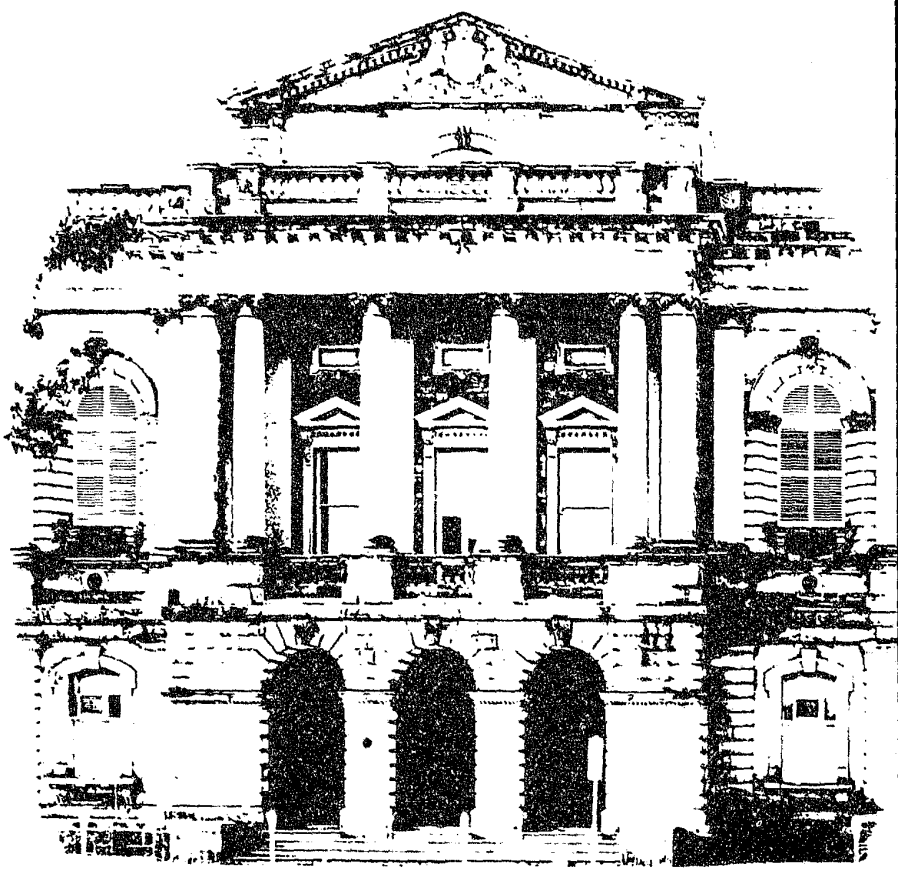
Bail Reform in South Australia



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Bail Reform in South Australia

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CONTENTS

PREFACE

This report on the Bail Act (1985), is the third in an occasional series of Research Bulletins on aspects of Crime and Justice in South Australia. Like its predecessors, it canvasses opinion as well as providing statistical information. It should be emphasised that views expressed in this report do not necessarily reflect policies of the South Australian Government. The primary purpose of this publication is to stimulate discussion and encourage reform.

The program of research which provides the basis for this publication has been initiated by Cabinet following a recommendation of the Working Party which overviewed implementation of the 1985 reforms. Research is being undertaken by Ms Lorraine Green and Ms Kate McIlwain, who drafted this report in consultation with the Director of the Office of Crime Statistics. This trend toward closer evaluation of policy initiatives can only be commended.

Preparation of this Bulletin would not have been possible without support and assistance from a number of sources. Special thanks are due to the Department of Correctional Services, particularly Mr. Frank Morgan and Ms Leeanne Weber of the Research and Planning Unit. The Research Team also is grateful to Mr. Richard Kleinig, Legal Officer in the Attorney-General's Department, to members of the Judiciary who provided comment on the workings of the new Act, and to Ms Lesley Bird for typing and layout.

Director,
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SUMMARY

1. The South Australian Bail Act, effective on 7th July, 1985, replaced and reformed a range of measures which had been incorporated in various Acts on a piecemeal basis.

2. Consolidation of these various measures into a single piece of legislation was an achievement in itself. However, the Act also aimed to provide clear guidelines which would reduce discrimination against defendants who were poor or lacked social resources, while still providing ample scope to protect the public.

3. Despite the new provisions, early indications are that the Bail Act has not achieved its full range of objectives. South Australia continues to have a higher rate of prisoners remanded in custody than many other parts of Australia - indeed since the new Act was introduced the number of unsentenced prisoners in South Australia has on occasions reached record levels. Moreover there is reason to believe that the bail system continues to prejudice the interests of the socially or economically disadvantaged.

4. This Bulletin argues that a number of administrative problems are undermining the Act's effectiveness. Foremost is a continued preference by bail authorities for imposing financial conditions. This discriminates against poor people and disadvantages those who lack community ties.

Procedures also need to be established to streamline bail reviews and ensure that accurate background information is collected on the financial and social circumstances of bail applicants.

Finally, this review has also exposed an under utilization of special provisions incorporated in the Bail Act. These include prosecutions for breach of bail and use of parole officers to supervise bail.

5. To resolve these problems, the Bulletin recommends a comprehensive review of the administration of the Bail Act. Suggested changes include:

- redesigning bail agreement forms;
- making courts more aware of the option of supervised bail;
- revising police standing orders to make it clear that financial conditions are to be imposed only in exceptional circumstances;
- encouraging bail authorities to prosecute breaches of bail rather than estreat recognizances;
- ensuring that bail application forms are completed in full;
- establishing procedures to ensure that legal aid and other bodies have knowledge of and can act on instances where remandees are in custody solely because of failure to satisfy a financial condition; and
- establishing clear guidelines on when the Crown should lodge an application for a review of bail.

INTRODUCTION

On 7 July 1985, South Australia's first Bail Act came into operation. The new Act, to apply to all people aged 18 or over apprehended on criminal charges, replaced and reformed a range of measures which had evolved under the common law and which had been incorporated in various Acts on a piecemeal basis.

Consolidation of these disparate measures into a single piece of legislation and introduction of uniform procedures for both police and court bail authorities was a significant achievement. However, the new Act represented more than simply an attempt at rationalisation. Since the early 1960s the United States, Britain and Australia have seen extensive analysis and criticism of accepted bail practices, and many jurisdictions have introduced new systems designed to be less discriminatory against defendants who are poor or lack social resources. South Australia's reform fell within this tradition. Enacted after extensive enquiries and empirical research by the Attorney-General's Department, it aimed to incorporate the best features of measures adopted elsewhere while still providing ample scope for protecting the public from absconding or reoffending by persons arrested.

