REVIEW OF THE BAIL ACT 1977

DISCUSSION PAPER NO. 25

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July 1991

The proposals contained in this paper are not the final views of the Commission but are put forward in order to stimulate discussion and to seek other suggestions. The Commission will welcome your opinions and comments. They will help the Commission to be better informed before making its final recommendations. If requested the Commission will treat your comments as confidential.

The closing date for comments is 5 September 1991. Please send your comments to the Executive Director, Law Reform Commission of Victoria, 160 Queen Street, Melbourne 3000, DX 246 Melbourne; Tel: (03) 602 4566.

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1. INTRODUCTION

1 The Attorney-General has requested the Commission to review the *Bail Act* and its practical operation. The terms of reference require the Commission to:

- consider whether the Act and its operation are consistent with the overall objectives of the criminal justice system, including the presumption of innocence, the desirability of speedy trials, the protection of the public and fairness in decision-making;

- assess the impact of the Act on remand populations, and on providers of legal, welfare, law enforcement and other community services.

This discussion paper is directed mainly at the first of these tasks. A research and consultation program is being developed to assist the Commission in performing the second.

The *Bail Act* 1977

2 The *Bail Act* 1977 governs the granting of bail. It gives most arrested people a right to bail provided they can meet the conditions set by the bail-granter. However, those accused of certain offences have to establish special reasons why they should not be held in custody. The *Bail Act* gives primary responsibility for bail decisions to the courts and bail justices. If it is not practicable to take any arrested person before a court or bail justice, a member of the police force who is above the rank of sergeant, or who is in charge of a police station, is required to make the decision. That decision is, of course, subject to an appeal to a court or a bail justice. In fact, as the following table shows, the vast majority of bail decisions are made by members of the police force:

Table 1
BAIL ACTIONS
For cases completed 1/1/90 to 31/12/90
Persons granted or refused bail on first bail application

Conditions of release	By Police	By Bail Justice	By Court	Total
Bail Act S.5(1)(a) own undertaking	32,793	91	1196	34,080
S.5(1)(b) with deposit	33		26	59
S.5(1)(c) with surety(s)	315	5	463	783
S.5(1)(d) with deposit and surety(s)	17		12	29
SUBTOTAL (Bail granted)	33,158	96	1,697	34,951
Refused bail		197	656	853
TOTAL	33,158	293	2,353	35,804

Source: COURTLINK Database (not all Magistrates Courts are connected to the COURTLINK system).

3 Bail may be granted on the accused's undertaking to appear for trial, either alone or in combination with:

- a deposit of money
- a surety
- both.

4 The conditions attached to a person's bail must not be more onerous than the nature of the offence and the circumstances of the accused require. In addition, special conditions may be imposed if they are

thought necessary to make sure that the accused appears for trial or that he or she:

- doesn't commit an offence while on bail
- doesn't endanger the public
- doesn't interfere with witnesses or the administration of justice.

5 People granted bail are required to sign documents acknowledging that they have been charged. They are told when to appear at the Magistrates court for mention.[1] This is in practice six to eight weeks from the date they are initially granted bail. At the Mention Court proceedings, they can indicate their intention to plead guilty or not guilty to the charge. If they will be pleading not guilty, a date for the trial will be set. If they indicate that they are going to plead guilty, the matter can be dealt with on that day or on another day. In either case bail is usually extended for a further period. Those who are refused bail or are unable to meet the conditions imposed are remanded in custody for seven days. These people return to court every eight days unless they are bailed. The eight-day period can be extended by consent of the accused person.

6 The aim of the system established by the *Bail Act* is to make sure that people are not held in custody unnecessarily while awaiting trial. The aims of imposing conditions on bail are more complex. The primary aim is to make sure that people who are released on bail attend for trial. But there is a broader aim as well: to protect the community against the risk of other crimes, including interference with witnesses.

Concerns about the bail system

Too many people are remanded in custody

7 Two main concerns have been voiced in relation to the operation of the *Bail Act*. The first is that it leads to far too many people being

1 Administrative changes introduced in March 1985 resulted in the establishment of 'Mention Court' procedures.

remanded in custody. This is said to have two unfortunate results. First, people are unnecessarily deprived of their liberty, sometimes for lengthy periods. Secondly, the State's resources are put under unnecessary strain, leading to a diversion of resources from other important projects. The former problem was emphasised in the 1990 *Bail Report* by the Legal Aid Commission. The second problem was emphasised in the 1990 *Analysis of Prisoner Remand Trends* by the Office of Corrections.

8 *Figures concerning the number of people held on remand.* Two types of argument have been used to support the claim that too many people are being remanded in custody. The first is based on figures published by the Australian Institute of Criminology and the Office of Corrections. The Institute figures are set out in *Trends & Issues, No. 27: Remand Imprisonment in Australia.* These show that the Victorian rate of remand in custody per 100,000 population has increased from 3.8 in 1978 to 8.1 in 1990 (see Figure 1, Appendix).[2] However, as Figure 2 shows (see Appendix), Victoria's remand rate remains below the national average - and, in particular, considerably below the remand rate in the most closely comparable jurisdiction, New South Wales. Moreover, as Figure 2 also shows (see Appendix), the long-term trend in Victoria appears to be fairly constant.

9 The fact that there has been such an increase in the remand rate is a matter of great concern. In analysing the figures, however, it is necessary to take other matters into consideration. The bare figures take no account of variations over time in general or specific crime rates; in police resources, priorities and attitudes; or in perceptions of the extent to which the public needs to be protected from people who are awaiting trial for offences.

10 Moreover, bail decisions may be influenced by the availability and suitability of facilities at the relevant time. This could help to explain the increase in remand numbers after the opening of the new Melbourne Metropolitan Remand Centre in May 1989. Until the new Centre was opened, those remanded in custody were held in the remand section of Pentridge Prison. Those who could not be

2 That is, from 144.3 people (in 1978) to 353.2 people (in 1990).

accommodated there remained for up to three days in police cells. There was a widespread belief that bail was being granted to people who should have been in custody, but who were bailed due to a lack of suitable accommodation.

