having a previous record of, narcotics offences, homicide, forcible rape, sodomy involving a minor, corrupting the morals of a child, carnal abuse and assault on a police officer were excluded from the study because of the special problems they posed. However, it was hoped that as the study continued the use of parole in at least some of these cases could be considered.

5.90 Defendants who were not excluded were interviewed by law students from New York University School of Law under the supervision of the Vera Institute. The aim of the interview was first to see whether the defendant qualified for further consideration for bail. To do so he had to satisfy one of the following requirements, or partially satisfy at least two:

1. present or recent residence at the same address for six months or more;
2. current employment or recent employment for six months or more;
3. relatives in New York City with whom he is in contact;
4. no previous conviction of a crime;
5. residence in New York City for ten years or more.

5.91 If the defendant qualified, the interviewer checked to see that the information given was correct. This was normally achieved by telephone calls, but in some instances field checks were necessary. The interviewer then made a recommendation as to whether the defendant ought to be recommended for bail on the basis of his community ties and the likelihood of his appearance. To qualify for a recommendation for bail, a defendant needed an address in New York and at least five points from the following categories:[85]

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[85] The schedule reproduced by the Australian Law Reform Commission: (*Criminal Investigation* (1975) Report No.2 Interim at 83 paragraph 179) varies in many respects both as to the information: taken into account and as to the applicable we ighting.

Prior record

1 No convictions.

0 One misdemeanour conviction.

-1 Two misdemeanour or one felony conviction.

-2 Three or more misdemeanour or two or more felony convictions.

Family Ties (in New York area)

3 Lives in established family home AND visits other family members (immediate family only).

2 Lives in established family home (immediate family).

1 Visits others of immediate family.

Employment or School

3 Present job one year or more, steadily.

2 Present job 4 months OR present and prior 6 months.

1 Has present job which is still available.

OR Unemployed 3 months or less and 9 months or more steady prior job.

OR Unemployment Compensation.

OR Welfare.

3 Presently in school, attending regularly.

2 Out of school less than 6 months but employed, or in training.

l Out of school 3 months or less, unemployed and not in training.

Residence (In New York area steadily)

3 One year at present residence.

2 One year at present or last prior residence
OR 6 months at present residence.

1 Six months at present and last prior residence
OR in New York City 5 years or more.

Discretion

+1 Positive, over 65, attending hospital, appeared on some previous case.

O Negative - intoxicated - intention to leave jurisdiction.

5.92 The Manhattan Bail Project was considered to be successful in New York and is now used in many other jurisdictions in the United States and in Canada.[86] In New York it is now known as the "New York Release on Recognizance Project". The investigators are employed by the Office of Probation, but they are not ordinary probation officers.

They are either fulltime salaried officials or law students attending night school who are paid on an hourly basis.[87]

5.93 Initially the figures indicated that the scheme was successful. During the three year operation of the Manhattan Bail Project, 3,305 defendants recommended for release were granted bail and only 1.6% failed to appear as required, compared with 3% who failed to appear under the previous system. However, later figures taken in 1967 after the scheme had been taken over by New York City were not as encouraging. It was discovered that the rate of absconding had increased from 1.6% to 9.4%. This increase may have been attributable to the increased use of the release on recognizance scheme,[88] an increase in the number of addicted

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86 Zander, 'Bail: A Re-Appraisal' [1967] *Crim. L.R.* at 136 and see paragraph 5.69 n.64 above.

87 Report of the Working Party, *Bail Procedures in Magistrates' Courts* (1974) HMSO at 45.

88 See paragraph 5.89 above. Apparently it now extends to defendants on homicide charges. In New York the alleged mass murderer known as "Son of Sam" was recently recommended for release on bail because

defendants and a failure to impose penalties against those failing to appear in court. Furthermore, in the same period, of those released without background information of the kind provided in the release on recognizance scheme, 16.2% failed to appear, and of those released who were not recommended for release, but who were nevertheless granted bail, the absconding rate was 19.3%.[89] Because the court is not bound to act on the recommendation regarding bail it is difficult to reach any firm conclusion as to the success of the Manhattan Bail Project. For example in 1971 the Judges of the New York City Criminal Court released only about half of those defendants who were recommended for release, and at the other end of the scale, released 28% of those who were not recommended.[90]

5.94 Although some persons interviewed in Western Australia by the Commission have expressed doubts as to the desirability of introducing the Vera Institute's bail procedure in this State, their concern has been directed towards the emphasis placed by the scheme on community ties as a bail criterion and the use of a points system to give effect to that emphasis.[91] The value of the Vera Institute as an information gathering and checking service has not been doubted.

5.95 The use of court staff for the purpose of providing information for a bail-decision-maker was recently recommended in England. The Working Party on bail procedures suggested that the information could be gathered on a standard form[92] and made available in every case when a defendant who is in custody is first brought into court, presumably as a pre-requisite for bail. The information collected would relate only to a defendant's community ties. It was considered that the police would be in a better position to draw the court's attention to any other reason for denying bail such as the defendant's dangerous nature and his previous record.

5.96 Under the English proposal, unlike the Vera Institute's procedure, information only would be conveyed to the bail-decision-maker and it would not be verified. For several reasons it was considered that it would be undesirable for the interviewer to make a recommendation to the bail-decision-maker. In the first place, he would be considering

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of his community ties and likelihood of appearance. However, not surprisingly, bail was refused: see *Sunday Times* 21 August 1977.

89 *Programmes in Criminal Justice Reforms: Vera Institute of Justice Ten-Year Report 1961-1971* at 38-39

90 Report of the Working Party, *Bail Procedures in Magistrates' Courts* (1974) HMSO at 45.

91 See paragraph 5.71 above.

92 Report of the Working Party, *Bail Procedures in Magistrates' Courts* (1974) HMSO at 47. The form is reproduced in Appendix VI.

material which formed only a part of that relevant to a bail decision. Second, it would be difficult to obtain an acceptable level of consistency having regard to the number of persons involved in the interviewing process and their different training and experience. Third, it was considered that bail-decision-makers might object in principle to any recommendation regarding bail as being an interference with the exercise of their judicial function. The need for verification of the information gathered was rejected because of the delay and the substantial outlay of resources which this would involve. Unlike the position in America, it was thought that in England it would be difficult to obtain all of the information over the telephone because of the number, of persons who did not have telephone facilities.

5.97 The Commission recognises that it would be desirable for a bail-decision-maker in Western Australia to be provided with as much relevant information regarding the defendant as possible and that this information should be concise and accurate. The form suggested by the English Working Party might be useful in this respect.[93] However, consideration needs to be given to the manner in which such a form could be introduced. There would appear to be at least the following alternatives-

1. a bail-decision-maker could be required to complete such a form when he makes his assessment as to the desirability of granting bail to a defendant;

2. such a form could be made available for the convenience of a bail-decision-maker and used by him at his discretion;

3. a defendant might be required to complete such a form for the information of the bail-decision-maker;

4. such a form might be completed and presented to the court by an independent body of persons.

The question also arises as to whether the information on the form ought to be required on every occasion when a defendant applies for bail, or whether it should be needed only when the defendant makes his first application for bail, or when bail is opposed by the police or

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93 See paragraph 5.95 above and Appendix VI.

when the bail-decision-maker in his discretion considers it to be desirable. Similar questions arise as to the circumstances in which the information should be verified.

5.98 If the information were gathered by the courts as suggested in the first two alternatives, this would have the advantage that the defendant would be required to provide the information directly to the bail-decision-maker on oath. This might obviate the need to verify the information. However, any such procedure would involve a considerable administrative burden for the bail-decision-maker and for this reason may be undesirable as a general rule.

5.99 It might be possible and perhaps desirable for bail-decision-makers to obtain the information in courts which handle only a small number of bail applications. This might apply to rural areas particularly. However, in a busy court such as the East Perth Court of Petty Sessions, where it has been estimated that the magistrate hears at least 12,000 cases per annum[94] (forty-five cases each day), the administrative burden of collecting information could create practical difficulties,[95] even if the majority of these cases were guilty pleas dealt with immediately without the question of bail arising.

5.100 In cases where it is impracticable to expect a bail-decision-maker to complete an information form, it might be possible for the information to be gathered and checked to some degree by an independent agency, for example, law students, court staff and probation officers. Policemen and duty solicitors might be further possibilities but use of these persons would be open to the criticism that they may not be regarded as being independent and capable of giving an impartial report. Law students would only be available in the Perth metropolitan area, and it might be difficult to ensure a continuous service. For example, problems in this respect might arise during examinations or vacation periods. The use of court staff might be undesirable in country areas where the only available person might be a police officer acting as a Clerk of the Court of Petty Sessions,[96] but in these cases the court would normally be in a better position to obtain the necessary information itself. However, probation officers might be the most satisfactory body of persons to perform the information gathering function, particularly if their role were to include a recommendation regarding bail to a bail-

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94 See paragraph 2.18 above.

95 By way of comparison, the investigators for the Manhattan Bail Project claimed that it took fifteen minutes to complete their questionnaire and about one hour to check the information given. Checking normally involved telephone calls but some field visits were made.

96 *Justices Act 1902*, s.34.

decision-maker. In courts where the service is most likely to be needed, a probation officer is either stationed on duty or is available on call. The gathering of information about a convicted defendant is already a major part of their duties if he is released on probation. They are well qualified for the task and, in cases where a defendant is convicted but released on probation, the personal contact made at the bail stage would not necessarily be lost.

5.101 A standard information form could also be used by the police when considering police bail. Police bail often arises at a time when it might be impracticable to require the police to have independent bail information before them. Its short duration might add to the impracticality. However, if attention were drawn to the relevant criteria, and the necessary information for a bail decision, it might assist the police to narrow the issues, and it might give a defendant some help as to what information is relevant and ought to be provided.

5.102 Two other issues arise for consideration relating to the provision of information relevant to a bail decision. The first arises in the situation where information is to be collected by an independent agency and provided in a report to the court. In this case consideration would need to be given to the type of information to be provided. For example, should it include matter relevant to the bail decision other than the defendant's community ties? Should the report include a recommendation as to whether bail should be allowed and if so, should this be based on a purely subjective assessment by the information gatherer, or should it be assessed objectively using a points system similar to that used in the Manhattan Bail Project? If a points system were favoured at this information gathering stage, research might be required before a points table suitable to Western Australia could be formulated.

5.103 The second issue arises in relation to information collected by the bail-decision-maker in court. The question is whether a defendant ought to be made compellable to give evidence on oath relevant to his bail application. At present there is no such requirement, and the normal rule in criminal cases is that a defendant is not obliged to give evidence in respect of any charge against him. The *Victorian Bail Act 1977* makes a defendant a compellable witness in respect of a bail application in that State.[97] This has the advantage of providing the court with more information regarding the bail decision, but if it allowed the defendant to be cross-examined on his evidence it might prejudice his defence. Consequently, the Victorian legislation has built-in protection by providing that the defendant shall not be examined or

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97 *Bail Act 1977* (Vic) , s.8

cross-examined by the court or by any other person as to the offence with which he is charged.[98]

Information for the defendant

5.104 It might be argued that a defendant could be at a disadvantage when he makes an application for bail to the police. He might be unaware of his right to apply for bail and of the information which might be relevant for the decision. At this stage it might also be difficult for him to obtain independent advice.

5.105 This problem might be reduced if a defendant were informed as to his right to apply for bail and if he were informed of the criteria taken into account by the police when considering a bail application and the information which could be most usefully provided in its support. A copy of a standard bail information form, such as has been suggested,[99] would help to serve this purpose in most cases. In addition, however, it might be argued that, when charging a defendant, the police ought to be required to advise a defendant of the desirability of consulting a solicitor, not only in relation to defending the charge, but also to represent the defendant on any application for bail. In its report on Commonwealth Police Bail, the Australian Law Reform Commission recommended that the police be obliged to inform a defendant of:-[100]

1. his entitlement to apply for bail;
2. the relevant criteria for bail decisions;
3. the conditions on which bail may be granted by the Commonwealth Police;
4. his entitlement to consult a lawyer or any other person in respect of his application for bail.

These recommendations have been carried forward into the Commonwealth *Criminal Investigation Bill 1977*.[101]

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98 Ibid., s.8(b).

99 See paragraph 5.97 above.

100 Australian Law Reform Commission, *Criminal Investigation* (1975) - Report No. 2 Interim at 80 paragraph 175(a).

101 cl.49 (2)(a) and (b).

5.106 Such an obligation might however, be too onerous for the police and the question of enforcing it might also cause difficulty. Under the Australian Law Reform Commission's proposals, obligations imposed on the Commonwealth Police were to be enforced by excluding evidence:

> "...obtained in contravention of, or in consequence of a contravention of or a failure to comply with, a provision of this Act, ... [if] ...the Court is satisfied, on the balance of probabilities that the evidence was so obtained..."[102]

There is a discretion given to courts to admit the evidence if this would specifically and substantially benefit the public interest without unduly prejudicing the rights and freedom of any person.

5.107 A failure or refusal to inform a defendant of the matters suggested in paragraph 5.105 above would not in many cases give rise to any evidence which could be excluded. Consequently, other enforcement measures, such as police disciplinary procedures or civil liability, might be necessary to avoid such obligations becoming "paper obligations".

Right to be heard

5.108 There is no clear direction as to who is entitled to be heard on a bail application. In *R. v Fraser*[103] the police did not object to bail being granted to the defendant who was charged with attempting to murder her husband, but justices refused bail on an objection made by counsel for the husband. An appeal by the defendant was allowed. For present purposes the case is relevant because doubts were expressed as to whether the husband had any right to be heard in opposition to bail. However, the case is also interesting from the point of view of the relevant criteria for a bail decision in that it was held that even if he did have sufficient interest to be heard, his concern that she might make a further attempt to take his life was irrelevant to the bail decision. To succeed the husband would have had to introduce evidence showing that she was unlikely to appear for her trial.[104]

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102 Criminal Investigation Bill 1977 (Cwth), cl.73(1).
103 (1900) 25 VLR 365.
104 See paragraph 5.31 above.

5.109 The Commission does not suggest that there should be a requirement for a defendant to serve notice of an application for bail on any interested person apart from the prosecution. However, in the interest of providing the bail-decision-maker with as much information as possible, it may be undesirable to impose any statutory restrictions on the persons who may be heard either in support of, or in opposition to, a grant of bail.

Public nature of proceedings

5.110 The fifth and final problem is whether bail applications should in some cases be heard in a venue which is closed to the public. It might be argued that a discussion in public of certain of the criteria mentioned in Part A of this chapter could be prejudicial to a defendant's subsequent trial. This might apply, for example, to a discussion of a defendant's previous convictions or whether a defendant is likely to commit further offences. For this reason, the prosecution might be reluctant to disclose information to the court, even though it might be relevant information for a bail decision. The police might also be reluctant to oppose bail on the grounds that further inquiries need to be made or that the defendant if released on bail would be likely to interfere with evidence. Disclosure of the reasons for their objection before others in open court, including friends of the defendant, might be prejudicial to the further inquiries or to the preservation of the evidence.[105]

5.111 From a defendant's point of view, the more informal and relaxed atmosphere of a private hearing may set him at ease, and he might become more willing to provide personal information regarding his background and community ties for the assistance of the bail-decision-maker.

5.112 The English Working Party on Bail Procedures recognised that hearings in private might enable objections to bail to be explored more freely in some cases. However, it concluded that these advantages were outweighed by the principle that justice should be dispensed in open court so that it can be seen to be done.[106]

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105 See paragraph 5.44 above.

106 Report of the Working Party, *Bail Procedures in Magistrates' Courts* HMSO (1974) at 23 paragraph 75. Bail hearings in private had earlier been recommended in England by the Cobden Trust, *Bail or Custody* (1971) at 23.

5.113 In Western Australia there is no legal requirement for bail applications to be heard in open court and, while recognising the force of the principle which persuaded the English Working Party to oppose the hearing of bail applications in private, it might be argued that in appropriate cases the court should be entitled to exclude the whole or any part of the public from a bail hearing. In some cases it may be sufficient simply to prevent the press from publishing reasons for a bail decision.[107] This might prevent wider public dissemination of information prejudicial to a defendant's trial, but it would not prevent the public from actually attending the hearing, and in country areas in Western Australia this might be insufficient protection for a defendant.

SUMMARY OF ISSUES

(1) Should a standard information form be used when a bail decision is made and, if so -

(a) who should have the task of its completion?

(b) should the information be verified?

(c) in what circumstances should completion of the form be required?

(d) if the form is completed by an independent agency should it include a recommendation as to whether the defendant should be granted bail and should this recommendation be based on a points system?

(e) if the form is completed by a justice, magistrate or judge in court, should the defendant be compelled to give evidence in support of his bail application?

(paragraphs 5.87 to 5.103)

(2) Should the Western Australian Police be required to inform a defendant of-

(a) his entitlement to apply for bail;
(b) the relevant criteria for bail decisions;
(c) the conditions on which bail might be granted;

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[107] In England, it was said in *R. v Fletcher* (1949) 113 JP 365 that although it was permissible for prior convictions to be mentioned in open court, they should not be published in any press report of the case.

(d) his entitlement to consult a lawyer or any other person in respect of his application for bail.

If so, how should such a requirement be enforced?

(paragraphs 5.104 to 5.107)

(3) Who should be entitled to be heard in respect of any application for bail?

(paragraphs 5.108 to 5.109)

(4) Should bail applications be heard in a venue which is closed to the public, and if so, in what circumstances?

(paragraphs 5.10 to 5.13 and paragraph 5.44)

CHAPTER 6 - CONDITIONS ATTACHED TO BAIL

INTRODUCTION

6.1 Conditions attached to bail are of two different kinds. There are pre-release conditions which must be met before the defendant obtains his release on bail, and post-release conditions, that is, conditions which operate after the defendant has been released on bail. Examples of pre-release conditions are the common requirements that the defendant enter into a recognizance, and that he should deposit cash or security or obtain a surety. More unusual conditions of this type are that the defendant should surrender a passport, or in one case that he should allow his photograph to be displayed in passport issuing offices throughout Australia.[1] Examples of post-release conditions are that the defendant should report periodically to the police, that he should reside and work where directed and that he should not make contact with a particular person.

6.2 This chapter deals with a number of difficulties which arise in relation to these various conditions. The Commission doubts whether there is any lawful authority for the imposition of many of these conditions. There may be doubts as to the desirability of imposing conditions which are impracticable or which require the co-operation of third persons or which might otherwise be incapable of fulfilment by the defendant. Some conditions may raise problems with regard to enforcement. The requirement of a surety as a condition of bail is considered separately in chapter 7 because of the particular difficulties involved.

CONDITION TO APPEAR IN COURT AS AND WHEN REQUIRED

The defendant's recognizance

6.3 A fundamental condition for a defendant's release on bail is that he should appear in court as and when required. With one exception a defendant is required to enter into a recognizance[2] to secure performance of this condition. The defendant is thereby required to pay a certain sum of money if he fails to appear.[3] The exception is s.86 of the *Justices Act*

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1 See paragraph 6.45 below.

2 The recognizance form is reproduced in Appendix VII.

3 See paragraphs 6.19 to 6.41 below for a discussion of the consequences for a defendant if he absconds.

1902 which allows a justice to "suffer the defendant to go at large", without a recognizance where he is charged with a simple offence "or other matter". The Commission understands that in practice it is rare for a defendant to be allowed to go at large. A recognizance is normally required in every case.

6.4 When recognizances are required, a separate recognizance is needed for every offence with which the defendant has been charged. This is at the least administratively inconvenient. For example, if a defendant is charged with sixty-eight counts of fraud and is granted bail, separate recognizances are required for each count. To avoid setting a disproportionately large figure for bail, bail-decision-makers tend to set a figure which they regard as suitable for the combined offence, divide that figure by the number of counts and set bail for each count accordingly.

6.5 There is no guidance or instruction for bail-decision-makers as to the appropriate sum to set in the recognizance. In most cases bail-decision-makers tend to set the figure by reference to the maximum possible fine. There may be some cases, however, when the bail-decision- maker bases the figure on the fine which is likely to be imposed on the defendant in the event of his conviction. Another view is that the figure set should at least be sufficient to cover the cost to the community of the defendant's reapprehension. One justice interviewed by the Commission indicated that his approach was to adopt a figure between that suggested by the police and by the defendant's counsel.

6.6 For offences where imprisonment is the likely penalty, bail is set on the basis of an informal flexible tariff depending on the type of offence and the circumstances in which it is alleged that the offence was committed. Thus, for example, a defendant charged with rape may be granted bail on a recognizance in the sum of $1,000-2,000, the amount for an armed holdup may be between $2,500-5,000 and for offences concerned with the importation of dangerous drugs the figure may be between $10,000-20,000. The Commission understands that it is uncommon in practice for a bail-decision-maker in Western Australia to take into account the means of a defendant or his ability to pay when setting the appropriate figure for the recognizance.

6.7 Some persons interviewed by the Commission have been critical of the existing law and practice in relation to the requirement of recognizances. The view has been expressed that

their effectiveness in securing a defendant's appearance in court may be minimal. The defendant knows he has nothing to lose unless he absconds and is later recaptured. It has been said that until that time, the recognizance is a worthless piece of paper.

6.8 One justice interviewed by the Commission criticised the practice of setting the amount of the recognizance, having regard to the seriousness of the offence. He said that the fact that bail had been set at an unusually high figure might prejudice the defendant at his trial since it might indicate that he had a criminal record or that the offence for which he is charged was alleged to have been committed in particularly serious circumstances. The solution suggested to the Commission was that there should be a fixed recognizance for each type of offence.

6.9 The practice of fixing the recognizance without regard to the defendant's means might also cause problems. If forfeiture proceedings were brought successfully against a defendant who absconded, but who has not the means to pay, the result might be a further term of imprisonment for non-payment of a court ordered sum.[4] The scale is one day for every $5 owing.[5] Consequently, a defendant who has signed a recognizance for $10,000 to obtain his release from custody, might face a term of up to 2,000 days if he did not have the means to pay. The situation might well arise where the term of imprisonment for non-payment of the forfeited recognizance could exceed the sentence imposed for the actual offence. On the other hand if bail were to be refused because a defendant did not have sufficient means to pay (if this became necessary) this could be criticised for discriminating against the poor.

Possible reforms

6.10 Suggestions have been made to the Commission that a failure to appear in answer to bail ought to be an offence. In England, the Working Party on Bail, after expressing doubts as to the effectiveness of a personal recognizance, reported that:[6]

> "We think that it would be a more effective deterrent to absconding if it were a criminal offence for a person to fail to answer his bail. Absconding while on bail is a serious violation of the criminal process, and we believe that the powers of courts to

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4 *Justices Act 1902*, ss.157-158. If the defendant is already in prison, serving his sentence, imprisonment for non-payment of the forfeited recognizance might be served concurrently. However, the prosecution may delay obtaining the warrant of commitment so that the terms will in effect run cumulatively.

5 *Justices Act 1902*, s.167(1).

6 Report of the Working Party, Bail Procedures in Magistrates' Courts HMSO (1974) at 34 paragraph 102.

> deal with such offenders should be strengthened. As we have already said, the system of personal recognizances seems to us largely ineffectual and we can see no reason why courts should not be able to sentence to imprisonment persons who have deliberately sought to avoid taking their trial. The appropriate maximum sentences might be three months' imprisonment and a fine of £400 for cases dealt with by magistrates courts and 12 months' imprisonment and an unlimited fine in the Crown Court. There should be power to order a sentence of imprisonment for absconding to run consecutively to any sentence of imprisonment imposed for the substantive offence".

6.11 The suggestion has been incorporated in the English *Bail Act 1976*. Section 3 provides that:

> "(1) A person granted bail in criminal proceedings shall be under a duty to surrender to custody, and that duty is enforceable in accordance with section 6 of this Act.
>
> (2) No recognizance for his surrender shall be taken from him."

The enforcement procedure referred to in section 6 is to create an offence if a defendant fails without reasonable excuse (the proof of which rests with him) to surrender to custody. He is punishable either on summary conviction or as if it were a criminal contempt of court. The penalties are as outlined by the Working Party.[7]

6.12 The Victorian *Bail Act 1977* provides a similar procedure. Section 5(1) contains a number of conditions which might be imposed in respect of a grant of bail, and no reference is made to any requirement that the defendant enter into a recognizance to pay any money in the event of his failure to appear. Section 30 creates an offence if the defendant fails without reasonable cause (the proof whereof rests upon him) to appear in answer to his bail. The penalty is imprisonment for twelve months.

6.13 The Australian Law Reform Commission's proposals, as adopted in the Commonwealth Criminal Investigation Bill, and which commended themselves to the New South Wales Bail Review Committee,[8] retain the concept of a personal recognizance although it is listed as the fourth most onerous condition of a total of six. There is no provision for absconding to be made an offence.

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7 See paragraph 6.10 above.

8 See paragraph 7.15 below.

6.14 The Commission sees merit in moves towards abolishing personal recognizances and creating an offence of absconding. This might solve the problems which have surfaced in relation to the existing use of personal recognizance procedure.[9] Instead of setting a sum by way of recognizance in advance, which might or might not subsequently turn out to be appropriate for forfeiture, the court could impose a penalty, which might involve imprisonment, looking retrospectively at all of the circumstances. This might include the circumstances in which bail was granted, the circumstances surrounding the defendant's failure to appear and the sentence which is to be imposed for the offence with which he was initially charged. From the defendant's point of view, the unknown factor of a penalty for absconding (which could include imprisonment), might increase the incentive for him to perform his undertaking to appear.

6.15 There might be difficulties if absconding were made an offence but these might not be insoluble. For example, it would be desirable for the offence of absconding to be dealt with at the same time as the principal offence and by the same court. This would not be possible if the offence of absconding were a simple offence and the principal offence were indictable. A separate committal for the absconding offence would be cumbersome. However, the English Working Party suggested, as a possible solution, that the absconding offence could be dealt with by the court considering the principal offence in the same manner as if it were a contempt of court. It considered also that a right of appeal should be given.[10]

6.16 Defendants who fail to appear as required but who have no intention to avoid trial would require special consideration. This group might consist of defendants charged with offences for being drunk or disorderly or gambling, who have paid cash and who do not expect to have to appear in court,[11] and defendants who are forgetful. In the latter case, the defendant might be able to satisfy the court that he had a reasonable excuse for his failure to appear. However, for defendants falling within the first two categories, it might be undesirable to add to their criminal record the more serious offence of absconding. Some changes to existing practice in respect of these offences might be required.

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9 See paragraphs 6.4 to 6.9 above.

