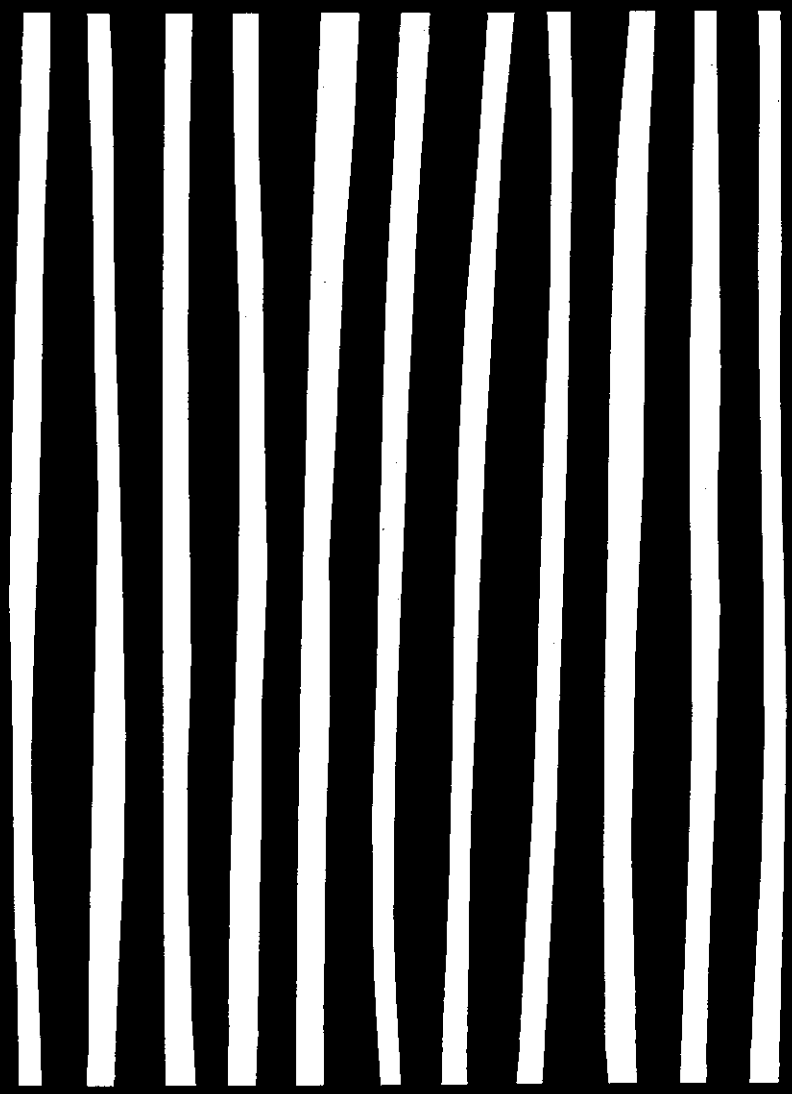

To bail or not to bail - a review of Queensland's bail law.

Queensland Law Reform Commission
Discussion Paper No 35

The short citation for this discussion paper is Q.L.R.C. W.P. 35

Published by Queensland Law Reform Commission, March, 1991

Printed by Active Offset (Brisbane) Pty. Ltd.

ACKNOWLEDGMENTS:
The Commission consulted with many people during the preparation this discussion paper.
Special thanks to Simon Allen, Matthew Brady, Ian Dearden, Julie Hayden, Marg Schmidt and Kelie Walsh.
Thanks also to the Management and Staff of the Brisbane Supreme, District and Magistrates Courts, and the Corrective Services Commission, whose assistance and encouragement made the pilot survey undertaken by the Commission possible.

ISBN: 0-7242-4327-5

INTRODUCTION

The Queensland Law Reform Commission has been requested by the Attorney-General, Mr. Dean Wells, to review Queensland's Bail Act 1980-1989.

As part of this review, the Commission would like to receive the views of members of the public about the efficiency and effect of present bail legislation. It would also appreciate comment about ideas for reform of the present system.

The Commission hopes to receive input from all relevant interest groups : victims of criminal acts, persons charged or convicted with criminal offences, those who work with people kept in prison (correctional centres) until trial, police, and the prosecution and defence lawyers.

To assist public input, the Commission has prepared this discussion paper. Legal jargon has been avoided to enable the issues to be examined by an audience wider than those trained in law.

Key issues have been isolated for discussion. The paper seeks to explain present problems with bail through a short introductory story, put forward research findings relating to the problems, and set out the Commission's tentative view.

Some of the stories used in this discussion paper are true case studies. Others have been constructed from the experience of Commissioners and those that they have consulted.

The Commission realises that some ideas for reform presented in this paper will have resource implications for the government departments primarily concerned with the administration of bail and its consequences : the Queensland Police Service, the Department of Family Services and Aboriginal and Islander Affairs, and the Corrective Services Commission. The Commission would like to know the probable effects of its proposals for these administrative bodies.

The closing date for submissions is 14th June, 1991. Written submissions should be sent to -

The Secretary,
Queensland Law Reform Commission,
P.O. Box 312,
NORTH QUAY. Q. 4002.

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1. THE IMPORTANCE OF BAIL

Historically, bail was a process to ensure that people who were charged with a criminal offence (defendants) appeared at court both for the hearing of their charge and the imposition of an appropriate punishment.

Today, bail attempts to serve additional functions for the protection of the community.

Those who are refused bail are kept in police watch-houses, lock-ups and prisons until trial.

The amount of people awaiting trial in Queensland prisons fluctuates between 9% and 10% of the total prison population. On 1 March 1991, 222 prisoners were awaiting trial. The Queensland Corrective Services Commission estimates that on that day the total prison population was 2200 prisoners. Therefore, presently people awaiting trial compromise 10% of the total prison population.

Considerable amounts of tax-payer's money are spent on keeping defendants in gaol before trial. During 1989-1990, the Queensland Corrective Services Commission spent $83,155,000 on maintaining and establishing prisons.[1] At least $7,400,000 of this amount would have been spent keeping defendants in gaol before their trial.[2]

The ramifications for the community of releasing defendants charged with violent offences before their trial cannot be ignored.

For the victim of a violent offence, the psychological damage and fear caused by the release of a defendant charged with the offence must be immense.

For the community, there is a risk that offenders with a history of violence may commit further violent offences before their trial.

For instance, the Commission has spoken with the parents of a ten year old girl who was assaulted and raped late last year. Following a good description of the assailant by the girl, a man was arrested within a few hours of the attack. Shortly after the arrest, two witnesses verified that the arrested man had attacked the child.

The man was charged with attempted rape, indecent dealing and assault. When brought before a magistrate on the morning following the attack, the magistrate

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1 Queensland Corrective Services Commission Annual Report 1989-1990, page 65.

2 This figure is 9% of the total custodial corrections budget. It is likely to be an underestimate. Prisoners in remand are held in the most costly form of imprisonment - maximum security. This has not been taken into account in the calculation.

was informed that the man had been released from prison approximately 18 months before this attack, after serving a term of imprisonment for the rape of a seven year old girl.

The magistrate ordered that the man be released on bail.

The distress caused to the family by the decision was understandable. They also argued that the defendant's history caused concern that the defendant might attempt to commit similar crimes while on bail.

The man's bail has subsequently been revoked by the Supreme Court.[3] He is awaiting trial in prison.

However, the ramifications of a refusal of bail cannot be understated. It involves a person's liberty.

In Australia's system of criminal law, a defendant is presumed innocent until found guilty by a court. An allegation of wrongdoing must be proved by the accuser. Until that occurs, an accused person ought not to be assumed to have committed the crime charged.

If a person is detained in a prison or a police lock-up during a period before trial (remanded in custody), that period in gaol is served before the court has determined -

- whether the person is guilty of any charge; and
- if guilty of any charge, whether imprisonment is an appropriate punishment (some lesser penalty, such as probation, a fine or a community service order may be more appropriate).

In practice however, people who are kept in gaol for a period before trial are usually gaoled in maximum security prisons reserved for the most serious convicted offenders. They suffer -

- loss of freedom;
- overcrowded living conditions;
- loss of control over basic life decisions - what to eat, when to get up, when to go to bed;
- extreme boredom caused by a structured regimen which has little or

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[3] The names of the victim and defendant have been withheld. The victim's family wishes to remain anonymous. The further publication of names, places, or circumstances are withheld so as not to jeopardise the defendant's trial.

no productive output, such as employment or training; and

- limited contact with family, friends, and those for whom they have responsibilities.

As a consequence of gaol before trial, non-convicted people may lose their employment, suffer damage to reputation, and face disruption to existing family relationships.

Because of detriments like these, a defendant whose period in gaol before trial is likely to be lengthy may be induced to plead guilty simply to get an earlier hearing date.

A person who is kept in prison before trial is restricted in preparing evidence for the defence case.

The uncertainty of a release date from prison may weaken the will of some defendants to present their best case at trial. One submission to the Commission by a legal practitioner with wide experience in bail cases explained -

> "It is the moral sapping, debilitating effect of incarceration on remand that contributes to the potentially permanent effects of refusal of bail. In the despondent state that overcomes many people immediately they are imprisoned, clear and definite instructions may be more difficult for a legal representative to obtain. Many prisoners seem to give up hope." [4]

Another prominent practitioner has observed -

> "The person who is out on bail has a greater chance, no matter what the charge is, of ultimately defeating it, because he is better equipped to face up to cross examination and the other processes of trial, if he has been in his own surroundings before he ultimately comes into court."[5]

Finally, a period of imprisonment before trial may decrease the chances of successfully arguing against a prison sentence if the defendant is convicted of the charge. When considering whether or not to impose short periods of imprisonment for a particular offence, judicial officers will take into account the employment and stability of a defendant and the ties and responsibilities a defendant has in the community. The greater a defendant's individual and community responsibilities, the greater the pressure on judicial officers not to impose a prison sentence, or a sentence that restricts the defendant from performing existing responsibilities. If a defendant has been gaoled before trial, the normal links forged by a person within the community are less likely to be present.

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4 Submission by Michael Barnes, Solicitor, Brisbane.

5 Frank Galbally "The Bailing of Accused Persons" LIJ June at page 224.

The defendant is unlikely to have employment, and existing ties within the community will have been loosened during the period spent by the defendant in gaol. The defendant has less ammunition to argue that a prison sentence should not be imposed.

In its review of the operation of present bail legislation, the Commission has been aware of the delicate balance between two often competing principles - the need to preserve the freedom of the defendant weighed against the need to protect the community from a re-offending or potentially violent defendant. The tentative conclusions of the Commission, which are set out below, are made within this context.

2. DECIDING WHETHER A DEFENDANT SHOULD BE RELEASED ON BAIL

This chapter discusses when it is appropriate to detain a defendant before trial and when it is not.

The first section deals with the present grounds upon which bail can be refused. It proposes that these rules should be reformulated.

The second section considers the large number of defendants who do not apply to the courts for bail, and suggests an idea to ensure that their detention is justified.

The third section proposes a sentencing principle to prevent those who are unlikely to be given a gaol sentence upon conviction from being detained in gaol before their trial.

A. Present provisions for refusing bail

One Saturday night, Ashley was seen taking part in an armed robbery and was subsequently arrested. Two police officers have been questioning Ashley about the robbery for some time ... .

"Look - I've done nothing wrong, and I've got nothing to say."
"O.K., O.K., Ashley. You are going to be charged with armed robbery. Is there anything further that you would like to add?"

"No. Can I go now?"
"Not this time, Ashley. This is the eighth time we've had to arrest you this year. Only last month you were in the Brisbane Magistrates Court pleading guilty to three counts of breaking and entering. You've only just got out from a 2 week sentence inside - and now this!"

"Doesn't the law say that I'm entitled to bail?"
"Yes and no. It's Saturday night. The Magistrates Court isn't opened until Monday morning. We've got to release you on bail if we can't get you before a magistrate within 24 hours. But there are exceptions. We have to refuse to give you bail if we believe that you'll commit further offences between now and your committal or hearing. On your track record, Ashley, I'm satisfied that that's exactly what will occur."

"But I'll lose my job for sure this time."
"You should have thought of that earlier this evening."

"Is that it then! You're just going to lock me up until my committal."
"No, Ashley. You'll be held in the lock-up until Monday morning. Then we'll take you down to the Central Court Building and let the Magistrate decide whether your spell in custody should continue."

Police have no power to release a defendant who is arrested on a charge carrying a mandatory (compulsory) life sentence or a serious drug charge.[6]

On all other charges, the arresting police officers are duty-bound to release the defendant on bail, with or without conditions, within twenty-four hours of apprehending a defendant. There are a number of exceptions.[7] For instance, this rule does not apply if the police officers are satisfied that there is "an unacceptable risk" that the defendant would -

- fail to appear at the time and place that the court will first consider the defendant's case; or
- commit an offence whilst on bail; or
- endanger the safety or welfare of members of the public; or
- try and contact or threaten witnesses who will be called during the defendant's trial.[8]

There are a number of factors that must be considered by police in assessing whether there is "an unacceptable risk" of these events happening. These include -

- the type of offence with which the defendant has been charged;
- the personal ties and responsibilities of the defendant;
- whether the defendant has a stable home and job;
- whether the defendant has appeared in court to face charges for which bail has previously been given; and

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6 Section 13 Bail Act 1980-1989. When the footnotes refer to a section, but not an Act, in the remainder of this paper that section is in the Bail Act, 1980-1989.

7 Section 7.

8 Section 16(1)(a).

- whether the evidence against the defendant is strong (-that is, is it likely that the defendant will be convicted of the charge for which bail is being considered).[9]

If police refuse bail and the defendant later applies to a court for bail, the court must make its order on the same criteria as the police. The court must release the defendant unless satisfied that there is an unacceptable risk of one of the events outlined above. They must take into account the same factors as the police in assessing this risk.[10]

In summary, then, when a defendant is charged with an offence, neither the police nor the courts will grant bail where there is an unacceptable risk that -

(i) the defendant will fail to appear at court when required; or

(ii) the defendant would either commit an offence, endanger the safety or welfare of members of the public, or interfere with witnesses.

In addition, if the charge is for armed robbery or involves drugs, the defendant will only be released if he or she can prove that being held in gaol before trial is not justified.

These 3 areas will now be discussed in more detail.

(a) Where there is an unacceptable risk that a defendant will fail to appear at a court hearing date.

The Commission considers that refusal of bail in these circumstances is justified. The integrity of the criminal justice system demands that people who commit offences must answer and be punished for these offences.

However, the Commission is concerned about the width of this ground in present legislation. Problems arise - for example if a defendant has failed to appear once before, does this constitute an unacceptable risk that he or she will fail to appear on this grant of bail? If a defendant has not appeared at court for the hearing of a minor charge for which it is accepted practice that no appearance is necessary (see page 34) then should this be taken into account?

The Commission therefore considers that legislation should clarify when a previous non-appearance can later be considered by a court.

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9 Section 16(2).

10 Sections 8 and 9.

(b) Where there is an unacceptable risk that a defendant would either -

- **commit an offence;**
- **endanger the safety or welfare of members of the public; or**
- **interfere with witnesses.**

On these grounds, a defendant could be detained on the basis of a future possibility.

A survey undertaken by the Commission[11] reviewed the cases of all defendants (115) who made applications for bail in October 1989 in the Brisbane Magistrates Courts. At the time a court first considered bail, bail was refused to 18 applicants. The reasons given for 38.39% (7) of these refusals involved at least one of the above categories.

Decisions about whether an individual will pose a risk in the community are often subjective. As a consequence, mistakes are unavoidable. Some defendants will be released but go on to commit serious crimes. Other defendants who would never have committed further crimes or who may be found not guilty may be needlessly deprived of their freedom.

American research in this area has suggested that the margin for error in this type of decision-making may be as poor as 10 inappropriate detentions to secure 1 held appropriately.[12]

Australian research about the reliability of assessing whether a person poses a risk to the community is scant. However, a Victorian Law Reform Commission preliminary study highlights the difficulties in this area.

The review concerned the assessment made by the Victorian Parole Board of 35 people who had been detained in prison at the Governor's Pleasure.[13] Assessments were made by the Parole Board based on quarterly supervision reports over the 5 year period following release. Nine of these people were assessed by the Parole Board as having a "good" prognosis after this 5 year period. Only 4 of the 35 came to the subsequent attention of the criminal justice

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11 Survey description and results can be found at page 84.

12 J.S. Goldkamp "Danger and detention: a second generation of bail reform." Journal of Crim Law and Criminology Vol 76 No 1 Spring 1985 page 1 at page 51, citing empirical research conducted by Angel, Green, Kaufman and Van Loon.

13 These 35 people were released from January, 1974 to December, 1988, and had been tried during the period 1959 to 1979. It is generally a condition of release from Governor's Pleasure in Victoria that the releasee undergo supervision for a period of 5 years.

system after their release from gaol. Significantly, all 4 had a "good" prognosis at the time they were discharged from supervision 5 years after their release.

It is difficult to accept that evidence showing a tendency towards future offending or dangerous behaviour is sufficient to justify detention.

If it were accepted that such evidence justifies detention, then individuals who showed a tendency towards future offending or dangerous behaviour would be detained whether or not they were charged with an offence or were waiting for trial. This cannot be supported. Members of the community who are not known to have committed any offence cannot be forcibly detained unless they fulfil the criteria necessary to commit them to a mental institution.

Even those convicted of criminal offences cannot have an extra term added to their prison sentence because a court considers that they may pose a danger upon their release.[14]

It would therefore seem illogical to allow those who are presumed innocent by the law to be detained for the prevention of possible future crimes.

In these circumstances, the Commission believes that the refusal of bail on the basis of a future possibility is not justifiable - with two exceptions.

First, the community must be protected from defendants who are likely to commit a violent offence.

The problem which the Commission faces is how this potential can be assessed. The Commission thinks that 3 factors must be present before detention could be justified -

(a) the defendant must have been charged with or convicted of an offence involving violence against a person;

(b) the prosecution must provide the court with evidence showing that the defendant would be likely to commit crimes involving violence before trial; and

(c) the court must be satisfied that there is an unacceptable risk that the defendant would commit crimes of a similar nature before the trial if he or she was released.

Secondly, the potential that a defendant may attempt to dissuade witnesses from testifying cannot be condoned.

However, the problem is to decide what action by the defendant could be

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[14] Veen v R [No2] (1987-1988) 164 CLR 465.

regarded as sufficient to dissuade a witness from testifying? For instance, is a real likelihood that the defendant would repeatedly telephone a witness enough?

The Commission considers that justice cannot be served if witnesses are frightened away from giving evidence. However, some witnesses may remain unaffected after a defendant has contacted them with requests not to testify. Other witnesses, especially victims of crimes such as rape or criminal domestic assault, may be deterred through a chance contact with the defendant.

In the Commission's view, detention is not justified unless the court was satisfied on evidence presented to it that there is a real likelihood that -

(a) the defendant would attempt to dissuade a particular witness from telling the truth at the defendant's trial or committal proceedings; and

(b) that witness would be dissuaded by the defendant's actions from telling the truth at the trial or committal proceedings.

In all other cases, the majority of Commissioners considered that the lack of certainty inherent in predicting a future possibility could not justify a defendant's detention until trial.[15]

This would mean that defendants charged with property offences could not be detained because of a likelihood that they may re-offend whilst on bail. If these defendants are charged with further offences whilst on bail, then their bail may be cancelled.[16] At this point, their detention will be based upon actual, rather than possible, allegations of re-offending.

The number of people kept in gaol before their trial may decrease as a result.

