THE LAW REFORM COMMISSION OF WESTERN AUSTRALIA

Report on Bail

PROJECT No. 64

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Law Reform Commission
City Centre Tower
44 St. George's Terrace
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The Law Reform Commission of Western Australia was established by the Law Reform Commission Act 1972.

The Commissioners are -

Mr. D.K. Malcolm, Chairman
Mr. N.H. Crago
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To THE HON. I.G. MEDCALF, Q.C., M.L.C.
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the Law Reform Commission Act 1972, I am pleased to present the Commission's report on the law and procedure relating to bail.

David K. Malcolm
Chairman

13 March 1979

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TERMS OF REFERENCE

The Commission was asked as a matter of priority to review the law and procedure relating to bail.

PUBLIC COMMENT

1. Bail is a subject of wide public concern. In order to obtain public comment the Commission has adopted several different approaches. In July 1976, shortly after the Commission received its reference, an advertisement was placed in The West Australian inviting members of the public to make preliminary submissions. In response thirteen submissions were received.[1]

2. During 1977, the Commission held wide-ranging and detailed discussions with a number of persons involved in the bail decision-making process in Western Australia. These included members of the police force, Justices of the Peace, Magistrates and Judges of the District Court and Supreme Court. It also held discussions with persons in the Fremantle Prison remand yard who had been refused bail or could not meet bail conditions and who were in custody awaiting trial.[2]

3. In November 1977 the Commission published a Working Paper.[3] No prior study of the Western Australian bail system existed. Consequently, the Working Paper contained an extensive review of current

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1. Persons and organisations who made preliminary submissions to the Commission are listed in Appendix I of the Commission's Working Paper: see n.3 below.

2. The Commission continued to take part in such discussions whenever possible. Its last meeting was in December 1978 when representatives of the Commission met members of the Aboriginal Advisory Committee (a group of Aboriginal defendants at Fremantle Prison) to discuss difficulties regarding bail which particularly affect Aborigines. See also paragraphs 7.15 to 7.17 below.

3. Law Reform Commission of Western Australia, Review of Bail Procedures (1977) Working Paper, referred to in this Report as "the Working Paper". Because of its length, the Commission, for practical reasons, has departed from its usual practice of attaching the Working Paper as an appendix to its report. Any person who wishes to study it, may obtain a copy, free of charge, at the Commission's office.

bail practices and procedures in this State, incorporating material obtained from the preliminary submissions to the Commission and the discussions by the Commission with persons involved in the bail process. In addition, the paper contained a full discussion of issues surrounding various reform proposals, both in Western Australia, and in other comparable jurisdictions. Further comment from the public was invited, and in response, seventeen written submissions on the paper were received.[4]

4. It has not been possible to include in this Report specific reference to every suggestion or criticism which was made. However, every comment and criticism has been given careful and detailed consideration by the Commission and has been taken into account in forming its recommendations. The Commission wishes to express its gratitude to all persons and organisations who have contributed to this project.

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4. The names of the persons and organisations concerned are listed in Appendix I to this Report.

INTRODUCTION

Separate bail legislation

1. There is a proliferation of bail legislation in this State. The law is to be found in no less than 117 separate provisions in fourteen different statutes, dating from 1679 to the present day, and there are also fourteen relevant regulations in the Criminal Practice Rules. Furthermore, not all of the law relating to bail can be found in legislation or regulations. Principles relating to the granting of bail can also be found in decided cases and in practice directions. There is no single source of authority either for the power to grant bail, or as to the relevant principles on which the bail decision should be made. There are doubts as to the legality of some practices adopted by bail-decision-makers[1] even though they may be desirable in principle. In some areas there are conflicting views as to the applicable law.[2] One possible reason for this uncertainty is that the law relating to bail has developed unsystematically as an adjunct to criminal procedure. It has never received separate systematic treatment either by the legislature or by the courts in Western Australia.

2. Against this background, the case for a single, rational and comprehensive enactment dealing with bail and its associated procedures appears to be unanswerable. The Commission suggested such a course in the Working Paper,[3] and it has received overwhelming support from commentators and persons interviewed by the Commission. It might be argued that suitable provisions should be made as a separate chapter in the Criminal Code. The Commission recommends, however, that there should be a separate Bail Act. It accepts the view of one commentator[4] that this is so because it is undesirable to clutter the Criminal Code with matters that do not relate to substantive law.

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1. Such as the imposition of a condition requiring a deposit of cash as security: see paragraph 6.22 below, and release of children on bail without a surety although charged with an offence for which a surety is a necessary requirement: see paragraph 7.3 below.

2. Compare, for example, the different attitudes taken as to the grant of bail during trial: see paragraph 3.1 below.

3. At 198, paragraph 10.18.

4. Judge Heenan.

The content of separate bail legislation

3. Separate bail legislation has recently been enacted in England,[5] Victoria,[6] and New South Wales[7] and has been proposed for Queensland.[8] The English Act does not deal with police bail. Neither that Act nor the Victorian Act deals with the power to grant bail in respect of criminal appeals.[9] In the Commission's view, it would be preferable in Western Australia, where the criminal law is codified, for separate bail legislation to deal with all aspects of bail for a defendant[10] at all stages of criminal proceedings, that is from arrest to the determination of an appeal, if any.[11] This is consistent with the New South Wales Act[12] and the Queensland Proposals.[13]

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5. Bail Act 1976 (UK).

6. Bail Act 1977 (Vic).

7. Bail Act 1978 (NSW), to be proclaimed. This legislation was introduced and passed in mid December 1978 when this Report was in its final stages of preparation. Significant features of the legislation have been incorporated in the Report. References, however, are to the provisions of the New South Wales Bail Bill, which is the latest publication to hand. The Bill was enacted without amendment.

8. Queensland Law Reform Commission, Report on the Law Relating to Bail in Criminal Proceedings, (1978) No. 25. The report contains a draft bill for a separate bail act, referred to in this Report as the "Queensland Proposals".

9. Bail in respect of criminal appeals is dealt with in separate legislation, such as the Administration of Justice Act 1960 (UK) and the Crimes Act 1958 (Vic).

10. A person charged with an offence can be referred to as an "offender", "accused", "defendant" or "appellant" depending on the stage reached during the criminal justice procedure. In this Report, for simplicity, the bail subject is described as the "defendant" in all cases.

11. It was suggested to the Commission that the proposed bail legislation should apply to any person who is alleged to have offended against a Commonwealth law in this State and that this aspect of the law relating to bail should be considered by the Commission. However, by virtue of s.68 of the Judiciary Act 1903 (Cwth), state laws relating to bail at present apply to persons charged with offences against the laws of the Commonwealth committed within that state. Further legislation on this matter would therefore seem to be unnecessary.

12. Bail Act 1978 (NSW), s.6.

13. Queensland Proposals, clauses 7 and 8.

4. In chapters 1 to 8 of this Report, the Commission makes recommendations as to the content of such separate bail legislation. The essential matters covered are -

(a) clarification of the authority to grant bail;
(b) creation of a qualified right to bail for all offences;
(c) clarification of the grounds for refusing bail;
(d) establishment of procedures to enable relevant information to be made available to -
    (i) bail-decision-makers;
    (ii) defendants;
(e) clarification of the conditions upon which bail may be granted;
(f) a review of the role of sureties;
(g) clarification of procedures for the review of bail decisions.

5. The Commission has not undertaken the task of preparing a draft bill to deal with the implementation of its recommendations. Whenever possible it has drawn attention in the Report to legislative precedents for the assistance of Parliamentary Counsel and, if requested to do so, it will provide whatever further assistance is needed to enable a draft bill to be prepared.

Other reforms

6. There are a number of other measures which would, in the Commission's view, improve the operation of the bail system, but which could be implemented otherwise than by legislative provisions in the proposed Bail Act. This applies, for example, to the increased use of summons procedures, both in lieu of and following arrest, and the introduction of bail hostels and other measures to ensure that pre-trial detention in custody is kept to a minimum and in improved conditions. These would be important reforms, but because their implementation could be achieved more appropriately through administrative directions, or by legislation otherwise than in the proposed Bail Act, they are considered separately in chapter 9 of this Report.

7. In the Working Paper, the Commission dealt separately with a number of special groups in the community which tend to encounter particular problems in relation to bail. For example, some children and Aboriginal defendants have difficulty meeting conditions requiring financial security and sureties. Defendants who have only recently

arrived, or who are not resident in Western Australia, may have difficulty finding a surety. Some Aboriginal and migrant defendants have difficulty understanding their bail obligations.

8. In many cases these particular problems would be remedied or alleviated by legislation adopting the general reform measures recommended by the Commission in this Report. In other cases, administrative directions might be desirable to ensure that the defendant's interests are sufficiently protected. These matters are considered along with other reforms of an administrative nature in chapter 9. Consequently, the Commission does not consider it to be necessary to deal separately with specific defendant groups such as children,[14] Aborigines, migrants or non-residents.

9. In the course of its study, the Commission noted some irregularities in the legislation governing the criminal justice procedure. For example, it noted that there is an inconsistency between the Justices Act 1902 and the Criminal Code 1913 as to the permitted constitution of a Court of Petty Sessions when dealing summarily with an indictable offence.[15] It considered whether a defendant should be entitled to plead guilty to an indictable offence when he first appears in court,[16] and whether provision should be made to enable statements to be obtained in connection with a simple offence from a witness who is ill.[17] No comments were received on any of these matters. The Commission is at present carrying out a review of the Justices Act, and as the matters raised are more appropriate to that project,[18] it has not made any specific recommendations concerning them in this Report.

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14. Provisions in the Child Welfare Act 1947 relating to bail could be repealed, but this should not affect other provisions dealing more generally with the welfare of children, such as s.33 which deals with the placement of children who are not released on bail. The Commission also suggests that s.73 of the Child Welfare Act 1947, which directs that a child shall not be remanded in custody while it is decided whether he is eligible to be dealt with by a children's panel, should remain unaffected by its recommended bail provisions: see paragraph 4.5, n.13 below.

15. Working Paper, at 13, paragraph 3.2 n.11 and at 40.

16. Ibid., at 27, paragraph 3.31 and at 40.

17. Ibid., at 27, paragraph 3.28 n.67 and at 40.

18. Project No. 55 Part I (Appeals from Courts of Petty Sessions) and Part II (Review of the Justices Act). A working paper on Part I was issued in February 1978.

CHAPTER 1 - BAIL TO BE CONSIDERED FOR ALL OFFENCES

Existing law and practice in Western Australia

1.1 In Western Australia there is no offence in respect of which jurisdiction to grant bail is excluded as a matter of law. Moreover, there is no express legislative provision dictating circumstances when bail must be refused. There are, however, some doubts as to whether bail can be granted to a defendant in certain circumstances. For example, there is doubt as to the existence and extent of the power to grant bail to a defendant who is tried summarily, convicted and remanded for sentence to the District or Supreme Court. Specific remedial legislation has been enacted for the most common case in which this occurs, namely drug offences, but the problem could arise in other areas.[1] In some cases the number of statutory provisions creates unnecessary complexity. This applies, for example, to the grant of bail to a defendant who pleads not guilty to an indictable offence.[2]

The Commission's recommendations

1.2 One commentator on the Working Paper suggested that defendants accused of drug trafficking should not be released on bail. Another commentator suggested that bail should be refused where a defendant is caught in the act of committing certain offences, and that the exclusion of bail for certain offences could serve as a deterrent to crime. On the other hand, the Law Society of Western Australia considered that there should be provision made for bail for all offences.[3]

1.3 It is appreciated that there is concern in the community as to the number of defendants, particularly those on drug trafficking charges, who avoid trial by failing to appear in answer to their bail.[4]

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1. For example, stealing: Working Paper, at 25, paragraph 3.25.

2. Ibid., at 28, paragraph 3.34.

3. There is no class of offences for which bail is not available in the legislation in England, Victoria, New South Wales nor in the Queensland Proposals. Neither is there a direction that bail must be refused where a defendant is caught in the act of committing a certain type of offence.

4. This is commonly referred to as "jumping bail" or "absconding". The Commission has adopted the latter expression in this Report.

Recent indications suggest that this number is increasing.[5] However, the solution, in the Commission's view, should not be a legislative direction refusing bail for defendants on such charges regardless of the circumstances of each particular case. The Commission considers that bail-decision-makers are becoming increasingly aware of the risks of releasing such defendants on bail. Adoption of the Commission's other recommendations in this Report, particularly those as to the introduction of clear legislative guidelines regarding the bail decision,[6] the provision of more information about defendants and sureties,[7] the introduction of an offence of absconding,[8] and establishment of a clear right of appeal by both the defendant and the prosecution,[9] should substantially reduce the chances of error in assessing the risk of absconding, and should generally improve the administration of bail.

1.4 The Commission therefore recommends that there should be provision made for bail for all offences and that doubts as to the legal authority to grant bail to a defendant during any interval in the determination of his case should be removed.[10]

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5. Police Department Western Australia, Annual Report 1977, at 6.

6. See chapters 3 and 4.

7. See chapters 5 and 7.

8. See chapter 6.

9. See chapter 8.

10. See Bail Act 1978 (NSW), s.6; and Queensland Proposals, clause 8. The Victorian and English legislation contains similar provisions but does not deal with bail at all stages of the criminal justice procedure: see paragraph 3 of the Introduction above.

CHAPTER 2 - THE AUTHORITY TO GRANT BAIL

Existing law in Western Australia

2.1 In Western Australia, bail decisions can be made by members of the police force, Justices of the Peace, Coroners, Magistrates and Judges of the District Court and Supreme Court and the Court of Criminal Appeal. In addition, where a defendant is a child,[1] an officer of the Community Welfare Department in charge of a Departmental Centre or Facility has the same power as a justice to grant bail.[2] There are, however, limits and in some cases doubts as to the authority of bail-decision-makers. These limits and doubts are summarised as follows -

(a) The powers of the police to grant bail are mainly limited to defendants who are charged with offences punishable in a summary manner who are not taken into custody pursuant to a warrant. The police may, however, be able to grant bail in respect of some serious offences in particular circumstances pursuant to s.48 of the Police Act 1892 and s.64 of the Justices Act 1902.[3]

(b) Justices of the peace have power to grant bail in respect of any offence except capital offences and murder. They frequently make decisions regarding overnight bail for defendants in the lock-up. The point may be arguable, but it appears that their power to do so arises in an ancillary way to their power to adjourn the hearing of the charge. As they do not purport to hear the charge, the basis for the exercise of their jurisdiction to make a bail decision in such circumstances is doubtful.[4]

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1. Within the meaning of the Child Welfare Act 1947, s.4(1).

2. Ibid., s.28(1).

3. Working Paper, at 18, paragraph 3.10. The powers under the Police Act can be exercised by any officer or constable who apprehends a defendant. Under the Justices Act the power is limited to an Inspector or officer in charge of a police station.

4. Working Paper, at 19, paragraph 3.11.

(c) The point may be debatable, but there is a view that the powers of the District Court to grant bail do not arise until an indictment is filed in that Court.[5]

(d) In the case of a defendant charged with a capital offence or murder, bail can be granted only by a judge of the Supreme Court.[6]

(e) The Supreme Court's inherent jurisdiction to grant bail does not apply to a defendant who has been convicted.[7]

The Commission's recommendations

2.2 In the Working Paper, the Commission considered three possible reforms regarding the authority to grant bail. These were that -

(1) the powers of the police to grant bail should be broadened;[8]

(2) the respective powers of other bail-decision-makers should be clarified;[9]

(3) bail for persons charged with drug trafficking offences[10] should be considered only by a judge of the District or Supreme Court.[11]

2.3 With regard to the powers of the police to grant bail, the Commissioner of Police, in his comment on the Working Paper, suggested that:

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5. Ibid., at 32, paragraph 3.40 and at 171, paragraph 8.4.

6. Justices Act 1902, s.115.

7. Re Edwards [1975] WAR 161.

8. Working Paper, at 39.

9. Ibid., at 39-40.

10. Assuming that such defendants should be entitled to bail: see paragraph 1.3 and 1.4 above.

11. Working Paper, at 42, paragraph 4.3 and at 188, paragraph 9.29.

> "provision be made for police officers of, or above the rank of sergeant, or officer in charge of a police station or lock-up for the time being, to allow to bail any person arrested for any offence (on warrant or otherwise) excepting capital offences."

The Commission agrees with this recommendation, except that murder should also be excluded, and the power should only be exercised if it is not practicable to bring a defendant before a court forthwith.[12] The Commission also considers that the power of authorised police officers to grant bail should cease when a bail decision is made by a justice, magistrate or judge.[13]

2.4 With regard to the powers of bail-decision-makers other than the police, some commentators on the Working Paper submitted that existing doubts as to their legal authority to grant bail were groundless.[14] Nevertheless, the Commission considers that the opportunity should be taken in the proposed bail legislation to provide that justices of the peace,[15] Community Welfare officers, coroners, magistrates and judges of the District Court, Supreme Court[16] and Court of Criminal

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12. This is the position in Victoria, see Bail Act 1977 (Vic), s.10(1) and s.4(2)(a) which limits the power to grant bail to a defendant charged with murder or treason to a Supreme Court judge. The Queensland Proposals contain similar provisions but give authority to grant bail to the member of the police force who takes custody of the defendant: clause 7(1).

13. cf. Bail Act 1978 (NSW), s.17(2)(a).

14. The Royal Association of Justices said that the legal authority to grant bail at the lock-up or elsewhere is not an assumed authority but is clearly authorised by the Justices Act 1902.

    The District Court Judges commented that Judges of that Court had adequate powers to grant bail, although Judge Heenan added that it would be as well for the proposed bail legislation to clarify these powers of the District Court.

15. Including special justices where the defendant is a child.

16. This should not affect the inherent jurisdiction of a judge of the Supreme Court to grant bail. Although most cases would be dealt with under the proposed Bail Act, there might conceivably be occasions where an unconvicted person is in custody in circumstances not governed by the proposed legislation. To allow for this situation, however unlikely it may be, the inherent jurisdiction of a Supreme Court judge to grant bail should continue: see also paragraph 8.8 below. There would seem to be no need to extend this jurisdiction to District Court judges provided they are given express powers to grant bail as recommended under the proposed bail legislation.

Appeal, should have authority, where appropriate,[17] to grant bail to a defendant on any charge other than murder or a capital offence such as wilful murder or treason. The authority to grant bail to defendants charged with murder or a capital offence should remain exclusively with judges of the Supreme Court.

2.5 With regard to the third suggestion, that the exclusive bail jurisdiction of judges of the Supreme Court should be extended from murder and capital offences to defendants on drug trafficking charges, one commentator supported the suggestion and one opposed it. A similar limit on the power to grant bail has been imposed in New Zealand.[18]

2.6 The Commission is aware of the concern in the community which gave rise to the suggestion that bail for persons charged with drug trafficking offences should be considered only by a judge of the Supreme Court. However, it takes the view that it would not be desirable to impose such a limitation. It accepts that a precedent for such an approach can be found in the case of murder and capital offences, but the Commission regards this as a distinction resting on traditional, rather than pragmatic, grounds. In the Commission's view, there is no sound practical basis for any extension to this approach, and apart from the recent amendments in New Zealand, such an extension has not been made in other comparative legislation or proposals considered by the Commission. The Commission has no doubt that all bail-decision-makers are aware of the risks in these cases, and the suggested distinction might make it more difficult for defendants on drug trafficking charges generally to obtain bail. Whilst this may be appropriate in the case of a non-resident of Western Australia who is caught importing a large quantity of drugs into this State, it might not be appropriate in other cases.

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17. See paragraphs 2.7 to 2.9 below. In the case of coroners and Community Welfare officers, the authority should be limited to defendants falling within their respective jurisdictions.

18. Misuse of Drugs Amendment Act 1978, s.30 which limits the power to grant bail to a person accused of dealing in class A (heroin) and class B (opium, cocaine and morphine) drugs to a Supreme Court judge.

2.7 Finally, with regard to the authority to grant bail, the Commission agrees with a general proposition expressed by one commentator on the Working Paper[19] that:

> "Generally it is desirable that, subject to any right of appeal, the court before which any particular person is to be tried should be the court controlling the grant, refusal or variation of bail to that person: that court should be the best fitted to weigh the various factors involved in making the bail decision. But there are occasions when it is not desirable - e.g. when bail is sought by a person at a circuit town when a Supreme Court Judge is available and a District Court Judge is not, or when that person has been, or is likely to be, committed to appear in the Supreme Court on another charge - and it is important that the alternative approach be left open. Probably it will be enough if the profession is informed, by practice note or in some other way, that when persons have been committed for trial or for sentence or are in custody upon a charge triable by the District Court applications on behalf of those persons should be made, in the first instance, to a District Court Judge - unless there are special reasons for making the application to a Supreme Court Judge".

2.8 Adopting this as a general proposition, the Commission recommends that bail for a defendant who is to appear in a Court of Petty Sessions, either to answer a charge of a simple offence, or for committal proceedings in respect of an indictable offence, should be dealt with by the police, a justice of the peace or a magistrate. In the case of committal proceedings, the question of bail should be considered by the court when committing the defendant for trial. Bail on any subsequent occasion, including a review of a previous bail decision, should be considered by the District Court or Supreme Court, depending on where the defendant is to be tried. In the case of appeals, whether to the Supreme Court against conviction or sentence in a Court of Petty Sessions, or to the Court of Criminal Appeal, bail should be dealt with by a single judge of the Supreme Court.

2.9 The Commission agrees with the suggestion that this procedure should be implemented by way of practice directions by the appropriate courts. A defendant wishing to make an application for bail to a bail-decision-maker contrary to the recommended practice, should

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19. Judge Heenan. The remaining Judges of the District Court expressed their agreement with these views.

be required to show special circumstances which justify this course. A defendant should also be aware that if he makes an application for bail to a judge of the District Court or Supreme Court in the first instance he would necessarily reduce the avenues of appeal.[20]

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20. Appeals, restrictions on repeated applications for bail by defendants and the continuation of a judge of the Supreme Court's inherent jurisdiction to grant bail are considered in chapter 8 below.

CHAPTER 3 - A QUALIFIED RIGHT TO BAIL

Existing law in Western Australia

3.1 In some circumstances the legislation in Western Australia provides that a defendant shall be granted bail.[1] In other cases the defendant is merely entitled to apply for bail and the bail-decision-maker is empowered to grant it. The Commission has been informed that in these cases there is a strong view amongst bail-decision-makers that a defendant charged with a simple offence should be granted bail, that a defendant charged with a capital offence (including murder) should not be granted bail, and that defendants charged with other offences should normally be granted bail unless the prosecution objects.[2] In the case of bail during trial, different opinions have been expressed,[3] but one view taken in the Supreme Court is that bail should be refused unless the defendant raises special circumstances personal to his case.[4]

3.2 In the Commission's view there are at least three unsatisfactory features of this existing law and practice. They are -

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1. These are where the defendant -

   (a) is charged with an offence which is not of a serious nature and cannot be brought before a justice within twenty-four hours: Justices Act 1902, s.64;

   (b) is charged with a misdemeanour other than one of nine specified in the sixth schedule to the Justices Act 1902: Justices Act 1902, s.121;

   (c) has brought an ordinary appeal against a decision of a Court of Petty Sessions: Justices Act 1902, s.188;

   (d) is committed for trial for an indictable offence and applies without success to have his case heard at the next sitting of the Supreme Court, unless the delay is caused by the temporary absence of material evidence: Criminal Code 1913, s.608.

2. Working Paper, at 60, paragraph 5.3.

3. Ibid., at 73-75, paragraphs 5.35 to 5.39.

4. R. v Cutler [1972] Supreme Court of Western Australia No. 193/72.

(a) the cases where the legislation provides that bail shall be granted rest on arbitrary and seemingly irrational distinctions, unnecessarily limit the discretion of a bail-decision-maker and create situations in which a defendant is unduly favoured;

(b) in cases where the legislation provides that bail may be granted, there could be a tendency for some bail-decision-makers to regard bail as a privilege for which a defendant must apply and, despite existing practice,[5] a defendant could be remanded in custody simply because the question of bail is never raised;

(c) although guidelines as to the initial approach which should be adopted by a bail-decision-maker when considering a bail decision have been laid down, they are difficult to locate,[6] and in some circumstances they conflict,[7] which makes a consistent uniform approach by bail-decision-makers difficult to achieve.

The Commission's recommendations

3.3 In the Commission's view, proposed bail legislation for Western Australia should make it quite clear that bail is neither a privilege, nor necessarily a matter requiring some form of application by a defendant. It has been suggested to the Commission that bail-decision-makers should have a discretion, unfettered by statute, to grant or refuse bail in every case.[8] In most other jurisdictions,

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5. Working Paper, at 30, paragraph 3.36.