To ensure that the legislation would be properly understood and put into effect, drafts of South Australia's new Bill were circulated widely for comment and a working party, comprised of representatives of government departments and other relevant organizations, was established to oversee its implementation. Despite this, early indications are that the new Bail Act has not achieved its full range of objectives. This State continues to have a higher rate of prisoners remanded in custody than many other parts of Australia - indeed since the new Act was introduced the number of unsentenced prisoners in South Australia has on occasions reached record levels. Moreover there is reason to believe that the bail system continues to prejudice the interests of the socially or economically disadvantaged.

This Research Bulletin discusses why these problems persist, and suggests ways the situation could be improved. Although evaluation of the new Bail Act is still at an early stage, it has become apparent to researchers that aspects of the current administration of bail are more consistent with the old approach than the new system. These problems are so major that it is essential that an attempt be made to resolve them before work proceeds further. Otherwise, introduction of the Act may well turn out merely to have been an occasion for ensuring that traditional practices become further entrenched. As the history of bail and bail reform shows, such a result would be far from satisfactory.

THE HISTORY OF BAIL AND BAIL REFORM

The concept of bail originally developed in mediaeval England. As an alternative to imprisoning every person awaiting trial, sheriffs were given the power to release defendants on their own promise, or an acceptable third party's, that they would appear in court (see Armstrong and Neumann, 1986). Later, forfeiture of money in default of appearance was introduced, and the concepts of sureties and cash bail became central to the common law system which the Australian States and Territories inherited.

First systematic criticism of those principles occurred in the United States, where as early as the 1920s researchers documented deficiencies in the traditional approach (Beeley, 1927). However the turning point in reform occurred in October 1961 when the Vera Foundation (now the Vera Institute of Justice) launched the Manhattan Bail Project in New York.

The emphasis of this three-year experiment was to replace cash bail with a system which allowed for the release of defendants upon conditions other than the lodgement or promise of cash or its kind. To facilitate this change Vera Foundation staff - mainly law students working on a part-time basis - undertook independent investigation of defendants' employment, residence patterns, family ties and previous records in order to supply courts with objective information on whether they constituted acceptable bail risks. A standard questionnaire and a points system for scoring responses were developed. Information was verified, and if a defendant was considered suitable for release on recognizance, summaries of the information collected together with appropriate recommendations were submitted to the Court.

The procedures had immediate impact: judges who had been provided with verified information were four times more likely to release an accused than when they had no such details. Of those granted bail only two out of two hundred failed to appear (Goldfarb, 1963; 156). As a result of the higher rates of release on bail, persons involved in the project also were much more likely either to be acquitted or to have their cases dismissed than was normally the case, and the rate of imprisonment of defendants found guilty decreased (Tomasic, 1976; 3-4). These results spurred the development of a Manhattan Summons Project: an equally successful program which extended pre-trial release to the police apprehension stage. It also led to similar schemes in several other U.S. States and stimulated Federal interest in bail reform, culminating in passage through Congress of the United States Bail Reform Act of 1966. Applicable to all federal courts, the Act designated personal recognizance as the preferred method of pre-trial release, and specified that in cases where "own recognizance" was not deemed sufficient to ensure a person's subsequent court appearance, first priority should be given to:

> "Creating an acceptable method of non-financial release by imposing conditions or restrictions on the defendant's release.

Only if non-financial conditions will not reasonably assure the appearance of the person at trial is the officer permitted to require the execution of a bail bond."
(Thomas, 1976; 27).

Several States revised their own bail provisions along the lines of the Reform Act, and within five years at least eighteen had followed federal law in creating a presumption in favour of 'own recognizance' release.

The themes common to all these U.S. reforms were that non-financial conditions could be more effective than cash bail or sureties, and that decisions concerning pretrial release should be based on objective information rather than subjective assessment. When authorities in Australia began reassessing bail in the 1970's, most took those findings as a starting point. However further initiatives also were suggested.

In its enquiry into Criminal Investigation, for example, the Australian Law Reform Commission (1975) argued that the best way to reduce reliance on financial sureties and cash bail was by establishing a hierarchy of release-types which authorities should consider, with non-financial conditions the first option. To minimise the possibility of arbitrariness the Commission also recommended that police and court bail procedures be made uniform.

These recommendations were taken up by the New South Wales Bail Review Committee, which reported in 1976, and were incorporated in that State's first Bail Act, which came into operation in March 1980. Its objectives included making bail procedures more systematic and uniform and reducing the number of defendants remanded in custody due to an inability to meet financial conditions. To ensure an incentive other than cash forfeiture for court attendance New South Wales made breach of bail a crime in itself, with penalties accumulative upon, but not to exceed, maximum punishment for the original offence.

Other innovations in the New South Wales Act included provision for review of bail decisions and codification of the criteria to be taken into account in deciding this issue. New South Wales also required that applicants for bail should complete a Manhattan-style questionnaire on their background and community ties. However no pass or fail marks were set - a point which has been criticised in subsequent evaluations which found that questionnaires were neither verified nor scored accurately. Nonetheless the overall finding from research assessment has been that the new legislation is a success, with the vast majority of persons arrested obtaining pre-trial release on non-financial conditions (Stubbs, 1984).

Victoria's Bail Act, introduced in 1977, also made breach of bail an offence and established a hierarchy of release-types with non-financial

release given preference. Compared with New South Wales, however, Victoria's approach was more restrictive in that it assumed that bail would not be permitted in a wide range of instances. These included cases where the alleged crime was murder, treason or drug-trafficking, or where weapons, firearms or explosives had been used. Victorian defendants who previously had absconded from bail also had to overcome a presumption that it would not be granted once more.

Queensland's bail legislation, introduced in 1980, again is more conservative than the approach recommended by the Australian Law Reform Commission and adopted in New South Wales. Queensland's Act sets out broad criteria to be observed by bail authorities, but it gives courts an overriding discretion to ignore even its own provisions and remand defendants in custody "... if satisfied that there is an 'an unacceptable risk' that the applicant, if released, would commit an offence or interfere with witnesses and the like" (Stewart, 1983; 556). Defendants in Queensland must also be remanded in custody if it has not been possible to obtain sufficient information to determine whether they would be acceptable risks, and there are no limits on the time defendants can be detained while data relevant to a bail decision are being collected.