This may alarm some members of the community needlessly. In West Germany, the number of people kept in gaol before their trials decreased by one-third between February, 1983 to February, 1988. During this period, the sentenced prison population fell by about 15%. Yet these reductions have reportedly occurred without any negative effects on either the level of fear of crime in the community, or levels of crime.[17]

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15 The Chairman of the Queensland Law Reform Commission, the Hon. Mr Justice McPherson, dissented.

16 In addition, when defendants are charged with an indictable offence whilst on bail they will not get bail unless they can establish why their detention is not justified - section 16(3).

17 J. Graham "Decarceration in the Federal Republic of Germany" Brit J Crim Vol 30 No 2 Spring 1990 at page 150.

(c) Where the offence facing the defendant is armed robbery or involves drugs

At present, defendants charged with serious drug or armed robbery charges will not be granted bail unless they can establish that their detention cannot be justified.[18]

The prosecution must normally establish the reasons why a defendant should not be released on bail. Drug and armed robbery charges leave the defendant, not the prosecution, with the responsibility of proof. Bail is therefore more difficult for a defendant to obtain.

The Commission realises that this position may reflect community concern about the seriousness of these crimes.

However, the need for special rules for these two classes of defendants has been questioned. For instance, the Queensland Law Society Inc wrote to the (then) Attorney-General in 1988 suggesting that this special requirement was not justified for those charged with drug offences.[19]

Armed robbery is a violent offence. The need for a special rule to deal with defendants charged with violent offences who may reoffend has been discussed on page 9. It does not seem logical to the Commission to deal with those charged with armed robbery in a different manner from those charged with, for instance, rape. Under the existing law, those who drive a get-a-way car in an armed robbery must show that they should not be detained before bail can be granted, while those charged with rape must be granted bail unless the prosecution establishes that one of the exclusions (discussed at the beginning of this section) applies.

Defendants charged with serious drug offences in this State face severe penalties. For instance, a person charged with supplying heroin or cocaine may, if convicted, be sentenced to a maximum penalty of life imprisonment.

The incentive for those facing criminal charges to avoid their trial may arguably increase with the severity of punishment upon conviction.

The findings of Commissions which have considered whether defendants charged with trafficking drugs are more likely to avoid trial than other defendants, are contradictory.[20]

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18 Section 16(3).

19 Letter from the Queensland Law Society Inc to the Hon P.J. Clauson MLA dated 18th October 1988.

20 The 1979 Williams Commission accepted that defendants charged with drug trafficking absconded at a disproportionately high rate. The 1979 Woodward Commission was of the opinion that the rate at which defendants charged with drug trafficking attended for trial was not disproportionate to that of defendants facing other charges.

The 1983 report of the Stewart Royal Commission of Inquiry into Drug Trafficking details the contradictory evidence and observations on the question, but makes no conclusive observation.[21]

The authors of a study of 1984 drug offence charges undertaken in New South Wales concluded that-

> "No reliable evidence of a relationship between type of drug charge and likelihood of absconding was found. Nor was any evidence obtained suggesting that those allegedly found in possession of large quantities of a drug were more likely to abscond.
>
> It follows that the legislative qualification to the presumption in favour of bail for alleged drug offenders is unwarranted and undesirable."[22]

In the survey undertaken by this Commission,[23] twenty-nine defendants in the Supreme Court sample group (58%) faced a drug offence as a major charge.

Significantly, only 1 of the defendants (3.45%) was refused bail until trial. This defendant faced a Federal, not State, drug charge. By comparison, the bail refusal rate of defendants facing major charges for offences not involving drugs was 23.8% (5/21).

10.71% (3/28) of defendants facing a major charge of a drug offence who were released on bail are still at large. 6.25% (1/16) of defendants facing a major charge not involving drugs are still at large.

The sample is too small to make any conclusive observations. It may, however, indicate that defendants charged with serious drug offences are marginally more likely to abscond than defendants facing non-drug charges.

However, the rate at which defendants charged with drug offences are refused bail merits comment. Defendants facing drug charges appear to be significantly more likely to get bail than defendants facing charges not involving drugs.

While theoretically the legislation makes it more difficult for defendants in drug matters to get bail, this does not appear to be reflected in practice.

In this light, the Commission would appreciate community views about whether and why different bail rules for those charged with drug offences should be maintained.

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21 Royal Commission of Inquiry into Drug Trafficking Report February 1983 Australian Government Publishing Service, Australian Capital Territory 1983 at pages 548-558.

22 D. Weatherburn et al "Drug Charges, bail decisions and absconding" Australia & New Zealand Journal of Crim (June 1987) 29 at pages 107-108.

23 The survey results start on page 83.

B. Automatic review by courts of defendants who have been refused bail by the police.

A census taken throughout Queensland's prisons on 1st March, 1991 revealed 222 defendants were in prison awaiting trial. Over 50% of these defendants had made no application for bail.[24]

These defendants had initially been refused bail by the police following arrest. After a police officer has refused bail, a court may override this decision at any time. The present legislation does not limit a court when it considers bail. However, as a general rule courts do not consider granting bail unless the defendant applies for it. Defendants who do not apply for bail at the time that they first appear in court will continue to be kept in gaol.

The ability of some defendants to make bail applications is restricted. Those with insufficient personal funds to pay a private lawyer must rely upon assistance from the Legal Aid Commission or the Public Defender's Office. These organisations may refuse to grant a defendant assistance. In these circumstances, defendants wishing to apply for bail must present their own cases. This is a daunting task. The disincentives to defendants making such an application are obvious - lack of familiarity with what to say and do in court, lack of legal advice in presenting their best case, and restricted ability to communicate with those outside gaol whose assistance or evidence may sway a court to grant bail.

The Brisbane-based Prisoners' Legal Service Inc. has set up an advice and assistance service for prisoners at Boggo Road gaol (Brisbane Correctional Centre) wishing to make their own bail application. This service is not available in other Queensland prisons.

The Commission considers that defendants should not remain in gaol before their trials unless a court has considered whether or not detention is necessary.

This view is strengthened by the fact that defendants have been kept in gaol before their trial when they were not later convicted of the offences for which they were placed in gaol.

In its review of 50 defendants who made bail applications in the Supreme Court in October and November 1989, the Commission found that 45 of these defendants are known to have spent time in gaol after their first appearance in court.

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[24] The census was undertaken by the Queensland Corrective Services Commission. Of the 222, 7 defendants had been granted bail but could not comply with the conditions of bail, 94 had been refused bail, and 118 had made no application for bail following a refusal of bail at the watch-house. The bail status of 3 defendants was not known.

Of these defendants, 31.11% (14) were not convicted of the criminal charges for which they were being held in gaol.[25]

The Commission is considering legislation to create an automatic review by the courts of people who have been refused bail by the police. The proposal is that defendants must be released after a set amount of days unless a court orders otherwise. If there is sufficient evidence to justify a defendant's detention, then an application should be made by the police or prosecuting authorities for a court order that the defendant be kept in prison until trial.

If no application is made by the police or prosecuting authorities within this time, the defendant must be released.

The proposal will only affect those defendants who do not make a bail application at their first appearance date. It will not affect a defendant's right to apply for bail soon after the police have refused to release a defendant.

The defendant must still be brought before a court as soon as possible following arrest. If the defendant wishes to apply for bail at a time earlier than the set period, an application can be made at this first court appearance and the present procedure would apply.

It will also not apply to defendants who have been refused bail by the courts.

The Commission seeks public views about this proposal. In particular, the Commission would like comments about the period of time that should pass before the defendant must be released. This time must take into account the time taken to transport country defendants to courts. For instance, if a defendant is charged in Mt. Isa with murder, then the prosecuting authorities will be required to arrange to have the person transported to the Townsville Supreme Court.

C. Limits on refusal of bail.

Bail is designed to ensure that defendants appear at their trial and, if found guilty, are punished.

If a defendant commits an offence for which a sentence of imprisonment is not likely to be imposed, the Commission believes that detaining a person before trial is unjustified.

A survey undertaken by the Commission produced noteworthy results in this area.[26]

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[25] For a full summary of these defendants, turn to page 96.

[26] The survey findings start on page 93.

The survey was hampered by difficulty in accessing some of the data held by Queensland Corrective Services Commission of the time spent by people in gaol before trial. Therefore it was not always possible for the Commission to compare the time spent by a defendant in prison before trial with the penalty the defendant received at trial.

However, of the 50 defendants in the Supreme Court sample a number of non-custodial sentences were applied to people who had spent time in gaol prior to their trial. These included -

(i) a defendant charged with 5 offences including a major charge of stealing was held in gaol for 1 month and 27 days prior to trial. At the trial, the defendant was convicted but not punished;

(ii) a defendant charged with four drug charges, the most serious being possession of a a drug of dependence, spent 4 months and 28 days in gaol prior to trial. Three charges were dropped. On the fourth charge, the defendant was convicted but no further penalty was imposed.[27]

The results obtained in the Magistrates Court sample were not as glaring. However -

(i) a defendant facing charges of stealing and false pretences spent 1 month and 27 days in prison before trial. He was convicted but no further penalty was imposed;

(ii) another defendant, charged with failing to comply with her conditions of probation, spent 5 days in gaol. Upon conviction, she also received no further penalty.

There is nothing in the present Act about taking periods in gaol before trial into account when passing sentence.

In the Supreme Court, the usual practice is for judges to double the period for which the defendant was held in gaol before trial and deduct this total from the sentence of imprisonment that is considered appropriate.[28]

It is not known what practices Magistrates may be applying in their courts.

If any penalty is imposed following a period in gaol before trial, this period should

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[27] This defendant was sentenced to be detained until the rising of the court.

[28] See for instance the unreported judgment of Mr Justice Ambrose in Whelan v A-G of Queensland CAA No 144 of 1990, and the recent Supreme Court judgment of R v Eastwell delivered on 9th March 1991.

be taken into account by the court.[29] A penalty extra to a prison sentence has been thought appropriate.

However in 4 of the 165 cases the Commission reviewed there has been a period spent in gaol prior to trial, where, at trial, no further penalty has been given to the defendant. In these cases, refusal of bail has been effectively the punishment given to the defendant - a punishment given before a court could give proper consideration to the evidence, to the circumstances of the defendant, and to what, if any, term of imprisonment would be appropriate.

For these reasons, the Commission believes that judicial officers should examine both the type of charge and the details of the case.

A principle could be inserted in the legislation that bail should be granted when there is a likelihood that, if convicted of the charge, the defendant would not be ordered to serve a term of imprisonment.

The adoption of such a principle would in no way increase the number of potentially violent defendants who are released on bail. This is because it is likely that a defendant with a demonstrated propensity towards violence who was convicted of a violent offence would be ordered to serve a period of imprisonment. The principle would not apply.

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29 R v Eastwell ibid.

3. THE NEED FOR DIFFERENT RULES IN SPECIAL CASES

The impact of a refusal of bail to two classes of people - aborigines and young people - can cause irreversible harm.

The general rules described in the previous section for deciding whether or not bail should be granted do not address the effects of imprisonment upon these two classes.

The Commission considers that special rules are required.

A. Detaining young defendants

It's 10 p.m. at the Southport watch-house. Emma is woken when keys jangle as a police officer opens the cell to let in another young person ...

"Hello. Here's company! What's ya name?"
"Judy."

"You don't look more than 14! What did ya do?"
"I was ridin' in a car with a mate, an' the cops pulled us over. Said the car wasn't roadworthy. What would they know? They searched the car and then they searched me. I got busted 'cos I had a joint in me back pocket."

"Yeah, but why didn't they let you go home?"
"I wouldn't tell them me mum's name or where I lived. Mum's boyfriend'll kill me if he knows I'm in trouble with the police. I'd rather stay in this dump for the night than face him."

"Won't be just tonight. You'll have to stay here 'til Monday at least. Sometimes it takes 'em even longer to get 'round to driving you to the Children's Court."
"Yeah.... Well.... I'm not gunna go home an' I'm not tellin' mum. So, you sound like you've done this before. What's your story?"

"Done it too often. They say that I broke into the old factory site. I didn't. Trouble is, the police know me. They've got me on other burgs before - lots of times. So, they think I did it. They told the magistrate I shouldn't get bail because I didn't turn up to a cuppla court dates. Didn't have the bus fare, did I. So, the magistrate said "O.K." Now I've got to sit it out in this dump 'til my trial."
"I thought there were other places that you could - you know - go if you were a kid after you got nicked by the cops."

"They're full at the moment. Sometimes happens. Nup - I'm gunna be here until there's space at the other places."
"So what's it like here?"

"Are you kidding! Have a look around. It's underground! Come to sunny Queensland and see the fluro lights. The food's takeaway and usually cold - but it's food. You get kept awake at night by the drunks in the other cells. Sometimes a fight breaks out. Haven't had a shower for a couple of days, and won't have one until a woman cop comes on duty. And you'll be wearing the same clothes until you get outa here...

Like adults, young people are entitled to bail unless an exception applies. The exceptions which entitle a police officer or court to refuse bail to an adult apply equally to young people. In addition, bail may be refused to a person under 17 years of age when police or a court are satisfied that the young person should remain in custody for her or his protection or welfare.[30]

Ironically, the consequences of a refusal of bail on these grounds may work against the young person's protection and welfare. Both before and after a child's first appearance in court, the young person can be detained in a facility that is recognised as one of the worst forms of incarceration - a police lock-up or watch-house.

Watch-house accommodation is unsuitable for the care of the young. Facilities are sub-standard. Further, young people who have had no or little contact with the criminal law may be corrupted by repeat offenders.

For instance, on 29 April 1988 a 16 year old youth with a long criminal record was convicted of raping and assaulting two 14 year old boys in a Queensland watch-house. The event took place in a three bed juvenile cell which was at the time accommodating four male youths.[31]

There are only four custodial centres for young people in Queensland.

Two are close to Brisbane. The Sir Leslie Wilson Youth Centre at Windsor has 20 beds for young people remanded in custody. The John Oxley Youth Centre at Wacol has 32 beds for young remandees.

An arresting police officer who has refused bail to a young person has a duty to

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30 Section 16(1)(b) and section 8 Children's Services Act 1965-1988.

31 Courier Mail 29th April 1988 and 6th May 1988.

arrange for the care of that young person.[32] Once a young person is arrested and refused bail, police may choose to transport the young person to Wacol or Windsor, or to place the young person in readily accessible secure accommodation - the police watch-house or lock-up at the back of their stations.

No doubt, convenience and efficiency would play a factor in the decision where to place the young person. However, for many police, the demands of their jobs do not allow them the time that it would take to transport the young person to Wacol or Windsor. This is particularly the case if the young person is arrested on the Gold Coast, the Sunshine Coast, or in Ipswich.

Young people may find that they remain in watch-house custody after a court refusal of bail.[33] In certain periods over the last 2 years, both the Sir Leslie Wilson Youth Centre and the John Oxley Youth Centre have been unable to accept young people detained before their trial due to staff or bed shortages.

In a submission received by the Commission from the Youth Advocacy Centre Inc. the present and future detriment to a young person placed in a lock-up or watch-house was highlighted -

> "The watch-house experience increases the prospect of 'criminalising' young people, either in their own, their peers', or authorities' perception, and may lead to further involvement in the criminal justice system ...
>
> For homeless youth, the chances of detention in a watch-house are, of course, greater, which means further stigmatising and problems for this doubly disadvantaged group."

The Department of Family Services and Aboriginal and Islander Affairs points out -

> "The premature or unnecessary incarceration of children increases the likelihood of their becoming recidivist offenders."[34]

The Commission is greatly concerned that young people are being detained for any period of time in police watch-houses or lock-ups.

In particular, the present exclusion, which allows the refusal of bail to young people on the grounds of their protection or welfare, will be self-defeating while young people continue to be remanded in police lock-ups.

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32 Section 26(1)(b)(i) Children's Services Act 1965-1988.

33 See sections 26(2)-(6) Children's Services Act 1965-1988.

34 Letter to the Commission dated 1st March 1991.

A prohibition against the detention in police facilities of young people would require an amendment to section 26 of the Children's Services Act. A review of this Act is not specifically within the Commission's brief, but the Commission cannot ignore the harmful effects that follow a refusal of bail for young people. The prohibition should be made.

The Commission also believes that the exclusion of a child from bail on welfare grounds should be abolished. The Commission is concerned for the welfare of young people. The removal of the present provisions will in no way inhibit the police from commencing care and protection applications when a young person's welfare is in jeopardy. However, to deal with the question of welfare through a Bail Act is inappropriate. It cannot be condoned.

People charged with offences can be summoned to attend at court. No arrest is made, so that no decision about whether bail is appropriate need arise.

The summons process is used infrequently. The most recent annual report of the (now) Queensland Police Service documents that, of the 3,847 young people under 17 years of age who were charged by Queensland police during 1988-1989, only 6.55% (252) were summoned to court. The question of bail arose in 93.45% of cases.[35]

One writer has observed that this compares unfavourably with other Australian States which prefer the use of summons instead of arrest for young defendants. For instance, 61.8% of Children's Court cases were begun by summons in South Australia during 1985-1986.[36]

Young people should be summoned, not arrested, in all but serious or violent offences.

Where a serious or violent charge is made, the Commission can recommend that special rules apply to a refusal of bail to these young people.

For instance, "No fixed place of abode" is a common ground given by police for refusing bail to young people.

Certainly, the fact that a young person cannot or will not give a permanent address might cause disquiet to police officers anxious to ensure that young persons can be arrested if they do not appear in court. Without an address, a young person would be difficult to find.

The question, however is whether this possibility can be used to justify detention of a young person.

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35 Queensland Police Department Annual Report 1989 at page 77.

36 J. Seymour Dealing with young offenders The Law Book Co. Sydney at page 216.

In New South Wales the law now directs that, for the purposes of assessing whether to bail a person under 18 years old, "the fact that a person does not reside with a parent or guardian shall be ignored."[37]

Victorian legislation provides that bail cannot be refused because a young person has no or inadequate accommodation.[38]

The Burdekin Inquiry recommended that bail legislation should specifically state that lack of accommodation is not sufficient reason to refuse bail.[39] The Commission agrees.

But is this enough? What of a young person, like Judy, who declines to tell police her address because her actual or de facto parents will be made aware of her offence and react violently to her? The New South Wales and Victorian legislation would not cover this fact situation. Queensland law should.

In those cases where a court is not prepared to release a young person facing a serious or violent crime, the young person could be required to live at a bail hostel until the court hearing. This alternative is discussed on pages 27 to 31.

Finally, the Commission can recommend that the Bail Act contain conditions for the release of young people which respond to the circumstances of the young.

The more responsive that bail conditions are in addressing the concerns held by courts and police about the release of a young defendant, the more likely it is that the young offender will not be detained in custody.

Presently, however, conditions of bail in the Bail Act make no distinction between adult and young defendants.

For instance, securities and sureties[40] are often used to secure the attendance of adult defendants. By comparison, it is unrealistic to expect that young defendants, particularly those who are homeless or with access to only limited financial resources, will have the same potential as adults to secure a court attendance through these means. In some cases, a parent may refuse to act as a surety, thus forcing the young person to remain in detention.

Conditions more appropriate to young defendants could include -

- close supervision equivalent to a probation order;

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37 Section 32(4) Bail Act (New South Wales) - effective 18th December 1988.

38 Section 128(7) Children and Young Persons Act 1989 - the provision has yet to become operational.

39 "Our Homeless Children" Report of the national inquiry into homeless children by the Human Rights and Equal Opportunity Commission 1989 at page 265.

40 These two concepts are explained on page 52.

- prohibited association with a particular group of young people;
- limitations on activities; or
- restrictions from attending particular places.