6. Guidelines can be found in legislation (e.g. s.64 of the Justices Act 1902 requiring bail to be granted for certain misdemeanours), case law (e.g. Western Australian, English and other Australian cases) and in practice directions e.g. Lord Widgery's practice direction in England on bail during the course of trial [1974] 2 All ER 794.

7. For example, the conflicting views in Western Australia as to the approach to be taken when considering bail during the course of trial: Working Paper, at 74-75, paragraphs 5.37 to 5.39.

8. In a submission on the Working Paper, Judge Heenan said:

> "The principles involved in the exercise of the bail decision have been stated clearly and often by the courts and should be well known to all bail decision makers. In this, as in most matters involving the exercise of judicial discretion, statutory fetters are undesirable".

however, a defendant is given what is referred to as a statutory right to bail.[9] Recognition of such a right appears to have been based on the presumption of innocence which underlies all criminal proceedings. The legislation giving effect to this right provides that bail shall be granted unless the bail-decision-maker is satisfied that it should be refused on one or more of several grounds specified in the legislation.[10]

3.4 The Commission agrees with the statutory approach taken in these jurisdictions, but it considers that it is undesirable to refer to the result as conferring a statutory right to bail. In the Commission's view, this expression tends to overshadow an equally important opposing right, namely the right of the community to be protected from harm and to see that a defendant is duly tried. The essence of the reforms recommended in this Report is not to create a right to bail, but to rationalise, clarify and restrict the grounds for refusing bail.[11] The Commission therefore suggests that a more accurate description of the result of its proposed reform measures would be the creation of a qualified right to bail, or, in other words, a right not to have bail refused on other than specified grounds.

3.5 There is an argument that such a qualified right to bail should not apply to overnight bail at the lock-up or bail during trial. In respect of overnight bail at the lock-up, the Victorian Act and the Queensland Proposals do not recognize a defendant's right to bail where he is in police custody but can be brought before a justice within twenty-four hours.[12] Thus, in a typical overnight bail situation, a defendant is merely entitled to be considered for bail, he has no right to it. In the Commission's view, there is no reason either in principle or in practice why a defendant who can be brought before a justice

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9. England, Victoria and proposed in Queensland. In New South Wales a distinction is created between a right to bail for minor offences and a presumption in favour of bail for most others, but the difference relates only to the grounds on which bail may be refused: see paragraph 4.23 below.

10. Bail Act 1976 (UK), s.4 and Schedule I; Bail Act 1977 (Vic), s.4; Bail Act 1978 (NSW), s.9 and Queensland Proposals, clauses 9 and 14.

11. See chapter 4 below.

12. Bail Act 1977 (Vic), s.4(1)(a); Queensland Proposals, clauses 7(1)(b) and 9.

within twenty-four hours of his arrest should not have a qualified right to bail during any delay. Although short in duration, overnight custody can be a traumatic experience and a qualified right to bail in these circumstances should be recognised. The Commission therefore recommends that once the police have completed the charging procedure, their duty should first be to release the defendant on bail, unless there are grounds for refusal, and secondly, if the defendant is not released on bail, bring him before a justice as soon as practicable.

3.6 The period during trial raises more difficult questions relating to the defendant's rights in relation to bail.[13] However, because the defendant has not been convicted, the Commission takes the view that a qualified right to bail should continue. In R. v Cutler[14] it was held that, to preserve the integrity of the trial, bail should be refused once the defendant is in the charge of a jury unless there are exceptional circumstances personal to the defendant's case. The Commission agrees that the integrity of the trial should be a relevant consideration regarding bail, and it recommends a special ground for refusing bail under this head.[15] However, it does not share the view that a grant of bail during trial, particularly where the defendant has previously been granted bail, should be exceptional. A defendant with a qualified right to bail should be granted bail unless there are grounds for refusing it, and having regard to the possibility of removing the problems referred to in Cutler's case by administrative measures, or by imposing special conditions,[16] bail during trial should be viewed more favourably.[17]

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13. A defendant has a right to bail during trial in New South Wales (Bail Act 1978 (NSW), ss.6(c)(i), 8(2) and 9(2)); England (Bail Act 1976 (UK), s.4(2)(a)), and in the Queensland Proposals: clause 9. The situation in Victoria is obscure. Section 4(1)(c) of the Bail Act 1977 (Vic) confers a right where the case is adjourned, but only if this is for inquiries or a report, and even in these circumstances the right is completely eroded by a discretion for a bail-decision-maker to refuse bail if satisfied it would not be desirable in the public interest.

14. [1972] Supreme Court of Western Australia No. 193/72.

15. See paragraphs 4.3 and 4.8 to 4.9 below.

16. See paragraphs 4.3, 4.9 and 6.29 below.

17. In this respect the Commission's views tend to favour the approach to bail during trial recommended by Lord Widgery in his practice direction ([1974] 2 All ER 794; Working Paper, at 75, paragraph 5.38) which in turn was favoured by the Court of Criminal Appeal in Kenneison v R., (1976) Western Australian Court of Criminal Appeal File Nos. 69-70.

3.7 In summary, therefore, the Commission recommends that a defendant in Western Australia should have a qualified right to bail at all stages of the criminal justice procedure prior to conviction. This, in effect, would mean that a bail-decision-maker, on each occasion when an unconvicted defendant appeared before him, would be required to -

(a) consider the question whether a defendant should be released on bail without the need for any application;

(b) decide, on the facts before him, or in the light of such additional information obtained at his request as he thinks fit, whether bail should be refused on one or more of the grounds specified in the legislation;[18]

(c) grant bail, with conditions if necessary, unless he is satisfied that, notwithstanding such conditions as he might impose, bail should be refused on one or more of the specified grounds.

3.8 A problem arises where no order is made regarding bail, either intentionally, or as the result of an oversight on the part of the bail-decision-maker. Under existing law, this gives rise to difficult legal questions, but, in practice, a defendant who had been in custody or who had been released on bail which has not been renewed would be returned to custody. A defendant who appeared in other circumstances, for example in answer to a summons, would be released at large without bail.

3.9 The New South Wales Bail Act is the only legislation considered by the Commission to deal with the situation where no order regarding bail is made. Under ss.10-11 a bail-decision-maker is deemed in these circumstances to have decided to release the defendant at large without bail. However, this provision applies "during an appearance" by a defendant before a court. It is doubtful whether it was intended

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18. In Canada the legislation is expressed in terms of a presumption in favour of bail with the onus on the prosecution to rebut it by showing cause why detention in custody is justified: Criminal Code 1953 (Can), s.457(1) and see Martin, Annual Criminal Code 1977 at 350-353. For the reasons expressed in paragraph 3.17 below the Commission does not agree with this approach. In some circumstances a bail-decision-maker might be justified in refusing bail even though the prosecution has failed to discharge the onus cast upon it.

to have more general application to any occasion when a bail-decision-maker, either intentionally or from oversight, fails to make an order as to bail.[19]

3.10 In the Commission's view, the bail legislation proposed for Western Australia should deal with the situation generally where no order as to bail is made, that is, where the defendant is neither granted bail nor remanded in custody. To presume that the bail-decision-maker has decided to release the defendant at large without bail appears to the Commission to be the logical and desirable solution. This would yield a result which would be consistent with the presumption of innocence, and its aim would be to avoid the undesirable consequence that a defendant might remain in custody because no application has been made on his behalf for bail and bail has not been considered. It would also demonstrate to the bail-decision-maker, and to the prosecution, the importance of considering the question of bail. However, in the Commission's view, the prosecution should be given power in these circumstances to bring a defendant back[20] before a bail-decision-maker to consider the question of his release on bail.[21]

No qualified right in certain cases

3.11 The Commission's recommendation above[22] is that a defendant should have a qualified right to bail until his conviction. Following conviction, different considerations apply. Bail is no longer based on the presumption of innocence. Important factors to be taken into account include the likelihood of a period of imprisonment for the defendant, the length of such imprisonment and, in the case of bail pending an appeal, the likelihood of the appeal succeeding. The Law

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19. The provision seems to have in mind the situation where there is a short adjournment during the defendant's appearance.

20. Either by issuing a summons, or by apprehending the defendant with the approval of the bail-decision-maker or in execution of a warrant.

21. See paragraph 8.17 n.31 below regarding appeals in certain circumstances when no order in respect of bail is made. See paragraphs 6.13 to 6.21 below as to other circumstances where a defendant might be permitted to go at large.

22. See paragraph 3.7.

Society expressed the view that, although bail should be available to a person appealing against a conviction, the person applying for bail should have to show compelling circumstances as to why bail should be granted.

3.12 The Commission recommends that there should be no qualified right to bail following conviction. This would mean that there would be no duty on a bail-decision-maker to consider the question of bail unless the defendant makes application for it. It would also mean that a bail-decision-maker would have a discretion to grant bail, or to refuse bail, and such refusal could be on the grounds specified in the Act, or on other grounds, unfettered by statute. Thus, for example, he might refuse bail simply on the grounds that he will be sentencing the defendant to a term of imprisonment, or that an appeal is unlikely to succeed. The Commission does not consider it to be desirable for such grounds to be specified exclusively in the legislation.

3.13 In other respects the decision regarding bail following conviction should be governed by the recommended bail legislation. This would include the provisions -

(a) dealing with the imposition of conditions in respect of bail;[23]

(b) requiring reasons to be given in cases where bail is refused;[24]

(c) relating to appeals.[25]

3.14 In New South Wales there is no entitlement or qualified right to bail for a defendant who is charged with an offence involving robbery with violence, or an offence of absconding from bail.[26] A

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23. See chapter 6 below.

24. See paragraphs 8.9 to 8.11 below.

25. See chapter 8 below.

26. Bail Act 1978 (NSW), s.9. There is, however, a power to grant bail to a defendant charged with such an offence (s.13) and this includes a power to refuse bail, but only in conformity with the provisions of the Bail Act: s.14.

similar approach is taken in Victoria, although it is framed in that legislation as a presumption against bail. This applies where a defendant is charged with -

(a) having committed an indictable offence whilst on bail awaiting trial for another indictable offence;

(b) an indictable offence and he is not ordinarily resident in Victoria;

(c) an offence of aggravated burglary or other indictable offence involving the use of firearms, offensive weapons or explosives; or

(d) an offence under the Bail Act 1977.[27]

To rebut the presumption the defendant must "show cause why his detention in custody is not justified".[28] There is no reference to the relevant factors the bail-decision-maker should take into account, nor to the standard of proof required.[29]

3.15 In the Working Paper,[30] the Commission considered whether a presumption against bail should be adopted and, possibly, extended in Western Australia to other offences, such as capital crimes (including murder), drug trafficking and serious breaking and entering offences.[31]

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27. Bail Act 1977 (Vic), s.4(4).

28. Ibid. A similar provision appears in Canadian legislation, but in place of the aggravated burglary category there is a category of offences under the Narcotic Control Act 1960 (Can): Criminal Code 1953 (Can), s.457(5.1) and see Martin, Annual Criminal Code 1977 at 350-353.

29. The Commission has been informed that this provision has had a significant practical effect on the granting of bail. It has meant that a defendant on one of the specified charges is likely to obtain bail only in those few cases where the police, for good reason, have not opposed bail. It has been suggested that the provision has made both the courts and the police more conscious of the possible dangers involved if bail is granted to a defendant charged with offences of the kind specified.

30. At 89, paragraph 5.76.

31. This is because there is, arguably, a high risk that defendants facing these charges will, if released on bail, fail to appear at their trial or will commit further offences. In the case of capital

(cont.....)

3.16 Several commentators expressed views which would be consistent with the creation of a presumption against bail in certain circumstances. Some suggested this approach for defendants charged with drug offences and bank robbery, at least where they were caught in the act of committing the offence and a successful defence seemed unlikely.

3.17 Having given the matter its further consideration, the Commission now takes the view that a statutory presumption in the context of bail legislation would be undesirable. A presumption in law creates an evidentiary burden on a party to introduce evidence to rebut it. This might be appropriate where there is a dispute between parties, for example, as in a criminal trial. But, in the Commision's view, it would be inappropriate in a matter such as a bail decision. This does not involve an issue which has to be proved one way or another by parties to a dispute. The question for a bail-decision-maker to answer should be whether to grant bail to a defendant having regard to the information made available to him at his request or otherwise. It should not be whether a particular party to the bail proceedings has discharged a statutory onus cast upon him.

3.18 Moreover, the Commission considers that, whether expressed in terms of a presumption or not, bail legislation for Western Australia should not identify certain categories of offences with the object of making it more difficult for a defendant charged with such an offence to obtain bail. Any selection of offences for such separate treatment would be arbitrary.[32] More importantly, the Commission is opposed to

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31. (cont.)
offences, the temptation to avoid trial might be related to the severity of the penalty upon conviction. Drug trafficking and breaking and entering offences also carry severe penalties, but in these cases there is an additional factor. It has been suggested to the Commission that these offences frequently involve a professional criminal who has access to large sums of money and other resources to enable him to leave the jurisdiction. A temptation to offend again could arise partly because this is his livelihood and partly because the defendant may take the view, that, as he is already facing charges of this kind, he has "nothing further to lose".

32. The arguments outlined in n.31 above are not supported by any extensive statistical survey in Western Australia. But even if statistics were available to demonstrate convincingly that those charged with certain offences were likely to offend again or
(cont.....)

the assumption, which underlies this legislative approach, that because a defendant has been charged with a certain type of offence, his behaviour, if bail is granted, will be similar to the behaviour of other defendants, who have previously been charged with the same type of offence and who, whilst on bail, have either absconded or committed an offence. The Commission considers that such a general assumption is unwarranted and could give rise to injustice in particular cases.

3.19 In the Commission's view, if the reforms recommended in this Report were adopted, there would be no need to follow the approach taken in Victoria and in New South Wales. For example, with regard to the suggestion that there should be a presumption against granting bail to persons charged with armed robbery offences, relevant reforms recommended by the Commission are -

(a) creation of a specific ground for refusing bail if there are substantial grounds for belief that a defendant will commit an offence while on bail;[33]

(b) procedures to provide a bail-decision-maker with more detailed information about the defendant, including information as to his past offences;[34]

(c) creation of a specific ground for refusing bail if a bail-decision-maker considers that he needs further information;[35]

(d) introduction of a right of appeal by the prosecution.[36]

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32. (cont.) abscond, the choice of offence would remain arbitrary. For example, in New South Wales, in the limited debate on the Bail Bill, the Opposition considered that the exceptions to the presumption in favour of bail did not go far enough, and went on to query why such offences as murder, attempted murder, rape and wounding with intent should not also be excluded from the presumption. It proposed that the presumption in favour of bail should not apply to all offences punishable by imprisonment for ten years or more.

33. See paragraphs 4.3 to 4.4 below.

34. See paragraph 4.12 and chapter 5 below.

35. See paragraphs 4.3 and 4.5 below.

36. See paragraphs 8.15 to 8.18 below.

3.20 The Commission is confident that bail-decision-makers in this jurisdiction would be better equipped to make an appropriate decision if these reforms were implemented. The introduction of provisions creating statutory qualifications excluding a qualified right to bail where the defendant has been charged with a particular offence, or in any other circumstances, would be unnecessary. It is expected that on proper consideration of the criteria proposed, cases which have caused difficulty in Victoria and New South Wales would result, in Western Australia, in a refusal of bail.

CHAPTER 4 - GROUNDS FOR REFUSING BAIL

The need to specify guidelines

4.1 Under existing law, a bail-decision-maker has a broad discretion whether or not to grant bail. Some of the factors which he takes into account at present, both in favour of and against a grant of bail were discussed in Part A of chapter 5 of the Working Paper. A common theme through comments on the Working Paper was that proposed bail legislation should provide guidelines for bail-decision-makers as to the matters they should take into account when making a bail decision. It was considered that this would not only give assistance to inexperienced bail-decision-makers, but it would also help to produce a more consistent approach to bail decisions, and provide a basis for recording the reasons for the decision for appeal purposes. No commentator considered in detail the content or nature of the guidelines.

4.2 In the Commission's view, the legislative approach for the provision of guidelines should be:

> first, as already foreshadowed,[1] to specify exclusively the grounds for refusal of bail; and
>
> secondly, where appropriate, to outline factors which are relevant to a bail-decision-maker's consideration of these grounds.

Unlike the approach in New South Wales,[2] the Commission recommends that the bail-decision-maker should not be limited to a consideration only of factors specified in the legislation.[3]

The Commission's recommended grounds for refusing bail

4.3 The Commission recommends that there should be a discretion[4] to refuse bail if a bail-decision-maker considers that, having regard to

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1. See paragraph 3.4 above.
2. Bail Act 1978 (NSW), s.32.
3. This is the approach adopted in the Victorian and English legislation, and proposed in Queensland.
4. Not an obligation: see paragraphs 4.17 to 4.22 below.

the conditions[5] that he could impose, there remains -

(a) substantial grounds for belief that a defendant, if released on bail, will -

(i) fail to surrender into custody in answer to bail;
(ii) commit an offence which is likely to involve violence or is otherwise serious by reason of its likely consequences;
(iii) endanger the safety or welfare of members of the public; or
(iv) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(b) a need to obtain more information about the defendant which is relevant either to the bail decision, or to the forthcoming trial;

(c) a need for the defendant to remain in custody for his own protection;

(d) in the case of bail during a trial, a substantial risk that the fairness or integrity of the trial process will be prejudiced.

4.4 From a practical point of view, the grounds specified in (a) above would be the most important for a bail-decision-maker to take into account.[6] There has been some debate as to whether bail should be refused on the ground that it is believed that the defendant will commit an offence while released on bail. The Commission has taken into consideration the arguments opposing preventive detention,[7] that is

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5. Although there might be prima facie grounds for refusing bail, a bail-decision-maker should still grant bail if he is able to impose conditions which are sufficient to remove any doubts he may have: see chapter 6 below.

6. These grounds are specified in the Bail Act 1977 (Vic), s.4(2)(d)(i) and are adopted in the Queensland Proposals, clause 14(1)(a). The English Act does not include endangering members of the public. However, in the Commission's view, this should be included to meet the case where it is believed that the defendant will be a danger, but it is not clear whether he is likely to commit any particular offence.

7. Working Paper, at 68-73, paragraphs 5.27 to 5.34.

detention in custody not for what a defendant has done, but for what he might do. It concludes that there is a legitimate public interest in preventing the commission of offences by defendants on bail, but that the discretion to refuse bail on this particular ground should be carefully defined. The Commission therefore recommends that this ground for refusal should apply only in cases where it is likely that the defendant will commit an offence which is of a serious nature, or involves a risk of injury to a person or property.[8]

4.5 With regard to ground (b), the Commission agrees that bail should be refused if a bail-decision-maker considers that he needs further information about the defendant for the purposes of making a bail decision.[9] Where the information is needed for other purposes related to the defendant's trial,[10] there is some difference in approach adopted by the English and Victorian legislation, but the end result is that a ground for refusing bail may arise if it is desirable to complete

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8. The New South Wales legislation contains a suitable precedent. Section 32(2) provides that bail can be refused on the basis that the defendant will commit an offence while at liberty on bail only if the bail-decision-maker is satisfied that -

   (a) the defendant is likely to commit it;

   (b) it is likely to involve violence or otherwise to be serious by reason of its likely consequences; and

   (c) the likelihood that the defendant will commit it, together with the likely consequences, outweighs the defendant's general right to be at liberty.

   The Commission prefers this approach to a proposal in the Commonwealth Criminal Investigation Bill 1977 (Clause 51(1)(c)(ii)) which would allow bail to be refused on these grounds by the Commonwealth Police, but only if the defendant had previously been convicted of an offence similar to the one it is believed might be committed by him while on bail.

9. Bail Act (Vic), s.4(2)(d)(iii); Bail Act 1976 (UK), Schedule I Part I clause 5; Queensland Proposals, clause 14(1)(c). The Commission recommends a procedure in paragraphs 5.2 to 5.5 below for a defendant to provide relevant information for a bail-decision-maker. Use of this procedure could reduce the number of occasions when bail is refused on this ground.

10. For example to determine whether a defendant is fit to stand trial. The Commission is considering the procedures to be followed when a defendant is remanded in custody in order to determine his fitness to stand trial in its project on Criminal Process and Mental Disorder, Project No. 69.

an enquiry or make a report on the defendant.[11] Neither the New South Wales legislation nor the Queensland Proposals create a specific ground for refusing bail in these circumstances.[12] The Commission considers that the provision of information for the benefit of a court when dealing with an alleged offender is desirable in principle and the Commission supports provisions which are designed to achieve this. The provisions of the English Act are clearly linked to this goal. The object of the Victorian Act appears to be rather more obscure. On balance, the Commission recommends the adoption of the provisions in the English Act, namely that there should be a ground for refusing bail if it would be impracticable to complete enquiries or make a report on the defendant without keeping him in custody.[13]

4.6 The Commission has noted that the police have, on occasions, opposed bail on the grounds that they wish to make further enquiries in respect of other offences for which the defendant is under suspicion, or to obtain further information to support the charge upon which he is held. The Commission has considered whether it might be desirable to add specific provisions to the legislation to deal with this difficult issue. Its conclusion is that this would be undesirable and unnecessary. Acceptable reasons for police opposition to bail, in circumstances where they are investigating a possible link between the defendant and other charges, would be to demonstrate that the likelihood of additional and serious charges gives rise to substantial grounds for believing that the defendant would abscond or tamper with the evidence of potential

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11. Bail Act 1976 (UK), ss.4(2) and 4(4) provides a general right to bail for a defendant in these circumstances, whether convicted or not, but provides a ground for refusal if it appears that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody: Schedule I Part I clause 7. The Victorian Act also creates a right to bail for such a defendant, whether convicted or not, but allows a bail-decision-maker to refuse bail if it would be against public interest to release the defendant before the enquiries or report are completed: Bail Act 1977 (Vic), s.4(1)(c).

12. The Queensland Proposals, clause 13(2), permit a court to grant bail subject to a condition that the defendant undergo an examination but only for the purpose of obtaining evidence in relation to the charge.

13. This recommendation is not intended to affect s.73(6) of the Child Welfare Act 1947 which provides that a child shall not be held in custody by reason only of the need to ascertain whether he is eligible to be dealt with by a children's panel.

witnesses. These are grounds for refusal of bail under (a) above.[14] Bail should not be refused merely on the ground that detention in custody would help police enquiries, for example by enabling them to continue police questioning.

4.7 With regard to ground (c), the protection of a defendant, the Victorian, New South Wales and English Acts and the Queensland Proposals all provide that a ground for refusing bail arises if a bail-decision-maker considers that a defendant should remain in custody for his own protection or, if he is a young person, for his own welfare.[15] The Comission agrees that this should be a ground for refusal of bail in Western Australia.

4.8 With regard to ground (d), the special ground applying to bail during trial, the Commission recommended above that a defendant should have a qualified right to bail at all stages of the criminal justice process until he is convicted. This should include bail during the course of a trial.[16] However, the Chief Justice, both in R. v Cutler[17] and in a submission on the Working Paper, has expressed the view that there are special reasons for refusing bail during the course of a trial. In essence these reasons are that -

(a) a jury could associate the decision to grant or refuse bail during a trial with the trial judge's view, at that stage of the proceedings, of the guilt or innocence of the defendant;

(b) a failure to appear by the defendant, even if temporary, could abort a half completed trial with great inconvenience to the judge and jury and cost to the public;

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14. See paragraphs 4.3 to 4.4

15. Bail Act 1977 (Vic), s.4(2)(d)(ii); Bail Act 1978 (NSW), s.32(b)(iv); Bail Act 1976 (UK), Schedule I Part I clause 3 and Part II clause 3; Queensland Proposals, clause 14(1)(b).

16. The Commission makes recommendations in paragraphs 3.6 to 3.7 above as to the approach which should be taken by a bail-decision-maker towards bail during the course of a trial.

17. [1972] Supreme Court of Western Australia No. 193/72.

(c) particularly in country areas where accommodation is limited, the community could consider the integrity of the trial process to be in doubt if the defendant were able to mix with witnesses and jurors during the course of the trial.

4.9 The Commission agrees that these are relevant factors which should be taken into account by the bail-decision-maker when considering bail during the course of a trial. Consequently, it recommends that a bail-decision-maker should be able to refuse bail for a defendant during trial if he considers that there would otherwise be a substantial risk that the fairness and integrity of the trial would be prejudiced. It also recommends, however, that administrative arrangements should be implemented in court, wherever practicable, to ensure that the jury are not made aware of whether the defendant has or has not been granted bail.