10 Report of the Working Party, *Bail Procedures in Magistrates' Courts* HMSO (1974) paragraph 104.

11 See paragraph 3.48 to 3.49 above.

6.17 There is also an argument in favour of extending the existing power[12] to release a defendant "at large" without any recognizance, on his undertaking to appear in court as and when required. It might, for example, be extended from simple offences to all offences triable summarily, and perhaps even to misdemeanours and crimes. The English *Bail Act 1976*, the Commonwealth Criminal Investigation Bill 1977 and the Victorian *Bail Act 1977* contain, as the first condition for release of a defendant on bail, a simple undertaking that he appear in court as and when required. The object of the legislation in all cases is for the bail-decision-maker to direct his attention first to this form of release.

6.18 It would also appear to be undesirable to require separate undertakings or recognizances in respect of every charge brought against a defendant. Provision for one undertaking or recognizance to appear in court at a certain place and time, irrespective of the number of charges, might reduce existing administrative inconvenience. The same principle could apply if an offence of absconding were introduced. If a defendant charged with fraud on several counts absconded, the absconding offence might be regarded as a single offence.

Consequences if the defendant fails to appear

6.19 If the defendant fails to appear in court as required, under existing law he faces the following consequences –

(a) re-arrest;
(b) forfeiture and enforcement of his recognizance, realising security deposited, if any;
(c) forfeiture of cash deposited, if any.

In addition, he is liable for sentence if he is convicted of the offence for which he was originally charged and there might be a tendency for the court to take into account the fact that the defendant has failed to honour his undertaking to appear. This may be on the basis that he has shown disregard or contempt for the system of law which conferred the benefits of bail upon him, and has betrayed the confidence reposed in him by the court.

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12 *Justices Act 1902*, s.86 and see paragraph 6.3 above.

6.20 It might be arguable whether it would be proper for a court when sentencing the defendant for the offence committed to take into account the fact that he has absconded from bail. A similar point was recently considered by the Full Court of the Supreme Court in Victoria, in a case where the defendant had committed the offence while on bail for other offences.[13] It was held that the fact that the defendant had shown disregard for the law and that he could not be trusted could be taken into account when sentencing the defendant, in so far as it might indicate that leniency if granted might be abused. It was left undecided, however, whether it would permit the sentence to be increased. In a case where the defendant has absconded, different considerations may apply in that this is a matter which has arisen after the commission of the offence for which he has been charged. This raises the further complication whether a sentence can be affected by events occurring after the offence has been committed. If absconding were made an offence as suggested above[14] this might avoid difficulties which might arise if the court indicated that it was taking into account the fact that the defendant has absconded from bail when sentencing him for the offence with which he was charged.

(a) *Re-arrest*

6.21 The police do not appear to have any power to arrest a defendant whom they suspect is about to abscond. If they have time, the police might apply to a magistrate and, as required, convince him that it is in the interests of justice to revoke bail and issue a warrant for the defendant's arrest.[15] Alternatively, if there is a surety, he may apprehend the defendant himself, or enlist the assistance of the police to do so.[16] If the defendant is on bail pending an appeal in the Supreme Court and appears to be about to abscond there is power for the police to apply to a justice for a warrant for arrest.[17] However, if recourse to any of these procedures is impracticable, for example, if the defendant is seen by the police boarding a plane, and there is no surety, the police appear to be powerless. The Commission suggests that the police could be given power to apprehend without warrant and bring before a justice or magistrate any defendant whom they have reasonable cause to suspect is on bail and is about to abscond. It might also be considered whether the existing power to revoke bail could be exercised by a justice, and not restricted to magistrates as at present.

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13 *R. v Gray* [1977] VR 225.
14 See paragraphs 6.10 to 6.16.
15 *Justices Act 1902*, s.94A
16 Ibid., s.94.
17 Ibid., s.217.

(b) *Financial consequences*

6.22 The defendant's liability for a forfeited recognizance and his loss of cash deposited if any, arise simply on his failure to appear in answer to his bail, regardless of the reasons, although in the case of bail granted by the police he is expressly permitted one hour after the appointed time to appear.[18] The reasons for the defendant's failure to appear and whether he had any intention to avoid his trial are irrelevant. There are differences in the procedure not only between enforcing a recognizance and forfeiting cash deposited but also depending on who set bail and whether it was for a matter relating to the Supreme Court or to the Court of Petty Sessions. It is therefore desirable to consider the financial consequences of a defendant's failure to appear on his bail under the following headings.

(i) Forfeiture of recognizances in respect of police bail

6.23 There is a separate procedure contained in s.48 of the *Police Act 1692* for forfeiture of recognizances in respect of police bail. If the defendant fails to appear within an hour after the time appointed, a justice *shall* cause a memorandum of the recognizance *and* of its forfeiture to be drawn up and signed by any constable.

(ii) Forfeiture of recognizance in the Court of Petty Sessions

6.24 If a defendant fails to appear in answer to bail fixed by a justice, the normal procedure is to obtain an order under the *Justices Act* forfeiting the recognizance. First, a justice or a magistrate certifies on the back of the recognizance that the defendant has failed to appear as required.[19] This evidence is then sent to the Crown Law Department for preparation of complaint documents. The Commission has been informed that it may take as long as three months to prepare and return these documents to the Clerk of the Court of Petty Sessions who signs the complaint and endeavours to have the documents served on the parties (i.e. the defendant and any surety) bound by the recognizance. If the documents are served, the matter can be set down for a hearing and an order may be made forfeiting the recognizance under

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18 *Police Act 1892*, s.48.

19 There is provision in s.93 of the *Justices Act* for the Attorney General or his representative or the Crown Solicitor to demand such a certificate, but there has been no occasion, as far as the Commission is aware, where it has been necessary to use this provision.

s.154A of the *Justices Act*. However, in many cases the complaint is never served. By the time the papers have been prepared for service on the parties, both the defendant and the surety (if any) may have left the State. From time to time a list of these uncompleted matters is sent to the police to follow up.

(iii) Forfeiture or estreatment of cash deposited in the Court of Petty Sessions

6.25 There is no procedure dealing with the forfeiture or estreatment of cash deposited by a defendant or his surety. This fact may add to the doubt which exists as to whether there is any authority to require or accept deposits of cash as a condition for bail.[20] However, in cases where cash is deposited the forfeiture procedure varies. On one view an order may be made directing the amount concerned to be paid directly into Consolidated Revenue. This is common procedure for example, where a defendant is charged with a drunkenness or gaming offence. The police may take $20 from the defendant and the expectation on both sides is that if the defendant fails to appear this amount will be estreated in substitution for a fine and no further action will be taken.

6.26 There is another view that an order forfeiting the cash deposited cannot be made in the absence of the defendant and that the complaint procedure under s.154A of the *Justices Act* is applicable in every case. There is often no difference in result between the two views however, in that if the complaint is not served, the money remains in a trust account in the court, and after a period of time, if no claim to it is made, it passes to Consolidated Revenue as unclaimed money. The Clerk of the East Perth Court of Petty Sessions has informed the Commission that in August 1977 he was holding $26,350 in his bail trust account awaiting either the service of process, or the lapse of time necessary to enable it to be transferred into Consolidated Revenue.

6.27 A third view is that the defendant ought to be brought before the court in each case and dealt with for the offence charged. In this case, instead of simply giving leave to the police to obtain a warrant for arrest of the absconding defendant, the court may actually issue a warrant directing the defendant to be arrested.

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20 See paragraphs 6.42 to 6.44 below.

(iv) Forfeiture of recognizance in the Supreme Court

6.28 The procedure for enforcing recognizances regarding matters to be heard in the Supreme Court is contained in the Criminal Code. Section 746A of the Code provides that if a defendant is granted bail to appear in the Supreme Court for his trial, or for any other proceeding in any criminal cause, and fails in any condition, the Court or a Judge may order his recognizance to be estreated, and that he, and any surety, "shall forthwith pay to the Attorney General to the use of the Crown the sum in which he is bound".

(v) Enforcement of orders made by the Court of Petty Sessions and the Supreme Court

6.29 The procedure in the *Justices Act* for enforcing orders made in a Court of Petty Sessions is contained in s.155 of that Act. It provides for execution against goods and chattels.[21] Alternatively, the defendant may be granted time to pay if necessary by instalments, or he may be imprisoned in default of payment. It is anomalous that enforcement under the *Justices Act* does not extend to execution against land, especially as the police normally insist on a surety having an interest in land as an essential qualification requirement.[22] Other possible enforcement procedures[23] permit execution against land, and the recognizance form in the fourth schedule to the *Justices Act*, designed for the information of a defendant and his surety, if any, refers to the possibility of execution being levied against land.[24]

6.30 An order made by the Supreme Court may be enforced by entering the order as a judgment of that Court and execution may be levied on the defendant's assets, including land. Apart from this, the procedure is the same in the Supreme Court as it is in the Court of Petty Sessions.

6.31 A deposit of security by a defendant or a surety for the payment of his recognizance may have the effect of simplifying and expediting the recovery procedure.

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21 Section 21 of the *Police Act 1892* empowers the police to enforce such an order and is also restricted to execution against goods and chattels.

22 See paragraph 7.56 below.

23 See paragraph 6.32 below.

24 See Forms 19 and 22.

(vi) Other procedures for enforcing recognizances

6.32 The provisions in the *Justices Act* and in the *Criminal Code* are expressed to be without prejudice to any other method of enforcement.[25] The Commission is aware of two other such methods. One is to enforce payment as a civil debt through the Local Court or the Supreme Court. The other is to use the procedure outlined in the *Recognizances (Forfeiture) Ordinance 1861*. Both of these procedures would permit recovery of the amount owed against an interest in land.[26] However, as far as the Commission is aware, neither procedure is in use, and it may be unnecessary to retain them as alternative procedures. The procedures in the *Justices Act* and in the *Criminal Code* could be made exclusive.

(vii) Relief from liability

6.33 There may be cases where a defendant and his surety, whether or not they have deposited cash, ought to be excused liability either in whole or in part. This may be so if they have made a mistake as to date or time the defendant was required to appear or if the defendant fell ill or was from some other cause beyond his control unable to appear. A surety it may be argued ought to be entitled to relief if he has taken all reasonable steps to ensure that the defendant attended his trial, or if he has taken reasonable steps to have bail revoked when he suspected that the defendant intended to abscond.

6.34 Although the statutory provisions provide that the court *may* order forfeiture, there is some conflict of opinion as to whether this would entitle the court to take mitigating factors into account and grant full or partial relief from liability. In *Re King and Scott*,[27] it was held that the section was an empowering provision and did not confer a discretion.

6.35 On the other hand, in *Re Southampton Justices*[28] it was suggested that although at one time the court may not have had a discretion in the matter, the word "may" in a section similar

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25 *Justices Act 1902*, s.154A(2); *Criminal Code*, s.746A.

26 *Local Courts Act 1904*, s.122; *Supreme Court Act 1935*, s.118; *Recognizances (Forfeiture) Ordinance 1861*, s.1.

27 [1931] NZLR 162. The Court of Appeal drew attention to an alternative procedure allowing the aggrieved person to apply to the courts for relief according to "equity and good conscience". There is no such procedure in Western Australia where the surety's only remedy may possibly be to appeal by way of order to review if he can show a mistake or error in law or fact: *Justices Act 1902*,.s.197.

28 [1975] 2 All ER 1073.

to s.154A of the *Justices Act 1902* in Western Australia[29] had altered this situation, and did confer a discretion.[30] However, these comments were not essential to the decision in that case as a later provision in the same section[31] expressly confers a discretion on the court.

6.36 A District Court Judge informed the Commission that where he thought a surety deserved relief from liability he would first reduce the amount of the surety's recognizance and then make an order for the forfeiture in full of that reduced amount. This practice does not appear to be expressly authorised by statute.

6.37 Alternatively, there have been cases where a surety has made application for relief from liability direct to the Attorney General of this State by writing personally, or in some cases through his solicitor or Member of Parliament. These cases are investigated by the Crown Law Department. If the application precedes a court order, the Attorney General may take any mitigating factors into account by directing that steps not be taken to obtain an order forfeiting the recognizance. If the application comes after the court order, the Attorney may waive enforcement of the order either in whole or in part. The Commission has been informed that the Attorney General has, on rare occasions, granted relief to a surety before and after the making of a court order.[32]

Possible reforms

6.38 If personal recognizances are to be retained, the Commission considers that there may be a need for a simplified procedure for forfeiture whereby the Crown proceeds by way of motion rather than complaint, with a summons to the surety issuable by the clerk of court. Apart from this the most important matters to consider for reform appear to be the procedure for estreating cash deposited and the question of granting relief from liability. With regard to cash bail, the procedure which has developed in relation to drunkenness and gambling offences might be criticised as it means that the defendant is, in effect, dealt with by the police. They fix the amount to be deposited and this in many cases takes the place of a judicially imposed fine.

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29 *Magistrates' Courts Act 1952* (UK), s.96(1).

30 [1975] 2 All ER 1073, per Lord Denning MR at 1077 and per Browne LJ at 1079.

31 *Magistrates' Courts Act 1952* (UK) s.96(3).

32 See paragraphs 7.13 and 7.76 n.72 below.

6.39 On the other hand, the procedure does have advantages for a defendant. If he considers that he has no defence to the charge and if he does not consider the amount of bail fixed by the police to be excessive, he may, by failing to appear at the court, avoid personal inconvenience and he does not have a conviction entered against his name. If he does not wish to take this course, the option always remains open to him to appear in court and be dealt with by a magistrate. Whichever view is preferred it would be desirable, in the Commission's tentative view, for one single procedure to be adopted in cases where the defendant has deposited cash.

6.40 With regard to the question of granting full or partial relief from liability, it may be argued that the present practice of obtaining relief through the Attorney General is unsatisfactory and could involve an overriding of judicial by executive authority. This may be arguable where the court has made an order forfeiting the recognizance, depending on whether the amount owing is characterised as a civil contractual debt or as a quasi-criminal order. The executive decision may frustrate the judicial decision to grant bail with a surety for a fixed sum. If no action were taken to enforce these recognizances, the desired effect of a grant of bail with a surety may be lost.

6.41 Apart from the need to preserve the integrity and independence of the courts, it may also be argued that it would be more satisfactory if the decision whether to grant relief from liability were made by the courts, as they would, if necessary, be able to hear sworn testimony on the matter.

OTHER SPECIAL CONDITIONS

Authority to impose special conditions

6.42 Bail-decision-makers commonly impose other special conditions to a grant of bail. These may be pre-release or post-release conditions.[33] However, with four exceptions, there appears to be no legal authority for the practice. The exceptions all relate to pre-release conditions and the most common of these which may lawfully be imposed is a requirement for a surety. As explained above[34] this matter is considered separately in chapter 7. Two of the other three exceptions relate to release on bail pending an appeal from the Court of Petty

33 See paragraph 6.1 above.
34 See paragraph 6.2 above.

Sessions to the Supreme Court. Under s.187 of the *Justices Act 1902* a defendant may be required by a Court of Petty Sessions to deposit cash of not less than $50 in lieu of a surety to obtain release on bail pending the hearing of an ordinary appeal. Under s.197 of the same Act applying to appeals by way of order to review, a judge, when granting the order may release the defendant on his "entering into a recognizance on such terms and conditions including, where applicable, procuring sureties or giving security, as the judge thinks fit". The third exception may be found in ss.50H and 50K of the *Offenders Probation and Parole Act 1963* under which a probationer from another State, who has breached his probation in Western Australia, may be granted bail by a court "on such conditions it thinks fit", pending receipt of instructions from the court in the other State concerned.

6.43 In 1972 the English Divisional Court considered the question whether the Harrow Magistrates' Court had any power at common law to impose a condition that two sureties be required to deposit cash of £500 each before the defendant obtained his release on bail.[35] It was held that in the absence of statutory authority, the Magistrates' Court did not have power to impose such a condition. It may be argued that the same reasoning would apply to a condition that the defendant himself deposit money, and, possibly to other conditions commonly imposed. As a result, it is at least doubtful whether bail-decision-makers in Western Australia have power, in the absence of statutory authority, to impose conditions of any kind in respect of a grant of bail.

6.44 The Commission tentatively suggests that there ought to be legislative authority for the imposition of special bail conditions. They are currently imposed in a variety of circumstances, and they are desirable for the reason that they give a bail-decision-maker greater flexibility when making a bail decision. The power to impose additional requirements might enable a bail-decision-maker to release a defendant on bail in circumstances where bail might otherwise be refused. For example, a requirement that a defendant deposit a sum of money in cash with the clerk of court might be appropriate where the defendant is unable to find a surety because he is a new arrival in Western Australia.

6.45 A magistrate in Perth recently demonstrated that bail-decision-makers may go to some lengths to enable a defendant to be released on bail by imposing special conditions. The case involved a Canadian man who was charged with importing heroin with a street value of

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35 *R. v Harrow Justices, Ex Parte Morris* [1972] 3 All ER 494.

$80,000. He was granted bail on a recognizance of $30,000 and on the conditions that he deposit $10,000 cash, surrender his passport, concur in having his photograph taken and sent to passport issuing authorities throughout Australasia, and report to the customs office in Fremantle between 1-2 pm and 7-8 pm each day. The prosecution opposed the grant of bail on the ground that the defendant had no ties in Western Australia, but objections were also made to the novel condition involving passport issuing authorities in Australasia. The defendant, to obtain his release on bail, simply had to concur with the arrangements. The administrative task of notifying passport authorities in every capital city in Australia including Canberra, and in every major city in New Zealand, was the responsibility of the Australian Narcotics Bureau.

6.46 Apart from the administrative burden the objections to the condition were that it was impracticable and provided no guarantee that the defendant would not be able to obtain a passport. First, there was the possibility that the defendant might obtain a passport from Canada. Secondly the co-operation of passport issuing authorities was required. The Narcotics Bureau foresaw difficulties if these offices became inundated with photographs of persons who were not permitted to obtain passports. Thirdly, the defendant might, by disguise, using glasses, wigs, beards and other devices, obtain a passport using a false name. This procedure would be simplified if the application for the passport were made, as it can be, by post. Fourthly, the defendant might have had access to a black market passport. The result, however, was that the defendant was released on bail, subsequently appeared in court in answer to his bail, and has now been sentenced for the offence.

Should the power to impose special conditions be unlimited?

6.47 There would appear to be differences of view among bail-decision-makers as to whether conditions ought to be within the means of the defendant. Some take the view that to impose a condition, particularly a pre-release condition, knowing that the defendant cannot comply with it, is tantamount to a denial of bail and is inconsistent with the grant of bail in the first place. Some bail-decision-makers suspect that such a practice might even involve a breach of s.139 of the *Criminal Code* which makes it an offence to demand excessive bail.

6.48 On the other hand, some bail-decision-makers take the view that a grant of bail subject to conditions which cannot in fact be met by the defendant is not necessarily inconsistent with

the grant of bail and does not involve a breach of s.139 of the Code. In their view much depends on the reason why the condition is imposed. If it is a condition of his release that a defendant produce a surety or a reference, and he is unable to do so, it might be quite proper for the defendant to remain in custody. The bail-decision-maker would probably have formed the view in such a case that the defendant ought not to be released from custody in the absence of these requirements. However, if the condition is that the defendant deposit cash or security for his recognizance, so that he has more at stake than his recognizance, it might be undesirable for a bail-decision-maker to impose a figure which he knew to be beyond the defendant's means. Similarly, if a condition were imposed which required action by a third person which could not be enforced,[36] it would be futile to impose such a condition if it were known that the third person concerned would not co-operate.

6.49 It would seem to be unnecessary and undesirable to impose any restriction that special conditions should be imposed only when it is known that they can in fact be fulfilled by the defendant. However, the view might be taken that an unfettered discretion to impose special conditions[37] would be too wide. It might be argued that some provision should be made to prevent bail decision-makers from imposing conditions which they know the defendant has no possibility of fulfilling, or conditions which are impracticable or fanciful. For example, the legislation could provide a specific list of conditions available to bail-decision-makers, or, with particular regard to post-release conditions, it might provide that conditions could be imposed only in regard to certain matters, such as residence, employment, and the persons whom the defendant is permitted to associate with.

6.50 Alternatively, as in Victoria and the United Kingdom,[38] the legislation might provide limits by specifying the purposes for which the condition may be imposed. Thus in these jurisdictions, a bail-decision-maker may impose only such conditions as he thinks are necessary to ensure that a defendant –

(a) appears in accordance with his bail;

(b) does not commit an offence while on bail;

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36 For example, a case where a defendant is not to be released unless his photograph is displayed in the offices of passport issuing authorities or if he is released on condition that he live and work in a specified place. It should be noted that in the Strus case (see paragraph 6.45 above) the condition was simply that the defendant agree to the arrangements concerning passport issuing authorities.

37 Such as that conferred by ss.50H and 50K of the *Offenders Probation and Parole Act 1963*.

38 *Bail Act 1977* (Vic), s.5(2); *Bail Act 1976* (UK), s.3(6).

(c) does not interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(d) does not endanger the safety or welfare of members of the public;[39]

(e) makes himself available for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence.[40]

6.51 In any case, it might be desirable to provide that a bail-decision-maker should not impose any special condition unless he is satisfied that it is reasonable to expect the defendant to be able to comply with it.

6.52 It might also be argued that legislation might direct a bail-decision-maker to consider conditions in a certain order, to ensure that he does not impose a more onerous condition when a less onerous condition would suffice. This matter is considered later in this paper.[41]

Enforcement of conditions

6.53 The enforcement of pre-release conditions does not present any difficulties. If the defendant is unable to meet the condition, he is not released from custody. Post-release conditions however, form a separate category for the purpose of enforcement. In this situation, the defendant has already gained his freedom, but he might be expected to comply with conditions such as, for example, that he report daily to the police, live and work where directed, and not make contact with a certain person.

6.54 There are no statutory provisions referring directly to the question of enforcement of post-release conditions. The absence of such provision is possibly not surprising, because, as pointed out earlier,[42] the legal authority to impose such conditions is doubtful. The Commission has been informed that in practice when these special conditions are imposed, they are written on the recognizance form which is signed by the defendant, but as far as the Commission is aware, there has been no case where the recognizance has been forfeited on any ground other than the defendant's failure to appear.

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39 This provision appears only in the Victorian legislation.

40 This provision appears only in United Kingdom legislation and might be regarded as falling outside the proper purposes and function of bail.

41 See paragraph 7.15 below.

42 See paragraph 6.43 above.

6.55 Indirectly, however, a post-release condition might be enforced by revoking bail and issuing a warrant for the defendant's arrest. Existing law permits this course by a magistrate "if satisfied that it is in the interests of justice so to do",[43] and similar powers are vested in Supreme and District Court Judges in relation to defendants released on bail by them.

6.56 It might be argued that provision should be made for more direct enforcement of post-release conditions. One possibility would be to give a police officer express power without warrant to arrest a defendant in circumstances where he believes on reasonable grounds that the conditions of his bail have been or are about to be broken, whether by him or by any other person.[44] Similar provisions appear in English and Victorian legislation[45] and follow logically if power were given to the police as suggested above,[46] to arrest a defendant who is believed to be about to abscond.

6.57 There is also the possibility of imposing further sanctions for a breach of condition in addition to the termination of the defendant's bail. For example, provision could be made for his recognizance, if any, to be forfeited, or for an offence to be committed if the defendant is in breach of the condition without reasonable excuse. However, difficulties may arise if such a course, particularly that involving forfeiture of recognizances, were adopted. In the first place, and possibly to a greater extent in the future,[47] the defendant might not have been required to enter into any recognizance. Secondly, forfeiture of the recognizance might be quite disproportionate to the seriousness of the breach of condition. For example, if it were discovered that a defendant did not live where directed, but he has nevertheless appeared for his trial, forfeiture or the recognizance might be an excessive penalty.

6.58 Creation of an offence for a breach of bail conditions might provide an additional deterrent to a defendant; it might provide a useful record for future reference if necessary as to the defendant's reliability when on bail, and the penalty could be more flexible than forfeiture of recognizance. However, it shares a further difficulty with a forfeiture of recognizance procedure in that it clearly involves additional administrative burdens. Ideally the hearing of a charge arising out of a breach of bail conditions, or a hearing as to whether a forfeiture of

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43 *Justices Act 1902*, s.94A and see paragraph 6.21 above where it is suggested that the exercise of this power could be given to a justice.

44 For example, if the condition was that the defendant should continue working for X but X terminates his employment.

45 *Bail Act 1976* (UK),s.7; *Bail Act 1977* (Vic), s.24.

46 See paragraph 6.21 above.

47 See paragraph 6.17 above.

recognizance should be ordered, should take place at the time of the defendant's trial. However, this might prejudice the defendant's trial and he may wish to have the matter cleared up much earlier. This might involve a separate trial, possibly in a court other than the one where he will ultimately appear for his trial on the offence charged. If the defendant faces arrest and possible termination of his bail if he breaks a condition thereof, it is questionable whether additional sanctions involving further administrative burdens are desirable.

SUMMARY OF ISSUES

(1) Should the defendant's personal recognizance continue to be a condition for bail, or should it be replaced by the creation of an offence of absconding?

(paragraphs 6.10 to 6.16)

(2) If personal recognizances were to be retained, should there be any guidance for bail-decision-makers as to the amount which ought to be fixed?

(paragraphs 6.5 to 6.9)

(3) If a defendant is charged with several offences which are to be dealt with together by the court, should a single recognizance suffice? If absconding were made an offence, should a single offence suffice?

(paragraphs 6.4 and 6.18)

(4) Should the existing power for defendants to be released "at large" be extended and bail-decision-makers encouraged to make greater use of this form of release?

(paragraphs 6.3 and 6.17)

(5) Should the police be given power to arrest without warrant a defendant whom they have reason to suspect is on bail and is about to abscond?

(paragraph 6.21)

(6) What should be the procedure if a defendant deposits cash and fails to appear?

(paragraphs 6.25 to 6.27 and 6.38 to 6.39)

(7) If personal recognizances were to be retained, in what way could the forfeiture procedure be simplified?

(paragraphs 6.22 to 6.24, 6.28 to 6.32 and 6.38)

(8) Should there be express statutory provision allowing a defendant to be relieved from liability for failing to appear in answer to his bail and, if so, who should be authorised to grant such relief and in what circumstances?

(paragraphs 6.33 to 6.37 and 6.40 to 6.41)

(9) Should bail-decision-makers be given express power to impose other conditions and if so should there be any limits to this power?

(paragraphs 6.42 to 6.52)

(10) Should there be legislative guidelines as to the order in which conditions should be considered?