11 The Office of Correction paper, *Trends and Characteristics of the Remand Population*, states that the proportion of remand prisoners to sentenced prisoners in custody has increased significantly in recent years. This increase is shown in Figure 3 (see Appendix). Again, however, the figures must be analysed in context. Major changes in sentencing have taken place in recent years in an attempt to devise suitable alternatives to imprisonment. In particular, non-custodial sentences (Community Based Orders) have provided a means of diverting a significant number of people from the prison system.[3] A large proportion of these people would have received a custodial sentence (including a custodial sentence that is imposed and then suspended) if the Community Based Order option had not been available.

12 If the number of sentenced adult offenders under the control of the Office of Corrections (excluding those fined) is compared with the number of remand prisoners, a different picture emerges - as Figure 4 shows (see Appendix). That is not to say, of course, that the figures presented by the Office of Corrections are irrelevant to the Commission's exercise. Quite the contrary. They remind us of the fact that so much has been done recently to reduce the level of imprisonment *after* trial, while so little has been done to reduce the level of detention *before* trial. They suggest that there may well be scope for applying in the Commission's bail exercise the philosophy that underlies recent changes in sentencing.[4]

13 *Inconsistency between bail and sentencing*. The second type of argument used to support the claim that too many people are being remanded in custody is based on a perceived inconsistency between the decisions made in relation to bail and the decisions made in relation to sentencing. Both the Legal Aid Commission and the Office of Corrections point to the anomaly that lies in people being

3 5,355 people were subject to a Community Based Order in June 1991.

4 That philosophy stresses that imprisonment is a sanction of last resort.

held in custody on remand, but, when found guilty, being given *non-custodial* sentences. The difficulty with this argument is that it appears to pay insufficient attention to the fact that, in sentencing an offender, a court is required to take account of any time spent in custody on remand. An anomaly exists only if the courts would have given non-custodial sentences to the people held in custody on remand *even without taking into account their time already spent in custody*. There is no simple way of telling whether that condition is fulfilled or not.[5]

Some people are let out on bail when they shouldn't be

14 The other main concern that has been voiced in relation to the operation of the *Bail Act* is that some people are remanded on bail when they should not be. Any bail system creates a risk that people who are bailed will abscond or commit offences. The question is whether the risk is an acceptable one or not. Some statistical information is available about absconding. The rate varies between offences, but the overall rate is 4.4%. This is lower than the rate in Queensland (9.2%), New South Wales (5.4% in 1987) and UK (11%).

15 No statistical information is available in relation to the commission of offences by people who are on bail. A pilot project is being undertaken by the Australian Institute of Criminology with the cooperation of the Victoria Police to determine the number and nature of the offences committed by people on bail. The Commission itself is hoping to make a study of a sample of people who abscond or commit offences to determine whether there is any set of characteristics that would help in predicting high-risk categories.

5 Office of Corrections statistics of those remanded in custody include those detained for very short periods - those not granted bail by police who are not able to make an application to a Bail Justice or Magistrate immediately.

The Commission's approach

16 Whether too many people are being held in custody on remand cannot be answered solely by reference to statistics. Ultimately, it has to be answered by reference to the objectives of the bail system and to the level of risk associated with that system that the community is willing to accept. If those objectives and that level are agreed, the questions that remain are whether the rules that govern bail and related issues are fair, just and consistent with them; and whether those rules are applied in a coherent and consistent manner by those who have the responsibility for making bail decisions.

17 But the objectives of the *Bail Act* alone are not sufficient. The bail system is part of the wider criminal justice system. In reviewing the existing bail system, it is essential to have regard to the fundamental principles of criminal justice. In this context, two principles stand out: the presumption of innocence, and the principle that imprisonment - in this context, 'detention' - is only to be used as a last resort. The Commission has borne these principles in mind in reviewing the *Bail Act* and in evaluating the specific criticisms made of it.

2. PROBLEMS AND PROPOSALS

18 Criticisms of the present bail system are of three main types: criticisms relating to the scope of the system; criticisms of the *Bail Act* itself; and criticisms of the decisions made by the courts in relation to bail. The Commission will deal in turn with each of these types of criticism.

Criticisms relating to the scope of the system

19 One criticism of the bail system is that a good deal of time and effort goes into making decisions on bail in cases where it should not be necessary to consider the question. That question only arises in relation to people who are arrested. In relation to both summary and indictable offences, police have the alternative of commencing proceedings by issuing a summons. In the case of indictable offences, the police must ask the court to which the matter will be referred to issue the summons. They can issue a summons for summary offences without reference to a court.

20 In practice, police generally arrest and charge people accused of indictable offences, as obtaining a summons is inconvenient and time consuming. In the case of summary offences, it seems that the level of cooperation provided by the accused, as well as the officer's perception of the amount of work involved, are important factors in deciding whether to proceed by arrest or summons.

21 In New South Wales, there is a special procedure under which police and courts are able to dispense with bail. The effect of this procedure is similar to that of having proceeded by way of summons. Police and courts in New South Wales are also entitled to issue a Court Attendance Order as a means of dispensing with the need for bail. A Court Attendance Order involves an agreement by the accused to appear in court on a specified date, or to have his case

dealt with in his absence. The number of bail decisions is greatly reduced in New South Wales as a result of these procedures.

22 The Commission believes that too many people are required to go through the bail process. Efficiency demands that the number be reduced. The Commission believes that the police should use the summons procedure rather than arrest in all cases where it is likely that bail would be granted on the accused's own recognisance - or promise to attend for trial.

23 The Commission also believes that the courts themselves should have the power to dispense with bail altogether in a case where there is no reason to believe that the accused will not turn up for trial or that he or she will commit a violent offence before trial. The accused would then be treated in the same way as a person proceeded against by summons. These changes would free the police and the courts from unnecessary work in relation to bail and significantly improve the efficiency of the system.

Criticisms of the Act itself

It overrides the presumption of innocence

24 The main criticism of the *Bail Act* is that, in certain cases, it overrides the presumption of innocence. A person who is arrested for an offence is generally entitled to bail. However, there are three types of exception.