4.10 The Victorian legislation provides two further grounds for refusing bail, namely -

(i) where the defendant is in custody pursuant to the sentence of a court,[18] or is in custody for failing to answer bail unless he satisfies the court that this was due to causes beyond his control;[19]

(ii) in a case involving personal injury, where there is doubt as to the nature of the defendant's offence because of uncertainty as to whether the injured person will live or die.[20]

4.11 The Commission takes the view that, although these matters are clearly relevant to the question of bail, it would be unnecessary

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18. Bail Act 1977 (Vic), s.4(2)(b): see also Bail Act 1976 (UK), Schedule I Part I clause 4.

19. Bail Act 1977 (Vic), s.4(2)(c). The English Act goes further in that it provides a ground for refusal of bail if the defendant has been arrested under the Bail Act: Bail Act 1976 (UK), Schedule I Part I clause 6. An arrest can be made if there are reasonable grounds to suspect that the defendant is not likely to appear in answer to his bail: Bail Act 1976 (UK), s.7(3)(a).

20. In such a case bail may be refused until the court is satisfied that the victim will not die: Bail Act 1977 (Vic), s.14.

and could create confusion[21] if they were made specific grounds for refusing bail. If the defendant is in lawful custody, whether under arrest or under sentence of a court for an offence, he could still be granted bail, but not released from custody until the period of lawful detention has expired.[22] This would also apply to a defendant who is in custody for a breach of bail provisions, but, in this case, his behaviour when previously released on bail should be a relevant factor tending to prejudice his chances of being granted bail again.[23] In cases where the offence is not known, because there is uncertainty as to whether a victim will live or die, a bail-decision-maker could refuse bail on the basis that, having regard to the potential seriousness of the offence, there are substantial grounds for believing that the defendant would abscond.[24]

Factors relevant to a bail-decision-maker's consideration of certain grounds for refusal of bail

4.12 In Victoria and England, the legislation provides additional guidance for bail-decision-makers by outlining some of the relevant factors which they should take into account when deciding whether to refuse bail. These relate only to the grounds specified in (a) above, that is where there are substantial grounds for belief that, if released on bail, a defendant would fail to surrender into custody, commit an offence, endanger the safety or welfare of any person or interfere with witnesses or the course of his trial. The Commission considers that such statutory guidance, limited to such grounds, would be useful also in Western Australia. It therefore recommends that, without limiting his

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21. For example, failure to answer bail is an offence in Victoria. If a defendant is in custody for such an offence he must be refused bail under s.4(2)(b). Section 4(2)(c) would therefore seem to be unnecessary. Further confusion could result from the different expressions used in s.4(2)(c) and in s.30(1) defining the offence of absconding. The former permits bail to be granted if the defendant satisfies the court that his failure to appear was "due to causes beyond his control". The latter creates an offence only if the defendant "fails without reasonable cause to appear".

22. This is the approach adopted in New South Wales (Bail Act 1978, ss.8(4) and 9(4)); Canada (R v Mallet (1975) 26 CCC(2d) 457) and proposed in Queensland, clause 8(6).

23. See paragraph 4.12 below.

24. See paragraphs 4.3 and 4.4 above.

discretion to take into account any other matters which he considers to be relevant, the bail-decision-maker should consider -

(i) the nature and seriousness of the offence, and the probable method of dealing with it;
(ii) the character, antecedents, associations, home environment, background and place of residence of the defendant;
(iii) the history of any previous grants of bail;
(iv) the strength of the evidence against the defendant.[25]

4.13 The Commission sought comments on the question whether bail legislation in Western Australia should provide some indication as to the relevant weight which bail-decision-makers should attach to the individual factors listed above. It considered that this might be of use in this State as a guide for bail-decision-makers, particularly the police and justices of the peace, who were frequently involved in making bail decisions but did not necessarily have any legal training in this field.

4.14 Two alternative methods of providing such an indication were considered. The first was to list the relevant factors in the proposed legislation in order of importance. The second was to implement a points system, known as the "Vera Institute Test", which has been operating for some time in New York and in other United States jurisdictions. This test, and the resulting points scored by a defendant, are designed to ensure that a bail-decision-maker gives sufficient weight to what is considered to be the most important issue, namely, the defendant's community ties, as an influence on the likelihood of his appearing in answer to bail.[26]

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25. This broadly is the approach taken in the Bail Act 1976 (UK), Schedule I Part I clause 9; Bail Act 1977 (Vic), s.4(3)and Queensland Proposals, clause 14(2). The New South Wales Act contains similar provisions but they relate only to the question whether the defendant would appear in answer to his bail, and the factors specified are exclusive: Bail Act 1978 (NSW), s.32(1)(a).

26. The Commonwealth Law Reform Commission, in its report (Criminal Investigation (1975) Report No. 2 interim at 84, paragraph 180, dealing with the grant of bail by Commonwealth Police and in the Australian Capital Territory and Northern Territory), did not advocate the introduction of a points system as this operates in New York, but it did recommend that serious consideration should be given to its informal adoption, for example, through regulations or by instructions. This approach has also been taken in New South Wales. Section 33 of the Bail Act 1978 (NSW) provides that regulations may make provision for a test for the purpose of assessing a defendant's background and community ties. In addition to the factors outlined in (i) to (iv) in paragraph 4.12 above, a bail-decision-maker must also take into account the defendant's rating in such a test: s.32(1)(a)(v).

4.15 One commentator on the Working Paper supported the introduction of a points system. Two commentators opposed it; one of them[27] expressing his reasons as follows -

> "I agree with the comment that it is not [desirable] to straight-jacket bail decisions and would in fact advise strongly against this on the basis that prediction scales (which is what such straight-jacketing would amount to) are notoriously unreliable as regards human behaviour and also suffer the defect that they rapidly become out-of-date".

No submissions were made regarding the alternative of listing the factors in order of importance.

4.16 On further consideration, the Commission takes the view that it would be undesirable to adopt either alternative in order to indicate the relative weight which should be given to the relevant factors. It considers that it would be wrong to assume that the relevant factors should be given a set general order of importance. Their importance should be left to the judgment of the bail-decision-maker in each particular case. The Commission also considers that weighted guidelines might tend unduly to narrow a bail-decision-maker's approach in his consideration of bail. They might also be misinterpreted by some bail-decision-makers in a way which could prejudice the chances of some defendants, such as a new arrival to Western Australia, of obtaining bail, or lead to the release of others who should not have been granted bail. The Commission considers further that a points system would be difficult to implement in a satisfactory way. In its view, the value of the New York experience is that it provides a means of presenting a bail-decision-maker with more information about a defendant for the purposes of making a bail decision. This aspect is dealt with in greater detail below.[28]

No obligation to refuse bail

4.17 There is a significant difference in approach between the English and Victorian legislation when defining the bail-decision-maker's task. In England, the bail-decision-maker is instructed that "the defendant need not be granted bail" if there are one or more grounds

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27. The Director of the Department of Corrections.

28. See chapter 5.

for refusal.[29] In Victoria the direction is that "a court shall refuse bail".[30]

4.18 Some discretion is possible in Victoria through the use of the expression "if satisfied that there is an unacceptable risk".[31] Doubts may arise in some cases, however, as to whether the discretion is wide enough. For example, it could be argued that a bail-decision-maker must refuse bail to a person charged with a minor offence such as drunkenness if there is evidence to show that there is an unacceptable risk that if released on bail he would offend again. Much would depend on whether the term "unacceptable" permits a balancing of the public interest, or whether it relates only to the likelihood or probability of the defendant committing the offence.

4.19 The situation also appears to be doubtful where a bail-decision-maker considers that a defendant should remain in custody for his own protection, but the defendant, fully aware of the danger, wishes to obtain his release from custody.[32] It might be argued that, notwithstanding the defendant's desire to obtain bail, a bail-decision-maker in Victoria would have no alternative but to refuse it.

4.20 Although amendments to the legislation might remove these specific doubts, others could arise. Difficulties of this kind could be avoided, however, under the more flexible English approach. Therefore, in the legislation proposed for Western Australia, the Commission

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29. Bail Act 1976 (UK), Schedule I Part I.

30. Bail Act 1977 (Vic), s.4(2).

31. This applies to the grounds that a defendant will not appear in answer to his bail or will commit an offence etc.: see paragraphs 4.3 to 4.4 above.

32. A case in point arose recently in Western Australia. On 16 November 1978 the following report appeared in The West Australian at 3 -

> An Aboriginal who has been speared seven times as tribal punishment applied for bail yesterday because he said he had one or two more spearings to go and wanted to get them over.
>
> The defendant was charged with assault and causing bodily harm. Bail was granted, set at $150 and $500 respectively, with a similar surety in both cases.

recommends the adoption of the English approach which clearly provides a bail-decision-maker with a discretion (not an obligation) to refuse bail if satisfied that there are grounds to justify this course.

4.21 Another area where there is a difference in approach is the degree to which a bail-decision-maker must be satisfied that a defendant would abscond or otherwise behave contrary to public interest if released on bail. In England, the bail-decision-maker must be satisfied that there are substantial grounds for belief.[33] In Victoria the approach taken is whether he is satisfied that there is an unacceptable risk.[34] Other possibilities include "sufficient grounds for belief", "reasonable grounds for belief", or a "likelihood", "probability" or "possibility" of the defendant behaving in the undesired way.

4.22 The English requirement of substantial grounds for belief was reached after considerable debate. In the Commission's view it is the most appropriate standard and should be adopted in the legislation it proposes for Western Australia.

Special provisions for minor offences or cases where pre-trial detention could exceed potential penalty for offence

4.23 A distinctive feature of the New South Wales legislation is that it provides separate and more limited grounds for refusal of bail for certain minor offences and non-imprisonable offences.[35] There is an obvious practical reason for such an approach. If the offence is of a trivial nature, or if the defendant cannot be imprisoned for the offence, then it should only be in rare cases that a refusal of bail would be justified. The New South Wales legislation therefore provides that where a defendant is charged with a specified minor offence, or a non-imprisonable offence, he should be entitled to release on bail unless he -

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33. Bail Act 1976 (UK), Schedule I Part I clause 2.

34. Bail Act 1977 (Vic). s.4(2)(d)(i).

35. Bail Act 1978 (NSW), s.8. The minor offences are to be prescribed by regulations made under the Act. The Bail Act 1976 (UK) in Schedule I Part II contains similar limited grounds for refusal of bail in respect of non-imprisonable offences.

(a) has previously failed to comply with a bail undertaking given or bail condition imposed in respect of that offence;
(b) is incapacitated by reason of intoxication, injury or use of drugs or is otherwise in danger or in need of physical protection;
(c) has been convicted of the offence or his conviction is stayed.

4.24 A similar issue arises in cases where a defendant has been in custody pending trial for a period which equals the maximum, or the minimum, sentence, or the sentence which is likely to be imposed on conviction for the offence for which he has been charged.[36]

4.25 The Commission has given careful consideration to the desirability of narrowing the grounds for refusing bail for a defendant who, if refused bail, would spend time in custody which would be disproportionate to the seriousness of the offence, or would exceed the maximum or the likely period of imprisonment which could be imposed for the offence. However, this would be to acknowledge the use of pre-trial detention as a form of punishment; a use which, in the Commission's view, misconceives its purpose.[37] There might also be cases where such a provision would create an undesirable limitation on a bail-decision-maker's discretion.[38]

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36. The Commission has been informed that cases have occurred in Western Australia where defendants who are children have spent longer in custody awaiting trial than the maximum sentence for the offence charged: Working Paper, at 131, paragraph 9.13. See also paragraph 9.16 below for the Commission's recommendations to help overcome this problem.

37. Pre-trial detention is none the less a deprivation of liberty and can be taken into account by a court when imposing a penalty following conviction (Working Paper, at 58, paragraphs 4.35 to 4.37 and at 80-81 paragraph 5.53 and see s.20 of the Criminal Code 1913 as to the position in relation to appeals.) It is not designed as a form of punishment, but primarily as a means of ensuring the attendance of the defendant at his trial. To take the view that pre-trial detention is a form of punishment could be regarded as inconsistent with the Commission's recommendations below (paragraphs 9.11 to 9.13) for improved remand facilities.

38. One such case could arise where a defendant is arrested for a non-imprisonable offence, and the police discover information which tends to link the defendant with a more serious offence. If a bail-decision-maker were obliged to release the defendant on bail when he appears on the minor offence, this could permit the defendant to frustrate police inquiries by absconding or by concealing evidence; behaviour which would otherwise justify a refusal of bail: see paragraph 4.3 above.

4.26 The Commission accepts that a refusal of bail in cases where a defendant is charged with a minor or non-imprisonable offence, or where pre-trial custody has exceeded the maximum sentence for the offence charged, is a sensitive issue, and one which could lead to injustice. However, the Commission takes the view that it is not a matter which necessarily lends itself to remedy through specific legislative directions. The decision should be left to a bail-decision-maker who should grant bail unless there are grounds for refusal.[39] If the bail-decision-maker refuses bail, the defendant should be entitled to appeal,[40] and he should be given the benefit of improved administrative procedures to reduce delays before his trial.[41]

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39. One of the factors to be taken into account when deciding whether the defendant is likely to abscond is the probable method of dealing with the defendant for the offence charged: see paragraph 4.12 above. In cases where the defendant is unlikely to be imprisoned for the offence, he would be unlikely to abscond, and this should, in practice, be an important factor in favour of granting bail.

40. See chapter 8 below.

41. See paragraphs 9.14 to 9.16 below.

CHAPTER 5 - THE NEED FOR MORE INFORMATION RELEVANT TO A BAIL DECISION

A. INFORMATION FOR A BAIL-DECISION-MAKER

Existing law in Western Australia

5.1 In Part B of chapter 5 of the Working Paper, the Commission listed a number of criticisms of existing law and practice regarding the provision of information to a bail-decision-maker. In summary these were -

(a) information is given in a haphazard way, sometimes extracted by questioning the defendant, sometimes volunteered by the prosecution or defendant;

(b) there is no indication given to bail-decision-makers, the prosecution, or the defendant, as to what information is relevant;

(c) bail decisions may be made in some cases with insufficient information;

(d) doubts may arise in some cases as to who can be heard in respect of a bail application;

(e) a defendant may be prejudiced in some cases by information publicised in open court.

Bail information form

5.2 The Commission suggested in its Working Paper[1] that a form could be devised to enable a defendant to provide a bail-decision-maker with concise, relevant and complete information, and so enable him to make a properly informed bail decision. To avoid unnecessary delays and administrative burdens, the Commission suggested that the form might not be needed in all cases. Its concern was to enable a defendant on a minor charge to obtain bail quickly and with a minimum of

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1. At 101, paragraph 5.97.

formality. On the other hand, in cases where there was real doubt as to whether a defendant should be granted bail, the Commission suggested that a check procedure might be implemented to enable the information recorded on the form to be verified.

5.3 A common theme throughout comments received on the Working Paper was that more information should be made available to a bail-decision-maker to assist him in making his decision. Consequently, the Commission has devised a bail information form, based on a similar form recommended by the English Working Party on Bail.[2] The form recommended by the Commission is reproduced in this Report as Form A in Appendix II.

5.4 Completion of the bail information form by the defendant should not be compulsory, but he should be made aware that his application for bail might be prejudiced for lack of information if it is not completed. A suitable notice to this effect is included in notes to accompany the form. In practice, in the interests of the defendant, it would be advisable for him to complete the bail information form particularly -

(a) in cases where bail is to be opposed;
(b) whenever advised to do so by the court;
(c) if charged with an indictable offence.

The Commission makes recommendations below as to the availability of the form and the provision of assistance to help a defendant to complete it.[3]

5.5 The bail information form should be used for the purposes of the defendant's bail application only, and should not be available as

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2. Report of the Working Party, Bail Procedures in Magistrates' Courts (1974) HMSO at 92-93. Such a form is not provided for in the English or Victorian provisions and it would appear that it is not contemplated in Queensland. In New South Wales there is no information form provided by the Act, but s.33 provides that regulations may make provision for a test to be carried out to obtain a rating as an indication of the defendant's background and community ties. If implemented, this test would presumably involve some form of questionnaire, and perhaps verification of the information provided by the defendant: see paragraph 5.6 below.

3. See paragraph 5.19.

evidence against him at his trial.[4] Administrative arrangements should be made to ensure that where such a form has been completed by the defendant, the original form, or a copy, becomes part of the record for consideration each time the question of bail arises.

Verification of information

5.6 Where the form is completed for the purposes of police bail, any necessary verification of the information recorded could be undertaken by the police. In other cases, verification, if necessary, could be undertaken by a Probation Officer, where available, or by a police officer, as ordered by the bail-decision-maker. Although this might involve additional burdens on the Probation Service, that Service, in a detailed and most helpful submission to the Commission, agreed that Probation Officers would be the most desirable body of persons to perform this function. As to availability of Probation Officers, the Service commented as follows -

> "The Probation and Parole Service of Western Australia has been able to provide a service which covers all the main populated areas of the State. In the metropolitan area, in addition to the Head Office at West Perth, there are offices at Fremantle and Bentley and reporting centres at Armadale, Belmont, Midland and Rockingham. In the country there are offices in the following centres: Albany, Kalgoorlie and Geraldton. The Bunbury office is expected to be operating by the end of February 1978 and an office is to be established at Port Hedland shortly after this. Additionally the use of Honorary Probation and Parole Officers has allowed the Service to cover many of the smaller towns of the State".

Offence for providing false or misleading information

5.7 The proposed form is informal in that it does not require the information to be given on oath or by way of statutory declaration. However, the Commission considers that some provision should be made to ensure that true answers are given. Consequently, the Commission recommends that the proposed Bail Act should specifically provide that

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4. This has particular relevance to the disclosure of previous convictions. In some circumstances a defendant might subsequently be tried by the person making the bail decision, and the possibility of prejudice could arise in this way. The Commission makes recommendations of an administrative nature on this issue below: see paragraph 9.21.

it shall be an offence, punishable by a fine not exceeding $500, knowingly to provide false or misleading information in the form to a bail-decision-maker in support of an application for bail.

Information from other sources

5.8 The Commission considers that it might be desirable in some circumstances to obtain information from other sources in the form of a bail report. The Probation and Parole Service is clearly the most suitable body to perform such a service, and, in its submission to the Commission, it expressed support generally for greater participation by the Service in the bail area. Consequently, the Commission recommends that a bail-decision-maker should be given the power to obtain a report from the Probation and Parole Service to help him make his decision whether or not to grant bail.[5]

Information under oath

5.9 The Victorian Act provides that a defendant may be required under oath to give information relevant to a bail decision.[6] The Commission has reservations as to the desirability of such a provision in Western Australia. To require information to be given under oath means punishment for failure to comply. In the Commission's view, this is undesirable and inconsistent with the defendant's general right to remain silent in criminal proceedings.[7] It might be argued that, because a bail-decision-maker should have an obligation to consider bail, he should, therefore, have the right to require information under oath. However, if the defendant declines to give relevant information, the bail-decision-maker has a number of options open to him. For example, he could adjourn the proceedings, refuse bail on the ground

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5. The question of providing adequate facilities for the Probation and Parole Service is considered further in paragraph 9.17 below.

6. Bail Act 1977 (Vic) s.8. This appears to apply even to police bail. See also Queensland Proposals, clause 15. There is no similar provision in the Bail Act 1976 (UK).

7. The Victorian Act prevents examination of the defendant as to the offence with which he has been charged. However, there might be other matters not directly relevant to the offence which the defendant might not wish to disclose.

that he needs more information,[8] or in appropriate cases,[9] he could release the defendant at large.

5.10 There are also provisions in the Victorian legislation allowing a bail-decision-maker to take into account other evidence, on oath or otherwise, which is relevant to the bail decision.[10] A spouse of the defendant is compellable, however, only in cases where she would be compellable to give evidence at the trial.[11] This is consistent with existing law in Western Australia on this issue,[12] and the Commission considers that there is no reason for any departure.[13] The Commission therefore recommends the adoption of the Victorian provisions for obtaining evidence from persons other than the defendant. It agrees that a bail-decision-maker should have a discretion to receive such evidence on oath or otherwise.[14]

Representation at a bail hearing

5.11 With one exception, the prosecution is represented either by the police or by the Crown Prosecutor at a bail hearing. The exception arises in the case of bail where a defendant appeals, by way of order to review, to a judge of the Supreme Court against a conviction or sentence by a Court of Petty Sessions. This application for an order to review is made ex parte, and the normal practice[15] is for the judge

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8. See paragraphs 4.3 and 4.5 above.

9. See paragraphs 6.13 to 6.15 below.

10. Bail Act 1977 (Vic), s.8(e). See also Bail Act 1978 (NSW), s.32(3).

11. Crimes Act 1958 (Vic), s.400(3A).

12. Evidence Act 1906, ss.8-9.

13. No departure from this principle is recommended by the Commission in its report on this topic: Western Australian Law Reform Commission, Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings (1977) Report No. 31.

14. A requirement for evidence to be given formally on oath could give rise to undesirable delays.

15. The Commission has been informed that on occasions some Judges have notified the Crown Prosecutor's office that they would like to hear argument on the question of bail.

to consider the defendant's release on bail, pending the hearing of the appeal, at the same time as he makes an order in respect of his application to appeal. It has been suggested to the Commission that any departure from this practice (for example, by requiring notice to be given to the prosecution if the application for an order to review is to be accompanied by an application for bail) would give rise to administrative burdens and could lead to delays in the defendant's release from prison, particularly if the case arose on a Friday, or related to a defendant who was convicted in a country town.

5.12 In the Commission's view it is generally desirable for a bail-decision-maker to hear argument both for and against a grant of bail. Under existing practices he has the opportunity to hear argument opposing bail, but only if he chooses to take this course in a particular case. If he does not choose to do so, the prosecution has no opportunity to make any submissions in regard to bail.

5.13 Several factors support a continuation of the present practice in the context of appeals by way of order to review. The discretion is exercised by a judge of the Supreme Court, it enables a defendant to be released from custody with a minimum of delay, and it applies only to summary offences. On the other hand, summary conviction, and, consequently, the procedure for appeals by way of order to review, can apply to some serious offences. This applies, for example, to certain drug offences,[16] assaults[17] and certain stealing offences.[18] In such cases, the Commission considers that the prosecution should be entitled to be heard in respect of bail. Consequently, it recommends that where an appeal is brought in respect of an offence which carries a maximum penalty of six months imprisonment or more, any application for bail should be made on notice to the prosecution. In other cases, it should be left to the bail-decision-maker to decide whether he requires argument opposing bail.

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16. Section 94B(5)(b) of the Police Act 1892 provides a maximum penalty of ten years imprisonment on summary conviction for selling cannabis. The defendant must be sentenced, however, by the District Court.

17. The Criminal Code 1913, provides a maximum of six months imprisonment for summary conviction for common assault (s.321) and twelve months for aggravated assault: s.322(3).

18. The penalty is up to six months imprisonment for breaking and entering and for stealing: Criminal Code 1913, ss.407A and 426.

5.14 In a case discussed in the Working Paper,[19] a husband sought to oppose his wife's release on bail on the ground that she might make a further attempt on his life. It was held that he had no right to be heard. In the Commission's view, only the prosecution and the defendant should be entitled to be represented as parties to bail proceedings. But this would not prevent a person, such as the husband in the case discussed, from giving relevant evidence for the prosecution in relation to the bail proceedings, or otherwise volunteering to be a witness. This follows from the Commission's recommendation above,[20] that a bail-decision-maker should be able to receive such evidence as he considers to be relevant to a bail decision. In the Commission's view no further recommendation is necessary on this matter.

Non-publication of bail hearings

5.15 The view was expressed in the Working Paper, and has recently been expressed by the Chief Justice, that, on many occasions, the publication of bail hearings could prejudice the defendant at his trial. This applies particularly to evidence of the likelihood of the defendant's conviction,[21] or evidence of his criminal record. There may also be other reasons for non-publication. For example, if bail is refused where the police wish to make further inquiries,[22] it may prejudice those inquiries if they must be revealed in open court.

5.16 Use of the Commission's bail information form, recommended above,[23] would solve the problem in many of these cases. The relevant information could be passed to the bail-decision-maker, and the reasons for his decision, where applicable, could be passed to the defendant.[24]

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19. R v Fraser (1900) 25 VLR 365: Working Paper, at 106, paragraph 5.108.

20. Paragraph 5.10.

21. This was the Chief Justice's major concern: see The West Australian, 23 October 1978 at 24 and 24 October 1978 at 11.

22. See paragraph 4.6 above.

23. See paragraph 5.3.

24. The Commission recommends that a form be used also for recording the bail-decision-maker's decision: see paragraphs 5.21 to 5.23 below.

Publication of the relevant evidence and the reasons for the decision would become a matter for the discretion of the bail-decision-maker.