Despite the more restrictive nature of their legislation, Queensland and Victoria generally experience lower rates of prisoners remanded in custody than New South Wales and most other Australian States. This confirms that it is not simply the legal framework, but the way bail is administered, that determines whether or not equity and efficiency are achieved. As Thomas (1976) has pointed out, one of the keys to the Manhattan Project's success was the vigour and thoroughness with which Vera Foundation staff carried out assessments. Once those functions were handed over to New York City's Office of Probation the scheme was administered in a more routine way and its effectiveness diminished. This lesson was not lost on the Departmental team charged with reviewing South Australia's bail system in 1983. As well as soliciting opinion on what legal framework would be appropriate for bail in the 1980s it spent time gathering empirical evidence on the way bail was being administered and considered ways procedures could be improved.

The team's final report, Review of Bail in South Australia (Attorney-General's Department, 1984) put considerable emphasis on both legal and administrative issues.

FINDINGS OF THE SOUTH AUSTRALIAN BAIL REVIEW COMMITTEE

From an administrative point of view the report found that improved communication between agencies and more systematic attempts to collect relevant information might well provide a basis for reducing the high number of unsentenced prisoners without putting the community atgreater risk.

This was particularly evident from a comprehensive census of unsentenced prisoners, carried out with generous assistance from Correctional Services staff on 27 August, 1983. Of 90 prisoners surveyed, fifteen (ie. 16.7%) were in custody because they had been unable to lodge cash bail (one case) or arrange sureties (fourteen). Of this group only four were alleged to have committed assaults, robberies or sexual offences: the rest faced property or driving charges. Moreover although twelve of the defendants were found guilty only four actually received prison sentences.

TABLE 1 UNSENTENCED PRISONERS IN CENSUS OF 27 AUGUST 1983, WHO FAILED TO FIND CASH BAIL OR ARRANGE SURETIES

Total period in custody before case finalised or released on bail	Most serious offence charged	Total amount of recognizance and cash bail required	Outcome of case
97 days	Break, enter & steal	$4,000	No evidence tendered
81 days	Break, enter & steal	$1,400	Bond
80 days	Break, enter & steal	$500 cash & $1,000 sureties	Case not yet completed - defendant finally released on bail
80 days	Break, enter & steal	$300	Suspended prison sentence, 2 months
67 days	Break, enter & steal	$800	Suspended prison sentence, 9 months
56 days	Assault	$900	Released on bond
44 days	Robbery	$900	Case not yet completed
43 days	Unlawful possession	$1,000	Bond
42 days	Break, enter & steal	$7,000	9 months imprisonment
30 days	Illegal use of a motor vehicle	$700	Bond
21 days	Illegal interference	$1,800	Convicted without penalty
27 days	Drive under influence	$2,000	Fined $700 & indefinite licence disqualification
18 days	Larceny	$2,000	6 months imprisonment
98 days	Assault	$1,000	9 months imprisonment
86 days	Rape	$4,000	3 years imprisonment

Most of these remandees spent considerable time in prison before their cases were finalised (Table 1). In the Review Team's view that may well have occurred because court, legal aid and other authorities simply failed to keep track of their cases once a bail decision had been made. Assuming that defendants offered bail would be able to accept it, courts tended to set subsequent hearing dates weeks or even months ahead. Once committed to gaol, remandees found it difficult to communicate with their legal representatives and request that their next court appearance be brought forward. This was illustrated by one case which the review team followed up in detail.

The defendant concerned, an invalid pensioner in his early forties, eventually spent almost two months in custody due to the lack of a surety. Information on his background and circumstances suggested that he was of below average intelligence and illiterate, and that his only permanent social contacts were pensioner parents (with whom he lived) and a brother who was unemployed. Perhaps under the misapprehension that acting as guarantor involved some cash payment, they had been unwilling to act as sureties. The defendant had requested legal assistance, but when the relevant legal aid body was contacted it was found that due to an error in the application form it had not realised the applicant was in gaol. The solicitor assigned to this case still was waiting for the defendant to contact him and discuss his defence. Similarly, Correctional Services personnel had been unable to prepare a pre-sentence report because they could not find the defendant at his home address. Eventually, after the Review Team made representations, the final hearing was brought forward and a pre-sentence report dispensed with. The defendant, whose only previous convictions had been twenty years earlier for drunkenness, was placed on probation for twelve months.

This case was perhaps an extreme example of the way poor communication between relevant authorities can result in what can only be described as an unnecessarily lengthy remand in custody. However further evidence of the extent to which more effective information gathering and exchange might help reduce custodial remands emerged when the Manhattan scoring system was applied to the data on background and social ties supplied by prisoners in the census. Out of the ninety involved, twenty-two (24%) obtained scores which would have justified a recommendation for release under the Manhattan system.

Other research undertaken or commissioned by the Bail Review Team included a survey of decisions by Police authorities in the Adelaide Metropolitan Area throughout June 1983, and analysis of records both of Criminal Courts of Summary Jurisdiction and of the Supreme and District Criminal Courts. Such studies provided little evidence to support the more extreme criticisms sometimes made of traditional bail systems - for example that people are routinely refused bail after arrest, or that there is gross inconsistency in decisions. Nonetheless they did confirm that there may be scope for improving both the collection of information and other aspects of administration.

With respect to Police bail, the major finding was that during the survey period just under 70% (ie. 877 from a total of 1,267) of bail applications made in the Adelaide Metropolitan Area were successful. Of the 390 refused, moreover, two thirds had warrants outstanding. This meant that in real terms, bail was denied for about one in eight arrests.

The Review Team noted, however, that of the 127 applicants unable to obtain Police bail in Adelaide, about half (61 or 48%) subsequently had it granted by a court. This suggested that perhaps pretrial releases could be increased if the quality of information available to police was improved, and Police were accorded similar powers to impose non-financial conditions as were available to the judiciary.

The most significant finding on Criminal Courts of Summary Jurisdiction was that although the vast majority of defendants had obtained some sort of pre-trial release, those in remote country courts appeared to be at a disadvantage - particularly if they were from aboriginal backgrounds. Analysis of the data using log-linear statistical techniques showed that much of this discrepancy could be due to "legally relevant" variables, such as offence charged and previous convictions. Nonetheless for some minor offences, such as drunkenness, it was clear that aboriginal defendants in remote country courts were more than twice as likely to have been held in custody than their counterparts in Adelaide, even when all other relevant factors had been taken into account.