25 *The three exceptions to the right to bail.* First, sub-section 4 (2) of the Act states that the court must refuse bail:

> (b) if the accused person is in custody pursuant to the sentence of a court for some other cause; or
>
> (c) if the accused person is in custody for failing to answer bail unless the accused person satisfies the court that the failure was due to causes beyond his control.

26 In fact, paragraph (b) is now a dead letter. It is contradicted by sub-section (2A) which states that:

> Despite sub-section (2)(b), a court is not required to refuse bail in the case of an accused person who is serving a sentence of imprisonment for some other cause but any bail granted must be subject to the condition that the person will not be released on bail before he or she is entitled to be released under a parole order made, or which may be made, in respect of him or her.

27 Despite sub-section (2)(b) then, a court is not required to refuse bail in the case of an accused person who is serving a sentence of imprisonment for some other cause, but any bail granted must be subject to the condition that the person will not be released on bail before he or she is entitled to be released under a parole order made, or which may be made, in respect of him or her.

28 Secondly, paragraph 4(2)(a) also requires the court to refuse bail to people charged with certain offences unless there are 'exceptional circumstances ... which justify the grant of bail'. The requirement of exceptional circumstances applies:

> (a) in the case of a person charged with treason or murder[6]...
>
> (aa) in the case of a person charged with -
>
> (i) an offence of trafficking in a drug of dependence under section 71 of the *Drugs, Poisons and Controlled Substances Act* 1981 or an offence of cultivating a narcotic plant under section 72 of that Act or an offence of conspiring to commit either of those offences under section 79(1) of that Act; or
>
> (ii) an offence under section 231 (1), 233A or 233B (1) of the *Customs Act* 1901 of the Commonwealth (as amended and in force for

6 Only a Supreme Court judge or the committing magistrate may grant bail in such a case, s13 *Bail Act.*

the time being) in relation to a commercial or trafficable quantity of narcotic goods within the meaning of that Act -

and the offence is alleged to involve -

(iii) 30.0 grams or more of heroin; or

(iv) 100.0 grams or more of cocaine; or

(v) a prescribed quantity of any other drug of dependence that is prescribed -

unless the court is satisfied that exceptional circumstances exist which justify the grant of bail.

29 Thirdly, sub-section (4) requires the court to refuse bail in a range of cases 'unless the accused person shows cause why his detention in custody is not justified'. The cases are those where the accused person is charged:

(a) with an indictable offence that is alleged to have been committed while he was at large awaiting trial for another indictable offence;

(c) with an offence of aggravated burglary under section 77 of the *Crimes Act* 1958 or any other indictable offence in the course of committing which the accused person or any person acting in concert with the accused person is alleged to have used or threatened to use a firearm, offensive weapon, or explosive within the meaning of the said section 77; or

(ca) subject to sub-section (2)(aa), with an offence of trafficking in a drug of dependence under section 71 of the *Drugs Poisons and Controlled Substances Act* 1981 or an offence of cultivating a narcotic plant under section 72 of that Act or an offence of conspiring to commit either of those offences under section 79(1) of that Act;

(cb) subject to sub-section (2)(aa), with an offence under section 231(1), 233A or 233B (1) of the *Customs Act*

1901 of the Commonwealth (as amended and in force for the time being) in relation to a commercial or trafficable quantity of narcotic goods within the meaning of that Act; or

(d) with an offence against this Act.

30 *Are the three exceptions to the right to bail justified*? Three questions arise in relation to those provisions. The first is whether it is consistent with the objectives of the bail system to deny bail altogether to people who are in custody for failing to answer bail for reasons that were not beyond their control. The second is whether there is any - and, if so, what - difference in practice between the requirement of exceptional circumstances and that of showing cause. The third is whether it is consistent with the objectives of the bail system to require 'exceptional circumstances' or the 'showing of cause' before bail can be granted in a variety of cases.

31 The reason for originally denying bail altogether in the case of a person who is already serving a sentence in custody was presumably that an order for release on bail on the second charge would be in conflict with the earlier order for a custodial sentence. The former order for the person's release on bail could obviously only have taken effect when the custodial sentence came to an end. Sub-section (2A) has disposed of the original rule altogether. The Act should be amended by repealing paragraph 4(2)(b) and converting sub-section (2A) into an independent rather than a qualifying provision.

32 The reason for denying bail altogether to a person who is in custody for failing to answer bail for reasons not beyond his or her control is also obvious enough. A person who has not honoured a bail obligation is generally not to be trusted to honour a similar obligation. But that hardly justifies a blanket denial of bail. There may be cases where the reason for not honouring the bail obligation has passed and is unlikely to recur. There seems no reason for not allowing the courts to make their own assessment of the likelihood of the person's honouring a new bail obligation as they are required to do in other cases. On that basis, paragraph 4(2)(c) should be repealed.

33 Although the *Bail Act* nowhere makes it clear, there is a clear distinction in practice between establishing that exceptional circumstances exist and showing cause. Although views on the matter vary to some extent between different judicial officers, it seems that a relatively narrow view is generally taken of what constitute exceptional circumstances. In particular, it is apparently not sufficient that the release of the person on bail in the circumstances would be consistent with the objectives of the Act. That is so, however, in relation to showing cause. But that requirement also has its difficulties. For example, it is sometimes treated as not being satisfied even if prosecution and defence agree that it is a suitable case for bail to be granted. The uncertainties are, of course, compounded in relation to the drug offences that fall within *both* of the requirements. It seems clear that it is much more difficult in practice to show exceptional circumstances than it is to show cause.

34 There is, however, little point in a fine examination of the difference in practice between the requirements of exceptional circumstances and showing cause. The reason is that there does not seem to be any justification for either type of special treatment of the cases picked out by the *Bail Act.* In some cases, the reason behind the request may appear to be consistent with the objectives of a system of bail. For example, the former requirement to show cause if the person is charged with an indictable offence and he or she is not ordinarily resident in Victoria (paragraph 4(4)(b)) appears to be based on the fear that the person will not attend court for trial.[7] And the requirement to show cause if the person is charged with an indictable offence that is alleged to have been committed while the person was 'at large' awaiting trial for another indictable offence appears to be based on the need to protect the public against the risk of further serious offences.