5.17 In cases where further protection measures were considered to be necessary, the Commission recommends that a bail-decision-maker should have a discretion to close the court or, preferably, to make his decision in open court, but make an order prohibiting the publication of the name of the defendant and all or any part of the proceedings.[25]

B. INFORMATION FOR A DEFENDANT

5.18 Several commentators on the Working Paper agreed with the Commission's suggestion[26] that there was a need for defendants to be made more aware of the law and procedure relating to bail. In the Commission's view, the best way of achieving this would be to provide a concise explanation of the bail system written in simple language. The Commission recommends that such information should be included as part of the bail information form.[27] This form would then serve a dual purpose. It would inform a defendant of the procedure relating to bail, and it would give him an opportunity, if he so wishes, to provide relevant supporting information for the bail-decision-maker. The proposed form also contains information for a defendant regarding his rights if bail is refused.[28]

5.19 The Commission recommends that there should be a statutory obligation on the police to give the form to every defendant who is taken into custody.[29] In addition the Commission suggests that the

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25. Bail Act 1977 (Vic), s.7 and Queensland Proposals, clause 16 would enable a bail-decision-maker to order that the evidence taken, the information given, the representations made and the reasons (if any) given shall not be published where the defendant has yet to stand trial for the offence. The penalty for contravention of such an order is $500 and/or imprisonment for three months (Vic) or six months (Queensland).

26. Working Paper, at 104-105, paragraphs 5.104-5.107.

27. See paragraph 5.3 above and Form A in Appendix II.

28. For example, his entitlement to written reasons for such refusal (see paragraphs 8.9 to 8.11 below) and, in the case of refusal of bail by the police, his right to apply to a justice for bail, or in any other case his right of appeal: see chapter 8 below.

29. A similar requirement is provided in s.18(1)(a) of the Bail Act 1978 (NSW).

form should be available at lock-ups, remand centres, prisons, Probation and Parole centres, courts, legal aid offices, the Citizens' Advice Bureau, Community Welfare offices and any other place where a defendant is likely to require advice and assistance in respect of bail. It expects that in most cases a defendant would be given assistance when completing the form. The Commission recommends, however, that the police should be required to read the form and, if necessary, explain its contents where a defendant appears to be illiterate, or for some other reason appears to be incapable of understanding its provisions. If necessary, the assistance of an interpreter should be obtained. The police should also be required, when refusing bail, or granting bail on conditions which a defendant considers that he cannot meet, to inform a defendant specifically that he is entitled to make application to a justice for bail, or for a review of the terms of bail set by the police.[30]

5.20 The Commission also considers that a defendant should be able to obtain assistance in respect of bail from persons of his own choosing. It therefore recommends that a defendant should be permitted to have reasonable access to a telephone for the purpose of communicating with a solicitor, or any other person, regarding bail.[31] He should also be entitled to be represented by such a person when a decision regarding bail is made by the police.

C. BAIL RECORD FORM

5.21 Many of the Commission's recommendations in this Report would, if adopted, create additional burdens and responsibilities on a bail-decision-maker. For example, he would be required to consider

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30. Such a provision appears in s.10(2) of the Bail Act 1977 (Vic) and see paragraph 8.4 below. A similar requirement is imposed on a Magistrate's Court in England where bail is refused and the defendant is not represented by counsel or a solicitor: Bail Act 1976 (UK), s.5(6). The Commission does not consider that such a provision is necessary in Western Australia.

31 Bail Act 1978 (NSW), s.19 imposes a similar requirement, but provides that an opportunity to make such communication is not required to be given if the police believe on reasonable grounds that this would result in -

(a) the escape of an accomplice of the accused person; or

(b) the loss, destruction or fabrication of evidence.

specific grounds for refusing bail,[32] and, in the exercise of his discretion to impose conditions in respect of a grant of bail, he would be required to have regard to statutory limitations.[33] It is also recommended that he should in some circumstances provide reasons for his bail decision.[34]

5.22 In order to facilitate the task of a bail-decision-maker when making his decision under the recommended bail legislation, the Commission has devised a bail record form,[35] drawing his attention to the matters he is required to take into account, and providing for the decision and, where necessary, his reasons, to be recorded . In the Commission's view, apart from its instructive value for bail-decision-makers who are not regularly involved in making bail decisions, such a form would encourage a uniform approach to bail decisions by directing the attention of all bail-decision-makers to the relevant criteria, and it would provide a convenient record of the decision for official purposes and for the purposes of an appeal.[36] It would also enable a bail-decision-maker to convey his reasons for the decision, where necessary, without publishing them in open court if non-publication of those reasons were considered to be desirable in the circumstances.[37]

5.23 The Commission therefore recommends that the proposed bail record form should be completed by a bail-decision-maker in all cases.

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32. See chapter 4 above.

33. See chapter 6 below.

34. See paragraphs 8.9 to 8.11 below.

35. See Form B in Appendix II.

36. The bail record form could replace the existing practice where the record of a bail decision on conditions appears in the form of a certificate on the warrant remanding the defendant in custody until those conditions are met.

37. See paragraph 5.16 above.

CHAPTER 6 - CONDITIONS OF RELEASE ON BAIL

Undertaking by defendant and the creation of an offence of absconding

6.1 The most important condition for the defendant's release on bail is an undertaking by him to appear in answer to his bail. Under existing law, this undertaking incorporates a monetary liability for default and is referred to as a recognisance. This condition does not apply, however, to a defendant who is released "at large" for a simple offence "or other matter" under s.86 of the Justices Act 1902.

6.2 The Commission, in its Working Paper,[1] discussed several criticisms which have been made of the recognisance procedure. One is that it is doubtful whether it operates as a sufficient incentive for a defendant to answer his bail. Other problems arise as to the setting of the amount concerned and recovery of the sum owing on default. The Commission suggested[2] that the defendant's recognisance procedure should be replaced by an undertaking to appear which, if broken without reasonable cause, would result in the commission of an offence which would carry its own additional penalty. This step has been taken in other jurisdictions.[3]

6.3 No commentator on the Working Paper opposed the creation of an offence of failing to appear in answer to bail. On the contrary, reaction generally from commentators favoured the creation of an offence of absconding. The Commission therefore recommends that -

(a) a defendant's recognisance should no longer be a condition of release on bail; and

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1. At 109-112, paragraphs 6.3 to 6.9.

2. At 113, paragraph 6.14.

3. Bail Act 1977 (Vic), s.6, which creates the duty to appear, and s.30, which creates the offence. Similar provisions appear in the New South Wales and English Acts, and are proposed in Queensland. Penalties are considered in paragraph 6.7 below.

(b) failure to appear in answer to bail, without reasonable cause, should constitute a criminal offence.[4]

6.4 With regard to the definition of the offence, the Commission prefers the English approach which applies both to failure without reasonable cause to appear, and failure by a defendant, who having reasonable cause, fails to appear as soon as reasonably practicable thereafter. The Commission also agrees that the onus should be placed on a defendant to show reasonable cause. It is opposed to the specification of what is or what is not reasonable cause by statute. This matter could be safely left to the discretion of courts to determine in individual cases. It therefore does not recommend the adoption of the English provisions which provide that a mere failure to give the defendant a copy of his bail undertaking[5] could never in itself constitute a reasonable excuse.[6]

6.5 If the defendant fails to appear in answer to his bail, there should be provision made for him to be arrested and dealt with both for the alleged principal offence and his offence of absconding. The Commissioner of Police suggested that an absconding defendant should be convicted in absentia of both offences. Existing procedures would permit this course to be taken in respect of simple offences.[7] The suggestion is, however, that because a defendant's failure to answer bail is normally an attempt to avoid trial on the basis that he is guilty

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4. Replacement of a defendant's recognisance by creating an offence of absconding might also remove a popular misconception that release on bail always involves payment of cash. Payment of cash, commonly referred to as cash bail, may, however, be required in some cases, for example -

   (a) where a bail-decision-maker considers that a defendant and/or a surety should deposit a certain sum as additional security for performance of a defendant's undertaking to appear (see paragraphs 6.25 to 6.27 below); and

   (b) where the police release a defendant charged with certain minor offences such as drunkenness and gaming, on his deposit of a certain sum: see paragraphs 6.16 to 6.21 below.

5. See paragraph 6.12 below.

6. Bail Act 1976 (UK), s.6(4).

7. Justices Act 1902, s.140.

of the offence, convictions in absentia should be possible for all offences including indictable offences. A defendant who had some other reason for absconding, and who considers his conviction to be wrong, could be permitted to make application subsequently to have the conviction set aside.

6.6 The Commission does not agree, however, that such an extension to the existing procedure for convictions in absentia should be made. In the first place, a defendant, in the case of the offence of absconding, would be convicted of the offence before being formally charged. More generally, however, the Commission considers that where the penalty on conviction for the offence charged is likely to be a period of imprisonment, it would be undesirable in principle, and in practice, for the defendant to be convicted in his absence. Accordingly, the Commission makes no recommendation for change to the existing provisions in Western Australia relating to convictions in absentia.[8]

6.7 With regard to the penalty for absconding, the Commission agrees with the New South Wales approach that the offence should be tried summarily (that is, without a jury), and should carry the same penalties as are provided for the offence in respect of which the defendant failed to appear, but with a maximum of three years imprisonment.[9] In the interests of flexibility, the Commission does not recommend adoption of the Queensland proposal to make a term of

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8. This would mean that a defendant who absconded would be dealt with in the same manner as a defendant who has escaped from legal custody, that is, he would have to be recaptured and then charged and dealt with for the offence committed.

9. Bail Act 1978 (NSW), s.51. Thus an absconding defendant who was charged with rape would face a life sentence for the rape offence (Criminal Code 1913, s.326) and a further three years for absconding. A defendant charged with aggravated assault on a female (which for summary conviction carries a maximum sentence of one year: Criminal Code 1913, s.322) would face one years imprisonment each for the assault and the absconding offences. If a defendant were charged with both rape and aggravated assault, he would face a term of three years for absconding even if he were subsequently convicted only of the assault charge. In Victoria, the penalty is up to twelve months imprisonment; in Queensland, a compulsory cumulative sentence of imprisonment up to two years and, in England, from three months and/or four hundred pounds for a summary offence to twelve months and/or a fine if dealt with in the Crown Court.

imprisonment mandatory in all cases. It recommends as an additional or alternative penalty the imposition of a fine not exceeding $3,000 and, that in fixing the amount, the court should be empowered to take into account not only the punishment of the offender, but also recovery of the cost of his recapture and return.

6.8 Wherever possible the absconding charge should be heard at the conclusion of the trial for the principal offence.[10] If the principal offence is an indictable offence, the District or Supreme Court, as the case may be, should be given express statutory power to hear the complaint.[11]

Form of undertaking

6.9 Existing law in Western Australia, relating to recognisances, requires a separate recognisance for every charge, even though they are to be heard together. In order to reduce the administrative burden in such cases, the Commission recommended in the Working Paper that a single undertaking should suffice, which would, in turn, give rise to a single offence on failure to appear.[12]

6.10 The police, the Royal Association of Justices and the Women Justices' Association of Western Australia agreed with this proposal. Accordingly, the Commission has prepared a draft form of undertaking which gives effect to it.[13] This means that in considering bail, a bail-decision-maker would make his decision having regard to the amalgamated charges. If the defendant were originally refused bail, but the more serious charges which influenced this decision were subsequently withdrawn, the defendant's entitlement to bail would require reconsideration. In cases where the charges were withdrawn in court,

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10. The court would be in a better position to sentence the defendant on the absconding offence if it were aware of the way he was to be treated in respect of the principal offence.

11. As in the Queensland Proposals 1978, clause 36(2). This would prevent two trials in two separate courts, one for the principal offence and one for the offence of absconding.

12 At 110, paragraph 6.4 and at 115, paragraph 6.18.

13. See Appendix II, Form C.

the bail-decision-maker should consider bail at that time. In other cases, there should be an obligation on the prosecution to inform the defendant concerned that he can make a fresh application for bail.

6.11 The Commission also recommends that the defendant's undertaking should be to appear at the time and place of the hearing or trial, or in the case of a proposed adjournment, as notified by the prosecution by post, by telegram or by hand.[14] This latter procedure would avoid the situation where a defendant appears as required on a particular day, merely to be informed that his trial or hearing cannot proceed on that day as planned, but is to commence on another day. On any occasion where an adjournment is granted to either party, the court should be given power to extend the defendant's undertaking if unnecessary, without requiring a new one, and without requiring the presence of the defendant if he has good reason not to be there.[15]

6.12 The Commission recommends, as part of its policy of providing more information to a defendant, that he be given a copy of his undertaking, including notification of the conditions of his bail and the consequences of breach of those conditions. It should be the responsibility of the person taking the defendant's undertaking, through an interpreter if necessary, to see that the defendant understands his bail obligations before he is released on bail.[16] This might reduce the number of occasions where defendants fail to appear because of error.

Release without an undertaking

6.13 In the case of a simple offence, there is power in Western Australia to release a defendant at large, that is, on the understand-

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14. Such a procedure is provided in Victoria and is proposed in Queensland, but in both cases only where the Crown Prosecutor is involved. The Commission considers that it would be desirable if the procedure could also be applied in Western Australia to trials for summary offences and committal hearings where the prosecution is conducted by the police. Subject to appropriate amendments in this regard, the Commission considers that the provisions of the Queensland Proposals, clause 20, including the penalty of $500 or six months imprisonment for the defendant's failure to notify the prosecution of a change in address, deal more satisfactorily with this matter than the corresponding Victorian provision: Bail Act 1977 (Vic), ss.15 and 29.

15. For example, if he is sick: Bail Act 1977 (Vic), s.16(3).

16. A similar requirement appears in Bail Act 1977 (Vic), s.17(1), but it is there imposed on the bail-decision-maker.

ing, without formality, that he will appear when necessary.[17] A similar provision appears in the Queensland Proposals[18] with the result, presumably, that in such a case a defendant would not commit an offence if he subsequently failed to appear.

6.14 In the Commission's view, although the power to release a defendant at large is rarely used in practice in Western Australia, there might be occasions where this procedure would be appropriate. One example might be where a defendant, having been arrested for a minor offence, seeks to remain in custody for publicity purposes. Accordingly, the Commission recommends that there should be a provision in the proposed Western Australian legislation allowing a defendant to be released from custody, without an undertaking, during any adjournment in criminal proceedings. A defendant who failed to appear might be tried in his absence, or in the case of a serious offence, a bench warrant could be issued for his arrest.

6.15 Another situation where a defendant should be released at large arises where he appears before a court and, through an oversight, no order is made regarding bail.[19]

Release by police without an undertaking on deposit of cash

6.16 In Western Australia, it is common for a defendant charged with certain offences, such as drunkenness and gaming offences, to be released on bail by the police on depositing a cash sum. The amount normally required is $20, which approximates the likely penalty for conviction of the offence. The practice followed in most cases,[20] is that a defendant who fails to appear in answer to his bail forfeits the cash deposited, but no further action is taken in respect of the offence charged. The matter is left in abeyance.[21] In these cases, therefore,

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17. Justices Act 1902, s.86.

18. Queensland Proposals, clause 8(3).

19. See paragraphs 3.8 to 3.10 above for a discussion of this situation and the position in New South Wales.

20. There are exceptions. Some Magistrates take the view that the defendant must be brought before the court as, in the defendant's absence, there is no authority to forfeit cash deposited by him in respect of bail: Working Paper, at 118-119, paragraphs 6.25 to 6.27.

21. There is no specific statutory authority for this practice.

a defendant absconds, not with the object of avoiding trial, but because he prefers to have the case dealt with by forfeiting cash deposited, thereby saving himself the trouble and expense of appearing in court, and avoiding the stigma of a conviction being entered against his name.

6.17 In the Queensland Proposals, special provision is made in clause 32 to deal with minor offences such as gaming and drunkenness. This provision would authorise a member of the police force to release a defendant on bail if he deposited, in cash, such amount as was considered to be sufficient security for his appearance. Failure to appear in answer to such bail would mean forfeiture of the cash deposited, but it would not constitute an offence. The court would retain its power to enter a conviction for the principal offence in the defendant's absence, or adjourn the hearing of the charge, or issue a warrant for the defendant's arrest. The proposals would appear to permit the continuation of any existing practice whereby in respect of some offences no further action would be taken. This procedure would not apply to indictable offences, or simple offences where there was a statutory duty upon the defendant to appear at his trial, but otherwise it would be available for offences specified in the Police Commissioner's administrative directions.[22]

6.18 The Victorian Act also contains specific provisions dealing with such offences,[23] but adopts a different approach. The authority is restricted,[24] the offences are specified,[25] the amount is limited,[26] and if, on failure to appear, the charge is heard in the defendant's absence, the cash deposited is used to pay any fine. Any surplus goes to Consolidated Revenue unless the defendant appears, in which case it is paid to him. As a defendant who is released under these provisions is not released on bail, he does not commit an offence if he fails to appear at the hearing of the charge.

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22. Queensland Law Reform Commission, Report on the Law Relating to Bail in Criminal Proceedings (1978) No. 25 at 8 and 18, paragraph 32.

23. Bail Act 1977 (Vic), s.11.

24. To a sergeant or officer in charge of a police station.

25. Drunk in a public place, drunk and disorderly or riotous behaviour and indecent language or behaviour.

26. Up to $50.

6.19 The New South Wales legislation provides for a defendant to be released on bail on the condition that he deposits cash,[27] but otherwise makes no special provision for cash bail in respect of minor offences. Section 52 provides that if a court convicts a defendant of a summary offence in his absence, he should not in addition be liable for an offence of absconding. The result, therefore, would seem to be that a court could continue its existing practice of dealing with minor offences by forfeiting cash deposited, and without proceeding further in respect of the principal offence.[28] Alternatively, it could deal with the principal offence by issuing a warrant or by entering a conviction in the defendant's absence. In the latter case, the defendant is not liable to prosecution for absconding.

6.20 The Commission has outlined arguments for and against the practice of dealing with certain minor offences by forfeiting cash deposited in respect of police bail and by taking no further action in respect of the principal offence.[29] If its general recommendations as to bail were adopted, continuation of the practice as a form of release on bail would arguably conflict with basic principles of those recommendations.[30] The Commission recognises, however, that practical considerations might justify the provision of an alternative procedure for the release of a defendant in the appropriate circumstances by the police on payment of cash.

6.21 In the Commission's view, a suitable alternative procedure would be to permit a police officer, who is authorised to grant bail, to

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27. Bail Act 1978 (NSW) s.36(2)(g).

28. Report of the Bail Review Committee, (1976) at 21. The police could decide in these circumstances not to charge the defendant with the new offence of absconding. Nevertheless the practice could give rise to difficulties similar to those outlined in n.30 below.

29. Working Paper, at 122-123, paragraphs 6.38 to 6.39.

30. Three difficulties would arise. First, the defendant would be required to undertake to appear in circumstances where he was not really expected to do so. Secondly, he would be invited to commit a further offence. Thirdly, it would contravene the Commission's recommendation (see paragraph 6.26 below) that cash should be required only as additional security to ensure that a defendant appears in answer to his bail.

release a defendant at large (that is, without bail) on payment of cash.[31] This power could apply to any summary offence, or it could be limited to specific offences such as gaming and drunkenness. Provision could be made to enable cash deposited by the defendant to be forfeited if he failed to appear at the hearing of the charge against him.[32] A decision as to what action should be taken in respect of the offence charged could be left to the discretion of the court.[33]

Conditions of release on bail other than the defendant's undertaking

6.22 Existing law in Western Australia does not deal adequately with conditions which can be imposed in respect of release on bail other than the defendant's undertaking. In some cases[34] there is no authority to impose them; in others the authority is obscure.

6.23 Commentators on the Working Paper generally favoured the introduction of statutory provisions to govern the imposition of conditions relating to bail. The District Court Judges suggested that bail-decision-makers should have a wide power to impose conditions. The Law Society submitted that the conditions that may be imposed should be specified in the legislation. It also suggested that cash bail should not be required in any circumstances as it is discriminatory.

6.24 In the Commission's view, the proposed legislation should distinguish and deal separately with conditions -

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31. This form of release, which is adopted in Victoria (see paragraph 6.18 above), would mean that the defendant would not be required to sign an undertaking, would not commit an offence if he failed to appear, and the limitation on the imposition of a condition requiring cash would not apply.

32. Subject to the defendant's power to apply for relief, see paragraph 6.38 below.

33. If a defendant has been charged with a summary offence and, if it were considered that further action should be taken in respect of that offence, a court could ask for particulars of the offence and exercise any of the following options -

    (a) issue a bench warrant for the defendant's arrest;

    (b) adjourn the hearing and ask the prosecution to inform the defendant that he is to appear in court;

    (c) proceed to hear the charge and make a decision in the defendant's absence.

34. For example, deposit of cash.

(a) requiring additional security for performance of the defendant's undertaking to appear, such as a deposit of money or other security or a requirement for a surety; and

(b) relating primarily to a defendant's behaviour when released on bail.

6.25 There are some differences in approach between the English and Victorian legislation relating to conditions falling within category (a). The Victorian approach is more detailed and for that reason appears to be more helpful than the English provisions.[35] In addition to a defendant's undertaking, which is required in every case, it specifies -[36]

(i) a deposit of money or other security;
(ii) a surety or sureties;
(iii) a combination of (i) and (ii).

The proposed surety may be required, by the person taking his recognisance,[37] to deposit cash or other security. The Commission recommends that these provisions should be adopted in Western Australia, but that the requirement of a deposit of cash or other security, not only by a defendant, but also by a surety, should be imposed only by the bail-decision-maker.[38] The Commission takes this view to ensure that the bail-decision-maker remains directly involved, to the fullest extent possible, in making decisions relating to the release of a defendant from custody.

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35. Bail Act 1977 (Vic), s.5. The Victorian approach is followed in the Queensland proposals.

36. The English Act merely permits a bail-decision-maker to require a surety (s.3(4)) and provides that security can be required if it appears that the defendant is unlikely to remain in Great Britain: s.3(5).

37. Apart from the bail-decision-maker himself, this could include other persons such as a member of the police of the rank of sergeant or above or in charge of a police station, or the Governor of a prison or a senior prison officer or above: Bail Act 1977 (Vic), s.27. For the Commission's recommendations regarding approval of sureties see paragraphs 7.27 to 7.32 below.

38. The Commission notes that in New South Wales and Queensland consideration is being given to the possibility of payment using bankcard or other credit card arrangements.

6.26 In addition, there is, in Victoria, a statutory direction that the conditions in category (a) should be considered by the bail-decision-maker in sequence, and that a condition should be no more onerous than is required in the public interest, having regard to the nature of the offence and the circumstances of the defendant.[39] The Commission does not agree with the first part of the statutory direction in Victoria requiring a bail-decision-maker to consider the possible bail conditions in sequence. In its view it would be sufficient if the legislation specified the relevant conditions without making any statutory assumption as to their order of severity. The Commission considers, however, that there should be a statutory direction that a bail-decision-maker should release a defendant on the basis of his undertaking alone, unless he considered that it would be desirable to require further conditions as security for performance of that undertaking.

6.27 If a bail-decision-maker were to decide that any such further condition was necessary, the Commission considers that his choice of the particular condition to be imposed, and its severity, should be governed by adopting the Victorian requirement that a condition should be no more onerous than is required in the public interest, having regard to the nature of the offence and the circumstances of the defendant. This would make it clear that, when imposing a condition, a bail-decision-maker should include in his consideration the ability of the defendant to meet it. Thus, if a bail-decision-maker considered that it was necessary to require a defendant to deposit a sufficient sum of cash as security for performance of his undertaking to appear, he should have regard to the defendant's circumstances when setting the amount required.[40] In these circumstances a requirement of cash would not be discriminatory.

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39. Bail Act 1977 (Vic), s.5(1).

40. Such a provision would also remove existing doubts as to the operation of s.139(1) of the Criminal Code 1913. This provision creates an offence if a justice of the peace wilfully and perversely and without reasonable excuse, and in abuse of his office, requires excessive and unreasonable bail. Doubt has arisen as to whether the demands must be excessive and unreasonable in relation to the type of offence with which the defendant has been charged, or whether it means excessive and unreasonable having regard to the defendant's means. The Commission's recommendations would make it clear that demands by way of conditions in respect of bail could be excessive and unreasonable unless the defendant's circumstances were taken into account.

