

# **The Bail Act**

Working Paper No. 41

Copyright is retained by the Queensland Law  
Reform Commission.

Queensland Law Reform Commission

February 1993



**THE BAIL ACT  
WORKING PAPER**

Queensland Law Reform Commission

1993

### **How to make comments and submissions**

The Commission welcomes comments and submissions on the recommendations and proposals made in this paper. Written comments and submissions should be sent to

**The Secretary  
Queensland Law Reform Commission  
PO Box 312  
Roma Street Qld 4003**

**The closing date for submissions is Friday 16 April 1993**

If you would like your submission to be treated as confidential, please indicate this clearly. However, submissions may be subject to release under the Freedom of Information Act 1992 (Qld).

The short citation for this Working Paper is Q.L.R.C. W.P. 41

Published by Queensland Law Reform Commission, February 1993

Copyright is retained by the Queensland Law Reform Commission

Printed by The Print People

#### **ACKNOWLEDGMENTS:**

The Commission wishes to thank the many individuals and organisations who made submissions in response to the Bail Discussion Paper No 35.

Thanks also to Tracey Bilsborough and Patricia McCarthy for their expertise in typing this Working Paper.

ISBN: 0 7242 5324 6

# CONTENTS

## Introduction

1.	What is Bail? .....	1
2.	Who Can Grant Bail .....	5
3.	A Presumption of Bail .....	9
4.	Duty of Police in Relation to Bail .....	13
5.	Refusal of Bail .....	17
6.	Reversal of Onus .....	32
7.	Review of Bail Decisions .....	34
8.	Cash Bail .....	41
9.	Failure to Answer Bail .....	45
10.	Conditions of Bail .....	52
11.	Recommendations of the Royal Commission into Aboriginal Deaths in Custody .....	57
12.	Young Offenders .....	64
13.	Bail After Conviction .....	69
14.	Bail During Trial .....	72
15.	Other Issues .....	74
	Conclusion .....	77



## INTRODUCTION

The Attorney-General has requested the Queensland Law Reform Commission to review the *Bail Act*

*with a view to advising me on the desirability of amendments to provide that an accused person has a right to bail.*

The Attorney-General has also requested that, in conducting its review of the *Bail Act*, the Commission take into consideration the recommendations of the Royal Commission into Aboriginal Deaths in Custody.

In addition, the Attorney-General has requested that the Commission's review of the law relating to bail include reference to the question of bail for people who commit offences of domestic violence.

Bail is a procedure which allows a person who has been accused of a criminal offence and arrested to be released from custody until he or she stands trial. A grant of bail ensures that an accused person does not suffer unnecessary or unlawful deprivation of liberty before trial. The bail process is consistent with the general principle of the presumption of innocence. The presumption of innocence means that it is the task of the prosecution in a criminal trial to prove beyond reasonable doubt that the accused person is guilty of the offence charged and that, until the prosecution so proves, the accused must be presumed to be innocent of the offence charged.

The right to bail is not unqualified. A delicate balance exists, in a consideration of a bail application, between the recognition of the presumption of innocence, on the one hand, and the need for the community's interests to be protected, on the other.

In March 1991, the Commission released a Discussion Paper containing a preliminary review of bail legislation in Queensland. Some of the views expressed in the Discussion Paper are reflected in this paper. In other areas, views have been modified as a result of consultations held since the release of the Discussion Paper.

This paper deals with the prima facie right to bail and with the criteria which qualify that right in the public interest. It therefore considers what test should apply in determining when bail should be denied; what particularised criteria are to be taken into account in the application of the basic test; and whether there should be a reversal of onus for certain serious offences.

It also considers review of a refusal of bail, continuation of the practice of granting cash bail, the consequences of failure to answer bail, and the nature of bail conditions.

In conducting its review and framing its recommendations, the Commission has been guided by the following principles:

- a person charged, but not convicted, of an offence is innocent in the eyes of the law;
- the law should also protect members of the public from harmful behaviour;
- the law should protect people from unlawful or unnecessary deprivation of liberty; and
- the administration of the criminal justice system requires that people accused of an offence are tried and (if appropriate) punished.

The Commission invites submissions on the proposals put forward in this paper.



The Honourable Mr Justice R E Cooper  
**Chairman**

**Members of the Commission**

Her Honour Judge H O'Sullivan (Deputy Chair)

Ms R G Atkinson

Mr W G Briscoe

Mr J M Herlihy

Mr W A Lee

**Principal Legal Officer**

Ms P A Cooper

**Consultant to the Commission**

Mr R G Kenny



# CHAPTER 1

## What Is Bail?

After being arrested and charged with the commission of an offence, and before the matter is finally resolved by conviction or acquittal in the appropriate court, a person (the defendant) may be remanded in custody or may be released from custody in the intervening period through a grant of bail.

Bail is a procedure which allows a person who has been accused of a criminal offence and arrested to be released from custody until he or she stands trial. The bail process is consistent with the general principle of the presumption of innocence - that is, that it is the task of the prosecution in a criminal trial to prove beyond reasonable doubt that the defendant is guilty of the offence with which he or she is charged and that, until the prosecution so proves, the defendant must be presumed to be innocent of the offence charged.<sup>1</sup> It recognises that the liberty of a person who has not been convicted of an offence should not be restricted unless it is necessary in the interests of the community that the person be detained.

Where bail is refused, the defendant is remanded in custody. This means that he or she is detained in a police watch-house or jail. During that time, the costs of that detention must be borne by the State and the defendant does not have the advantage of normal contact with family or friends, or of being able to engage in employment. Obviously, those benefits are available to a defendant who is released on bail.

In Queensland, matters relating to bail are presently dealt with under the *Bail Act 1980*.

Under the *Bail Act*, a defendant is eligible to be considered for bail at any stage of the criminal law process. Except for serious offences such as murder and some of the offences under the *Drugs Misuse Act*,<sup>2</sup> a police officer in charge of a watch-house is empowered to grant bail.<sup>3</sup> This is known as 'watch-house bail'.

There is no right for a defendant to be granted bail at the watch-house. However, there is a duty on the police officer to investigate the question of whether or not bail should be granted. Bail may be refused if the police officer is of the opinion that there would be an unacceptable risk that the defendant, if released on bail, would fail to appear and surrender into custody when required, or would, whilst on

---

<sup>1</sup> See for example *Woolmington v DPP* [1935] AC 462 at 481-2; *Mancini v DPP* [1942] AC 1 at 11; *R v Mullen* (1938) 59 CLR 124 at 136.

<sup>2</sup> *Drugs Misuse Act* section 13.

<sup>3</sup> *Bail Act* section 7.

bail, commit an offence, endanger the safety or welfare of the members of the public or interfere with witnesses or otherwise obstruct the course of justice.<sup>4</sup>

A defendant who is not granted watch-house bail may apply to a court for bail. Generally speaking, a court has power to grant bail to a person held in custody on a charge of an offence if the defendant is awaiting proceedings in that court in relation to that offence. The Magistrates Courts may also grant bail to a defendant who has been committed in that jurisdiction for trial in the District Court or the Supreme Court.<sup>5</sup> The Supreme Court has an overriding authority to determine bail applications, whether or not the defendant has appeared before the Supreme Court in relation to a charge for the offence for which bail is sought.<sup>6</sup> There are some offences for which, at present, bail can be granted only by a judge of the Supreme Court.<sup>7</sup> These offences include murder, treason, piracy and demands with menaces upon agencies of government, all of which carry a mandatory sentence of life imprisonment. They also include offences under the *Drugs Misuse Act* - such as drug trafficking, supplying or producing heroin or cocaine, producing more than 500 grams of cannabis or possessing more than 10 grams of pethidine - which cannot be dealt with summarily<sup>8</sup> and for which the penalty following conviction is imprisonment for more than fifteen years.<sup>9</sup>

Unlike the position with respect to watch-house bail, a defendant who appears before a court which has power to grant bail has, subject to some exceptions, a right to be granted bail for the offence with which he or she is charged.<sup>10</sup> Where a court is able to grant bail, there can be a refusal to do so on the same grounds as may be found by a police officer.<sup>11</sup>

When a defendant is released on bail, the release is usually made subject to certain conditions which are designed to ensure that the defendant will appear before a

---

<sup>4</sup> Bail Act section 16.

<sup>5</sup> Bail Act section 8(1)(a). Committal proceedings are a preliminary hearing in the Magistrates Court of more serious charges to determine whether there is sufficient evidence to establish a case against the defendant for trial in the District Court or the Supreme Court.

<sup>6</sup> Bail Act section 10.

<sup>7</sup> Bail Act section 13.

<sup>8</sup> Matters which are dealt with summarily are heard by a magistrate sitting alone and not by a judge and jury. Some indictable offences, which must normally be heard by a judge and jury, may be dealt with summarily.

<sup>9</sup> See *Drugs Misuse Act* section 13.

<sup>10</sup> Bail Act section 9.

<sup>11</sup> Bail Act section 16.

court in the future to answer the charge which has been made.<sup>12</sup> In the usual case of a grant of bail, the defendant signs a document known as an 'undertaking', which is a promise in writing to appear in court when required.<sup>13</sup>

However, for relatively minor offences, the defendant may be released without an undertaking. If this happens, the defendant will be required to make a deposit of money as security for his or her appearance. This is referred to as 'cash bail'. Cash bail may be granted by a police officer or a magistrate. It is not available for indictable offences, or for offences such as drink driving offences under section 16 of the *Traffic Act*, which are specified in the Second Schedule to the *Bail Act*.<sup>14</sup> A defendant cannot be released on cash bail if he or she is not carrying, at the time of arrest, sufficient money to pay the amount of cash bail set.

When cash bail is granted, a failure to appear in court as required will result in the forfeiture of the monies paid. Usually, no conviction will be recorded against the defendant.

Hence, whether or not a conviction is recorded against a defendant charged with an offence for which cash bail may be granted may depend, in part, on the amount of money the defendant is carrying at the time of his or her arrest. Although there is a power in the *Bail Act* to issue a warrant for the arrest of a person who fails to answer cash bail, this is rarely used.

Where bail other than 'cash bail' is granted, the defendant signs an undertaking, promising to appear in court when required to do so. Failure to appear in accordance with an undertaking is an offence under the *Bail Act* and, usually, a warrant will be issued for the arrest of the defendant.<sup>15</sup>

In addition to the requirement of an undertaking, the *Bail Act* enables the police officer or court to impose further conditions of bail.<sup>16</sup> These are arranged in the Act in an increasing hierarchy of severity but the Act requires that the conditions for the grant of bail not be more onerous than is necessary, having regard to the nature of the offence involved, the particular circumstances of the defendant and the public interest. Thus, the defendant may be released on his or her own undertaking, alone. If that is not sufficient, the defendant may be released on his or her own undertaking with, additionally, a requirement that he or she make a deposit of money or of some other security of stated value. In the event that this is

---

<sup>12</sup> Bail Act section 11.

<sup>13</sup> Bail Act section 20.

<sup>14</sup> Bail Act sections 14, 14A.

<sup>15</sup> Bail Act section 33.

<sup>16</sup> Bail Act section 11.

not sufficient, the person may be released on his or her own undertaking with the additional requirement that another person, known as a surety, also signs an undertaking. In that undertaking, the surety promises to make payment of a stated sum of money in the event that the defendant does not appear in accordance with the defendant's own undertaking. Finally, the defendant may be released on his or her own undertaking, along with a deposit of money or other security of stated value together with the requirement of a surety.

Entering into an undertaking is a serious matter. In the event that the defendant does not appear in court, in addition to the commission of an offence under the *Bail Act* by the defendant, the defendant and surety, if any, are liable to forfeiture of the amount of money stated in the undertaking.

The Act also enables more specific bail conditions to be imposed. For example, the defendant may be required to report to a nominated police station periodically or to surrender a passport. In each case, the condition is designed to enable the defendant to be released from custody but, at the same time, to ensure that the defendant will appear in court as required and that no public detriment will occur as a result of his or her release.