B. Detaining aboriginal defendants

John Pilot died in the Brisbane City watch-house in the early hours of 25th January 1987.

He had been arrested for being drunk in a public place at 6 p.m. on Friday 23rd January 1987. Thirty-six hours later, he was discovered lying facedown in a pool of blood on a watch-house cell floor.

The cause of death was diagnosed as asphyxia brought about by a fit following a complete withdrawal of alcohol.

Following Pilot's arrest, an outstanding warrant of arrest was served upon him. He had previously failed to appear in Holland Park Magistrates Court to answer a charge of unlawful wounding. Whilst Pilot was convicted, but not punished, for being drunk in a public place on the morning following his arrest, he was not given bail on the outstanding unlawful wounding charge. He was therefore to be kept in gaol until the hearing of the outstanding charge on 27th January 1987.

Pilot was an unemployed, homeless, aborigine. In the 10 years preceding his death he had been arrested for drunkenness at least 56 times.

Pilot had 4 months previously suffered an epileptic fit following arrest whilst detained in the watch-house. No record accessible to watch-house staff was made of this fit.

Within 24 hours of Pilot's arrest, a fellow inmate witnessed Pilot trembling whilst receiving his evening meal. The same inmate heard coughing, vomiting and thumping consistent with a person beating his head against a cell wall from the direction of Pilot's cell during the evening prior to his death. Two inmates heard similar noises.

Pilot's cell was on the second level of the watch-house. Aside from contact with police during cell checks, inmates had to yell if they wished to communicate with watch-house staff.

During the last of 2 cell checks by watch-house staff whilst Pilot was in custody, police noticed blood on Pilot's cell floor, bed and door, and a cut above Pilot's left eye. No questions were asked. No further checks of Pilot's cell were made for nearly 6 hours.

Between 1st July 1986 and 30th June 1987, 23,880 arrested people were processed through the Brisbane watch-house. 6,608 were charged with drunkenness.

Commissioner Wyvill, who has inquired into those Queensland deaths investigated by the Royal Commission into Aboriginal Deaths in Custody, concluded that Pilot's death was a consequence of official neglect -

> *"The place where he was incarcerated, the system of purported checks on prisoners and the neglect by senior watch-house staff all contributed."*[41]

Both aboriginal and white defendants have died in the watch-house following arrest and a refusal of bail.

In the case of aborigines in particular, many have been arrested while drunk or for being drunk in a public place.

That death may indirectly follow from a refusal of bail has generated public outrage.

As a consequence of the death of aboriginal people held in gaol, the Royal Commission into Aboriginal Deaths in Custody was established.

The investigation conducted by the Royal Commission into Aboriginal Deaths in custody has spanned nearly 4 years. Its report and recommendations are currently being finalised.

In these circumstances, it would be premature and inappropriate for the Queensland Law Reform Commission to conduct its own research or report upon this important and sensitive area.

However, Queensland initiatives concerning the manner of dealing with people who are refused bail following arrest for being drunk in either a public place or hotel are contained in the Bail Act.[42] This initiative is ineffectual. The Commission therefore feels compelled to highlight the problem.

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[41] The story has been summarised from the findings of Commissioner L.F. Wyvill "Report of Inquiry into the death of John Raymond Pilot" Australian Government Publishing Service Canberra. The quote appears at page 1.

[42] Section 14B.

The recommendations made in the interim report of the Muirhead Royal Commission into Aboriginal Deaths in Custody may have provided an appropriate start to reform in this area. So far, government response to these recommendations has been minimal.

The interim report, published in December 1988, included the following three recommendations -

(1) "In jurisdictions where drunkenness has not been decriminalised, governments should legislate to abolish the offence of public drunkenness."

New South Wales, South Australia and Northern Territory had decriminalised public drunkenness before the making of this recommendation.

Western Australia has responded to the recommendation by recently enacting legislation to decriminalise the offence. Victorian legislation has been prepared, but not enacted.

Queensland and Tasmania will soon be the only States that impose criminal penalties upon those found drunk in a public place.[43]

Recent developments illustrate no impetus in Queensland to reverse this situation. In a review of the Liquor Act (the Act which criminalises public drunkenness) presented to the Queensland state government in 1990, the issue of public drunkenness was not addressed.[44]

(2) "The abolition of the offence of drunkenness should be accompanied by adequately funded programs to establish and maintain facilities for the care and treatment of intoxicated persons."

Through a 1989 amendment to the Bail Act 1980-1989, Queensland appears to have adopted this measure in part.[45] The amendment gives to police officers in charge of watch-houses a discretion to grant bail to a person who has been charged with being drunk in a public place or a licensed liquor outlet on two conditions. First, the person must pay a cash deposit. Secondly, the person must be taken to a "declared place". A person can be given bail in this manner whether or not charges additional to public drunkenness have been laid.

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43 Queensland: section 81 Liquor Act 1912-1989. Tasmania: section 4 Police Offences Act 1935. In Queensland, it is also an offence to be drunk on licensed premises.

44 The information was obtained from researchers working at the Muirhead Commission, and confirmed by the Department of Tourism, Sport and Racing.

45 Section 14B.

The amendment contemplates the release of defendants who are drunk into detoxification centres. At "declared places", these defendants can be given a level of care and supervision not available at watch-houses, as the story of John Pilot so tragically highlights.

At the time of writing this paper, no places to which these defendants can be released have been declared suitable. The Commission understands, however, that a declared place could be piloted soon in Mt. Isa.

In contrast, Northern Territory, New South Wales, South Australia and Western Australia have set up diversionary facilities for intoxicated defendants. Legislation for the establishment of diversionary facilities in Victoria is soon to be presented to parliament in that State.

(3) "Legislation decriminalising drunkenness should place a statutory duty upon police to consider and make use of alternatives to detention of intoxicated persons in police cells. Alternatives should include the options of taking the intoxicated person home or to a facility established for the care of intoxicated persons."

Even if places had been declared as suitable for the release of intoxicated defendants in Queensland, the Bail Act amendment does not place a duty upon a police officer in charge of a watch-house to consider alternatives to watch-house custody for defendants who are drunk. The police officer in charge may choose whether or not to release a defendant to a declared place.

The Commission's view is that the Muirhead interim recommendations and the issue of public drunkenness cannot be and have not been dealt with in Queensland bail legislation.

The Queensland provision allowing a person to be released on bail to a declared place ceases operation in May 1992.[46] Although it has been technically operational for 2 years, the provision serves no practical purpose in the absence of the establishment of "declared places". It is not desirable to allow ineffectual legislation to remain on the statute books.

However, a broader imperative motivates the Commission's view. An initiative to establish places to which those who may injure themselves or others due to their drunkenness is to be supported. New South Wales, Victoria and South Australia have taken this approach. Care and supervision should be given to intoxicated people whether or not a criminal offence has been committed. The legislation which authorises the establishment of places for the care of drunken people should not be incorporated within legislation dealing with the criminal law alone.

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46 Section 14B(8).

The Commission's final recommendations on this question will rely upon the government's response to the Muirhead Commission's final report. Researchers working on the Muirhead Commission's final report have told the Law Reform Commission that, in those States which have decriminalised public drunkenness but have not established places for the care of those found drunk, people found drunk have been arrested for other offences.

If the government decriminalises public drunkenness following the Muirhead Commission's final report without establishing declared places for the care of those found drunk in public, the arrest and detention of drunk people in watch-houses may well continue. If this occurs, special provision for drunken defendants will need to be made in bail legislation. For instance, those who are drunk when arrested and who would not normally be released on bail could be bailed to a bail hostel. The discussion about bail hostels starts on the next page. The lesson to be learnt from the death of John Pilot cannot be ignored.

4. *BAIL HOSTELS - ALTERNATIVES TO DETENTION IN GAOL*

In Queensland, judicial officers consider a defendant's home environment, employment and background when deciding whether to grant the defendant bail.[47]

Defendants who come from stable backgrounds with community links and responsibilities are regarded as more likely to abide by bail conditions and to appear at their trials than defendants who are unemployed with nowhere permanent to live.

An unemployed or homeless person runs a greater risk of being kept in prison before trial. Poverty may jeopardise freedom.

Bail hostels address this inequity. They are supervised hostels where defendants are required to live before their trial. They are set up to accommodate those who lack a stable or permanent living environment and would otherwise risk being gaoled before trial.

Bail hostels are a United Kingdom initiative.

By the beginning of 1977, nine bail hostels were operating in that country; three in London and the remaining six in other parts of England.

A U.K. Home Office study of 351 defendants ordered to live in a bail hostel as a condition of bail during the first half of 1977 produced the following results -

(1) 40% of the sample were under the age of 21 and a further 25% were aged between 21 and 29 years;

(2) 16% of the sample were first offenders;

(3) Almost half of the sample had previously served a custodial sentence;

(4) The offences for which the sample were charged ranged from murder to non-indictable offences. Burglary, robbery and theft accounted for 55% of the offences facing these bail hostel residents;

(5) In the cases of nearly two-thirds of the sample, the fact that the defendant had no fixed address was given by the magistrate as the reason for ordering that the defendant live at a bail hostel until trial. In a further 27% of cases the fact that the defendant was unable to return home (for instance, because of family resistance) was given by the magistrate as a reason for making bail conditional upon residence

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[47] Section 16(2)(b).

in bail hostels. Therefore, 326 of the 351 people in the sample stayed in a bail hostel because they had nowhere suitable to live;

(6) One-third of the sample either kept their jobs or found work during the time that they stayed in the hostel. This would seem to be one of the clear advantages of bail hostels. If defendants are gaoled, they almost certainly lose their employment. Bail hostels allow defendants to continue their employment - the curfew hours at hostels are usually 11.00p.m. to 6.00a.m.;

(7) More than one-third of the sample broke bail. Eleven people failed to arrive at the hostel. Eighty-six people absconded. Thirty-one were charged with further offences. Fifteen broke other conditions of their bail. This non-compliance rate is a matter for concern. However, the initiative had only begun when this research was conducted. It could be expected that staff were operating on a trial and error basis. With the increased experience of management and staff the non-compliance rate may well have fallen.

The authors of the survey concluded that bail hostels were being used appropriately by the courts to accommodate people who would otherwise have been kept in gaol until their trial.[48]

A research study conducted three and a half years later came to opposite conclusions. The study was confined to one hostel over a 6 month period during 1982-1983. The sample size was 59. The total number admitted to the hostel during the period of the research was 64.

The researchers found that -

(1) 91% of hostel residents had spent time in gaol because of a refusal of bail before being bailed to a hostel;

(2) 61% of residents were aged 26 years or less;

(3) Only 9 of the residents (15.3%) had no fixed address before arrest. A further 7 had been charged with offences against either their wife or children, making their return to home unlikely;

(4) 95% of the sample were unemployed;

(5) 32% of the sample had one or no prior convictions;

(6) 36% of the sample had previously received a sentence of imprisonment;

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[48] K. White and S. Brody "The use of bail hostels" [1980] Crim LR at pages 420-425.

(7) 22% of residents breached bail by absconding from the hostel (13). However, only two of those who absconded remained at large at the end of the survey period;

(8) 25% of the sample (15) thought that their families could have provided them with accommodation.

Final outcomes were not available to the researchers in 16 cases. Of the remaining 43, only 9 (23%) received custodial sentences for their offences.

The conclusion reached by these researchers was not positive. They commented that a bail hostel -

> ".....designed to accommodate homeless offenders, or perhaps act as some sort of 'halfway house' for offenders whose character and offences might make them a risk to the community if they were granted unconditional bail, was being fuelled, by and large, with young, unemployed, in the main non-serious offenders, most of whom had local links and ties."[49]

Nevertheless, the British government announced funding for a further 200 bail hostels during 1989-1990, raising the number of places in bail hostels to over 2000.[50]

Australia's first bail hostel opened in Fremantle, Western Australia in July 1983. It is the only bail hostel operating in the southern hemisphere.

The hostel has 24 beds. Twenty are reserved for male defendants, and 4 for female defendants.

From its commencement, the occupancy rate has been low. During the first 2 years, the occupancy rate was less than 60%. In the following 2 years an occupancy rate of around 60% was maintained. At present, the average occupancy is 12 (50%). Either the scheme has not attracted the confidence of courts, or the courts do not know about bail hostel services.

Residents at the hostel are able to move around freely between the hours of 6.00a.m. and 11.00p.m. The residents are served the same meals that are given to prison (correctional) officers at work. Few residents are home for lunch-times, although only 2 or 3 out of every 12 residents are employed at any one time.[51]

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[49] J. Pratt and K. Bray "Bail Hostels - alternatives to custody?" Brit J Criminal Volume 25 No 2 April 1985 at pages 161-167.

[50] R. Morgan "Remands in custody; problems and prospects." [1989] Crim LR 481 at page 491.

[51] Information obtained from R. Dixon, the manager of the North Freemantle bail hostel.

Although no cost-benefit analysis has been conducted, it has been estimated that the cost of maintaining a person in a bail hostel was less than a third of the cost of keeping a person in prison.[52]

A management study recently conducted of the Western Australian bail hostel concluded that the hostel has not picked up the type of people for which it had hoped.

This appears to be at variance with initial evaluation of hostel clients. From the date it first opened to the end of 1984, 40% of residents had nowhere permanent to live and 90% were unemployed.[53]

In summary, then, bail hostels cannot claim unqualified success on the material available to the Commission.

A high level of absconders have been reported from the hostels. Research from the United Kingdom indicates that the hostels may have brought more people under intensive control by a government department who, in the absence of bail hostels, would otherwise have gone free.

On the other hand, the hostels have provided a cost-effective alternative to the imprisonment of the unemployed and homeless.

The idea has potential. The Commission is considering whether the concept can be reformulated.

A possible reason for the problems associated with bail hostels is their size. The United Kingdom hostels can accommodate up to 60 defendants. The ages of these defendants range from late teens to middle age. Some defendants have previously been gaoled whilst others may have no conviction against their name. The charges facing some defendants are minor compared to the charges facing others. The hostels therefore attract defendants of extremely diverse characters, experience, and backgrounds. Rules and programs adopted in the hostel could not be responsive to this diversity.

These problems may diminish with -

- a reduction in the number of defendants who normally live in a hostel; and
- a development of specialist hostels which target groups of defendants with a common link.

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52 Information obtained from D. Daley, the manager of Development and Advisory Services, Community Based and Corrections (Western Australia).

53 C. Roe "Stirling House Bail Hostel" in Review of Australian Criminological Research ed D. Biles AIC Australian Capital Territory 1985 at page 28.

For instance, on page 20 it was suggested that, in the case of young defendants, refusal of bail should only be considered for serious or violent offences. If bail is refused, it would appear to the Commission that the less restrictive environment of a bail hostel would be more appropriate to house young people than youth detention centres. This is particularly the case where a judicial officer may consider detention appropriate for unemployed or homeless youth.

On page 26 the problems associated with aborigines who are arrested and detained was touched upon. Bail hostels staffed by aborigines may prove a safer environment for those aborigines who would normally be kept in prison before their trial.

The idea will be developed further in the Commission's final report after consultation with relevant government departments.

5. STREAMLINING THE BAIL PROCEDURE

This chapter addresses two systems for dealing with defendants who have been charged with minor offences.

A person who has committed a minor offence can be required to attend court without being bailed. The first section of this chapter looks at this procedure.

If the offence is very minor, bail legislation presently allows a person to be processed without going to court. This system is discussed in the second part of this chapter.

A. An alternative way of requiring a defendant's appearance in court

The decision whether or not to bail a person who has been charged with a criminal offence only comes into play if a person is arrested.

In the previous section, the Commission suggested that young people should not be arrested unless charged with a serious or violent crime. Instead, the charge should be processed through the summons procedure.

Adult defendants, too, should be processed more often through the summons procedure.

The difference between the arrest and summons procedure is highlighted by the following story.

Truong is sitting in a small room in Myers. A store detective says that Truong has shoplifted two jumpers. Truong is talking with two police officers who were called in by the store detective.

"But I didn't do it!"
"You'll have to go to court. It's up to the magistrate whether or not to convict you of shoplifting."

"Well - what now?"
"We'll charge you. It's just a question of how."

"What do you mean?"
"There are two ways we can lay this charge. You can be summoned to court. If we're sure of where you can be reached, we can let you go and serve a summons on you later. The summons will require you to attend court on a specific date. If you don't turn up, a warrant can be issued for your arrest.

"Well, what's the other way?"
"We can formally arrest you, take you back to the police station, and release you on bail. You'll have to sign a form saying that you guarantee to turn up to court on a specific date. If you don't, you will not only be arrested again but you may be guilty of an additional offence - breaching your bail."

"If I go back to the police station, will you fingerprint me?"
"Yes."

"And what happens to the fingerprints?"
"If the magistrate finds that you're not guilty, we'll destroy them."

"Well, who decides whether or not I have to go back to the police station?"
"That's up to us."

During 1990, defendants were required to respond to 26,417 criminal charges in the Brisbane Magistrates Court.

Only 8.9% (2,353) of these charges were laid through the summons procedure. The remaining 91.1% (24, 064) charges were processed after the defendant was arrested by the police.

The summons procedure minimises the trauma of criminal proceedings faced by defendants. Rather than be transported to a police station for fingerprinting, photographing and bail, the defendant is released and, later, served with a summons.

Police processing time is usually minimised through the summons procedure. However, in some cases the police will spend as much time processing and serving a summons on a defendant as it would take them to process a defendant through arrest and watch-house bail. A procedure which would allow the police to serve a summons on a defendant at the time of first contact could be considered.

Warrants can be issued for the arrest of people who do not appear in court on the date required by both a summons or bail.

An additional incentive is provided through the bail procedure - a person who does not respond to a condition of their bail may be found guilty of the additional offence of breaching bail.

Yet, on available statistics, defendants charged under summons are more likely to appear in the Brisbane Magistrates Court on the date required than defendants who have been bailed.

Defendants failed to appear at court when required in 2.7% of the charges which

commenced by summons in the Brisbane Magistrates Court during 1990. By comparison, defendants failed to appear in court when required in 9.4% of the charges initiated by arrest and listed with the Brisbane Magistrates Court during 1990.

This somewhat surprising result may be explained because the summons procedure is only used sparingly. If police have any doubt that a defendant may not appear in court, they are more likely to harness the arrest and bail procedure. Further, defendants who are bailed are generally facing a more serious charge, and therefore penalty, than defendants who are processed through summons. They have greater reason to try and avoid appearing in court.

On the other hand, the high rate of attendance in court of people who are summoned may support an argument that the procedure should be extended for charges where the penalty upon conviction is not great.

Presently, police officers have a discretion whether persons charged with a range of offences should be processed by summons, or by arrest and bail.

In the Brisbane Magistrates Court in 1990 -

- Nearly 40% (935) of charges laid by summons concerned shoplifting. By comparison, only 108 shoplifting charges in that court in 1990 involved arrest and bail.

- Stealing represented the second most prevalent charge to be laid by summons. The court processed 169 stealing charges laid by summons, compared to 1,801 laid through the arrest and bail procedure.

- Around 60% of charges laid by summons concerned either, shoplifting, stealing, false pretences (e.g. bankcard fraud) or assault occasioning bodily harm. In the case of the last three charges, more of these charges were processed through arrest and bail than by summons.

Guidelines setting out whether a person should be arrested or summoned should be developed.

B. Cash deposit forfeit

Queensland bail law includes a system for dealing with defendants who have committed minor offences without the defendant appearing in court.[54]

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[54] Sections 14, 14A and 14B.