6.28 With regard to conditions falling within category (b), namely those relating to a defendant's behaviour when released on bail, the Commission considers that there should be statutory guidelines limiting the bail-decision-maker's discretion as to the type of condition which may be imposed. To achieve this it favours the Victorian and English approach which limits a bail-decision-maker's discretion in terms of the purposes for which he is imposing the condition. This approach is, in the Commission's view, more appropriate than an alternative adopted in Canada which emphasises the actual conditions rather than their objective.[41]

6.29 In Victoria and England, the purpose of imposing the condition must relate to the grounds for refusing bail[42] so that a defendant, who would otherwise be refused bail on such grounds, can be released from custody. Adopting this approach for Western Australia the Commission recommends that conditions should be able to be imposed for the purposes of ensuring that a defendant -

(a) appears as required;
(b) does not commit an offence;
(c) does not endanger members of the public;
(d) does not interfere with witnesses or obstruct the trial process or, in the case of bail during trial, prejudice the fairness or integrity of the trial;
(e) appears as required for the purposes of a medical examination.[43]

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41. Section 457(4) of the Criminal Code 1953 (Can) lists the conditions which can be imposed as follows -

    (a) report at stated times to a police officer or other designated person;
    (b) remain within the jurisdiction;
    (c) notify a person under (a) of any change of address or employment;
    (d) refrain from communicating with certain persons;
    (e) deposit a passport;
    (f) comply with other reasonable conditions.

42. See paragraph 4.3 above.

43. With the exception of the condition relating to the fairness or integrity of the trial, these purposes are specified in the Bail Act 1977 (Vic), s.5(2) and s.5(4); Bail Act 1976(UK), s.3(6) and Queensland Proposals, clause 13.

6.30 The Commission, in the Working Paper,[44] suggested that there might be cases where an alcoholic or drug addicted defendant should be released on bail on the condition that he live in or report regularly to an approved drug or alcohol centre, for his protection, and to equip him better for his trial.[45] The Royal Association of Justices agreed with the suggestion. A comparable provision exists in Western Australia under the Convicted Inebriates' Rehabilitation Act 1963. It involves an order that the defendant receive treatment, and applies only after his conviction.

6.31 Some persons might argue that a release on bail on condition that the defendant live in a drug or alcohol clinic would be tantamount to an order that the defendant receive treatment. However, the Commission would not agree. If a bail-decision-maker were to take the view that a defendant should be refused bail because of his drug or alcohol problem,[46] then it appears to the Commission that it would be better for that bail-decision-maker to have a power to grant bail on the condition that the defendant will make himself available to receive the care and protection which the bail-decision-maker considers that he needs. The defendant would not be obliged to comply with the conditions imposed. He could, if he so wished, choose to remain in custody in a remand centre, or he could appeal if he considered that the condition was unreasonable. The Commission therefore recommends that, in addition to the purposes specified above,[47] provision should be made to enable a bail-decision-maker to impose conditions which are designed for the purposes of providing care and protection for a defendant or to enable him to be better prepared for his trial and rehabilitation.

6.32 It might be implied that the requirement for a condition to be imposed for a specific purpose would exclude conditions which were too severe, unreasonable or impossible. However, the Commission considers

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44. At 191, paragraph 9.34.

45. Such purposes do not appear in the Victorian, English or proposed Queensland legislation.

46. On the ground, for example, that he should be refused bail for his own protection: see paragraph 4.3 and 4.7 above.

47. See paragraph 6.29.

that it would be preferable to deal specifically with this point in its proposed legislation. In its view this could best be achieved by directing that conditions in category (b) should be governed by the same requirement as for conditions in category (a),[48] namely, that they should be no more onerous than are required in the public interest, having regard to the nature of the offence and the circumstances of the defendant.

Enforcement of conditions

6.33 Enforcement of conditions arises only in connection with post-release conditions. If the defendant cannot meet a condition of his release on bail , he remains in custody. With regard to the defendant's undertaking to appear, the Commission expressed its view above[49] that this should be enforced by making failure to appear a criminal offence.

6.34 The Commission has given consideration to the desirability of creating offences for breaches of other conditions attached to release on bail, such as living or working where directed, not communicating with a particular person, reporting to the police and so on. One commentator on the Working Paper supported such a proposal. However, the legislation in Victoria, and England and proposed in Queensland has not taken such a step,[50] and the Commission does not recommend it.

6.35 In the view of the Commission, post release conditions should be enforced by terminating bail. In some circumstances arrest without warrant may be justified. The Police Department, the District Court Judges and the Women Justices' Association of Western Australia suggested that a police officer should have power to arrest, with or without a warrant, a defendant who he reasonably suspected was about to abscond. On the other hand, the Law Society considered that such a power could be abused. It submitted that the police should be required to obtain a warrant in all cases.

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48. See paragraph 6.27 above.

49. Paragraph 6.3.

50. It is an offence under the Criminal Code 1953 (Can), s.133(3) for a defendant without reasonable excuse to fail to comply with a condition of his release on an undertaking to appear. The penalty is up to two years imprisonment if dealt with as an indictable offence.

6.36 The English and Victorian legislation and the legislation proposed for Queensland give a police officer the power to arrest a defendant without a warrant if he has reasonable grounds for believing that the defendant has broken, or is breaking, or is about to break, any condition of his release on bail, including the condition that he appear in answer to his bail undertaking.[51] There are also powers to arrest without warrant where a surety notifies the police in writing that he believes the defendant is about to abscond, or where the police believe that a surety is dead or other security is no longer sufficient.

6.37 The Commission agrees that a police officer should have power to arrest without warrant in the circumstances outlined above,[52] particularly where the condition concerned is the condition for the defendant's appearance. If failure to appear were made an offence, this would, in effect, be a situation where the police would be arresting a person who they reasonably suspected was about to commit an offence. However, the Commission considers that some limit should be imposed as to the circumstances when arrest without warrant should be permitted. In its view, where the breach of the condition concerned is not one which would lead to the commission of an offence, the police should be empowered to arrest without warrant only in exceptional circumstances where there is an emergency. Where there is no urgency, for example, where a surety has died or other security is no longer sufficient, the police should be directed to proceed where possible by issuing a summons to the defendant to appear before a bail-decision-maker to show cause why bail should not be revoked or granted on renewed conditions.[53] Where a summons would be inappropriate (for example, where the defendant's whereabouts are unknown), a warrant for arrest for these purposes should be obtained. If the defendant has been taken into custody he should be brought before a justice as soon as possible. Justices should reconsider bail, and either refuse it on one of the grounds specified, or renew it on the same or varied conditions.

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51. Bail Act 1976 (UK), s.7(3)(b); Bail Act 1977 (Vic), s.24(1); Queensland Proposals, clause 30(1)(a).

52. See paragraph 6.36.

53. In some cases, for example, where the police have power to approve sureties, this could be attended to without appearance by the defendant in court.

6.38 In addition to any penalties for the offences charged,[54] a defendant who fails to appear should be liable to forfeit any security provided by him for the performance of his undertaking to appear. The Commission recommends, however, that the court should be given a discretion not to forfeit the whole of the security.[55] It should be the defendant's responsibility to make an application in this respect, and to qualify for such relief from forfeiture, he should be required to satisfy the court that he had reasonable cause for his failure to appear.[56] There should also be a time limit[57] within which such an application may be brought. This procedure should also apply to release of a defendant at large on deposit of cash if such a form of release were adopted.[58]

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54. Including the offence of absconding: see paragraph 6.3 above.

55. Such a discretion is provided in Bail Act 1976 (UK), s.5(8); Bail Act 1977 (Vic), s.32 and Queensland Proposals, clause 35. Similar provisions are recommended for sureties: see paragraphs 7.20 to 7.21 below.

56. Bail Act 1976 (UK), s.5(7).

57. Say one month.

58. See paragraph 6.21 above.

CHAPTER 7 - SURETIES

The requirement of a surety as a condition for bail

7.1 Doubts have been expressed as to whether a requirement of a surety is desirable as a condition for release on bail in modern conditions. It has been argued that changing social conditions have destroyed much of the effectiveness of a surety's role, and that what is left (which is no more than a guarantee) is undesirable and can give rise to considerable hardship. Consequently, it has been suggested that sureties should no longer be required as a condition for release on bail.[1]

7.2 In its discussion of sureties, in chapter 7 of the Working Paper, the Commission observed that much of the criticism of release on bail with sureties was justified. However, as abolition of sureties as a condition for bail would narrow the options open to a bail-decision-maker, and could increase the number of defendants who were refused bail, the Commission suggested, and now recommends, that this step should not be taken.

7.3 Nevertheless, there is, in the Commission's view, an important need to reconsider the circumstances in which this condition should be imposed. For example, the Commission understands that some bail-decision-makers require a surety almost as a matter of course when granting bail.[2] This approach is supported in some cases by legislation which imposes a mandatory requirement for a surety.[3] The Commissioner of Police suggested that, in the case of child defendants, it is desirable to require a parent as a surety, so that such parent can exercise a basic parental right to control the child by declining to act as a surety.

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1. Working Paper, at 135-141, paragraphs 7.9 to 7.20.

2. Ibid., at 153, paragraph 7.50. This attitude is illustrated by a recent case in Western Australia where two defendants on disorderly conduct charges were granted bail on a recognisance of $25 with a similar surety: The West Australian 4 September 1978 and 23 September 1978.

3. Working Paper, at 133, paragraph 7.3. The Commission understands that this requirement is not adhered to in some cases where child defendants are involved: Working Paper, at 180, paragraph 9.10.

7.4 The Commision does not agree with these attitudes as to the need for sureties. To encourage a departure from these attitudes, and to remove unnecessary fetters from the bail-decision-maker's discretion, the Commission recommends that there should be no mandatory requirement for sureties. It also recommends[4] that a bail-decision-maker should be directed first to consider the defendant's release on his undertaking alone, and not to impose a condition requiring a surety unless he considers that this would be desirable as security for performance of that undertaking.

7.5 A further suggestion made in the Working Paper[5] was that a bail-decision-maker should provide written reasons for his decision to require a surety. This might have certain advantages. For example, it might inhibit a bail-decision-maker from continuing to require a surety as a matter of course, and it might direct his attention to the suitability of other conditions of bail and the particular additional role which he expects a surety to perform. On the other hand, such a requirement would impose considerable administrative burdens on bail-decision-makers with the associated problems of delay, expense and formality. No commentator made any submission on this matter. On further consideration, having regard to its recommended statutory directions regarding the imposition of conditions generally,[6] and assuming that attitudes towards the need for sureties will change, the Commission recommends that written reasons for requiring a surety should not be necessary.

Obligations and liability of a surety

Emphasis on positive aspects of a surety's obligations

7.6 In the Working Paper, the Commission suggested that one of the criticisms of the surety system might be that sureties are required without proper consideration being given to the role they are expected to play.[7]

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4. See paragraphs 6.26 to 6.27 above.

5. At 143, paragraph 7.25.

6. See paragraphs 6.26 to 6.27 above.

7. At 141, paragraph 7.20.

7.7 In early English law, the obligation of a surety was to take custody (not necessarily in a literal sense) of the defendant, and see that he appeared at his trial. There is now a greater emphasis placed on a surety's financial role. He is merely obliged to pay what he promised in the event that the defendant fails to appear in answer to his bail.[8] The Commission does not disagree that the financial aspect of a surety's obligation might impose a moral obligation on a defendant to perform his undertaking to appear. But the Commission considers that the more positive aspects of a surety's obligation should be emphasised.

7.8 With this aim in mind, the Commission has prepared a notice, attached to a surety's undertaking,[9] which informs him that he is expected to take all reasonable steps to ensure that the defendant understands and complies with all of the conditions of his release on bail, and that he is to notify the police if he suspects that he intends to abscond.

Power to arrest

7.9 At common law, a surety has a power to arrest a defendant, without warrant, and bring him before a court thereby to discharge his liability as a surety. This common law power continues in England[10] and in South Australia,[11] and it is given express statutory recognition in Western Australia,[12] Tasmania[13] and more recently in Victoria.[14] In

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8. For example, the recognisance form provided for in the Justices Act 1902 (4th schedule form 19) merely recites that the surety has acknowledged that he owes "to our Sovereign Lady the Queen the several sums following . . ." but that this shall be void if the defendant appears in answer to his charge.

9. Appendix II, Form D. The Commission considers that the proposed bail legislation should be expressed in modern language, and, for this reason, has deliberately chosen the expression "undertaking" to replace "recognizance".

10. Halsbury, Laws of England (4th ed. 1976) Vol. 11 at 112, paragraph 166.

11. Hannan, Summary Procedure of Justices (4th ed. 1975) at 34.

12. Justices Act 1902, s.94.

13. Justices Act 1959, s.36.

14. Bail Act 1977 (Vic), s.21.

other jurisdictions, a surety is given a statutory power to arrest, without warrant, if he has reasonable grounds to suspect that the defendant will not appear voluntarily in answer to his bail.[15] On the other hand, in New South Wales a surety has no right to arrest a defendant and, it would appear, in New Zealand, a surety does not have power to apprehend a defendant without a warrant.[16]

7.10 Adopting the New South Wales approach, it could be argued that it is neither necessary nor appropriate for a person to have a power to apprehend a defendant by reason only of his being a surety. If a surety wishes to be discharged from his obligations he should make application to a court. If he believes that a defendant is about to abscond he should notify the police. There would be few occasions when the prevention of a defendant from absconding could not be handled more appropriately by the police. Furthermore, there is a risk that a surety would consider his power to arrest to be an obligation to arrest if he is not to forfeit the amount of his undertaking, and this could give rise to embarrassment,[17] and the possibility of personal injury to the surety. Having regard to these possible consequences there might be a reduction in the number of persons willing to act as sureties.

7.11 On balance, however, the Commission takes the view that a surety should retain a power to arrest a defendant without warrant, but in much more limited circumstances than he can at present. The Commission agrees that the preferable course for a surety who wishes to be discharged from his obligations should be to make application for this purpose to a court.[18] It also agrees that in cases where a surety

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15. Court of Petty Sessions Ordinance 1930 (ACT), s.81; Justices Act 1886 (Q), s.96. It is intended in the Queensland Proposals (clause 27) to continue this express power which would appear to supplement a surety's common law powers.

16. Bail Act 1979 (NSW), s.61. In New Zealand a power to arrest without warrant must be given either in the Crimes Act 1961 or in some other statutory provision: Crimes Act 1961 (NZ), s.315. Section 53 of the Summary Proceedings Act 1957 (NZ) and s.320 of the Crimes Act 1961 (NZ) appear to be the only relevant provisions on the power of sureties, and these provide for the issue of a warrant for arrest where a defendant is about to abscond.

17. In most cases the surety would be a relative or close friend.

18. See paragraph 7.35(b) below.

suspects that a defendant is about to abscond he should notify the police. There might, however, be cases where a surety suspects that a defendant is about to abscond in circumstances where he does not have a reasonable opportunity to obtain the assistance of the police. It is in this situation that the Commission recommends that a surety should have a power to arrest without warrant.

7.12 There are two reasons why the Commission has taken the view that a surety should have a power to arrest without a warrant. In the first place, it would be consistent with the Commission's desire that, in future, sureties should play a greater role in securing a defendant's appearance in answer to bail. The mere fact that a surety is given a power of arrest, although necessarily limited, would place a surety in a stronger position to fulfil that role. Secondly, in cases where, as a last resort, a surety could reasonably prevent a defendant from absconding,[19] it is in the public interest that such steps should be taken to prevent a defendant from absconding. It would be undesirable if a surety who took such steps were to face possible liability for assault and false imprisonment.

Liability if a defendant fails to appear

7.13 The Commission recommends that the legislation should provide that a surety should be liable to forfeit the amount of his undertaking only if the defendant fails to appear in answer to his bail. In making its decision whether to relieve from forfeiture, the court should be empowered, however, to take into consideration any steps taken by the surety to ensure that the defendant fulfils the conditions of his bail, or any reasonable excuse such as illness or mistake. The surety should retain a copy of his undertaking for his own information, and this should contain details of the defendant's undertaking to appear, and the other conditions imposed in respect of his release on bail.[20] A person authorised to take the surety's undertaking should

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19. For example, where the surety is the defendant's father.

20. Existing practice in Western Australia is that a surety is not given written notice of his obligation and criticism of this practice has been made to the Commission.

not do so unless he is satisfied that the surety is aware of his obligations and his potential liability.[21]

Liability in special cases

7.14 In England and Victoria, additional obligations can be imposed on a surety who is a parent or guardian of a minor defendant, but only with that person's consent. These additional obligations are designed to secure performance of conditions of the defendant's release on bail other than his undertaking to appear,[22] and in England, the parent or guardian surety can be required also to appear in court with the defendant.[23] There is a danger that the possibility of such extra obligations being imposed might make it more difficult for children to be released on bail. In the Commission's view, it would be preferable to obtain the services of a parent as surety without additional complications. The parent or guardian would be aware, if the Commission's recommendations were accepted, that his efforts to secure performance of other conditions for release on bail could be taken into account if his recognisance were liable to forfeiture for non-appearance of the defendant.[24]

7.15 It has been suggested to the Commission[25] that there is a need for a special approach to sureties for Aboriginal defendants. The problem is that where such defendants are granted bail with a requirement for a surety, a large proportion cannot meet this requirement because relatives, and others they know, do not have sufficient means to meet the potential liability, and are therefore not acceptable as a surety. The suggested solution is that in cases where the defendant is

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21. See, for example, Bail Act 1977 (Vic), s.17(2). In some cases, the proposed surety might need to obtain the assistance of an interpreter before approval is given.

22. For example, conditions not to commit an offence, endanger members of the public or interfere with witnesses or the trial process: Bail Act 1977 (Vic), s.5(3); Bail Act 1976 (UK), s.4(7). The extent of the surety's liability is limited, however, to $200 in Victoria and fifty pounds in England.

23. Children and Young Persons Act 1969 (UK), s.29(2).

24. See paragraph 7.13 above and 7.21 below.

25. The suggestion was first made as a preliminary submission by the Aboriginal Legal Service of Western Australia, and was repeated by the Aboriginal Advisory Committee: see p.3, n.2 above.

part of a closely-knit community or family, and where there is a responsible member of that community who is prepared to undertake to ensure that the defendant appears as required in court, the defendant should be released on bail on the basis of that undertaking alone.

7.16 An obvious difficulty which arises is the lack of any sanction or penalty for any such person who fails to abide by his undertaking. One suggestion was that he could be made liable to a penalty.[26] An alternative view, however, is that the threat of financial detriment should not be necessary in every case. The incentive to abide by the undertaking could arise from an Aborigine's sense of duty, arising from the trust placed on him, backed by the knowledge that any failure on his part would result in custody for the defendant with little prospect of further release on bail, and, for the person who entered the undertaking, a loss of respect by his tribal elders. In other words the reliance would be placed on a social rather than a legal sanction.

7.17 The Commission has given careful consideration to this novel proposition, and has discussed it with a Magistrate who has had considerable experience dealing with Aboriginal defendants. It has reached the conclusion that there might be cases where a defendant could be released on bail on the formal undertaking of another to ensure that he understands and complies with his obligations. Such cases have arisen under existing law, and artificial tactics have been adopted to avoid any problem as to the surety's inability to pay the amount set.[27] In the Commission's view, such tactics should not be necessary. It therefore recommends that provision be made for bail to be granted on the basis of an undertaking from a responsible person to take all reasonable steps to ensure that the defendant complies with the conditions of his release on bail, including his undertaking to appear in answer to bail.[28] A person who entered into such an undertaking would not be a

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26. The Aboriginal Legal Service of Western Australia suggested that a penalty could be considered if the surety fails to give an adequate reason for any failure to see that the defendant appears in court as required.

27. Such tactics currently in use include setting bail at a low figure e.g. $1, overlooking the surety's means when approving him as a surety or approving him regardless of his means knowing that he can apply for relief from forfeiture.

28. A suitable application and undertaking form should be introduced to serve the same purpose as Form D in Appendix II.

surety in the strict sense as no forfeiture of a specified amount would be involved if the defendant failed to appear. It is recommended, however, that, in other respects, he should have the same powers and obligations as a surety.[29]

7.18 Although this recommendation is made in the context of problems experienced by Aboriginal defendants, the Commission stresses that the recommended provisions should not be restricted to such defendants but should apply generally where release of a defendant on such an undertaking would be appropriate.

Enforcing the undertaking

7.19 In the Working Paper,[30] the Commission dealt at some length with the archaic and complex procedures which presently apply to the enforcement of recognisances. One commentator[31] agreed that certain aspects of the law[32] were confusing and required clarification. He also suggested that the legislation should show clearly that the court has a discretion to relieve the surety, entirely or in part, from liability. The Commission agrees with these comments and adds that in its view, the proposed bail legislation should provide a single modern and simplified procedure for enforcement.

7.20 The Commission recommends that, on the failure of a defendant to appear as required in his undertaking, a summons should be issued by a clerk of petty sessions requiring the surety to appear at a certain time and place to show cause why an order should not be made forfeiting the amount he undertook to pay, using any cash or other security provided by him. Whether or not the surety appears, the

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29. This should include the power of arrest: see paragraphs 7.9 to 7.12 above.

30. At 117-123, paragraphs 6.22 to 6.41 and at 159-161, paragraphs 7.67 to 7.72.

31. Judge Heenan.

32. Referring particularly to s.682A of the Criminal Code and ss.155, 157 and 167 of the Justices Act 1902.

court should be entitled to make such order as it thinks fit, to be enforced, if necessary,[33] as if it were a civil judgment.[34]

7.21 Under existing procedure, if a surety wishes to seek relief from liability he makes application to the Attorney General.[35] If the court were given powers, as recommended above,[36] to grant relief from forfeiture, the Commission considers that it would be preferable for a surety to seek his relief in that forum in answer to the summons. If he was dissatisfied with the decision made, he should be entitled to appeal to a superior court from the order made.[37] The Attorney General would still retain his ultimate discretion, in an administrative capacity, to grant relief by not enforcing the court's order, or by giving the surety time to pay or liberty to pay by instalments.

Qualifications of a surety

7.22 Existing law makes no provision regarding the qualifications of a surety. In practice, the police generally require that a surety should be a land-owner in Western Australia[38] but, in some circumstances, this requirement is waived.[39] The Law Society, in its comments on the Working Paper, submitted that the criteria for eligibility as a surety should be set out in bail legislation.

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33. Enforcement would not be needed where a surety has deposited cash.

34. This would be in contrast to the present situation where the order forfeiting a recognisance may be enforced as if it were a fine: Working Paper at 119-120, paragraph 6.29. In the case of a surety in a jurisdiction other than Western Australia, (as to which see paragraphs 7.23 and 7.31 below) recovery of the amount owing should proceed under legislation dealing with the reciprocal enforcement of judgments.

35. Working Paper, at 122, paragraph 6.37.

36. Paragraphs 7.13 and 7.20.

37. A right of appeal by way of order to review could be made under existing law to a Supreme Court judge in respect of a decision made in a Court of Petty Sessions - Justices Act 1902, s.197 (1)(a). A right of appeal to a Full Court of the Supreme Court in respect of such a decision made by a District or Supreme Court judge would be novel but, in the Commission's view, would be desirable.

38. Working Paper, at 155, paragraph 7.56.

39. For example, where child defendants are involved: Working Paper, at 180, paragraph 9.10.

7.23 The Commission recommends that there should be certain minimum qualifications for a proposed surety. One is that he should be of full age.[40] Another minimum requirement is that he should have assets to meet his financial commitment, but it should not be necessary that he must own his own house or land. In view of the supervisory role expected of a surety, the Commission considered whether a third requirement should be that a proposed surety should be at least present in Western Australia during the time of the defendant's release on bail. However, difficulties could arise if this were made a mandatory requirement and, in the Commission's view, this matter would be better left to be considered in the exercise of discretion by the person required to decide whether or not to approve the surety.[41]

7.24 The Commission also recommends that there should be statutory guidelines, for the assistance of a person approving a surety, and for the information of the proposed surety, as to the factors which may be taken into account when considering his qualifications to act as surety. These are dealt with adequately in the Victorian Act.[42] However, in view of the number of cases recently in Western Australia where sureties have sought relief in respect of their financial commitment,[43] the Commission recommends the adoption of a provision in the Queensland Proposals that a proposed surety may be rejected if forfeiture would be unduly injurious to him or his family.[44]

7.25 Although there are no disqualifying factors in the Victorian Act, the Commission recommends that a proposed surety should be disqualified if there are reasonable grounds to suspect that he or she is

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40. Eighteen in Western Australia, cf. Bail Act 1977 (Vic), s.9(1) where the age is twenty-one years.

41. See paragraph 7.31 below as to approval of sureties outside Western Australia.

42. Bail Act 1977 (Vic), s.9(2) namely the proposed surety's -

    (a) financial resources;
    (b) character and previous convictions;
    (c) proximity whether in point of kinship, residence or otherwise to the defendant.