(paragraphs 6.17 and 6.51 to 6.52 and see also paragraphs 7.15 and 7.24 to 7.25 below)

(11) How should special conditions be enforced?

(paragraphs 6.53 to 6.58).

CHAPTER 7 - SURETIES AND OTHER MEANS OF SUPERVISION OF A DEFENDANT RELEASED ON BAIL

Introduction

7.1 Sureties have played an integral part in bail since its inception. The concept is believed to date as far back as Anglo-Saxon times, one theory being that it arose out of the law relating to hostages.[1] There was, however, a distinction between release of a defendant on bail with a surety and "mainprise".[2] A defendant granted mainprise could be released from custody if a person, known as a "mainpernor", provided security by promising to pay a fixed sum of money if the defendant failed to appear in court as required. On the other hand, a defendant released on bail, was given into custody of his surety. The surety, like the mainpernor, was liable on a promise to pay a fixed sum of money if his charge failed to appear as required, but he was also liable to punishment.[3] To avoid punishment a surety was expected to exercise his power to have the defendant taken back into custody.[4]

7.2 The role of a modern surety in Western Australia is, in theory, similar to the role of a surety in early English law, the only difference in law being that he is no longer liable to any punishment if the defendant fails to appear. In practice, however, he could be more accurately described as a modern mainpernor since there is little emphasis now placed on his traditional supervisory and custodial role.[5]

Statutory provisions relating to sureties

7.3 Statutory provisions referring to the requirement of sureties as a condition of bail[6] normally confer a discretion to grant bail "with or without sureties".[7] However, there are two

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1 Roulston, 'The Quest for Balance in Bail: The New South Wales Experience', published in *Australian Criminal Justice System* (edited by Chappel and Wilson, 1972) at 468.

2 Mainprise is defined as a writ directed to the sheriff, commanding him to take sureties for a prisoner's appearance, usually called mainpernors, and to set him at large: Jowitt, *Dictionary of English Law* (2nd ed. 1977).

3 Originally the surety was liable on a "body for body" basis to the same penalties as were faced by the defendant. However, after the thirteenth century, he became liable only to a fine: see Holdsworth, *A History of English Law*, Vol. IV at 526.

4 Ibid.

5 See paragraph 7.8 below.

6 See Appendix III.

7 This applies mainly to the provisions in the *Justices Act*. With the exception of s.580 which applies also to justices' bail, the *Criminal Code* has no express provision relating to sureties. Indirectly however,

overlapping bail provisions in which the requirement for sureties are mandatory. They are s.116 of the *Justices Act 1902* and s.580 of the *Criminal Code*. Section 116 gives justices, or a magistrate, power to grant bail for crimes or certain serious misdemeanours listed in the sixth schedule to that Act,[8] but only "with such surety or sureties as in the opinion of the Justices will be sufficient to ensure his [the defendant's] appearance at the time and place when and where he is to be tried". Section 580 of the Code also applies to justices and provides that where the Attorney General or an officer appointed by the Governor exercises a power to present an indictment against a defendant without a preliminary hearing, the defendant may be arrested, brought before a justice, and may only be released on bail "with sufficient sureties to attend to be tried on the indictment".

7.4 The mandatory requirement for sureties in s.116 of the *Justices Act* creates difficulties which are considered below.[9] Before examining the problems associated with a mandatory provision for sureties, it may be appropriate to consider whether there is a need for sureties at all, or, if there is such a need, whether their existing role or function needs revision.

The changed role of a surety

7.5 Although sureties may not be required by law, it is common practice, even for a summary offence, for a defendant to be required to produce an acceptable surety as a condition for his release on bail.

7.6 The development of bail, involving the release of a defendant into the custody of a surety in early English law, can be readily understood. Society was structured differently from the society of today. The master-servant relationship was frequently a lasting and more personal relationship and the servant was possibly more dependent on his master. The community was closer-knit; families stayed together and there was little opportunity for travel. There was no properly organised police force to keep a check on a defendant and to re-apprehend him if necessary.

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s.139(1) of the Code may provide some guidelines as to when a surety ought not to be required: see paragraph 7.49 below.

8 Abduction of girl under sixteen, assault punishable under s.316 of the *Criminal Code*, attempt to commit a crime, attempt to obtain money by false pretences, concealing birth of child by secret burying or otherwise, indecent assault, offences against morality (Chapter XXII of *Criminal Code*), perjury and subornation of perjury, riot.

9 See paragraphs 7.38 to 7.46 below.

7.7 Circumstances have changed. For a variety of reasons employers may not have the same interest in the release of their employees on bail, and a defendant may have difficulty in persuading someone other than a close relative or a close friend to act as surety. Such persons may agree to act as surety, not because they feel that they can supervise or control the defendant's activities, but because they feel pity for him or some moral obligation towards him. These circumstances, together with a more open community and greater opportunity for travel, may suggest that it is unrealistic now to consider a defendant released on bail as being released into the "charge" of his surety. It may also be said that, with the development of an organised police force, it is no longer necessary to rely on a surety system to provide this supervision.

7.8 As a result of these changes, there appears to be less emphasis in practice on the custodial or supervisory role of a surety, leaving the financial undertaking as the only legal obligation he incurs.[10] For example, the recognizance form signed by the surety refers only to his financial obligation to pay if the defendant fails to perform the condition in his bail to appear.[11] The bail notice designed for the information of the defendant and his surety is also confined to this aspect.[12] No reference is made in any form or notice as to the surety having any custodial or supervisory role, nor as to his having any obligation to take steps to ensure that the defendant appears as required by his bail. There is no reference in the notice to sureties as to their power to arrest the defendant.[13] In effect, a modern surety is a financial guarantor of appearance. He simply provides security by entering into a bond to pay money to the Crown if the defendant fails to perform the condition in his bail to appear.

Should sureties be abolished?

7.9 It may be argued that, notwithstanding the changed role of a modern surety, he still performs a useful function and ought to be retained for the following reasons –

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10 A remnant of a surety's former role however remains in his power to arrest: see paragraphs 7.73 to 7.78 below.

11 *Police Act 1892*, 2nd schedule; *Justices Act 1902*, 4th schedule, form No. 19.

12 *Justices Act 1902*, 4th schedule, form No.23. This notice is not used, but the notice in Appendix VIII to this paper which is in practice used by justices, is to the same effect.

13 *Justices Act 1902*, s.94.

(a) The fact that a close friend or relative stands to lose a considerable sum of money if a defendant fails to appear imposes a moral obligation on the defendant to keep his promise to appear.

(b) In some circumstances a surety may be able to take active steps to supervise a defendant on bail and to see that he appears in court as and when required.

(c) The fact that a person is prepared to act as a surety may be regarded as a good reference as to the defendant's reliability.

(d) A surety may have knowledge of the defendant's reliability and of his intentions. This may place him in a better position than the police to anticipate the defendant's movements. If he shows any sign that he intends to abscond, a surety may apprehend the defendant, with or without police assistance,[14] and have bail revoked.[15]

(e) If a defendant does abscond, a surety may be able to help the police to locate him.

(f) The expense of a defendant's recapture if he absconds ought not to fall on the community. The forfeiture of a surety's recognizance is usually sufficient to meet this cost.

(g) A surety may be able to assist a defendant who has difficulty in understanding the criminal justice system.

(h) In the case of police bail, a surety may be able to take a defendant home if he is drunk, or injured, or otherwise incapacitated.

7.10 This is not to say that a surety ought to be required on every occasion when one or more of these considerations is relevant. It would follow that the ability of a person to perform some of these functions ought not to be the sole attribute sought in a surety. It is difficult to reach any firm conclusion as to why sureties are in fact required in any particular case. It

14 Ibid.
15 Ibid., s.94A.

appears to the Commission that the factors which may most influence a bail-decision-maker are –

(a) the possibility of a defendant responding to the moral obligation imposed by the surety's undertaking;

(b) the knowledge that the defendant will be released from custody only if someone, probably of some standing in the community, is prepared to stake what may be a considerable sum of money on the likelihood of the defendant's appearance; and

(c) the expectation that that person will take what steps he can to avoid having to pay that sum to the Crown.

7.11 On the other hand the following criticisms of the use of the surety system in these circumstances may be made -

(a) It may place an unfair moral obligation on a friend or relative of the defendant to become a surety for him.

(b) It may impose a considerable financial loss on a surety which may often arise in circumstances where there is little he could have done to avoid it.

(c) It may indirectly impose an obligation on a surety to supervise, defendant who is released from custody to ensure that he appears as required in answer to his bail. This would be a task which might be performed more satisfactorily by the police.

(d) A person may be accepted as a surety, not because he is able to meet his liability, or supervise the defendant, but because this may be the only way, or the simplest way, of securing a defendant's release on bail.

(e) It imposes a double obstacle to a defendant's release on bail. First he has to find someone who will act as surety, secondly that person has to be accepted as a surety.

(f) It is open to abuse by a bail-decision-maker in that it may prove an indirect means of keeping a defendant in custody as an alternative to a direct denial of bail. Instead of a bail-decision-maker making a difficult decision as to the likelihood of a defendant appearing in answer to his bail, the decision is left to a surety.

(g) It is open to abuse by a defendant who indemnifies his surety.

(h) Personal freedom is a value enjoyed by the whole community, and it may be more equitable if the community as a whole, rather than an individual acting as a surety, paid the cost and took the responsibility of preserving this freedom.

7.12 A requirement for a surety and his acceptance on the basis of the moral obligation which is thereby imposed on the defendant might give rise to problems in some cases. A good example is a widowed or separated mother who agrees to act as surety for her son. It is in this type of case that the harm from a defendant's failure to appear is the most severe. Not only is the defendant's failure to appear at his trial against public interest, but the relationship between the defendant and his mother may be prejudiced, his chances of rehabilitation in the section of the community in which he is accustomed to living may be reduced and the financial consequences to the mother may be disastrous. The situation may force her to seek relief from the Attorney General. The defendant, sympathetic for his mother's plight, may be tempted to commit further offences in an endeavour to repay her. In either case the knowledge that financial relief might be available for the surety may detract from the moral obligation felt by a defendant.

7.13 There have been several cases in Western Australia in the last two years where persons, responding to feelings of sympathy or moral obligation, have agreed to act as surety and later, when the defendant has absconded, have sought relief either from the courts or from the Attorney General.[16] In one case a separated mother of six children agreed to act as surety

[16] See paragraphs 6.33 to 6.37 and 6.40 to 6.41 above where the relief procedure is described more fully.

in the sum of $6,500 for a man that she had known for four months and for whom she felt sympathy. Her only income was a supporting mother's pension and a half share of the house in which she was living. There have been two cases involving sums of $2,000 and $1,500 where mothers with little income or assets, apart from an interest in their houses, have agreed to act as sureties for sons who have absconded. In another case a married couple agreed to act as surety at the request of a relative who worked with the defendant and because one of the couple's parents knew the defendant's parents. The defendant absconded and they were ordered to pay $800. The mother who agreed to pay $2,000 had the amount reduced to $1,000. The case for the other mother is still under consideration. In the other cases, apart from being given time to pay, relief was denied.

7.14 The requirement of a surety to provide a reference for a defendant, or to supervise him and see that he appears for his trial, may also be criticised. The New South Wales Bail Review Committee in its report[17] said:

> "This traditional [supervisory] role of the surety has little practical application today. It was feasible two hundred years ago, when the mobility of the work-force was very limited, when there was little travel across state and international boundaries, and when employers, family, and other community members could reasonably be expected to exercise some practical supervision over a defendant for whom they acted as surety.
>
> However, these conditions no longer exist, and the Committee believes that it would be futile to attempt to reintroduce effective supervision as an element of the surety system in New South Wales. Most people are prepared to act as surety for a defendant not because they can control his conduct, but because they wish to help him by enabling him to remain at liberty pending trial. They often have no idea that they are undertaking a responsibility, and introducing procedures to inform them of this responsibility would be pointless when they rarely can perform what is expected of them.
>
> Given the futility of expecting a surety to control the defendant's conduct, the system has operated in recent years primarily as a reference service. Courts are prepared to release a defendant provided he can supply an acceptable person to vouch for his

17 *Report of The Bail Review Committee* (1976) at 15.

reappearance to the tune of whatever sum the court requires. However, even in this more limited role, the surety system is ineffective.

First, there may be little genuine inquiry into whether or not the surety is of good standing himself, and therefore a proper person to act as a referee. Sureties are required to satisfy Police or the court (usually the court clerk) of their acceptability, but inquiries are usually restricted to their financial status. Indemnification of a surety by a defendant is a common law misdemeanour, but in practice it is impossible to detect and undoubtedly often occurs.

Second, studies carried out by the Committee indicate that the sanction of forfeiture which is expected to ensure the genuineness of the surety's good opinion of the defendant is of dubious effectiveness".

7.15 The solution of the Bail Review Committee, based on the Australian Law Reform Commission report relating to bail granted by the Commonwealth Police,[18] was to provide six options for granting bail to a defendant. These were to range from the least to the most onerous for the defendant. They are summarised as follows –

(a) unconditional release;
(b) release on the defendant's promise to perform non-financial conditions;
(c) release on a written character reference from a third person;
(d) release on the defendant's agreement to pay a specified sum of money if he fails to appear;
(e) release as in (d) but with security;
(f) release on payment of cash by the defendant.

The Committee did not advocate sureties in the role of guarantors come only as a requirement for bail, but made provision in (d), (e) and (f) for the defendant to be released if another person, acceptable to the approving officer, complied with the conditions.

7.16 Condition (c) was intended to retain:

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18 Criminal Investigation (1975) Report No.2 Interim at 85-87. These proposals have been incorporated into the Criminal Investigation Bill 1977.

> "...the notion of the value of the surety being his good opinion of the accused; the good opinion, that is, of a person who appears to the bail-decision-maker to be trustworthy."

The referee would incur criminal liability if he made a false statement, but he would suffer no loss if the defendant failed to appear.

7.17 Abolition of a requirement for sureties as a condition for bail has also been recommended in South Australia.[19]

7.18 The Commission appreciates the weight of these criticisms of the surety system for release on bail in modern conditions. One of the biggest problems it sees is that a bail-decision-maker may tend to grant bail in nearly every case, but endeavour to make it difficult for a defendant charged with more serious offences to take advantage of it by imposing correspondingly more onerous requirements for a surety. These requirements may be imposed without any real consideration of the role which might be expected of a surety in the circumstances, or of the defendant's ability to obtain one. The result may be that some defendants who are professional criminals may be able to arrange a surety even for very substantial sums through indemnification agreements, while others, possibly more deserving of release on bail, remain in custody.

7.19 The Commission is not convinced that the solution is to abolish sureties. Although designed to facilitate the release of a defendant on bail, the solution recommended by the New South Wales Bail Review Committee and the Australian Law Reform Commission[20] may have the opposite effect in some cases. It may be argued that sureties can perform a useful service in securing the release of a defendant on bail, and in those cases the removal of sureties as a requirement for bail may mean the difference between bail and no bail for the defendants concerned.

7.20 The criticism of the surety system might be not that sureties are unnecessary and undesirable in every case, but that, in practice, they are required without proper consideration

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19 Criminal Law and Penal Methods Reform Committee of South Australia, *Court Procedure and Evidence* (1975) 3rd Report at 55.

20 See paragraph 7.15 above.

being given to the role they are expected to play, that they are required on too many occasions and that the wrong persons are being accepted as sureties. If so, the concept of sureties could be retained, but their modern role could be reconsidered and other procedures could be implemented designed to reduce the number of occasions when it is considered to be necessary to require a surety.

A reconsideration of a surety's role

7.21 Many of the problems and the criticisms of the surety system might be avoided if greater emphasis were placed on a surety's supervisory role. In effect this would mean a return to a surety's traditional role in early English conditions. The New South Wales Bail Review Committee concluded that these conditions no longer exist in New South Wales. However, this might not necessarily be the case in Western Australia. There might be cases where effective supervision might be a real possibility. For example, an employer might have considerable influence and opportunity for supervision over an apprentice employee. A member of the armed forces, a seaman in a ship and an employee on an isolated sheep station might all, in a physical sense, be under the direct control and influence of their employers. In these circumstances, if a bail-decision-maker knew that an employer would be prepared to act as a surety, this might be the most suitable form of release.

7.22 In cases where effective supervision were possible, this could be stressed in the forms he and the defendant were required to complete, and in any notices which they were to be given. It could become part of a surety's express undertaking[21] to take every practicable step to bring the defendant into court as and when required, and his power to re-apprehend the defendant[22] could be brought clearly to the attention both of the surety and the defendant.

7.23 It need not necessarily follow that a surety would never be required in any other case. There may be cases, for example, where the bail-decision-maker was satisfied that the existing role of a surety as a guarantor or as a special referee would be desirable. Although provision of a reference is incorporated into the recommendations of the New South Wales Bail Review Committee and the Australian Law Reform Commission as a condition for bail, there may be a vast difference between the content of a reference from someone who has nothing to lose unless he makes a false statement, and a reference from someone who is

21 See paragraphs 7.67 to 7.72 below.

22 *Justices Act 1902*, s.94.

prepared to stake a sum of money on the accuracy of his assessment of the defendant's reliability.

7.24 The Commission is not suggesting that the status quo should be maintained in respect of requirements for sureties. It sees merit in the Australian Law Reform Commission's suggestion that there could be a number of conditions for release on bail beginning with the least onerous and ending with the most onerous for a defendant.[23] If such a measure were adopted, a requirement for sureties could be added[24] as one of the more onerous conditions, if not the most onerous condition, for release on bail.

7.25 In any case where a bail-decision-maker considered that it was desirable to impose a requirement for a surety, he could be required to state reasons why he thought this step was necessary and what role he expected the surety to play. This might involve a brief preliminary inquiry as to whether the defendant knows a person who would be suitable to act as a surety. This in itself may be desirable to prevent any tendency for sureties to be required as a matter of course and without any real consideration of their availability or effectiveness in any particular case. It would also give to the persons responsible for approving sureties an indication of the attributes they should be looking for. If the result were a reduction in the number of occasions when a surety were required, but a more prudent assessment of the value of a surety in each individual case, this would be a desirable achievement.

Supplementary or alternative procedures for supervising defendants on bail

7.26 The introduction of other procedures may serve either to supplement the existing sureties system or, if necessary, to replace the need to rely on sureties to supervise defendants released on bail. The following suggestions may be considered -

(a) improved remand facilities;
(b) bail hostels;
(c) specialised supervision;
(d) professional bondsmen.

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23 See paragraph 7.15 above.

24 There is no condition *requiring* sureties in the Australian Law Reform Commission's proposals as reflected in the Criminal Investigation Bill 1977.

Each merits separate consideration.

(a) *Improved remand facilities*

7.27 Existing conditions for a defendant remanded in custody, and possible improvements to these, are discussed in chapter 4.[25] In general, conditions are very similar in Western Australia to those applicable to a convicted person serving a prison sentence.[26] The main object of introducing improved remand facilities would be to see that a defendant is not subjected unnecessarily to prison conditions. However, they could also serve to reduce the need for sureties. For example, present practice is that if a defendant is considered not to be sufficiently reliable to be released on bail on his own recognizance, a surety might be required. However, if the defendant could be sent to a remand centre with improved facilities where he was given the opportunity to continue his employment and, perhaps, in suitable cases, to visit his family at weekends, this might be a more satisfactory arrangement, both for the defendant and the community.

(b) *Bail hostels*

7.28 The introduction of bail hostels might relate indirectly to the need for sureties as they might provide an alternative, and in many cases a more realistic procedure, for release of persons who need care and assistance and some supervision.

7.29 The aim of bail hostels and their operation were considered earlier in this working paper.[27] For the reasons there outlined, however, the Commission is tentatively of the view that in Western Australia there is no need for bail hostels as these function in England.

(c) *Specialised supervision*

7.30 Another procedure which might reduce the need for a defendant to produce a surety would be to grant him bail on conditions supervised by a specialised voluntary organisation or

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25 See paragraphs 4.11 to 4.13 and 4.26 to 4.29 above.

26 The main difference between conditions applicable in the remand yard and conditions applicable to a convicted prisoner, is that the latter are required to work in the workshops each day. Defendants on remand are able to work if they want to, in which case they work with convicted prisoners in the workshops. There is no separation in the remand yard between so called "hardened criminals" on remand and young first offenders.

27 See paragraphs 4.19 to 4.25 above.

the probation and parole service. This procedure has been adopted in the United States of America. Under the provisions of the *Federal Bail Reform Act 1966* (USA), instead of the defendant being released on his own recognizance, he may be released on a number of conditions ranging from the least to the most stringent for the defendant. The first condition is that the defendant be placed "in the custody of a designated person or organization agreeing to supervise him".[28]

7.31 Prior to 1966, the Act specified that the defendant could be placed under supervision of a probation officer. The removal of express reference to the probation service was to avoid the possibility of any infringement of the constitutional right of a defendant which might occur if an officer normally involved at the post conviction stage were to make inquiries of the defendant. There was also concern as to the additional duties this might impose. Consequently, the Act now permits the defendant to be released into the custody of any person or organisation designated by the court who or which is willing to supervise him. However in the Western District of Texas at least, a programme of bond supervision has been continued using the United States probation officers with outstanding results.[29]

7.32 In Western Australia the services of probation officers might be considered to be suitable for this purpose. Their present functions, powers and duties are prescribed in the *Offenders Probation and Parole Act 1963* and by regulations made in that behalf by the Judges of the Supreme Court.[30] They are to supervise convicted persons as ordered by the court[31] and submit to the court such information as may be required relating to any convicted person.[32]

7.33 Although a condition is now imposed in many cases for a defendant to report periodically to the police, it may be argued that supervision by probation officers would be a more satisfactory alternative. The police are able to exercise some supervision of the defendant to see that he does not leave the district without their knowledge, but it involves an unwelcome administrative burden. A condition requiring a defendant to report to a probation officer might enable the latter to establish a more personal contact. He might then be able to

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28 United States Code, Ch.207 of Title 18, s.3146(a) (1).

29 See Paul F. Cromwell Jr. and Omar G. Rios *Bond Supervision: Implementing the Federal Bail Reform Act* - Federal Probation December 1974 at 30. It would appear that the role of a designated person would be very similar to that of sureties in early English law: see paragraph 7.1 above.

30 s.6(6).

31 s.9.

32 s.8.

help the defendant to keep his occupation and generally he might be able to help solve any problems faced by the defendant during the period he is on bail. He could be given power to apply to have bail revoked by the court or, if necessary in an emergency, to enlist the assistance of the police. This would be useful if the defendant became unco-operative, failed to report, or if the officer suspected that the defendant intended to abscond, or commit further offences.

7.34 Specialised supervision would not be appropriate for every defendant released on bail. It may, for example, be suitable only in cases where the duration of the defendant's release on bail is likely to be lengthy, so that there is an opportunity for a personal relationship to be established. Furthermore, it would be administratively impracticable for every defendant to be supervised in this manner. Another practical difficulty would be to make suitable arrangements for country areas. At present full time probation services are available only in Perth, Albany, Kalgoorlie and Geraldton. Offices will shortly be opened in Bunbury and Port Hedland. Other country areas are served by a network of honorary probation officers. Although the service is understood to be available in all districts, it may be unreasonable to impose additional responsibilities on the persons involved.

(d) *Professional bondsmen*

7.35 The professional bondsman has developed in America for two reasons. First, because it is permissible there for a surety to be indemnified. Secondly, because bail-decision-makers in America normally require cash to be deposited as a condition for release on bail.[33] In return for a cash premium for his services, and usually on receiving some collateral security as well, a professional bondsman might agree to provide the necessary cash. In the event of non-appearance by the defendant, the bond is forfeited after a grace period of a number of days during which the bondsman may produce the defendant in court. Apart from providing an alternative to a private surety, it has been said[34] that the professional bondsman provides an additional advantage, namely, he can be added to the agencies seeking to enforce court appearance. However, although the system is still widely used in America it seems to have serious drawbacks:[35]

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33 See paragraph 5.88 above.

34 *Programs in Criminal Justice Reforms: Vera Institute of Justice Ten-Year Report 1961-1971*, (1972) at 21.

35 Ibid., at 20.

> "Abuses tended to creep into the system, such as collusive ties some bondsmen developed with the police, lawyers, court officials, and also with organised crime. But more important, the central determinant in whether an accused person would go free on bail pending trial became the decision of a business man who was interested not in the even-handed application of justice, but in profit".

7.36 In Western Australia an agreement by a defendant to indemnify another is illegal and void as against public policy and it may involve the commission of a criminal offence.[36] An exception would be required to this rule if professional bail bondsmen were to be introduced in this State.

7.37 It could be argued that, in Western Australia, professional bondsmen would be of some benefit to any defendant who may be unable to obtain his release on bail because he cannot obtain a private surety. However, having considered the United States' experience, the Commission suggests that there are no sound reasons in principle for removing the present prohibition on indemnification of sureties. The essential features of a surety system outlined earlier in this chapter[37] would be absent in a professional bondsman situation. The bondsman would not be at risk in most cases and, consequently, the possibility of effective supervision would be doubtful. The defendant would feel no sense of moral obligation to appear, and the bondsman would not usually be in a position to give a satisfactory reference.

Should sureties be mandatory for some offences?

7.38 The Commission considers that sureties may serve a useful purpose, but the question arises whether they should be essential to release on bail for certain offences. In Western Australia, s.116 of the *Justices Act 1902* creates such a requirement for bail granted to any person charged with a crime or one of a number of serious misdemeanours detailed in the sixth schedule to that Act.[38] Section 580 of the *Criminal Code* to a certain extent overlaps this provision by requiring a surety if justices release a defendant on bail when an ex officio

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36 See paragraphs 7.82 to 7.87 below.
37 See paragraphs 7.9 to 7.10 above.
38 See paragraph 7.3 n.8 above.

indictment (that is, an indictment leading to a trial without a preliminary hearing) has been presented against him.[39]

7.39 There are difficulties and anomalies in the application of s.116. For example, it applies whenever a defendant is "charged before justices with any crime [not being a capital crime or the crime of murder], or with any of the misdemeanours stated in the sixth schedule", but the word "charged" is ambiguous. Some magistrates take the view that a defendant can only be formally charged with a crime or misdemeanour at the committal stage of the proceedings, this being the first opportunity for the defendant to defend himself. Other magistrates take the view that the defendant is "charged" when he first appears before the court.[40]

7.40 The consequence of the latter view is that a surety is, in effect, mandatory in respect of every decision to grant bail in respect of a crime or sixth schedule misdemeanour. This view is difficult to reconcile with ss.64 and 82 of the *Justices Act*. These provisions in the general part of the Act give power in certain situations to grant bail "with or without sureties" in respect of any offence, presumably including indictable offences.[41] This gives rise to an apparent conflict in the Act as to the legal requirements for a surety in respect of bail for a person charged with a crime or sixth schedule misdemeanour.