35 In many other cases in which exceptional circumstances or the showing of cause are required, the link with the objectives of a system of bail is less apparent. In some of them, the gravity of the offence appears to be the basis for the requirement. Treason and murder are very serious offences, it is true. But many murders are

7 *Re Loubie* (1985) 62 ALR 139. *Magistrates Court Amendment Act* 1989.

committed in the heat of the moment and in special circumstances by people who have no history of violent crime and who are unlikely to re-offend, or to fail to attend for trial. The crimes associated with the use of weapons referred to in paragraph 4(4)(c) and the drug offences referred to in paragraphs 4(2)(aa) and 4(4)(d) and (e) are also serious, but not nearly as serious as attempted murder (with its obvious risk of re-offending) or rape.

36 In any event, the seriousness of an offence is not itself the ultimate basis on which to make decisions about bail (cf para 44). The ultimate question is whether there is a significant risk of further serious offences or of the person not turning up at trial. The seriousness of an offence is not a good surrogate for the significance of either of those risks. There may be some offences where the rate of recidivism during bail, or of failing to attend for trial, justifies taking special care. But the statistical evidence certainly doesn't justify the special rules relating to bail in each of the cases covered by paragraphs 4(4)(c), 4 2(aa), and 4(4)(d) and (e) of the *Bail Act* 1977.

37 Two recent reviews of bail in other jurisdictions have concluded that there is no justification for singling out particular offences for special treatment.[8] However, a report by the Director of Public Prosecution Working Party suggests an extension to all drug offences. But the concern that led to this suggestion could easily be met by requiring the court to take into account, in all cases, any information that is available in relation to the rate of absconding of people accused of the particular type of offence and granted bail.

38 The Commission believes that the rules requiring exceptional circumstances or the showing of cause in relation to certain types of offence should be abolished. Shifting the burden of proof in such cases imposes a strictly adversarial model on what should incorporate some aspects of an inquisitorial process. Bail should be available on the same basis and according to the same criteria in relation to all offences. What those criteria should be is dealt with in the next section of the paper.

8 Queensland Law Reform Commission, *Discussion Paper on Bail*, March 1990; Australian Capital Territory, *Draft Bail Bill*, April 1990.

It requires bail to be refused for insufficient reason

39 The second criticism made of the *Bail Act* is that it requires bail to be refused in some cases for insufficient reason. Excluding the special cases requiring 'exceptional circumstances' or the showing of 'cause', bail decisions are to be made on the basis set out in paragraph 4(2)(d) of the Act. Bail is to be refused only if the court is satisfied:

> (i) that there is an unacceptable risk that the accused person if released on bail would -
>
> fail to surrender himself into custody in answer to his bail;
>
> commit an offence whilst on bail;
>
> endanger the safety or welfare of members of the public;
>
> interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person;
>
> (iii) that it has not been practicable to obtain sufficient information for the purpose of deciding any question referred to in this sub-section for want of time since the institution of the proceedings against him.

40 Sub-paragraph (i) may seem to be generally consistent with the objectives of a bail system. The last three criteria in that sub-paragraph reflect recognition of the need to protect the public against the risk of further offences, including interference with witnesses. Concern has been expressed, however, about the use of bail for preventive detention. There can be no doubt that the public is entitled to protection against significant risks of further serious harm. But that hardly justifies the width of the second criterion in sub-paragraph (i). A significant risk of 'an offence' being committed while on bail is hardly a good reason for remanding a person in custody. At the very least, sub-paragraph (i) should be amended to restrict the requirement to refuse bail to cases where the unacceptable

risk relates to a 'serious' offence, or, better still - as the Queensland Law Reform Commission has recently suggested - to an offence involving violence.

41 But the Commission would go further. The problem lies not only in the range of the offences that are to be taken into account, but also the lack of specificity about the level of the risk of an offence being committed. It is notoriously difficult to make reliable predictions about a person committing further offences. In light of that fact, courts should be very wary indeed of depriving a person of his or her liberty on the basis of a risk of a further offence being committed. The bail system should not be used as an indirect form of introducing a form of preventive detention. The Commission believes that deprivation of liberty on that basis is justified only if there is reason to believe that there is a very substantial risk of the relevant type of offence, and that reason does not lie merely in the fact that the accused has (allegedly) committed the crime in relation to which bail is being sought.

Miscellaneous criticisms

42 A number of minor, but nonetheless important, criticisms have also been made of the *Bail Act*. The Commission deals with them in turn:

43 • *To impose a requirement that the accused make a 'deposit' in relation to a minor offence discriminates against the poor.*

In fact, deposits are only rarely required. But the risk of discriminating against the poor is certainly something that should be taken into account by the court when it considers the basis on which to release a person on bail.

44 • *An accused who is on bail is normally remanded in custody from the time when the jury retires until it reaches its verdict, and, in the case of a finding of guilt, until the accused is sentenced.*

One reason for the present practice[9] lies in the fear that an accused, anticipating the jury's verdict, will have a last chance to abscond. Another reason is that some courts want to give a short, sharp jolt to accuseds whom they do not intend to sentence to prison. A third reason is that it is thought by some people unseemly for the accused to be at large while the jury is not. None of these reasons justifies the practice. Neither is a proper use of the system of bail. Remanding in custody either for verdict or for sentence should be based on the usual criteria.[10]

45 • *The courts do not have power to remand a person between 17 and 21 to a Youth Training Centre, even though that option is available in sentencing.*

At present, accuseds between 17 and 21 who are remanded in custody are held in adult remand facilities. However, people of that age who are convicted and sentenced are not necessarily held in an adult correctional facility. The court has the power to send such people to a Youth Training Centre. The Commission believes that the courts should have a similar power in relation to remanding such people in custody.