43. Working Paper, at 138, paragraph 7.13.

44. The Queensland provision, clause 23(7), adopts the expression "ruinous or materially injurious". However, forfeiture in any circumstances would be materially injurious. In the Commission's view the question should be whether forfeiture would be unduly injurious.

being indemnified against liability.[45] It makes no further recommendation as to automatic disqualification of a surety.

7.26 The Police Department and the Royal Association of Justices both recommended that a formal document should be introduced to enable information relevant to a proposed surety's qualifications to be made readily available to the person considering his application. The Commission has prepared a suitably revised declaration.[46] This would not prevent the person considering the suitability of the surety from obtaining any further information he considered to be necessary.[47] The penalty for providing false or misleading information should be forfeiture of the amount which the surety has undertaken to pay, in the court's discretion, and termination of the defendant's release on bail.[48]

Approval of sureties and release of a defendant

7.27 Section 92 of the Justices Act 1902 provides that a surety's recognisance can be taken by any justice of the peace, a clerk of petty sessions, a police officer of or above the rank of inspector or sub-inspector or in charge of a police station, or a keeper of a prison, which includes a superintendent. The consequences in law follow as if the recognisance were entered into before the required justices. Presumably the taking of a recognisance is the same thing as approving the person as a surety. In practice, in the absence of specific directions by the bail-decision-maker, sureties are approved by the

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45. This allegedly occured in a recently reported case in Western Australia: The West Australian 1 September 1978 at 19. In this case, a twenty-six year old secretary agreed to act as surety for a man she said she had known for only a few weeks. It was alleged that she did not have, and never had, the means to pay the amount concerned ($1,700) and that there was an arrangement whereby the defendant was to give her an interest in his motor car if she agreed to act as surety. It was reported that as this was not within the concept of an approved surety no forfeiture was ordered.

46. See Appendix II Form D. It is intended that this declaration replace the affidavit of justification which is now out of date and rarely used in practice: Working Paper at 156, paragraph 7.60.

47. See Bail Act 1977 (Vic), s.9(5)(b).

48. This is the sanction in Victoria: Bail Act 1977 (Vic), s.9(6).

police or by the clerk of petty sessions, but at nights, or in the weekend, approval by a justice of the peace is considered to be necessary. At least three practical difficulties resulting from this procedure have been brought to the Commission's attention. These are that -

(a) the Commission has been informed that the police, on occasions, have refused to approve a surety, for no apparent reason, and have thereby frustrated a decision to grant a defendant bail;[49]

(b) during the weekend it is difficult to complete the necessary formalities for approval of the surety;[50]

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49. In some cases the surety has been subsequently approved by a clerk of petty sessions: see Working Paper, at 157, paragraph 7.61.

50. One commentator on the Working Paper described her attempts to be approved as a surety. These lasted a full weekend and involved many trips between the East Perth Court of Petty Sessions, the East Perth Lock-up, the Fremantle Police Station and the Fremantle Prison. A similar case was reported in The West Australian, 24 July 1978 at ?, where a defendant remained in custody all weekend despite the fact that he had arranged for a Justice of the Peace and a surety to attend the remand yard on Saturday afternoon.

It has been suggested to the Commision that several factors contribute to these difficulties. These include -

(a) a reluctance by the police and by prison authorities to become involved in the formalities regarding the fulfilment of the defendant's conditions of bail;

(b) a lack of facilities by the police and by prison authorities to check a surety's identity, relationship to the defendant and other qualifications;

(c) a lack of facilities by the police and by prison authorities to accept cash or other security or surrendered documents required from a defendant or a surety;

(d) absence of a person at Fremantle Prison who is able to take a recognizance.

(c) even if a surety comes forward and is approved, there is an administrative difficulty, arising out of the Prison Regulations, in obtaining the defendant's release from custody after 4.30 pm during the week, or at any time in the weekend.[51]

7.28 The Queensland Proposals specify that any surety must be approved by a justice of the peace.[52] In Victoria and England the power to approve a surety seems to be much wider.[53] No commentator on the Working Paper dealt specifically with this issue.

7.29 In the Commission's view, it would be preferable for the bail-decision-maker to approve the surety which he requires. This should be possible in many cases where a defendant takes the precaution of bringing a surety to the court and relevant information is before the bail-decision-maker in the form of the surety's declaration.[54]

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51. The material part of the regulations (regulation 57) reads as follows -

> 57. Discharge of prisoners on completion of sentences, shall be governed by the following rules:-
>
> . . .
>
> (3) If the prison authorities are not notified before 3 p.m. in case of remission of sentences, fines paid, or sureties entered into, the discharge may not take place until after 8 a.m. on the following day, and where that day is a Sunday, Christmas Day or Good Friday, the discharge will take place on the next following day.

The Commission has been informed that the reason for this regulation is that prison staff involved in areas, such as reception, discharge, property, finance and clerical duties, cease duty at 4.30 pm and there is no one available to process the release of a person in custody.

52. Queensland Proposals, clause 23(4). A keeper of a prison may, however, take a surety's recognizance: clause 19(4).

53. ss.9(3) and 27 of the Bail Act 1977 (Vic) provide for the taking of a surety's undertaking by any bail-decision-maker, or clerk of any Magistrates' Court or by the governor of a prison or prison officer of or above the rank of senior prison officer, with the consequences in law being the same as if the undertaking were entered into before the court granting bail. A similar provision appears in s.8(4) of the Bail Act 1976 (UK).

54. See paragraph 7.26 above. The notice to the defendant suggests that this course should be taken whenever possible to reduce delays in obtaining his release on bail: see Appendix II Form A.

If it is not practicable for the bail-decision-maker to approve a surety, he should expressly delegate this task to a particular authorised person or body.

7.30 The Commission considers that where a bail-decision-maker does not himself approve a surety, or give directions as to approval, a clear procedure should be included in the proposed bail legislation for approval by other authorised persons. The Commission has considered limiting the authority to approve a surety to a justice of the peace, but has decided against such a course. It could give rise to unnecessary difficulty if a justice were not available. In practice, information regarding the qualifications and suitability of a proposed surety must be obtained through the police. The police are therefore in a position which is as good as, if not better than, that of justices of the peace to approve sureties. It would also be convenient for a clerk of petty sessions to be able to approve sureties at the court. Consequently, the Commission recommends that, in addition to any bail-decision-maker (including authorised police officers), a clerk of petty sessions should be empowered to approve sureties.[55] Moreover, the Commission recommends that a person who is empowered to approve a surety should be required to make the necessary enquiries as to the proposed surety's suitability[56] and make a decision in this respect.[57]

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55. Although a keeper of a prison might have authority under existing law to approve a surety, he has no special expertise in this area, and does not have the same facilities as the police to make the necessary enquiries as to suitability. The Commission has been informed that, for these reasons, Department of Corrections Officers are reluctant to become involved in this matter. Having regard to the availability in most areas of justices of the peace (see also paragraph 9.20 below), and police officers of the required rank, and having regard to the Commission's recommendations for sureties to be required on fewer occasions (see paragraph 7.4 above) there should be no need for Department of Corrections personnel to become involved.

56. This might involve obtaining information additional to that provided in the proposed surety's declaration: see Bail Act 1977 (Vic), s.9(5)(b).

57. This would avoid inconvenience and delays which can arise if a person who is empowered to approve a surety declines to do so because he does not wish to become involved.

7.31 In a case where the only suitable person to act as a surety is not living in Western Australia, and is not able to come to Western Australia during the period of the defendant's bail, arrangements should be made for an application form to be sent to the proposed surety.[58] He should complete the declaration[59] and return his application to the court in Western Australia where bail was granted, to be considered for approval in accordance with the bail-decision-maker's directions.

7.32 If a surety is not considered to be suitable, he should be entitled to make further applications for approval, provided this course is not inconsistent with the bail-decision-maker's directions as to approval.[60] The form designed for the information of a proposed surety makes this point clear.[61] In addition, the Commission recommends that there should be a statutory obligation on a person who refuses to approve a proposed surety to provide reasons for his decision and, where appropriate, to inform the rejected surety of his or her ability to re-apply.

7.33 The Commission considers that a defendant should be entitled to his release from custody as soon as he is able to comply with the conditions of his bail. In this respect, the Commission takes the view that the provisions in the Prison Regulations, relating to the release of

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58. The Commission has not recommended disqualification of a person who is not resident in Western Australia from acting as a surety, but, in view of the emphasis which is to be placed on a surety's active role, it would expect that sureties who are not well placed to exercise such a role should be approved in exceptional circumstances only: see paragraph 7.23 above.

59. The declaration should be taken by someone authorised in his jurisdiction to take statutory declarations.

60. If the bail-decision-maker has directed that a surety be approved by the C.I.B., and if no approval is given, the course open for a defendant would be to apply for a rehearing in respect of his grant of bail to see if other conditions could be substituted: see paragraph 8.7 below. If no directions were given as to approval of sureties, the rejected surety should be able to apply again to a justice of the peace, magistrate or a judge of the District or Supreme Court. The Commission has considered whether a formal appeal procedure should be implemented for these purposes, but it has decided that this would be an unnecessary complication and could create confusion.

61. See Appendix II, Form D.

defendants after 4.30 pm, are inappropriate for the release of defendants who have been granted bail, but who are in custody pending compliance with bail conditions. It has expressed its view that these administrative difficulties should be removed.[62] It now recommends that special facilities should be made available for the release of defendants from custody as soon as the conditions of their bail have been met.[63]

The formalities of a surety's undertaking

7.34 The Commission recommends the adoption of two provisions which are designed to streamline further the procedure relating to sureties. One would permit a surety to enter into his undertaking before an authorised person without having to go to the remand yard.[64] The other would permit a surety to agree, in advance, to continue to act as surety until the defendant's trial, regardless of the number of adjournments. If he so agrees, this would enable a defendant's bail to continue from one adjournment to another without the need for the surety to attend the court in order to sign fresh undertakings.[65]

Discharge from liability

7.35 The Commission recommends that a surety's liability should be discharged in the following circumstances, namely -

(a) by order of a court following arrest of the defendant, either by the police at a surety's request,[66] or by the surety himself where he has reasonable grounds to believe that the

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62. The Commission's views were publicised in The West Australian, 26 July 1978 at 40.

63. This would include special facilities for accepting cash or other securities or passports deposited outside the hours when the court is open.

64. A suitable procedure is provided in the Queensland Proposals, clause 24. It allows a surety to complete formalities at the court and provides for the transmission of his undertaking to the keeper of the prison for release of the defendant.

65. Working Paper, at 161, paragraph 7.72 and see s.16 of the Bail Act 1977 (Vic) and Queensland Proposals, clause 22.

66. Bail Act 1977 (Vic), ss.21(1) and 24(1)(b).

defendant intends not to appear in answer to his bail, and in circumstances where he has no reasonable opportunity of obtaining the assistance of the police;[67]

(b) by order of a court on an application made by the surety at any time and on appearance by the defendant, unless the court considers that it would be unjust to discharge the surety;[68]

(c) by death;[69]

(d) when the defendant appears in answer to the charge or charges against him.[70]

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67. See paragraph 7.11 above.

68. Bail Act 1978 (NSW), s.42; Bail Act 1977 (Vic), s.23 and Queensland Proposals, clause 28. All provisions empower a court to issue a warrant to secure the attendance of the defendant. On his appearance, the defendant may be released on bail with another surety. Several commentators on the Working Paper submitted that a surety should be entitled on notice to obtain a discharge from liability. The Commission considers, however, that if this were possible as a unilateral act, without an order from the court, and without the appearance of a defendant, it could be open to abuse by a surety giving notice just before the defendant absconds.

69. Bail Act 1977 (Vic), s.20; Queensland Proposals, clause 26. The defendant may be required to find another surety. The Commission considered whether a disability such as insanity should also terminate liability. However, it might be difficult in practice to determine when insanity should relieve the surety and, in the Commission's view, this matter would best be left to a bail-decision-maker's discretion when considering relief: see paragraphs 7.13 and 7.20 to 7.21 above.

70. A practical difficulty can arise as to the precise time when a surety's obligations terminate. It might be argued that it should be sufficient if the surety surrenders the defendant into the custody of the court officials without having to wait for the defendant's case to be called. However, it might be difficult in practice to determine when such surrender has occurred, and the knowledge that his surety is discharged might tempt a defendant to take advantage of any confusion in the court and abscond. Surrender into the custody of the court could, however, be regarded as grounds for granting relief from forfeiture: see paragraphs 7.13 and 7.20 to 7.21 above.

It recommends that a surety's liability should be suspended during any period which the defendant subsequently spends in lawful custody.[71]

Indemnification of a surety

7.36 The Commission recommends that indemnification of a surety, or making an agreement to do so, should constitute an indictable offence punishable summarily[72] and should disqualify the surety.[73] However, as there could be a wide range of possible agreements or arrangements which might be construed as an agreement to indemnify a surety, the Commission recommends that a prosecution should be brought only with the consent of the Attorney General.[74] The maximum penalty for indemnifying a surety should be imprisonment not exceeding one year and a fine not exceeding $1,000.[75]

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71. Queensland Proposals, clause 33. This would apply, for example if the defendant is arrested on another charge and bail is refused. Suspension of liability appears to be more appropriate than s.19(3) of the Bail Act 1977 (Vic) which provides for discharge of a surety's liability in these circumstances. If the surety wishes to be discharged he should make an applicaion to the court under (b) above.

72. This is in accord with submissions by the Police Department and the Women Justices' Association of Western Australia.

73. See paragraph 7.25 above.

74. As in the United Kingdom Bail Act 1976, s.9(5) and as in the New South Wales legislation with the consent of the Minister: Bail Act 1978 (NSW), s.58(5).

75. This would be consistent with the proposals in Queensland, clause 25. In New South Wales the maximum penalty is two years imprisonment and a fine of $2,000 on summary conviction, or three years imprisonment and a fine of $3,000 for conviction on indictment. In Victoria the maximum penalty is three months imprisonment and a fine of $500. In England it is three months imprisonment and a fine of four hundred pounds on summary conviction, or twelve months imprisonment and a fine for conviction on indictment.

CHAPTER 8 - REVIEW OF BAIL DECISIONS

A. REVIEW BY THE DEFENDANT

Existing law in Western Australia

8.1 A review of a bail decision may arise in several different ways. For example, a defendant might be -

(a) refused bail and may wish to appeal against that decision;
(b) refused bail but subsequently wish to have bail reconsidered because of a change in circumstances;
(c) granted bail but on conditions which he cannot meet and therefore wishes to have reviewed.

Although it might be expected that the appropriate procedure for (a) would be appeal, and for (b) and (c) a rehearing in whole or part, there is no authority for the last procedure, and existing practice in all three situations is for a defendant to make a fresh application for bail to the same or another bail-decision-maker. Such a practice lends itself to bail shopping, that is, the practice of making repeated applications for bail to different bail-decision-makers, on the same judicial level, in the hope that one will permit his release from custody.

8.2 The Royal Association of Justices, in its comments on the Working Paper, submitted that limits should be imposed on the defendant's right to make repeated applications for bail. The Commission agrees and considers that the proposed bail legislation should clarify the law regarding review of bail decisions, and that the review procedure should be appropriate to the nature of the application, and the stage reached in the criminal proceedings when the occasion for review arises.

Police bail

8.3 Although the Commission's recommendation is that the proposed bail legislation should include police bail, it considers that, for practical reasons, police bail should be dealt with as a separate area for the purposes of its proposals regarding appeals. This is because of the short duration of police custody,[1] and because a formal appeal

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1. Seldom longer than 24 hours.

structure would be inappropriate for decisions made by the police. The Commission therefore recommends that there should be no limitations on the ability of a defendant to make repeated applications to the police for bail, either by way of an application de novo, or by way of a rehearing in whole or part.[2]

8.4 If the defendant is refused bail by the police, or granted bail on conditions which the defendant cannot meet, he should be entitled to make application to a judicial officer such as a justice of the peace, magistrate or judge of the District Court or Supreme Court. The Commission has recommended a procedure for giving notice to a defendant to this effect.[3] In the Working Paper, the Commission questioned whether it might be desirable for such applications to be made by telephone if necessary.[4] One commentator agreed with the suggestion, but the Royal Association of Justices disagreed. Having given the matter its further consideration, the Commisson considers that applications for bail by telephone would be undesirable. The danger is that a justice of the peace, or other bail-decision-maker, might make a decision without sufficient information regarding the defendant, and without having a reasonable opportunity of assessing personally his trustworthiness. In the Commission's view, adequate representation by justices at police lock-ups would be a preferable solution.[5]

Review of decisions made by bail-decision-makers other than the police

8.5 When bail for a defendant is considered by a bail-decision-maker holding judicial office, different considerations apply. In the Commission's view, the existing law does not deal adequately with the review of such decisions and measures should be introduced to avoid the situation where one bail-decision-maker can make a decision overriding that of another bail-decision-maker on the same or possibly a

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2. If, for example, a defendant were refused bail by a police sergeant at the East Perth lock-up, he would be able to ask the Superintendent or any other authorised police officer to reconsider his release on bail when he makes his rounds.

3. See paragraph 5.19 above.

4. At 171-172, paragraphs 8.5 to 8.6.

5. See paragraphs 9.18 to 9.20 below.

higher judicial level. A formal appeal procedure would solve the problem, but it would not necessarily be applicable in every case. Regard should be had to the type of review sought. It should also be noted that the following recommendations are not intended to affect a bail-decision-maker's obligation to give fresh consideration to the release of a defendant on bail each time he is brought before the court.[6] Thus, if a justice of the peace were to refuse bail for a defendant at a lock-up, it should not follow that a magistrate must also refuse bail when the defendant appears before him the following day.[7]

8.6 The Commission recommends that if a defendant wishes to challenge a refusal of bail by a bail-decision-maker, other than the police, he should do so by way of appeal, in the nature of a rehearing de novo, according to the following structure -

(a) from a justice of the peace or magistrate to a judge of the District or Supreme Court;[8]

(b) from a judge of the District or Supreme Court to the Court of Criminal Appeal.[9]

With regard to appeals falling within category (a), the Commission recommends that a practice direction should be issued directing that

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6. See paragraph 3.7 above.

7. In a case reported recently in Western Australia (see The West Australian, 7 October 1978 at 13) a Magistrate refused bail reportedly on the basis that another Magistrate had earlier refused bail for the same defendant and that the matter should therefore go to the Supreme Court. It is understood that the defendant's appearance before the second Magistrate was arranged especially to reconsider bail, and in these circumstances the course taken by that Magistrate would be appropriate. It should not be the approach to take, however, when the defendant appears in court at the end of each period of remand in custody.

8. Existing law permits appeals in these circumstances to a judge of the Supreme Court by way of an order to review, but only on the basis that there has been a prima facie case of error, or mistake, in law or fact, or that the justices had no jurisdiction in giving the decision: Justices Act 1902, s.197(1)(a).

9. An appeal in these circumstances would be novel, but in the Commission's view it would be desirable. Existing appeal provisions apply only to appeals against convictions or sentence: Criminal Code 1913, s.688.

appeals should, where appropriate, be made to the District Court.[10] Bail-decision-makers other than judges of the District Court could be directed not to consider bail in these circumstances unless there were special circumstances advanced by the defendant. The jurisdiction of the District Court to grant bail should be clarified accordingly.[11]

8.7 A formal appeal should not, however, be necessary where there are relevant facts (whether or not they existed at the time the decision was made) which could not reasonably be brought to the attention of the bail-decision-maker who refused bail,[12] where the defendant was not represented by counsel or a solicitor,[13] or where bail was granted on conditions which the defendant subsequently finds that he cannot meet.[14] In these cases, a rehearing in whole or part would be more suitable, and it would be preferable, in fact, for this to be carried out by the bail-decision-maker who made the initial decision. The Commission has considered the possibility of legislating to this effect. However, such a requirement could give rise to administrative difficulties in practice, and possible delays. Consequently, the Commission recommends that the proposed bail legislation should provide that whenever a rehearing of a bail decision is appropriate, as suggested above, it should be made, if practicable, to the bail-decision-maker who made the initial decision, but otherwise to a bail-decision-maker on the same, or higher, level of judicial authority.[15]

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10. See paragraphs 2.7 to 2.8 above. This would apply to defendants charged with indictable offences punishable by a sentence of imprisonment not exceeding fourteen years.

11. See paragraphs 2.1(c) and 2.4 above.

12. cf. Bail Act 1977 (Vic), s.18(4) which refers to new facts or circumstances which have arisen since the making of the order and were not disclosed to the bail-decision-maker.

13. Ibid.

14. Ibid., s.18(2) and (6). Where a defendant who has been released on bail with a surety wishes to have conditions of his release on bail reviewed, the surety (if any) should be notified so that he has an opportunity to withdraw if he so wishes: Bail Act 1977 (Vic), s.18(7).

15. Although many of these matters are incorporated in s.18 of the Bail Act 1977 (Vic), the Commission takes the view that those provisions do not give sufficiently clear directions on the question of appeals.

8.8 The Commission recommended, earlier in this Report,[16] that the inherent jurisdiction of a judge of the Supreme Court to grant bail should be continued. However, the Commission recommends that bail decisions made in exercise of that jurisdiction should be governed by these recommendations regarding the limitations on fresh applications. Otherwise a defendant would have an opportunity to opt out of the legislation and shop for bail among Supreme Court judges in the exercise of their inherent jurisdiction. Consequently, it is recommended that the inherent jurisdiction of a Supreme Court judge to grant bail should cease as soon as a decision regarding bail has been made by a bail-decision-maker other than the police.

Reasons for refusal

8.9 The Commission, in the Working Paper,[17] suggested that it might be desirable to require a bail-decision-maker at all levels, including the police, to give written reasons for his bail decision whenever this is specifically requested, and in any case where bail is refused. Such a requirement would appear to have several advantages[18] one of which being that it would be of assistance for the purposes of an appeal. The English, Victorian and proposed Queensland legislation all require written reasons for refusal of bail by bail-decision-makers.[19]

8.10 The Department of Corrections was the only commentator to deal with this issue, and it supported the suggested need for reasons for a bail decision for the purpose of review. The proposal would impose additional duties on a bail-decision-maker as he is not currently required to give reasons under existing law, and some do not do so in practice. However, use of the bail record form, recommended by the Commission,[20] would simplify the task of a bail-decision-maker in this respect, and would considerably reduce the burden which this proposal might otherwise impose.

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16. See paragraph 2.4, n.16 above.

17. At 89-90, paragraphs 5.77 to 5.78.

18. See paragraph 5.22 above.

19. Bail Act 1976 (UK), s.5(3); Bail Act 1977 (Vic), ss.10(3) and 12(1); Queensland Proposals, clause 17(b).

20. See paragraphs 5.21 to 5.23 above.

8.11 The Commission therefore recommends that reasons for a bail decision should be provided by a bail-decision-maker when requested by either of the parties to the bail decision,[21] and in any case where bail is refused. The English Act also requires written reasons to be given wherever conditions in respect of bail are imposed or varied.[22] The Commission is concerned, however, that such a requirement would impose an excessive administrative burden on bail-decision-makers and could cause delay when dealing with bail cases. In the Commission's view, administrative burdens should not be be imposed on bail-decision-makers in the absence of a clear need for reform. Consequently, the Commission does not recommend adoption of these additional requirements in the English Act.[23]

Information for a defendant

8.12 A particular difficulty in respect of a review of a bail decision by a defendant is that he might be unaware that a review procedure is available. Although a defendant should have a qualified right to bail, the onus, in a review situation, is on him to make an application for the review. The lack of guidance appears most clearly where bail has been granted to a defendant, but on conditions which he subsequently finds that he cannot meet. Unless he were made aware that he can apply for a review, the provision of such a procedure would be futile.

8.13 The Commission has already made recommendations which might be sufficient in some situations.[24] However, it considers that special provision should be made to deal with cases where defendants cannot comply with the conditions imposed.

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21. If bail is granted it would normally be the prosecution only who would ask specifically for reasons, and the Commission anticipates that this will occur in a minority of cases where an appeal by the prosecution is contemplated: see paragraphs 8.15 to 8.18 below.

22. Bail Act 1976 (UK), s.5(3).

23. Similar recommendations are made above in respect of sureties. The Commission recommends that written reasons should be given in a case where a proposed surety is not approved (see paragraph 7.32) but that a bail-decision-maker should not be required to give reasons for his decision to require a surety: see paragraph 7.5.

24. These include -

    (a) use of a bail information form which contains summarised advice for a defendant as to his rights to obtain a review (see paragraph 5.18 above) and Appendix II Form A;

(cont....)