Under this system, a person is released on bail after paying a small sum of money. Whilst the bail notice given to the person by the police will tell them to attend at court on a particular day, the person is told that if he or she does not go to court on that day, nothing further is likely to happen. The cash deposit is forfeited when the person does not appear in court.

This procedure is described in the following story.

Rhett got involved in a fight in the Queen Street Mall one Friday night. Later, back at the city watch-house ...

"Rhett, you are going to be charged because of that foul language you used in the Queen Street Mall tonight."
"With what?"

"Offensive language."
"So what happens then?"

"You and your friends have been arrested ..."
"Yeah, and fingerprinted. You took my photograph too. What happens with them now?"

"Because you've been arrested, there are two ways by which you can be charged. You can pay a cash deposit. This is a sum of money that you pay now. It's like a fine. If you don't turn up to court, you're not likely to hear anything more from us."
"How much do I have to pay?"

"We'll work that out. On an offensive language charge, it's usually about $10.00."
"Do I get a conviction against me?"

"Not really. Your court record will say 'cash deposit forfeited.'"
"What if I don't have any money on me to pay the cash deposit?"

"Then I'll have to charge you through the second way. Your court record will record the charge as a conviction. You'll probably be ordered to pay a fine. And, so that we can make sure you turn up at court, we'll have to bail you. In your case, this will just mean that you sign a form saying that you will turn up at your court hearing date. If you don't turn up, then you may also be charged with breaching bail."
"Sounds messy. I've got some money on me to pay that cash deposit. I want to get out of here."

During 1990, 1,266 charges processed through the Brisbane Magistrates Court were disposed of by forfeiture of a cash deposit.

With only three exceptions, all of these charges were laid under the Vagrants, Gaming and Other Offences Act 1931-1989 or the Police Act 1937-1989. Typically, the charges concerned the use of obscene language, offensive or disorderly behaviour, minor assault of police officers, resisting arrest or hindering police.

Cash deposits forfeited during this period ranged from $10 to $300. The standard deposit varied between offences. For the charge of assaulting police, people released on cash deposits were asked to pay $50.00 in all but a few cases. By contrast, only $10 was usually asked of people charged with using obscene language or behaving in an offensive manner.

Many features of the cash deposit forfeit system have merit.

The system deals only with minor crime - the type of crimes for which a magistrate would impose a small fine. The forfeit of the cash deposit operates as punishment through a fine. However, it is technically not a conviction, as a court has not found the offender guilty. The system allows a fine to be imposed without requiring the defendant to undergo the inconvenience and stress of a court hearing. Further, it does not tie up court time (and therefore taxpayers' money) with minor offences when a defendant does not wish to dispute a charge.

The system has safeguards. A defendant can dispute the charge.

However, the procedure can be improved.

First, a person who has insufficient cash to pay a cash deposit at the watch-house will be bailed and required to attend court.

On a random day in the Brisbane Magistrates Court[55] cash deposits were forfeited for six obscene language charges and one disorderly conduct offence. However, three people were bailed to appear in court on that day for the same type of charges - two for the use of obscene language and one for disorderly conduct. They were all fined between $10.00 and $40.00.

In a case where a person who is eligible to be released on a cash deposit, has insufficient money to pay the deposit, a system should be devised to allow payment of the cash deposit to be made within a set period of time, so that court proceedings can be avoided.

Secondly, courts have the power to issue a warrant for the arrest of someone released on cash deposit.[56]

The power has been used sparingly.

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[55] 2nd October 1989

[56] Section 14(10).

However, a defendant released on the cash deposit forfeit system will have been told by the police not to turn up to court. By not attending court, the defendant will have done nothing wrong. It is not acceptable that such a defendant has to undergo the stigma and trauma of another police arrest. The power should be removed.

Both the procedures outlined in this chapter have implications for the amount of information kept by the police on members of the public.

People who are arrested can be (and usually are) taken back to a police station, fingerprinted and (sometimes) photographed. This information is then centrally recorded.

The fewer that are summoned, the greater the number of people who have to undergo this procedure.

Cash deposit forfeiture comes into play only after an arrest.

While the Commission is concerned about whether police time spent processing arrests for minor offences is efficient or justified, the issue is not within its brief. No doubt it will receive the attention of the Queensland Criminal Justice Commission at some later time.

6. FAILING TO ATTEND ON THE DATES REQUIRED

One of the primary purposes of bail is to ensure that defendants appear at the court hearing of the charges laid against them.

A survey of bail applications made to courts conducted by the Commission produced the following results -

- In a random month, 115 people made a bail application in the Brisbane Magistrates Court. Twelve did not receive bail either on their initial or subsequent applications; 1 received bail only to lose it. Of the 103 who were released on bail, 44 (42.72%) failed to appear on a date that they were required to attend court. Eleven (10.68%) of those released on bail are still at large.

- Over a 2 month period, 50 people applied to the Supreme Court for an application, variation, or reconsideration of bail and had subsequent trials which were heard in Brisbane. Five (10%) of this sample group were not released on bail. One person's bail was revoked. Of the remaining 44 defendants, 9 (20.45%) failed to appear when required at court. Four (9.09%) of the defendants who were granted bail are still at large.

Readers should not be alarmed by these figures.

Most defendants are bailed from a police watch-house following arrest. The majority of court hearings concern problematic bails: those defendants who the police are reluctant or doubtful about releasing.

The Commission's survey concerns bail applications made in courts. It therefore concentrates on this group of defendants.

The overwhelming majority of defendants who receive bail attend their court hearing dates.

In the Brisbane Magistrates Court during 1990, the hearing of 26,417 criminal charges commenced.

In 91% (24,064) of these charges, bail was considered either by the police or the court.

Where a defendant does not appear on the dates required for a court appearance a warrant for the defendant's arrest is usually issued. On 2233 individual court charge files, a warrant of arrest was issued following a defendant's non-appearance in court. This represents a non-attendance rate of 9.28% for all

charges. However, this is an over-representation of how many defendants fail to appear, as many defendants face two or more charges. Only 664 defendants were charged with failing to appear during 1990 in the Brisbane Magistrates Court.

Figures taken in the Brisbane Supreme Court recently show a fall in the number of defendants against whom a warrant of arrest was ordered following a failure by those defendants to attend court at a required time. In 1988, warrants of arrest were ordered in 10.02% of cases tried in the Supreme Court. In 1989, the figure fell to 7.31%. By 1990, warrants of arrest were ordered in only 3.44% of case tried in the Supreme Court.[57]

In summary, the Commission therefore believes that the non-appearance rates in its survey can be reasonably explained. This view is bolstered by the fact that, in its submission to the Commission, the rate of non-appearance by defendants in courts was not one of the readily identifiable problems which the police wished to draw to the Commission's attention.[58]

The failures to appear cited above may involve any court date at which courts are considering an aspect of the defendant's case. It may be that the defendant's presence is only required for a number of minutes before the court.

Neither the police station nor court procedures are geared to giving a defendant a clear idea about when the defendant must next come to court or the consequences of failing to come to court.

It may be that some defendants' reasons for not being in court involved forgetfulness or confusion. The defendant may have been mistaken about the date upon which attendance at court was required. The form upon which the date was written may have been lost.

It may be that some defendants were fearful of what would happen when they attended court. Many feel that the structure of the criminal justice system is uncommunicative and intimidatory. It is therefore not surprising that some people act irrationally.

The non-appearance will not necessarily be a failure to appear for a court trial or sentence. Indeed, defendants whose cases have not been determined by the court account for approximately 9% of all defendants who made applications concerning bail during the survey period. The Commission does not know what efforts have or can be made by the Queensland Police Service to follow up these defendants.

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57 In 1990 changes were made to the Supreme Court's criminal jurisdiction. The effect has been to concentrate Supreme Court trial work on serious drug and unlawful killing cases. This may have had some bearing on the decline.

58 Letter to Commission from the Queensland Police Service dated 25th October 1990.

A. The consequences of failing to appear at court on the dates required

A defendant who fails to appear at court on the dates required by a grant of bail may, if convicted, be penalised up to $2,400 or 2 years imprisonment.[59] One approach to the high rate of failures to appear is to impose harsher penalties on defendants who do not appear when required. In two Australian jurisdictions, the maximum penalty that can be imposed is 3 years imprisonment or a fine not exceeding $3,000.[60] Two other states provide lower penalties.[61]

However, the Commission does not believe that an increase in penalty is necessary or desirable.

Nan is just about to go out the front door of her Annerley home when the phone stops her in her tracks.....

"Hello?"
"Mrs Melto - hi. It's Darryl Burns, your husband's solicitor. Mrs Melto, your husband didn't turn up for his court hearing yesterday. His 0.05 charge was on - remember? Anyway, the barrister who is looking after him phoned me yesterday afternoon. The court has issued a warrant for his arrest."

"Oh my goodness. Why?"
"Because he didn't turn up at court, Mrs Melto. He was on bail. He had to turn up."

"But he's in hospital. I'm just on my way out the door to pick him up. He couldn't have gone yesterday. He had an angina attack. I had to get him off to hospital. We must have forgotten - what with all the worry and everything."
"I'm sorry to hear that Mrs Melto. Is your husband all right?"

"Yes, yes. The doctors just wanted to keep him in overnight for observation."
"Do you think he's well enough to go to court this morning?"

"Heavens. I don't know. It could excite him too much. What will happen? Will they put him in gaol?"
"No, Mrs Melto. That's not likely from what you've told me. You see, if your husband doesn't appear at court when he's required to, the magistrate may convict him of another offence - failing to appear..."

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59 Sections 33 and 35.

60 Bail legislation - New South Wales: section 51; Western Australia: section 51.

61 Bail legislation - Victoria: section 30, maximum 12 months imprisonment; Tasmania: section 35, maximum 3 months imprisonment or $500.

"Will they gaol him?"
"No, Mrs Melto. You see, there's two ways your husband can avoid being convicted. One is by going to a magistrate at the court before the warrant for your husband's arrest is executed - before he gets arrested. Then it's arguable that the magistrate cannot convict your husband."

"What's the other way?"
"If you wait for your husband to be arrested, then he'll be brought before the court and asked to explain why he did not appear yesterday. If the court thinks that he has a reasonable excuse - and I assure you Mrs Melto, he does - then the court won't convict him."

"What should I do? You tell me."
"Well, see how your husband is first. If he's up to it, drive him to the court. Ring me before you leave. I'll meet you there and with any luck we'll have it fixed up in no time."

In the majority of cases in the Commission's survey, where there has been a non-appearance the defendant has either -

(a) provided the court with a reasonable excuse for the failure to appear; or

(b) voluntarily attended at court after the failure to appear before an arrest was made.[62]

These two points will now be discussed.

(a) When defendants can give the court a good reason for not attending court on the date required

Courts have been given power to handle a non-appearance humanely. Judicial officers can take into account personal factors that explain a defendant's non-appearance and to refrain from punishing them when a reasonable excuse can be given.[63]

The Commission's survey showed that in only 2.27% (1) of non-appearance cases in the Magistrates Court and in no cases in the Supreme Court, did the courts consider that the defendant's excuse for not appearing was not reasonable and

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62 Turn to page 90 for these survey results.

63 Section 33(2).

that, as a consequence of the failure to appear, the defendant should be imprisoned.

(b) When defendants appear at court after failing to appear but before being arrested.

Courts respond to these defendants in different ways.

(i) In the Magistrates Courts

A defendant who has not been arrested cannot be convicted with failing to appear.[64]

When many magistrates deal with these defendants, "no conviction" is recorded and the warrant for the defendant's arrest is withdrawn.

However, some magistrates who are faced with such defendants decline to withdraw the warrant for the defendant's arrest[65] unless they are satisfied that the failure to appear was due to a reasonable cause. If the warrant is not withdrawn, the defendant may be subsequently arrested and, if appropriate, convicted.

Legislation should clarify an appropriate procedure to be followed in all cases.

Should defendants who have failed to appear escape conviction by presenting at court before arrest?

On the one hand, a defendant may not have turned up to court at a date required for a reason that would not be acceptable to the court: fear of imprisonment, insufficient funds for a bus fare to court, or forgetfulness. The essence of bail is to ensure that a defendant appears at court when required. Defendants whose reasons are not recognised by the court as adequate should be punished whether or not they turn up voluntarily at a later time before their arrest. The court and its staff have been inconvenienced. Time has been wasted. A warrant for arrest has been issued.

On the other hand, the defendant has appeared at court, although not at the time requested. Through this voluntary appearance, the defendant has recognised a continuing obligation to attend at court so that the charges he or she faces can be dealt with. The defendant should therefore not be

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64 Section 33(1)(b).

65 This power is discretionary under section 28A(2).

treated in the same way as a defendant who fails to appear and does not later notify the authorities. Whilst a non-appearance at the scheduled time may have been administratively inconvenient to the court, it is not of itself sufficient to impose a conviction. Further enquiry needs to be made.

Certainly, a blanket rule to release these defendants without penalty would not be appropriate. Defendants would be able to procrastinate a court hearing indefinitely through continual late attendances. However, more leeway should be given to these defendants than those who do not appear in court until arrested. If the defendant has not intentionally missed a court appearance, then a conviction for failing to appear should not follow.

(ii) In the Supreme Court

Warrants to arrest a defendant who has not appeared at a time required in the Supreme or District Courts can only be ordered if -

- the defendant has been given notification that the Director of Prosecutions is applying for a warrant of arrest; or

- the defendant cannot be found or is likely to abscond.

This is not the case in the Magistrates Courts. The magistrates can issue warrants of arrest immediately a defendant does not appear on the date required.

However, defendants appearing in the Magistrates Courts are given a set date upon which they must next appear.

This is not the case in the District and Supreme Courts. Defendants are told that they must appear during some future period, but are not given a set date until a later time. Thus, in the Supreme and District Courts protection from arrest is given to defendants who may not have received this notification about the date upon which they are required to attend court.

The Queensland Police Service has told the Commission that the process for obtaining a warrant of arrest in the District and Supreme Courts unnecessarily drains its resources -

> "The police are required to make extensive inquiries to attempt to find the defendant, to either serve notice or to advise the court that the defendant cannot be found or has absconded.

> Advice of the finding that the defendant has fled etc., is required - at least in the Supreme Court - by affidavit. This further utilises police time."[66]

The Service argues that defendants should be given a set date to appear in the District and Supreme Courts (a call-over date). The same procedure for obtaining a warrant of arrest which is followed in the Magistrates Courts can then be applied in the District and Supreme Courts.

(c) When defendants have been arrested for failing to appear.

Those defendants who are brought to court after being arrested for failing to appear must provide the court with an explanation then and there. No time for preparation or collection of evidence is allowed by the law. [67]

Where a defendant has been arrested, this can mean that a conviction for failing to appear may be imposed without giving the defendant proper time to present his or her best case. The presentation is arranged in haste and may miss evidence which would influence a judicial officer not to convict.

This practice is universally recognised as unfair.

Indeed, many judicial officers allow defendants to come back to court later so that they have time to prepare their case.

No other Australian jurisdiction requires a court to deal straight away with a defendant who has failed to appear on a date required.

The legislation should be altered to enable a judicial officer to deal with the charge at a later date. The only consideration which the court should attend to immediately is whether or not the defendant should be granted bail until the hearing of the charge.

(d) When defendants have been convicted of failing to appear

Presently, a defendant who is convicted of failing to appear at a court date can be ordered to serve a term of imprisonment of up to two years.[68]

A prison term should not be imposed upon a defendant who is not likely to have a

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66 Letter to the Commission dated 25th October 1990.

67 Section 33(3).

68 Sections 33 and 35.

period of imprisonment imposed at the hearing of the offence for which the defendant is required to appear. In this context, the penalty for failing to appear in South Australia has some merit - courts cannot impose penalties for failures to appear which are greater than the maximum penalty for the offences for which the defendant was first bailed.[69] The Commission is considering a modification of this approach - unless there are special circumstances, a defendant should not be penalised for a failure to appear at a rate greater than the penalty it is likely that the defendant would receive upon conviction for the charges for which bail was given.

Presently, a defendant who is ordered to serve a period of imprisonment for failing to appear must serve this period on top of any term of imprisonment that has previously been imposed. If another period of imprisonment is imposed when the defendant is in gaol for a breach of bail, this must be served after the period of imprisonment for failing to appear. [70]

As a general rule, courts can decide whether terms of imprisonment can be served concurrently or cumulatively.[71] The Commission can see no reason why the general rule should not apply to sentences of imprisonment imposed for a failure to appear.

B. Suggestions to improve the rate at which defendants appear when required at court

Whilst defendants who have failed to appear may have reasonable excuses for the failure or may have surrendered before arrest, the non-appearance rate of people whose bail has been scrutinised by the courts is high. Failures to appear are administratively inconvenient: for court staff who must issue warrants and relist proceedings and for police who must arrest non-appearing defendants.

The following practical reforms may help to alleviate this problem.

(a) Better explanations about bail undertakings could be provided to defendants

At a minimum, police and court officers should in clear and simple English explain to a defendant the date upon which to next attend court and the consequences of not attending. The date should be given to them in writing. This should be done after bail has been granted and at every court appearance date until the trial.

This could be backed up by a pamphlet or form explaining in simple English the date upon which to next attend court, and the rights and responsibilities of

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69 Bail Legislation - South Australia: section 17.

70 Section 33(4).

71 Section 20 The Criminal Code; section 156 Justices Act 1886-1989.

defendants who are bailed. This could be handed out at watch-houses and courts to all defendants released on bail.

However, it was not thought that many defendants would read this material. Defendants are anxious after being bailed. Their first concern is to leave the court or watch-house. Pieces of paper get put aside or lost. Things which are said can be forgotten or misunderstood; written explanations should be used to back up, verbal explanations.

(b) Verified information could be presented to the court concerning any application for bail made to it

"Verified information" means information that has been checked by a third party.

At present, the information presented to the court is, more often than not, hastily prepared by arresting police officers and defence lawyers. When bail applications are contested by police, the information presented by both sides in court can be one-sided. The court often lacks an objective assessment based on verified information.

The success of programs designed to provide courts with objective verified information about bail applicants is well documented.

The idea was first tested with the launch of the Manhattan Bail Project in 1961. The program aimed to replace reliance by the courts on cash deposits (which could often not be met) with release upon the defendant's undertaking to appear. The program showed immediate results. Judges who had been provided with verified information were four times more likely to release an accused than when this information was not presented. During the first three years of the project, 3,505 defendants were released on their own undertaking. Of these, only 1.6% wilfully failed to appear in court on the dates required. This compared to a 3% failure rate for those released on a cash security. The Vera Insitute of Justice, the body instrumental in the establishment of the project, observed that -

> "it appears that verified information about a defendant's background is a more reliable criterion on which to release a defendant than is his ability to purchase ... bail".[72]

A similar initiative has been recently piloted in the United Kingdom by the Vera Institute of Justice. The project involved eight probation services in collecting information in cases where police had indicated an intention to object to bail. These probation services often possessed information about defendants which could be relevant to an assessment of whether or not to oppose bail. The eight schemes differed in the quality and quantity of information that was provided.

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[72] Information concerning the Manhattan Bail Project was derived from a number of sources. This quote is reproduced from R. Tomasic Bail and Pre-Trial Release - Strategies and Issues The Law Foundation of New South Wales North Sydney 1976 at page 3.

Typically, however, the information search sought to verify the defendant's -

- address;
- medical history;
- employment; and
- probation supervisory history.

In some cases, extra efforts were made to obtain appropriate accommodation for the defendant or to arrange for the defendant's placement in a drug or alcohol rehabilitation service.