46 • *Several anomalies exist in relation to appeals from bail decisions.*

Three main problems have been drawn to the Commission's attention. The first is that the courts are very hesitant about granting bail to a person who is on bail after conviction, even though an

9 This appears to be the subject of a *Practice Note* used by judges.

10 See also Section 101(3)(a) and Section 101(5) of the *Sentencing Act* 1991 (not yet proclaimed). These sections appear to adopt the principle that people do not have to be remanded in custody pending the court pronouncing the sentence.

appeal is pending and there is no likelihood of that person absconding. The second is that it is unclear whether an appeal to the Supreme Court against a grant of bail involves an appeal in the strict sense, or a hearing *'de novo'* (afresh). The third is the lack of an appeal to the Full Court of the Supreme Court - which means that the usual opportunity for laying down clear principles to be followed by the Supreme Court is lacking. The Commission agrees with each of these criticisms of the appeal process. It should be possible to appeal to the Full Court on a matter of law. An appeal to the Supreme Court should be a rehearing on the merits - except where the appeal is by the Director of Public Prosecutions against a grant of bail. That type of appeal should only be allowed on restricted grounds - such as an error of law.

Criticisms of the decisions made by the courts in relation to the granting of bail

47 Concern is expressed from time to time about a decision to grant bail in a particular case. In some cases, the criticism may be deserved. Often, inadequate information is available to the court for it to make a fully informed decision. Moreover, divergent decisions by different courts are almost inevitable given the breadth of the discretion they are required to exercise. Decision-making might well be improved if full information were available to the courts and if more guidance were given to them in relation to exercising their discretion.

48 The exercise of the courts' discretion is already 'guided' by sub-section 4 (3) which requires the court to have regard to:

> all matters appearing to be relevant and in particular, without in any way limiting the generality of the foregoing, to such of the following considerations as appear to be relevant, that is to say -
>
> (a) the nature and seriousness of the offence;
>
> (b) the character, antecedents, associations, home environment and background of the accused person;

(c) the history of any previous grants of bail to the accused person; and

(d) the strength of the evidence against the accused person.

49 It might be possible to guide the exercise of the discretion more carefully by being more specific about the factors referred to in sub-section (3). It might also be desirable to add to the list of matters to be taken into account, including the rate of absconding of people granted bail in relation to the particular type of offence. But a more radical solution may be preferable - to guide decision-making by improving the quality of the information supplied to the court, and by providing the court with a point-scoring mechanism to assist it in weighing up all of the relevant factors. Alternative models in this regard are provided by the Manhattan Bail Project and the Nassau Bail Project.

Manhattan Bail Project

50 The project was initiated in 1961 by the Vera Foundation of the New York University Law School, and the Institute of Judicial Administration.

The theory behind the project was that more people could be successfully released on bail if verified information concerning their character and community ties were available to the court at the time when bail decisions were made.

51 The scheme initially involved interviewing people refused bail. The interview was aimed at finding out whether they had:

- a present or recent residence at the same address for six months or more
- current employment or recent employment for six months or more
- relatives in (New York City) with whom there is regular contact
- no previous conviction of a crime
- residence in (New York City) for ten years or more.

52 If the accused met at least one of the criteria, or partially met at least two of the five criteria, the information was verified. This was usually done by telephone, interview of people attending the court hearing, or by field investigation. Interviews were of 15 minutes duration, and verification was usually completed in an hour.

53 The project team provided the court with the information they obtained from the accused. When it was appropriate, they made a recommendation that the person should be bailed on his or her own recognisance (ROR). The basis on which the recommendations were made is set out in the following table.

Point-scoring system of the New York Release on Recognisances Project (formerly Manhattan Bail Project)

To be recommended, the defendant needs:

1. A New York area address where he can be reached and
2. A total of five points from the following categories

Inter-viewer	Categories
	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 four months OR present and prior six months.
1	Has present job which is still available OR Unemployment three months or less and nine months or more steady prior job OR Unemployment compensation OR Welfare.
3	Present in school, attending regularly.
2	Out of school less than six months but employed, or in training.
1	Out of school three 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 six months at present residence.
1	Six months at present and last prior residence OR in New York city five years or more.
	Discretion
+1	Positive, over 65, attending hospital, appeared on some previous case.
-1	Negative, intoxicated, intention to leave jurisdiction.

54 For the purposes of the project, only half of the completed assessments recommending bail were actually given to the court. The other half became the control group. The court made bail decisions in relation to those in the control group using the existing criteria. Of those recommended for release by the Project team, 60% were granted bail. Fourteen per cent of those recommended but whose recommendation did not go to the court were given bail. The project sample resulted in four times as many people being given bail. The success of the Manhattan Bail project was measured in two ways. First, of the 250 people released on bail on their own recognisance, only three moved away and only two were arrested on new charges while awaiting trial. This was similar to the rate of breach for the control group. Second, when compared with the control group who were equally eligible for release, those released were more than twice as likely to be found not guilty (59%) as those released on cash bail or other conditions (23%).

Nassau Bail Project

55 The Manhattan Bail Project spawned a number of similar schemes throughout the United States. Perhaps the most significant is the Nassau Bail Project - a project again sponsored by the Vera Institute. The main objective of this project is similar to that of the Manhattan Project. However, the target group is different. The Manhattan Project was aimed at attempting to influence the initial bail decision-makers; the Nassau Bail Project targets those who have been refused bail.

56 People who have been remanded in custody for at least 12 days are screened by project staff. However, those charged with certain serious offences are excluded,[11] as are those who are required to answer charges in other jurisdictions, those who have a history of breaking bail, those who have no community ties, and those where there is evidence of mental instability.

11 Those charged with murder, serious burglary, serious larceny, serious drug charges, sexual offences against children, rape and serious robbery are excluded.

57 The target population is subjected to an extensive investigation process. The information they provide is verified, past criminal history is reviewed, previous employers are contacted, and visits are made to the applicant's family. Defence counsel is contacted, court dates obtained and likely outcomes noted. People who are likely to receive a custodial sentence are given a lower priority for inclusion in the program.