## CHAPTER 2

## Who Can Grant Bail?

## A. The existing legislation

When a person has been arrested and charged with an offence, in most cases bail may be granted by the police officer in charge of the police station, lock-up or watch-house where the person has been detained, or by the watch-house keeper.<sup>17</sup> There are, however, some serious offences for which a police officer or watch-house keeper does not have power to release a person on bail.<sup>18</sup>

Bail may also be granted when a defendant appears in court. The *Bail Act* provides that a court may grant bail to a person held in custody on a charge of an offence if the person is awaiting proceedings in that court in relation to that offence.<sup>19</sup>

If the defendant has been charged with a less serious offence, which will be heard in the Magistrates Court, a magistrate will have power to grant bail. A magistrate may also grant bail to a defendant charged with a more serious offence who undergoes committal proceedings<sup>20</sup> prior to trial in the District Court or the Supreme Court.<sup>21</sup>

The Supreme Court has an overriding power to grant bail whether or not the defendant has appeared before that court.<sup>22</sup> There are some offences for which bail may be granted only by a judge of the Supreme Court.<sup>23</sup> These are serious offences such as murder, and certain offences under the *Drugs Misuse Act*.<sup>24</sup>

---

<sup>17</sup> Bail Act section 7(1).

<sup>18</sup> Bail Act section 13.

<sup>19</sup> Bail Act section 8(1)(a)(i).

<sup>20</sup> Committal proceedings are a preliminary hearing in the Magistrates Court of more serious charges to determine whether there is sufficient evidence to establish a case against the defendant for trial in the District Court or the Supreme Court.

<sup>21</sup> Bail Act section 8(1)(a)(iii).

<sup>22</sup> Bail Act section 10.

<sup>23</sup> When the Juvenile Justice Act 1992 comes into effect it will allow a judge of the Children's Court to grant bail to a child charged with one of these offences. See Chapter 12.

<sup>24</sup> Bail Act section 13. See page 2.

## B. Recommendations

### 1. Members of the Police Service

The Commission is of the view that the present limitation on the power of police officers and watch-house keepers to grant bail for some serious offences need not be retained.

The Commission believes that access to bail should be made available at the earliest possible opportunity.

Further, the Commission can see no logical basis for the arbitrary distinction which presently exists, when members of the police service are able to grant bail for other serious offences such as armed robbery. The Commission considers that the criteria proposed as grounds for the refusal of bail are sufficient to ensure that bail is not granted in an inappropriate situation.<sup>25</sup>

This proposal is consistent with the recommendations of the Criminal Code Review Committee. The Committee has proposed significant changes to the offences for which, at present, bail is only available from the Supreme Court. The Committee has recommended that the sections of the Code which create the offences of treason, piracy and demands with menaces upon government be repealed,<sup>26</sup> and that there be no mandatory sentences for any offence.<sup>27</sup> The Committee also recommended that all drug offences be incorporated into the Code and that, subject to the discretion of the magistrate and the consent of the defendant, all drug offences be able to be determined by summary proceedings.<sup>28</sup>

### 2. Magistrates Court

The Commission is of the view that the power of the Magistrates Court to grant bail should also be extended. In the light of the fact that magistrates decide whether or not defendants should stand trial for serious offences such as murder, and are able to hear most charges arising under the *Drugs Misuse Act*,<sup>29</sup> the Commission

---

<sup>25</sup> See Chapter 5.

<sup>26</sup> Final Report of the Criminal Code Review Committee to the Attorney-General, Schedule 2. See Bail Act section 13.

<sup>27</sup> Final Report of the Criminal Code Review Committee to the Attorney-General, Introduction.

<sup>28</sup> Final Report of the Criminal Code Review Committee to the Attorney-General, Schedule 3, Chapter 17 and Chapter 29.

<sup>29</sup> Drugs Misuse Act section 13.

considers that magistrates should be empowered to deal with bail applications in all cases.

Further, in relation to indictable offences triable in the District Court or the Supreme Court, the Commission recommends that no application to the trial court should be available unless an application has first been brought in the Magistrates Court. If the application is refused by a magistrate, or granted on terms unacceptable to the defendant, the defendant should then be able to bring an application for bail in the court in which the offence will be tried.

### **3. District Court**

The District Court is now the court in which all but the most serious indictable offences are heard.<sup>30</sup> It is also, in geographical terms, more accessible than the Supreme Court.<sup>31</sup>

The Commission is of the view that the District Court, rather than the Supreme Court, should be the main court of review for bail applications.

The Commission therefore recommends that the District Court should have power to grant bail to a defendant charged with a simple offence, an indictable offence triable in the Magistrates Court, or an indictable offence triable in the District Court.

However, a defendant should be able to bring a bail application in the District Court only after bail has been refused by a magistrate or granted on conditions which are unacceptable to the defendant.

### **4. Supreme Court**

The Commission recommends that the overriding power of the Supreme Court to grant bail whether or not the defendant has appeared before that court should be retained. This power derives from the Supreme Court's inherent jurisdiction and serves as a safeguard for the defendant.

However, application to the Supreme Court should be available only after an application has been made to the Magistrates Court. If a magistrate refuses bail, or grants bail on conditions which are unacceptable, to a defendant charged with

---

<sup>30</sup> District Courts Act 1967-1989 section 59.

<sup>31</sup> There are District Court judges permanently located in Cairns, Brisbane, Southport, Rockhampton and Townsville. Judges make circuit visits to the following centres: Bowen, Bundaberg, Cairns, Charleville (includes Roma and Cunnamulla), Charters Towers (includes Hughenden), Clermont (includes Emerald), Cloncurry (includes Mt Isa), Dalby, Gladstone, Goondiwindi, Gympie, Innisfail, Ipswich, Kingaroy, Longreach, Mackay, Maroochydore, Maryborough, Rockhampton, Stanthorpe, Southport, Toowoomba, Townsville and Warwick. There are judges of the Supreme Court permanently based in Townsville and Rockhampton. Supreme Court judges make circuit visits to Cairns, Longreach, Mackay, Maryborough/Bundaberg, Mt Isa, Roma and Toowoomba.

an offence which must be heard in the Supreme Court, the defendant should be able to apply to the Supreme Court for bail. If the offence is a simple offence, an indictable offence triable in the Magistrates Court, or an indictable offence which is triable in the District Court, a further application should be made to the District Court before the Supreme Court is approached.



## CHAPTER 3

### A Presumption of Bail

#### A. Rationale for bail legislation

##### 1. Protecting people from arbitrary detention

Bail legislation has evolved from the need to protect individuals from arbitrary detention between the time an accused is arrested and trial. It provides the legal procedure to ensure that a person who has been arrested does not suffer unnecessary deprivation of liberty.

If bail legislation is to achieve this end, the circumstances in which an accused may or may not be detained in custody before trial must be clearly defined.

Bail legislation must therefore contain guidelines for the exercise of the power to grant bail. One of the primary focuses of the Commission's review of the *Bail Act* has been to consider the suitability and sufficiency of the guidelines it provides.

##### 2. An accused is innocent until proven guilty

Our criminal justice system is based on the presumption of innocence. That is, a person charged with an offence is innocent until the prosecution satisfies a court or jury beyond reasonable doubt that he or she is guilty.<sup>32</sup>

Only those people who are found guilty of an offence are liable to be punished. Punishment may take the form of imprisonment. Unless the need for imprisonment pending trial is demonstrated, an accused should not be imprisoned before the question of guilt can be determined: the accused is entitled to be released before trial.

##### 3. Ensuring an accused attends court for trial

Bail procedures would not be necessary if a trial could be conducted immediately following arrest. However, both the defendant and the prosecution need time to prepare for a court hearing. A defendant who pleads not guilty to a charge may instruct a lawyer, collect evidence, arrange for witnesses and prepare arguments. A defendant who intends to plead guilty to a charge may also need time to collect character and other evidence to explain to the court both why the offence was

---

<sup>32</sup> See for example *Woolmington v DPP* [1935] AC 462 at 481-2; *Mancini v DPP* [1942] AC 1 at 11; *R v Mullen* (1938) 59 CLR 124 at 136.

committed and what factors favourable to the defendant the court should consider before imposing a punishment. In both cases, the prosecution requires preparation time to consult with an arresting police officer, victim (if any) and other witnesses, about the offence and to arrange the material that needs to be given to the court. Some time lapse between arrest and trial is therefore inevitable.

A procedure to ensure that a defendant attends court for trial would also not be necessary if all people who were arrested were detained in custody between arrest and trial. As well as being unjust, this would also be impractical. 213,302 accused persons appeared for sentence and trial in Queensland Magistrates Courts during 1989-1990.<sup>33</sup> Such a policy would therefore involve huge public expense. It would also involve the unnecessary detention of many defendants who would, in any event, have turned up for their trial if released and who may subsequently be acquitted.

When a defendant is released between arrest and trial, bail places an obligation upon the defendant to attend court on required dates. Failure to do so is a criminal offence.<sup>34</sup>

## **B. The Bail Act**

When this Act was passed in 1980 it was Parliament's intention that it should clarify bail law existing at that time and introduce a right to bail.<sup>35</sup>

With certain exceptions,<sup>36</sup> the Act imposes upon the courts a duty to grant bail to a defendant held in custody between arrest and trial.<sup>37</sup>

There is, however, no duty to grant bail to a defendant who has been tried and convicted of an offence and who wishes to be released from custody pending an appeal against the conviction.<sup>38</sup> This is because, in such a situation, the effect of the conviction is to displace the presumption of innocence.

---

<sup>33</sup> 1989-90 *Law and Order Queensland* Australian Bureau of Statistics page 12. The figure was obtained over the 12 month period from 1 July 1989 to 30 June 1990.

<sup>34</sup> Bail Act section 33. See Chapter 9.

<sup>35</sup> The Hon. W.D. Lickiss in the Second Reading Speech about the Bail Bill Parliamentary Debates 25 March 1980 page 2930.

<sup>36</sup> Bail Act sections 13 and 16.

<sup>37</sup> Bail Act section 9.

<sup>38</sup> See for example *Ex parte Maher* [1986] 1 Qd R 303. See also Chapter 13.

When the matter of bail after arrest is considered by a member of the police service rather than a court, the initial duty imposed by section 7 of the Act is merely to 'investigate the question whether or not bail should be granted'.

Where a member of the police service or a court is authorised to grant bail, bail is to be refused if the member or court is satisfied that one or more grounds specified in section 16(1) is present. In making a decision about a defendant's bail status, the member or court must start from the presumption that the defendant is entitled to be released. The presence of any relevant justification for bail refusal may then be considered.

In some circumstances - where, for example, a defendant is charged with committing an indictable offence while on bail for another offence, or with an offence under the *Bail Act* itself, or with an indictable offence which was allegedly committed with the use (or threatened use) of a gun, an explosive, or an offensive weapon such as a knife - the presumption that the defendant is entitled to be released is displaced. Rather, the defendant must show that detention in custody is not justified.<sup>39</sup> In legal terms, this is referred to as a reversal of the onus of proof.

In summary, the *Bail Act* creates a presumption in favour of bail except when the matter is considered by a member of the police service or following upon conviction. This presumption is read subject to the remainder of the Act which, for the purposes of considering rights to bail, includes the reverse onus provision referred to in the previous paragraph.

### C. Legislation in other jurisdictions

The *Bail Acts* of New South Wales and the Australian Capital Territory establish an entitlement to bail in respect of 'minor offences' subject to a limited range of exceptions. For the more serious offences, those Acts create an entitlement to bail, subject to the specific criteria listed in the Act. The Australian Capital Territory provision encompasses all offences;<sup>40</sup> the New South Wales provision does not extend the presumption in favour of granting bail to certain drug offences, robbery with aggravating circumstances and some offences related to domestic violence.<sup>41</sup>

The Northern Territory *Bail Act* does not distinguish between categories of minor and other offences but, in subsection 18(2), provides that a person accused of an

---

<sup>39</sup> Bail Act section 16(3).