7.41 The difficulty becomes more acute when the defendant is charged with a crime, but has a right to elect summary trial.[42] In this situation, before one reaches the difficulty of determining when the defendant is "charged" with the offence, there may be a doubt as to whether s.116 of the *Justices Act*, would apply at all to such a charge in these circumstances.

7.42 One solution is for the defendant to apply to the Supreme Court for bail. However, the Commission suggests that mandatory requirements for a surety ought to be abolished, not only to remove the technical difficulties caused by s.116, but also because a mandatory requirement for sureties appears to be wrong in principle. Those who would support retention of the mandatory surety requirements of s.116 may argue that it is reasonable to suppose that a defendant charged with a crime or one of the more serious misdemeanours listed in the sixth

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39 This procedure is rare in Western Australia. There was, however, one case in 1976 arising out of a shooting incident at a remote cattle station where the Crown proceeded by way of ex officio indictment.

40 See generally L.L. Davies: *Bail at Petty Sessions*; The Justices of the Peace Western Australia Vol. 19 No. 11 at 212.

41 Admittedly s.64 excludes power in cases where the offence is "serious", but the interpretation of the word serious need not necessarily include all indictable offences.

42 For example, persons found armed with intent to commit a crime: *Criminal Code*, ss.407-407A.

schedule would be more likely to abscond from his bail, and that a surety would reduce the likelihood of this occurrence.

7.43 It would be difficult to substantiate such a view. No doubt the seriousness of the offence is a relevant factor contributing to the likelihood or otherwise of a defendant absconding, but it is only one of many relevant factors and possibly not the most important.[43]

7.44 The criticisms of a mandatory requirement for sureties for some offences may be listed as follows –

(a) It over-emphasises the importance of the nature of the offence charged as a relevant criterion;

(b) it may over estimate the effectiveness of a surety;

(c) it may be regarded as an additional penalty for a defendant who has not yet been convicted;

(d) it may place pressure on those persons accepting a surety to accept a person who is not really suitable;

(e) it may be regarded as a backdoor way of allowing bail but making its achievement impossible.

7.45 It was suggested earlier in this chapter,[44] that the present use made of the surety requirement might be open to the criticism that it is used on too many occasions without consideration of the effective role which might be expected of a surety in each particular case. If this criticism were accepted, retention of a mandatory requirement for a surety because of the nature of the offence charged, irrespective of the particular circumstances of each case, would be undesirable.

7.46 Even if the concept of a mandatory requirement for sureties were acceptable, it would remain necessary to determine the offences to which this should apply. The distinction created

43 See paragraphs 5.9 to 5.13 and 5.65 to 5.72 above.
44 See paragraphs 7.20 and 7.25 above.

by s.116 may be unsatisfactory. For example, it seems to be illogical that a person charged with concealing the birth of a dead child, who faces a maximum term of imprisonment of two years,[45] requires a surety before he can be admitted to bail, but a person charged with unlawful wounding, and who faces a maximum of three years imprisonment,[46] does not. There may also be an argument that modern attitudes towards homosexual acts, at least when performed by consenting adults in private, warrant removal of this as an offence for which a surety is mandatory.[47]

Possible improvements to the law and practice relating to sureties

7.47 It is necessary to examine the existing practice relating to sureties to see whether any improvements are desirable if they are to be retained. The Commission has considered possible reform measures as follows-

(a) instruction as to occasions when sureties ought to be required;
(b) guidelines as to the qualifications of a surety;
(c) special provision as to who may approve sureties;
(d) clarification of a surety's obligations and liabilities;
(e) clarification of the rights of a surety;
(f) the effect of death or incapacity of a surety;
(g) clarification of the liability of a person who agrees to indemnify a surety.

(a) *Instruction as to occasions when sureties ought to be required*

7.48 In Western Australia there is little or no official instruction given to bail-decision-makers as to the proper role of a surety nor as to the occasions when one is needed. The police manua1[48] contains a number of guidelines for the police concerning bail, but it is silent on the matter of sureties. Justices have been given some guidance as to their powers to grant bail and the procedure,[49] but, like police instructions, they do not refer specifically to a surety's role or the need for sureties. As far as the Commission is aware, there are no practice directions on

45 *Criminal Code*, s.291.
46 Ibid., s.301.
47 Ibid., s.181.
48 *Western Australian Police Manual 1960*.
49 See Virtue (The Hon. J.), *A Manual for Justices*, (4th ed. 1974) and *Western Australia Handbook for Justices; A Collection of Certain Lectures Delivered to Justices of the Peace*, edited by Robert H. Burton, S.M.

the role of sureties or the need for sureties from the Judges of the Supreme Court, and little assistance on this aspect can be derived from decided cases.

7.49 The only legislative guidance (apart from those sections providing a mandatory requirement for sureties) relevant to the question when or when not to require a surety is s.139(1) of the *Criminal Code*. An offence is thereby created if any justice who is:

> "required by law to admit an accused person to bail, wilfully and perversely and without reasonable excuse, and in abuse of his office, requires excessive and unreasonable bail".

The section arguably applies only if bail is granted under ss.64 or 121 of the *Justices Act*, these being the only occasions when bail is "required by law".

Apart from this limitation, the provision is of value as a guide only in so far as it indicates when a justice granting bail ought not to require a surety. Even in this limited area the application of s.139(1) may cause problems. For example, there may be a view amongst some justices and magistrates that it would amount to a breach of this provision if a surety requirement were imposed knowing that the particular defendant was unable to find one.[50]

7.50 The Commission is aware, from interviews with justices and magistrates, of two schools of thought as to the proper occasion to require a surety. There appears to be a similar divergence of view amongst judges. Some take what may be called the "traditional view" that a surety is an integral part of bail, and should be required if possible as a condition in every case. They take the view that bail on a personal undertaking by the defendant ought to be granted only as a last resort after all efforts by the defendant to obtain a surety have failed.

7.51 The other view, which may be more lenient for the defendant, is that a surety ought to be required only where there is some reason to suggest that the defendant, if released on bail, would otherwise abscond, or where sureties are, as at present, required by law.[51] Those adopting this view tend to make greater use of other conditions for release on bail, and impose a requirement for a surety only as a last resort.

7.52 Assistance to bail-decision-makers as to the proper occasion to require a surety may be desirable in the interests both of consistency and in preventing excessive use of surety

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50 See paragraphs 6.47 to 6.52 above for further reference to this problem.

51 *Justices Act 1902*, s.116; *Criminal Code*, s.580 and see paragraph 7.38 above.

requirements. The form of such assistance would depend on the view taken as to the modern role of sureties. However, it might be undesirable to impose any restrictions as to the occasions when a surety might be required, and difficult to provide guidelines in the form of legislation. If a bail-decision-maker were aware of the problems which may arise when a surety requirement was imposed,[52] but nevertheless formed the view that a surety was desirable in a particular case, it might be unwise to impose any restrictions on this discretion. Some guidance might result, however, if conditions relevant to bail were listed in legislation in order of priority and if the bail-decision-maker were required to give reasons for choosing to impose a requirement for a surety.[53]

(b) *Qualifications of a surety*

7.53 Qualifications which would be desirable for a surety also depend on the view of the modern role he is to play and the occasions when he is needed. Consideration could be given to the following factors to be taken into account in determining eligibility.

(i) Ability to supervise the defendant

7.54 A family relationship may in some cases be acceptable, particularly where the surety can maintain a supervisory role. However, it may be more desirable to seek an employer-employee or a master-servant type of relationship.

(ii) Geographic proximity

7.55 It follows from ability to supervise the defendant that, ideally, a surety should reside in a location where he is able to carry out the role expected of him. It may, however, be undesirable to impose any strict requirements as to residence of a surety. For example, a young defendant's father in Perth may be an acceptable surety for his son's appearance in Albany, provided the person accepting the surety is satisfied that he is able effectively to carry out his proposed role from a distance. There may be occasions when a surety ought to be accepted even if he is living elsewhere in Australia.[54] A situation may arise where a

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52 See paragraphs 7.11 to 7.14 above.

53 See paragraphs 7.15 and 7.24 to 7.25 above.

54 This is a problem which relates particularly to granting bail to children, migrants and non-residents in the State. It is considered further in this context in chapter 9.

defendant's employer is prepared to act as surety, but is temporarily resident inter-state. Hopefully there would be few occasions when enforcement would be needed, but if it were, it may be possible to serve process and enforce the judgment as a civil judgment under the provisions of Part IV of the *Service and Execution of Process Act 1901* (Cwth).

(iii) Financial ability to meet his potential liability

7.56 Ideally, a surety should be able to pay the amount set in the recognizance without having to sell essential assets such as his home. The Commission has been informed that, in practice, sureties are accepted by the police only if they own their own house or land. The view could well be taken, however, that if as a result of the defendant absconding from bail the surety either has to sell his house, or obtain relief from liability,[55] then he ought never to have been accepted as a surety.

(iv) Absence of a criminal record

7.57 One view is that a person with a previous conviction ought not to be acceptable as a surety in any circumstances. He may be unreliable, or he may be acting in concert with the defendant, putting up bail while the defendant commits a further offence to repay the surety when he fails to appear for his trial. On the other hand, there is an argument that a surety's criminal history ought not to be taken into account unless it indicates that he may assist the defendant to avoid his trial, or unless there is evidence to show some other unlawful plan between the surety and defendant. A criminal record does not necessarily prevent a surety from bringing a defendant into court, or from paying the recognizance in default.

7.58 The solution may be not to insist on the absence of a criminal record as a requirement for a surety, but rather to take the existence of a criminal record into account as a possible disqualifying factor depending on how serious the offence was, how recently it was committed, and how relevant it is to his character, his relationship with the defendant and the fulfilment of his proposed role as a surety.

The problem might be appreciated more if the roles were reversed and the question were, for example, whether a Western Australian resident would be acceptable as a surety for his son in custody in London. This situation occurred in a recent case of which the Commission is aware. The defendant was unable to obtain a surety in England, and his father in Perth was unacceptable in the English court even if he agreed to travel to London specially for the purpose of obtaining his son's release. Temporary presence of the surety in the jurisdiction was considered to be insufficient.

55 See paragraphs 6.33 to 6.37 and 6.40 to 6.41 above.

(v) General discretion

7.59 Any legislative provision relating to qualifications of a surety should leave a discretion in the person responsible for accepting him as a surety. It would be undesirable to lay down inflexible qualification requirements for a surety, and a person should not necessarily be accepted in every case where he meets any suggested guidelines. However, it might be possible to list classes of persons who ought to be disqualified from becoming a surety. Existing law[56] disqualifies minors,[57] persons who have entered into an agreement to go surety for the defendant in return for an indemnity from him against any loss or liability should the defendant fail to appear and persons who are themselves in custody.

(c) *Approval of sureties*

7.60 In the first half of this century,[58] it was common for a surety to come forward and be accepted in court. The practice was to require the surety to give evidence on oath as to his qualifications by signing an affidavit of justification. In some rural areas, for convenience, sureties are still approved in court, but they are not required to give evidence on oath. Apart from the practice in these areas, the present procedure is for the surety to be accepted by the police or a Clerk of the Court of Petty Sessions. The change is believed to have been for convenience; to avoid delays and disruption if the defendant did not bring a suitable person to act as surety into court. In some cases the bail-decision-maker, when deciding bail, may expressly nominate the police to approve sureties. In other cases, no specific directions may be given, and either the police, or the Clerk of the Court of Petty Sessions, may approve the sureties.

7.61 It is convenient for the police to interview sureties. They have the facilities to check to see that the proposed surety has the requisite qualifications. However, it may be questionable

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56 See Archbold, *Criminal Pleading Evidence and Practice* (37th ed. 1969) at 72 paragraph 206.

57 That is persons under eighteen years.

58 One magistrate who was interviewed by the Commission thought the practice continued at least until the 1940's. A form of this affidavit has been made available to the Commission and is reproduced in Appendix IX. A similar procedure still applies in South Australia where the surety is required to complete an affidavit of justification: *Justices Act 1921* (SA) , s.33 and see also s.9(3) of the *Bail Act 1977* (Vic). It is not clear whether there is power to require the surety to justify on oath in Western Australia. Kennedy Allen, *The Justices Acts (Queensland)* (3rd ed. 1956) at 310 states that justices do have such power, but he cites no authority and except for provisions relating to appeals from the Court of Petty Sessions (viz: ss.187 and 200(3) of the *Justices Act 1902*) none can be found in Western Australian legislation.

whether they are the appropriate body to make the decision whether or not to accept the surety since they have arrested the defendant in the first place. The Commission's attention has been drawn to the fact that sureties have, from time to time, complained to the Clerk of the Court of Petty Sessions that they have been rejected for no apparent reason by the police. In some cases they have been accepted by the clerk. A refusal by the police to accept a surety for bail can delay the release of a defendant, and it may even frustrate a decision to grant bail if the defendant, possibly through ignorance, does not take steps to have the surety requirement removed or have his surety accepted by a justice or some other person authorised to do so.

7.62 One alternative might be for the police to interview proposed sureties and submit a report and recommendation to a magistrate or justice if there is one available, otherwise to the Clerk of the Court of Petty Sessions or, in the case of police bail, to the police officer in charge of the lock-up. The relevant person would then make the decision either to approve, or to reject, the proposed surety, having regard to the interviewing policeman's report and recommendation. It has also been suggested to the Commission that there should be a return to the requirement that a proposed surety complete an affidavit of justification.

7.63 If any of these alternatives were adopted, the resulting procedure might be more time consuming, and it may involve additional administrative work for the police, but it would have several advantages. It would provide a full screening procedure for proposed sureties. The final decision to accept or to reject the surety would, in most cases, be retained on a judicial level, and this may help to impress upon the surety the importance of what he proposes to do and his potential liability. As to the latter point, the Commission understands that the police give sureties a verbal explanation of their obligations and their potential liability. Justices of the Peace approving sureties at the East Perth lock-up, give both the defendant and the surety notices they have prepared setting out particulars of their obligations. There are other forms of notices in the fourth schedule to the *Justices Act* for the information of the defendant and his sureties.[59] However, there is no requirement in the Act that these notices must be given,[60] and the Commission has been informed that they are not generally used.

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59 *Justices Act 1902*, fourth schedule form Nos. 20 and 23.

60 Section 96(2) provides that the notices in the fourth schedule *may* be used for the purposes to which they are respectively applicable adapted where necessary to suit the circumstances.

7.64 Another alternative to acceptance of sureties by the police, would be to delegate this task to a Clerk of the Court of Petty Sessions, with a right of application to a justice or magistrate to challenge his refusal to accept a surety.

7.65 A further possibility might be to leave the decision in the first instance to the police or a Clerk of the Court as at present, but provide that a defendant, who is granted bail, but who is still in custody because he cannot obtain an acceptable surety, should be brought before a justice in every case within twenty-four hours, and thereafter as ordered from time to time by the justice.[61] This would ensure that no defendant remains in custody because he cannot find a surety acceptable to the police or a clerk, and because he does not take the initiative to have the surety accepted by a justice, or have the requirement waived.

7.66 Following acceptance of his surety, the defendant is normally released immediately from custody. There is one administrative complication however, arising out of Prison Regulations. These do not permit the release of a prisoner after 3 pm until 8 am the following day, unless that day happens to be Sunday, Christmas Day or Good Friday, in which case the delay may be greater. The reason is that prison staff involved in the discharge procedure go off duty at 4.30 pm. It would be desirable if these administrative difficulties could be removed, and special facilities incorporated for release of defendants as soon as they have met the conditions imposed for their bail.

(d) *Obligations and liability of a surety*

7.67 A surety's only legal obligation is to satisfy the amount of his liability if the defendant fails for any reason to appear as required by his bail. This liability is strict in every case. The procedure for the forfeiture of the surety's recognizance and of cash deposited if any, and the possibility of his obtaining relief from liability is the same for the surety as it is for the defendant.[62]

7.68 Although a surety may be under the impression that he is required to supervise the defendant and attend court with him when he is required to do so, it is no part of his legal obligation to do either.[63] In practice, he might take reasonable steps to secure the defendant's

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61 See also paragraph 8.9 below.
62 See paragraphs 6.22 to 6.41 above.
63 See paragraphs 7.1 to 7.8 above.

attendance in court in the hope that this might qualify him subsequently for relief from his liability to pay the forfeited recognizance.[64] He may also appear in court each time with the defendant because bail expires each time the defendant appears, and the defendant might otherwise be returned to custody until he finds a surety if his case were adjourned and bail renewed on the same conditions.

7.69 It might be argued that in cases where a surety was required to exercise supervision over a defendant[65] it ought to be part of his legal undertaking to bring the defendant into court and appear himself to explain if necessary why the defendant has failed to appear. This might serve to emphasise the active role expected of the surety in these circumstances. It has been suggested to the Commission that the enforcement procedure could be streamlined if the surety were required to appear with the defendant. If the latter failed to appear, the surety could be required to provide an explanation there and then. If the explanation were accepted, the surety's liability on his recognizance could be reduced or waived, otherwise an order could be made forfeiting his recognizance in full. If both the surety and the defendant did not appear, the consequence for the surety could be immediate entry of judgment for the amount owing and commencement of recovery procedure. If the surety has paid cash into court, and if he and the defendant failed to appear, or if he appeared but could not provide a satisfactory excuse, the court could be given authority to order the immediate payment of the cash into Consolidated Revenue. In any case where the court has acted in the absence of the surety, the surety could be given the right of commencing proceedings within a certain time, say three months, for a hearing to enable his liability to be reduced in whole or in part.

7.70 Additional obligations of this kind might be difficult to enforce. The imposition of a fine might be unreasonable and forfeiture of the recognizance would add nothing to the existing liability of a surety who had undertaken obligations simply to pay if the defendant failed to appear. If liability to forfeiture were linked to whether the surety had taken reasonable steps to secure the defendant's attendance in court, this would amount to a watering down of a surety's existing strict liability. One solution might be to increase the amount of a supervisory surety's recognizance, and proportion it so that part is forfeited if the defendant fails to appear, and the remainder is forfeitable if the surety fails to satisfy the court that he had taken reasonable steps to secure the appearance of the defendant. However, this would introduce further complexity to the forfeiture procedure.

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64 See paragraphs 6.33 to 6.41 and 7.13 above

65 See paragraphs 7.21 to 7.22 above.

7.71 The Commission is tentatively opposed to any increase in a surety's obligations and to the streamlined procedure suggested above[66], for enforcing forfeiture of recognizances or of cash deposited by a surety. If the role of a surety were made more onerous fewer persons might be prepared to act as such, and this might lead to an increase in the number of defendants who were unable to be released on bail. The procedure adopted for enforcing the financial liability of a defendant who fails to appear and for granting him relief[67] ought to apply equally to a surety.

7.72 In cases where a surety is not expected to exercise a supervisory role, it might be inconvenient for a surety to be required to appear, or even to feel under any obligation in practice to do so in order to secure the release of the defendant again if his case is adjourned. Each appearance for a surety might mean loss of time at his employment, and expense travelling to and from court. It might therefore be argued that, unless the police or some other interested party persuades the court to order otherwise, bail should continue on the same conditions from the time it is granted until the trial or appeal is ready to proceed or until the defendant is sentenced, as the case may be. This might require an administrative procedure to be established to keep the surety informed as to when and where the defendant is required to appear. It would also mean that a surety would be entering into an obligation initially for an indefinite duration, but there is a procedure available and another suggested for him to terminate this obligation.[68]

(e) *Rights of a surety*

7.73 Section 94 of the *Justices Act* entitles a surety, with or without the assistance of the police, to apprehend the defendant at any time without having to show cause. The apprehended defendant must be brought before justices or delivered to a prison.[69] The right applies only where a defendant is on bail to appear before justices or to take his trial before the Supreme Court or the District Court. By implication, therefore, it is arguably not

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66 See paragraph 7.69 above.

67 See paragraphs 6.22 to 6.41 above.

68 See paragraphs 7.73 to 7.78 below.

69 There are no provisions specifying when the defendant must be so dealt with. The provisions in the *Criminal Code* dealing with the obligations of a person making an arrest and the penalty for wilful delays only apply where a person is arrested on a charge of any offence: *Criminal Code*, ss.140 and 570.

applicable where a defendant is awaiting sentence for any offence (indictable or summary) by the Supreme Court or District Court and is granted bail with a surety.

7.74 The surety's power to apprehend has been used occasionally in circumstances where a surety suspects that the defendant is about to abscond from bail, and in such circumstances its use is quite proper. The surety may either bring the defendant into custody himself, or enlist the assistance of the police.

7.75 The police are required by s.94 to render assistance to a surety, but they have no power to act themselves until the defendant fails to appear as required in answer to his bail. They may, however, apply to a magistrate and if they can satisfy him that it is in the interests of justice to do so, the magistrate may revoke bail and issue a warrant for the defendant's arrest.[70] The adequacy of the police powers in these circumstances has been discussed earlier in this paper.[71]

7.76 There have been occasions recently in Western Australia where there may have been some confusion as to the powers of the police to apprehend a defendant on instructions from a surety. In two cases[72] where sureties informed the police that they suspected that the defendants had left with an intention to abscond, they are reported to have been told by the police that there was nothing the police could do until the defendants concerned failed to appear in answer to their bail. This may be true in so far as police power extends, unless they obtain a warrant for arrest or an order revoking bail, but they are required to act on instructions from a surety under s.94.

7.77 There have also been occasions in practice where a surety may apprehend a defendant for no reason other than that he may wish to disclaim or discharge himself from further liability. There is no other procedure available for a surety who wishes to disclaim. It may come as a surprise to a defendant to discover that the person who has enabled his release on

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70 Ibid., s.94A. There is also provision in s.217 of the *Justices Act 1902* which enables the police to obtain from any justice a warrant for arrest of a defendant who has entered into a recognizance and appears to be about to abscond. However, this appears to apply only to defendants who are released on bail pending an appeal from a decision of the Court of Petty Sessions.

71 See paragraph 6.21 above.

72 *The West Australian* 7 April 1976 and 11 May 1977. In both cases the defendants did not appear and the sureties (their mothers) faced payment of $2,000 and $1,500 respectively. However, in making the order in the 1976 case, the Judge is reported to have stated that it was an appropriate case for representations to be made to the "Minister for Justice" for relief.

bail may terminate his freedom at any time even though he is complying with the terms of his bail and clearly intends to continue to do so. The procedure may be open to abuse by a surety.

7.78 A more satisfactory solution might be to enable a surety to be discharged if he gives reasonable notice to the defendant and to the police. Reasonable notice would give the defendant time to arrange for a substitute surety or to have the conditions for his bail reviewed. Alternatively, the surety could be given rights to apply to a court for a discharge and a warrant could be issued for the defendant's arrest.[73]

(f) *Death or other incapacity of surety*

7.79 Difficult legal issues may arise if a surety dies, or otherwise becomes unfit to perform his role as surety, for example, if he becomes insane, or is himself imprisoned for some offence. The solution might depend on the nature of the surety's role. If it were purely a financial obligation to pay a fixed sum of money on the occurrence of some future event,[74] then the subsequent legal disability of the surety would be irrelevant and the liability would pass on to his estate in the case of death or his committee in the case of lunacy. It may be regarded as unjust that a surety's recognizance could be forfeited in circumstances where there was nothing he could do to prevent the defendant from absconding. However, special legislation would be required to extinguish the surety's liability.[75] Such legislation would be consistent with any move towards emphasising the positive duties of a surety to supervise the defendant and if necessary to bring him into court. If a surety were incapable of performing this role, by reason of death or legal disability,[76] he could be discharged from further liability.

7.80 On the other hand, if it were provided that the surety's responsibility terminated on his legal disability, physical or mental, this might remove the moral constraint imposed on the defendant, and may amount to an invitation to him to abscond, or ignore other bail conditions imposed. Public policy may require strict financial responsibility, regardless of fairness to the

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73 This is the procedure in the *Bail Act 1977* (Vic), s.23.

74 As appears to be the existing position: see paragraphs 7.1 to 7.8 above for a discussion of the surety's existing role.

75 Section 20 of the *Bail Act 1977* (Vic) is an example. It provides that where a surety dies before bail is forfeited, his estate shall not be liable, but the defendant may be required to find another surety.

76 This would exclude incapacity due to imprisonment of the surety.

surety. In cases of hardship, or in other special circumstances, the court, or the Attorney General,[77] may be able to grant total or partial relief.

7.81 A surety who becomes bankrupt remains liable on his recognizance regardless of the view taken as to the nature of his role. He remains capable of supervising the defendant if this were required and, on the financial side, as the Crown in the right of the State is bound by the provisions of the *Bankruptcy Act 1966* (Cwth),[78] it ranks as an ordinary unsecured creditor.

(g) *Indemnification of sureties*

7.82 An agreement by the defendant to indemnify his surety is illegal in that it is contrary to public policy. In England the parties to the agreement are guilty of the common law offence of conspiracy.[79] In Western Australia, the offence of conspiracy is the subject of Chapter LVIII of the *Criminal Code*. Section 558 creates the offence of conspiracy to commit a crime, s.559 deals with conspiracy to commit any offence which is not a crime and s.560 creates the offence of conspiracy, inter alia, to effect any unlawful purpose.

7.83 The meaning of "unlawful purpose" has yet to be clarified in Western Australia. Section 4 of the *Criminal Code Act*[80] provides that:

> "No person shall be liable to be tried or punished in Western Australia for an indictable offence, except under the express provisions of the Code or some other Statute Law of Western Australia".

Some may argue that, because of this provision, the "unlawful purpose" referred to in s.560 must relate to a breach of some statutory provision in this State. However, such an interpretation would mean that s.560 would add nothing to s.559. The correct interpretation may be that s.560 itself, in defining the offence of conspiracy to effect an unlawful purpose, satisfies s.4 of the Act, and that the meaning of "unlawful purpose" may be gathered from

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77 See the comments as to the Attorney General's role in paragraphs 6.40 to 6.41 and 7.13 above.

78 s.8.

79 *R. v Porter* [1910] IQB 369 and see generally Archbold, *Criminal Pleading Evidence and Practice* (37th ed. 1969) at 72 paragraph 206. There is provision that both parties to an indemnification agreement commit an offence under s.31 of the *Bail Act 1977* (Vic). The penalty is three months imprisonment or a fine of $500.