58 Those applicants who are assessed as satisfactory are interviewed again. The aims of this further interview are:

- to clarify for the applicant the objectives and requirements of the agency
- to obtain more detailed information about the applicant's history and needs.

59 Successful applicants are asked to sign an 'Agreement to Terms' and 'Undertaking to Answer'. They are then released from custody to spend a period of orientation in a hostel before being released into the community. This period is used for further assessment as well as orientation. Individual release plans are developed. Requirements relating to supervision are explained and schedules of appointments are developed and agreed to.

60 When the orientation period is completed, community residential arrangements are put in place and necessary services are identified. The participants are then released and taken to their accommodation. Regular direct contact between participants and project supervisory staff is critical during this 'community' phase. In some cases, face-to-face contact is made more than once a day and is supplemented by telephone contact. Regular contact is also maintained with the participants' employers, schools and families. All participants are required to undergo weekly, randomly-scheduled urine monitoring to test for the use of illegal substances.

61 When breaches are detected, remedial action follows soon after. Initial reaction to minor breaches includes the tightening of controls, stricter curfews and more frequent contact with project supervisory

staff. More substantial breaches result in a return of the participant to the hostel for reassessment, or to correctional custody.

62 Participants in the program are regularly reminded of court appearance dates. They are taken to the court by project staff. Project staff remain with the participants for the duration of the court proceedings. They note changes to court schedules and make sure that participants understand and accept court directions. At the court hearing, project staff provide the court with information about the participants' progress on the program and argue for a non-custodial sentence. During the first 14 months, 74 people were placed on supervision by the project staff. Of the 30 participants who completed the program of supervision, eight had received custodial sentences, and 22 non-custodial ones.

63 In its preliminary evaluation, the Vera Foundation claims that the goal of 'implementing a workable and independent release mechanism...and keeping 'fail to appear' and rearrest low...has been established'. During the 14-month period, only 2 (2.7%) of the participants were rearrested. The fail to appear rate was even lower. Only two of the 325 scheduled court appearances were missed, an appearance rate of more than 99%. The Vera Institute is conducting further research to determine the impact of the project on correctional numbers. To achieve a positive outcome the Institute will need to show that:

- people selected for the program without its intervention would have stayed remanded in custody for lengthy periods of time
- the project results in reducing the frequency or the length (or both) of custodial sentences imposed on people in the program.
- the period of time between release to the program and final disposition can be controlled.

64 The Institute is confident that when it reaches an intake rate of 150 people per year, the program will be responsible for a reduction of forty beds per day in remand facilities.

65 The Manhattan and Nassau Bail Projects indicate the benefits of providing better information to those who make decisions about bail, of structuring those decisions by reference to the information provided, and by concentrating resources on assessment and supervision rather than on providing remand beds. The Commission intends to have discussions with the Police, the Magistrates and the Office of Corrections in order to develop a project that draws on the United States schemes, but which is tailored to the particular needs of Victoria. It will be aimed at assisting the courts in making bail decisions, not at taking away their discretion, or substituting bureaucratic for judicial decision-making. It will take account of the need for expedition in making bail decisions. It will provide that any information that is obtained for the purposes of the bail decision is not to be used by the prosecution in the trial of the relevant offence. In developing that scheme, the Commission will make a careful assessment of its costs and benefits and those of possible alternatives. It may well be possible to implement some aspects of that scheme - particularly ones relating to the provision of information and of improved supervision - without the need for legislation. In particular, it may be possible to develop a computerised expert system or decision support system for use by the courts. Developments that take place in this area will be recorded in our final report.

Conclusion

66 In summary, the Commission's proposals are:

(1) The *Magistrates Court Act* should be amended to make it necessary for police to use the summons procedure rather than the arrest procedure in all cases except those where arrest is necessary to protect the public interest. The courts themselves should have the power to dispense with bail altogether when there is no appreciable risk that the accused will not turn up for trial, will commit a violent offence or will interfere with witnesses or the administration of justice.

(2) The *Bail Act* should be amended:

- to get rid of the mandatory denial of bail to people who have breached bail for a reason that was not out of their control.
- to get rid of the requirement of exceptional circumstances or the 'showing of cause' in the case of certain offences.
- to restrict the circumstances in which bail is to be refused to cases where there is an unacceptably high risk that the accused would fail to turn up for trial, would commit a violent offence, or would interfere with witnesses or the administration of justice.
- to establish remand facilities at Youth Training Centres. This would make it unnecessary to remand these people in adult facilities as is presently being done.
- to abolish the practice which requires some accuseds to make a small deposit, since this discriminates against the poor.[12] The Commission finds no evidence that such deposits are related to the likelihood of accuseds appearing at court.
- to base decisions to grant or refuse bail to people who are awaiting the outcome of a court hearing on the usual criteria. The practice of remanding people who have been on bail while the court deliberates their case is inconsistent with the principle of bail.
- to consider bail on the usual criteria for people who have been convicted and who were on bail prior to their conviction, and have appealed against their conviction.
- to make bail appeals to the Supreme Court a rehearing on the merits of the case, except where the appeal is by the Director of Public Prosecutions against the grant of

12 This is consistent with the recommendations made by the Royal Commission into Aboriginal Deaths in Custody.

bail or the conditions set. That appeal should only be on restricted grounds, such as an error of law.

- to make appeals from the Supreme Court to the Full Court possible in bail matters. This would provide the vehicle for the Full Court to pronounce principles in particular cases.

(3) The making of bail decisions should be assisted by providing better information to the courts. Consideration should be given to establishing a system based on the Manhattan and Nassau Bail Projects, but geared to Victoria's particular needs. An attempt should be made to develop a computerised expert system or a decision support system to assist courts in making decisions about bail.