<sup>40</sup> Bail Act (ACT) section 8(1).

<sup>41</sup> Bail Act (NSW) section 8A(1), section 9(1), (5).

offence is entitled to be granted bail in accordance with the Act unless the police officer or court is satisfied that, pursuant to consideration of the factors listed in section 24 of that Act, the refusal of bail is justified or where the person has been convicted of the offence. The general presumption in favour of granting bail does not apply where the accused has been charged with murder or treason.

#### **D. A new approach**

The Commission is of the view that bail legislation in Queensland should enshrine a presumption of the right to bail in all cases except following conviction.

The Commission therefore recommends that section 7 of the *Bail Act* should be amended to impose a duty on a member of the police service or a watch-house keeper to grant bail in accordance with the Act.<sup>42</sup>

The general entitlement to bail is consistent with the presumption of innocence which is subject to justifiable detention only where the criteria for refusal of bail are satisfied. The Commission considers that the criteria suggested in Chapter 5 as factors to be taken into account in the determination of a bail application are sufficiently broad for bail to be refused in every case where a justification for that refusal exists. The breadth of the criteria available for consideration provides a safeguard for the community.

Thus, the Commission considers that, except upon conviction, a defendant should be entitled to be granted bail in accordance with the Act unless the granting authority is satisfied that, pursuant to a consideration of the matters proposed by the Commission,<sup>43</sup> the refusal of bail is justified.

---

<sup>42</sup> See page 11.

<sup>43</sup> See Chapter 5.

## CHAPTER 4

### Duty of Police in Relation to Bail

In Chapter 3 the Commission recommended that the *Bail Act* should be amended by imposing on members of the police service and watch-house keepers a duty to grant bail in accordance with the Act. The Commission is of the view that further obligations should also be imposed.

The first of these obligations is that a person who has been taken into custody should be informed that, subject to certain provisions of the *Bail Act* relating to circumstances in which bail may be refused<sup>44</sup> and to conditions of bail,<sup>45</sup> he or she is entitled to be released from custody on bail.

If the person does not speak or understand English, he or she should be entitled to communicate with an interpreter to assist the person to communicate with members of the police service.

Where bail is refused, there should be a further duty to give reasons for the decision and to inform the defendant of the right to have the decision of the police officer or watch-house keeper reviewed.<sup>46</sup>

The Commission also recommends that a defendant who is refused bail should be entitled to communicate with an interpreter, a legal practitioner or any other person who might be able to assist the defendant in making an application for review of the decision to refuse bail.

The member of the police service or watch-house keeper should be under a duty to inform the defendant of these rights and, where the defendant requests that such facilities be made available, to provide reasonable facilities to enable the communication to take place.<sup>47</sup> What is reasonable will, of course, depend on the circumstances. However, the Commission is of the view that, for example, a defendant should not be restricted to a single phone call.

---

<sup>44</sup> See Chapter 5.

<sup>45</sup> See Chapter 10.

<sup>46</sup> See Chapter 7.

<sup>47</sup> See *Bail Act (ACT) section 13; Bail Act (NSW) section 19*. In New South Wales, interpreters are provided by the Community Interpreter Service (Department of Ethnic Affairs). There are regional offices of the Service in Newcastle and Wollongong. Interpreters are flown to remote areas. There is provision for emergency contact by police for bail applications at any time. The cost of providing the service is the responsibility of the Police Service. The Commission understands that the service is not widely used. In part, infrequency of use may be attributed to resourcing implications. Other reasons for not using the service may relate to the availability and quality of interpreters. See Chan, *Police Services for Immigrants: A New South Wales Study*.

The Commission recognises that there may be situations where the right of a defendant to communicate with another person may be abused. The Commission therefore recommends that the duty to provide facilities should not apply if there are reasonable grounds for believing that refusal of the facilities is necessary to prevent the escape of the defendant, the escape of an accomplice of the defendant, or the loss or destruction of evidence.<sup>48</sup>

Where there is an obligation on a member of the police service or watch-house keeper to inform a defendant of his or her rights, notification should be given in such a way that the defendant is able to understand it. It should be in clear, simple language. The information should be provided in writing and it should also be read to the defendant. A multi-lingual notification form should be available. The notification form should be endorsed with the date and time of reading, and signed by the police officer or watch-house keeper. The original signed copy of the notification should be attached to the charge sheet and a copy given to the defendant.

At present, because the duty on members of the police service or watch-house keepers is merely to consider whether to grant bail, there is a requirement that a defendant who is not brought before a court within twenty-four hours must be released on bail.<sup>49</sup> A general duty to grant bail would override this situation. However, the Commission believes that a time limit should be retained for a defendant who, having been refused bail, does not make an application to have the decision reviewed or makes an application for review which is unsuccessful. Retaining the time-limit would ensure that bail would be granted in any event if the defendant was not brought before a court within that limit.

These recommendations are reflected in the proposed redraft of section 7:

*Duty of Member of Police Service to Grant Bail.*

*7(1) Where a person who has been apprehended on a charge of an offence is delivered into the custody of a member of the police service at a place that is a police station, watch-house or lock-up and it is not practicable to bring the person before a court forthwith, the member of the police service who is in charge of or the watch-house keeper at that place must -*

- (a) inform the person, or cause the person to be informed, that if he or she cannot speak or understand the English language, he or she may have recourse to the services of a competent interpreter;*

---

<sup>48</sup> See Bail Act (NSW) section 19; Bail Act (NT) section 16.

<sup>49</sup> Bail Act section 7(1)(b).

- (b) *subject to subsection (3), if the person asks for facilities to do so, provide the person with reasonable facilities to enable the person to communicate with such an interpreter or any other person who may reasonably be expected to assist him or her to communicate with a member of the police service;*
  - (c) *inform the person, or cause the person to be informed of*
    - (i) *the matters specified in section 16 regarding the granting of bail to the person; and*
    - (ii) *the conditions subject to which the person may be released on bail; and*
  - (d) *subject to the Act, grant bail to the person.*
- (2) *Where a person is refused bail, the member of the police service or the watch-house keeper must -*
- (a) *inform the person, or cause the person to be informed of the decision to refuse bail;*
  - (b) *inform the person, or cause the person to be informed of the reasons for the decision to refuse bail;*
  - (c) *inform the person, or cause the person to be informed, that he or she may -*
    - (i) *have the decision to refuse bail reviewed by ....;<sup>50</sup>*
    - (ii) *communicate with a legal practitioner of his or her choice in connection with the making of an application for a review;*
    - (iii) *if he or she cannot speak or understand the English language - have recourse to the services of a competent interpreter; and*
    - (iv) *communicate with any other person of his or her choice, being a person who may reasonably be expected to assist in connection with an application for review;*

---

<sup>50</sup> Possible review procedures are considered in Chapter 7.

- (d) *subject to subsection (3), if the person asks for facilities to do so, provide the person with reasonable facilities to enable the person to communicate with the legal practitioner, interpreter or such other person; and*
  - (e) *if the person does not apply for a review of the decision to refuse bail, or if the person makes an application for review which is unsuccessful, and if it is not practicable to bring the person before a court within 24 hours after the person is taken into custody, subject to this Act grant bail to that person and release that person from custody in accordance with this Act.*
- (3) *The member of the police service or the watch-house keeper may refrain from providing the person with facilities for communicating with any other person if the member or watch-house keeper believes, on reasonable grounds, that it is necessary to do so in order to prevent -*
- (a) *the escape of an accomplice of the accused person; or*
  - (b) *the loss, destruction or fabrication of evidence relating to an offence.*
- (4) *Where in accordance with subsections (1) and (2), information must be provided to a person, the member of the police service or the watch-house keeper must -*
- (a) *prepare or cause to be prepared a notice in the prescribed form detailing the matters required to be notified to the person;*
  - (b) *read out such notice to the defendant and, thereafter, endorse the notice with the date and time of reading;*
  - (c) *sign the original copy of the notice and attach it to the charge sheet; and*
  - (d) *give a copy of the notice to the defendant.*

The existing subsections 7(2) to (5) would remain, but would need to be renumbered.



## CHAPTER 5

### Refusal of Bail

#### A. Criteria for refusal

Individual rights are not absolute. They can be qualified by an overriding need to protect other individuals or society generally.

In Chapter 3, the Commission recommended that there should be a prima facie right to bail in all cases except following conviction. However, in each case, the value, or weight, given to the prima facie right to bail involves the balancing of that individual right with other community rights. The Commission believes that the public benefit will override the right of a defendant to bail in certain circumstances.

The present criteria for refusal of bail are set out in subsection 16(1) of the Act. They are based on the notion of 'unacceptable risk'. Subsection 16(2) provides for further criteria to assist in determining whether or not there is an unacceptable risk. The present Victorian *Bail Act* also relies upon this notion of 'unacceptable risk'.<sup>51</sup>

No other jurisdiction in Australia uses that concept. In Western Australia<sup>52</sup> and South Australia,<sup>53</sup> there is a discretion vested in the bail-granting authority with certain factors listed to which the authority may have regard.

In New South Wales, the Northern Territory and the Australian Capital Territory, the discretion of the bail granting authority has been stated in very wide terms with certain factors to be taken into account. This approach is similar to that taken in the United Kingdom, where there is a prima facie right to bail prior to conviction,<sup>54</sup> but where bail is not granted if the authority is satisfied that there are substantial grounds for believing that one or more of stated criteria will occur.<sup>55</sup>

In the Australian Capital Territory, the *Bail Act* enables the decision maker to have regard to only three classes of matters - the probability of the person appearing in

---

<sup>51</sup> Bail Act (Vic) section 4(2).

<sup>52</sup> Bail Act (WA) section 13, Schedule Part C.

<sup>53</sup> Bail Act (SA) section 10.

<sup>54</sup> Bail Act (UK) section 4(1), (2).

<sup>55</sup> Bail Act (UK) section 4(1), Schedule 1, Part 1.

court, the interests of the person charged and the protection of the community.<sup>56</sup> The New South Wales Act is in broadly similar terms with more detail being provided with respect to the defendant's potential for violence.<sup>57</sup> The Northern Territory Act uses the same categories and, in addition, refers to a specific category of domestic violence offences.<sup>58</sup>

The Commission is of the view that the reference in the Queensland Act to 'unacceptable risk' as the basic test for determining a bail application should be abandoned and that, instead, the three categories used in New South Wales, the Australian Capital Territory and the Northern Territory should be adopted as the criteria for deciding whether the accused person's right to bail should be displaced.

The Commission also has a specific reference to consider the bail status of a person charged with a domestic violence offence.

It is the view of the Commission that, in the light of the incidence of domestic violence, which has resulted in the enactment of domestic violence legislation in Queensland, Queensland bail legislation should follow the Northern Territory model and refer specifically to offences of that nature. The Commission recommends that the definition of 'domestic violence' in the *Domestic Violence (Family Protection) Act 1989* should be incorporated into the *Bail Act* by an amendment to the definition section of the *Bail Act*.<sup>59</sup>

The reference from the Attorney-General concerning domestic violence offenders requested the Commission to consider whether there should be an automatic refusal of bail to violent offenders who breach protection orders. Protection orders are presently available under the *Domestic Violence (Family Protection) Act*.<sup>60</sup> Another type of protection order is an injunction under the *Family Law Act*.<sup>61</sup>

The Commission is of the view that, while there should not be automatic refusal of bail in these circumstances, breach of a protection order is a criterion which should be taken into account in determining whether to refuse bail.

The Commission also recommends the adoption of the approach found in the Australian Capital Territory *Bail Act* which requires that, if bail is granted to a

---

<sup>56</sup> Bail Act (ACT) section 22.

<sup>57</sup> Bail Act (NSW) section 32.

<sup>58</sup> Bail Act (NT) section 24(1)(d); Justices Act (NT) Division 8 of Part IV.

<sup>59</sup> Bail Act section 6.