80 Forming part of Appendix B to the *Criminal Code Act.*

English case law. Indemnification of a surety would be an offence in Western Australia under s.560 only if this latter view were adopted.

7.84 As a further possibility, a party to an agreement to indemnify a surety could be charged with the offence of conspiring to obstruct, prevent, pervert or defeat the course of justice.[81]

7.85 An alternative criminal charge would be available if the defendant and his surety were required to deny on oath that they were parties to an existing agreement to indemnify bail. This is not required under existing law, but, if it were introduced, it would enable the parties to be charged under s.169 of the Code for having made a false statement under oath. This approach would not cover the case, however, where the indemnification agreement is made after the recognizance has been taken.

7.86 Whether or not indemnification of a surety is a criminal offence in Western Australia, it is clear that in such circumstances the surety would not be acceptable.[82] As explained above,[83] this situation is in direct contrast to that in the United States, where indemnification of sureties is permissible and in fact forms the basis upon which the professional bondsman has emerged.

7.87 Any relaxation in existing law in Western Australia relating to indemnification of sureties can be justified only if there is felt to be a need here for a bail procedure similar to that currently operating in the United States, or if the community is prepared to take the risk of this occurring. The Commission has expressed its view that it is opposed to the introduction of professional bondsmen.[84]

SUMMARY OF ISSUES

(1) Should sureties be abolished?

(paragraphs 7.9 to 7.20)

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81 *Criminal Code*, s.135.

82 See paragraph 7.59 above.

83 See paragraph 7.35 above and Ares, Rankin and Sturz, 'The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole' (1963) *New York University L.R.* Vol. 38, 67 at 69.

84 See paragraphs 7.35 to 7.37 above.

(2) If sureties are to be retained is there a need to revise their role, for example by-

(a) Incorporating into their undertaking an obligation to supervise the defendant and if necessary to bring him into court or to arrest him?

(paragraphs 7.21 to 7.22)

(b) Making a requirement for sureties the most onerous condition for bail, to be imposed only as a last resort, and with reasons to be given as to why it is considered to be necessary or desirable to impose this condition?

(paragraphs 7.15 and 7.24 to 7.25)

(3) Should there be alternative procedures for supervising defendants pending trial, appeal or sentence such as –

(a) Improved remand facilities?

(paragraph 7.27)

(b) Bail hostels?

(paragraphs 7.28 to 7.29)

(c) Specialised supervision by an organization such as the probation and parole service?

(paragraphs 7.30 to 7.34)

(d) Specialised supervision by bondsmen?

(paragraphs 7.35 to 7.37)

(4) Should sureties ever be mandatory for release on bail for some offences?

(paragraphs 7.38 to 7.46)

(5) Having regard to a surety's modern role and the occasions when it is considered to be justifiable to require a surety-

(a) Should there be any instruction or legislative guidance provided on these matters?

(paragraphs 7.48 to 7.52)

(b) Should there be any instruction or legislative guidance as to the desirable qualifications of a surety, or providing for disqualification of a surety?

(paragraphs 7.53 to 7.59)

(6) Who should approve sureties and how should the necessary information be obtained?

(paragraphs 7.60 to 7.65)

(7) Can a procedure be implemented to allow defendants to be released from custody as soon as they have obtained a surety?

(paragraph 7.66)

(8) Should bail require renewal each time the defendant appears in court as required?

(paragraph 7.72)

(9) Should the same procedure apply to both defendants and sureties in regard to -

(a) Forfeiture of recognizances or cash deposited?

(b) Enforcement of liability on a forfeited recognizance?

(c) The granting of relief from liability, as applicable to defendants who fail to appear in answer to their bail?

(paragraph 7.71)

(10) Should sureties be required to appear in court with the defendant?

(paragraphs 7.68 to 7.71)

(11) Should there be a procedure entitling sureties, on notice, to disclaim further responsibility?

(paragraphs 7.77 to 7.78)

(12) Should a surety have a power to arrest a defendant who is released on bail at any stage of the criminal justice process?

(paragraph 7.77)

(13) Should death, or legal disability discharge a surety or his estate from liability?

(paragraphs 7.79 to 7.81)

(14) Should indemnification of a surety be an offence in Western Australia and should it automatically disqualify a surety?

(paragraphs 7.82 to 7.87)

CHAPTER 8 - REVIEW OF BAIL DECISION

Review by the defendant

8.1 With one possible exception, a defendant in Western Australia has no statutory right of appeal against a bail decision. The possible exception applies to bail granted by justices. Section 197 of the *Justices Act 1902* allows a person "who feels aggrieved" by the decision of any justices and who can show a prima facie case of error or mistake in law or fact or that the justices had no jurisdiction in giving the decision, to appeal to the Supreme Court by way of order to review. A decision is defined in s.4 to include an *admission* to bail. A defendant who wished to appeal would normally be concerned with a *denial* of bail, although he might be concerned with an admission to bail in cases where he wished to challenge the conditions imposed. There might be an argument that although s.4 refers only to an admission to bail, a denial of bail might come within the broad meaning of "decision".

8.2 Although a defendant's right of appeal is limited, this poses no obstacle to his having his application for bail reheard. This is better for the defendant than an appeal. It means he does not have to demonstrate that the bail-decision-maker who made the decision which is the subject of the appeal made some mistake or exceeded his jurisdiction. It is, in effect, a complete re-hearing of the defendant's bail application which might or might not be based on a change in his circumstances.

8.3 When making a fresh application for bail there would appear to be at least four options open to a defendant. They are –

1. an application to the same bail-decision-maker who made the decision which is the subject of the review, or to another bail-decision-maker of the same level of authority, for example, from one police officer to another police officer entitled to grant bail, or from one justice to another and so on;

2. an application to a bail-decision-maker on a higher level of authority exercising his statutory powers to grant bail, for example, from a police officer to a justice, from a justice to a magistrate, and from a magistrate to a judge;

3. an application to a Supreme Court Judge in the exercise of his inherent jurisdiction;

4. an application for release on a writ of habeas corpus.

The first three methods are commonly used in Western Australia in some circumstances. A common situation where the first type of application arises is where a justice grants bail with a surety but the defendant is unable to obtain one. The defendant might go back to the same justice or another justice and apply for bail to be granted on different conditions. An application of the second kind might occur if the police deny bail and the defendant makes application directly to a justice. If bail is denied in the Court of Petty Sessions the defendant normally adopts the third procedure. It was held in *Re Edwards*[1] that Judges of the Supreme Court have an inherent jurisdiction to grant bail only to defendants who are not convicted. Consequently, the third procedure would be unavailable in cases for example where bail has been denied in the Court of Petty Sessions to a defendant who has been convicted and remanded for sentence.[2] Proceedings by way of writ of habeas corpus are rare in Western Australia and would not be appropriate in cases where there is authority to grant bail.

8.4 District Court Judges within the jurisdiction of that Court[3] are given all the powers of a Supreme Court Judge.[4] However, there may be some doubt as to whether this confers on District Court Judges the inherent jurisdiction of Supreme Court Judges to grant bail to unconvicted defendants. It might further be arguable whether District Court Judges have any powers of a Supreme Court Judge, whether inherent or statutory, prior to the presentation of an indictment in the District Court. This doubt has led to a practice whereby defendants charged with indictable offences who have had bail refused in the Court of Petty Sessions make application for bail to a Supreme Court Judge prior to the presentment of the indictment in the District Court, even though their trial will subsequently take place in the District Court. This division of authority may be regarded as undesirable and consideration could be given to

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1 [1975] WAR 161.

2 This may not cause problems if the defendant is charged with an indictable offence. Section 573 of the *Criminal Code* appears to give authority to a Supreme Court Judge to grant bail. However, it may be troublesome where the defendant has been convicted of a simple offence and refused bail under the *Offenders Probation and Parole Act 1963.*

3 That is, in respect of indictable offences punishable by not more than fourteen years.

4 District Court of Western Australia Act 1969, s.42.

the desirability of clarifying the extent of the District Court Judge's powers. The Commission welcomes comment as to what these powers, in respect of bail, should be.

8.5 Several problems might arise in relation to a review of a bail decision made by the police at the lock-up. For example, a defendant might not be aware of his right to make a fresh application to a justice at the lock-up, he might assume that he must wait in custody until he appears in court the following day. In addition, at this stage he might not have had an opportunity to arrange for legal representation. Another problem is the sometimes awkward time when the police decision is made. A defendant might be reluctant to make a bail application to a justice at an unusual hour.

8.6 The Australian Law Reform Commission has suggested proposals in respect of bail in relation to the Commonwealth Police which might reduce these problems. The suggestions, which have been incorporated in the Bill currently before the Commonwealth Parliament,[5] are that -

(a) the police must inform the defendant that he is entitled at any time to apply to a magistrate for bail;[6]

(b) if the defendant wishes to apply for bail he must be brought before a judge, magistrate or justice in person as soon as practicable and if possible within one hour;[7]

(c) the defendant may make application for bail by telephone to a judge or magistrate if it is impracticable for him to be brought personally before a bail-decision-maker.[8]

These proposals might be considered to be suitable for adoption in this State in relation to bail applications considered by Western Australian police.

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5 Criminal Investigation Bill 1977 (Cwth).

6 Ibid., cl.53(1) (a). The term "magistrate" includes a justice: s.3(1).

7 Ibid., cl.54(2). An application can be made to a judge only if it is impracticable for the defendant to make his application to a magistrate or justice.

8 Ibid., cl.54(2) and (3) .

8.7 In the absence of any limits to the alternative methods of review referred to above, the way lies open for a defendant to make repeated applications to bail-decision-makers on the same level of authority, or having higher authority in the hope that one might grant bail on conditions which he can meet. This procedure is called "bail shopping". Thus a defendant, if dissatisfied by the decision of one justice could take his case to another justice, then to a magistrate, then to another magistrate, then to a judge and so on. It might be possible for a defendant who has had his application heard and refused by a Supreme Court Judge to make a fresh application before a justice.

8.8 Although doubt has been expressed on the legality of bail shopping,[9] it is a common practice in New South Wales[10] and it has been given judicial approval.[11] It might be desirable for a defendant to be able to make repeated applications for bail on the basis of altered circumstances,[12] and it might be acceptable for the defendant to be able to make applications to bail-decision-makers in an ascending order of authority.[13] It might be questionable, however, whether a defendant ought to be permitted to submit an application for bail on the same grounds to bail-decision- makers on the same or on a lower level of authority.

8.9 One bail-decision-maker interviewed by the Commission suggested that it might be desirable to provide for an automatic review say, within twenty-four hours, of a decision granting bail on conditions. In his experience there had been occasions where defendants who were unable to comply with the conditions of a grant of bail, had remained in custody in circumstances where the bail-decision-maker if he had known of the defendant's difficulty, would have imposed alternative conditions. In many cases this problem would not occur if bail-decision-makers made inquiries initially when imposing the condition as to whether the defendant would be able to comply with it,[14] or if the defendant were made aware of his right to re-apply for bail. However, the Commission recognises that there might still be cases where

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9 Gibbs J. in *R. v A.* (1968) 13 FLR 342 at 342-343 "It is true that it used to be believed that application for bail might be made in turn from judge to judge and in fact I know of my own experience in another jurisdiction [i.e. Queensland] where on occasions applications were so made although perhaps it may be said not with any great success. It is however now doubtful whether there ever was any such rule and whether one judge has power to entertain an application for bail which another judge has dismissed".

10 *R. v Fernon* (1967) 85 WN (Pt 1) NSW 544 (defendant made application to five different Judges. He failed in all applications).

11 *R. v Higgs* [1962] NSWR 34; *R. v Fraser* (1892) 13 LR (NSW) 150.

12 Such alteration might be a gradual process as for example if the defendant remains in custody pending trial for a period that gradually becomes excessive, or if it becomes more obvious that he is unlikely to be convicted for the offence.

13 For example, from the police to a justice to a magistrate, and to a judge. In this situation the re-application resembles an appeal.

14 See paragraphs 6.47 to 6.52 above.

an automatic review would be desirable. This could be implemented by administrative measures establishing a liaison between bail-decision-makers and the authority having the custody of the defendant.

Review by the prosecution

8.10 The prosecution has a right of appeal against a decision made by a justice or magistrate admitting a defendant to bail. The appeal is to the Supreme Court by way of order to review, but is limited by the need to show that the decision was made as a result of a mistake of law or fact or was made in excess of jurisdiction.[15] As far as the Commission is aware, an appeal is rarely made. There do not appear to be any provisions enabling the prosecution to appeal against a bail decision made by the District Court or Supreme Court.[16]

8.11 In the absence of a right of appeal a bail-decision-maker has no authority, neither statutory nor inherent, to review a bail decision on the application of the prosecution. A magistrate[17] or a judge[18] may, however, revoke bail if he considers this to be in the interests of justice, and it has been suggested above[19] that the police could be given power to arrest a defendant whom they have reason to believe is on bail and intends to abscond. It might be argued that there should be parity between the rights of the prosecution and a defendant to apply for a review of a bail decision. This would enable the prosecution to apply from a justice through to a Judge of the Supreme Court[20] to have bail denied. On the other hand, it might be considered that the powers of the police, especially if supplemented in the ways suggested above,[21] are adequate. If there has been a change in circumstances since a bail decision was made, then just as this may be used by a defendant to support a fresh application for bail if this has been denied, it may be used by the police in cases where bail has been granted to support an application for revocation.

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15 *Justices Act 1902*, s.197(1) and see paragraph 8.1 above.

16 Section 687(3) of the Code may appear to be wide enough to grant such a power. It provides that the Court of Criminal Appeal shall have full power to determine any questions necessary to be determined for the purpose of doing justice in the particular case. However, s.688 sets out the rights of appeal in criminal cases, and there is no right given either to the defendant or the prosecution to appeal against any decision made in respect of bail.

17 *Justices Act 1902,* s.94A. See also paragraph 6.21 above where it is suggested the power might also be given to a justice.

18 *Criminal Practice Rules*, Order VI rule 10.

19 See paragraph 6.21 above.

20 It would not be desirable to permit "anti-bail shopping" that is applications to bail-decision-makers on the same level of authority for bail already granted to be refused.

21 See paragraph 6.21 above.

8.12 A power to arrest without warrant could be exercised in cases where there was insufficient time to obtain a revocation order. It might be desirable, however, to confer a right of appeal to the Court of Criminal Appeal against a bail decision made by the District Court or Supreme Court.

SUMMARY OF ISSUES

(1) Should Supreme Court Judges have power to grant bail to convicted defendants?

(paragraph 8.3)

(2) Should District Court Judges have the same powers, inherent and statutory, in relation to bail, as Supreme Court Judges in respect of a matter falling within District Court jurisdiction and should they have such powers irrespective of whether an indictment has been presented in the District Court?

(paragraph 8.4)

(3) Should the police be required to inform a defendant of his right to apply for bail and arrange for him to appear before or telephone a bail-decision-maker for this purpose?

(paragraphs 8.5 to 8.6)

(4) Should any limits be imposed on a defendant's right to make repeated applications for bail?

(paragraphs 8.7 to 8.8)

(5) Should a decision to grant bail be reviewed automatically within a certain time to see whether the defendant has been able to comply with the conditions?

(paragraph 8.9)

(6) Should the prosecution have a right to appeal against a bail decision made by a District Court or Supreme Court Judge?

(paragraph 8.12)

(7) Should the prosecution be entitled to make repeated applications to have a grant of bail upset, and if so, what limits should be imposed?

(paragraph 8.11)

CHAPTER 9 - SPECIAL GROUPS

9.1 Some members of the community may encounter particular difficulties if required to make an application for bail. They include children, Aborigines, non-residents, persons in transit, migrants and other persons who may need special treatment.[1] In this chapter the Commission outlines the difficulties faced by these persons together with various suggestions which might enable them to be overcome.

CHILDREN

9.2 Children,[2] by reason of their age and financial status, are in a particularly vulnerable situation if arrested and charged with an offence. For this reason special provision has already been made for children in legislation[3] to provide for children's courts.[4] These courts have a different approach to children's offences and punishment generally.[5] In addition, special provisions for the bail of children have been included in the *Child Welfare Act*.[6] These provisions have recently been amended to broaden the bail provisions even further.[7]

9.3 Section 28 of the *Child Welfare Act* provides:

> "(1) The powers conferred upon justices in regard to admission to bail may be exercised in the case of children by the Director or by the Clerk of the Children's Court, or by the officer in charge for the time being of any Departmental Centre or Departmental facility or by any Police Officer".

9.4 In addition, s.33(4) with certain exceptions[8] makes it the duty of every police officer and officer of the Department for Community Welfare to ensure so far as is practicable that a

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1 The Australian Law Reform Commission divided the groups into three, namely children, Aborigines and non-English speakers. Each of these groups was considered to have difficulties which warranted special protective measures: Australian Law Reform Commission, *Criminal Investigation*, (1975) Report No.2 Interim chapter 9.

2 "Child" means any boy or girl under the age of eighteen years: *Child Welfare Act 1947*, s.4.

3 *Child Welfare Act 1947*.

4 Ibid., s.19.

5 Ibid., s.25 provides that "The court, in dealing with a child, shall have regard to the future welfare of the child".

6 Ibid., ss.28 and 33.

7 *Child Welfare Act Amendment Act (No.2) 1976.*

8 These exceptions include (inter alia) children charged with certain serious offences such as treason, wilful murder, murder, manslaughter or rape or attempting any such crime or who are likely to commit further

child arrested for an offence is not held in custody, but is taken to his place of residence and there released if any person is willing to agree to act as a surety. Where no one is willing to act as a surety the child may be held in custody.[9]

9.5 The provisions of s.28 broaden the classes of persons who can grant bail to children, but only confer on such persons the powers of justices.[10] These powers are principally derived from the *Justices Act 1902* and the *Police Act 1892*. Thus s.28 incorporates into the *Child Welfare Act 1947* any defects and uncertainties which might exist in these Acts. The procedure on the arrest of a child is somewhat similar to the procedure for the arrest of adults, with s.33 requiring the child to be brought before a Children's Court as soon as possible, though the legislative policy of s.33(4) seems to be against detention in custody. However, in spite of the special provisions made for children, some of them may still have difficulty in obtaining bail. Many of these problems have been referred to the Commission by the Department for Community Welfare[11] in a most helpful submission.[12]

Release on bail generally

9.6 When a child is arrested, present practice is that unless there is a person readily available to act as a surety the child is taken by the police to one of the Department's remand centres. He may be released on bail by the Department, but the Commission understands that this is unlikely if the defendant does not have any suitable place to stay. If bail is denied, the child would normally be taken to the institution known as Longmore. The Department also maintains a number of other institutions ranging from maximum security centres such as Riverbank to hostels such as Stuart House and Watson Lodge,[13] and in some cases a child is placed by the Department in a hostel. However, in Perth, if the charge is particularly serious, such as murder, the child may be kept in the Special Yard at Fremantle Prison.

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offences. The procedure only applies to children for whom proceedings by way of summons would not be effective.

9 *Child Welfare Act 1947*, s.33(5).

10 Ibid., s.28(1).

11 Referred to in the remainder of this chapter as "the Department".

12 Letter from Director, Department for Community Welfare dated 21 September 1976 on file with the Commission.

13 See Department for Community Welfare Annual Report 1976.

9.7 The Department's attitude seems to be that there should be a reduction in the number of occasions when a child is held in custody. In its submissions to the Commission it indicated that –

1. whenever practicable, children should be brought before the court by means of a summons rather than by arrest;

2. where children are arrested, bail should be freely available in all except the most serious cases;

3. in view of the fact that few children abscond, a greater number should be released on bail pending trial or sentence in the District Court or Supreme Court.

9.8 In the case of children who have no suitable place in which to stay if released on bail, the most desirable solution might be for them to be required to stay in one of the Department's hostels. Greater use of these hostels for children who were denied bail was suggested by the Department. In some cases a child might be permitted to continue his employment, if any, and maintain other community ties.

Sureties

9.9 A child who no longer lives at home or who is from the country or from other parts of Australia may have difficulty if required to obtain a surety in that he might not know anyone suitable. His friends might also be children who, by reason of their age, would be unacceptable as sureties even if they met the other requirements, such as being a land owner and of good character.[14] The difficulty becomes more acute if the child is charged with a crime or with one of the misdemeanours in the sixth schedule to the *Justices Act*.[15] In this situation a requirement for a surety appears to be a compulsory condition for release on bail.

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14 See paragraph 7.56 above.

15 See paragraphs 7.3 n.8 and 7.38 to 7.46 above.

9.10 According to one commentator,[16] the Children's Court may sometimes "turn a blind eye" on any requirement for a surety where children are involved, and may release them on their own bond even where serious indictable offences are involved, as long as they have a suitable place in which to stay. The same commentator also suggested[17] that the parents of children are often accepted as sureties even though they might not meet the normal qualification requirements.

9.11 Some improvement might be made if the compulsory requirement for sureties for crimes and sixth schedule misdemeanours were abolished.[18] However, the Department might wish to go further. Its attitude is that few children abscond, and that more could be released on bail without sureties.

Deposit of cash as a condition of bail

9.12 A deposit of cash required as a condition of bail could create difficulty for children. Many of them would not have sufficient funds because they would be too young to be in regular employment. The Commission understands that in practice cash is only required as a condition of police bail if the child is thought to be in employment and has the means to pay. This does not occur very often. As far as court bail is concerned, the deposit of cash as a condition of bail is apparently almost never required. As already pointed out in this working paper,[19] the legal authority to require a deposit of cash is obscure. It might be argued that if the law were clarified to allow the imposition of such a condition it could be extended to children, but only where they have sufficient funds and where there is no other reasonable means of securing their appearance.

Duration of custody

9.13 The Department has informed the Commission that there have been cases where a child who has decided to defend a charge, and who has been denied bail, has spent a longer period in custody waiting trial than the maximum sentence which could have been imposed

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16 Lloyd Davies: *Bail at Petty Sessions.* The Justice of the Peace Western Australia (August 1976) Vol. 19 No.11, 210 at 215.

17 Ibid.

18 See paragraphs 7.38 to 7.46 above where doubts are raised as to the desirability of a compulsory requirement for sureties in any case.

19 See paragraph 6.43 above.

on him for the offence if he were an adult. It also informed the commission that children committed to superior courts for trial or sentence[20] may have to wait between one and four months for their case to be heard.

9.14 The Department suggests that a case involving a child who is in custody ought to be given priority. Administrative measures might be desirable to ensure that this is given effect to and that the child does not remain in custody for an excessive period. However, it might also be desirable to provide for a child to be released from custody if the period so spent pending trial is equivalent to the minimum sentence, if any is expressed, for the offence with which he has been charged. Alternatively, the legislation might provide for his release after he has been in pre-trial custody for the probable or maximum sentence. This however, would appear to be a matter concerning all defendants, whether children or not, and might not require separate treatment in provisions relating to children.[21]

Attitude of parents

9.15 According to the Department some children when arrested find it difficult to obtain bail because of the attitude of their parents. In some cases parents refuse to become sureties for their children in order to ensure that they stay in the Department's institutions as a punishment. This attitude has apparently been encouraged by some police officers. It seems to the Commission to be wrong that a child who is otherwise suitable for bail should be detained in custody merely because of his parent's attitude. It could be argued that, if sureties were no longer mandatory for some offences, there would be less opportunity for such an abuse to take place.

ABORIGINES

9.16 Some bail-decision-makers have expressed to the Commission their concern that some Aborigines who come into contact with the criminal law experience particular problems in relation to bail. In some cases these problems arise from a lack of understanding of the bail

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20 In respect of certain serious offences such as murder, manslaughter and treason, a Children's Court can only exercise the powers of a Court of Petty Sessions in respect of committal for trial of persons charged with indictable offences. In respect of other indictable offences brought against children over fourteen years of age, a Children's Court has a discretion to try the case or commit to a superior court for trial or sentence: *Child Welfare Act*, s.20.

21 See paragraph 4.14 above.

system and what it expects of them. However, there may be other problems such as difficulty in obtaining sureties or in raising a cash deposit for bail. In this section of the paper the Commission considers the extent of the problems and the measures which might be taken to reduce or avoid them.

Sureties

9.17 Prior to the establishment of the Aboriginal Legal Service it was common for police, justices of the peace and magistrates to require Aborigines to find sureties. As a person has to be a landowner to qualify as a surety[22] this created difficulty for many Aboriginal defendants who did not have friends or relatives in this category. Partly because of a greater awareness of this fact, and partly because of the activities of the Aboriginal Legal Service, bail-decision-makers now tend not to require sureties when granting bail to Aborigines. However, under s.116 of the *Justices Act*, sureties are mandatory if a defendant is charged with any crime or with any of the misdemeanours listed in the sixth schedule to that Act.[23]

9.18 The Aboriginal Legal Service has informed the Commission[24] that in many cases where a surety is required another Aborigine will now be accepted as a surety without an enquiry as to his means. This practice, together with the number of occasions on which the Aboriginal Legal Service has applied to the Supreme Court for bail without sureties, has apparently had the effect of improving the situation.

9.19 The Aboriginal Legal Service has suggested, however, that further improvements could be made. In particular it said that more emphasis could be placed on the surety's responsibility to see that the defendant appeared in court. They thought this could be achieved by punishing the surety if he did not bring the defendant to court rather than by binding a surety to pay a sum of money. Another suggestion by the Aboriginal Legal Service was that the defendant and his surety could be given a written statement, either by the police or the clerk of court, setting out when the defendant was to appear in court and that the defendant was liable to arrest if he did not do so. This might be useful even where the defendant or his surety were illiterate. Most Aborigines apparently keep important documents even when they are unable to read them. In such a situation the defendant or his surety could show the written

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22 See paragraph 7.56 above.
23 See paragraphs 7.3 n.8 and 7.38 to 7.46 above.
24 Letter from Aboriginal Legal Service dated 21 June 1977 on file with the Commission.

statement to the Aboriginal Legal Service officers who could explain to them their obligations and help to ensure that the defendant appeared in court.

Deposit of cash as a condition of bail

9.20 Aborigines, in common with other defendants, are sometimes required to deposit cash as a condition of bail. Of the various bail-decision-makers, the police seem to make the greatest use of this condition. Sometimes Aborigines do not have sufficient money to comply with this condition and this results in their detention in custody. As pointed out above the legal authority for the imposition of this condition is obscure.[25] If the situation were clarified to allow the imposition of this condition, it might be argued that it should apply to Aboriginal defendants in circumstances similar to those discussed in relation to children.[26] That is, the condition should be imposed only where the defendant has the means to pay cash and there is no other reasonable method of securing his attendance in court.