The project is currently being evaluated, but appears to have generated similar results to the Manhattan Bail Project.[73]

New South Wales legislation contemplates the collection of verified information for use by the courts in assessing bail applications.[74] New South Wales Bail Regulations contain a standard form test which allocates points for itemised answers to questions concerning background, associates, and community ties. On attaining a particular number of points, the defendant is assessed as a good or poor risk for release on bail. This standard form appears on the next page.

However, the point scoring scheme is rarely used. No organisation or department has legislative authority or adequate resources to conduct testing. Police sometimes fill in the questionnaire when requested by a magistrate if a defendant's release from custody is borderline.

In New South Wales, bail assessments of a different nature are being conducted from 6 Magistrates Courts and the Supreme Court.

The Commission believes that the introduction of a scheme based upon these initiatives could be considered in Queensland.

The courts would benefit from the provision of accurate information in their bail assessment decisions. Magistrates can be freed from the appearance of partisan treatment that may flow from a reliance on information provided by police prosecutors.

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73 R. Morgan "Remands in custody : problems and prospects" [1989] Crim LR 481 at pages 489-91.

74 Section 33 Bail Act 1978 provides that a test can be applied to a defendant "for the purpose of obtaining a rating as an indication of background and community ties".

Points to be allocated	Information about accused person obtained from questionnaire and comments therein
	A. FAMILY TIES
	The accused person-
3	(a) lives with immediate family AND has at least weekly contact with other immediate family members;
2	(b) lives with immediate family OR has at least weekly contact with immediate family;
1	(c) lives with a non-family person;
0	(d) lives alone.
	B. EMPLOYMENT
	The accused person-
3	(a) has been employed at his present job for 1 year or more;
2	(b) has been employed at his present job for 4 months or more OR at his present job and his prior job for 6 months or more;
1	(c) is employed OR receiving unemployment benefits or other form of pension;
1	(d) is being supported by his family or his savings;
0	(e) is unemployed and not receiving unemployment benefits or other form of pension.
	C. RESIDENCE
	The accused person-
3	(a) has lived at his present address for 1 year or more;
2	(b) has lived at his present address for not less than 6 months OR his present and prior address for 1 year;
1	(c) has lived at his present address for not less than 4 months OR his present address and prior address for 6 months;
0	(d) has no fixed place of abode.
	D. TIME IN AREA
1	The accused person has lived continuously in the city, town or district in which he now lives for 10 years or more.
	E. OTHER FACTORS
0 to 1	Other factors disclosed (e.g. pregnancy, old age, poor health, attending school).
	F. PRIOR RECORD
	The accused person has-
2	(a) no prior convictions;
1	(b) 1 summary conviction & no conviction on indictment;
0	(c) 2 summary convictions or 1 conviction on indictment;
-1	(d) 3 or more summary convictions or 2 or more convictions on indictment.

Bail Regulation 8(2) NSW.

More time would be available for the collectors of information to fashion meaningful conditions upon which a defendant is bailed to alleviate concerns that the court would or could have about a defendant's release.

The assessing body could be authorised to ensure that the defendant understands these conditions and the effect of their breach.

Simple follow up procedures to verify the names and residential addresses of defendants could assist with bringing down the failure to appear rate, particularly in the case of driving offenders.

The resources for this initiative could be provided by the Corrective Services Commission. Internationally, these initiatives have led to a decrease in failures to appear as well as both remands in custody and sentences of imprisonment. The financial resources of corrective services departments have been preserved as a consequence. These savings could, in part, be applied to piloting and (if successful) maintaining a bail assessment scheme.

(c) Checks on defendants who are released on bail

In the Commission's Magistrates Court survey sample, conditions were not often imposed on defendants who were released on bail - 26.92% were released on conditional bail.

This was not the case in the Supreme Court sample - 91.33% of defendants released on bail were conditionally released. A detailed discussion of survey results can be found on page 86.

The majority of conditions imposed in both survey samples required the defendant to report to the police at regular intervals.

The value of conditions requiring the defendant to report to the police is debatable. Police have neither the time nor the resources to follow up defendants who fail to report. Assumptions can be made by the police that a defendant is no longer reporting because the charges have been dealt with by a court.

Reporting conditions do not necessarily ensure that a defendant appears on court dates. However, failure to report at the required times can alert the authorities that a defendant may have absconded. The defendant could be traced before "the trail grows cold".

In the Brisbane Magistrates Court during 1989, 25,785 individual criminal charges involved bail. Only 8 charges were laid for a breach of bail other than failure to appear. Similar figures were obtained for 1990 - although 24,064 charges involved bail, only 7 charges were laid for a breach of bail other than a failure to appear.

From these figures it does not appear that police are prosecuting those defendants who do not comply with their reporting conditions. If reporting conditions are to have any effect, then the system for reporting must be improved.

Defendants who are given probation or community service orders following conviction must report to staff at Corrective Services Commission's regional offices. Those offices are based around Queensland. Responsibility for monitoring bail reporting could be delegated to them, without the need to set up a separate organisation.

This suggestion may have particular merit for young offenders charged with property offences. In the Magistrates Court sample, over 80% of the defendants who failed to appear were charged with non-violent property or driving offences.

An overview of the bail assessment supervision scheme conducted in New South Wales after its first six months of operation produced a profile of the types of defendants who were assessed under the scheme.

71% were unemployed or receiving a Social Security benefit. 36.5% were aged 22 or less. 46% had been at their current address for 3 months or less. 51% were current or previous clients of Corrective Services.[75]

This profile is apt for young property offenders. The staff at corrective services offices would appear suitably geared to handle reporting conditions placed on these defendants.

(d) Diverting driving offenders from court

In the Commission's survey, driving offenders represented a substantial proportion of people who failed to appear in the Magistrates Courts.[76] The Commission discussed a proposal that driving offenders should not have to appear in court unless they elected to do so. Drink drivers facing gaol sentences would be exempt.

Under the proposal, the driving licence of a drink driver who did not elect to go to court would be automatically forfeited. A fine would also be imposed to be paid within 28 days.

This may alleviate the problem of drink drivers failing to appear.

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75 Paper presented by B. Smith, the (then) Programme Manager of Probation and Parole Services in New South Wales - "Assisting the Court - Bail assessment developments" at a seminar conducted by the Australian Institute of Criminology in Adelaide between 29th November and 1st December 1988.

76 See pages 90 and 91.

However, the Commission did not consider that the proposal would be socially acceptable. The court appearance is seen as part of the punishment.

Many hundreds of Queenslanders are hurt, maimed or killed as a consequence of driving offences every year.

If driving offenders, particularly drink drivers, are not processed through the courts, the criminality of their conduct cannot be driven home. No criminal conviction would be imposed. The seriousness with which society and the law now views driving offences could not be made plain to defendants by judicial officers during the court appearance.

(e) Drug offenders - a special case

Three of the 4 defendants still at large in the Supreme Court sample of the Commission's survey were charged with drug offences: 2 with supplying and one with trafficking drugs.

If convicted, 1 of these defendants would face a mandatory life sentence. The remaining 2 would face a maximum of life imprisonment upon conviction.

All 3 defendants had spent time in gaol before their release on bail - 1 for a period of 2 months. Each therefore, had had a taste of what may lie ahead.

The absconding rate for drug offenders (10.3%) is only marginally more than for other defendants in the Supreme Court sample. However, drug offences were the primary offences to be dealt with by the Supreme Court in considering bail applications in the survey period - 58% of bail considerations concerned drug charges.

Sentences for serious drug convictions are severe. Defendants will continue to abscond whilst drug penalties remain at their present level.

7. CONDITIONS OF BAIL

Before being released on bail, a defendant must agree to turn up to court when required.[77]

To provide the defendant with additional incentives to appear at court when necessary, the court can order the defendant -

- to pay an amount of money to the court before being released. The amount can be forfeited if the defendant does not turn up to court when required. This is called a security;[78]

- to nominate a person who will guarantee to pay to the court an amount of money if the defendant does not turn up to court when required. This person must be approved by the court. The person may be required to prove to the court that he or she has sufficient financial backing if the defendant does not appear. The person is called a surety.[79]

In addition, the court can order the defendant to comply with conditions which regulate the defendant's conduct or movements from the date of release until the trial.[80]

This chapter looks at the types of conditions that are imposed, the reasons why conditions are imposed, and the effect of conditions.

A. Financial incentives

In a census of prison inmates taken on 1st March, 1991, 7 (3.75%) out of the 222 defendants who were in Queensland gaols before their trial on that date had been granted bail but had been unable to comply with the conditions that attached to the bail. [81]

The organisation which undertook the survey was unable to tell the Commission

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77 Section 20.

78 Sections 11 and 32.

79 Sections 11 and 21.

80 Sections 11 and 20.

81 The census was undertaken by Queensland Corrective Services Commission.

what condition of bail these defendants had been unable to comply with. However, it is more than likely that these conditions required the defendant to provide a security or surety before release.

In the survey undertaken by the Commission[82] -

- 8.65% of the defendants granted bail in the Magistrates Court sample; and

- 42.23% of the defendants granted bail in the Supreme Court sample;

were required to pay a security or nominate a surety.

Whilst 5 defendants under the age of 25 were required to provide a surety in the Magistrates Court sample, no defendant under that age was required to pay a security.

In the Supreme Court the charges facing defendants are usually more serious than in the Magistrates Court. This is reflected in the results of the Supreme Court survey, where the amount required by a surety or security was generally large. In 57.9% of cases where these conditions were imposed, the amount required was $10,000 or more. In 5 of the 8 cases where defendants under 25 years of age were required to provide a surety or security, the amount was $5,000 or more.

The fact that some defendants would not be able to raise a surety or security of the magnitude often required in the Supreme Court would not be surprising.

The less money available to a defendant, the lower a security or surety needs to be to maintain an incentive for the defendant to appear at court. A $500 security will be a powerful incentive to a young or unemployed person to appear at court, but would be of little incentive for a person earning a professional salary.

It would seem, however, that in some cases courts have set financial incentives beyond the financial means of defendants. This amounts to a refusal of bail.

The Commission believes that a principle should be inserted in bail legislation that judicial officers must take into account a defendant's financial means when deciding what level of financial incentive needs to be imposed on the defendant.

Under the present system, magistrates and judges are not subsequently notified if a defendant cannot obtain a security or surety which has been imposed as a condition of release. It may never come to their attention that the condition imposed is beyond the means of the defendant.

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[82] See page 86 for a discussion of survey results about conditions.

The Commission suggests that the bail status of any defendant who has been granted bail and who still remains in gaol 4 days after the grant, must be brought back before a court for review.

Finally, the Commission is considering two procedures which will simplify the system of financial incentives.

First, the Commission doubts whether the concept of sureties still serves any valuable purpose in bail processes.

Historically, sureties were people with power to bring a defendant to court before trial. Sureties in Queensland still have the power to arrest a defendant with or without the assistance of police.[83] In practice, this power is never used. In the Commission's view, members of the public should not be encouraged to arrest others - such a job should be left to the police. Accordingly, the Commission does not believe that the historical function served by sureties is necessary or desirable.

Sureties today provide a moral incentive for the defendant to appear at court. If the defendant fails to appear, his or her surety will be required to pay a not insubstantial amount to the court. The closer the relationship between the defendant and the surety, the greater the incentive to the defendant to appear in court.

However, the same incentive would still be present if the surety undertook to pay a security on behalf of the defendant. One process could achieve the results presently achieved by two.

Secondly, financial incentives should not be limited to cash. A defendant should be able to use any property with monetary value as a security. For instance, a family home, a car or shares could be used. A defendant with a young family and a mortgage may not have any money in the bank but could use the family home to guarantee his or her appearance in court.

B. Conditions which regulate or monitor a defendant before trial

Judicial officers in Queensland are given extremely wide powers about the conditions that they can impose on defendants at the time bail is granted. Magistrates [84] and judges [85] are not restricted in the type of conditions that can be imposed nor by the circumstances which must be present before a condition can be lawfully imposed.

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83 Section 24.

84 Section 20(3)(b)(ii).

85 Section 20(3A)(b)(ii).

Conditions regulate a defendant's life. At minimum, they may cause some inconvenience. However, some special conditions imposed fall just short of imprisonment - a defendant may be restricted to home and permitted to leave only for work or another approved purpose. Conditions usually require that the defendant's actions be scrutinised by some state authority. Conditions therefore can restrict a defendant's liberty.

The Commission therefore believes that greater legislative guidance is required about when conditions can be imposed.

Around Australia, judicial officers are required by legislation to consider what, if any, bail conditions should be imposed upon a defendant after a decision has been made to release the defendant on bail. Interstate statutes make it clear that a decision about bail conditions is subsequent to, and independent of, a decision whether or not to bail the defendant.

In practice, however, the consideration of bail conditions is often addressed before the decision about whether or not to release a defendant has been made by a court. Defence laywers present bail applications by arguing that the imposition of conditions would diminish the reasons why bail should be denied to a point where the court has insufficient reason to deny bail.

The courts should have power to impose conditions for the same reasons that bail can be refused.

Judicial officers should consider whether the imposition of conditions would meet the concerns they hold for releasing the defendant from custody. If this were statutorily required, it may encourage conditions to be imposed that were more appropriate for individuals. This potential will be increased if court-based assessment of defendants who are seeking release on bail is introduced.[86] Assessors with greater time to both find out about the defendant and fashion conditions which respond to the defendant's circumstances will assist courts in making these decisions.

A decision-making hierarchy should be inserted in bail legislation. Judicial officers could be directed to consider a defendant's bail application in the following order -

(1) to release the defendant without imposing conditions;

(2) to release the defendant conditionally; and

(3) to remand the defendant in custody.

Most of the conditions presently imposed by courts are designed to ensure attendance at court.

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[86] This was discussed on page 46.

It is fundamental to a grant of bail that the defendant will appear at all court proceedings relevant to the criminal charges laid. This would appear to be a more than appropriate reason to justify the imposition of conditions upon a defendant.

In what other circumstances should conditions be imposed?

On pages 8 and 9, it was argued that the liberty of a person who the law presumes to be innocent should not be restricted on the basis of a possibility that he or she may, commit offences whilst on bail. As conditions restrict the defendant, the same arguments apply to bail conditions as they do to the grant or refusal of bail.

Earlier in this discussion paper, however, the Commission has suggested that defendants should not be denied bail because there was a possibility that the defendant would commit an offence before trial. There may be more public support for this suggestion if conditions could be imposed. Some of these conditions are presented below.

C. Types of conditions

(a) Conditions to ensure that the defendant appears in court

These are not listed in Queensland's bail legislation.

The most commonly-used conditions follow -

(1) to report to a local police station a set number of times each week;

This condition is frequently used by courts. In the survey undertaken by the Commission -

. 54.29% of those bailed with conditions in the Magistrates Court sample group; and

. 93.02% of those bailed with conditions in the Supreme Court sample-

had to report regularly to a police station as a condition of bail. Most commonly, defendants were required to report 3 times per week. The Commission doubts the effectiveness of this condition. Its views and suggestions for improvement can be found on page 49.

(2) to surrender or refrain from applying for a passport;
(3) to avoid points of international departure;

These conditions are designed to limit a defendant's ability to leave the country. They are often applied in drug cases.

(4) to reside at a particular place.

(b) Other conditions

In Western Australia and South Australia, defendants can be released on bail but be confined to their homes . The condition may allow the defendant to leave home for employment purposes, medical care or some other reason approved by (the equivalent of) the Corrective Services Commission or the police. However, at all other times the defendant should remain at home. Officers of (the equivalent of) the Corrective Services Commission monitor that the defendant remains at home by a number of personal and telephone checks each day.

In South Australia, defendants can also be placed under the supervision of (the equivalent of) a Corrective Services Commission office until trial.

Both of these types of conditions presently exist in Queensland as forms of punishment that can be imposed upon a defendant after conviction. They are not presently conditions of bail. The former is equivalent to a home detention order. The latter resembles a period of probation.

Compelling reasons should be required before a court could impose these types of conditions on a defendant who the law presumes to be innocent. The Commission is therefore reluctant to insert these conditions within bail legislation. Public comment is sought.

8. OTHER ISSUES

A. Compensating defendants kept in gaol before trial who are not convicted

In its review of 50 defendants who made bail applications in the Supreme Court in October and November 1989, the Commission found that 45 of these defendants are known to have spent time in gaol after their first appearance in court. Of these defendants, 31.11% (14) were not convicted of the criminal charges for which they were being held in gaol.[87]

One person who was acquitted spent 11 months and 13 days in gaol. Another, who spent 5 months and 6 days in custody, was discharged after the prosecution offered no evidence at the trial. For a full summary about these defendants turn to page 96.

The Commission is extremely concerned that such a large percentage of defendants have spent often lengthy periods in gaol after being charged for offences for which they are not convicted.

Whether and how these defendants should be compensated should be addressed. The Commission seeks public comment about whether the issue of compensation should be dealt with in bail legislation.

B. Which courts should deal with bail applications

Most people who are refused bail by the police are brought before a magistrate on the sitting day following their arrest.

This is usually the time a defendant's first court bail application is made.

The Bail Act does not allow magistrates to hear bail applications in the following circumstances -

(1) if the defendant is charged with -

- murder;
- treason;

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87 Three were acquitted. In the cases of the remaining 10, either no evidence was offered by the prosecution or a nolle prosequi or no true bill was formally entered.

- piracy;
- attempted piracy with personal violence;
- blackmail of Ministers, government officials or departments coupled with threats of inflicting injury or detriment where the demand is not complied with, and the threats have been acted upon.[88]

All these charges carry a mandatory life sentence of imprisonment following conviction.

(2) if the defendant is charged with drug offences laid under the Drugs Misuse Act 1986-1989 -

(a) where the penalty following conviction is more than 15 years;

These drug charges include -

- supplying heroin or cocaine;
- producing heroin or cocaine;
- producing more than 500 grams of cannabis, 20 grams of opium, 10 grams of codeine, or 2 grams of morphine;
- possessing more than 2 grams of cocaine, methadone, or heroin.

(b) where the penalty following conviction is less than 15 years, but the prosecution or magistrate elect or order the trial be held in the District Court.[89]

A person, whether an adult or a child, who is charged with any one of the above offences cannot be bailed at the watch-house. Only a judge of the Supreme Court has power to order that the person be released on bail.

The Commission believes that these distinctions are not logical and cannot be justified.

As magistrates can hear bail applications made by defendants facing charges carrying maximum life sentences, why should magistrates not be able to decide bail for charges carrying the lesser penalties imposed by the Drugs Misuse Act 1986-1989?

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88 Section 13.

89 See sections 13 and 45 Drugs Misuse Act 1986-1989.

Magistrates are able to deal with bail applications concerning drug charges laid under Commonwealth legislation, but not equivalent charges laid under Queensland legislation. For instance a person charged with possessing more than 2 grams of heroin believed to have been imported into Australia[90] can be bailed from a Magistrates Court. But a person charged with possession of a corresponding amount and type of drug under Queensland legislation must apply to the Supreme Court for bail.

These distinctions should be abolished.

Some argue that magistrates should be given power to hear bail applications no matter what the charge. Magistrates constantly deal with bail applications. They have power to determine bail for offences which carry a maximum penalty of life imprisonment, for instance, arson,[91] rape,[92] and armed robbery.[93]

Administratively, the suggestion may have merit. Following an arrest, the police must bring a defendant before a magistrate or justice of the peace as soon as practicable.[94] Where the defendant is brought before a magistrate, a bail application could be conveniently dealt with. Police and Supreme Court time would be saved as a result.