<sup>60</sup> Domestic Violence (Family Protection) Act section 4(1).

<sup>61</sup> Family Law Act (Cwth) section 114.

person charged with a domestic violence offence, notification must be given to the victim of the violence.<sup>62</sup> However, the Commission considers that Queensland legislation should extend the requirement which, in the Australian Capital Territory, does not apply when bail is granted by a court. The Commission is of the view that, in all cases where bail is granted to a person charged with an offence involving domestic violence, the victim should be notified. If bail is granted by a court, the prosecution should have a duty to effect such notification.

## **B. Recommendation**

The Commission recommends that section 16 of the Act should be replaced with the following provision :-

### *Criteria for refusing bail*

*16(1) In making a determination regarding the refusal of bail to an accused person, a member of the police service or a court must take into consideration the following matters, so far as they are reasonably ascertainable, and only the following matters:*

- (a) the probability of the person failing to appear in court in respect of the offence for which bail is being considered, having regard only to -*
  - (i) the background and community ties of the person;*
  - (ii) the history of any previous grants of bail to the person;*
  - (iii) the circumstances in which the offence is alleged to have been committed, the nature and seriousness of the alleged offence, the strength of the evidence against the person and the severity of the sentence likely to be imposed on the person; and*
  - (iv) any other information relevant to the likelihood of the person failing to appear;*
- (b) the interests of the accused person, having regard only to -*
  - (i) the period that the person may be held in custody if bail is refused and the conditions under which he or she would be held in custody;*

---

<sup>62</sup> Bail Act (ACT) section 16(3).

- (ii) *the need of the person to be free for the purposes of preparing for his or her appearance before a court, obtaining legal advice or for other purposes; and*
- (iii) *the need of the person for physical protection, whether the need arises because the person is incapacitated by intoxication, injury or use of drugs, or arises from other causes; and*
- (c) *the protection and welfare of the community, having regard only to -*
  - (i) *the nature and seriousness of the alleged offence, and in particular whether the offence is of a sexual or violent nature, including domestic violence;*
  - (ii) *whether or not the person has failed to observe a reasonable bail condition previously imposed in respect of the alleged offence, or has failed to comply with an order made under section 4(1) of the Domestic Violence (Family Protection) Act 1989 as amended or an injunction granted under section 114 of the Family Law Act;*
  - (iii) *the likelihood of the person interfering with evidence, intimidating witnesses or jurors or otherwise obstructing the course of justice whether in relation to himself or herself or any other person; and*
  - (iv) *the likelihood that the person will or will not commit an indictable offence while released on bail.*

The Commission also recommends that the following provision be included in the *Bail Act*:

*Notification of bail decision*

16A *Where bail is granted to a person accused of a domestic violence offence -*

- (a) *a member of the police service who decides to grant bail to that person; or*
- (b) *if the decision to grant bail to that person was made by a court, the prosecuting authority;*

*must take or cause to be taken all reasonable steps to inform, as soon as practicable -*

- (c) *if a child of the accused person was a person against whom it is alleged that the conduct which constituted the offence was directed - the person who has the care and control of the child; and*
- (d) *if any other person was a person against whom it is alleged that the conduct which constituted the offence was directed - that other person;*

*of the decision and, where the accused person is admitted to bail subject to one or more bail conditions, of that condition or those conditions.*

The Commission further recommends that section 6 of the *Bail Act* be amended by inserting, after the words 'Director of Prosecutions Act 1984-1988', the following provision:-

*'domestic violence', in relation to an offence, means any offence involving domestic violence as defined in section 3 of the Domestic Violence (Family Protection) Act 1989.*

### **C. Notes on proposed provision**

The proposed provision sets out the factors to be taken into account by a police officer or a court in determining whether the prima facie right to bail should be displaced. It incorporates various features from the equivalent provisions in the New South Wales, Northern Territory and Australian Capital Territory legislation.<sup>63</sup>

#### **1. Paragraph 16(1)(a)**

This deals with the probability that the accused will appear in court to answer the charges for which bail is being considered.

It does not include the rating system which has been incorporated into the New South Wales *Bail Act*.

In New South Wales, the *Bail Regulations* made pursuant to the *Bail Act* contain a standard form test which allocates points for itemised answers to questions

---

<sup>63</sup> The proposed provision differs from the ACT provision in that it requires the bail-granting authority to take into account the 'reasonably ascertainable material' as is the case in NSW and the NT.

concerning background, associates and community ties. An accused is assessed as a good or poor risk for release on bail according to the points attained.

The Commission believes that the rating system is not appropriate for introduction, on the basis of its potential for discriminating against those defendants already disadvantaged by lack of accommodation, employment, and a social support network.

The only relevant criteria for the purposes of the sub-paragraph are:

**a. Sub-paragraph 16(1)(a)(i)**

*the background and community ties of the person*

Equivalent provisions in New South Wales,<sup>64</sup> the Northern Territory<sup>65</sup> and the Australian Capital Territory<sup>66</sup> detail specific instances of the community ties to which the court or police officer must have regard. These are variously included as 'home environment', 'family situation', 'employment' and 'criminal record'. The express reference to those matters may have the effect of limiting a consideration of other aspects of a person's 'background and community ties' which may be relevant to the question of bail. Moreover, the express reference to a factor such as employment may have the effect of disadvantaging a person who, in fact, is unemployed. The Commission considers that all of the circumstances of the person's background and community ties should be available for consideration and this is best achieved by utilising a general formula.

**b. Sub-paragraph 16(1)(a)(ii)**

*the history of any previous grants of bail to the defendant*

This makes specific reference to previous grants of bail. Bail history is included in the New South Wales<sup>67</sup> and Northern Territory provisions<sup>68</sup> where it is expressly referred to in terms of the 'previous failures' in respect of bail. The proposed provision repeats that contained in the present paragraph 16(2)(c) of the Act and, obviously, enables account to be taken not only of previous failure to appear, but also of previous grants of bail which have been answered by the defendant.

---

<sup>64</sup> Bail Act (NSW) section 32(1)(a)(i).

<sup>65</sup> Bail Act (NT) section 24(1)(a)(i).

<sup>66</sup> Bail Act (ACT) section 22(1)(a)(i).

<sup>67</sup> Bail Act (NSW) section 32(1)(a)(ii).

<sup>68</sup> Bail Act (NT) section 24(1)(a)(ii).

While the Commission is concerned with the breadth of this component of the criteria for refusing bail, it is of the view that the previous bail history of a defendant cannot be ignored. The proposed provision merely raises the defendant's bail history as a factor. The particular circumstances of any previous failure to appear could be taken into account. Failure to answer bail in the past would not necessarily preclude bail on a later occasion, but must be one of the factors that a member of the police service or a court considers.

**c. Sub-paragraph 16(1)(a)(iii)**

*the circumstances in which the offence is alleged to have been committed, the nature and seriousness of the alleged offence, the strength of the evidence against the person and the severity of the sentence likely to be imposed on the person*

This paragraph repeats the Australian Capital Territory provision<sup>69</sup> but adds the reference to the severity of the probable penalty. This reference is also made in the New South Wales<sup>70</sup> and Northern Territory<sup>71</sup> provisions.

In some cases where there has been a period spent in jail prior to trial, no further penalty is given if the accused is convicted at trial. Effectively, refusal of bail has been the accused's punishment. However, this punishment has been imposed before a court could give proper consideration to the evidence, the circumstances of the defendant and to what, if any, term of imprisonment would be appropriate.

The Commission considers that the inclusion of a reference to the likely penalty for the alleged offence goes some way to dealing with that issue but does so in terms which retain the discretion in the bail-granting authority.

**d. Sub-paragraph 16(1)(a)(iv)**

*any other information relevant to the likelihood of the person failing to appear*

The terms of this paragraph are broad enough to include the provisions in the Northern Territory<sup>72</sup> and New South Wales<sup>73</sup> Acts which enable the court to take

---

<sup>69</sup> Bail Act (ACT) section 22(1)(a)(ii).

<sup>70</sup> Bail Act (NSW) section 32(1)(a)(iii).

<sup>71</sup> Bail Act (NT) section 24(1)(a)(iii).

<sup>72</sup> Bail Act (NT) section 24(1)(a)(iv).

<sup>73</sup> Bail Act (NSW) section 32(1)(a)(iv).

into account 'any specific evidence indicating whether or not it is probable that the person will appear in court'.

## 2. Paragraph 16(1)(b)

This deals with the interests of the accused. The only relevant factors are:

### a. Sub-paragraph 16(1)(b)(i)

*the period that the person may be held in custody if bail is refused and the conditions under which he or she would be held in custody*

This paragraph appears in the New South Wales<sup>74</sup> and Northern Territory<sup>75</sup> provisions and is not presently contained in the Queensland *Bail Act*. The provision raises three matters -

- (1) The length of time that a person may have to spend in custody, rather than be released on bail, pending commencement of proceedings for the alleged offence.
- (2) Physical arrangements which exist in watch-houses and remand centres.
- (3) The need for special provisions in certain circumstances, particularly in relation to young people and Aboriginal defendants.

### (1) *Time likely to be spent in custody*

The inclusion of this as one of the factors to be taken into account enables delays in court lists to be considered.

### (2) *Physical arrangements*

#### a. Remand centres

The *Bail Act* is concerned with the decision of whether or not a person should be released from custody pending criminal proceedings. The quality of the environment within which the person is detained if bail is refused is not a matter to be determined by the *Bail Act*. However, the proposed provision allows a bail-granting authority to take those considerations into account.

---

<sup>74</sup> Bail Act (NSW) section 32(1)(b)(i).

<sup>75</sup> Bail Act (NT) section 24(1)(b)(i).



The Commission believes that the *Bail Act* is not the appropriate medium for effecting change to the conditions which prevail in existing detention centres for persons who are refused bail. Remand centres fall within the province of the Queensland Corrective Services Commission and, to the extent that there is a shortfall of facilities in those places, it is a matter for the appropriate authority to institute change.

b. Watch-house facilities

Although the Commission is of the view that the *Bail Act* is not the appropriate medium for reforming the nature of remand centres, it recognises that the environment in which an accused is detained prior to his or her first court appearance may be relevant to the success or failure of a bail application.

The New South Wales and the Australian Capital Territory legislation contain provisions which require certain facilities to be provided to accused persons.<sup>76</sup> These provisions relate to a person who has been kept in police custody and require, where it is reasonably practical to do so, for a person to be provided with facilities for washing and for a change of clothing.

The Commission is of the view that a similar requirement should be introduced into the Queensland *Bail Act*. The provision of such facilities may improve a person's capacity to obtain bail in a subsequent court proceeding because of the person's enhanced physical presentation before the court, probably a Magistrates Court, and may also enhance the person's psychological capacity to deal with such a procedure. The Commission therefore recommends the inclusion in the *Bail Act* of the following provision:

*Facilities to be provided to accused persons*

(1) *where an accused person in police custody is to be brought, for the first time in relation to the offence, before a court more than four hours after he or she came into custody -*

(a) *the police officer for the time being in charge of the police station at which the person is in custody; or*

(b) *if the person is not in custody at a police station, the member of the police service who has custody of the person;*

*must, if it is reasonably practicable to do so, cause the person to be provided with, and allowed to use -*

---

<sup>76</sup> Bail Act (NSW) section 21 and regulation 5; Bail Act (ACT) section 18.

- (c) *facilities to enable the accused person to wash, shower or bathe and, (if appropriate) to shave; and*
  - (d) *facilities to enable the accused person to change his or her clothing.*
- (2) *Nothing in subsection (1) requires a member of the police service to provide clothing for the accused person unless the clothing is brought to the police station or other place at which the accused person is in custody by a member of the accused person's family or by some other person.*

**(3) *The need for special provisions***

Because of the particular issues which may arise in connection with the detention of young people and of Aboriginal defendants, these questions are dealt with in separate chapters. Special provisions for young defendants are considered in Chapter 12. The particular needs of Aboriginal defendants are considered, in the light of the recommendations of the Royal Commission into Aboriginal Deaths in Custody, in Chapter 11.