Absconders

9.21 The Commission has been informed that there is a high incidence of cases where Aboriginal defendants have failed to appear in answer to their bail. However, it might be misleading to refer to all of the defendants concerned as absconders. Some tend to be vague about dates and often forget to turn up for trial. Some cannot afford to travel to the place of trial or turn up at the wrong court. Some may have language difficulties and may not fully appreciate their obligations. The Aboriginal Legal Service has informed the Commission that it cannot recollect any cases where Aborigines have deliberately failed to appear in court with the object of avoiding trial. Even where Aborigines do not appear for trial they tend to remain with their friends and relatives in the area where they have always lived. As one commentator pointed out, an Aborigine "has no facilities to fly to Brazil".[27] Perhaps more importantly, he has no desire to do so. Nevertheless, even if the failure to appear does not stem from a deliberate attempt to avoid trial, it remains a substantial administrative problem for the authorities and creates an additional expense for the criminal justice system.

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25 See paragraph 6.43 above.

26 See paragraph 9.12 above.

27 Lloyd Davies: *Bail at Petty Sessions.* The Justice of the Peace Western Australia (1976) Vol. 19 No. 11, 210 at 218.

9.22 The problem might be reduced to some extent if Aboriginal defendants were given written advice of their obligation to appear.[28] Steps might also be taken by the Aboriginal Legal Service to ensure that the defendant is fully aware of his obligations and, perhaps, to see that he is able to get to the court on the relevant occasion. There might be an alternative. The Australian Law Reform Commission recommended that Aboriginal defendants in custody for serious offences or any offences against the person or property could be entitled to nominate a "prisoners friend". This could be:[29]

> "a lawyer, welfare officer, relative or other person Aboriginal or not, who is able to interpret if necessary, and who is chosen by the person in custody of his own volition".

9.23 The Australian Law Reform Commission's recommendation was that a prisoner's friend should be present during any questioning or other investigative procedures. It could be argued that he could also take the necessary steps to see that the defendant was aware of his obligations if granted bail and that he was in a position to be able to fulfil them. However, unless the Australian Law Reform Commission's recommendations were extended to minor offences such as drunkenness or disorderly behaviour, the prisoner's friend proposal may not go very far in reducing the problems associated with Aborigines who fail to appear in answer to bail.

General difficulties

9.24 One study in Western Australia in 1965[30] indicated that Aborigines were less likely to obtain release on bail than non-Aboriginal defendants. This may be caused partly by the particular difficulties experienced by some Aboriginal defendants discussed above. However, it has been suggested[31] that it could be attributable also to the relationship between Aborigines and the police and that in this context it reflects a definite policy, perhaps based on prejudice, against release on bail of an Aboriginal defendant. The Commission has been informed that some Aboriginal defendants have been kept in custody without being told of their right to

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28 See paragraph 9.19 above.

29 Australian Law Reform Commission, *Criminal Investigation* (1975) Report No.2 Interim at 121 paragraph 253.

30 Eggleston, *Aborigines and the Administration of the Criminal Law* referred to in *The Australian Criminal Justice System* (1977) 2nd ed. by Chappell & Wilson at 115. Her study of a sample of 4,000 cases from Western Australian country towns in 1965 indicated that only 14.3 percent of Aborigines were released on bail in contrast to 33.6 percent of non-Aborigines.

31 *The Australian Criminal Justice System* (1977) 2nd ed. by Chappell & Wilson at 115 and comments on file from District Legal Officers of the Aboriginal Legal Service of Western Australia.

apply for bail either at all or in a manner which they can understand.[32] Even if properly informed, some defendants in this situation might feel too intimidated to ask for bail, not only in the context of police bail, but also in courts, particularly when previous requests have been denied.

9.25 The relationship between the police and Aboriginal defendants has received some attention in Western Australia in recent years but this, and the application of the criminal justice system generally to Aborigines, is a matter which is beyond the scope of this project. The question of bail involves only one segment of this difficult area. The Commission notes, however, that steps have been taken in Western Australia to ensure that the application of the criminal justice system to Aborigines does not place them at a disadvantage. For example, the police have lectures, training courses and the assistance of Aboriginal police aides who work in co-operation with the police in areas with a significant Aboriginal population.[33] In addition, the Western Australian Government has recently commissioned Mr. T. Syddall, a magistrate in Broome, to investigate and report to the Government on the application of the criminal justice system to Aborigines.

NON-RESIDENTS AND PERSONS IN TRANSIT

9.26 A particular difficulty faces a non-resident or person in transit if he is arrested in Western Australia for an offence for which a surety is mandatory[34] or if the bail-decision-maker considers the case warrants a surety. Such a defendant might not be able to find a surety in Western Australia[35] and he would not normally have any community ties here. However, he might be able to arrange a suitable surety in his home jurisdiction and he might have substantial community ties there. The problem is to decide whether such a person should be granted bail and, if so, on what conditions.

9.27 There has been a number of cases recently in Western Australia concerning drug offences where this question has arisen. However, the view has been expressed by some bail-

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32 Comments on file from District Legal Officers of the Aboriginal Legal Service of Western Australia.

33 For a description of the work of Aboriginal Police Aides and the areas in which they operate see *Annual Report of Western Australia Police Department 1977* at 20. Subjects associated with Aboriginal culture and welfare are now included in all courses conducted by the Law Education Branch and the Principal of the Police Academy: *Annual Report of Western Australia Police Department 1976* at 6.

34 *Justices Act 1902*, s.116.

35 See the case of Kaup reported in *The West Australian* 31 March 1976 and 7 April 1976. Kaup was detained in custody for five months on a rape charge because he could not raise bail in Western Australia. He was acquitted at his trial.

decision-makers interviewed by the Commission that the number of defendants falling into this category is increasing in respect of all offences. In its survey at Fremantle Prison,[36] the Commission noted that there was a disproportionate number of defendants from overseas jurisdictions in the remand yard.[37] Most of these defendants had been granted bail but could not meet a condition requiring a surety. As the tourist industry develops, and more persons pass through Western Australia, the problem is expected to increase and a grant of bail provided these defendants find a surety might not be an adequate solution. To a non-resident or person in transit it is in effect a denial of bail.

9.28 One solution might be to allow persons from other jurisdictions to act as a surety for defendants in Western Australia.[38] In addition it might be desirable for bail-decision-makers to be provided with more information regarding the defendant's character. This might include information regarding the defendant's community ties and responsibilities in the jurisdiction where he normally resides, and a reference. In addition, greater reliance might be placed on other conditions for release on bail.[39] These might include surrender of passport, reporting regularly to specified authorities, deposit of cash or other conditions suitable for the particular case.

9.29 It might be argued that because of the growing incidence of absconding by defendants in transit involved in drug importation offences,[40] these defendants ought to be denied bail. However, the Commission has expressed its tentative view that it would be undesirable to create a category of offences which were non-bailable.[41] Nevertheless the problem appears to be serious and it might be desirable for a bail application by a defendant in these circumstances to be considered only by a Judge of the Supreme Court.[42]

MIGRANTS

9.30 Bail procedures may create several problems for migrants. Those who have recently arrived in Western Australia might experience the same problems as non-residents and

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36 See paragraph 2.20 above and Appendix II.

37 This number however includes migrants to Western Australia which group is considered separately below: see paragraphs 9.30 to 9.31 below.

38 See paragraph 7.55 above.

39 For a discussion of the various conditions which might be imposed, see chapter 6.

40 According to the Police Department the figure is now 21% of all defendants charged with drug trafficking offences: see paragraph 2.15 above and article in *The West Australian* 5 May 1977.

41 See paragraph 4.3 above.

42 Ibid.

persons in transit.[43] However, there might be some migrants who do not understand English or the concept of bail and what it involves. On the day of the Commission's survey at the remand yard of Fremantle Prison, nearly half the prisoners awaiting trial were from overseas countries, yet, based on figures from the five year census in 1971, migrants as a percentage of the population of Western Australia in 1971 comprised approximately 28%.[44] This disproportionate number of migrants in custody appears to be common throughout Australia[45] and, as it has been claimed that migrants have a lower crime rate than persons born in Australia,[46] the disproportion might be greater than the numbers indicate.

9.31 Problems encountered by migrants who have recently arrived in Western Australia might be reduced if bail-decision-makers took an approach similar to that suggested above in relation to non-residents and persons in transit.[47] Migrants who have language difficulties or problems in understanding the concept of bail might be assisted by interpreters or by "prisoners' friends" if these were to become a part of the Western Australian criminal justice system.[48]

OTHER GROUPS

9.32 Drug addicts, alcoholics and the mentally unstable create problems for bail-decision-makers. The difficulty in many cases is that they might not be suitable for immediate release on bail only because there might not be any person prepared to look after them and protect them, not only from other members of the community, but also from themselves. In addition, some defendants, might not be able to remember when they have to appear in court.

9.33 Defendants who are intoxicated or drugged are more likely to be a problem for the police when considering bail. Unless the defendant can find someone to take care of him if released on bail the only existing alternative left to the police might be to deny bail.[49] This might be an undesirable solution, however, for a defendant who is addicted to alcohol or

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43 See paragraphs 9.26 to 9.29 above.

44 Western Australia Year Book 1976 at 138.

45 Commission of Inquiry into Poverty, Essays on Law and Poverty: *Unconvicted Prisoners: The Problems of Bail* (1977) at 14.

46 R.D. Francis: 'Contemporary issues concerning migration and crime in Australia' published in *The Australian Criminal Justice System* (2nd ed. 1977) 100 at 103.

47 See paragraph 9.28 above.

48 See paragraphs 9.22 to 9.23 above.

49 The police have been criticised by one magistrate for releasing intoxicated drivers before they were sober: see *The West Australian* 5 January 1977.

drugs. Courts have broader powers to deal with defendants who appear to be suffering from a mental disorder[50] but their power to deal with defendants who are persistent alcohol or drug offenders is limited.[51]

9.34 There have been quite far reaching treatment programmes in other jurisdictions which have taken many of these persons outside the confines of the criminal law.[52] These "diversion schemes" as they are known, have been briefly mentioned earlier in the paper.[53] Short of the introduction of these schemes it might be desirable to confer power on a bail-decision-maker to impose a special condition for defendants with alcohol or drug problems to be released on bail on conditions that they live in, or report regularly to an approved alcohol or drug institution. This power could supplement the existing powers under the *Mental Health Act* and might be a more desirable alternative to a remand in custody for the defendant's own protection.[54]

SUMMARY OF ISSUES

Children

(1) Should there be an increased use of procedures which avoid custody for bringing children before the court?

(paragraph 9.19)

(2) Should more children who are denied bail be sent to Community Welfare Department hostels?

(paragraph 9.8)

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50 *Mental Health Act 1962*, s.36. A defendant may be remanded for up to twenty-eight days on bail for an examination by a medical practitioner or in custody in an approved hospital.

51 The Alcohol and Drug Authority maintains institutions for the treatment of such offenders, but the defendant can be ordered to attend only on conviction summarily or on indictment, of an offence and drunkenness was an element or a contributory cause of the offence: *Convicted Inebriates Rehabilitation Act 1963*, s.4(1).

52 United States of America National Advisory Commission on Criminal Justice Standards and Goals: *Corrections* chapter 3 Diversion from the Criminal Justice Process: see also Law Reform Commission of Canada: *Diversion*: Working Paper No.7 January 1975.

53 See paragraphs 4.30 to 4.34 above.

54 See paragraphs 5.46 to 5.47 above and *Bail Act 1977* (Vic), s.4(2) (d) (ii) and *Bail Act 1976* (UK), s.4(1) and schedule I Part 1 cl.3.

(3) Should more children be released on bail without requiring a surety?

(paragraph 9.11)

(4) Should there be any statutory provisions limiting the occasions when a child can be required to deposit cash as a condition for bail?

(paragraph 9.12)

(5) What steps should be taken to ensure that a child denied bail does not remain in custody for an excessive period?

(paragraph 9.14)

Aborigines

(1) Should sureties for Aboriginal defendants have additional supervisory duties and be liable to punishment if the defendant fails to appear?

(paragraph 9.18)

(2) Should Aboriginal defendants be given a written notice of their obligations if released on bail?

(paragraph 9.19)

(3) Should there be any statutory provisions limiting the occasions when an Aborigine can be required to deposit cash as a condition for bail?

(paragraph 9.20)

(4) Should a "prisoner's friend" procedure be introduced for the assistance of Aborigines when dealing, among other things, with problems concerning bail?

(paragraphs 9.22 to 9.23)

Non-residents and persons in transit

(1) Should persons from other jurisdictions be acceptable as sureties?

(paragraph 9.28)

(2) Should greater use be made of release on conditions other than for a surety for such defendants?

(paragraph 9.28)

(3) Should bail for such defendants charged with drug trafficking offences be considered only by a Supreme Court Judge?

(paragraph 9.29)

Migrants

(1) Should a "prisoner's friend" procedure be introduced for migrants when dealing, among other things, with problems relating to bail?

(paragraph 9.31)

Other groups

(1) Should provision be made for bail-decision-makers to grant bail to a defendant on condition that he live in or report regularly to an approved alcohol or drug treatment centre?

(paragraphs 9.32 to 9.34)

CHAPTER 10 - CONCLUSIONS AND TENTATIVE PROPOSALS FOR REFORM

Introduction

10.1 The existing legislation relating to bail in Western Australia is found in various statutes.[1] There are no less than 117 provisions in 14 statutes from 1679 to the present day and no less than 13 statutory regulations. There is no single piece of legislation dealing comprehensively with the subject. Typically, the present statute law deals with the granting of bail (and related matters such as sureties and recognizances) as an incident to the exercise of jurisdiction by particular courts, and by the police, in respect of particular kinds of offences. Consequently, the statute law as to bail has developed piecemeal and presents the appearance of having been enacted ad hoc and as an adjunct to substantive and jurisdictional matters of more immediate significance. When one considers bail as a separate subject it is apparent that there are gaps in the existing legislation. In some cases the legislation is unclear. It does not generally appear to provide an adequate foundation for the practice in granting or varying bail during the different stages of the processes of criminal justice.

Right to bail

10.2 There is no general statutory right to bail in Western Australia. Generally, the *Justices Act*, *Police Act* and *Supreme Court Act* (and others) empower a bail-decision-maker to release a defendant on bail. Although there are some circumstances in respect of which bail is mandatory (such as pending trial or sentence where a person is charged with a misdemeanour other than a sixth schedule misdemeanour),[2] existing legislation in most cases makes a grant of bail discretionary. In two particular cases,[3] doubt exists as to whether bail may be granted at all - these are first, the power exercised by justices in granting bail at the police lock-up and second, that exercised in respect of a person sent to the District Court for sentence for a simple offence. The Commission is of the view that these last two matters require legislative clarification.

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1 The most important of these are: *Justices Act 1902*; *Criminal Code 1913*; *Police Act 1892*; *Offenders Probation and Parole Act 1963*. Bail provisions may also be found, however, in a number of other statutes, such as the *Mental Health Act 1962* and the *Coroners Act 1920*: see Appendix III. There are also Commonwealth statutory provisions which may apply in Western Australia but the Commission's paper is confined to State legislation.

2 *Justices Act 1902*, s.121.

3 See paragraphs 3.11 and 3.25 above for discussion of these two instances.

Criteria for bail

10.3 There are no statutory guidelines governing the exercise of discretion by bail-decision-makers. In some cases the legislation contains phrases such as "except where the offence appears ...to be of a serious nature"[4] and "if he [a police officer] shall deem it prudent",[5] the relevant bail-decision-maker "may" release the defendant on bail. It is apparent that different weight is given to different criteria by different bail-decision-makers. Whilst it is clear that the bail decision must ultimately be discretionary and cannot be straightjacketed within rigid statutory rules the Commission is of the view that the identification of the relevant criteria in legislative form would be of assistance to bail-decision-makers and it has been informed by magistrates that they would welcome such a step. There might also be a need for more information about the defendant to be made available to a bail-decision-maker.

Defendant's own recognizance

10.4 There are no statutory provisions governing the circumstances in which a person may be bailed solely upon his own recognizance, nor as to the amount of such recognizance whether the defendant is bailed with or without a surety. The practice varies widely. For example, the Commission is aware that some persons charged with serious offences (such as those involving narcotic drugs) have been bailed on their own recognizance alone, and have absconded, whilst defendants on minor charges have been required to obtain a surety. The amount set may be arbitrary; in some cases it may be set by reference to the maximum fine by which the offence charged is punishable; in others, by reference to the cost to the community of re-apprehending an absconding defendant or by the application of a rule of thumb relating the amount of bail to the seriousness of the offence. It might be desirable to abolish personal recognizances altogether and replace them by creating an offence for absconding.

Cash bail

10.5 There are few statutory provisions governing the circumstances in which bail may be granted upon a deposit of cash. Many defendants are in fact released upon cash bail but, apart from the release on a cash deposit of persons charged with drunkenness or gaming offences,

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4 *Justices Act 1902*, s.64.

5 *Police Act 1892*, s.48.

there appears to be no systematic use of cash bail procedures or uniformity of treatment of defendants who deposit cash and fail to appear. It may be that a cash deposit should be made a legislative requirement for bail in certain circumstances - for example, where a person charged with a serious offence (especially an offence involving narcotic drugs) is unable to obtain a surety. There may also be circumstances in which even a surety should be required to deposit cash.

Requirement of sureties

10.6 There are no statutory provisions governing the requirement of sureties. Generally, bail may be granted "with or without a surety or sureties".[6] In the one case in which sureties appear to be required by statute for some offences the legislation is ambiguous and arbitrary.[7] The offences concerned (such a, concealing the birth of a child, abduction of a girl under sixteen, perjury and riot) bear no obvious or rational connection with the requirement of suretyship. There is an argument that the role of sureties should be reviewed.

Qualification of sureties

10.7 There are no statutory provisions governing the classes of persons who may, or may not, be acceptable as sureties. Bail-decision-makers adopt different attitudes to this matter. The police (apparently without statutory authority) frequently require a surety to be a landowner. A surety with a criminal record is almost always unacceptable if this fact is known. If sureties were to be retained as a condition for bail, there may well be occasions when both of these "requirements" could be dispensed with if the sureties were in other respects suitable. In the Commission's view legislative criteria could well rationalize this situation.

Obligations and rights of sureties

10.8 There are no statutory provisions indicating the obligations and rights of a surety. In the Commission's view a form of statutory notice issued to a surety at the time of accepting his obligation might well place the whole matter of suretyship upon a more appropriate basis.

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6 *Justices Act 1902*, s.90.

7 Ibid., s.116.

Indemnification of sureties

10.9 It is not entirely clear that indemnification of a surety is an offence in Western Australia. In the Commission's view the indemnification of a surety should be an offence and specific statutory provision should be made for this.

Other conditions attached to bail

10.10 With only one or two exceptions, there are no statutory provisions governing conditions upon which bail may be granted other than that the defendant enter into a recognizance, obtain a surety or in some cases deposit cash. The *Offenders Probation and Parole Act*, however, is exceptional. It allows a bail-decision-maker to impose such conditions as he thinks fit. Consequently, in the majority of cases, notwithstanding their frequent imposition, there does not appear to be any statutory authority for the practice of imposing such conditions as reporting to the police and undertaking not to associate with a particular person. The Commission is of the view that the practice of imposing conditions upon a grant of bail is a useful element in the bail process and should at least be given legislative foundation.

Absconders

10.11 There is no provision authorising the police to arrest without warrant a defendant whom it is believed on reasonable grounds is about to abscond from bail. The Commission is tentatively of the view that the police should be empowered to arrest without warrant a person whom it is believed upon reasonable grounds is about to abscond from bail. It is in any event anomalous that whereas a surety may arrest a person on bail at any time the police may not do so.

Forfeiture of recognizances

10.12 Various aspects of the existing statutory law relating to forfeiture of recognizances are unclear. First, it is not clear whether forfeiture is mandatory or discretionary upon a defendant absconding from bail, and if discretionary, whether partial forfeiture is permissible. Second, it is not clear what the rights of a person who has entered into a recognizance (or deposited

cash) are. In particular, it is not clear whether he has a right to be heard prior to an order for forfeiture being made against him. Third, it is not clear what steps he may take to obtain relief following an order for forfeiture having been made.

10.13 In relation to a defendant, many of these problems would be avoided if absconding were made an offence. In the case of sureties, it is the Commission's tentative view that forfeiture should either be discretionary or that adequate procedures be established to review forfeiture in hard cases. In some circumstances a defendant's failure to appear at his trial may be due to factors other than any intention to abscond and forfeiture may well work substantial injustice. It may well be that a surety who has taken all reasonable steps to procure the attendance of an absconding defendant should in some circumstances be relieved.

10.14 The existing review procedures have no statutory basis and do not avail those who are simply unaware of them. The case of an elderly parent made destitute by forfeiture of a recognizance entered into on behalf of a son is an example of the need for adequate review procedures.

Challenging the bail decision

10.15 There are limited statutory provisions governing the procedure by which bail decisions may be challenged. At present if defendants are refused bail or granted bail on conditions they cannot meet they can make successive applications de novo to other bail-decision-makers, including Supreme Court Judges who have inherent power to grant bail to unconvicted defendants. It is arguable that a defendant should be able to have any bail decision reheard including a bail decision made at the post conviction stage, but only by a bail-decision-maker having a higher level of authority, or, if by a bail-decision-maker having the same level of authority, only on the basis of a change in the defendant's circumstances. The District Court's powers to grant bail should also be clarified.

10.16 The prosecution at present is in a less advantageous position than a defendant. It has only a right to appeal from a decision of justices or to seek revocation of bail. It might be argued that the prosecution should have a similar right to that of a defendant to have bail decisions reviewed by a simple and speedy application.

10.17 There is no legislative provision requiring a bail-decision-maker to give reasons for any bail decision. It may well be desirable that reasons in writing be given in any case in which a bail-decision-maker refuses a bail application and also in any case in which, following a grant of bail, either the prosecution or the defence requests that reasons in writing be given.

Legislative reform

10.18 The matters referred to above are only some of the issues which arise for consideration in this review of bail procedures. There are many more gaps, ambiguities and obscurities discussed in the paper which are summarised at the end of each chapter. The result seems to indicate a clear need to rewrite and modernise the law relating to bail in Western Australia. The preferable mode of accomplishing this would seem to be to consolidate and reform the law as to bail by enactment of separate bail legislation. This could be achieved either as a separate *Bail Act* or as a new chapter of the *Criminal Code*.

APPENDIX I

List of persons, departments and organizations who made preliminary submissions

Aboriginal Legal Service of Western Australia

Associated Banks in Western Australia

Commonwealth Banking Corporation

Commonwealth Bank Officers' Association

Department for Community Welfare

Douglas, A.J.

Falconer, J.A.

Haabjoern, M.D.

Hall, P.G.

Jay, G.M.

McGuire, M. SM

Tennant, B.G.

Yelland, J.A.

APPENDIX II

RESULTS OF SURVEY AT REMAND YARD OF FREMANTLE PRISON

The Commission conducted a one day survey of the remand yard of Fremantle Prison on 22 December 1976. Out of forty-one prisoners thirty-seven agreed to be interviewed. Of these twenty-three were on remand awaiting trial and the remaining fourteen were awaiting sentence or appeal. The following information relates only to those prisoners awaiting trial and is based solely on the responses given by the prisoners. The Commission has been informed that the numbers in the remand yard on that day were unusually low.

Defendants awaiting trial - twenty-three persons

(1) Age

The defendants awaiting trial were mostly young with eighty percent being under the age of twenty-eight years.

(2) Marital Status

Married or de facto	5
Single or divorced	18
Total	23

(3) Country of origin

Country		Number of persons
Australia)	Caucasian	7
	Aboriginal	5
United Kingdom		7
Malta		1
New Zealand		1
Hungary		1

Germany		1
	Total	23

(4) Employment

The defendants were mostly unskilled or semi-skilled workers.

Employment situation	Number of persons
Employed in the week before arrest	10
Unemployed	12
Full time student	1
Total	23

(5) Residence

Most of the defendants were either renting premises or living with friends, parents or relatives. None of them were buying their own home and most had spent only a few weeks or months at the address at which they lived prior to their arrest. As would therefore be expected most had spent only a short time in the area where they lived.

(6) Offences with which charged

The principal offence with which each defendant was charged is set out as follows:

Principal offence	Number of persons
Rape	6
Wilful murder	4
Stealing with violence	4
Breaking and entering	2
Possession of heroin	2
Stealing	1
Stealing cars	1

Attempted extortion	1
Bringing stolen goods into Western Australia	1
Unlawful possession of car	1
Total	23

(7) Bail position

All defendants in custody awaiting trial had been granted bail except for the four men charged with wilful murder. The terms for the nineteen men granted bail are set out below together with the reasons why they said they were still in custody.

Principle offence	Bail Amount*	Surety Amount	Reason for still being in custody
Stealing	200 cash	Nil	Cannot raise cash
Breaking and entering	200	200	Absconded from bail
Attempted extortion	250	500	Cannot obtain approved surety
Unlawful possession of car	700	700	Cannot obtain surety
Breaking and entering	1000	1000 + 1000	Cannot obtain surety
Bringing stolen goods into Western Australia	1000	1000	Defendant knows person able to go surety but cannot contact
Rape	1000	1000	Cannot obtain surety
Robbery with violence	1000	1000	Cannot obtain surety

*

Principal offence	Bail amount	Surety amount	Reason for still being in custody
Stealing with violence	1000	1000	Cannot obtain surety
Rape	1000	1000	Cannot obtain surety
Stealing cars	1800 cash	1000	Can find surety but cannot

* If cash was required in addition to the execution of a personal recognizance it is specifically mentioned otherwise only a recognizance was required. Special conditions such as reporting to the police have not been included.

			raise all of the cash - $800 short
Stealing with violence	2000	1000 + 1000	Cannot obtain surety
Rape	2300	2300	Cannot obtain surety
Rape	2500	2500	Defendant knows person able to go surety but cannot contact
Rape	2700	2700	Cannot obtain surety
Rape	2700	2700	Cannot obtain surety
Possession of heroin	11000	11000	Cannot obtain surety
Possession of heroin	11000	11000	Cannot obtain surety
Stealing with violence	Defendant did not know not know terms of bail		Did not know

It will be noted that the principal reason for defendants not being able to meet the terms of bail, was failure to find a surety. In addition, two defendants could not raise the cash required. The defendant who could not raise $200 cash bail was a middle aged man who had no previous criminal record. At the time of the interview he had been in custody for twenty-eight days.