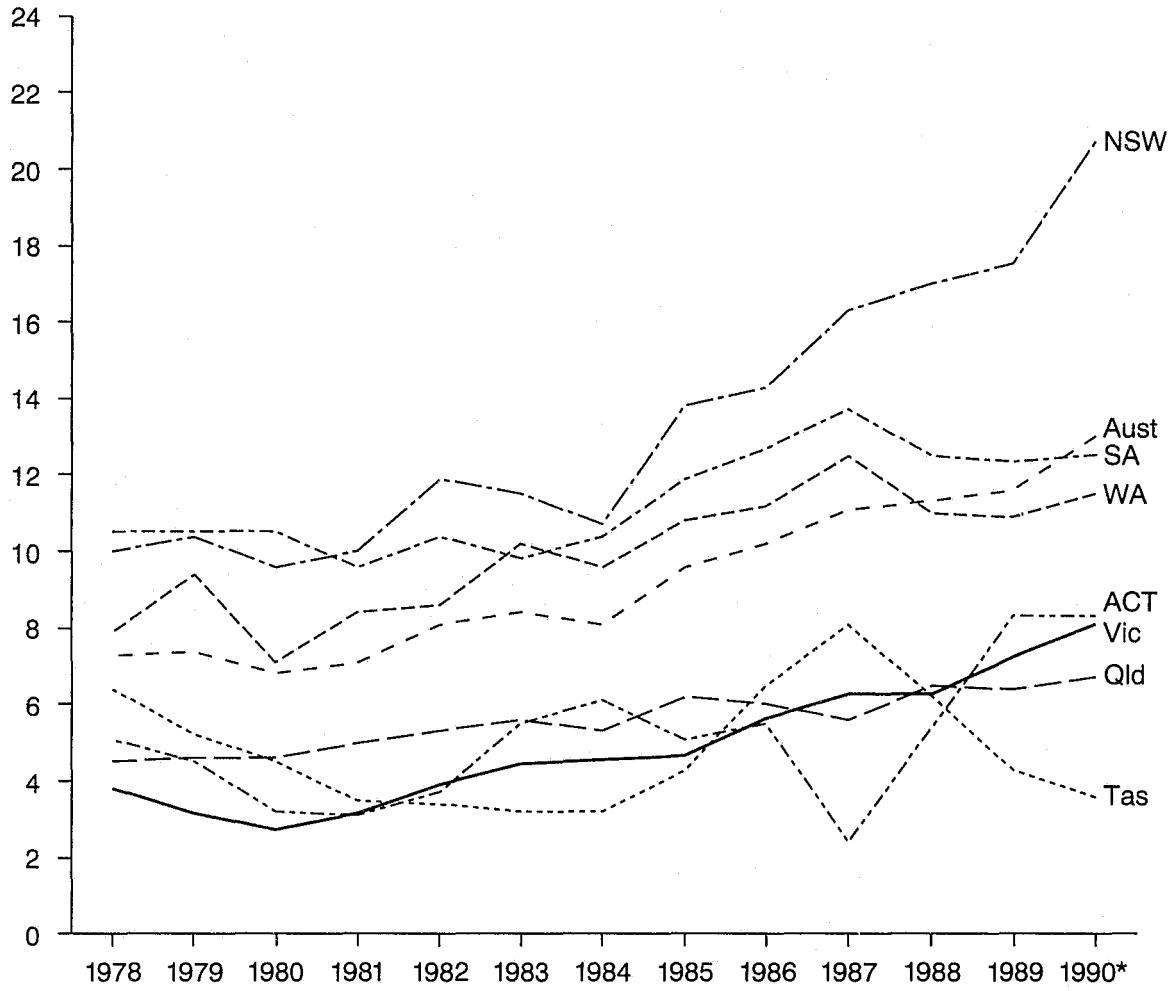
67 In the course of its work on the reference, the Commission has become aware of the great difficulty experienced by people in understanding the *Bail Act*. In its final report, the Commission will include a plain English Bill that covers the whole Act, including those parts of it that are not covered by the Commission's final recommendations. This Bill will assist in the efficient administration of the Act and make it much more accessible to those who are the clients of the bail system.

APPENDIX

FIGURES

* First six months only
Source: Australian Institute of Criminology, *Trends and Issues,* No 27, December 1990.

FIGURE 2
Remand rates per 100,000, 1978-1990



* First six months only
Source: Australian Institute of Criminology, *Trends and Issues*, No 27, December 1990.
Northern Territory not included.

FIGURE 3
A comparison of the proportion of remand to sentenced prisoners in custody, 1978 and 1991.