**b. *Sub-paragraph 16(1)(b)(ii)***

*the need of the person to be free for the purposes of preparing for his or her appearance before a court, obtaining legal advice or for other purposes*

This paragraph is similar to the provision in New South Wales,<sup>77</sup> the Northern Territory<sup>78</sup> and the Australian Capital Territory.<sup>79</sup>

---

<sup>77</sup> Bail Act (NSW) section 32(1)(b)(ii).

<sup>78</sup> Bail Act (NT) section 24(1)(b)(ii).

<sup>79</sup> Bail Act (ACT) section 22(1)(b)(ii).

c. **Sub-paragraph 16(1)(b)(iii)**

*the need of the person for physical protection, whether the need arises because the person is incapacitated by intoxication, injury or use of drugs, or arises from other causes*

This paragraph repeats the New South Wales,<sup>80</sup> Northern Territory<sup>81</sup> and Australian Capital Territory<sup>82</sup> provisions. The Commission considered the question of whether, in addition, the provision should include the age of the person. Prior to the recent enactment of the *Juvenile Justice Act*, age was referred to as a specific factor in paragraph 16(1)(b) of the *Bail Act* in Queensland. However, when the *Juvenile Justice Act* comes into operation it will have the effect of amending the *Bail Act* by deleting this reference.<sup>83</sup>

When the *Juvenile Justice Act* comes into operation, bail arrangements for a child who is arrested and charged with an offence are to be determined in accordance with Part 3 of that Act. Section 39 of the Act requires that the arrested child be taken promptly before a Children's Court to be dealt with according to law. However, where it is not practicable to do so, the child must ordinarily be released from custody. Subsection 39(1) provides that the police officer in charge of the place where the child is detained or the watch-house keeper must grant bail to the child and release the child from custody 'unless the *Bail Act* 1980 otherwise provides'. There is at present a limit on the offences for which a member of the police service can grant bail.<sup>84</sup> For those offences for which police bail is available, the sole criteria for refusing bail are those listed in section 16. If the offence is one for which bail can only be granted by a court,<sup>85</sup> the sole criteria for refusing bail will again be those set out in section 16.

The Commission is of the view that circumstances may arise, in the case of young defendants, where their age may make them vulnerable and where, as a result of their vulnerability, it may be in their best interests not to release them on bail. However, the Commission believes that the proposed wording of section 16(1)(b)(iii) is wide enough to allow a child to be detained on this basis if warranted, without 'age' being specifically included as a criterion. Age of itself is not a sufficient ground for refusal. The Commission is also of the view that refusal of bail to young offenders should be subject to strict legislative guidelines.

---

<sup>80</sup> Bail Act (NSW) section 32(1)(b)(iv).

<sup>81</sup> Bail Act (NT) section 24(1)(b)(iv).

<sup>82</sup> Bail Act (ACT) section 22(1)(b)(iii).

<sup>83</sup> Juvenile Justice Act section 235.

<sup>84</sup> See Chapter 2.

<sup>85</sup> See Chapter 12.

Proposed provisions relating to the detention of young offenders are considered in Chapter 12.

### 3. Paragraph 16(1)(c)

The terms of paragraph 16(1)(c) focus upon the need for protection and welfare of the community. The Australian Capital Territory provision omits the reference to 'welfare' but it is included in the Northern Territory<sup>86</sup> and New South Wales<sup>87</sup> provisions. The Commission is of the view that the concept of the 'welfare' of the community is different in character from that of the 'protection' of it and that both components should be included.

#### a. Sub-paragraph 16(1)(c)(i)

*the nature and seriousness of the alleged offence, and in particular whether the offence is of a sexual or violent nature, including domestic violence*

Arguably, these matters have been taken into account in a consideration of the nature and seriousness of the offence in sub-paragraph 16(1)(a)(iii). Certainly, they are referred to there, but the purpose of that provision is different. There, the focus is on the probability of the person appearing in court. In sub-paragraph 16(1)(c)(i), rather than being on the probability of the person appearing in court, the focus clearly is on the protection and welfare of the community. Therefore the Commission considers that there is merit in the inclusion of the reference to the nature and seriousness of the offence in sub-paragraph 16(1)(c) as well as in sub-paragraph 16(1)(a)(iii).

The community nexus justifies the specific reference to offences 'of a violent nature' and 'domestic violence'. The term 'domestic violence' is defined in the *Domestic Violence (Family Protection) Act* 1989. It includes a range of conduct which does not necessarily involve physical violence against the person. The Commission has recommended that this definition be incorporated into the *Bail Act*.<sup>88</sup> The express reference to domestic violence in sub-paragraph 16(1)(c)(i) ensures that regard may be had to the full range of conduct which constitutes domestic violence as provided for in the definition.

The Commission gave particular consideration to the inclusion of the words 'sexual or' before the words 'violent nature' in sub-paragraph 16(1)(c)(i). The Commission is of the view that, as all offences involving non-consensual sexual acts are acts of

---

<sup>86</sup> Bail Act (NT) section 24(1)(c).

<sup>87</sup> Bail Act (NSW) section 32(1)(c).

<sup>88</sup> See pages 18, 21.

violence, there should be no distinction between the two. However, the Commission recognises that not all sexual offences involve non-consensual sexual acts. The inclusion of the word 'sexual' in the provision, whilst serving the purpose of providing a specific focus to sexual offences, also ensures that offences involving young victims, albeit where 'consent' was obtained, may be considered.

**b. Sub-paragraph 16(1)(c)(ii)**

*whether or not the person has failed to observe a reasonable bail condition previously imposed in respect of the alleged offence, or has failed to comply with an order made under section 4(1) of the Domestic Violence (Family Protection) Act 1989 as amended or an injunction granted under section 114 of the Family Law Act.*

This paragraph repeats the provision in the Northern Territory<sup>89</sup> and New South Wales<sup>90</sup> Acts. It does not appear in the Australian Capital Territory provision. Again, it may be, by inference, included in earlier parts of the section but, as with sub-paragraph (i), the focus is different. It also includes specific reference to breach of a protection order.

**c. Sub-paragraphs 16(1)(c)(iii) and (iv)**

*the likelihood of the person interfering with evidence, intimidating witnesses or jurors or otherwise obstructing the course of justice whether in relation to himself or herself or any other person;*

*the likelihood that the person will or will not commit an indictable offence while released on bail*

These provisions raise the issue of detention on the basis of a future possibility. The Commission is of the view that reference to consideration of likely future behaviour is inevitable in bail legislation. A judgment on the question of whether or not the defendant will answer bail at all requires, of necessity, a consideration of the defendant's future conduct.

Sub-paragraph 16(1)(c)(iii) recognises the need to protect particular individuals who comprise a class which may be at risk if the defendant is released. The proposed provision is similar to that which appears in the Australian Capital Territory Act.<sup>91</sup>

---

<sup>89</sup> Bail Act (NT) section 24(1)(c)(i).

<sup>90</sup> Bail Act (NSW) section 32(1)(c)(i).

<sup>91</sup> Bail Act (ACT) section 22(1)(c)(iii).

Sub-paragraph 16(1)(c)(iv) refers to the likelihood that the defendant will commit an indictable offence whilst on bail. There is at present in the Queensland *Bail Act* a reference to the likelihood that the defendant will commit an offence while on bail.<sup>92</sup> The proposed provision is different in that it is restricted to serious or indictable offences, and in that it brings the factor into account under the heading of the need for the protection and welfare of the community.

Thus, to the extent that there is the potential for repeated violence in the accused, including domestic violence, this can be taken into account as part of the need for the protection and welfare of the community.

#### **D. Previous proposals about future conduct**

In the Discussion Paper, the Commission considered three factors which might justify detention on the basis that the accused, if released, might commit an offence.<sup>93</sup>

These factors were:

- the defendant must have been charged with or convicted of an offence involving violence against a person
- the prosecution must provide a court with evidence showing that the defendant would be likely to commit crimes involving violence before trial
- 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.

#### **E. Conclusion - future conduct**

After a process of consultation, the Commission is of the view that the introduction of the above criteria into the legislation has the potential to create unnecessary complexity. They already exist in the general discretion conferred on the bail-granting authority. The nature of the offence likely to be committed would always be taken into account and, contrary to the first recommendation, a future offence of violence could be envisaged in situations where the person was not charged with or convicted of a violent offence.

---

<sup>92</sup> Bail Act section 16(1)(a)(ii)(A).

<sup>93</sup> Queensland Law Reform Commission, Discussion Paper No. 35, March 1991, page 9.

The requirement of the need for offences to be of a 'similar nature' may raise conceptual problems of characterisation which would complicate the bail application unnecessarily. Again, those matters are presently there as part of the overall discretion.

An example of the unnecessary and restrictive guidelines which can be imposed in legislation is found in the New South Wales *Bail Act*<sup>94</sup> and they need not be repeated in the Queensland statute. The Australian Capital Territory and Northern Territory Acts have chosen not to include those criteria and their example should be followed.

---

<sup>94</sup> Bail Act (NSW) section 32(1)(c).

## CHAPTER 6

### Reversal of Onus

In Chapter 3, reference was made to the need for an accused, at present, to show justification for the granting of bail in certain circumstances.<sup>95</sup> Section 16(3) of the *Bail Act* operates to impose a reverse onus of proof on a bail applicant.

The Commission has conducted wide consultations on whether or not the presumption against bail in respect of certain offences should be retained. On balance, the Commission is of the view that there is no justification for a category of offences to exist where the onus is cast upon the accused to justify the granting of bail. The reversal of onus provision presently contained in section 16(3) of the Act should therefore be removed.<sup>96</sup> Clearly, however, this does not mean that an accused is entitled to bail in every case. Rather, his or her circumstances will fall to be considered within the framework of criteria which apply in all cases.

These criteria have been set out in Chapter 5 in the proposed section 16.<sup>97</sup> They are broad enough for the bail-granting authority to take into account the circumstances of the offence including, for example, whether or not a drug offence is involved, whether or not a firearm was used in the commission of the offence and whether or not the offence was committed while the accused was already on bail. For this reason there is no need for a provision reversing the onus in respect of any class of offences as exists in the present subsection 16(3).

Such an approach is consistent with the presumption of innocence but tempered by the need for the factors set out in section 16 to be considered, in the first instance, by a police officer and subsequently by a magistrate or a judge of the District Court or of the Supreme Court.

Because the duty to grant bail imposed on a court by section 9 of the *Bail Act* is expressed to be subject to other provisions of the Act, the reversal of onus provision in section 16(3) had the effect of displacing that duty in a situation where a defendant failed to satisfy the required onus. Consequently, the duty applied only in certain cases. This is reflected in the heading to section 9: *Duty of court to grant bail in certain cases*. The Commission's recommendations in relation to a

---

<sup>95</sup> See page 11.

<sup>96</sup> This recommendation is consistent with section 4(3) of the Legislative Standards Act which provides that: Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation -  
(d) does not reverse the onus of proof in criminal proceedings without adequate justification.

<sup>97</sup> See pages 19-31.



presumption in favour of bail and to the removal of the reversed onus provision mean that there would be a general duty on a court determining a bail application to grant bail, subject only to the criteria specified in Chapter 5. The Commission therefore recommends that the words 'in certain cases' in the heading to section 9 be deleted.

## CHAPTER 7

### Review of Bail Decisions

There are two stages of the criminal justice process at which the *Bail Act* allows an application for bail to be considered prior to the trial of the accused.

First, a determination about bail may, in certain circumstances, be made by the police before the accused appears in court.<sup>98</sup> Second, an application for bail may be brought in court.<sup>99</sup>

A decision about the grant or refusal of bail gives rise to the following issues:

**A. Interim review of a decision by a member of the police service to refuse bail prior to the accused's first court appearance**

Some Australian jurisdictions make provision for this<sup>100</sup> and, arguably, the terms of the Act in Queensland are broad enough to encompass the situation. However, specific provision should be made for it.