8.14 One solution considered was an automatic review of decisions granting bail with conditions imposed, if the defendant is still in custody after twenty-four hours.[25] The Commission rejects such a procedure, however, because of the excessive administrative burden it would impose on bail-decision-makers, the police, and the Department of Corrections. Nevertheless, it would be desirable to introduce some follow-up procedure to ensure that defendants do not remain in custody unnecessarily through an oversight. Consequently, it recommends that an administrative procedure should be introduced whereby the Department of Corrections should make a weekly return, to the Probation and Parole Service, of defendants who are still in custody because they have been unable to meet the terms of their bail. Probation and Parole Officers should then make a check to see whether an application for a rehearing should be made to vary the conditions imposed and, if appropriate, arrangements should be made for the defendant to make his application to the relevant court.

B. REVIEW BY THE PROSECUTION

8.15 Under existing law in Western Australia, it appears that the prosecution has a limited right of appeal against a bail decision made by a justice of the peace or magistrate,[26] but has no right of appeal against a decision made by a judge of the District Court or Supreme Court. On the other hand, the prosecution is able to apply to a court to have bail revoked, and the Commission has recommended that the powers of the police to arrest a defendant on bail should be widened.[27]

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24. (cont.)

(b) legislative directions preventing the imposition of impossible conditions (see paragraphs 6.27 and 6.32 above);

(c) requirements that where the police refuse bail they should advise the defendant concerned that he may make application for bail to another bail-decision-maker (see paragraph 5.19 above).

25. s.18(2) of the Bail Act 1977 (Vic), provides specifically that in these circumstances bail may be reconsidered, but the defendant must make an application. There is no automatic review.

26. The appeal is limited to the grounds that the decision was made as a result of a mistake of law or fact or was made in excess of jurisdiction: Justices Act 1902, s.197(1)(a).

27. See paragraph 6.37 above.

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It might, therefore, be argued that an appeal procedure for the prosecution is unnecessary.

8.16 Three commentators on the Working Paper[28] suggested that the prosecution should be given a right of appeal. Although not recognised in the English, Victorian or proposed Queensland legislation, the Commission agrees with these commentators that a right of appeal should be given to the prosecution.[29] In the Commission's view, a properly structured appeal procedure is a more appropriate method of correcting a faulty decision than a subsequent order revoking bail.

8.17 The Commission therefore recommends that the same right of appeal proposed for defendants should be available to the prosecution. The result intended is that the prosecution should be able to appeal to a superior court[30] in respect of a decision[31] to grant bail, or in respect of the conditions imposed on such a grant. The appeal should be by way of a rehearing and, pending the appeal, the defendant's bail should continue.

8.18 If the prosecution do not wish to challenge the initial decision to grant bail, but become aware of circumstances which make it no longer desirable for the defendant to remain on bail on the conditions imposed, the police should be empowered to make application to a bail-decision-maker for an order revoking bail, or varying the conditions and, in appropriate cases, should have power to arrest the defendant.[32] Repeated applications for such an order should be made only

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28. Judge Heenan, the Police Department and Mr. Hooyer.

29. A right of appeal is given to the prosecution in Canada: Criminal Code 1953 (Can), s.457.6 and in New Zealand in the case of bail decisions relating to a defendant charged with dealing in hard drugs: Misuse of Drugs Amendment Act 1978 (NZ), s.35(3).

30. See paragraph 8.6 above for the appropriate structure.

31. The proposed formal appeal structure should not apply to the situation where a bail-decision-maker is deemed to have dispensed with bail where no order regarding bail is made: see paragraph 3.10 above. If such omission is due to an oversight it would be preferable for the police or prosecution to raise the question of bail at a later stage with the bail-decision-maker concerned, rather than to require a formal appeal.

32. This would apply, for example, where -

(a) the police suspect that a defendant intends to abscond;
(b) a surety requests the police to arrest the defendant;

(cont....)

on the basis of material facts which could not reasonably have been presented in support of any earlier application.[33] There should, however, be a right of appeal from the bail-decision-maker's decision on the application to revoke or review bail.

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32. (cont.)

(c) any condition of the defendant's release requires reconsideration for example because of insufficiency of security, death of a surety, impossibility of performance or for any other reason.

As to appropriate circumstances for arrest see paragraph 6.37 above.

33. The intention is to prevent anti-bail shopping by the police. The Victorian Act (s.26(1)) permits a court by which the defendant was admitted to bail to review the decision if it is "of opinion that he [the defendant] was released with insufficient security or with security which has become insufficient . . .". The reference to "release" is ambiguous, but it would appear that the first part of this provision lends itself to anti-bail shopping.

CHAPTER 9 - OTHER REFORMS

9.1 The Commission's principal recommendation in relation to the law of bail is the enactment of separate legislation dealing exclusively with bail. Chapters 1 to 8 above contain the Commission's detailed recommendations as to the content of such legislation. However, during its study, and in the Working Paper, the Commission considered a number of incidental reforms which could improve the operation of the bail system, but which would not be suitable for inclusion in the proposed bail legislation. These include -

(a) increased use of summonses both in lieu of and after arrest;

(b) introduction of bail centres and a bail hostel;

(c) improvements to conditions for defendants who are not released on bail, including better custodial conditions and arrangements for reduction of pre-trial delays;

(d) improved interviewing facilities at courts;

(e) maintenance of an adequate service by bail-decision-makers in rural areas;

(f) establishment of a bail committee to provide a continuing review of bail procedures;

Many of these matters attracted public comments and these, together with the Commission's suggestions, are dealt with in this chapter.

Increased use of summonses

9.2 Statistics published in the Working Paper[1] indicate that the police in Western Australia tend to make extensive use of their powers of arrest. These statistics, applying to country areas, showed that almost 65% of adults appearing in court were arrested. Statistics published in 1978 by the Police Department,[2] applying to the same areas, show an increase in this figure to 69%.

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1. At 4, paragraph 2.6.

2. Police Department of Western Australia, Annual Report 1978 at 36.

9.3 There are two occasions when a summons procedure can be used to bring a defendant before a court. One arises when the defendant is apprehended for a minor offence and there is no need to make an arrest. In such a case, the defendant's name and address can be taken, and he can subsequently be issued with a summons. The other occasion arises where the circumstances are such that the defendant should be arrested,[3] but he can later be released from custody with a summons to appear in court subsequently to answer the charge, thus avoiding the necessity for bail.

9.4 The Commission favours an increase in the use of a summons on both of these occasions. The summons procedure reduces unnecessary inconvenience and embarrassment for a defendant, reduces the cost to the community, both in terms of financial cost and in terms of the use of police manpower, and it avoids the need to consider the problems and formalities associated with bail. In its comments on the Working Paper, the Law Society said it was strongly of the view that in the case of all simple offences (including drunken driving), the need for bail should never arise as the use of a summons procedure was a perfectly adequate method of dealing with the complaint in most cases.

9.5 Suitable procedures for the use of summonses as an alternative to arrest and bail are provided in existing law.[4] In the Commission's view, there should be no need to impose statutory directions as to when such procedures should be used. The advantages of the summons procedure, rather than arrest and bail, should be obvious to those involved. The Commission considers, however, that, in the light of published statistics and the Law Society's comments, there should be a review, on an administrative level, by the Police Department of their procedures for bringing a defendant before a court. The aim of such a review should be to reduce the incidence of detention following arrest in this jurisdiction.

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3. For example, to prevent a breach of the peace, or in the case of a person charged with drunken driving, where he is unable safely to return to his home.

4. Sections 58-59 of the Justices Act 1902 appear to favour the issue of a warrant in the first instance for a person charged with an indictable offence, and a summons in the first instance for persons charged with a simple offence. In practice, however, this procedure is not always adopted.

Introduction of bail centres and a bail hostel

9.6 In England, bail hostels were established to allow defendants with no fixed abode to be released on bail. The primary reason for their introduction was to reduce the number of defendants who were detained in custody pending trial. In Western Australia, absence of a fixed abode is not given the same weight as in England as a ground for refusing bail.[5] There is a view, however, that there are defendants in Western Australia who are released on bail who could benefit from early contact with social workers associated with a bail hostel. For example, defendants in a bail hostel could be given advice so that they would be better prepared for their trial, and they could receive guidance and counselling services to enable them to obtain more permanent accommodation and employment and to avoid a prison environment. A condition that a defendant reside in a bail hostel could also provide additional supervision over a defendant, supplementary to, or in place of, supervision by a surety. This could be of considerable importance to some groups in the community, such as migrants and Aborigines, who might have difficulty finding a person who is prepared to act as a surety.[6]

9.7 The Probation and Parole Service, in a detailed submission on the Working Paper, drew a distinction between a bail hostel, and a bail centre. It pointed out that the main purpose of a bail hostel is to provide accommodation for a defendant who, if released on bail, would otherwise have no suitable place in which to reside. A defendant in this situation could benefit from guidance and some supervision at a bail hostel, but this would be incidental to its main purpose. A bail centre, on the other hand, would be primarily concerned with guidance and supervision of a defendant who has been released on bail, and would only be concerned incidentally as to his place of residence.

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5. This view is supported by the Commission's survey of defendants on remand at Fremantle Prison in December 1976. Only one of the 37 persons interviewed would have been possibly suitable for release on bail into the care of a bail hostel.

6. Children would not go to a bail hostel. They fall under the control of the Community Welfare Department which is already running hostels for the placement of child defendants. A remand in security institutions such as Riverbank should be needed in exceptional circumstances only: see Working Paper, at 178-179, paragraphs 9.4 to 9.6 and s.33 of the Child Welfare Act 1947.

9.8 The Probation and Parole Service submitted that District Offices of the Service could become bail centres. A requirement that a defendant report at regular intervals at a bail centre[7] could be added as a possible condition attached to the grant of bail. The Probation Service considered that substantial benefits could be achieved in many cases if it were able to establish contact with a defendant before his trial.

9.9 With regard to bail hostels, the Probation and Parole Service submitted that a bail hostel should be established as a pilot project in Perth with the co-operation of the courts, the police and the Department of Corrections. It suggested that the hostel should function under the supervision of the Probation and Parole Service as an extension to its broad concept of a bail centre.

9.10 The Commission agrees with the aims of bail centres and bail hostels and supports their implementaton. Although the cost of achieving these aims is an important consideration, the Commission believes that the true cost to the community may not be known unless, or until, the beneficial effects are analysed. Indications are that experiments in other jurisdictions with bail centres, and bail hostels, have been successful. Those which began initially with private funding are being subsidised by Governments, and numbers generally are increasing.[8] One way of introducing a pilot project, without initial Government capital outlay, would be to enlist the aid of a voluntary organisation, such as the Salvation Army, to provide the accommodation in existing establishments.[9] The Commission therefore recommends that arrangements be made to establish Probation and Parole Offices as bail centres in Western Australia, and to establish a pilot bail hostel in Perth.

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7. As to the distribution of District Offices in Western Australia see paragraph 5.6 above.

8. Mr. R.M. Christie, the Under Secretary for Law in Western Australia, recently completed a study on the growth and operation of bail hostels in England. He gave an address on his findings to the Western Australian Branch of the Australian Crime Prevention Council. The paper is unpublished, but a copy is held on file by the Commission.

9. Brigadier Steere, the Head of the Salvation Army Social Welfare Services in Western Australia, has informed the Commission that, without committing his organisation in any way, he is strongly in favour of the introduction of a bail hostel project in this State. This is the way the first hostel began in England, and the Commission has been informed that a similar scheme, involving the Salvation Army with Government assistance, is planned in Victoria.

Improvement to conditions for defendants who are refused bail

(a) Custodial conditions

9.11 Several commentators on the Working Paper considered that there was a need for improved facilities, both at the East Perth lock-up and in Fremantle Prison. The Department of Corrections said:

> The present accommodation for remands is really identical to prison accommodation and, with the exception of more liberal visiting arrangements and there being no obligation to work, the lot of a remand prisoner in Fremantle Prison is indistinguishable from that of a sentenced prisoner.

Commentators who were critical of conditions at the East Perth lock-up included the Law Society, the Royal Association of Justices, a District Court Judge and a barrister in private practice. These conditions were also said to be particularly unsuitable for a defendant who is in custody during the course of his trial.

9.12 The Government has now announced that the construction of the first stage of the Canning Vale Prison will be a 100 cell remand unit to replace the remand section at Fremantle Prison. Work commenced on this project in November 1978 and it is expected to be completed in March 1980. The Commission welcomes this move. It recommends that improvements should also be made to conditions at the East Perth lock-up.

9.13 The Commission has not investigated in detail the specific improvements which could be implemented and does not make any specific recommendations in this regard. It suggests, however, that in implementing improvements to the conditions of custody of defendants on remand generally, consideration be given to -

(a) separation of defendants on remand from convicted offenders and, if possible, separation of young offenders and first offenders on remand from defendants on remand with criminal records;[10]

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10. Ideally a remand centre should be located away from a prison. This is one unfortunate aspect of the Canning Vale plans. However, the practical alternative, which the Commission understands to have been adopted at Canning Vale, is to make the remand centre a separate unit.

(b) improved access to legal services, including a library of essential texts and materials, a right to see a solicitor at all stages of detention and the provision of information regarding legal aid if the defendant does not have a solicitor;[11]

(c) the desirability of a defendant being able to -

(i) send and receive mail;
(ii) have reasonable use of a telephone;
(iii) receive food from outside the centre;
(iv) wear his own clothing;
(v) receive visitors;
(vi) receive dental and medical treatment from his own practitioner;
(vii) perform such work as is available in the centre;

(viii) participate in recreation;
(ix) obtain reading materials from outside the centre.[12]

(d) the provision of counselling and advisory services and practical assistance in safeguarding property;[13]

(e) in the case of short term or over night custody, the provision of facilities to enable a defendant to wash and shave and obtain clothing suitable for a favourable appearance in court;

(f) continuation of training or trade development;[14]

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11. Ideally a remand centre should be located close to the court and to legal practitioners. It is another unfortunate aspect of the planned Canning Vale Remand Centre that it is located so far from Perth. Possibly the problem could be overcome by an administrative procedure for transporting defendants upon request of their lawyers from Canning Vale to, say, the East Perth lock-up for the day.

12. All these matters are specified in s.20 of the Remand Centres Ordinance 1976 (ACT).

13. For example, one defendant who wrote to the Commission was a farmer who needed assistance to provide food and water for his stock. There is no obligation on any authority to assist a defendant in such circumstances.

14. This is particularly relevant to long term remands, some of which exceed six months: see paragraph 9.14 below.

(g) introduction of varying security measures for defendants who are less likely to abscond.

(b) Reducing pre-trial delay

9.14 The Commission is also concerned at the length of time some defendants have spent in custody awaiting trial. Its survey of defendants on remand in Fremantle Prison in December 1976 showed that the average time spent in custody at the date of the survey was sixty-two days. At least one defendant was in custody awaiting trial for 155 days, and a case was reported recently where a defendant waited for his trial for ten months.[15] In Scotland, defendants in custody who have not been tried after 110 days are entitled to be acquitted unless the prosecutor was not responsible for the delay.[16] The average period in custody awaiting trial in Scotland is forty-two days.[17]

9.15 The Commission considers that it would be inappropriate to make any specific recommendation on this subject without detailed research, which would extend beyond its principal objective of reform to the law relating to bail. However, it recommends that the matter should be kept under review by the relevant authorities and, if possible, that priority should be given to the trial of defendants who are remanded in custody. The need for such a review becomes particularly important in cases where the defendant has spent a period in custody which is nearing the maximum or the likely sentence which may be imposed by the court for the offence.

9.16 The Commission recommends that such a review should be implemented by an administrative procedure whereby the Department of Corrections makes a periodic return to the Probation and Parole Service, or, in some cases, direct to the relevant court, of defendants who have been in custody awaiting trial for more than say one month.

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15. The West Australian, 15 November 1978.

16. Criminal Procedure (Scotland) Act 1975, s.101.

17. Scottish Office Central Research Unit, Pre-Trial Bail and Custody in the Scottish Sheriff Court (1976) (HMSO) at 15. By contrast, for persons granted bail, the average is ninety-six days.

A similar procedure should apply to defendants who are children, the return in such case to be made by the Department of Corrections, or the Community Welfare Department, to the Childrens' Court.[18] Arrangements could then be made, where necessary, for expediting the trial.

Improved interviewing facilities at the court

9.17 The Probation and Parole Service commented that all courts in Western Australia have inadequate facilities for officers of that Service to interview defendants. The Commission has recommended extensions to the role of the Probation and Parole Service to enable it to become involved in bail procedures prior to conviction.[19] Adoption of these recommendations would create additional demands for adequate interviewing facilities. The Commission therefore recommends that, wherever possible, arrangements should be made within a court to provide a separate room, with reasonable access to a telephone, for the purpose of interviewing defendants. Such facilities would be useful not only for Probation and Parole personnel, but also for solicitors and the legal aid services.

Maintenance of adequate services by bail-decision-makers in rural areas

9.18 One of the problems caused by Western Australian geography is the difficulty of providing bail-decision-makers throughout its vast area. Justices of the peace have performed a vital role in the bail-decision-making process both in rural and metropolitan areas.[20] They act on a voluntary basis, and perform a real service to the community.

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18. A similar procedure is recommended above for a review of a bail decision in circumstances where a defendant has been granted bail but cannot meet the conditions imposed: see paragraph 8.14.

19. For example, verification of information provided by the defendant on his bail information form (see paragraph 5.6 above) and provision of pre-bail reports: see paragraph 5.8 above.

20. In Perth, justices of the peace consider bail and see that a defendant is able to have a surety approved and obtain his release from custody at night time and in the weekends. A justice of the peace is also available on roster until 11 pm nightly at the East Perth lock-up.

9.19 The Commission recognises, however, that for practical reasons there must be limits to the extent of such a service and it notes that the Royal Association of Justices and the Women Justices' Association of Western Australia suggested that justices should not be called out for bail purposes between 1 am and 6 am. The Commission agrees with this suggestion.

9.20 One matter which does cause the Commission some concern, however, is that it has been informed that, in some country areas, justices of the peace do not wish to become involved in making bail decisions. This attitude can obviously cause delays and inconvenience for defendants and the police. The Commission recommends that as far as possible the situation should be remedied.

9.21 Another problem, particularly in rural areas, arises as to whether a bail-decision-maker, having considered a defendant's previous criminal record in relation to bail, should then be disqualified by law from taking part in the subsequent trial of the defendant. At present there is a mixed view among justices and magistrates as to whether they ought to regard themselves as being disqualified from hearing these cases. In view of the unfairness that may result, it might be thought that bail-decision-makers should be disqualified by statute from hearing cases in these circumstances.[21] This would not cause difficulties in Perth because of ready access to other magistrates. However, it might cause considerable difficulty in rural areas where another magistrate or justice might not be available, or only be available after considerable delay. No one commented on the issue. In the Commission's view, it is undesirable for a bail-decision-maker subsequently to take part in the trial, and the situation should be avoided wherever possible. Nevertheless, it would be impracticable to recommend any formal disqualification at this stage. Accordingly, the Commission recommends that the matter be left to the discretion of the justice or magistrate concerned.[22]

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

22. The difficulty is not confined to the situation where the justice or magistrate has previously made a decision regarding bail. The Commission has been informed that it is common in rural areas, where there is a small community, for a justice or magistrate to hear a case involving a defendant with whom he is acquainted and who he knows has a criminal record.

Continuing review of bail procedures

9.22 To meet the changing needs of society the bail system is in need of continuing review. In other jurisdictions,[23] bodies have been established to act in an advisory capacity in respect of criminal law and procedure. If the Government in Western Australia considered it to be desirable to establish a similar body in this jurisdiction, it would be appropriate for that body to maintain a continuing review of bail procedures. Such a body might consider it to be desirable to establish a bail sub-committee consisting of representatives from all categories of bail-decision-makers,[24] the Crown Law Department, the Probation and Parole Service, the Department of Corrections and the Law Society. Such a committee could make available statistical or other information for the benefit of bail-decision-makers.

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23. For example, in South Australia (Criminal Law Reform Committee of South Australia), England (The Criminal Law Revision Committee) and in New South Wales (Criminal Law Review Division of the Department of the Attorney General and of Justice).

24. That is the police, justices of the peace, Community Welfare officers, magistrates and judges.

CHAPTER 10 - SUMMARY OF RECOMMENDATIONS

10.1 The Commission summarizes its recommendations as follows -

SEPARATE BAIL ACT

1. A separate Bail Act should be enacted to deal in a comprehensive way with bail and its associated procedures at all stages of criminal proceedings.

(Introduction paragraphs 2-3)

BAIL TO BE CONSIDERED FOR ALL OFFENCES

2. The fact that a defendant is charged with an offence of a particular kind should not of itself deprive him of the right to have bail considered by an authorised person.

(paragraph 1.4)

AUTHORITY TO GRANT BAIL

3. Judges of the Court of Criminal Appeal, Supreme Court and District Court, magistrates, coroners, justices of the peace and certain police officers and Community Welfare officers should have authority to grant bail to a defendant for any offence but this authority should be limited as follows -

(a) the authority to grant bail for a capital offence including murder should be limited to a judge of the Supreme Court;

(paragraph 2.4)

(b) the authority of coroners and Community Welfare officers should be limited to defendants within their respective jurisdictions;

(paragraph 2.4)

(c) the authority of police officers to grant bail should be limited to a sergeant or above or to an officer in charge

of a police station and should cease once a decision has been made by a justice of the peace or other judicial officer;

(paragraph 2.3)

(d) by provisions regarding appeals;

(paragraphs 2.9 and 8.5 to 8.7)

(e) by practice directions specifying certain persons who should consider bail at different stages of criminal proceedings

(paragraphs 2.7 to 2.9)

4. Judges of the Supreme Court should retain their inherent jurisdiction to grant bail to unconvicted defendants but this authority should be limited by the practice directions referred to in 3(e) above and provisions regarding appeals.

(paragraphs 2.4, 2.7 to 2.9 and 8.8)

A QUALIFIED RIGHT TO BAIL

5. Whether or not a formal application for bail is made, an unconvicted defendant should be granted bail, subject to a bail-decision-maker's discretion to refuse bail if he is satisfied that, having regard to the conditions that he could impose, there remains -

(a) substantial grounds for belief that the defendant , if released on bail, will -

(i) fail to surrender into custody;
(ii) commit an offence which is likely to involve violence or is otherwise serious by reason of its likely consequences;
(iii) endanger the safety or welfare of members of the public; or

(iv) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

(b) a need to obtain more information about the defendant which is relevant either to the bail decision or to the forthcoming trial;

(c) a need for the defendant to remain in custody for his own protection;

(d) in the case of bail during trial, a substantial risk that the fairness or integrity of the trial process will be prejudiced.

(paragraphs 3.4 to 3.7, 4.3 to 4.9, 4.20 and 4.22)

6. Where no order is made regarding bail, whether intentionally or otherwise (that is where the defendant is neither granted bail nor remanded in custody), the defendant should be deemed to be released at large without bail, but with a power to bring him before a court in cases where the failure to make an order was a mistake.

(paragraph 3.10)

Additional guidelines for the bail-decision-maker's decision

7. In considering a refusal of bail on the grounds specified in 5(a) above, relevant factors should include -

(i) the nature and seriousness of the offence, and the probable method of dealing with it;

(ii) the character, antecedents, associations, home environment, background and place of residence of the defendant;

(iii) the history of any previous grants of bail;

(iv) the strength of the evidence against the defendant.

(paragraph 4.12)

No qualified right for convicted defendants

8. A bail-decision-maker should have a discretion, unfettered by statute, to grant or refuse bail to a defendant following his conviction pending sentence or the outcome of an appeal.

(paragraphs 3.12 to 3.13)

INFORMATION

Information for a bail-decision-maker: bail information form

9. There should be a bail information form (see Form A in Appendix II) which defendants should be encouraged to complete so as to provide bail-decision-makers with sufficient information to make a bail decision.

(paragraphs 5.3 to 5.4)

10. The bail information form should be used for the purposes of the defendant's bail appliction only, and should not be available as evidence against him at his trial.

(paragraph 5.5)

11. A bail-decision-maker should be authorised to require verification of the information contained in the bail information form by a Probation Officer or a Police Officer.

(paragraph 5.6)

12. It should be an offence, punishable by a fine not exceeding $500, knowingly to provide false or misleading information in the form to a bail-decision-maker in support of an application for bail.

(paragraph 5.7)

Information from other sources

13. A bail-decision-maker should be empowered to obtain a report from the Probation and Parole Service and take into account evidence on oath or otherwise from any other person, for the purpose of making his bail decision.

(paragraphs 5.8 to 5.10)

14. A defendant should be under no obligation to give evidence on oath at the bail hearing.

(paragraph 5.9)

Representation at a bail hearing

15. Where an appeal is brought against a conviction or sentence by a court of petty sessions in respect of an offence which carries a maximum penalty of six months imprisonment or more, any application for bail should be made on notice to the prosecution.