In analysing statistics on the Supreme and District Criminal Courts, the Review Team's main interest was in the number of accused remanded in custody at the pre-sentence stage. Research showed that out of more than 1,400 accused whose cases had been finalised by Higher Criminal Courts during the calendar year 1982 more than half (54%) had been in gaol during all or part of the proceedings. However only one in five (21.1%) had been held right from the time of committal. The rest (ie. about 30% of all accused) had been on bail up until they were found, or pleaded, guilty.

The Bail Review Team acknowledged that once a person is convicted, any 'rights' to bail elapse. Nonetheless in view of the fact that more than forty percent of accused who had been in custody for all or part of the Higher Court proceedings did not eventually receive a gaol sentence, it considered that there may be scope for reducing the percentage of pre-sentence remands in custody. Rates of non-appearances for Higher Courts seemed quite low - about 6% - and almost all defaulters had been rearrested within a month. Moreover it was extremely uncommon for persons granted bail after being convicted to fail to appear for sentence.

THE BAIL ACT, 1985

The above findings, and views expressed by individuals and groups consulted by the Review Team, had a major influence on the way the new Bail Act developed. Rather than simply consolidating previous law, it attempted to provide a framework for reducing the use of monetary bail and sureties and ensuring that racial or other minorities were not disadvantaged. At the same time, however, the Act provided ample scope for allaying public concern about possible release of individuals who may pose a risk.

One clause where protection of the public was the principal concern is Section 14. This provides the Crown with the right to request the review of a court bail decision. Until the enactment of the new legislation, only accused people had been entitled to request such reviews. However Section 14 now ensures that whenever a Crown application for bail review is lodged, the decision will be reconsidered by the Supreme Court. In the meantime the accused remains in custody for a maximum period of seventy-two hours.

Further evidence of the Act's concern for public security is Section 10, which lists the factors to be taken into account by bail authorities. Despite considerable controversy among researchers over whether it is possible accurately to predict a particular offender's 'dangerousness', the risk of further offending is one of the criteria. So too is the gravity of the offence alleged, even though some legal commentators argue that this is inconsistent with the presumption of innocence. Section 10 also requires bail authorities to consider the likelihood of absconding, any concerns expressed by the victim and 'any other relevant matter'. In other words, it ensures that although the law now is codified, the Act in no way inhibits bail authorities' discretion.

The Act also stipulates that Section 99 of the Justices Act, which provides for the imposition of restraint orders in instances where there is potential for domestic violence or other breaches of the law, and for arrest without bail wherever such orders are breached, should not be disturbed by the new provisions. Moreover police are empowered to arrest without warrant if it appears that bail is likely to be breached. Within this concern for preserving order, however, the Act contains provisions clearly aimed at eliminating the more discriminatory aspects of the former system.

In particular, Section 11 follows the Australian Law Reform Commission's proposals in establishing a hierarchy of bail types, with first preference to be given to non-financial conditions. To further ensure that incentives other than cash or financial recognizances would be used, Section 17 adopts the New South Wales precedent and makes breach of bail an offence in itself, with a maximum penalty of three years. The Act also contains provision for telephone review by a Magistrate of police bail decisions, and requires that applications for bail should be made in writing on standard forms.

The purpose of formalising bail application procedures and of Section 9, which authorises court bail authorities to make enquiries and hear evidence is, of course, to improve information-gathering and administration. As mentioned earlier, the departmental Review Team which carried out the groundwork for the new Act was strongly of the view that its objectives could only be achieved if relevant agencies were prepared to improve their administration:

> "Unless those administering the system ensure the changed emphasis and new philosophies, and [relevant agencies] appreciate the significance of administrative support procedures, the reforms proposed will fail."
> (Attorney-General's Department, 1984; 90)

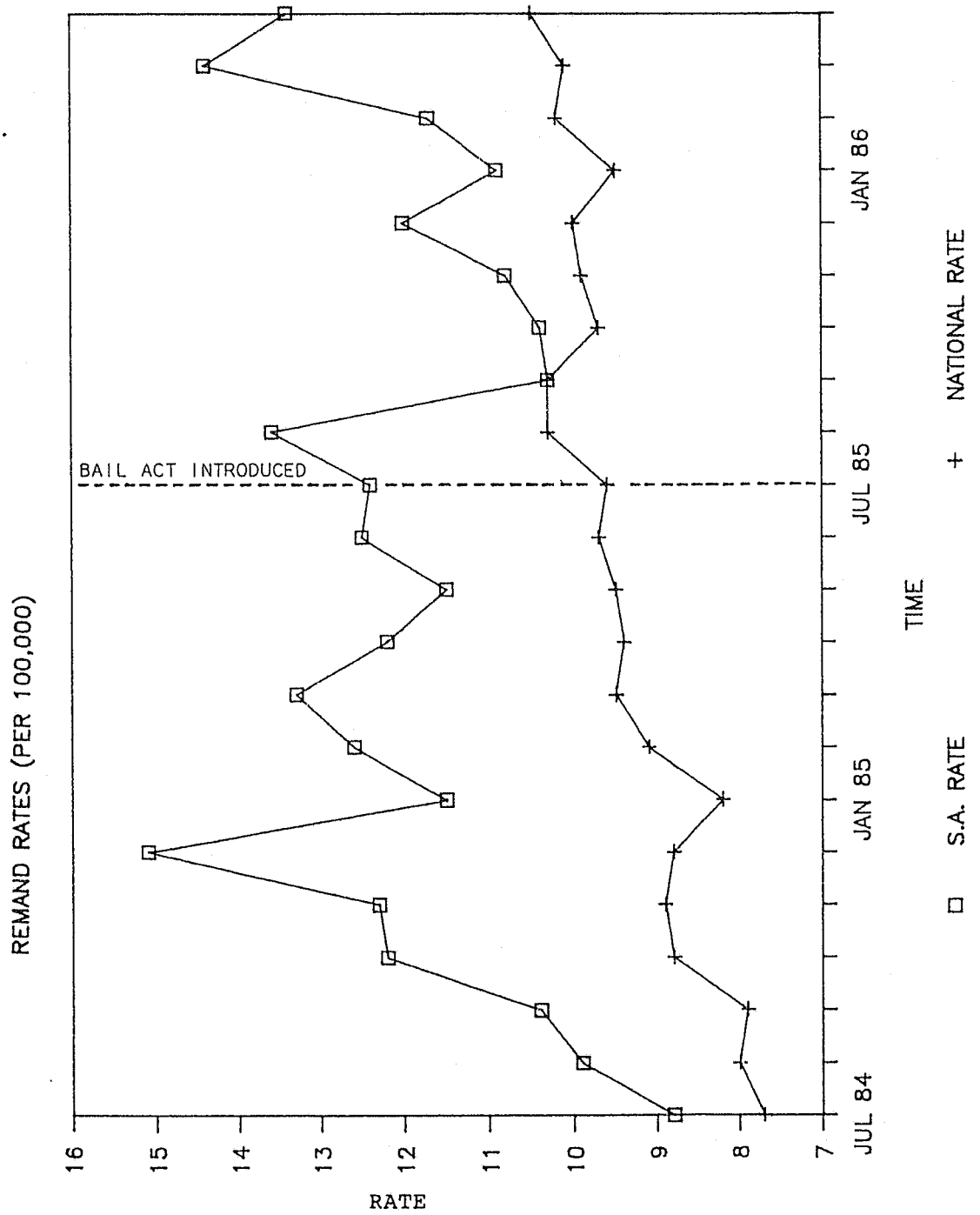
For this reason, although the Government assented to the Bail Act in March 1985, its proclamation was deferred for four months while a working party considered desirable or necessary reforms to administrative procedures. It is now time briefly to review the first twelve months' operation, and to assess what impact, if any, the new system has had on bail in South Australia.