(8) Time in custody

The average time spent by those in custody awaiting trial at the time of interview was sixty-two days. This was also the median period of time spent in custody, that is half the accused persons had spent more than sixty-two days in custody and half had spent less. The longest period spent in custody by any one defendant (he was charged with wilful murder) was one hundred and fifty-five days and the lowest was seven days.

(9) Previous Record

Twenty-one out of the twenty-three defendants had previous criminal records and eighteen of them had been to prison before.

(10) Language difficulties

Out of the twenty-three persons in custody awaiting trial four had difficulties with the English language. Three out of the four were Aboriginals and one was a migrant.

APPENDIX III

SUMMARY OF THE PRINCIPAL LEGISLATIVE PROVISIONS WHICH RELATE TO BAIL

INDEX

JUSTICES ACT 1902

- Part I Preliminary
- Part IV General procedure
- Part V Proceedings in case of indictable offences
- Part VI Proceedings in case of simple offences and other matters
- Part VIII Appeals from the decision of justices

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- Order VI Bail and recognizances

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OFFENDERS PROBATION AND PAROLE ACT 1963

- Part II Probation of offenders
- Part IIIA Orders relating to probation and parole of offenders made in another State or a Territory
  - *Div. 1 Probation orders made in another State or a Territory*

SUPREME COURT ACT 1935

DISTRICT COURT OF WESTERN AUSTRALIA ACT 1969

CHILD WELFARE ACT 1947

- Part V Children's Panels

CORONERS ACT 1920

MENTAL HEALTH ACT 1962

RECOGNIZANCES (FORFEITURE) ORDINANCE 1861

HABEAS CORPUS ACTS 1679 and 1816

BILL OF RIGHTS 1688

MISCELLANEOUS ACTS

- ROYAL COMMISSIONS ACT 1968
- FOREIGN SEAMEN'S OFFENCES ACT 1878

JUSTICES ACT 1902

Part I Preliminary

4 "Decision" includes a committal for trial and an admission to bail as well as a conviction, order, order of dismissal, or other determination.

"Matter" means any act, omission, fact or event (except an indictable offence not punishable summarily) upon complaint whereof justices may give any decision against or in respect of any person.

Part IV General procedure

64 A person taken into custody without a warrant shall be brought before a justice as soon as practicable after he is taken into custody. If it is not practicable to bring the defendant before a justice within twenty-four hours clerks of petty sessions and certain police officers shall inquire into the offence and unless it appears to be of a serious nature, shall discharge the defendant on recognizance with or without sureties for a reasonable amount to appear before justices at the day, time and place named in the recognizance.

79 In any case of a charge of an indictable offence, the justices may adjourn the hearing and remand by warrant the defendant to jail for a period not exceeding eight clear days at any one time.

80 The justices may verbally remand the defendant in custody for a period not exceeding three clear days.

81 Any justices may order the defendant to be brought before them at any time before the expiration of the time for which he was so remanded.

82 Instead of the defendant being remanded in custody he may be bailed for a period which may not unless the defendant consents exceed thirty days.

83 On a charge of an indictable offence the justices may remand the defendant to appear before justices in another place.

84 This section provides that where the defendant is remanded to another place, the recognizances shall be treated as if taken before the new justices and shall be transmitted to the proper officer if the defendant is committed for trial. If the justices do not think the evidence is sufficient to put the defendant on his trial he may be discharged and the recognizances previously taken are null and void.

86. In any case of "a simple offence or other matter" the justices may adjourn the hearing and allow the defendant to go at large, or commit him or discharge him on bail.

87 When justices commit on remand or adjournment they may commit to jail or other place of security in the place where they are acting.

88 After the decision the defendant must be committed to a jail.

90 When justices are authorized to discharge a defendant upon recognizance they may order his discharge with or without sureties.

91 If the defendant does not appear the justices may issue a warrant for his apprehension.

92 Once justices have fixed the amount of the recognizance in which the defendant and his sureties are bound, the actual documents may be signed before other justices, clerks of petty sessions, certain police officers or where one of the parties is in jail, before the keeper of the jail.

93 When the conditions of a recognizance are not complied with, any justice may certify in what respect the conditions have been breached, and transmit the same to the proper officer. Such certificate shall be deemed sufficient prima facie evidence of the recognizance having been forfeited.

94 Sureties may arrest the defendant and any police officer shall if required by such sureties assist them in such apprehension.

94A A magistrate may if satisfied that it is in the interests of justice so to do, revoke the order admitting the defendant to bail and issue a warrant for his arrest.

Part V Proceedings in case of indictable offences

97 When an information is presented in the Supreme or District Courts against a defendant whether he is bound by recognizance to appear or not, then a certificate of the information having been issued may be presented.

98 Thereupon a warrant may be issued.

99 If such person is apprehended he may be committed for trial or discharged on recognizances.

100 If the defendant is already in jail for another offence he may be detained there.

107 If in the opinion of the justices the evidence is sufficient to put the defendant on trial for an indictable offence they shall commit him for trial and in the meantime shall commit him to jail until delivered by due course of law or admitted to bail as hereinafter mentioned.

114 If the defendant admits guilt he may be committed to a competent court for sentence. In the meantime he may be committed to jail or admitted to bail.

115 Only a judge can grant bail for capital crimes or the crime of murder.

116 This section allows justices to admit to bail persons charged with crimes or sixth schedule misdemeanours but makes sureties mandatory in respect of such offences.

117 When a person charged with a crime or sixth schedule misdemeanour is committed to jail, to take his trial or for sentence, he may be admitted to bail at any time by the justice who signed the warrant of commitment or a magistrate.

118 Justices may certify on the back of the warrant of commitment their consent to the defendant being bailed and the amount of bail which ought to be required.

119 If it is inconvenient for the surety to join in the recognizance of bail with the defendant, the justices may make a duplicate of the certificate of consent, for execution before any other authorized person.

120 When the certificate and recognizance is produced to the keeper of the jail the defendant shall be discharged.

121 Where a person has been charged with a misdemeanour (other than a sixth schedule misdemeanour) bail is mandatory pending trial or sentence, with or without sureties.

121A This section authorises the Registrar of the District Court and certain other officers to vary upon notice the recognizances of a defendant and his surety and to fix some other or later time for appearance.

122 When a defendant in custody is admitted to bail by a justice other than the committing justices, then the justice admitting to bail shall transmit the recognizances to the committing justices.

123 When justices admit to bail a person then in jail such justices shall send to the keeper of the jail a warrant of deliverance and the defendant shall then be released if he is not detained for any other offence.

126 Justices may commit a refractory witness, provided that if the justices do not commit the defendant or admit him to bail, the witness may be freed.

130 This section deals with recommittal in case of error and provides for bail to be granted or to be enlarged if the defendant has already been admitted to bail.

Part VI - Proceedings in case of simple offences and other matters

134 This section provides for the dismissal or adjournment of a complaint of a simple offence if the complainant does not appear. If the case is adjourned the defendant may be committed or discharged on recognizances.

136A Where a decision is given by justices in default of appearance of the defendant or complainant the party not appearing may apply within twenty-one days to have the decision set aside. The provisions of s.187 and 188 relating to the release and security for appearance of an appellant who is in custody apply as if they were repeated in this section. The section makes certain other provisions concerning the rehearing.

154A When any person bound with or without sureties by any recognizance entered into

(a) pursuant to this Act;
(b) pursuant to an order of a court of summary jurisdiction;
(c) in respect of any matter cognizable by such a court;
(d) to attend or appear before such a court,

fails in any condition of the recognizance complaint may be made against those bound and proceedings issued as in the case of a matter cognizable in courts of summary jurisdiction. On the hearing, the court may make an order forfeiting the recognizances.

155 This section makes provision for the enforcement of payment of orders, by execution against goods and chattels, and imprisonment.

156 When a justice issues a warrant of execution, he may suffer the person against whom it is issued to go at large or order the person to be kept in custody, unless such person gives sufficient security by recognizance or otherwise, for his appearance at the place appointed for the return of the warrant.

Part VIII Appeals from the decision of justices

187 An appellant shall after he gives notice of appeal enter into a recognizance with or without sureties to appear before the court to which the appeal is made. Instead of sureties the defendant may deposit a sum of not less than $50 in cash. Sureties are not to be dispensed with except by a magistrate, unless a deposit of money is made.

188 Where an appellant is in custody a Court of Petty Session shall on the appellant complying with the provisions of s.187 release him from custody.

197 This section makes provision for an appeal by way of order to review where a person feels aggrieved by "the decision" of any justice. It provides that a Judge of the Supreme Court may release the appellant on recognizance "on such terms and conditions including where applicable procuring sureties or giving security, as the Judge thinks fit".

200 An appellant shall enter into recognizances for his appearance on such conditions as the Judge has ordered.

201 Where an order for the release of the appellant from custody is granted a memorandum of the decision of the Judge setting out the terms and conditions of the recognizance required shall be sent by the Master of the Supreme Court to the Clerk of Petty Sessions from which the appeal was made, the Attorney General and any person who by the order to review is called upon to show cause. When the appellant is released the Master of the Supreme Court and Attorney General must be notified by the person who had custody of the accused.

210 When any person committed to jail by virtue of a summary conviction or order is brought up by writ of habeas corpus and the Supreme Court postpones the final decision of the case, such Court or a Judge may discharge the person upon his recognizance with or without sureties for his appearance at such time and place and upon such conditions as the Court or Judge may appoint.

216 This section provides for the enforcement of the conviction where the appeal is not duly set down for hearing. If the appellant has been released from custody the justices may estreat the recognizance and issue a warrant for the arrest of the appellant and commit him to jail according to the conviction.

217 An appellant may be arrested on a justice's warrant if he is about to leave Western Australia. When apprehended he may be committed to jail until the time for hearing of the appeal.

CRIMINAL CODE 1913

19 (8) When a person is convicted of a non capital offence, the court or justices may instead of passing sentence discharge the offender upon his entering into his own recognizance with or without sureties, in such sum as the court or justices think fit conditioned that he shall appear and receive judgment at some future sittings of the court or when called upon (This is analagous to bail, but is not generally considered to be a bail provision. See also s.656 which is in similar terms).

20 The time during which a convicted appellant, pending the determination of his appeal, is admitted to bail and subject to any directions which the Court of Criminal Appeal may give to the contrary on any appeal, the time during which the appellant if in custody is specially treated as an unconvicted prisoner, shall not count as part of any term of imprisonment under his sentence. Except as aforesaid a term of imprisonment takes effect from the commencement of the offender's custody under sentence.

139 (1) Any person who being a justice and being required by law to admit an accused person to bail wilfully and perversely and without reasonable excuse and in abuse of his office, requires excessive and unreasonable bail is guilty of a misdemeanour.

140 Any person who having arrested another upon a charge of an offence wilfully delays to take him before a justice to be dealt with according to law is guilty of a misdemeanour.

427 A Court of Petty Sessions shall refrain from dealing with certain indictable offenders triable summarily. With certain other offenders a Court of Petty Sessions may convict the defendant and commit him for sentence.

473 (2)(h) Forgery of bonds (recognizances) is a crime.

512 To falsely acknowledge recognizances is a crime.

565A A person in command of an aircraft may arrest persons found committing offences in the aircraft and may hold the person so arrested in custody until he can be brought before a justice to be dealt with according to law.

570 It is the duty of a person who has arrested another upon a charge of an offence to take him forthwith before a justice to be dealt with according to law.

572 The practice and procedures relating to committal for trial on indictable offences are as set forth in the laws relating to justices of the peace.

573 The Supreme Court or a Judge thereof may admit to bail any person who has been committed for trial or for sentence or is in custody, upon a charge of an indictable offence, whether bail has been refused or not, or may reduce the bail of any such person to whom bail has been granted.

577 Where there is a change of place of trial, the recognizances of bail are deemed to be changed to that time and place. Notice of such time and place must be given to persons bound by the recognizances otherwise their recognizances cannot be forfeited.

579 The Attorney General may present an indictment in any court against any person for any indictable offence and subject to s.580 the accused is to be dealt with as if committed for trial.

580 A person arrested and charged in an ex officio information is to be brought before a justice who may commit him to prison or may in a proper case, admit him to bail with sufficient sureties to attend to be tried on the indictment.

608 A person committed for trial may make application during the first sittings of the court held after his committal to be brought to his trial. If an indictment is not presented against him at some time during those sittings, the court may, upon motion made on his behalf on the last day of such sittings, admit him to bail, *and is required so to do*, unless it appears upon oath that some material evidence for the Crown could not be produced at those sittings.

If the defendant is not brought to trial at the second sittings, he is entitled to be discharged.

609 The trial of a person who has not been committed for trial or held to bail may be brought on, on application by the defendant if not brought to trial within a year after the indictment is presented.

611 On an adjournment of a trial the defendant may be remanded to another court having jurisdiction. The defendant may be admitted to bail or if he has already been on bail the court may enlarge his bail.

635 Trials must take place in the presence of accused. However, the court may permit a person charged with a misdemeanour to be absent during the whole or any part of his trial on such conditions as it thinks fit.

645 If the judge becomes incapable during the trial, the accused must remain in custody, but he has the same right to bail as upon an original committal for trial for the offence with which he is charged, and any justice may in a proper case, admit him to bail accordingly.

656 This section empowers a court to discharge the defendant on recognizance to appear for sentence at some future date.

669 (l)(b) A court may discharge an offender on recognizance with or without sureties to appear and receive judgment if called upon and in the meantime to keep the peace and be of good behaviour.

682 Enforcement of order for payment of money by any court (including a court of summary jurisdiction) may be entered up as a judgment of the Supreme Court and shall be enforceable accordingly.

682A When any decision of the Supreme Court or District Court orders payment of a sum of money then such decision may be enforced in such manner and by such means as a similar decision of justices is enforceable, and shall for that purpose be deemed an order made by justices and the relative provisions of the *Justices Act 1902* shall apply thereto accordingly.

690 (2) If an order arresting judgment is reversed the offender can be arrested. An offender so arrested may be admitted to bail by order of the court.

691 Where the court orders a new trial the defendant may be arrested and such person may be admitted to bail by order of the Court of Criminal Appeal or of the court before which he is being or to be tried, which order may be made at any time.

700 (2) The Court of Criminal Appeal may, if it seems fit, on the application of an appellant admit the appellant to bail pending the determination of his appeal.

702 The powers of the Court of Criminal Appeal to admit to bail may be exercised by any Judge of the Supreme Court. If the Judge refuses an application the appellant shall be entitled to have the matter determined by the Court of Criminal Appeal.

729 This section outlines the practice to be applied to an ex officio information. The accused person is to be treated in all respects as if committed for trial. This section is subject to s.580.

731 A court may direct persons to be prosecuted for perjury. A person so committed may be admitted to bail in the same manner as if he had been committed for trial by a justice.

732 A court may commit for trial fraudulent debtors. Persons so committed may be admitted to bail by the court as if committed for trial by a justice.

746A This section makes provision for the enforcement of recognizances. Where the conditions of a recognizance have not been observed the court may order that the recognizance be estreated forthwith, and the person bound shall forthwith pay to the Attorney General to the use of the Crown the sum in which he is bound.

747 The Judges of the Supreme Court may make practice rules.

CRIMINAL PRACTICE RULES

Order VI Bail and recognizances

Rule 1 Applications for bail shall be made upon notice of motion or summons served on the Crown Prosecutor. A copy of the deposition or other documents showing the cause of the custody shall be produced to the judge on the hearing of the application.

Rule 2 When an order is made for admission to bail, a notice specifying the name, places of abode and descriptions of the proposed sureties and the time and place at which it is proposed the recognizances shall be taken, shall unless the judge otherwise orders be given to the Crown Prosecutor and the principal officer of police at the place where the defendant is in custody at least twenty-four hours before the recognizance is taken.

Rule 3 Recognizances may be entered into before judges, associates, justices, clerks of petty sessions and certain police officers or where one of the parties is in jail before the keeper of such jail.

Rule 4 Recognizances shall contain a condition that the party shall appear and attend from day to day at the trial until discharged.

Rule 5 An appellant on bail shall by the order of the Court of Criminal Appeal or a Judge thereof be ordered to attend his appeal.

Rule 6 The person before whom any recognizances are taken shall forward them to the Registrar who if they are in proper form, forwards them to the jailer who shall release the defendant.

Rules 7 & 8 Repealed.

Rule 9 The court may vary an order for bail.

Rule 10 The court may revoke an order for bail.

Rule 11 Sureties may apprehend the defendant.

Rule 12 Where a surety has arrested the defendant, the Superintendent of the prison shall notify the Registrar who shall inform the Judge or the Court.

Rule 13 Nothing in these rules shall take away any other lawful right of a surety to apprehend the defendant and thereby to discharge himself of his suretyship.

Rule 14 Whenever the defendant's case is called on he shall surrender himself to such persons as the court directs.

Rule 15 Where there is a private prosecution, provision is made for any notice or document under this order to be served on the private prosecutor instead of the Crown Prosecutor.

Rule 16 This rule makes provision for the form of recognizances when a warrant has been issued under ss. 690 or 691 of the Code and bail has been granted.

POLICE ACT 1892

21 Every non-commissioned officer and constable of the Police Force shall execute all processes directed to him for levying the amount of any recognizance forfeited to Her Majesty. ... And the amount of any recognizance so forfeited may in addition to the manner prescribed by *Recognizances (Forfeiture) Ordinance 1861* be levied by distress and sale of goods and chattels of persons bound thereby and may otherwise be recovered and enforced as in a case of an ordinary fine or penalty imposed by a justice. And a breach of the condition of a recognizance may be proved before a justice upon ex parte proof on oath thereof.

43 Police officers may apprehend certain offenders "... and shall detain any person so apprehended in custody, until he can be brought before a Justice, to be dealt with for such offence, or until he shall have given bail for his appearance before a Justice, in the manner hereinafter mentioned".

44 Similar provisions to s.43 for persons disturbing the peace on board ships.

48 "Where any person who may be apprehended as aforesaid, or who may be charged with any offence punishable in a summary manner, shall be brought without a warrant of a Justice into the custody of any police officer or constable" such officer may if he deem it prudent, take bail by recognizance with or without sureties ... without any fee or reward from such persons … conditioned that such person shall appear for examination before a justice at some place to be specified in the recognizance at the hour of ten in the forenoon next after such recognizance shall be taken. If the defendant does not appear a justice may draw up a memorandum of such recognizance and of its forfeiture.

49 This section empowers the police and certain aggrieved persons to apprehend certain offenders punishable in a summary way, without warrant. The offender shall be detained in custody until he can be brought before a justice to be dealt with according to law or until he shall have given bail for his appearance as herein before provided.

94B Persons charged with certain drug offences are committed to the District Court for sentence and in the meantime may be committed to jail or admitted to bail to appear before the Court for sentence.

OFFENDERS PROBATION AND PAROLE ACT 1963

Part II Probation of offenders

9 (l)(a) Where a court has convicted a person of an offence and requires a pre-sentence report from the Chief Probation Officer, the court may adjourn the hearing of the proceedings with respect to the offence and release the person on bail with or without sureties to appear on the adjourned hearing.

16 If a probationer is convicted of failing to comply with the conditions of probation (otherwise than by conviction on another charge) a Court of Petty Sessions may (inter alia) commit the probationer to custody or release him on bail with or without sureties to appear before the court by which the probation order was made.

17 Where a probationer has been convicted of an offence other than against s.16 a summons or warrant shall be issued to bring the probationer before the court by which the probation order was made. If the court is the Supreme Court and the Court is not thus sitting he is brought before a Court of Petty Sessions and may be committed in custody or released on bail with or without sureties.

19 The provisions of the *Justices Act* ss.115-123 apply to the foregoing provisions of this Act relating to bail as far as they are applicable. For the purposes of these provisions every such probationer shall be regarded as a person charged with an indictable offence.

19A Where a person charged with breach of probation is asked by a court concerning a conviction averred in the complaint and he does not admit it, then the court may adjourn the hearing for proof and commit the probationer to custody or release him on bail with or without sureties.

Part IIIA Orders relating to probation and parole of offenders made in another State or a Territory

Div. 1 Probation order made in another State or a Territory

50G If the probationer is convicted of failing to comply with a condition of probation, the Court of Petty Sessions may fine him, make an order under s.50H or commit him in custody or release him on bail with or without sureties to appear before a court having similar jurisdiction to the court by which the order was originally made.

50H In event of a breach of probation the court may order his return to the State in which the probation order was originally made, and may remand him in custody or on bail "on such conditions as it thinks fit". The period the probationer can be detained in custody is limited to fourteen days.

50J A probationer who is convicted of an offence other than an offence against s.50G of this Act is guilty of an offence against this Act. If the person has been convicted by a court not having jurisdiction similar to that of the court which made the original order, then the court may commit him in custody or on bail with or without sureties to appear before a court in this State having similar jurisdiction to the court which made the original order.

50K The court may, pending the return of the probationer to the State in which the probation order was made, admit the probationer to bail "on such conditions as it thinks fit" or detain him in custody for a period of not more than fourteen days.

SUPREME COURT ACT 1935

156 By this section the Sheriff is instructed to detain all persons who are committed to his custody by the court and shall discharge all such persons when so directed by the court or the law.

DISTRICT COURT OF WESTERN AUSTRALIA ACT 1969

42 "(1) Except as provided in subsection (2) of this section, the Court has all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence.

(2) The Court has no jurisdiction to try an accused person charged with an indictable offence, in respect of which offence, the maximum term of imprisonment that can be imposed exceeds fourteen years, or for which the penalty is death.

(3) The jurisdiction conferred on the Court by sub-section (1) of this section does not limit or diminish the jurisdiction of the Supreme Court as a Court of criminal jurisdiction.

43 "(1) The provisions of section 577 of the *Criminal Code* apply to a person committed for trial at the Court at any place and to a person against whom an indictment has been presented in the Court.

(2) The express reference in this section to the application of section 577 of The *Criminal Code* does not exclude the application of the other provisions thereof to and in relation to the Court and in particular to -

(a) the jurisdiction of the Court;
(b) the practice and procedure of the Court;
(c) any person against whom an indictment has been presented in the Court; and
(d) an appeal by a person convicted on indictment, by the Court."

CHILD WELFARE ACT 1947

Part IV Wards and Children's Courts

19 (6) Subject to this Act all the provisions of the *Justices Act* shall apply to the proceedings, orders and convictions of the Children's Court.

20 (1) The Children's Court has (subject to Part V of this Act and succeeding provisions of this section) exclusive jurisdiction to deal with offences committed by children.

(3) A Children's Court may –

(a) instead of hearing a complaint of an indictable offence brought against a child of over fourteen years act as a Court of Petty Sessions on a committal;

(b) and (c) may commit children over the age of fourteen years who have been convicted or found guilty of an indictable offence to the Supreme or District Court for sentence.

(8) Where a complaint of wilful murder, murder, treason or manslaughter is made against a child, a Children's Court only has the power to commit in the same way as a Court of Petty Sessions.

28 (1) The powers conferred upon Justices in regard to admission to bail may be exercised in the case of children by the Director or by the Clerk of the Children's Court or by the officer in charge for the time being of any Departmental Centre or Departmental facility or by any police officer.

(2) A child who appears to be suffering from a mental disorder or who ought to be remanded for observation as to his future treatment, may be remanded in some suitable place for a period not exceeding one month.

29 An officer of the Department may without warrant apprehend a child appearing or suspected to be a destitute or neglected or uncontrolled child. The child may be taken home and left there on the recognizance of a near relative for his appearance in court or placed in a Departmental Centre or alternatively with some respectable person. A child so apprehended shall as soon as is practicable, be brought before the Court to be dealt with according to law.

33 (1) When a child is apprehended or charged, he shall, as soon as is practicable be brought before the court or where appropriate the Children's Panel to be dealt with according to law.

(2) Unless the proceedings are initiated by way of summons or the child is released on bail, pending the hearing of any proceedings against a child (or during adjournments etc.) the child shall be -

(a) left at his place of residence on recognizance of a relative or other responsible person;
(b) placed with some respectable person;
(c) placed in a Departmental Centre.

(4) It is the duty of every police officer and officer of the Department to ensure, so far as is practicable, that a child arrested for an offence is not held in custody unless –

(a) offence is treason, murder, manslaughter or rape (or attempts to commit such offences)
(b) the detention is necessary to prevent further offences;
(c) proceedings by way of summons would not be effective, are not possible or reasonable having regard to the welfare of the child, other persons, or property.

(5) Where no person is willing to enter into a recognizance for the appearance in court of a child arrested for an offence the child may be held in custody.

Part V - Children's Panels

73 (6) Where a child is arrested for an offence to which this part of this Act applies that child shall not be held in custody by reason only of the need to ascertain whether he is eligible to be dealt with by a panel but the powers conferred upon justices in regard to admission to bail may be exercised from time to time until the matter is ascertained.

CORONERS ACT 1920

7 Every coroner shall have in respect of all inquests all the power, authority and jurisdiction which belong to the office of a coroner in England except in so far as the same are varied by or are inconsistent with this Act.

17 Where a coroner orders a person to be committed for trial for manslaughter, arson or reckless or dangerous driving (causing death) he may accept *bail with good and sufficient sureties* for the appearance of the person at the Supreme or District Court.
A Warrant of Commitment by the coroner can be backed for bail.

18 Where a coroner admits a person to bail he shall –

(a) cause recognizances to be taken;
(b) give notice thereof to every person so bound;
(c) transmit such recognizances to the Attorney General.

20 A Warrant of Commitment or holding to bail by the coroner shall be regarded as equivalent to an ordinary commitment or holding to bail by justices.

MENTAL HEALTH ACT 1962

36 (1) Where it appears to *a court of summary jurisdiction* before which a person is charged with an offence, that the person is or may be suffering from a mental disorder, the court may by order in the prescribed form order that the person be remanded for any period not exceeding 28 days either –

(a) on bail for examination by a medical practitioner; or
(b) in custody, for reception into and observation in an approved hospital.

47 Persons found unfit for trial may be admitted to an approved hospital. The fact of a person being a patient under this section does not operate as a bar to his subsequent indictment and trial.

RECOGNIZANCES (FORFEITURE) ORDINANCE 1861

1 The Registrar of the Supreme Court shall within fourteen days after each sitting of the Court prepare for the Chief Justice an abstract of all recognizances forfeited in the Court as well as by any Justice or Justices of the Peace. A copy is sent to the Sheriff for execution. If the parties do not have sufficient property to satisfy the warrant of execution they can be lodged in the jail until the next sitting of the Court.

2 If the person shall give security (by way of sureties) to the sheriff for his appearance at the next sitting of the Court he is to be discharged from custody.