In the Commission's view, the need for the closer scrutiny of some applications outweighs this convenience. The greater the penalty that can be imposed on a defendant following a conviction, the greater is the incentive for a defendant to avoid turning up for trial. The attention given by courts to an application for bail should increase with the likely penalty facing a defendant following a conviction.

The Commission believes that the court which has power to hear the case against the defendant should be the court which first considers whether to release a defendant on bail.

This recommendation does not, however, deal with present procedural difficulties in drug cases. The problem is outlined on the next page.

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90 Section 233B Customs Act (Commonwealth) 1901.

91 Section 461 The Criminal Code.

92 Section 348 The Criminal Code.

93 Section 411 The Criminal Code.

94 Sections 137 and 552 of The Criminal Code; section 69, Justices Act 1986-1989.

It's 8.30 a.m., and Sue is hard at work at the legal firm of Donoghue and Stevenson. Sam, Sue's administrative assistant, arrives ...

"Where were you when I left at 5.30 p.m. yesterday? And don't tell me that you were still at court."
"But I was!"
"All day?"
"That's right. A barrister and I spent most of the day just organising bail for our client."

"Why so long?"
"You remember Danni, don't you. I got bail for Danni two months ago after she'd been charged with supplying a dangerous drug. Well, Danni's trial was listed for hearing yesterday in the Brisbane Magistrates Court."

"That shouldn't have taken you more than 3 hours."
"I thought that, too. The trial started at 10.30 a.m. Great, I thought, I won't have to cancel any of my afternoon appointments. We broke for lunch at 1 p.m. The magistrate came back at 2.30 and told us that, on the evidence heard from the prosecution, she was going to override the prosecution's election to have the matter dealt with summarily."

"Speak English, Sue!"
"It's like this. With many drug offences, the police can choose whether or not a defendant's trial proceeds in the Magistrates Court , or the District Court. A Magistrates Court hearing is better for our clients because the penalties upon conviction are lower. In Danni's case, the prosecution requested that a magistrate hear the charge."

"So - what went wrong?"
"Once some evidence has been given, the magistrate may assess that the charge should be dealt with in a higher court. That's what happened with Danni. Instead of hearing the case, the Magistrate thought Danni should be committed for trial in the District Court. Then the letter of the law stepped in. As soon as a magistrate makes this type of decision in drug cases, the defendant's bail is withdrawn. Bail can only be granted again by the Supreme Court."

"Poor Danni."
"Poor Danni nothing. The police waited with Danni in the corridor at the Magistrates Court. I dashed back here and got Luke to type up the paper work for the Supreme Court. The barrister and I arrived at the Supreme Court at 3.30 p.m. A judge heard our case at 4.30 p.m. Danni was ordered to be released on her own undertaking. The Registry at the Supreme Court stayed open especially for us, so that the order could be officially stamped after the hearing. We arrived back at the Magistrates Court at 5.30 p.m. with the order to give to the police. Danni and the police were still waiting in the corridor."

"Danni must have been worried though - any Supreme Court case would scare the daylights out of most people."
"Yeah, probably. But I'm the real martyr in this saga."

"Sounds like a waste of time."
"It was. That's just the point. Danni has been out on bail until yesterday merely on her own promise to front at court when needed. She had already turned up twice to the court. There was absolutely no reason to doubt that she would continue turning up to court on the dates required. She had co-operated with the police throughout the case. Everyone agreed that she would be let out on bail. It was just that the magistrate lost the power to extend her bail. So I had to waste my time, my barrister's time and a Supreme Court judge's time to get bail re-instated."

"Poor baby. Thank goodness it only happens in drug cases."
"Yeah - so did you miss me?"

"No, but your clients did. Mrs. Williams wants you to ring her urgently - her husband beat her up again yesterday. Sid Jenkins needs to hear from you about ... ."

Where defendants have been granted bail by a court which initially had power to consider the case, the Commission considers that the grant should continue until the defendant breaks a condition of bail or fails to appear at court when required.

At Boggo Road gaol, Juan is watching a video on the television in the K Wing Yard...

"Hey Juan. How did ya go with that bail application this morning?"
"Oh, g'day Jim. Still waiting to hear. When me solicitor was up from the Gold Coast yesterday he was a bit worried that I lived so far outa town. He said that you have to give an address where legal notices can be left for me which is 25 kilometres from the Brisbane Supreme Court."

"How's that?"
"Not good. I couldn't think of one at first. Then I remembered Uncle Pedro in Windsor. Hope that does the trick."

"Do ya mean that you may not have got bail if you couldn't give 'em an address within 25 kilometres of the Court just so that they can drop off some legal notices for ya?"
"Yep. It's so that the Director of Prosecutions fellow can make sure you get the notice which tells you when you're case is gunna be on without tramping all over the country."

"So, what does your solicitor say about getting you out on bail before your appeal?"
"Touch and go apparently. This is me first time inside. I've always turned up to court before. But the judges don't like givin' ya bail when you've been convicted and sentenced to a term inside and ya goin' to appeal. How 'bout you?"

"Got convicted and sentenced yesterday for possession of marijuana. No good Juan - got 1 year. Me barrister said that it wouldn't do any good to appeal. Mind you, would have been longer if I hadn't done time in here before the trial. The judge said that said he doubled the time I spent in here and took it away from the sentence he would have given me. Pretty hefty term for possessing dope, hey."
"Bad luck, Jim. At least now you can get a transfer out to a prison farm which gives you better things to do than watch these damn videos...."

C. Providing an address within 25 kilometres of the court

A defendant cannot be released on bail until he or she signs an "undertaking" - a guarantee to turn up to court on particular dates and to comply with the conditions upon which bail was given.

Where a defendant has been either committed for trial or convicted and is appealing that conviction or sentence, the undertaking must contain an address where notices can be left and assumed to have come to the defendant's attention. This address must be no more than 25 kilometres from the court which will hear the trial or appeal.[95]

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95 Section 20(2).

This requirement was inserted in 1988 at the insistence of the (then) Director of Prosecutions. This justification was given for the amendment[96] -

> "The present wording of the Act has presented serious difficulties for the Director of Prosecutions and the Courts in organising trials where a number of cases may be listed before a particular Judge for a particular week of a sittings. When matters are brought on at very short notice it is difficult and indeed sometimes impossible, for the Director of Prosecutions to comply with the requirements of the present section to give notice to the parties effected. An example is where a trial is listed for hearing in Cairns and the accused resides at Cedar Bay and that is also the address provided by him for the service of notices. It is difficult, if not impossible, to serve notices at such an address at short notice. Indeed, postal deliveries are not made to some addresses given by defendants. The proposed amendments will require a defendant to give an address for service within 25 kilometres of the Court where the matter is to be heard. The onus will then be upon the defendant to check daily, or at whatever intervals may be necessary, at that address to ascertain if any notices have been left for him. If notices have been delivered at that address and the defendant fails to appear, then the Director of Prosecutions can properly apply for a warrant for his apprehension."

Where defendants are represented by solicitors throughout a criminal proceeding, the Director of Prosecutions may not be faced with a problem when serving trial notices as solicitors for these defendants are allowed to accept documents.[97]

But even then, the requirement may present difficulties. A submission from the Brisbane Magistrates Court observed -

> "In a large number of cases the defendant does not reside, nor is the office of his legal representatives situated within, that limit. There have been occasions where it has been virtually impossible to obtain an address within the twenty five (25) kilometre limit."[98]

The section is primarily directed towards defendants who may not be able to afford to retain private solicitors and who may not be granted legal representation for committal proceedings. As a consequence, low-income defendants are often not represented at a committal hearing - the Director of Prosecutions may not know who is later employed to represent the defendant at trial.

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96 This explanation appears in the Bill Book, which sets out legislation existing at the time the amendment was being considered, the proposed amendment and the reasons for the amendment. It was provided to the Commission by the Attorney-General's Department.

97 Section 27 allows solicitors to accept notice of trial documentation.

98 Letter to the Commission dated 29th January 1991.

Both the Crown Solicitor and the Director of Prosecutions have acknowledged that the provision could produce an unfair result.

Certainly, the Commission understands that the Director of Prosecutions may indeed have problems serving some defendants in remote areas. However, the Commission believes that laws with general application should not be made on the basis of a difficult minority. This is particularly the case when the difficulty arises because the defendant is poor.

The Director of Prosecutions has suggested that the requirement be replaced by allowing the court to decide whether an address for service other than the defendant's home is needed. The Commission supports this view.

D. Applying for bail following a conviction

The present legislation contemplates that defendants may make applications for bail following a conviction.[99]

The Act also contains "an exhaustive statement of the manner in which the discretion to grant bail is to be exercised in Queensland,"[100] for defendants against whom charges have been made.

However, it contains little guidance about the right to bail of a convicted defendant who has been ordered to serve a term of imprisonment.

The refusal of bail for people who have been convicted and sentenced to imprisonment has been justified by the need to preserve the integrity of the decisions made by juries.[101] If a jury has found the defendant guilty, its verdict should be effective immediately. An application for bail suspends the effect of the verdict, giving it a provisional quality. The verdict should not be seen as a mere step in the criminal process which takes effect only after appeal avenues are exhausted.

Unlike a defendant whose guilt or innocence has not been judged, a defendant who has been convicted does not have a right to bail.[102]

Judges have acknowledged that convicted defendants who have been ordered to serve periods of imprisonment and who have lodged an appeal, are entitled to bail in limited circumstances.

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99 See section 20(2)(b).

100 Ex parte Maher [1986] 1 QdR 303 per Thomas J at 307.

101 Per Brennan J Chamberlain v R (1983) 153 CLR 54 at 519-520; adopted by Kelly SPJ in Ex parte Maher [1986] 1 QdR 303.

102 Section 9, which gives this prima facie right, specifically excludes convicted defendants.

The circumstances in which bail can be granted have been described by the courts as limited to the "very exceptional"[103], "exceptional"[104], "exceptional or unusual"[105], or "special".[106]

For ease of reference, this paper will refer to the limited circumstances as "exceptional."

Exceptional circumstances include those cases where -

(1) the defendant has a good chance of being cleared of any criminal charge when the appeal is heard; or

(2) the defendant would have to serve an unacceptably long portion of the sentence of imprisonment before the appeal was heard. For instance, if the defendant appeals a sentence of imprisonment of 3 months, but the appeal will not be heard for 4 months, then the defendant could often be granted bail.[107]

The Commission believes that bail legislation should set out that -

> "A defendant who has been convicted and ordered to serve a period of imprisonment may be granted bail if the court believes that the defendant will serve a period of imprisonment before the appeal hearing in excess of that which is likely to ultimately be imposed."

This wording would cover (1) and (2) above.

There will be other circumstances personal to each defendant. However, unless some exceptional circumstances are established, it seems irrelevant to the court's decision that, if bailed, the defendant would turn up at the appeal. For instance, when refusing bail to Lindy Chamberlain, His Honour Justice Brennan observed that -

> "I do not think that there is any likelihood of her failing to answer to her bail if bail were granted."[108]

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103 Re Kulari [1978] VR 276.

104 R v Wood [1970] QLR 8; Ex parte Maher [1986] 1 QdR 303; Chamberlain v R (1983) 153 CLR 514.

105 R v Byrne [1937] QWN 30.

106 R v Southgate (1960) 78 WN (NSW) 44.

107 Ex parte Maher [1986] 1 Qd R 303 at 312.

108 Chamberlain v R (1983) 153 CLR 54 at 517.

In that case, the removal of the defendant from her baby whilst the baby was being breastfed was described as "tragic,"[109] but was not thought sufficiently exceptional to justify bail.

The Commission considers it appropriate for the courts to retain the power to bail a convicted defendant who is sentenced to imprisonment in circumstances it considers are exceptional. It would not limit the courts by attempting to list these circumstances further than is discussed above. Public comment is sought on these proposals.

E. Taking remand periods into account as part of the sentence

Judicial officers are not directed by present legislation to take periods of imprisonment prior to trial into account when assessing an appropriate sentence for a convicted defendant.

Nevertheless, when a defendant is ordered to serve a term of imprisonment, the practice usually adopted by judges in the Supreme Court is -

- to calculate an appropriate time for which the defendants should be imprisoned; and

- to deduct from the previous calculation a period equal to twice the time spent by the defendant remanded in custody.[110]

In effect, sentences of imprisonment are discounted by double the amount of time a defendant is kept in gaol prior to trial.

This practice recognises that imprisonment prior to trial is equivalent to punishment.

Presently, there is a problem in leaving these periods for judicial officers to take into account in determining an appropriate sentence.

Sentences handed down by judicial officers who take account of time spent in gaol before the hearing of the charge may seem lighter than the conviction deserves. Take as an example a defendant who was convicted of three counts of burglary. If a judicial officer considered that a 3 month period of imprisonment was appropriate and a defendant had spent one and a half months remanded in custody, a conviction without any penalty should be imposed to properly account for the period in gaol prior to trial. A member of the community, who may not know about

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109 Ibid.

110 The rationale for this procedure was described by His Honour Mr Justice Ambrose in the unreported judgment of **Whelan v A-G of Queensland** CAA No 144 of 1990 at page 3 of the judgment.

discounting penalties for the period served before trial, would be extremely puzzled by such a result. The practice exacerbates the public perception that sentences of imprisonment are too light.

The Commission considers that legislation should state that a period in which a defendant is kept in gaol before trial should be treated as a period of imprisonment already served by that person under sentence.

F. Doing the paperwork after a Supreme Court judge grants bail

It's 5pm - one hour after the time at which the Supreme Court Registry usually closes for the day...

"Come on Mickey - I'll walk to the bus stop with you."
"Not tonight, Grace. The Registry's staying open. A bail application's being made upstairs at the moment. We may have to perfect an order for bail.*

"So, what's the hurry?"
"The defendant has to stay in gaol until Boggo Road gets the order from us. If a defendant is granted bail and we don't perfect the order before closing, the defendant gets to spend a night in gaol unnecessarily."

"That's over and above the call of duty. I'm impressed."
"Yeah - it's a better service than defendants with some solicitors get."

"Come on, Mickey. You only get what you pay for."
"I think that's part of the problem, but we can't be sure. All we know is that some solicitors don't perfect an order that their client be released on bail for 2, even 3 days. The longest we've seen is a week. Their clients spend this time out at Boggo Road or Sir David Longland knowing they're entitled to go and waiting for the order to turn up."

"That's unforgivable. There must be <u>some</u> explanation for it."
"Could be that the client hasn't paid the solicitor for the bail application. It'd be pretty strong leverage to make sure they get their costs, you know - 'you don't pay; we don't give over to the gaol the order that will release you.' Maybe they're too busy."

"Too busy! To get someone out of gaol!"
"You're working in the Supreme Court library, Grace. You throw the book at them."

* *Before it is effective, an order of the Supreme Court must be corrected to the satisfaction of the Registrar of that court and then be signed and sealed by him.*

The Commission is particularly concerned to learn that some defendants have remained in gaol for days after a Supreme Court order for their release on bail had been made.

In all but a handful of cases, the defendant is released on the day the order is made. Apparently, as regularly as once a month a defendant may spend an extra 1, 2 or even 3 days in gaol before the defendant's solicitor perfects the court order to enable the defendant's release. Indeed, the staff at the Supreme Court Registry recently learned that a defendant who had been granted bail in November last year was (at the time of writing 4 months later) still in gaol.

When an unrepresented defendant is granted bail, the Registry arranges for the order to be typed up and sent to the relevant gaol on the day the grant is made. This has meant that the office has sometimes stayed open well after its normal closing time.

Ironically, it seems that some represented defendants have not been given the same standard of service.

Certainly, the Commission understands that if an order for bail has been made after the Registry has closed, a solicitor will be unable to perfect the order releasing a client on bail until the time at which the Registry next opens.

However, the Commission wishes to learn of the circumstances which result in a defendant being detained in prison for more than 24 hours after an order for release on bail has been made.

If a defendant has not paid the solicitor's fees for the bail application, the solicitor has no lien on the order of the court to release the defendant on bail.[111]

The fact that some solicitors may be willing to thwart their instructions to seek and obtain the release of their client by in effect ransoming the client's freedom would be obnoxious to the majority of members of the legal profession.

It may be that solicitors have done everything possible to ensure that their fees are paid and have agreed to turn up to do a bail application on the defendant's guarantee that the money will be paid to the solicitor at court before the application is made.

After receiving submissions concerning this issue the Commission will consider whether some legislative intervention is required.

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111 See Clifford v Turrill 2 De G & SM 1, and in particular The Vice Chancellor Sir J.L. Knight Bruce at 2 - "Lien cannot be allowed to intercept the completion of an order of this court which has been passed."

SUMMARY

The Commission considers that present bail legislation needs to be changed. Some changes will be minor. Other changes will be of greater significance.

A summary of the chapters in this discussion paper follows. It includes the Commission's tentative view about the changes that should be made when a new Bail Act is drafted.

Before responding to any of the issues that follow, readers should refer to the previous chapters to obtain a more detailed explanation.

Final discussions will not be made until public reaction to this paper has been received.

1. THE IMPORTANCE OF BAIL

In its review of the operation of present bail legislation, the Commission has been aware of the delicate balance between two often competing principles - the need to preserve the freedom of the defendant weighed against the need to protect the community from a re-offending or potentially violent defendant. The tentative conclusions of the Commission, which are set out below, are made within this context.

2. DECIDING WHETHER A DEFENDANT SHOULD BE RELEASED ON BAIL

A. Present provisions for refusing bail

(a) Where there is an unacceptable risk that a defendant will fail to appear at a court hearing date.

The Commission considers that refusal of bail in these circumstances is justified. The integrity of the criminal justice system demands that people who commit offences must answer and be punished for these offences.

However, the Commission is concerned about the width of this ground in present legislation. Problems arise. For example if a defendant has failed to appear once before, does this constitute an unacceptable risk that he or she will fail to appear on this grant of bail? If a defendant has not appeared at court for the hearing of a minor charge for which it is accepted practice that no appearance is necessary then should this be taken into account?

(b) Where there is an unacceptable risk that a defendant would either -

- **commit an offence;**
- **endanger the safety or welfare of members of the public; or**
- **interfere with witnesses.**

On these grounds, a defendant could be detained on the basis of a future possibility.

A survey undertaken by the Commission reviewed the cases of all defendants (115) who made applications for bail in October 1989 in the Brisbane Magistrates Courts. At the time a court first considered bail, bail was refused to 18 applicants. The reasons given for 38.39% (7) of these refusals involved at least one of the above categories.

American research in this area has suggested that the margin for error in this type of decision-making may be as poor as 10 inappropriate detentions to secure 1 held appropriately.

Those convicted of criminal offences cannot have an extra term added to their prison sentence because a court considers that they may pose a danger upon their release.

It would therefore seem illogical to allow those who are presumed innocent by the law to be detained for the prevention of possible future crimes.

In these circumstances, the Commission believes that the refusal of bail on the basis of a future possibility is not justifiable - with two exceptions.

First, the community must be protected from defendants who are likely to commit a violent offence.

Secondly, the Commission considers that justice cannot be served if witnesses are frightened away from giving evidence. Witnesses must be protected.

(c) Where the offence facing the defendant is armed robbery or involves drugs

The prosecution must normally establish the reasons why a defendant should not be released on bail. Drug and armed robbery charges leave the defendant, not the prosecution, with the responsibility of proof. Bail is therefore more difficult for a defendant to obtain.

The Commission realises that this position may reflect community concern about the seriousness of these crimes.

However, the need for special rules for these two classes of defendants has been questioned.

The Commission would appreciate community views about whether and why different bail rules for those charged with drug offences should be maintained.