(paragraphs 5.13)

16. Only the prosecution and defendant should be entitled to be represented as parties to bail proceedings.

(paragraph 5.14)

Non-publication of bail hearings

17. A bail-decision-maker should have a discretion either to close the court for a bail hearing or to prohibit the publication of the name of the defendant and all or any part of the proceedings.

(paragraph 5.17)

Information for a defendant

18. The bail information form should include an explanation of the bail system, and there should be provision made to ensure

that this form is readily available to a defendant and is understood by him, through interpreters, if necessary.

(paragraphs 5.18 to 5.19)

19. A defendant should be permitted to have reasonable access to a telephone for the purpose of communicating with any person for assistance in respect of a bail decision.

(paragraph 5.20)

Bail record form

20. There should be a bail record form (Appendix II Form B) which should be completed by a bail-decision-maker in all cases.

(paragraphs 5.22 to 5.23)

CONDITIONS OF RELEASE ON BAIL

Undertaking by defendant and the creation of an offence of absconding

21. The defendant's recognizance should be replaced by an undertaking to appear (Schedule II Form C) and a failure to appear should consitute an offence unless the defendant shows that he had a reasonable excuse.

(paragraph 6.3)

22. The offence of absconding should carry the same penalty as the principal offence, with an upper limit of three years imprisonment and a fine of $3,000.

(paragraph 6.7)

23. The absconding charge should normally be tried summarily (that is, without a jury) at the conclusion of the trial for the principal offence and if the principal offence is an indictable offence, the District or Supreme Court, as the case may be, should be given express power to hear the complaint.

(paragraph 6.8)

Form of undertaking

24. Where a defendant is charged with more than one offence, a single undertaking to appear should suffice, which should, in turn, give rise to a single offence on failure to appear.

(paragraph 6.10)

25. The defendant's undertaking should be to appear at a specified time and place, or as notified by the prosecution, and should be variable without a further undertaking by the defendant.

(paragraph 6.11)

26. There should be provision to ensure that a defendant -

(a) receives a copy of his bail obligations;
(b) understands these obligations; and
(c) is aware of the consequences of failure to comply with them;

and an interpreter should be used where necessary.

(paragraph 6.12)

Release without an undertaking

27. There should be a provision allowing a defendant to be released from custody without an undertaking during any adjournment in criminal proceedings.

(paragraph 6.14)

28. If it is considered to be desirable to continue the existing practice of dealing with certain offences (such as gaming and drunkenness) in the defendant's absence by forfeiting cash deposited at the request of the police, provision could be made to enable an authorised police officer to release a defendant at large but on payment of cash

(paragraphs 6.20 to 6.21)

Conditions of release on bail other than the defendant's undertaking

29. If he considers that further conditions would be desirable as security for a defendant's undertaking to appear, a bail-decision-maker should be empowered to require -

(a) a deposit of money or other security;
(b) a surety or sureties;
(c) a combination of (a) and (b);
(d) a deposit of cash or other security by a surety.

(paragraphs 6.25 to 6.26)

30. A bail-decision-maker should also be authorised to impose conditions for the purpose of ensuring that a defendant -

(a) appears as required;
(b) does not commit an offence;
(c) does not endanger members of the public;
(d) does not interfere with witnesses or obstruct the trial process or prejudice the fairness or integrity of the trial;
(e) appears as required for the purposes of a medical examination;
(f) is given care and protection to enable him to be better prepared for his trial and rehabilitation

(paragraphs 6.29 and 6.31)

31. Any conditions imposed by a bail-decision-maker should be no more onerous than is required in the public interest having regard to the nature of the offence and the circumstances of the defendant.

(paragraphs 6.27 and 6.32)

Enforcement of conditions

32. If a defendant who has been released on bail breaches a condition of his release, or if any such condition is no longer suitable for some other reason, the police should be given

power to bring the defendant before the court by issuing a summons or by arrest, with or without warrant, depending on the urgency of the case, to enable bail to be revoked or conditions to be varied.

(paragraph 6.37)

33. If a defendant breaches his undertaking to appear, he should be liable to forfeit any security provided by him for the performance of his undertaking, subject to an application for relief against forfeiture.

(paragraph 6.38)

SURETIES

No longer mandatory

34. There should be no mandatory requirement for sureties.

(paragraph 7.4)

Information

35. A proposed surety should receive a form containing -

(a) details of the defendant's bail obligations;
(b) a notice to the proposed surety explaining his rights, obligations and liability;
(c) information about the proposed surety for the person authorised to approve a surety;
(d) the proposed surety's undertaking;
(e) a formal record of the surety's approval;

(Schedule II Form D and paragraphs 7.8, 7.13 and 7.26)

36. An authorised person should not take a surety's undertaking unless he is satisfied, through an interpreter if necessary, that the surety is aware of his obligations and potential liability.

(paragraph 7.13)

Liability of a surety

37. If a defendant fails to appear in answer to his bail, the surety should forfeit the amount he undertakes to pay, unless a court orders otherwise.

(paragraphs 7.13 and 7.21)

Special form of undertaking

38. A bail-decision-maker should be empowered to release a defendant on bail upon an undertaking, from a responsible person, to take all reasonable steps to ensure that the defendant complies with the conditions of his release on bail (including his undertaking to appear in answer to bail), but with no financial liability.

(paragraph 7.17 to 7.18)

Enforcing the undertaking

39. If a defendant fails to appear, a summons should be issued by a clerk of petty sessions requiring the surety to appear and show cause why he should not forfeit the amount he undertook to pay together with any cash or other security provided by him.

(paragraph 7.20)

40. The court should be entitled to make such order as to enforcement as it thinks fit, capable of execution, if necessary, as if it were a civil judgment.

(paragraph 7.20)

Qualifications of a surety

41. The minimum qualifications for a surety should be that he -

(a) is of full age;
(b) has sufficient assets to meet his financial undertaking.

(paragraph 7.23)

42. A person when considering whether he should approve a surety should take into account his-

(a) financial resources;
(b) character and previous convictions;
(c) proximity whether in point of kinship, residence or otherwise to the defendant,

and whether his financial liability would be unduly injurious to him or his family.

(paragraph 7.24)

43. A proposed surety should be disqualified if there are reasonable grounds to suspect that he or she is being indemnified against liability.

(paragraph 7.25)

Approval of sureties and release of a defendant

44. The bail-decision-maker should either approve the surety personally or expressly delegate this task to a particular authorized person or body.

(paragraph 7.29)

45. Any bail-decision-maker (including authorized police officers) and a clerk of petty sessions, should be authorised to approve sureties.

(paragraph 7.30)

46. A person authorised to approve a surety should be required to make the necessary inquiries as to the proposed surety's suitability and make a decision in this respect.

(paragraph 7.30)

47. If a surety is not approved, he should be given reasons, and he should be informed that he is entitled to re-apply for

approval to another authorised person, unless this would be inconsistent with any directions given by the bail-decision-maker as to approval of sureties.

(paragraph 7.32)

48. A defendant should be released from custody immediately upon satisfying the conditions of his bail, and prison regulations should be amended to ensure that this is able to be done.

(paragraph 7.33)

Formalities of a surety's undertaking

49. A surety should be permitted to enter into his undertaking before an authorized person without having to go to the remand yard.

(paragraph 7.34)

50. A surety should be able to agree, in advance, to continue as a surety for the period of any extension to the defendant's bail without the need for further undertakings.

(paragraph 7.34)

Discharge from liability

51. If a surety wishes to be discharged from liability he should make application to a court, but if he suspects that the defendant intends to abscond, he should notify the police, or, where he has no reasonable opportunity to obtain the assistance of the police, he should be empowered to apprehend the defendant.

(paragraph 7.11)

52. A surety's liability should be discharged in the following circumstances -

(a) by order of the court following the arrest of the defendant;

(b) by order of the court on an application made by the surety;

(c) by death of the surety;

(d) when the defendant appears in answer to the charges against him;

and suspended while a defendant is in lawful custody for another offence.

(paragraph 7.35)

Indemnification of a surety

53. Indemnification of a surety should be an offence requiring consent of the Attorney General for prosecution, punishable on summary conviction, and having a maximum penalty of twelve months imprisonment or a fine not exceeding $1,000.

(paragraph 7.36)

REVIEW OF BAIL DECISIONS

Review by defendant

54. There should be no limit to the number of applications for bail which can be made to the police, but in respect of decisions made by other bail-decision-makers, there should be provision made to regulate appeals and rehearings with the object of preventing bail shopping.

(paragraphs 8.3 to 8.8)

Reasons for refusal

55. Reasons for a bail decision should be provided by a bail-decision-maker, including the police, when requested by any of the parties to the bail decision, and in any case where bail is refused.

(paragraph 8.11)

Information for a defendant

56. There should be provision made to ensure that a defendant is aware of his right to appeal, or obtain a rehearing, and an administrative procedure should be introduced to notify authorities of defendants who are still in custody because they cannot meet the terms of their bail.

(paragraphs 8.13 to 8.14)

Review by prosecution

57. The prosecution should have a right of appeal, to be governed by the same procedures applicable to appeals by defendants.

(paragraph 8.17)

58. The police should also be empowered to bring a defendant who is on bail before a court for the purpose of revoking bail or varying the conditions of hi release.

(paragraphs 6.37 to 6.38 and 8.18)

OTHER REFORMS

Increased use of summonses

59. There should be greater use of summonses, where appropriate, both as an alternative to arrest, and as an alternative to releasing an arrested defendant on bail.

(paragraphs 9.3 to 9.5)

Introduction of bail centres and a bail hostel

60. Arrangements should be made to establish Probation and Parole Offices as bail centres in Western Australia, and to establish a pilot bail hostel in Perth.

(paragraph 9.10)

Improvements to conditions for defendants who are refused bail

61. Steps should be taken to improve conditions for defendants who are refused bail and remanded in custody.

(paragraphs 9.12 to 9.13)

62. Consideration should be given to procedures to reduce delays before trials for defendants who have been refused bail.

(paragraphs 9.15 to 9.16)

Improved interviewing facilities at courts

63. Improved interviewing facilities should be provided at courts for the use of the Probation and Parole Service, solicitors interviewing clients, and the legal aid services.

(paragraph 9.17)

Maintenance of adequate services by bail-decision-makers in rural areas

64. Steps should be taken to ensure that there are sufficient justices of the peace in rural areas who are willing to undertake judicial duties.

(paragraph 9.20)

65. A bail-decision-maker who has considered a defendant's previous criminal record should preferably not take part in the subsequent trial.

(paragraph 9.21)

Continuing review of bail procedures

66. Consideration should be given to the creation of an advisory body in respect of criminal law and procedure to maintain a continuing review of bail procedures.

(paragraph 9.22)

10.2 The Commission has not prepared a draft bill to deal with the implementation of its recommendations. If requested to do so, however, it will provide whatever further assistance is needed to Parliamentary Counsel to enable a draft bill to be prepared.

(Signed) David K. Malcolm
Chairman

Neville H. Crago
Member

Eric Freeman
Member

13 March 1979

APPENDICES

APPENDIX I

List of those who commented on the Working Paper

Chief Justice, Sir Francis Burt
Commissioner of Police
Council for Civil Liberties in Western Australia
Department of Corrections
Department for Community Welfare
Finlayson, M.R., J.P.
Hooyer, T.H.J.
Judge Heenan
Judges of the District Court
Law Society of Western Australia
Manolas, K.
Morris, B.
Probation and Parole Service
Robinson, F.M.
Royal Association of Justices of Western Australia
Tennant, B.G.
Women Justices' Association of Western Australia

APPENDIX II

FORM A

NOTICE TO DEFENDANT

AND

BAIL INFORMATION FORM

NOTICE REGARDING BAIL

Bail

1. A person charged with any offence in Western Australia may be granted bail, that is, released from custody on certain conditions pending his case being dealt with.

Authority to grant bail

2. If you are charged with murder or a capital offence, such as wilful murder or treason, bail may be granted only by a Judge of the Supreme Court. In respect of all other offences, bail may be granted by an authorised police officer (that is, a police officer who is of or above the rank of sergeant or who is in charge of a police station), a Justice of the Peace, Magistrate or a Judge of the District or Supreme Court.

Duty to make a decision regarding bail

3. You are not required to apply for bail but it is recommended that you should do so. A decision regarding bail must be made first by an authorised police officer when you are taken into police custody, and must be considered subsequently by the relevant court each time you appear in that court. On each occasion, bail may be granted with or without special conditions, or it may be refused on certain grounds specified in s. of the Bail Act 1979. If bail is refused, you are entitled to written reasons.

Refusal of bail

4. If bail is refused by the police, or granted on conditions which you cannot meet, you may make a fresh application for bail to any authorised person, including the police, but normally your application should be made to a Justice of the Peace.

5. In the case of a decision made by a Justice of the Peace, Magistrate or Judge, you may -

   (a) apply for a rehearing if bail was granted on conditions which you cannot meet, or if you were not represented by a solicitor, or if there has been a change in your circumstances since the decision was made; or

   (b) appeal in accordance with s. of the Bail Act 1979.

Sureties

6. As a condition of your release on bail you may be required to obtain one or more sureties. A separate form contains information in this respect for a person proposing to act as a surety. It also contains a number of questions to be answered by such a person for the purpose of assessing his suitability to act as a surety. You could reduce delays in obtaining your release on bail if you could arrange to have a person who could act as surety for you obtain and complete the surety form and appear, with the form, in court when you appear.

Representation

7. You are entitled to be represented by a solicitor on any occasion when bail is being considered. If you do not have a solicitor, or have been unable to obtain one, you may be able to consult one on duty at the court. you are entitled to make reasonable use of a telephone to communicate with any person for assistance in respect of bail.

Information

8. On any occasion when bail is being considered, answers to the questions in this form will be of value in deciding whether bail should or should not be granted and may only be used for this purpose. You are not required to complete the form, but any failure to do so may result in a refusal of bail until the relevant information can be obtained.

   It is suggested that you complete the form, particularly -

   (a) in cases where bail is to be opposed;
   (b) whenever advised to do so by a court;
   (c) if you have been charged with a serious offence, that is, an offence which may be tried by a jury.

APPLICATION FOR BAIL

N.B. Before completing, see notes on opposite page of this form.

1. Name _____ 2. Age _____

Surname First Names

3. Nationality if other than Australian _____

4. Address

Present Address

Description of present address

Own house _____
Parents' home _____
Boarding house _____
Tenanted property _____
Other (describe)

How long resident in Western Australia? _____years

5. Family circumstances

Unmarried ____
Married ____
Separated ____
Co-habiting ____
Living with children ____

Dependants
Children, number ____
Others, number ____
Relationship of others to you _____

Nearest relative

Name _____ Relationship _____

Address _____

6. Employment

Present occupation _____

Employer's name	Place	How long employed

Previous employment:

Employer's names	Places	How long employed

If allowed bail would present employment continue? Yes No Not known

Earnings $_____p.w.

Estimate of net worth of property in W.A. $_____.

7. Possible sureties

Name	Address	Phone	Relationship

8. Special reasons for wanting bail

Outline other matters to be taken into account (e.g. illness, physical condition, contract of employment, domestic difficulties etc.).

9. Offence

The above information is provided knowing that it is an offence under the Bail Act 1979, punishable by a fine not exceeding $500, knowingly to provide false or misleading information.

Signature of applicant

10. OFFICE USE ONLY

Charge No.

On bail in another case? Yes No

Other proceedings pending? Yes No

Previous convictions?

Nature	Previous bail record

On probation or parole? Yes No

Answers to questions 4-8 above verified? Yes No

Comments by probation or police officer

Probation or Police Officer

APPENDIX II (cont.)

FORM B

Bail Record

1. Applicant

1.1 Name

Mr. Mrs. Miss

Surname First names

1.2 Charge

(Note: In the case of a charge of wilful murder, murder or treason, bail can be granted only by a Judge of the Supreme Court of Western Australia).

2. Grounds for refusal of bail

2.1 Are there substantial grounds for believing that, having regard to -

(a) the nature and seriousness of the offence;
(b) the character, antecedents, associations, home environment and background of the applicant - see application form for further details;
(c) the history of any previous grants of bail to the applicant;
(d) the strength of the evidence against the applicant;
(e) any other matter considered to be relevant.

the applicant would -

(i)	fail to appear in answer to bail?	Yes	No
(ii)	commit an offence whilst on bail?	Yes	No
(iii)	endanger the safety or welfare of a member of the public?	Yes	No
(iv)	interfere with a witness or otherwise obstruct the course of justice whether in relation to himself or to any other person?	Yes	No
2.2	Should the applicant remain in custody for his own protection?	Yes	No
2.3	Should the matter be adjourned and the applicant remain in custody while further information is obtained?	Yes	No
2.4	Should bail during trial be refused to preserve the fairness and integrity of the trial?	Yes	No

3. Other matters

Is the applicant in custody pursuant to the sentence of the court on another matter, or for failing, without reasonable excuse, to answer bail? Yes No

4. Decision

4.1	Defendant is released at large	_____
4.2	Bail is not granted	_____
4.3	Bail is granted on the following conditions*	
	(a) simple undertaking to appear	_____
	(b) lodge as security	_____
	(c) deposit of cash of $_____	_____
	(d) undertaking with no financial liability to ensure applicant complies with bail conditions	_____
	(e) surety/s for the sum of $_____	_____
	(f) deposit of_____ as security or $_____ by surety/s	_____
	Additional special conditions, if any	
	(g) report to probation service/police	_____
	(h) refrain from associating or communicating with_____	_____
	(i) live or work where directed	_____
	(j) surrender passport	_____
	(k) undertake not to leave the jurisdiction	_____
	(l) other conditions - specify	_____

*Note: Conditions (b) to (f) can be imposed only if it is considered that the applicant's undertaking alone would not be a sufficient incentive for him to appear in answer to bail.

Other conditions may be imposed only for the purpose of overcoming grounds for refusing bail.

No condition should be more onerous than is required in the public interest having regard to the nature of the offence and the circumstances of the applicant.

5. Reasons for decision (if requested by prosecution or defendant or if bail is refused).

APPENDIX II (cont)

FORM C

UNDERTAKING BY DEFENDANT

(in duplicate one copy to be retained by defendant)

Charge/s No/s _____

Details of Grant of Bail
(to be completed before undertaking given)

Defendant _____ (name) _____ (occupation)

_____ (address) _____ (charge/s)

Bail granted on _____ (date) by _____ (description e.g. police, justice, magistrate or judge)

on condition that -

(a) defendant undertakes to appear at _____

on _____ (date) at _____ (time) or as notified by the prosecution.

(b)

(c)

(d)

(state other conditions if any)

Undertaking to Her Majesty the Queen

I, _____ the abovenamed defendant, having been granted bail on the above conditions, do hereby -

1. undertake to comply with such conditions including the condition that I appear in answer to bail at the required time and place;

2. acknowledge that -

   (a) If I fail, without reasonable excuse, to appear, as required, in answer to bail -

      (i) I commit an offence under the Bail Act 1979 and become liable to the same penalties as are provided for the offence or offences in respect of which bail was granted, with a maximum of three years imprisonment and/or a fine not exceeding $3,000;

      (ii) I shall forfeit cash or other security, if any, provided by me as security for performance of my undertaking to appear;

      (iii) my surety or sureties, if any, shall be liable to forfeit the amount set in relation to my release on bail; and

      (iv) I shall remain liable to be dealt with for the offence or offences with which I was originally charged.

   (b) if I break any of the above conditions, or if there are reasonable grounds to suspect that I am about to do so, I may be arrested and returned to custody.

_____
(signature)

I satisfied myself before taking this undertaking that the defendant understood the nature and extent of the conditions imposed in respect of his/her grant of bail and the consequences of his /her failure to comply with them.

Undertaking given on _____ at _____ in the State of Western Australia before me _____

* Judge of the Supreme Court
* Judge of the District Court
* Stipendiary Magistrate
* Justice of the Peace
* Registrar, or Clerk of Petty Sessions
* A member of the police force of or above the rank of sergeant or for the time being in charge of a police station

APPENDIX II (cont)

FORM D

APPLICATION BY PERSON PROPOSING TO ACT AS SURETY FOR BAIL

(in duplicate, one copy to be retained by surety)

NOTICE TO PERSON PROPOSING TO ACT AS SURETY FOR BAIL

1. It is a condition of the release on bail of the defendant in this case that he obtain a surety.

2. Before you agree to act as surety you should know that you are expected to take all reasonable steps to -

(a) ensure that the defendant understands and complies with all of the conditions of his release on bail including, most importantly, the condition that he appear in answer to his bail at the appointed time and place;

(b) notify the police, or, if you have no reasonable opportunity to obtain the assistance of the police, arrest the defendant yourself, should you have reason to suspect that he intends to breach the condition of his release on bail that he appear in answer to his bail at the appointed time and place.

3. If you agree to act as surety you must complete the undertaking at the end of the form. Your application to act as surety may be approved on the basis of this undertaking alone. In this case, provided the defendant appears as required in answer to bail, no payment of cash is involved. In some cases, however, in addition to your undertaking, you may be required to deposit cash or other security before your application to act as surety is approved.

4. If the defendant fails to appear in court at the appointed time and place to answer the charge/s against him, the amount which you agree to pay as surety shall, unless the court is satisfied that you have fulfilled your obligations, become due and payable, using cash or other security (if any) deposited by you.

5. You must complete the declaration on the opposite page in this form. All questions must be answered truthfully. A failure to do so constitutes a criminal offence. In addition, if the defendant has been released on bail, such bail may be terminated, and you may be ordered to pay the amount which you agree to pay as surety.

6. If your application to act as surety is approved, your obligations will continue until such time as the defendant appears at the appointed time and place in answer to his bail, or until your obligations as surety are terminated by exercising your power of arrest or by obtaining a discharge from the court. If you so wish you may agree, in advance, to any extension of the defendant's bail in the event of a postponement of the hearing. If you so agree your own obligations will be similarly extended until the defendant appears as required.

7. Subject to any express stipulations to the contrary made by the person granting bail, your application to act as a surety should be made to a police officer of the rank of sergeant or above, or the officer in charge of a lock-up, or a clerk of Petty Sessions. If your application is rejected, you may re-apply to a Justice of the Peace, a Magistrate or a Judge of the District Court or Supreme Court.

DETAILS OF GRANT OF BAIL
(to be completed before undertaking given)

Charge No._____

Defendant _____ (name) _____ (occupation)

_____ (address) _____ (charge)

Bail granted on _____ (date) by _____ (description e.g. police, justice, magistrate or judge)

on condition that

(a) Defendant undertakes to appear at _____ (place)

on _____ (date) at _____ (time) and on any subsequent adjournment or as notified by the prosecution.

(b) Defendant obtains _____ surety/sureties for the sum of $_____ (each);

(c)

(d)

(state other conditions if any).

DECLARATION

I, _____ (name) of _____ (address)

(occupation),
do solemnly and sincerely declare that:

1. I have attained the age of eighteen years.

2. I am the defendant's
(here state relationship to defendant e.g. friend, parent, employer etc.)

3. I have known the defendant for years.

*4. I own/do not own the premises in which I am living.

5. The net value of my estate available for payment of debts is at least $

*6. (a) I have not been convicted of any offence.

(b) I have been convicted of the following offences -

(here state nature of offence/s and date of conviction)

7. I am not at present in custody for any offence.

8. I am presently acting as surety for

   (insert full name/s of defendant/s or delete if inapplicable)

9. I have not received any indemnity or promise of indemnity or any consideration for becoming a surety.

10. I have read the notice to persons proposing to act as surety for bail and I understand my obligations.

And I make this solemn declaration by virtue of section one hundred and six of the Evidence Act 1906.

_____
(signature of proposed surety)

Declared at
this day of
19

Before me,

_____
(Justice of the Peace or other person authorised to take statutory declarations)

* Delete whichever is inapplicable

UNDERTAKING

If a surety does not wish his undertaking to extend beyond the time and place specified in (a), (b) must be deleted. See paragraph 6 of the notice to proposed surety.

I undertake to pay to Her Majesty the Queen the sum of $ if the abovenamed defendant fails to appear -

(a) at the time and place specified in paragraph (a) above; and

(b) on any subsequent adjournment or as notified by the prosecution;

and I agree that security, if any, provided by me may be realised for the purpose of making such payment.

APPROVAL

Surety approved/not approved.

I satisfied myself before approving the abovenamed _____
(name)
as surety that he/she understood the nature and extent of his/her obligations and the obligations of the defendant.

_____

* Judge of the Supreme Court
* Judge of the District Court
* Stipendiary Magistrate
* Justice of the Peace
* Registrar, or Clerk of Petty Sessions
* A member of the police force of or above the rank of sergeant or for the time being in charge of a police station

END