3 The Court may at its discretion order the discharge of the forfeited recognizances.

HABEAS CORPUS ACTS 1679 and 1816

It would appear that the *Habeas Corpus* Acts of 1679 and 1816 are still in force in relation to Western Australia. These Acts confer wide powers on certain judicial officers to grant bail. These powers would be exercisable in Western Australia by the Supreme Court. In practice, however, it would appear that the Supreme Court through either its inherent powers or more modern statutory authority would not need to rely on these Acts for authority to bail.

BILL OF RIGHTS 1688

This Act appears to be still in force in relation to Western Australia though the only significant portion of the Act in relation to bail (prohibition of excessive bail) would appear to have been substantially repeated in s.139 of the *Criminal Code.*

MISCELLANEOUS ACTS

The following are miscellaneous Acts which may affect bail decisions or which make provisions analogous to bail.

ROYAL COMMISSIONS ACT 1968

16 This section makes provision for the arrest of a witness who has been served with a summons and who fails to appear. The defendant is detained in custody until he is brought before the Commission or until he is released by order of the Chairman or on appeal by order of a Judge or the Full Court of the Supreme Court as the case may be.

17 In respect of an apprehension pursuant to s.16 an appeal lies to a Judge or where one of the Commissioners or the sole Commissioner is a Judge to the Full Court of the Supreme Court.

FOREIGN SEAMEN'S OFFENCES ACT 1878

3 If a seaman deserts from a foreign ship or commits certain offences then any justice may issue a warrant for the apprehension of such seaman and at the request of the Master, Mate or other person having charge of the vessel, may inter alia order such seaman to be put forcibly on board the vessel to which he may belong.

7 This section limits action to those cases where the Consul of the nation concerned has assented or the Government of the nation concerned has signified by publication in the Government Gazette that the whole or any part of the Act may be enforced against the crews of vessels belonging to it.

APPENDIX IV

TIME-TABLE - REMAND PRISONERS

6.45 am	Reveille	(7.45 am weekends and holidays)
7.00 am	Unlock to yards	(8.00 am weekends and holidays)
7.15 am	From yards to cells for breakfast	(8.20 am weekends and holidays)
7.40 am	Unlock to yards	(8.40 am weekends and holidays)
8.05 am	Work parade	
11.10 am	Work parties return to yards	
11.30 am	From yards to cells for lunch and lockup.	
12.10 pm	Unlock to yards	(1.00 pm weekends and holidays)
1.05 pm	Work parade	
4.10 pm	Work parties return to yards	
4.30 pm	From yards to cells for evening meal and lockup	
9.15 pm	Warning bell for lights out	
9.30 pm	Lights out	

APPENDIX V

EXTRACT FROM POLICE MANUAL AND ROUTINE ORDERS

Western Australian Police Manual

Bail is surety by a person duly authorised for appearance at a certain day and place to answer and be justified by law. (Hales, Sum.96). It is of two kinds, viz., that admitted by a Police Officer and that allowed by a Judge or Magistrate.

Any person apprehended and charged without warrant with any offence punishable in a summary manner, may be admitted to bail by recognisance with or without sureties by any Police Officer or Constable in charge of a Station to appear before the Magistrate at ten in the forenoon of the following day, or should that day fall on a Sunday, Good Friday, or Christmas Day, or public holiday, then to a like hour on the day following. (*Police Act*., Sec.48. See also *Justices Act*, 1902-1926, Sec.64.)

Persons apprehended on warrant can only be admitted to bail by a Justice of the Peace.

Bail should not be withheld merely as a punishment. The requirements as to bail are merely to secure the attendance of the accused at the trial. (*R. v Rose*, 67 L.T.Q.B. 289).

It is not expedient to accept the Solicitor of the accused as bail for his client. (R. v Scott-Jervis, Times, 20th Nov., 1876). nor a person who has been indemnified by the accused. Persons in custody cannot be bail. Infants cannot be bail. (Archbold's Criminal Pleading).

The test as to whether bail should be granted or refused should be applied by reference to the following considerations: - (a) nature of the charge, (b) the nature of the evidence in support of the accusation; (c) the severity of the punishment which conviction will entail. The character or behaviour of the accused is said to be irrelevant; (d) whether the sureties are independent or indemnified by the accused; (e) the likelihood or otherwise of the accused answering to his bail if granted.

No person charged with a capital crime shall be admitted to bail except by order of the Supreme Court or a Judge thereof. (*Justices Act*, Sec.115).

When bail is fixed by any Court of Petty Sessions, the recognisances may be entered into before a Justice, Clerk of Petty Session, Inspector or Sub-Inspector of Police, or a Police Officer in charge of a Station, or where the party is in Gaol, before the Keeper of such Gaol. (Ibid. Sec.92).

Defendant is placed in custody of his bail, who may re-seize him and bring him before a Justice or deliver him into custody of the Keeper of the Gaol named in the warrant of committal, as the case may be, and the Police Officer shall, if required by such sureties, assist them in such apprehension. (Ibid. Sec.94)

A Justice who wilfully and perversely and without reasonable excuse and in abuse of his office, requires excessive and unreasonable bail from an accused person is guilty of a misdemeanour. (*Criminal Code*, Sec.139). The Justices should also consider in exceptional cases whether bail should be refused temporarily to allow of investigations and examinations of books to be completed, e.g. to ascertain the full extent of defalcations in cases of manipulation of books, or to allow of further processes to be executed. In cases of misdemeanour bail should be granted.

As to Recognisances, see Section 746A, *Criminal Code*; also *Justices Act*, 1902-1957, Sec.93. and C.C. 1913, Sec.19. Subsec. 7-8.

An agreement between an accused person and his bail by which the latter is to be indemnified against the consequences of the non-appearance of the former is unlawful in that it tends to produce a public mischief, and the parties to such an agreement are guilty of a criminal offence, notwithstanding that it may not be shown that they entered into the agreement with any intent to defeat the end of justice.

Routine Orders

Bail

The expression "bail" in the legal sense includes the process by which a person in custody obtains his release from custody for a time which is granted on recognizance with or without sureties provided by the person in custody.

A bailor or bondsman is one who gives surety for the appearance of another in Court with or without special conditions attaching thereto.

The amount fixed for recognizance for bail should be sufficient to ensure the person's compliance with the terms of the order granting bail, and should not be unreasonable.

Persons arrested for simple offences without warrant for any offence punishable in a summary manner may be admitted to bail by the then Officer in Charge of the Police Station.

The Police Bail Book must be used for this purpose. Section 48 of the Police Act and the Second Schedule Form P.23.

There have been a number of occasions where complaints have been made emanating especially in country districts where Aborigines could have or should have been released to bail more promptly and liberally in the terms which have been set down for their embailment, having regard to the persons arrested and the fact that local residents are less likely to fail to appear and answer to bail than itinerants.

In all cases where a person is arrested and charged with a minor offence such as refusing name and address, false name and address, drunkenness, disorderly conduct and the like, provided he is not intoxicated and his true identity is known, he should be admitted to bail as soon as possible subsequent to arrest, if it is considered his release will not result in further immediate offences similar to that necessitating his original detention.

A person held in custody for a minor offence and without the requisite bail money should, in the spirit of the preceding section, be released on his own recognizance without any moneys

being deposited and the question of his release should not be wholly dependent on his inability to raise bail money or arrange suitable surety.

It must be understood that bail is not in any circumstances to be withheld by way of punishment, and all steps must be taken to avoid reasonable interpretation, that this is the intention.

A person arrested for an indictable offence or on warrant may only be admitted to bail by a Justice except in the case of capital offences, when bail may be granted only by a Judge of the Supreme Court. *Justices Act* Form 19 must be used in every case.

In all cases where persons have been arrested by members of the Criminal Investigation Branch, approval of bail and amount required must be obtained from the Criminal Investigation Branch - all sureties wherever this is possible should be approved by the Criminal Investigation Branch - however, it must be realised that the question of bail is for the Officer in Charge, as he is the person obliged by law to faithfully discharge this prerequisite and not the arresting officer. However, communications between these two officers must not be ignored, and co-operation and co-ordination are essential.

Where a person has been charged on several counts, a separate bond is required for each charge.

As the purpose of bail is to ensure a prisoner will appear to answer a charge, care should be exercised to see that the amount fixed as bail is not excessive, but is applicable only to the seriousness of the charge.

When a person has appeared before a court, and bail has been fixed by the court, the Officer in Charge of a Police Station may, upon approving the bondsman, admit the prisoner to bail and sign the recognizance. A Justice or Magistrate is not required in these circumstances.

When a person has been arrested on warrant, he can only be admitted to bail by a Justice, and it should be ensured that the Justice is informed of the nature of the offence and, where he does not have an awareness, the maximum penalty provided by the law for the offence for which the person was arrested.

Where bail is fixed in a given sum requiring cash to be deposited, not calling for a surety, and the prisoner is not in a position to provide the money but another person is willing to do so, but on the condition that it is deposited in his own name as bailor, then both the prisoner and the surety are to be bound.

When a recognizance is conditioned for the appearance of a person on a certain day before Justices, or to take his trial before the Supreme Court or the District Court of Western Australia, the sureties bound by such recognizance may, before the day so appointed, apprehend their principal and bring him before Justices or deliver him into the custody of the Police. Any Police Officer shall if required by the sureties, assist them in such apprehension. (Section 94, *Justices Act*.)

The *Justices Act* (Section 94A) also provides that a Magistrate may revoke the order admitting a person to bail.

In the case of a person not arrested on warrant and sureties are taken by the Officer in Charge of a Police Station or Lockup for a simple offence punishable in a summary manner, amounts must be of equal obligation. However, this is not to be confused with the provisions of the *Justices Act* when a Justice admits to bail.

The attitude in these matters has to a degree become more enlightened and Police Officers should not lose sight of the criticism which can be levelled at this department in the requesting of an unreasonable amount of bail or a reluctance to admit to bail on a person's own recognizance when his identity and place of abode are known.

To supplement the foregoing instructions, the undermentioned article which appears in the *Law Journal* Volume 21, page 249, is published for general information:-

> "Recent publicity in this country has criticised the practice of magistrates and other courts releasing offenders on bail where there is some possibility, owing to the offender's antecedents, of his committing further offences whilst on bail. The comments of the Court of Criminal Appeal in *R. v Phillips* (1947) (45 Local Government Reports of England 410) are relevant to this question and show that the problem is not a purely academic or local one.

> "In that case, Atkinson, J., in delivering the court's judgement, said, -"The Court feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial, and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record of housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it. There were three charges against the applicant. With regard to one, there was no defence and in the case of another, he was actually arrested in the act. Yet, in spite of all his previous convictions, the applicant is given bail, not once but twice: first pending the hearing before the Magistrates, and again on committal for trial. To turn such a man loose on society until he has received his punishment for an undoubted offence, an offence which was not in dispute, is, in the view of the Court, a very inadvisable step to take. The Court wishes magistrates who release on bail young housebreakers such as this applicant to know that in nineteen cases out of twenty it is a very wrong step to take. The Court hopes that some publicity will be given to these observations, so that magistrates may know the view of the Court of Criminal Appeal."

CHILDREN:

A child or young person within the meaning of the *Child Welfare Act 1947-1972* may be admitted to bail under Section 28(1) of the said Act which states:-

> "28(1) The powers conferred upon justices in regard to admission to bail may be exercised in the case of children by the Director or by the Clerk of the Children's Court or by the officer in charge of any Government detention house, reception home, remand home, police station or police lockup."

These instructions can be read in conjunction with Standing Order 1811 of Part XVIII - Prisoners, wherein the operative words are "reasonable grounds".

In respect of other matters appertaining to bail, Section 9 subsection (l)(a) of the *Offenders Probation and Parole Act 1963*, where a Court convicts an offender and requires a pre-sentence report - a Court may adjourn the hearing and release the accused person on bail notwithstanding that the defendant is convicted and unsentenced (it is not usual to do this after conviction, but the provision is there).

Under Section 36 of the *Mental Health Act 1962*, the Court may remand a person charged for medical observation for a period not exceeding 28 days and may release the person on bail.

A serious view will be taken, and appropriate action shall follow in any case of non-compliance with this directive.

A.L.M. WEDD.
Commissioner of Police.

12th August, 1975.

APPENDIX VI
INFORMATION FORM PROPOSED BY ENGLISH WORKING PARTY

BAIL INFORMATION	DATE OF HEARING	CHARGE:
	CASE NO.	

1 DEFENDANT

1.1 NAME Surname	First Names	Mr/Mrs/Miss
1.2 AGE yrs	1.3 NATIONALITY	1.4 IF BORN ABROAD, HOW LONG RESIDENT UK mths/yrs
1.5 REPRESENTED BY:		1.6 LEGAL AID Applying Applied Granted
1.7 PROBATION OFFICER (IF ANY):	1.8 ON BAIL IN ANOTHER CASE	1.9 OTHER PROCEEDINGS PENDING

2 MARITAL STATUS*

2.1 UNMARRIED
2.2 MARRIED
2.3 SEPARATED
2.4 WIDOWED
2.5 DIVORCED
2.6 CO-HABITING

2.7 CHILDREN
Living with defendant
Dependent on defendant

3 DOMESTIC CIRCUMSTANCES

3.1 HOUSE
3.2 FLAT
3.3 PARENTS HOME
3.4 LODGINGS
3.5 BED-SIT
3.6 ROOM(S)
3.7 CARAVAN

3.8 SHARING
3.9 TENANT
3.10 OWNER/ OCCUPIER
3.11 HOMELESS

4 ADDRESS(ES)

	4.1 PRESENT (How long:)	4.2 PERMANENT (If different)	4.3 OTHER RECENT (If any)
No. and Street District Town	…… ……	…… ……	…… ……
Tel. No. (If any)			

5 OCCUPATION*

5.1 PRESENT			5.2 USUAL (If different)	
5.3 SELF-EMPLOYED	5.4 EMPLOYED	5.5 UN-EMPLOYED	5.6 HOUSEWIFE	5.7 RETIRED

6 EMPLOYMENT

	6.1 PRESENT (How long:)	6.2 PREVIOUS (When:)
Name of Firm etc.	……	……
No. and Street	……	……
District/Town	……	……
Tel. No. (If any)		

7 INCOME*

7.1 £ PW	7.2 EARNINGS	7.3 SICKNESS BENEFIT	7.4 UN-EMPLOYMENT BENEFIT	7.5 PENSION	7.6 OTHER

8 POSSIBLE SURETIES

	Name	Address	Tel. No. (If any)
8.1			
8.2			

9 RELATIVE, FRIEND OR EMPLOYER LIKELY TO BE IN COURT:

Name Relationship etc.

10 OTHER MATTER DEFENDANT WISHES TAKEN INTO ACCOUNT

(eg Illness, Physical Condition, Employment, Domestic Difficulties):

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* Insert tick (v) where applicable.

APPENDIX VII

FORMS OF RECOGNIZANCE UNDER THE JUSTICES ACT 1902, POLICE ACT 1892 AND CRIMINAL PRACTICE RULES

Justices Act 1902

19. - *Recognisance for the appearance of a defendant, where the case is adjourned or not at once proceeded with.*

Western Australia,)
[Perth] to wit.)

Be it remembered that on the day of
, 19 , A.B., of , in the said State
, and L.M., of in the said State
, personally came before the undersigned, [*one*] of Her Majesty's Justices of the Peace for the said State [*or*, etc.], and severally acknowledged themselves to owe to our Sovereign Lady the Queen the several sums following - that is to say, the said A.B. the sum of , and the said L.M. the sum of , to be made and levied of their several goods and chattels, lands, and tenements respectively, to the use of our said Lady the Queen, her heirs and successors, if [he], the said A.B., shall fail in the condition indorsed

Taken and acknowledged before [*me*] the day and year first above mentioned, at
, in the said State .

Condition.

The condition of the within-written recognisance is such that if the said A.B. charged upon the complaint of C.D. with (here insert briefly nature of charge such as larceny, assault, etc.), shall personally appear at in the said State, on the day of
, 19 , at o ' clock in the forenoon, before such Justices as may then be there, [further] to answer the said charge made by C.D. against the said A.B., then the said recognisance to be void, or else to stand in full force and virtue.

J.S., J.P.

22. - *Recognisance of Bail on Committal for Trial.*

[Same as Recognisance, Form 19.]

J.S. , J.P.

Condition.

The condition of the within recognisance is such that whereas the said A.B. was this day charged before [*me*], the Justice within mentioned, that [*etc., as in the warrant*]: if, therefore, the said A.B. shall appear at the next criminal sittings of the Supreme Court [*or as the case may be*] to be held at , in the State of Western Australia, on the day of 19 , and surrender [himself] into the custody of the superintendent [or keeper] of Her Majesty's prison [*or* gaol] there, and to plead to such information as may be filed against [him] in respect of the charge aforesaid, and take [his] trial upon the same, and not depart from the said Court, without leave, then the said recognisance to be void, or else to stand in full force and virtue.

28. - *Recognisance on appeal.*

[Same as Recognisance, Form 19.]

Condition.

Whereas the said A.B. was, on the day of ,19 , at convicted before E.F. [and others], [one of] Her Majesty's Justices of the Peace for the said State [*or*, etc.] of an offence against the provisions of the section of the Act [*or as the case may be3 describing the Act or By-Law under which the offence is created*]; and it was by the said conviction adjudged that the said A.B. should for such [his] offence forfeit and pay [*etc., as in the conviction*], and should also pay to the said C.D. the sum of [his] costs [*or* Whereas on the day of , at , upon the hearing of a complaint made by C.D., of , against A.B., of E.F. [and others], [one of] Her Majesty's Justices for the said State [*or* etc.], adjudged that the said A.B. should pay to the said C.D. the sum of on or before the , then next, and should also pay to the said C.D. the sum of for costs]: And whereas the

said A.B. has given notice of his intention to appeal from the said conviction [*or* order] to the Supreme Court [*or as the case may be*], holden at . Now, the condition of the within - written recognisance is such that if the said A.B. shall prosecute the said appeal without delay and submit to the judgment of the said Court, and pay such costs as the said Court shall award, then this said recognisance to be void, or else to stand in full force and virtue.

Police Act 1892

Recognisance for the Appearance of a person in charge of a Police Station or Lock-up.

Be it remembered, that on of and of personally came before the undersigned, and severally acknowledged themselves to owe to our, Sovereign Lady the Queen, the several sums following, that is to say the said the sum of and the said the sum of of good and lawful money to be made and levied of their several goods and chattels, lands and tenements respectively, to use of our said Lady the Queen, her Heirs and Successors, if he the said shall fail in the condition endorsed.

Taken and acknowledged, the day and)
year first abovementioned at)
before)

Officer of Police *or* Police Constable in Charge,
as the case may be.

The condition of the within written Recognisance is such, that if the said shall personally appear on the day of instant, at ten o'clock in the forenoon, at before such Justice of the Peace for the said State as may then be there, to answer to any information then and there exhibited against the said and to be further dealt with according to law, then the said recognisance to be void, or else stand in full force and virtue.

Criminal Practice Rules

No.6. - Recognisance to Answer Indictment or Information.

Be it remembered that on *etc.* A.B., of *etc.* , G.H., of *etc.*, and I.J., of *etc.*, personally came before me, the undersigned, one of His Majesty's justices of the peace for the State of Western Australia (*or as the case may be*), and severally acknowledged themselves to owe to our Lord the King the several sums following, that is to say, the said A.B. the sum of $, and the said G.H. and the said I.J. the sum of $ each to be made and levied of their goods and chattels, lands and tenements, respectively, to the use of our said Lord the King, his heirs and successors; upon condition that if the said A.B. shall personally appear in the Supreme Court of Western Australia, at the Supreme Court House, Perth (*or as the case may be*), at the next sitting of the said Court, and answer an indictment [or information] lately presented in the said Court against him for certain crimes [*or* misdemeanours], according to the course of the said Court, and shall personally attend from day to day on the trial of the said indictment [*or* information], and not depart until he shall be discharged by the Court before which such trial shall be held, then this recognisance shall be void, but otherwise shall remain in full force.

Taken *etc.*

No. 7. - Recognisance to Appear at Trial.

Be it remembered *etc. as in Form No.6* to "Successors": *then proceed*: upon condition that if the said A.B. shall personally appear at the Circuit Court at M. on the day of next (*or as the case may be*), and surrender himself into the custody of the superintendent of the prison there, and answer all such charges as on His Majesty's behalf shall then and there be made against him, and take his trial upon the same, and not depart that Court without leave, then this recognisance shall be void, but otherwise shall remain in full force.

Taken *etc.*

No.8. - Recognisance to Appear for Sentence.

Be it remembered that on *etc.* A.B. (*insert names and descriptions of the defendant and bail, if bail required*) personally came into the Supreme Court of Western Australia at Perth (*or as*

the case may be) [*or* before me, one of His Majesty's justices of the peace for the State of Western Australia], and acknowledged to owe to our Lord the King the several sums following, that is to say, the said A.B., the sum of $, and the said and the sum of $ each to be levied of their goods and chattels, land and tenements, respectively, to the use of our said Lord the King, His heirs and successors; upon condition that if he, the said A.B., shall personally appear in the said Supreme Court of Western Australia to Perth (*or as the case may be*) on the day of next [*or* whenever he shall be thereunto required], in order to receive the sentence of the said Court for certain crimes [*or* misdemeanours] whereof by a jury [*or* by his own confession] he was this day [*or* on the day of] convicted, and so from day to day, and not depart from that court without leave, then this recognisance shall be void, but otherwise shall remain in full force.

Taken *etc.*

No. 11. - Recognisance of Bail of Appellant.

Be it remembered that whereas was convicted of on the day of , 19 (and was thereupon sentenced to), and now is in lawful custody in His Majesty's prison at and has duly appealed against his conviction (and sentence) to the Court of Criminal Appeal, and has applied to the said Court for bail pending the determination of his appeal, and the said Court has granted him bail on entering into his own recognisances in the sum of $ (and with sureties each in the sum of $), the said personally cometh before me the undersigned being one of His Majesty's Justices of the Peace (*or as the case may be*) and acknowledges himself to owe to our said Lord the King the said sum of $, to be made and levied of his goods and chattels, land and tenements to the use of our said Lord the King, his heirs and successors, if he the said fail in the condition endorsed.

Taken and acknowledged this day of 19 , at the Prison at , before me,

Justice of the Peace (*or as the case may be*).

Condition.

The condition of the within written recognisance is such that if he the said shall personally appear and surrender himself at and before the Court of Criminal Appeal at each and every hearing of his appeal to such Court and at the final determination thereof and shall abide by the Judgment of the said Court and shall not depart or be absent from such Court at any such hearing without the leave of the said Court, and in the meantime shall not depart out of Western Australia, then this recognisance is to be void or else is to stand in full force and effect.

The following is to be filled up by the Appellant and signed by him:-

When released on bail my residence, to which any Notices, etc., are to be addressed, will be as follows:-

(Signed)

Appellant.

No. 12. - Recognisance of Appellant's Sureties.

Be it remembered that on this day of , 19 , of (occupation) and of , (occupation) personally came before us the undersigned being (two) of His Majesty's Justice of the Peace sitting at a Petty Sessional Court at in the of and severally acknowledged themselves to owe to our Lord the King the several sums following, that is to say, the said the sum of $, and the said the sum of $, to be made and levied of their goods and chattels, lands and tenements, respectively, to the use of our said Lord the King, his heirs and successors, if now in lawful custody in His Majesty's Prison at fail in the condition hereon endorsed.

Taken and acknowledged before (us) the undersigned, the day and year first above mentioned.

Justices of the Peace.

Condition.

The condition of the within written Recognisance is such that whereas the said having been convicted of and now in such lawful custody as before-mentioned (under a sentence of for such offence), has duly appealed to the Court of Criminal Appeal against his said conviction (and sentence), and having applied to the said Court for bail, pending the determination of his said appeal, has been granted bail on his entering into recognisance in the sum of $, with sureties each in the sum of $, if the said shall personally appear and surrender himself at and before the said Court at each and every hearing of his said appeal to such Court and at the final determination thereof, and shall abide by the Judgment of the said Court, and shall not depart or be absent from the said Court at any such hearing without the leave of the Court and in the meantime shall not depart out of Western Australia, then this recognisance is to be void or else is to stand in full force and effect.

APPENDIX VIII

NOTICE OF SURETY

To: ……

Take notice that the recognisance entered into by you requires ……..

to appear at …….. Court of Petty Sessions on …….. the….

day of …… 19….. at ……o'clock.

His failure to appear could result in your bail of ……..dollars being forfeited and/or an order being made for you to pay that sum to the Crown.

Sgd. POLICE OFFICER

JUSTICE OF THE PEACE

CLERK OF COURTS Date ……/…… /19…….

NOTICE FOR DEFENDANT

TO: ……...

Take notice that the recognisance entered into by you requires you to appear at ……. . Court of Petty Sessions on ……the …… day of ……19.…… at o'clock.

Your failure to appear could result in your bail of……. dollars being forfeited and/or a warrant being issued for your arrest.

Sgd. POLICE OFFICER

JUSTICE OF THE PEACE

CLERK OF COURTS Date ……/…… /19…….

DUTY COUNSEL SCHEME

A Duty Counsel rostered by the Law Society of W.A. is available at court each day to provide preliminary legal advise to defendants.

In some circumstances the Duty Counsel will also appear for a defendant, for example to apply for an adjournment or to address on penalty when a plea of guilty is entered.

If you wish to consult the Duty Counsel you should attend the Court at 9 a.m. on the morning you are to appear.

APPENDIX IX

AFFIDAVIT OF JUSTIFICATION OF SURETY

R. v. …….

EXAMINATION of a person offering h self as surety.

Questions put by the Magistrate.		Answers given upon oath by the person offering h self as surety.
1.	What is your name?	1.
2.	Where do you live?	2.
3.	Are you a householder?	3.
4.	How do you take your house?	4.
5. (a)	What is your rent?	5. (a)
(b)	What is the rateable value of your house?	(b)
6. (a)	Are you married?	6. (a)
(b)	What is your husband's name?	(b)
(c)	What is his (your) occupation?	(c)
7.	Are you worth £ after all your just debts are paid?	7.
8. (a)	Are you willing to be bound as surety for……..…… in the sum of £ ……?	8. (a)
(b)	And are you prepared to forfeit that sum if he does not comply with the conditions of h recognizance?	(b)
9.	Have you received any indemnity or promise of indemnity for becoming surety?	9.
10.	Have you received any payment or consideration or promise of payment or consideration for becoming surety?	10.

(*Signed*)

Read over to the said)

and signed by h , at the)
Police Court,)
this day of 19)
W7776/29