B. Automatic review by courts of defendants who have been refused bail by the police.

A census taken throughout Queensland's prisons on 1st March, 1991 revealed 222 defendants were in prison awaiting trial. Over 50% of these defendants had made no application for bail.

The Commission considers that defendants should not remain in gaol before their trials unless a court has considered whether or not detention is necessary.

This view is strengthened by the fact that, in the Commission's survey, a significant number of defendants had been kept in gaol before their trial when they were not later convicted of the offences for which they were placed in gaol.

In its review of 50 defendants who made bail applications in the Supreme Court in October and November 1989, the Commission found that 45 of these defendants are known to have spent time in gaol after their first appearance in court. Of these defendants, 31.11% (14) were not convicted of the criminal charges for which they were being held in gaol.

The Commission is considering legislation to create an automatic review by the courts of people who have been refused bail by the police. The proposal is that defendants must be released after a set amount of days unless a court orders otherwise. If there is sufficient evidence to justify a defendant's detention, then an application should be made by the police or prosecuting authorities for a court order that the defendant be kept in prison until trial.

If no application is made by the police or prosecuting authorities within this time, the defendant must be released.

C. Limits on refusal of bail.

In 4 of the 165 cases the Commission reviewed there has been a period spent in gaol prior to trial, where, at trial, no further penalty has been given to the defendant. In these cases, refusal of bail has been effectively the punishment given to the defendant - a punishment given before a court could give proper consideration to the evidence, to the circumstances of the defendant, and to what, if any, term of imprisonment would be appropriate.

A principle could be inserted in the legislation that bail should be granted when there is a likelihood that, if convicted of the charge, the defendant would not be ordered to serve a term of imprisonment.

3. THE NEED FOR DIFFERENT RULES IN SPECIAL CASES

The impact of a refusal of bail to two classes of people - aborigines and young people - can cause irreversible harm.

The Commission considers that special rules are required.

A. Detaining young defendants

Bail may be refused to a person under 17 years of age when police or a court are satisfied that the young person should remain in custody for her or his protection or welfare.

Ironically, the consequences of a refusal of bail on these grounds may work against the young person's protection and welfare. Both before and after a child's first appearance in court, the young person can be detained in a facility that is recognised as one of the worst forms of incarceration - a police lock-up or watch-house.

A prohibition against the detention in police facilities of young people would require an amendment to section 26 of the Children's Services Act. A review of this Act is not specifically within the Commission's brief, but the Commission cannot ignore the harmful effects that follow a refusal of bail for young people. The prohibition should be made.

The Commission also believes that the exclusion of a child from bail on welfare grounds should be abolished.

The most recent annual report of the (now) Queensland Police Service documents that, of the 3,847 young people under 17 years of age who were charged by Queensland police during 1988-1989, only 6.55% (252) were summoned to court. The question of bail arose in 93.45% of cases.

Young people should be summoned, not arrested, in all but serious or violent offences.

"No fixed place of abode" is a common ground given by police for refusing bail to young people.

The Burdekin Inquiry recommended that bail legislation should specifically state that lack of accommodation is not sufficient reason to refuse bail. The Commission agrees.

In those cases where a court is not prepared to release a young person facing a serious or violent crime, the young person could be required to live at a bail hostel until the court hearing.

Finally, the Commission can recommend that the Bail Act contain conditions for the release of young people which respond to the circumstances of the young.

Conditions more appropriate to young defendants could include -

- close supervision equivalent to a probation order;
- prohibited association with a particular group of young people;
- limitations on activities; or
- restrictions from attending particular places.

B. Detaining aboriginal defendants

The investigation conducted by the Royal Commission into Aboriginal Deaths in custody has spanned nearly 4 years. Its report and recommendations are currently being finalised.

In these circumstances, it would be premature and inappropriate for the Queensland Law Reform Commission to conduct its own research or report upon this important and sensitive area.

However, Queensland initiatives concerning the manner of dealing with people who are refused bail following arrest for being drunk in either a public place or hotel are contained in the Bail Act. This initiative is ineffectual. The Commission therefore feels compelled to highlight the problem.

A 1989 amendment to the Bail Act 1980-1989, contemplates the release of defendants who are drunk into detoxification centres. At "declared places", these defendants can be given a level of care and supervision not available at watch-houses. At the time of writing this paper, no places to which these defendants can be released have been declared suitable.

The Commission's view is that the issue of public drunkenness cannot be and have not been dealt with in Queensland bail legislation.

It is not desirable to allow ineffectual legislation to remain on the statute books.

Care and supervision should be given to intoxicated people whether or not a criminal offence has been committed. The legislation which authorises the establishment of places for the care of drunken people should not be incorporated within legislation dealing with the criminal law alone.

4. BAIL HOSTELS - ALTERNATIVES TO DETENTION IN GAOL

An unemployed or homeless person runs a greater risk of being kept in prison before trial. Poverty may jeopardise freedom.

Bail hostels address this inequity. They are supervised hostels where defendants are required to live before their trial. They are set up to accommodate those who lack a stable or permanent living environment and would otherwise risk being gaoled before trial.

Bail hostels cannot claim unqualified success on the material available to the Commission.

A high level of absconders have been reported from the hostels. Research from the United Kingdom indicates that the hostels may have brought more people under intensive control by a government department who, in the absence of bail hostels, would otherwise have gone free.

These problems may diminish with -

- a reduction in the number of defendants who normally live in a hostel; and
- a development of specialist hostels which target groups of defendants with a common link.

For instance, it would appear to the Commission that the less restrictive environment of a bail hostel would be more appropriate to house young people than youth detention centres.

Bail hostels staffed by aborigines may prove a safer environment for those aborigines who would normally be kept in prison before their trial.

5. STREAMLINING THE BAIL PROCEDURE

A. An alternative way of requiring a defendant's appearance in court

Adult defendants should be processed more often through the summons procedure.

A procedure which would allow the police to serve a summons on a defendant at the time of first contact could be considered.

Presently, police officers have a discretion whether persons charged with a range of offences should be processed by summons, or by arrest and bail.

Guidelines setting out whether a person should be arrested or summoned should be developed.

B. Cash deposit forfeit

Queensland bail law includes a system for dealing with defendants who have committed minor offences without the defendant appearing in court.

Under this system, a person is released on bail after paying a small sum of money. Whilst the bail notice given to the person by the police will tell them to attend at court on a particular day, the person is told that if he or she does not go to court on that day, nothing further is likely to happen. The cash deposit is forfeited when the person does not appear in court.

In a case where a person who is eligible to be released on a cash deposit, has insufficient money to pay the deposit, a system should be devised to allow payment of the cash deposit to be made within a set period of time, so that court proceedings can be avoided.

Secondly, courts have the power to issue a warrant for the arrest of someone released on cash deposit.

However, a defendant released on the cash deposit forfeit system will have been told by the police not to turn up to court. By not attending court, the defendant will have done nothing wrong. It is not acceptable that such a defendant has to undergo the stigma and trauma of another police arrest. The power should be removed.

6. FAILING TO ATTEND ON THE DATES REQUIRED

The overwhelming majority of defendants who receive bail attend their court hearing dates.

A. The consequences of failing to appear at court on the dates required

The Commission does not believe that an increase in penalty is necessary or desirable.

Those defendants who are brought to court after being arrested for failing to appear must provide the court with an explanation then and there. No time for preparation or collection of evidence is allowed by the law.

The legislation should be altered to enable a judicial officer to deal with the charge at a later date. The only consideration which the court should attend to immediately is whether or not the defendant should be granted bail until the hearing of the charge.

Presently, a defendant who is convicted of failing to appear at a court date can be ordered to serve a term of imprisonment of up to two years.

Unless there are special circumstances, a defendant should not be penalised for a failure to appear at a rate greater than the penalty it is likely that the defendant would receive upon conviction for the charges for which bail was given.

Presently, a defendant who is ordered to serve a period of imprisonment for failing to appear must serve this period on top of any term of imprisonment that has previously been imposed. If another period of imprisonment is imposed when the defendant is in gaol for a breach of bail, this must be served after the period of imprisonment for failing to appear.

As a general rule, courts can decide whether terms of imprisonment can be served concurrently or cumulatively. The Commission can see no reason why the general rule should not apply to sentences of imprisonment imposed for a failure to appear.

B. Suggestions to improve the rate at which defendants appear when required at court

Whilst defendants who have failed to appear may have reasonable excuses for the failure or may have surrendered before arrest, the non-appearance rate of people whose bail has been scrutinised by the courts was, in the Commission's survey, high. Failures to appear are administratively inconvenient: for court staff who must issue warrants and relist proceedings and for police who must arrest non-appearing defendants.

The following practical reforms may help to alleviate this problem.

(a) Better explanations about bail undertakings could be provided to defendants

At a minimum, police and court officers should in clear and simple English explain to a defendant the date upon which to next attend court and the consequences of not attending. The date should be given to them in writing. This should be done after bail has been granted and at every court appearance date until the trial.

This could be backed up by a pamphlet or form explaining in simple English the date upon which to next attend court, and the rights and responsibilities of defendants who are bailed. This could be handed out at watch-houses and courts to all defendants released on bail.

(b) Verified information could be presented to the court concerning any application for bail made to it

At present, the information presented to the court is, more often than not, hastily prepared by arresting police officers and defence lawyers. When bail applications are contested by police, the information presented by both sides in court can be one-sided. The court often lacks an objective assessment based on verified information.

The success of programs designed to provide courts with objective verified information about bail applicants is well documented.

The Commission believes that the introduction of a scheme based upon these initiatives could be considered in Queensland.

The resources for this initiative could be provided by the Corrective Services Commission. Internationally, these initiatives have led to a decrease in failures to appear as well as both remands in custody and sentences of imprisonment. The financial resources of corrective services departments have been preserved as a consequence. These savings could, in part, be applied to piloting and (if successful) maintaining a bail assessment scheme.

(c) Checks on defendants who are released on bail

The value of conditions requiring the defendant to report to the police is debatable. Police have neither the time nor the resources to follow up defendants who fail to report.

The reporting function could be more efficiently administered by the Corrective Services Commission.

7. CONDITIONS OF BAIL

A. Financial incentives

In a census of prison inmates taken on 1st March, 1991, 7 (3.75%) out of the 222 defendants who were in Queensland gaols before their trial on that date had been granted bail but had been unable to comply with the conditions that attached to the bail. It is more than likely that these conditions required the defendant to provide a security or surety before release.

The less money available to a defendant, the lower a security or surety needs to be to maintain an incentive for the defendant to appear at court. A $500 security will be a powerful incentive to a young or unemployed person to appear at court, but would be of little incentive for a person earning a professional salary.

The Commission believes that a principle should be inserted in bail legislation that judicial officers must take into account a defendant's financial means when deciding what level of financial incentive needs to be imposed on the defendant.

Under the present system, magistrates and judges are not subsequently notified if a defendant cannot obtain a security or surety which has been imposed as a condition of release. It may never come to their attention that the condition imposed is beyond the means of the defendant.

The Commission suggests that the bail status of any defendant who has been

granted bail and who still remains in gaol 4 days after the grant, must be brought back before a court for review.

The Commission doubts whether the concept of sureties still serves any valuable purpose in bail processes.

The same incentive would still be present if the surety undertook to pay a security on behalf of the defendant.

Financial incentives should not be limited to cash. A defendant should be able to use any property with monetary value as a security. For instance, a family home, a car or shares could be used.

B. Conditions which regulate or monitor a defendant before trial

Magistrates and judges are not restricted in the type of conditions that can be imposed nor by the circumstances which must be present before a condition can be lawfully imposed.

The Commission believes that greater legislative guidance is required about when conditions can be imposed.

Most of the conditions presently imposed by courts are designed to ensure attendance at court.

In what other circumstances should other conditions be imposed?

Earlier in this discussion paper it was argued that the liberty of a person who the law presumes to be innocent should not be restricted on the basis of a possibility that he or she may, commit offences whilst on bail. As conditions restrict the defendant, the same arguments apply to bail conditions as they do to the grant or refusal of bail.

However, the Commission has also suggested that defendants should not be denied bail because there was a possibility that the defendant would commit an offence before trial. There may be more public support for this suggestion if conditions could be imposed.

C. Types of conditions

In Western Australia and South Australia, defendants can be released on bail but be confined to their homes. In South Australia, defendants can also be placed under the supervision of (the equivalent of) a Corrective Services Commission office until trial.

Both of these types of conditions presently exist in Queensland as forms of punishment that can be imposed upon a defendant after conviction. They are not presently conditions of bail. The former is equivalent to a home detention order.

The latter resembles a period of probation.

Compelling reasons should be required before a court could impose these types of conditions on a defendant who the law presumes to be innocent. The Commission is therefore reluctant to insert these conditions within bail legislation. Public comment is sought.

8. OTHER ISSUES

A. Compensating defendants kept in gaol before trial who are not convicted

In its review of 50 defendants who made bail applications in the Supreme Court in October and November 1989, the Commission found that 45 of these defendants are known to have spent time in gaol after their first appearance in court. Of these defendants, 31.11% (14) were not convicted of the criminal charges for which they were being held in gaol.

Whether and how these defendants should be compensated should be addressed. The Commission seeks public comment about whether the issue of compensation should be dealt with in bail legislation.

B. Which courts should deal with bail applications

The Commission believes that the court which has power to hear the case against the defendant should be the court which first considers whether to release a defendant on bail.

Where defendants have been granted bail by a court which initially had power to consider the case, the Commission considers that the grant should continue until the defendant breaks a condition of bail or fails to appear at court when required.

C. Providing an address within 25 kilometres of the court

The section is primarily directed towards defendants who may not be able to afford to retain private solicitors and who may not be granted legal representation for committal proceedings. As a consequence, low-income defendants are often not represented at a committal hearing - the Director of Prosecutions may not know who is later employed to represent the defendant at trial.

The Director of Prosecutions has suggested that the requirement be replaced by allowing the court to decide whether an address for service other than the defendant's home is needed. The Commission supports this view.

D. Applying for bail following a conviction

The Commission believes that bail legislation should set out that -

> "A defendant who has been convicted and ordered to serve a period of imprisonment may be granted bail if the court believes that the defendant will serve a period of imprisonment before the appeal hearing in excess of that which is likely to ultimately be imposed."

The Commission considers it appropriate for the courts to retain the power to bail a convicted defendant who is sentenced to imprisonment in circumstances it considers are exceptional. It would not limit the courts by attempting to list these circumstances further than is discussed above. Public comment is sought on these proposals.

E. Taking remand periods into account as part of the sentence

The Commission considers that legislation should state that a period in which a defendant is kept in gaol before trial should be treated as a period of imprisonment already served by that person under sentence.

F. Doing the paperwork after a Supreme Court judge grants bail

The Commission is particularly concerned to learn that some defendants have remained in gaol for days after a Supreme Court order for their release on bail had been made.

In all but a handful of cases, the defendant is released on the day the order is made. Apparently, as regularly as once a month a defendant may spend an extra 1, 2 or even 3 days in gaol before the defendant's solicitor perfects the court order to enable the defendant's release. Indeed, the staff at the Supreme Court Registry recently learned that a defendant who had been granted bail in November last year was (at the time of writing 4 months later) still in gaol.

After receiving submissions concerning this issue the Commission will consider whether some legislative intervention is required.

10. THE COMMISSION'S SURVEY RESULTS

In January, 1991 the Queensland Law Reform Commission conducted a survey of court files in the Supreme, District and Magistrates Courts.

Defendants who had made bail applications in court provided the focus of the survey.

The survey aimed to detail the progress of these defendants through the criminal justice system: the conditions upon which bail was granted; the appearance rate of defendants in court following a release on bail; the acquittal rate of these defendants; the amount of time defendants who were not granted bail spent in gaol.

The information and data available about both those remanded in custody and those who were granted bail is scant. To our knowledge, a survey on this topic has not been undertaken before in Australia. This is understandable. It is a difficult study to undertake.

The exercise required extensive manual cross-referencing between Magistrates, District and Supreme court files, together with the Corrective Services Commission data base.
A person who is bailed in the Magistrates Court may be tried in the District Court.

An application for variation or, if bail is initially refused, a re-application for bail may have been heard in the Supreme Court prior to the trial. The person may have been granted bail on the condition that a deposit of money be made, but was unable to raise that amount. Time in gaol will result. This information cannot be ascertained from court files. Corrective Service Commission records must be accessed.

All of these sources of data were followed up where appropriate.

The survey started at two points.

First, the Brisbane Magistrates Court files of every defendant whose first court appearance date was in October, 1989 were examined. The files concerning six defendants were missing. These files may or may not have been relevant to the survey. Any file of a defendant who, either during that month or subsequently, made a bail application or an application for variation of bail either in the Magistrates or Supreme Courts was extracted.

One hundred and fifteen defendants were within this category. Only one of this sample group made applications for a variation of bail.[112]

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112 One of the two had bail varied.

Secondly, the Brisbane Supreme Court files of every defendant who made a bail application, re-application or application for variation during October and November 1989 were examined. All those defendants whose subsequent court trials were held in Brisbane at either the Magistrates, District or Supreme courts were extracted to provide the sample group.[113]

Fifty defendants were within this category. Seven applications concerned variations of bail.[114]

October and November, 1989 are months with no identifiable event or occurrence which could effect or skew the types of offences or numbers of defendants entering the criminal justice system. The Commission required months in which it would be likely that the trials of defendants would have now been heard. Hence, the latter part of 1989 was chosen. September and December were excluded as times in which school holidays were taking place, and therefore a potential period for a rise in youth crime may result. August, the time at which the Exhibition Show is held, usually sees a rise in arrest rates. July was an acceptable survey month. October and November were chosen, however, so that the survey in the Supreme Court could be undertaken over a continuous period.

The highly publicised Orleigh Park murder, involving four female defendants, took place during October 1989. This had little bearing on the survey, as only one of the four who were accused of committing the murder applied for bail during the survey period.

Three defendants within the survey sample applied for bail following conviction and the imposition of a prison sentence: one in the Brisbane Magistrates Courts and two in the Brisbane Supreme Courts. These defendants have been excluded from the samples.

A. Refusal of bail

(a) The Brisbane Magistrates Courts.

Bail was initially refused 15.65 (18) of the survey sample.

Of those initially refused:

- 33.33% (6) were subsequently granted bail;
- 50% (9) made no further application for bail;

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113 The trials of the defendants were held in many court locations in South East Queensland. The Commission had permission to access the records of files processed in Brisbane courts only.

114 Six of the seven applications resulted in a variation.

- 61.11 (11) were charged with one offence only;
- 27.78% (5) were charged with a property-related offence only[115];
- 77.78% (14) were young people aged 25 years or less. This age group were disproportionably represented in initial bail refusals. They represent 63.72% (72/113) of the sample; two ages were unknown. Of all young people who applied for bail, 19.44% were refused bail on their initial application. By contrast, of all defendants over 25 years of age, 9.76% (4/41; 2 ages were unknown) were refused bail on their initial application;
- In 4 cases multiple reasons for refusal were given;
- In 6 cases (33.33%) it was thought that there was an unacceptable risk that the defendant would fail to appear if released;
- In 6 cases (33.33%) it was thought that the defendant, if released, would commit an offence before trial;
- In 2 cases (11.11%) it was thought that the defendant, if released, would endanger members of the public;
- In 1 case (5.55%) it was thought that the defendant would interfere with witnesses if released;
- In 5 cases (27.77%) the defendant was before the court having been charged with an indictable offence whilst on bail; and
- In 4 cases (22.22%) the reason for the refusal was not known.

The time spent by one defendant who was remanded in custody is not known. One other defendant was released on watch-house bail only to be charged later with different offences; he was remanded in custody and the custody period, it would appear, was concurrent. He appeared twice, but has only been counted once for the purposes of the average time spent in custody.