At present an apparent protection for the defendant arises through section 7(1)(b) of the Act which requires the defendant to be released from custody if it is not practicable to bring him or her before a court within twenty-four hours. But that provision is read subject to the remainder of the Act which enables the police officer to refuse bail for the reasons set out in section 16.

The Commission has recommended the retention of a time limit for bringing the defendant before a court.<sup>101</sup> However, in addition to this requirement, there could be a specific review procedure available to the defendant in respect of a refusal of bail. Such a provision would also need to include a specific time-frame. For example, there could be a requirement that where a defendant seeks a review of a decision by a member of the police service to refuse bail, the review should be conducted within a period of no longer than four hours after the original decision.

---

<sup>98</sup> *Bail Act* sections 7, 14.

<sup>99</sup> *Bail Act* section 8.

<sup>100</sup> *Bail Act* (ACT) section 38.  
*Bail Act* (NT) section 33.

<sup>101</sup> See page 14.

Section 33 of the Northern Territory *Bail Act* provides some guidance. The provision enables the defendant to seek review of the decision to refuse bail. The application is to a magistrate or a justice for review of that determination. Also, where there has been a failure by the police officer to determine the bail question within a period of four hours after the defendant was charged with an offence, the application may similarly be made.

The Commission is of the view that a similar review provision should be introduced into the Queensland *Bail Act*. This review procedure would depend upon the defendant for its initiation. Where the defendant did not make an application for review, his or her circumstances would fall within the specific twenty-four hour time-frame contained in the proposed section 7(2)(e).<sup>102</sup>

The review could be conducted by a magistrate. Obviously, such a proposal has resource implications and would present practical problems in implementation, not the least of which, in remote areas, would be the availability of the magistrate. The practical problems involved could be alleviated to some extent by the availability of telephone, telex, radio facilities as referred to in subsection 33(4) of the Northern Territory Act.

A further disadvantage to review by a magistrate is that, in remote areas, the magistrate who determines the review may be the same magistrate who sits at the defendant's first court appearance. Under the Commission's proposals, the magistrate would be required to consider the question of bail at the defendant's first court appearance.<sup>103</sup> In the view of the Commission, it would be undesirable to have the question of the defendant's bail considered by a magistrate who might previously have upheld a police officer's refusal of bail. The Commission considers that the review should be conducted by a person who is not part of the decision-making process.

The Commission is of the view that the preferable alternative would be for the review to be conducted by a higher ranked police officer.

For administrative purposes, Queensland is divided into eight Police Regions. The Commission recommends that review of a refusal by a member of the police service to grant bail should be carried out by an officer of the rank of Inspector in the relevant region.

A system of internal review has the advantage that the review is carried out by someone who not only is in a situation of authority over the member of the police service who made the decision to refuse bail, but who also has practical experience in the field. The Royal Commission into Aboriginal Deaths in Custody recommended that a police officer's refusal of bail should be reviewed by the same

---

<sup>102</sup> See pages 14 and 15.

<sup>103</sup> See page 37.

or a higher ranked officer.<sup>104</sup> The Commission does not agree with the proposal that the review should be conducted by the officer who refused bail. The view of the Commission is that the review should be independent of the original decision. Further, it may be that the decision to refuse bail is made by the arresting officer. The Commission considers that the review should be conducted by someone removed from the arrest situation.

The Commission further recommends that, if this proposal is implemented, a review of its operation should be carried out after three years.

Section 13 of the *Bail Act* at present imposes a limitation on a police officer's power to grant bail. The Commission has recommended that this limitation should be removed.<sup>105</sup> However, if the limitation is retained, there will be an automatic refusal of bail at the watch-house if the defendant has been charged with one of the offences specified in section 13.<sup>106</sup> In this situation, review of the refusal by a higher ranked officer would not be available.

#### **B. Automatic consideration of bail by court at defendant's first appearance**

Only in a minority of cases is the charge against a defendant finally determined at the defendant's first court appearance. In most cases, a date is set for a further appearance before the court. When this happens, the defendant will be either remanded in custody or admitted to bail. At present, the question of bail will not be considered unless an application is made by the defendant.

Consistently with its belief that defendants should not be held in custody before trial unless a court has considered whether detention is necessary, the Commission is concerned about the number of people for whom no court application for bail has been made.<sup>107</sup>

In the Discussion Paper, the Commission put forward the view that, where no bail application is made at the first appearance date, the defendant should be released after a specified period of time unless the prosecution satisfies the court that the defendant should be kept in custody until the trial.<sup>108</sup> This proposal would mean

---

<sup>104</sup> See pages 58, 60-61.

<sup>105</sup> See page 6.

<sup>106</sup> These offences include murder, treason and certain drug offences.

<sup>107</sup> A census undertaken by the Queensland Corrective Services Commission on 1 March 1991 indicated that of 222 people in prison awaiting trial, 118 - or over 50% - had not made a court application for bail following refusal of bail by a police officer.

<sup>108</sup> Queensland Law Reform Commission, Discussion Paper No. 35, March 1991, page 14.

that a defendant would be detained beyond his or her first court appearance if no bail application were made at that time. The initiative to make the application would remain with the defendant. There would also be a difficulty in determining an appropriate time limit before release, particularly in remote areas where defendants must be transported to court.

The Commission is of the view that, at the first appearance by the defendant before a magistrate, there should be a mandatory requirement that the question of the defendant's bail be considered. It should not be left to the defendant to initiate the application. The prosecution should be required to state by statutory declaration or on affidavit the reasons why bail should be refused.

Provision should be made to require the magistrate to consider bail in every case and to state the specific grounds for any refusal to grant bail. Where, during those proceedings, the defendant has made submissions in support of bail, the magistrate's reasons will explain any refusal. On the other hand, where the defendant makes no specific submissions, perhaps because he or she is unrepresented,<sup>109</sup> the need to give reasons will require that the magistrate considers the sufficiency of the reasons given by the prosecutor as to why bail should not be granted. In that way, without specifically requiring the prosecution to establish non-entitlement to bail, an evidential onus will rest with the prosecution to state grounds for refusal in the particular case.

Such a mandatory requirement for the magistrate to consider bail has the effect that any subsequent deprivation of liberty pending trial has at least been sanctioned by the court with reasons having been given.

## **C. Review of a court's bail decision**

### **1. Renewed applications**

Section 19 of the *Bail Act* in its present form enables a defendant who has been refused bail, or who has been granted bail but is dissatisfied with the amount fixed or with any condition imposed, to make a new application to a court empowered by section 8 of the Act to grant bail or to vary the terms upon which bail has been granted. The Commission is of the opinion that the procedure as provided for in section 19 should be continued, but with some amendment.

---

<sup>109</sup> The duty solicitor scheme conducted by the Legal Aid Office provides representation for some accused persons at their first court appearance.

Guidance can be taken from the New South Wales Act.<sup>110</sup> A similar provision is found in the Australian Capital Territory Act,<sup>111</sup> but that provision sets limits on the making of a further application for bail.<sup>112</sup> Those limits relate to the question of whether or not the defendant was represented on the first occasion and whether or not fresh evidence has become available since the making of the first application. Those limits are not contained in the New South Wales or the Northern Territory provisions and the Commission considers that they should not be adopted in Queensland.

There is sufficient safeguard in the New South Wales<sup>113</sup> and Northern Territory<sup>114</sup> provisions in that a court may refuse to entertain an application if it is satisfied that the application is 'frivolous or vexatious'. The Commission recommends that a similar limitation should be introduced in Queensland.

## **2. Refusal by magistrate to grant bail pending committal proceedings**

At present, section 19 of the *Bail Act* enables an application to be made to 'a court empowered by section 8 to grant bail'. In turn, section 8 enables a court to grant bail in the circumstances there stated. Section 8(1)(a)(i) provides that a court may grant bail to a person held in custody on a charge of an offence who is awaiting a criminal proceeding to be held in that court in relation to that offence.

The terms of section 8 raise questions about authority to grant bail to a person who is charged with an indictable offence and who is facing committal proceedings in the Magistrates Court to determine whether he or she should stand trial in the District Court. Section 8 would allow the magistrate to consider bail in that situation. However, at present, it is not clear whether a judge of the District Court would have power to grant bail following refusal by a magistrate to do so.<sup>115</sup>

Arguably, this may be covered by the terms of section 8(1)(a)(i) as it now stands. However, the Commission recommends amendment of this provision to make it clear that this avenue is available even where committal proceedings have not been held. The terms of section 8 should be broadened to allow a further application to

---

<sup>110</sup> Bail Act (NSW) section 22.

<sup>111</sup> Bail Act (ACT) section 19.

<sup>112</sup> Bail Act (ACT) section 19(5).

<sup>113</sup> Bail Act (NSW) section 22(4).

<sup>114</sup> Bail Act (NT) section 19(4).

<sup>115</sup> A judge of the Supreme Court would be authorised to grant bail by the overriding powers contained in section 10 of the Bail Act.

be made following a magistrate's refusal to grant bail to a defendant charged with an indictable offence which is triable in the District Court. In that situation, a further application for bail should be heard by a District Court judge. If that application is unsuccessful, or is granted on conditions unacceptable to the defendant, the defendant should then be able to bring a further application in the Supreme Court.

### **3. The Supreme Court**

At present, section 10 of the *Bail Act* enables a Supreme Court judge to hear a bail application for any offence. The Commission considers that this jurisdiction of the Supreme Court should be retained. However, application to the Supreme Court should be available only as a last resort after the question of bail has been considered by a magistrate and, in the case of a simple offence or an indictable offence triable in the Magistrates Court or an indictable offence triable in the District Court, has been further considered by a judge of the District Court.

### **4. Extended jurisdiction of magistrates in relation to bail**

In Chapter 2, the Commission recommended that the Magistrates Court have jurisdiction to grant bail in all cases.<sup>116</sup> In the light of this recommendation, the Commission has considered whether it would be appropriate for the *Bail Act* to contain, in addition to the procedures outlined above, a procedure for review of a magistrate's decision.

The Commission is of the view that where bail has been refused, or granted on terms unacceptable to the defendant, the available procedures for making a fresh application would make a review mechanism unnecessary.

A further question arises as to whether, where bail has been granted by a magistrate to a defendant charged with a serious offence for which at present bail may only be granted by the Supreme Court, the Crown should be able to seek a review of the magistrate's decision.

While at first glance it appears that the Commission's proposal involves a considerable extension of the jurisdiction of the Magistrates Court in relation to bail applications, it should be borne in mind that, at present, a magistrate may grant bail when defendants are facing committal proceedings for most major offences. These offences include, for example, rape and armed robbery. The existing provisions of the *Bail Act* do not give the Crown any right to seek review of a magistrate's decision to grant bail to a person facing committal proceedings for one of these offences.

---

<sup>116</sup> See pages 6-7.

#### D. Review of a defendant's bail status

Where a court imposes as a condition of bail<sup>117</sup> the giving of a security or surety<sup>118</sup> which the defendant cannot obtain, the defendant is kept in custody. However, it may never come to the attention of the court that the defendant has not been released. Under the present system, it is left to the defendant to apply for an order varying the grant of bail.<sup>119</sup>

In the Discussion Paper, the Commission proposed a system of automatic review of the bail status of a defendant granted bail but retained in custody.<sup>120</sup> The Commission's initial suggestion was that a defendant should be brought back before a court for a review of his or her bail status, if he or she were still in custody four days after bail had been granted. While the Commission is still in favour of a system of automatic review, it is of the view that the proposed time-frame may have been insufficient. Such a short period may, in fact, prove a disincentive for a defendant to comply with the financial commitment imposed. The Commission therefore recommends that the review period should be fourteen days.

---

<sup>117</sup> See Chapter 10 for an explanation of conditions of bail.

<sup>118</sup> See page 4.

<sup>119</sup> Bail Act section 19.