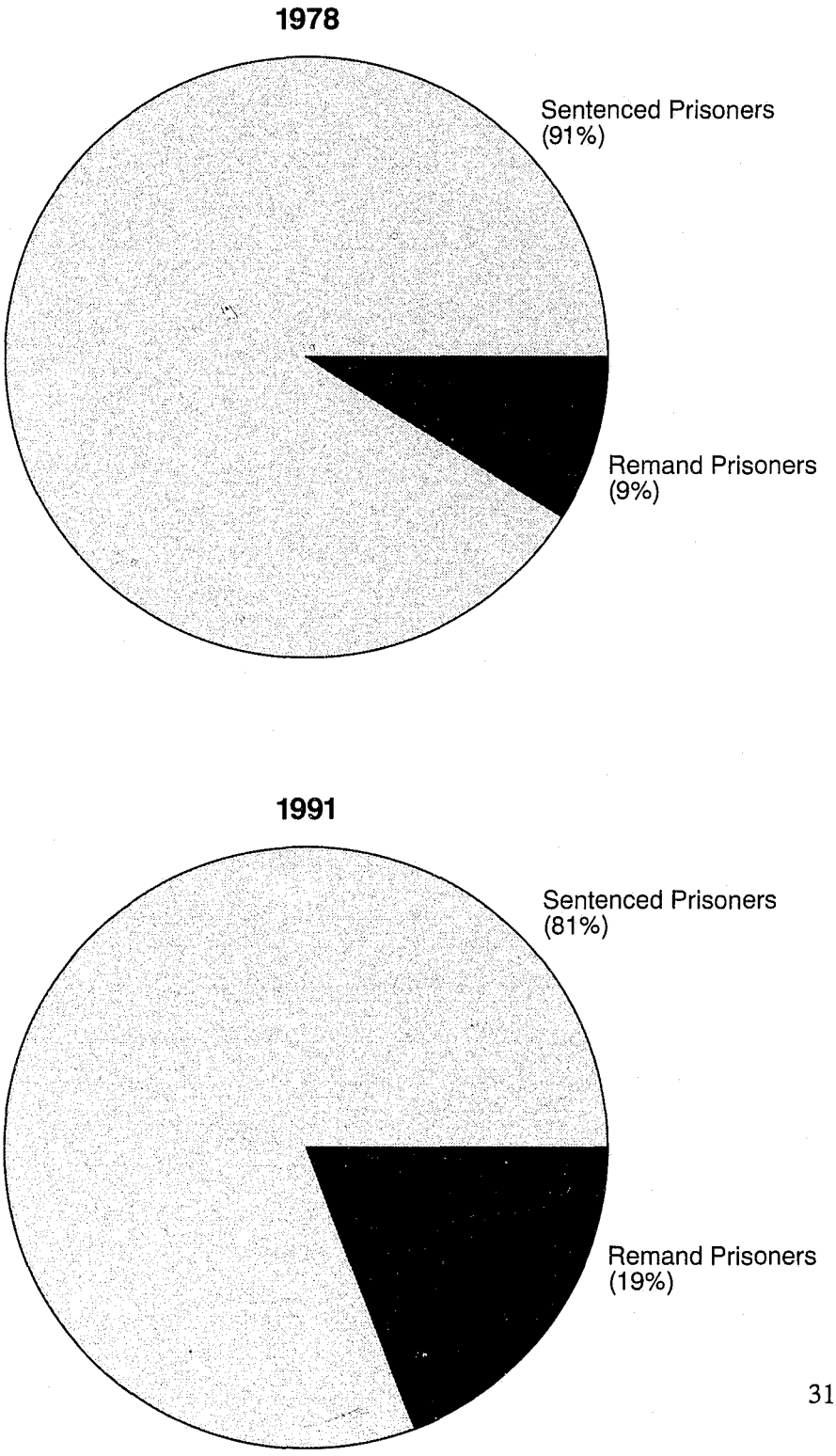
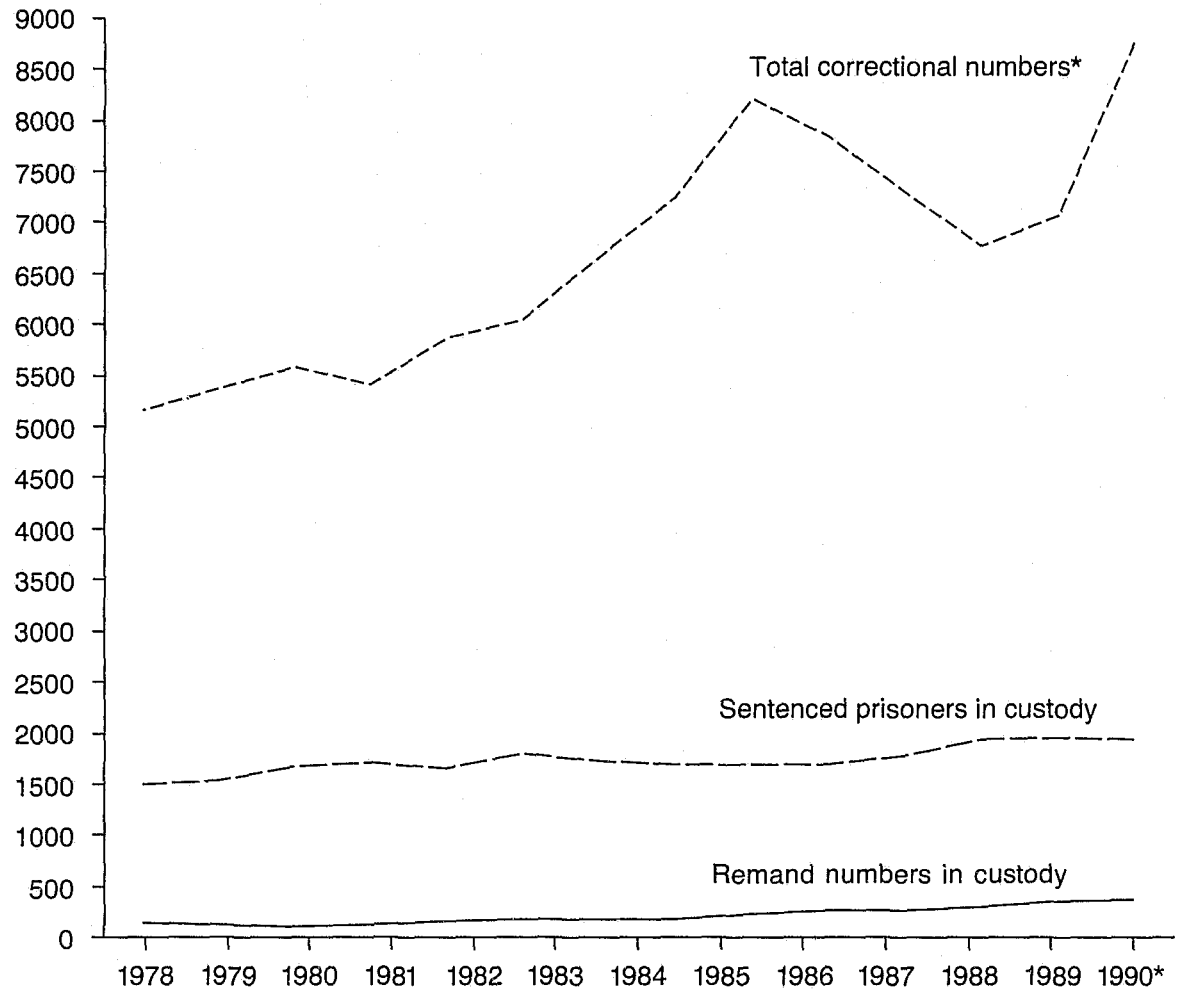


FIGURE 4
Correctional and remand populations, 1978-1990



* Correctional numbers include prisoners, parolees, those on pre-release, and those on Community Based Orders (or earlier equivalents).