EFFECTS OF THE NEW LEGISLATION

Statistics on the number of unsentenced prisoners in South Australia indicate that if the new Bail Act had any effect on custodial remands, it was only temporary. Immediately after the Act was proclaimed, on July 7, there was a significant decrease in the number and rate of unsentenced prisoners. This continued throughout the following two months, and by September 1985 the South Australian rate was the same as for the nation as a whole - only the second time this had occurred in almost eight years (Figure 1). After this point, however, numbers of remandees began to increase, and by March 1986 they had reached record levels. At 13.4 per 1,000 adult population, the rate of unsentenced prisoners in this State during April 1986 was the third highest in Australia.

Such figures suggest that although legislation has changed, administrative procedures may not have altered. Other information available to the researchers confirms this theory. It is clear that although the Bail Act contains provision for prosecuting breach of bail, the old system of forfeiture of cash or recognizances remains the preferred option. From July 1985 to March 1986 there have been just thirty-five offences for breach of a bail agreement which have been reported or become known to police. Previous research by the Bail Review Committee suggests that far more reports, and consequently prosecutions, should have occurred during this period.

FIGURE 1 SOUTH AUSTRALIAN AND NATIONAL RATE OF PRISONERS REMANDED IN CUSTODY, JULY 1984 TO APRIL 1986



Further evidence that authorities continue to see cash bail and reccgnizances as important despite the Act's requirements that they be used only as a last resort is provided by the standard bail agreement forms used in association with the new system. Forms used both by Police and in Criminal Courts of Summary Jurisdiction (Appendix 1) give predominance to cash bail and monetary recognizance, with other types of conditions listed last. In the researchers' view, this is inconsistent with the spirit of the new legislation. New forms, along lines suggested in Appendix 2, should be adopted.

As the Bail Review Committee's report showed, extensive use of cash bail and financial recognizances invariably means that at least some defendants will spend weeks or even months in gaol, not because bail authorities consider them unacceptable risks but because they are poor or lack a social network. Until the research team has completed its current program of studies it will not be possible accurately to assess the extent to which this problem persists, despite the new Act. However the following case, detected in the course of preparatory work, does not give rise to optimism that it has been resolved.

The case involved a pensioner aged 61, arrested during January 1986 in Adelaide for shop theft. The total value of goods stolen was a dollar and five cents. At his first appearance, the defendant was granted bail on his own recognizance, but then failed to appear at a subsequent hearing. According to the defendant, the reason was that he had been in hospital undergoing surgery. Indeed, a subsequent medical assessment found that he was "an extremely ill man and required long term care in a geriatric environment". However, in light of the failure to appear, the Magistrate set new bail conditions, requiring recognizances of $100 from both the defendant and a guarantor. The defendant was unable to find a surety, and as a result was remanded in custody until the next hearing, a month later.

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

Cases such as this illustrate the problems Criminal Justice administrators can experience, in trying to avoid custodial remands for defendants who, while not posing any threat to the community, nonetheless have a chronic inability to abide by even the simplest undertakings. However readers will recall that it was instances such as this which prompted the Bail Review Team to suggest a new approach.

As a result, the Act contains specific provision for the Probation Service to supervise for defendants who, like the individual in this case, may have difficulties in complying with requirements because of ill health, age or intellectual deficiency.

Like some other aspects of the new legislation, however, it seems rarely to be used. Since July 1985 there have been just thirty-eight cases of Correctional Services supervision of a bailee. Moreover it seems that even though this problem was highlighted in The Bail Review Report, and the report of the Working Party on the implementation of the new Act, Legal Aid, Court and Correctional Services still have not instituted procedures for ensuring prompt review of custodial remands which have occurred simply because of an inability to meet financial conditions.

Perhaps the best way to address these problems would be to reconvene the Working Party which supervised the Act's implementation. If this does occur, the Working Party also could give consideration to the review of Police standing orders with respect to bail. In the research team's view these do not give adequate emphasis to the Act's philosophy that financial conditions should only be imposed in the exceptional instance. Another problem which needs to be addressed relates to the Crown's right to request a review of bail decisions. Although the Act has now been in operation for eleven months, the Commissioner of Police and the Crown Prosecutor have yet to finalise guidelines on the circumstances in which Police Prosecutors may request a review. In the absence of such guidelines, persons whose bail is subject to review can spend up to seventy-two hours in gaol, only to find that the Crown then declines to proceed. Problems are further exacerbated by the fact that because lodgement of the review application had caused the original bail determination to be set aside, the defendant must be returned to court to finalise a new agreement. Urgent consideration should be given to amending the Act and relevant administrative procedures to ensure that once it has been decided that a review will not proceed, the original bail agreement immediately comes into effect.

Other issues in need of consideration include revising the explanatory pamphlet on bail and ensuring that it is distributed to all persons arrested (as the Act requires). Interviews with unsentenced prisoners indicate that, although the pamphlet was purposely written in a manner that is free of jargon, there remain some sections which they cannot understand and the pamphlet has some important omissions. Appendix 3 contains a redraft which should overcome these problems. Some prisoners also claimed that they had not seen the pamphlet, or that they only were provided with a copy after decisions had been made. These assertions need to be checked, and if necessary the problem addressed.