<sup>120</sup> Discussion Paper pages 53, 54.



## CHAPTER 8

### Cash Bail

Sections 14 and 14A of the *Bail Act* provide for the police or a magistrate to grant bail for some offences on the deposit of a sum of money as security for the defendant's appearance in court. This procedure is known as cash bail. The amount of the deposit is at the discretion of the police or the magistrate.

If the defendant fails to appear, the money paid as security is forfeited. This is usually regarded as a sufficient 'penalty' for the offence and no conviction is recorded against the defendant. Although the *Bail Act* provides for the issue of a warrant of arrest when a defendant fails to answer cash bail,<sup>121</sup> this power is, in practice, rarely used.

The Commission is of the view that the grant of cash bail should remain available. However, a number of improvements could be made to the existing system.

#### A. Access to cash bail

If, at the time the defendant is arrested, he or she is not carrying sufficient money to pay the amount imposed as security, the defendant will not be able to be released on cash bail. If bail is granted, the defendant will have to give an undertaking to appear in court when required.<sup>122</sup> The defendant will have to stand trial and, if found guilty, will have a conviction recorded. If the defendant fails to appear in court in accordance with the undertaking, he or she commits a further offence.<sup>123</sup>

The Commission considers it inappropriate that the decision to record a conviction against a defendant charged with an offence for which cash bail may be granted may depend, in part, on the amount of money the defendant is carrying at the time of his or her arrest.

In the Discussion Paper,<sup>124</sup> it was proposed that a system should be devised to allow payment of the cash deposit to be made within a set period of time if the

---

<sup>121</sup> Bail Act section 28A.

<sup>122</sup> See page 3.

<sup>123</sup> Bail Act section 33.

<sup>124</sup> Queensland Law Reform Commission, Discussion Paper No 35, March 1991, page 36.

accused has insufficient money when he or she is arrested and charged. However, such a procedure would raise significant questions about the criteria for and conditions of release. It would be, in essence, a grant of bail for the purpose of obtaining bail.

An alternative method would be for bail to be granted on requiring an undertaking, as occurs at present, but with a particular condition requiring the defendant to appear at a Magistrates Court at a time, perhaps ten days ahead, unless, within seven days, the requested monies are made payable at the watch-house. This would enable some control to be kept over the defendant and, in the absence of payment of monies, the undertaking would be enforced in the normal way. If the money were paid within the specified time, no conviction would be recorded and the need for court proceedings would be avoided. This procedure would have considerable administrative implications.

The Commission is of the view, therefore, that the practical problems of the above proposals would outweigh their advantages.

In Chapter 4, the Commission recommended that a defendant who is detained at a police station or watch-house and who wishes to be released on bail, should be provided with reasonable facilities to communicate with a legal practitioner or other person who could assist the defendant to obtain bail. Such a provision would assist the defendant to raise the amount of cash necessary for cash bail, without the administrative problems of the proposals outlined above.

## **B. 'Legitimising' the present practice**

The Commission acknowledges the merit of the present informal system in terms of administrative convenience and cost savings. It is also to the advantage of a person who has committed a minor offence to have no conviction recorded.

However, the Commission is concerned at the variance between the informal arrangement of forfeiture of the amount deposited with no consequential detriment, and the provisions of the *Bail Act* concerning failure to answer bail. It is also concerned at the discretionary nature of the present system of granting cash bail.

The Commission is therefore of the view that the existing practice should be formalised by legislation. The Commission recommends that the *Bail Act* should be amended to allow a defendant who is charged with an offence for which cash bail is available to elect to pay an amount of money in full answer to the charge. Where the defendant so elects, there would be no power to arrest the defendant for failure to answer bail.

The effect of the Commission's recommendation would be to formally change the character of the sum of money paid from a security for the defendant's appearance to an 'on the spot' fine. The Commission recognises that an 'on the spot' fine is, in

effect, a form of penalty, and that the *Bail Act* is not the appropriate legislative vehicle for a provision relating to penalties. The Commission recommends that a provision be included in the *Penalties and Sentences Act* to the following effect:

*A person charged with an offence for which cash bail is available is entitled to elect not to contest the charge but to pay 'the prescribed amount' and to be relieved of any further liability.*

The *Bail Act* should be amended correspondingly by the inclusion of the following provision:

*Where a person has paid the prescribed penalty in accordance with section ... of the Penalties and Sentences Act, that person must be immediately released from custody and is not to be subject to any further proceedings for the offence for which the penalty was paid.*

At present, there are no fixed legislative guidelines as to the amount of cash bail required to be deposited by a defendant. There appears to be some variance in practice. To ensure fairness and consistency, the amount to be paid should be regulated by legislation.

### **C. Offences for which cash bail is available**

The formal recognition of payment of a sum of money as a penalty, with no further consequential detriment to the defendant, requires that the range of offences for which cash bail is available should be considered carefully.

At present, cash bail is not available to a defendant who has been charged with an indictable offence. The Commission is of the view that this position should remain unchanged. The Commission recommends further that cash bail should not be available for any offence for which the only penalty which may be imposed is a term of imprisonment.

The Commission has considered a range of offences - such as using obscene language, offensive or disorderly behaviour and resisting arrest - for which cash bail is commonly granted, together with the maximum penalties which may be imposed for such an offence. The Commission recommends that cash bail should be available for an offence for which the maximum fine which may be imposed does not exceed four penalty units or its monetary equivalent.<sup>125</sup>

---

<sup>125</sup> The present equivalent of one penalty unit is sixty dollars: *Penalties and Sentences Act 1992* section 5.

**D. Where the defendant elects to contest the charge**

The procedure outlined above may be to the advantage of some defendants.

However, a defendant may see the payment of a monetary penalty as an admission of guilt, even though no conviction is recorded. In some situations, a defendant may wish to contest the charge which has been brought against him or her. A defendant should not be deprived of the right to have the case heard by a court.

The Commission therefore recommends that a defendant who is charged with an offence for which cash bail may be granted should be entitled to elect to answer bail and to contest the charge. Where a defendant so elects, he or she should be released on an undertaking. The procedure of issuing a warrant of arrest for failure to answer the undertaking should remain available.

## CHAPTER 9

### Failure to Answer Bail

#### A. The offence

Failure to answer bail is an offence.<sup>126</sup>

The Commission is of the view that this fact, and the consequences of committing the offence, should be clearly spelt out in the *Bail Act*.<sup>127</sup>

The existing legislation requires that, for the offence to be committed, two elements must be present. First, the person must fail to surrender into custody in accordance with an undertaking. Second, the person must be apprehended under a warrant issued for failure to appear in court as required.<sup>128</sup>

The Commission is of the view that this nexus between failure to surrender into custody in accordance with an undertaking and apprehension under a warrant should be removed. Whether or not an offence has been committed should not depend on the person's apprehension. No other Australian jurisdiction has introduced legislation making apprehension an element of the offence.

#### B. Procedure for dealing with the offence

##### 1. Warrant

When a defendant fails to surrender into custody as required, a warrant for the apprehension of the defendant may be issued.<sup>129</sup>

The procedure for issuing a warrant depends on whether the defendant is required to appear before the Magistrates Court, or before the District Court or the Supreme Court. If the defendant is to appear before either the District Court or the Supreme Court, a warrant may not be issued unless the defendant has been notified that the Director of Prosecutions intends to apply for a warrant, or unless the defendant

---

<sup>126</sup> Bail Act section 33.

<sup>127</sup> Cf Bail Act section 33.

<sup>128</sup> Bail Act section 33(1).

<sup>129</sup> Bail Act section 33(1)(b).

cannot be found or is considered likely to abscond.<sup>130</sup> However, in the Magistrates Court a warrant may be issued immediately a defendant fails to appear.<sup>131</sup>

The reason for the difference in procedure is that a defendant who is to appear in the Magistrates Court is given a set date on which he or she is required to appear. This does not happen in the District Court or the Supreme Court. A defendant who is required to appear in either of those courts is remanded to a future sittings of that court.

In the Discussion Paper, the possibility was raised of giving defendants a set date to appear in the District Court or the Supreme Court.<sup>132</sup> This would enable the same procedure for issuing a warrant of arrest to apply in the District Court and the Supreme Court as applies in the Magistrates Court, thus reducing the demand on the resources of the Queensland Police Service which must at present make extensive enquiries to attempt to find the defendant either to serve notice or to advise the court that the defendant cannot be found. It would also create certainty for the defendant.

However, the adoption of such a proposal would impact significantly on the administration of the District Court and the Supreme Court. In those courts, the criminal jurisdiction operates on a system known as a 'running list'. This means that a fixed date is not given for the trial of any matter. After the indictment has been presented,<sup>133</sup> a case is allocated to a sittings of the court commencing on a particular date. Cases are listed in the order that they will be heard. The parties will be given a provisional starting date, but this is subject to change depending on the length of time taken by the preceding cases on the list. A trial may commence before or after the provisional date.<sup>134</sup> The 'running list' enables the courts to operate more efficiently, so that more trials are held and cases are heard sooner. Allocating set dates for trial would increase delays in hearing trials.

On balance, the Commission is not convinced that the advantages of a set date would outweigh the disadvantages of the present system. The Commission is of the view that the better approach lies in improved methods of providing information to defendants about hearing dates and of enforcing reporting conditions so that the whereabouts of a defendant are better known.

---

<sup>130</sup> Bail Act section 28(1).

<sup>131</sup> Bail Act section 28A(1).

<sup>132</sup> Queensland Law Reform Commission, Discussion Paper No 35, March 1991, pages 43-44.

<sup>133</sup> The indictment is the formal document containing the charge which must be presented to the court by the prosecution.

<sup>134</sup> If unusual circumstances exist, a case may be allocated a 'not before' date, so that the trial will not commence before the specified date.

## 2. Proceedings

Section 33 of the *Bail Act* provides for proceedings for an offence against that section to be instituted and taken without the usual procedure of laying a complaint. The warrant for failing to appear under which the person was apprehended is to be produced to the court and, on production of the warrant, the court then and there calls on the person to prove why he or she should not be convicted of the offence.<sup>135</sup>

The Commission is of the view that the requirement that the person be dealt with 'then and there' is unjust and unnecessarily harsh. The defendant may not be legally represented and may not have had an opportunity to prepare an answer to the charge of failing to appear.

The Commission is of the view that the requirement that the person be dealt with 'then and there' should not be retained. It should be replaced by a provision requiring that the matter be dealt with in accordance with the usual rules which apply in the particular court.<sup>136</sup>

### C. Onus of proof

Usually, the onus is on the prosecution in a criminal trial to prove that the defendant is guilty of the offence with which he or she is charged.<sup>137</sup>

Section 33, by requiring that the person be called upon by the court to show why he or she should not be convicted for failing to answer bail, reverses the usual onus of proof.

The Commission is mindful of the provisions of the *Legislative Standards Act 1992* dealing with the reversal of onus of proof,<sup>138</sup> and recommends that the ordinary onus of proof rules should apply to the offence under section 33 of the Act. The effect of this would be that, if a defendant raised evidence of reasonable excuse for

---

<sup>135</sup> Bail Act section 33(3).

<sup>136</sup> See for example Bail Act (NSW) section 51.

<sup>137</sup> See for example *Woolmington v DPP* [1935] AC 462 at 481-2; *Mancini v DPP* [1942] AC 1 at 11; *R v Mullen* (1938) 59 CLR 124 at 136.

<sup>138</sup> Section 4(3) of the *Legislative Standards Act* provides that:  
Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation -

(d) does not reverse the onus of proof in criminal proceedings without adequate justification.

the failure to answer bail, the prosecution would have to negative that evidence in order to obtain a conviction.<sup>139</sup>

#### **D. Penalty for failing to answer bail**

The penalty for failing to appear in court on the date required by a grant of bail is a fine of up to \$2,400 or a prison sentence of up to two years.<sup>140</sup>

Although the maximum penalty which may be imposed in some other Australian jurisdictions is higher,<sup>141</sup> the Commission believes that the existing penalty is adequate and should not be increased.