The average time spent in custody by the remaining 16 defendants who were refused bail (whether or not a subsequent application for bail was successful) was 43.31 days.

31.25% (5/16) of these defendants spent time remanded in custody, for more than 50 days. Their average stay totalled 101 days.[116]

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115 One with breaking and entering, two with unlawful use of a motor vehicle, and two with stealing with violence.

116 This time excludes time during which a defendant may have been held in a watch-house prior to the court's first determination concerning bail.

In the case of one defendant, although the initial period of remand is known, the subsequent period of remand is unknown. These figures are therefore an under-representation of the average stay in custody.

(b) Brisbane Supreme Court.

Bail was initially refused 38% (19) of the survey sample.

Of those initially refused -

- 73.68% (14) were subsequently granted bail;
- all defendants made further applications for bail; two made three and another made two further unsuccessful applications. Two were granted bail on the second re-application;
- 31.58% (6) were facing one charge only. All bar one of these charges involved violence. The remaining offence concerned a Federal law drug charge; and
- 57.89 (11) were young people aged 25 years or less. This age group are disproportionably represented in initial bail refusals. They represent 38.30% (18/47) of the sample; three ages were unknown. Of all young people who applied for bail 61.11% were refused bail on their initial application. By contrast, of all those defendants who were more than 25 years of age, 27.59% were refused bail on their initial application. However, only two young people were refused bail upon subsequent re-applications.

Reasons for refusal of bail were not given on Supreme Court files.

B. Conditions of bail

(a) In the Brisbane Magistrates Courts.

22 defendants were given watch-house bail in the sample group of 104 defendants who were granted bail at some stage before their trial. The 22 defendants were included in the sample because they made subsequent applications for bail. In all but 2 of these, their only condition of bail in the watch-house was that they reside at a particular place and appear when required at court. The conditions imposed in these 2 cases were -

- a security less than $500; and
- not to interfere with witnesses or the victim.

Seven defendants made an application subsequent to being given watch-house bail. The remaining 89 defendants had conditions fashioned by the court. The rest of the text concerns these defendants.

Of those defendants who were granted bail at some stage before their trial, 33.65% (35/104) of the defendants had conditions imposed on them other than residing at a particular place and appearing when required at court.

Within the sample, 72 defendants were 25 years or less. 6.95% (5/72) of this group were granted bail on the condition that they provide a surety. The sureties did not exceed $5,000; one was less than $1,000. No person of 25 years or less was required to provide a security.

Two sureties and two securities were required from defendants over 25 years of age. Thus -

. 9.76% (4/41) of defendants over 25 years of age; and

. 8.65% (9/104) of defendants

were required to provide some monetary incentive for their later appearance in court.

Of those bailed with a condition other than residing at a particular place and appearing when required at court -

. 54.29% (19/35) were required to report at regular intervals to the police;

. 8.57% (3/35) to report twice per week;

. 34.29% (12/35) to report 3 times per week; and

. 11.43% (4/35) to report daily.

When reporting conditions were given, the defendant was required to report 3 times per week in 63.16% (12/19) of cases.

The courts have power to impose special conditions it thinks are necessary. Special conditions were imposed on defendants who were granted bail in three cases (2.88%). Those conditions - to surrender or not to apply for a passport, and to stay away from points of international departure - were all to ensure the defendant remained in Australia. Two cases involved drugs, but one concerned a major offence of car theft.

(b) In the Brisbane Supreme Court.

Two defendants were given watch-house bail of the 46 defendants who were granted bail at some stage before their trial. These 2 defendants were included in

the sample because their bail was revoked and a subsequent application for bail was consequently made. One defendant's further applications for bail were unsuccessful. The other defendant was subsequently granted bail by the court.

Therefore, 45 (46-1) defendants had conditions fashioned by the court. The rest of the text concerns these defendants.

Of those defendants granted bail within this sample group, 95.56% (43/45) had conditions imposed on them other than to live at a particular place or to appear when required in court.

93.02% (40/43) of defendants had reporting conditions attached to their bail. Where reporting conditions were imposed, in 75% (30/40) of cases the defendant was required to report three times per week.

Financial incentive to appear at the court case was provided to 42.23% (19/45) of defendants. Generally, the defendant was required to provide a surety or a cash deposit of an amount not less than $2,000. In 57.9% (11/19) of cases where this condition was imposed, the amount required was $10,000 or more. 42.11% (8/19) of these conditions were imposed on young people of 25 years of age or less. In five of the eight cases where young people were requested to provide a surety or security, the amount was $5,000 or more.

Only three of the eighteen young people who were granted bail (16.67%) were bailed on their own recognizance. The remainder had a reporting condition as one of the multiple of conditions attaching to bail.

The power to impose special conditions was utilised in 40% (18/45) of cases. In all but 3 of these 18 cases, the conditions involved the surrender of passport or other restrictions on travel either inside or outside Queensland. Of the remaining 3 cases-

(i) a person facing a major charge of carnal knowledge was to have only supervised contact with the child victim;

(ii) a person facing a major charge of assaulting with intent to steal was forbidden to visit the hotel which was the scene of the assault or from leaving his home between 7pm and 6am; and

(iii) a person facing a major charge of murder was ordered to remain at home except when reporting to police or seeking medical treatment.

C. Breach of bail

One of the primary purposes of bail is to ensure that defendants appear at the court hearing of the charges laid against them.

The overwhelming majority of defendants who receive bail attend their court hearing dates.

In the Brisbane Magistrates Court during 1990, the hearing of 26, 417 criminal charges commenced.

91% (24,064) of these charges involved bail.

Where a defendant does not appear on the dates required for a court appearance a warrant for the defendant's arrest is usually issued. On 2233 individual court charge files, a warrant of arrest was issued following a defendant's non-appearance in court. This represents a non-attendance rate of 9.28% for all charges. However, this presents an over-representation of how many defendants fail to appear, as many defendants face two or more charges. Thus, only 664 defendants were charged with failing to appear during 1990 in Brisbane Magistrates Court.

Most defendants are bailed from a police watch-house following arrest. The majority of court hearings concern problematic bails: those defendants who the police are reticent or doubtful about releasing.

The Commission's survey concerns bail application made in courts. It therefore concentrates on this group of defendants.

(a) The Brisbane Magistrates Court.

Twelve people were not released on bail in the sample group.

Of the remaining 103 who were released on bail, 42.72% (44) failed to appear on a date that they were required to attend court.

This figure is less concerning when read in conjunction with the penalties that were imposed for the failure to appear.

Nearly 60% of the defendants received no penalty for failing to appear.

Some of the defendants in this group may not have been penalised because of a technicality in the legislation. A defendant can only be convicted of the offence of failing to appear if a warrant for the defendant's arrest has been issued and executed.[117] If a defendant has failed to appear, that defendant cannot be

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[117] Section 33(i)(b) Bail Act 1980-1989.

convicted until she or he is arrested under warrant. Some defendants who have not attended court as required "turn themselves in" before being arrested. They should not be convicted under existing legislation.[118]

Penalty for failing to appear	Number of defendants
Not convicted	52.27% (23)
Convicted but not punished	6.52% (3)
Fined	13.64% (6)
Imprisoned	2.27% (1)
Still at large	25% (11)

However, others within this group will have been arrested. They will not have been convicted because they have provided the magistrate with a satisfactory explanation for their failure to attend court. Forgetfulness or lack of funds to obtain transport are not regarded as reasonable excuses.

Only one defendant received a gaol sentence for failing to appear. The sentence was for a period of less than one month.

Further, the sample group contains all defendants who made bail applications within the survey month. Nineteen defendants were included in the sample because they failed to appear and a subsequent bail application has to be made after their arrest. These defendants were all granted watch-house bail.

Twenty-two defendants in the sample group were given watch-house bail.

The failure to appear rate for people who were first granted bail by a court (and was therefore refused watch-house bail) was 30.86% (25/81).

79.55% (35) of all defendants in the sample who failed to appear were charged with either driving offences (16) or theft offences involving no violence (19).

Driving under the influence of alcohol represents the major charge faced by 21 of the defendants in the sample. Two-thirds (14) of these defendants failed to appear.

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[118] The Commission understands, however, that some magistrates do not take this view and nevertheless convict such defendants unless they can provide a satisfactory reason for their absence.

Thirty-five defendants in the sample group faced a major charge of a theft-related property offence involving no violence. 54.29% (19) of these defendants failed to appear.

Defendants facing major charges of either driving under the influence of alcohol and unlawful use of a motor vehicle comprised 50% (14+7) of those defendants who failed to appear.

The non-appearance rate for defendants who faced, as a major charge, an offence other than driving or non-violent theft-related property offences was 20.45% (9/44).

Six people were initially refused but subsequently granted bail. Four of these people failed to appear.

There does not appear to be any significant correlation between age and failure to appear. 37.5% (27/72) defendants in the sample who were 25 years of age or less failed to appear. 36.36% (16/44) of defendants who were over the age of 25 failed to appear. One defendant's age was unknown.

However, the correlation between sex and failure to appear produced a surprising result. Three women and nine men were refused bail initially and subsequently. Women numbered 17 and men numbered 98 in the sample group. Of those defendants granted bail, 64.29% (9/14) of the women compared with 39.33% (35/89) of the men failed to appear.

25% (11/44) of those who failed to appear are still at large. The defendants comprise 10.68% (11/103) of those defendants who were at some time granted bail. The major offences facing these defendants were driving under the influence of alcohol (2), theft-related property offences involving no violence (6), stealing with violence (1), unlawful wounding (1), and possession by a prisoner of a hacksaw (1).

Of those people released on bail, conditions of bail, other than residing at a particular place and appearing when required at court, were imposed in 27 (25.96%) of cases. Of the remaining 26 cases, 65.38% (17/26) defendants appeared when required at court, only 9 of those who failed to appear (34.62%): (9/26) had conditions other than residency requirements attached to their bail. Where reporting conditions were imposed, 35.7% (5/14) of defendants failed to appear.

(b) The Brisbane Supreme Court

Five (10%) of the sample group were not released on bail.

One of the remaining 45 defendants was granted bail initially which was subsequently revoked. Two re-applications for bail, by this defendant were not successful.

Of the remaining 44 defendants, 9 (20.45%) failed to appear when required at court.

Five of these defendants (11.36%) were not convicted for their failure to appear. As in the Magistrates court, either these defendants were able to satisfy the court that they had a reasonable excuse for their non-attendance, or they subsequently presented at court of their own volition before a warrant of arrest was executed. Two of these defendants were charged with drug offences, two with unlawful use of a motor vehicle and one with breaking and entering.

Four of the defendants who were granted bail are still at large (9.09%).

Three of these defendants were charged with drug offences (two with trafficking and another with the supply of a 1st schedule drug). All three were granted bail on their initial application in the Supreme Court.

The remaining defendant who was still at large was charged with unlawful wounding. This initial application for bail was refused in the Brisbane Magistrates Court. A subsequent application to the Brisbane Supreme Court was successful.

These defendants are male: two are aged 25 years or less; two are older than 25 years.

All defendants were bailed on the condition that they report to the police three times a week. Two were required to provide a monetary surety or cash deposit; one of $1,000 and the other of $10,000.

Forty defendants who received bail 88.89% (40/45) were required by the conditions of bail to regularly report to the police. Where reporting conditions were imposed, in 75% (30/40) of cases the defendant was required to report three times per week.

Eight of the nine defendants who failed to appear had reporting as a condition of bail. However, if the success of reporting conditions can be measured by the rate at which defendants who have these conditions attached to their bail appear when requested in court, then the "success rate" is 80% (32/40).

HISTORY OF DEFENDANTS WHO WERE REMANDED IN CUSTODY

MAGISTRATES COURT

MAJOR OFFENCE CHARGED	NUMBER OF OFFENCES CHARGED	TIME SPEND IN GAOL PRIOR TO TRIAL	RESULT
ACQUITTED			
Driving under the influence	1	½ day	Acquitted
NOLLE OR NO TRUE BILL			
Breach Bail Act	1	Not known	Charge dropped
Breach Supreme Court Bail	1	Not known	Charge dropped
Stealing with violence	1	5 days	Nolle
CUSTODIAL			
Driving under the influence	2	8 days	Convicted & sentenced on all charges; · 2 months & 21 days custodial sentence · license disqualified - 2 years
Stealing with violence	1	4 months 23 days	Convicted & sentenced on all charges; · 6 years custodial sentence
Dangerous Driving	1	1 month 13 days	Convicted & sentenced on all charges; · 28 months custodial sentence · absolute disqualification
Breach of community service order	2	6 days	Convicted & sentenced on all charges; · received between 1 week & 1 month custodial sentence
Break and Enter	1	3 months 28 days	Convicted & sentenced on all charges; · 2 years custodial sentence
Unlawful use of a motor vehicle	1	3 Months 4 days	Convicted & sentenced on all charges; · 9 months custodial sentence

MAJOR OFFENCE CHARGED	NUMBER OF OFFENCES CHARGED	TIME SPEND IN GAOL PRIOR TO TRIAL	RESULT
NON CUSTODIAL SENTENCE			
*Driving under the influence	1	2 months 19 days	Convicted & sentenced on all charges; · fine - $500 · disqualification from driving - 5 months
*Stealing	15	2 months 20 days	Convicted & sentenced on all charges; · 3 years probation · restitution - $7,059.26
Breach Probation	7	1 day	Convicted & sentenced on 5 charges; · 9 months probation · 160 hours community service
Discharge of firearm in public place	3	1 day	Convicted & sentenced on 2 charges; · total fines $300 ($200 + $100)
Driving under the influence	1	1 day	Convicted & sentenced on all charges; · fine $1,000 · disqualification from driving - 15 months
Failure to comply with Probation	1	5 days	Convicted but not punished
Stealing	8	1 month 27 days	Convicted but not punished
STILL AT LARGE			
Concealing hacksaw whilst a prisoner	1	13 days	Still at large

* These charges involve the same defendant and it would appear the remand period was served concurrently.

MAJOR OFFENCE CHARGED	NUMBER OF OFFENCES CHARGED	TIME SPEND IN GAOL PRIOR TO TRIAL	RESULT
NOT YET HEARD			
Murder	1	Not known	Not yet heard
Unlawful use of motor vehicle	1	2 months	Not yet heard
Unlawful use of motor vehicle	1	18 days	Not yet heard
NOT KNOWN - RESULT			
Unlawful use of motor vehicle	3	1 month 14 days	Not known

HISTORY OF DEFENDANTS WHO WERE REMANDED IN CUSTODY

SUPREME COURT

MAJOR OFFENCE CHARGED	NUMBER OF OFFENCES CHARGED	TIME SPEND IN GAOL PRIOR TO TRIAL	RESULT
ACQUITTED			
Murder	1	11 months 13 days	Acquitted of all charges
Indecent Assault	2	8 days	Acquitted of all charges
Supply of First Schedule drug	10	Not known	Acquitted of all charges
NOLLE OR NO TRUE BILL			
Armed Robbery	1	1 month 17 days	Nolle
Armed Robbery	7	17 days	Nolle
Supply drugs	2	One day	Nolle
Trafficking in drugs	4	12 days	Nolle
Unlawful use of motor vehicle	3	1 month 6 days	No true bill
Supply drugs	2	1 day	Nolle
Unlawful use of motor vehicle	6	1 month 6 days	Nolle
Receiving	2	Not known	Nolle
Trafficking in drugs	5	Not known	Nolle
Dishonest application of funds	1	5 months 6 days	Dismissed - no evidence offered
Produce dangerous drug	3	3 days	Defendant discharged. Prosecution did not proceed.

MAJOR OFFENCE CHARGED	NUMBER OF OFFENCES CHARGED	TIME SPEND IN GAOL PRIOR TO TRIAL	RESULT
Stealing	5	1 month 27 days	Convicted but not punished
STILL AT LARGE			
Supply First Schedule drug	4	14 days	Defendant still at large
Trafficking in drugs	7	3 months 7 days	Defendant still at large
Unlawful wounding	1	2 months 5 days	Defendant still at large
Trafficking in dangerous drug	6	Not known	Defendant still at large
NOT HEARD			
Armed robbery	3	One day	Trial not yet heard
Supply drugs	9	Not known	Trial not yet heard
NOT KNOWN - RESULT			
Possession of drugs - Third Schedule	3	1 day	Not known
Possession of dangerous drug	3	Not known	Not known

MAJOR OFFENCE CHARGED	NUMBER OF OFFENCES CHARGED	TIME SPEND IN GAOL PRIOR TO TRIAL	RESULT
CUSTODIAL SENTENCE			
Supply drugs	3	2 months 21 days	Convicted & sentenced on all charges; · 6 months custodial sentence; · probation for 3 years
Break and enter with intent	2	2 months 25 days	Convicted & sentenced on all charges; · 6 months custodial sentence; · 3 years probation; · $1,900 restitution
Assault with intent to steal	1	1 month 24 days	Convicted & sentenced on all charges; · 2 years custodial sentence
Breaking & entering	14	10 days	Convicted & sentenced on 12 charges; · 2 years custodial sentence
Possession of drugs - Third Schedule	2	1 day	Convicted & sentenced on all charges; · 2½ years custodial sentence
Trafficking in Drugs	12	Not known	Convicted & sentenced on 4 charges; · 2½ years custodial sentence
Supply of dangerous drug First Schedule	14	Not known	Convicted & sentenced on all charges; · 3 years custodial sentence
Trafficking in drugs	18	2 months 4 days	13 charges dropped convicted & sentenced on 5 charges; · 2 years custodial sentence
Unlawful wounding	5	2 months 4 days	3 charges nollied convicted & sentenced on 2 charges; · 15 months custodial sentence
Possession of dangerous drug	4	4 months 28 days	3 charges nollied convicted & sentenced on 1 charge; · custodial sentence to the rising of the court
Armed robbery	6	7 months 27 days	Nollied on 1 charge convicted & sentenced on 5 charges; · 4 years custodial sentence Prosecutor appealed & sentence raised to 7 years

MAJOR OFFENCE CHARGED	NUMBER OF OFFENCES CHARGED	TIME SPEND IN GAOL PRIOR TO TRIAL	RESULT
Attempted murder	10	1 month 5 days	Nollied on 8 charges convicted & sentenced on 2 charges · 5 years custodial sentence
Supply of dangerous drug	9	Not known	Nollied on 2 charges, one charge dropped convicted & sentenced on 6 charges · 2 years custodial sentence
Trafficking in drugs	14	Not known	Nollied on 13 charges convicted & sentenced on 1 charge; · 27 months custodial sentence
NON CUSTODIAL SENTENCES			
Produce dangerous drug	3	9 days	One charge dropped convicted & sentenced on 2 charges; · 100 hours community service
Supply drugs	4	29 days	One charge dropped convicted & sentenced on 3 charges; · 100 hours community service; · probation for 2 years
Possession of imported heroin	1	4 days	Convicted of all charges; · Bond for 18 months; · $200 recogizance
Breaking & entering	2	24 days	Convicted of all charges; · 2 fines each of $300
Produce dangerous drug	1	Not known	Convicted of all charges; · Bond for 12 months; · $500 fine
Produce dangerous drug	15	12 days	3 charges dropped convicted & sentenced on 12 charges; · 150 hours of community service; · probation for 2 years
Possession of imported heroin - Customs Act	2	4 days	defendant discharged on 1 charge convicted & sentenced on 1 charge; · bond for 12 months; · $200 recognizance
Supply drugs	3	Not known	2 charges nollied convicted & sentenced on 1 charge; · 240 hours of community service