Finally, the Working Party must give serious consideration to improving the accuracy and completeness of the information used in making bail determinations. From research both in Australia and

overseas, there can be no doubt that the key to an efficient yet equitable system lies in ensuring that bail authorities are quickly provided with comprehensive and accurate information on an applicant's background and circumstances. The Bail Act acknowledges this, by empowering authorities to make enquiries and complete a standard application form. From discussions with some police and magistrates, however, it seems that the reasons for these innovations are far from understood, and that many see the new procedures merely as unnecessary bureaucratic intrusions.

Clearly, more needs to be done to breathe life into the administration of bail in this State. Perhaps this means allocation of more resources to the critical tasks of collecting, verifying and summarising information. When one considers that each prisoner in South Australia costs the State at least $35,000 per year, there is every reason to believe that such an effort would be well rewarded.

CONCLUSION

In reviewing the above comments, readers should be careful to avoid premature judgment about whether the Bail Act 1985 has 'failed' or 'succeeded'. Our view is that the legislation has provided the framework for an efficient and fair system. Undoubtedly it has succeeded in reducing public concern about offenders absconding, reoffending, or otherwise posing a risk. It also is clear that some aspects of the new legislation which initially met with scepticism - such as provision for telephone reviews - are working smoothly. The problem that remains to be resolved - namely reducing inadvertent discrimination against the poor or socially isolated - is as much an administrative problem as one of legislation. Only when there has been positive effort to develop programs in this area as well, will it be possible to know whether the attempt to reform bail in South Australia has achieved its objectives.

RECOMMENDATIONS

In light of problems encountered, the research team recommends that the following steps be taken immediately, to improve the administration of bail in South Australia.

1. Bail Agreement forms used by Police, Criminal Courts of Summary Jurisdiction and in the Higher Criminal Courts should be redesigned, along lines suggested in Appendix 2, to give greater emphasis to non-financial conditions, and to make it clear that breach of bail is a serious offence.

2. Courts should be made more aware of the option of granting bail subject to the supervision of a probation officer, and of the circumstances under which supervised bail can be used. Administrative procedures should be established to notify district parole offices of a bailee who has a condition requiring supervision.

3. Police standing orders on bail should be revised, to make it clear that financial conditions should only be used as a last resort.

4. Relevant authorities should be encouraged to prosecute breaches of bail, rather than relying on forfeiture of cash or recognizance.

5. Bail authorities should be asked to ensure that bail application forms always are completed in full.

6. The Bail Pamphlet (as contemplated by Section 13 (1)(b)(i) of the Act) should be revised along the lines suggested in Appendix 3.

7. Steps should be taken to ensure that the Bail Pamphlet is made available to every person arrested, in a language he or she understands, as contemplated by the Act itself.

8. The Correctional Services Department, Legal Aid organisations and the Courts Services Department should take immediate steps to ensure that appropriate authorities are informed as soon as a defendant is remanded in custody because of failure to satisfy a financial condition, and that the case is returned to court for a review. This was originally recommended in the Report of the Working Party on the Implementation of the Bail Act, but was obviously not followed through adequately.

9. The Crown Prosecutors and the Commissioner of Police should immediately finalise agreement on guidelines for lodging applications for Supreme Court review of bail decisions.

10. Administrative procedures and, if necessary, law should be amended to ensure that once the Crown decides not to proceed with a bail review application, the initial bail determination is immediately revived.

11. The Bail Working Party (comprised of relevant departmental and legal aid representatives) be reconvened, to review and improve the administration of bail. It should be serviced by the bail research team from the Office of Crime Statistics.

12. Standard procedures for varying a bail agreement should be established so that any variation of conditions can be entered in the space provided on the original bail agreement.

13. Serious consideration should be given to allocating more resources to collecting and verifying background information on bail applicants.

APPENDICES

Bail Act, 1985

(Sections 6 and 7)

SOUTH AUSTRALIA

Form B1—Bail Agreement and Guarantee of Bail

I, ... of .....
(Eligible Person) *(Address)*
..... and who is charged with/convicted of
..... agree to be present
(Offence)
at the ..... at .....
(Name of Court)
on the ..... day of ..... 19 , at ..... a.m./p.m.,
or at any other time when called upon, and to be present throughout all proceedings in that or any other Magistrates' Court, District Criminal Court, or Supreme Court, as the case may be, in relation to this matter until the matter has been disposed of. I also agree to comply with all of the conditions that appear below. I understand that if I do not appear when I have to, or if I break any condition, then I will be liable to be arrested and may be liable to pay any money or part thereof, that I have undertaken to forfeit to the Crown.

..... *(Eligible Person's Signature)*

Guarantee

I/We ..... of .....
..... and
of .....

guarantee that the abovenamed eligible person will comply with all of the terms and conditions of this agreement, AND if the said eligible person fails to comply with a term or condition herein, then I/We may be liable to forfeit the whole, or part of, the sum of $ ..... to the Crown.

..... *(Guarantor)*

..... *(Guarantor)*

CONDITIONS OF BAIL

1. The eligible person agrees not to leave the State for any reason without the permission of the court or justice before which the eligible person is bound to appear.

2. ..... undertakes to forfeit to the Crown $ .....
(Eligible Person)
if he/she fails to comply with the Bail Agreement.

3. ..... undertakes to forfeit to the Crown $ .....
(Guarantor)
if the eligible person fails to comply with the Bail Agreement.

4. ..... undertakes to forfeit to the Crown $ .....
(Guarantor)
if the eligible person fails to comply with the Bail Agreement.

5. Other

Taken before me this ..... day of 19

* A person in breach of a bail agreement:
  (1) Is liable to be arrested with or without a warrant
  (2) Is guilty of an offence and may be liable to a maximum of 3 years imprisonment.

* A bail agreement may be varied on application.

GS059 *(Bail Authority/Justice of the Peace)*

APPENDIX 2 PROPOSED BAIL AGREEMENT FORM

THIS PROPOSED FORM IS OPEN TO SUGGESTIONS
TO ENSURE THE FINAL FORM FULFILLS ITS OBJECTIVE

Bail Act, 1985

SOUTH  *AUSTRALIA*

Form B1–Bail Agreement and Guarantee of Bail

PART A

I, ...of.....
(Eligible Person) *(Address)*

.....and who is charged with/convicted of

.....agree to be present
(Offence)

at the .....at .....
(Name of Court)

on the .....day of.....19 , at .....am/pm, or at any other time when called upon, and to be present throughout all proceedings in that or any other Magistrates' Court, District Criminal Court or Supreme Court, as the case may be in relation to this matter until the matter has been disposed of. I also agree to comply with all of the conditions that appear below. I understand that if I do not appear when I have to, or if I break any condition, then I will be:

- Liable to be arrested with or without a warrant
- Liable to pay money or part thereof, that I have undertaken to forfeit to the Crown
- Guilty of an offence, and may be liable to a maximum of three years imprisonment.

CONDITIONS OF BAIL (please tick the appropriate conditions)

1. The eligible person agrees not to leave the State for any reason without the permission of the court or justice before which the eligible person is bound to appear.

☐ 2. The eligible person will reside at .....
.....
.....

☐ 3. The eligible person will report to police at .....
between the hours of.....and.....each day/week
commencing / /19 .

☐ 4. The eligible person will surrender any passport he/she may possess.

☐ 5. The eligible person will place himself/herself under the supervision of an officer of the Department of Correctional Services and obey the lawful directions of that officer.

☐ 6. The eligible person will not contact in any way.....

.....(specified person(s)).

☐ 7. .....undertakes to forfeit to the Crown $.....
(Eligible person)

if he/she fails to comply with the Bail Agreement.

☐ 8. .....undertakes to forfeit to the Crown $.....
(Guarantor)

if the eligible person fails to comply with the Bail Agreement.

☐ 9. .....undertakes to forfeit to the Crown $.....
(Guarantor)

if the eligible person fails to comply with the Bail Agreement.

☐ 10. Other .....

.....
(Eligible person's signature)

GUARANTEE

I/We.....of.....
(Guarantor 1)

.....
(Address)

AND.....of.....
(Guarantor 2)

.....
(Address)

Hereby guarantee that the abovenamed eligible person will comply with all of the terms and conditions of this agreement, AND, if the said eligible person fails to comply with a term or condition herein, then I/We may be liable to forfeit the whole or part of, the sum of $.....to the Crown.

.....
(Guarantor 1)

.....
(Guarantor 2)

Taken before me this .....day of .....19 .

.....
(Bail Authority/Justice of the Peace)

FOR ANY VARIANCE OF THIS AGREEMENT PLEASE ATTACH PART B TO THIS FORM.

THIS PROPOSED FORM IS OPEN TO SUGGESTIONS
TO ENSURE THE FINAL FORM FULFILLS ITS OBJECTIVE

Bail Act, 1985

SOUTH  *AUSTRALIA*

PART B: DETAILS OF VARIED CONDITIONS OF THE BAIL AGREEMENT AND GUARANTEE OF BAIL

(excluding condition not to leave the State)

* THIS FORM SHOULD BE ATTACHED TO THE ORIGINAL FORM B1.

1. Date .....

   Bail Authority .....

   Condition number which is being varied ☐☐

   Details of the new condition .....

   .....

   .....

   .....

   (Eligible person's signature)

2. Date .....

   Bail Authority .....

   Condition number which is being varied ☐☐

   Details of the new condition .....

   .....

   .....

   .....

   (Eligible person's signature)

3. Date .....

   Bail Authority .....

   Condition number which is being varied ☐☐

   Details of the new condition .....

   .....

   .....

   .....

   (Eligible person's signature)

APPENDIX 3 PROPOSED BAIL LEAFLET

1. GENERAL

The law of Bail in South Australia is contained in the Bail Act, 1985.

This pamphlet is designed to assist you in making an application for bail and inform you of the seriousness of a bail agreement and the implications of non-compliance.

It will also assist people who want to "stand bail" (ie. be a guarantor) for you.

If there are things you do not understand, ask the police or phone your lawyer.

If you do not have a lawyer and you want help you should apply to the Legal Services Commission, phone (08) 224 1222.

2. WHAT IS BAIL?

Bail is an agreement between the Crown (including Police) and you. The agreement allows a person charged with an offence to be at large so long as that person appears at the scheduled court hearings and obeys any special condition that might be set by the Court or Police.

3. CAN I APPLY FOR BAIL?

You can apply for bail if:

(i) You have been charged with an offence but not yet convicted;
(ii) You have been convicted but not yet sentenced;
(iii) You have been convicted and sentenced, but have lodged an appeal.

4. I THINK I QUALIFY. HOW DO I APPLY?

All applications for bail must be made in writing on the prescribed form.

These forms are available from Courts and Police Stations. You must answer all questions and sign the form before the application can be considered.

If there is a question you don't understand, ask a Court Officer, your lawyer or a police officer.

5. ON WHAT GROUNDS IS BAIL GRANTED

Whether or not you are granted bail will depend on many factors, such as:

(i) The seriousness of alleged offence;

(ii) The likelihood you may not appear in court;
(iii) The likelihood you may offend again;
(iv) The likelihood you may cause trouble with a witness;
(v) Any need you or an alleged victim may have for protection;
(vi) Your health;
(vii) Whether you have previously not obeyed bail conditions;
(viii) Any other relevant matter.

6. WHAT IF BAIL IS REFUSED?

(a) If your bail application is refused by the police bail authority, you may re-apply to a justice of the peace any time.

If your application is still refused, you may apply to have the decision reviewed by a magistrate.

If the police will not be able to take you to a Court by 12 noon the next day, you can request that a magistrate review your case over the telephone. If you ask, the police bail authority must let you know how to make a telephone call to one of these magistrates.

(b) If your bail application is refused by a magistrate you may apply to the Supreme Court to have the bail decision reviewed. The decision of the Supreme Court is final.

7. WHAT IF I CANNOT ACCEPT THE CONDITIONS OF BAIL?

If for some reason you are unable to accept the conditions of the bail agreement you may ask for a review of the conditions. There is a special form to be filled out which you should get from the police or court bail authority. The review of conditions will normally be heard within a few days.

8. WHAT IS MEANT BY MY BAIL AGREEMENT?

If you do not appear at your court hearing or fail to keep to the specified conditions set out by the Police or Court who gave you bail then you are in "breach of bail". To BREACH A BAIL AGREEMENT, OR A TERM OF IT, IS A CRIMINAL OFFENCE AND CAN BE PUNISHED BY UP TO THREE (3) YEARS IN GAOL.

In addition, any money you or your guarantor promised to the Crown as part of the agreement may be lost. If necessary the court will order for it to be collected in the same way as a fine.

The police also can arrest you without a warrant if they have reasonable grounds to believe you are going to skip bail or are not keeping to any of the conditions of your bail.

9. WHAT ARE THE CONDITIONS OF BAIL?

They are the rules you must obey in return for your freedom. They may include such things as not seeing or contacting certain people, staying away from certain places, agreeing to live at a certain address, being under the supervision of a Correctional Services Officer, reporting to the police regularly, or giving up your passport. Conditions are set by the court or police to suit individual cases.

10. WHAT IS MY GUARANTOR AND WHAT DOES HE OR SHE HAVE TO DO?

A guarantor is any person who signs the bail agreement form allowing you to be freed on bail. The guarantor may or may not have to promise to pay some money to the Crown if you don't appear at your court hearings.

The guarantor also signs the agreement to make sure you will go along with the special conditions set by the police or court.

If the guarantor suspects you may not appear in court or fail to keep to the special conditions set he or she can apply to the court to have your bail agreement changed.

11. WHAT CAN HAPPEN TO MY GUARANTOR IF I DON'T KEEP TO MY BAIL AGREEMENT?

If you don't keep to your bail agreement your guarantor may have to pay to the Crown any sum of money referred to in that guarantee.

12. CONCLUSION

A bail agreement is in force throughout the whole of the Court case until you are found guilty. At that stage it is reconsidered. Even if you have been found guilty but are waiting to be sentenced (or have appeared) you may apply for a new bail agreement.

At any stage of your court case the Police, the Crown or a Guarantor may apply for the agreement to be changed or cancelled.

APPENDIX 4 PUBLICATIONS OF THE SOUTH AUSTRALIAN OFFICE OF CRIME STATISTICS (July, 1986)

Series 1 Crime and Justice in South Australia - Quarterly Reports

Vol. 1 No. 1 Report for the Period Ending 31st December, 1978 (February, 1979)

Vol. 1 No. 2 Report for the Period Ending 31st March, 1979 (June, 1979)

Vol. 1 No. 3 Report for the Period Ending 30th June, 1979 (September, 1979)

Vol. 2 No. 1 Report for the Period Ending 30th September, 1979 (December, 1979)

Vol. 2 No. 2 Report for the Period Ending 31st December, 1979 (March, 1980)

Vol. 2 No. 3 Report for the Period Ending 31st March, 1980 (July, 1980)

Vol. 2 No. 4 Report for the Period Ending 30th June, 1980 (September, 1980)

Vol. 3 No. 1 Report for the Period Ending 30th September, 1980 (December, 1980)

Vol. 3 No. 2 Report for the Period Ending 31st December, 1980 (May, 1981)

Vol. 3 No. 3 Report for the Period Ending 31st March, 1981 (July, 1981)

Vol. 3 No. 4 Report for the Period Ending 30th June, 1981 (September, 1981)

Series 11: Summary Jurisdiction and Special Reports

No. 1 Homicide in South Australia: Rates and Trends in Comparative Perspective (July, 1979)

No. 2 Law and Order in South Australia: An Introduction to Crime and Criminal Policy (September, 1979)

No. 3 Robbery in South Australia (February, 1980)

No. 4 Statistics from Courts of Summary Jurisdiction: Selected Returns from Adelaide Magistrate's Court: 1st January - 30th June, 1979 (March, 1980)

No. 5 Statistics from Courts of Summary Jurisdiction: Selected Returns from South Australian Courts: 1st July - 31st December, 1979 (September, 1980)

No. 6 Statistics from Courts of Summary Jurisdiction: Selected Returns from South Australian Courts: 1st January - 30th June, 1980 (December, 1980)

No. 7 Statistics from Courts of Summary Jurisdiction: Selected Returns from South Australian Courts: 1st July - 31st December, 1980 (September, 1981)

No. 8 Statistics from Supreme and District Criminal Courts: 1st July 1980 - 30th June, 1981 (November, 1981)

No. 9 Homicide and Serious Assault in South Australia (November, 1981)

Series A: Statistical Reports

No. 1 Statistics from Criminal Courts of Summary Jurisdiction: 1st January - 30th June, 1981 (April, 1982)

No. 2 Crime and Justice in South Australia: 1st July - 31st December 1981 (August, 1982)

No. 3 Statistics from Criminal Courts of Summary Jurisdiction: 1st July - 31st December, 1981 (November, 1982)

No. 4 Crime and Justice in South Australia: 1st January - 30th June, 1982 (February, 1983)

No. 5 Statistics from Criminal Courts of Summary Jurisdiction: 1st January - 30th June, 1982 (September, 1983)

No. 6 Crime and Justice in South Australia: 1st July - 31st December, 1982 (October, 1984)

No. 7 Statistics from Criminal Courts of Summary Jurisdiction: 1st July - 31st December, 1982 (December, 1984)

No. 8 Crime and Justice in South Australia: 1st January - 30th June, 1983 (April, 1985)

No. 9 Statistics from Criminal Courts of Summary Jurisdiction: 1st January - 30th June, 1983 (January, 1985)

No. 10 Crime and Justice in South Australia:
1st July - 31st December, 1983 (September, 1985)

No. 11 Statistics from Criminal Courts of Summary Jurisdiction:
1st July - 31st December, 1983 (June, 1985)

No. 12 Crime and Justice in South Australia:
1st January - 30th June, 1984 (December, 1985)

No. 13 Statistics from Criminal Courts of Summary Jurisdiction:
1st January - 30th June, 1984 (October, 1985)

No. 14 Crime and Justice in South Australia:
1st July - 31st December, 1984 (April, 1986)

No. 15 Statistics from Criminal Courts of Summary Jurisdiction:
1st July - 31st December, 1984 (May, 1986)

Series B: Research Bulletins

No. 1 Shoplifting in South Australia (September, 1982)

No. 2 Law and Order in South Australia (2nd Edition)
(November, 1985)

No. 3 Bail Reform in South Australia (July, 1986)

Series C: Research Reports

No. 1 Sexual Assault in South Australia (July, 1983)

No. 2 Evaluating Rehabilitation: Community Service Orders in
South Ausrralia (May, 1984)

Series D: Social Issues Series

No. 1 Random Breath Tests and the Drinking Driver (November, 1983)

APPENDIX 5 REFERENCES

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Tomasic, R. (1976), *Bail and Pre-Trial Release*, Sydney, Law Foundation of New South Wales.