In the Discussion Paper, the Commission suggested that the penalty for failing to answer bail should not exceed that which would be likely to be imposed in respect of the offence for which bail was granted.<sup>142</sup> After careful consideration of submissions received, the Commission is of the view that while such an approach may be suitable in most cases, legislation should recognise that breach of bail is a serious matter.

The court in question would have, within the prescribed limits, a full discretion in determining the penalty for failure to answer bail. The Commission considers, however, that in exercising its discretion, the court should be under a statutory obligation to take into account all relevant circumstances, including, in an appropriate case, the prescribed penalty for the offence for the hearing of which the defendant failed to appear.

In the Discussion Paper,<sup>143</sup> the Commission questioned the present requirement that a prison sentence imposed for failing to appear must be served in addition to any previously imposed term of imprisonment, or any other term which is imposed while the defendant is serving a sentence for breach of bail.<sup>144</sup> The Commission believes that it should not be mandatory for such sentences to be served cumulatively. The Commission recommends that this part of the present provision

---

<sup>139</sup> See for example *Loveday v Ayre* [1955] Qd R 264.

<sup>140</sup> Bail Act section 35.

<sup>141</sup> See for example Bail Act (NSW) section 51, which provides for a maximum penalty of three years imprisonment or \$3,000.

<sup>142</sup> Discussion Paper page 45.

<sup>143</sup> Discussion Paper page 45.

<sup>144</sup> Bail Act section 33(4).



should be removed. The Commission notes that the question of cumulative or concurrent sentencing is now dealt with by the *Penalties and Sentences Act*.<sup>145</sup>

### **E. Improving the rate at which defendants appear in answer to bail undertakings**

In the Discussion Paper, the Commission made a number of recommendations for improving the rate at which defendants appear in answer to their bail undertakings.<sup>146</sup>

The suggestions made by the Commission included:

- (a) Providing better explanations about bail undertakings to defendants;
- (b) Presenting to the court verified information concerning any application for bail made to it; and
- (c) Checking on defendants released on bail.

#### **1. Information verification schemes**

At present, a court hearing a bail application may have difficulty in making an objective assessment of the situation because the information put before the court may be hastily prepared and one-sided.<sup>147</sup>

Programs designed to provide courts with objective, verified information about bail applications have been implemented in other jurisdictions.<sup>148</sup> These schemes may have contributed to an increased rate of grant of bail.<sup>149</sup> However, the Commission is of the view that bail regimes in countries such as the United States where verified information schemes have been introduced are very different from the Queensland system, where a wider range of factors is taken into account in determining a bail application.

---

<sup>145</sup> See *Penalties and Sentences Act 1992* section 155.

<sup>146</sup> Discussion Paper pages 77-78.

<sup>147</sup> The problem is of less significance in the Supreme Court where procedures involve the presentation of material by affidavit.

<sup>148</sup> See, for example, *Bail Information Schemes: practice and effect*, Research and Planning Unit Paper 69, Home Office, London.

<sup>149</sup> See for example Zander, *Bail: A Re-appraisal*, 1967 CrimLR 139; Stone, *Bail Information for the Crown Prosecution Service*, London: Vera Institute of Justice, 1988; *Bail Information Schemes*, note 148 above.

The solution recommended by the Commission is the creation of a presumption in favour of bail, and a requirement that the prosecution state by statutory declaration or on affidavit the reasons why bail should be refused. The Commission is of the view that implementation of these recommendations would significantly lessen the risk of bail being denied because of a lack of reliable evidence.

The Commission considers that the available information about bail verification schemes is not sufficiently compelling to justify the resources which would be required to conduct further investigations and implement such schemes in Queensland. The Commission believes that, ideally, every defendant should be represented in court at a bail application. However, the solution, in the Commission's view, is not to set up another system, but to properly resource existing systems such as the Legal Aid Commission's Duty Solicitor scheme.

## 2. Checks on defendants

Many defendants who are granted bail, particularly in the higher courts, are conditionally released.<sup>150</sup> The results of surveys conducted by the Commission indicate that the majority of conditions imposed require the defendant to report to police at regular intervals.<sup>151</sup>

If the likelihood of the defendant failing to appear in court is a relevant consideration in displacing the presumption in favour of bail,<sup>152</sup> then the ability of the bail-granting authority to impose a reporting condition may assist a defendant to obtain bail. Further, although reporting conditions cannot of themselves guarantee that defendants appear in court, failure of a defendant to comply with a reporting condition may alert the authorities that a defendant may have absconded.

The Discussion Paper questioned the value of conditions requiring the defendant to report to the police. It was suggested that responsibility for monitoring bail reporting conditions could be given to the Corrective Services Commission.<sup>153</sup>

This procedure would have the advantage that the defendant would be in contact with the same agency as would have had responsibility if the defendant had been kept in custody, rather than with the police who may be seen as agency of the prosecuting authority. Defendants who are given probation or community service orders following conviction must report to staff at regional offices of the Corrective Services Commission.

---

<sup>150</sup> Conditions of bail are discussed in Chapter 10.

<sup>151</sup> Discussion Paper page 49.

<sup>152</sup> See Chapter 5.

<sup>153</sup> Discussion Paper pages 49, 50.

On the other hand, the greater spread of police stations throughout the State as compared with the facilities of the Corrective Services Commission may necessitate the continuation of the present role of the Police Service. Access to certain police stations outside usual working hours would enable a person to meet bail conditions and, at the same time, fulfil employment obligations. Retaining the police in their present role of reporting agency may also be an advantage when failure to report leads to investigation and the need for arrest.

On balance, the Commission is of the view that there is not sufficient evidence to warrant a change to the present system.

## CHAPTER 10

### Conditions of Bail

When a defendant is released on bail, it is usual for the grant of bail to be made subject to certain conditions.<sup>154</sup> The purpose of the conditions is to ensure that the defendant appears in court when required to do so, and that the defendant does not pose a risk to the community or to the interests of justice when he or she is released.

The most commonly imposed form of condition is an undertaking, which is a written document signed by the defendant, in which the defendant promises to appear in court as required.<sup>155</sup> Failure to appear in court in accordance with an undertaking is a criminal offence, and a warrant may be issued for the arrest of the defendant.<sup>156</sup>

Another kind of condition imposes a financial incentive for the defendant to appear. In addition to signing an undertaking, the defendant may be required to pay a sum of money by way of security.<sup>157</sup> If the defendant fails to appear in court, the security may be forfeited unless the defendant can provide a reasonable excuse for failing to appear.<sup>158</sup> In addition, the defendant may be required to provide a 'surety'. A surety is a person, approved by the court, who undertakes to pay a sum of money if the defendant does not appear in court.<sup>159</sup> The surety is usually someone close to the defendant.<sup>160</sup> The surety forfeits the amount if the defendant does not appear.<sup>161</sup>

Conditions other than financial incentives may also be imposed. An example of a condition which does not involve a financial incentive is a requirement that the

---

<sup>154</sup> See Bail Act section 11.

<sup>155</sup> Bail Act section 20.

<sup>156</sup> Bail Act section 33.

<sup>157</sup> Bail Act section 11.

<sup>158</sup> Bail Act section 32.

<sup>159</sup> Bail Act section 21.

<sup>160</sup> Bail Act section 21(3)(c).

<sup>161</sup> See for example *Ex parte Doueihi* [1986] 2 Qd R 352, where the amount forfeited by the surety when the defendant absconded was \$50,000.

defendant report at specified intervals to a nominated police station.<sup>162</sup> Another example is a requirement that the defendant surrender his or her passport. The *Bail Act* confers a wide discretion as to the nature of such conditions.<sup>163</sup>

The Commission considers that the present system could be improved in the following ways:

1. As explained on page 52, a surety runs the risk of substantial financial hardship if the defendant fails to appear and the surety is required to forfeit the amount of the undertaking. It is therefore essential that a surety understands the extent of the risk incurred, and is aware of the right to seek a discharge as a surety.<sup>164</sup> The *Bail Act* at present contains a number of provisions relating to notification of a surety of his or her rights and obligations.<sup>165</sup> The Commission is of the view that the surety should be given a verbal explanation as well as a standard form. In addition, the standard forms should be up-dated and expressed in plain English. Multi-lingual forms should also be available.
2. At present, a surety may be required to show proof of ownership pursuant to section 21(6A). Alternatively, a surety may be required to find funds in accordance with section 21(6). There is concern that the presence of both options may result in unfairness in some instances. On the other hand, situations may arise where it is appropriate for the court to exercise its discretion in deciding which to apply in a particular case. Perhaps the answer lies in the requirement that the conditions of bail are not to be more onerous than necessary in the circumstances.<sup>166</sup>
3. The Commission sees no justification for retaining the power of a surety, with or without the assistance of the police, to apprehend a defendant.<sup>167</sup> The main purpose of a surety, since the surety may be liable to pay a substantial amount if the defendant absconds, is to provide a financial incentive for the defendant to appear in court. If the surety suspects that the defendant is planning to abscond, the surety may inform the police, who have power to apprehend the defendant without a warrant.<sup>168</sup> In addition, the surety may

---

<sup>162</sup> Reporting conditions were discussed in Chapter 9.

<sup>163</sup> *Bail Act* section 11(2).

<sup>164</sup> *Bail Act* section 23.

<sup>165</sup> *Bail Act* section 20(5), Forms 7 and 8.

<sup>166</sup> See *Bail Act* section 11(1).

<sup>167</sup> *Bail Act* section 24.

<sup>168</sup> *Bail Act* section 29.

apply for a discharge.<sup>169</sup> The Commission is of the view that these provisions provide sufficient protection for a surety. The power of arrest by a surety should therefore be abolished.

4. The existing legislation provides that any condition imposed on a defendant not be more onerous than the court or member of the police service granting bail considers necessary, having regard to the nature of the offence, the circumstances of the defendant and the public interest.<sup>170</sup> The Commission is of the view that the reference to the 'circumstances of the defendant' may not be sufficient. In financial terms, what is an onerous condition will depend on the resources available to the defendant. The Commission therefore considers that the *Bail Act* should be amended to include a specific provision that, in the determination of the level of security required, the financial means of the defendant be taken into account.
5. Where a court imposes as a condition the giving of a security or surety which the defendant cannot obtain, the defendant is kept in custody. However, it may never come to the attention of the court that the defendant has not been released. Under the present system, it is left to the defendant to apply for an order varying the grant of bail.<sup>171</sup>

In the Discussion Paper, the Commission proposed a system of automatic review of the bail status of a defendant granted bail but retained in custody. The Commission's initial suggestion was that a defendant should be brought back before a court for a review of his or her bail status, if he or she were still in custody four days after bail had been granted.<sup>172</sup> While the Commission is still in favour of a system of automatic review, it is of the view that the proposed time-frame may have been insufficient. Such a short period may, in fact, prove a disincentive for a defendant to comply with the financial commitment imposed. The Commission therefore recommends that the review period should be fourteen days.

6. The present *Bail Act* gives a court or member of the police service, in granting bail, power to impose any conditions considered necessary by the court or member in order to ensure that the defendant appears in court and, while on bail, does not commit an offence, endanger the safety or welfare of

---

<sup>169</sup> Bail Act section 23.

<sup>170</sup> Bail Act section 11(1), 11(2).

<sup>171</sup> Bail Act section 19.

<sup>172</sup> Queensland Law Reform Commission, Discussion Paper No 35, March 1991, pages 53, 54.

members of the public or interfere with witnesses or otherwise obstruct the course of justice.<sup>173</sup>

The Commission is of the view that, without limiting the generality of the power to impose conditions, the kinds of conditions which may be imposed should be more clearly spelled out. The list could include:<sup>174</sup>

- (a) a requirement that the defendant report periodically, or at specified times, at a specified place;
- (b) a requirement that the defendant reside at a specified place;
- (c) a requirement that the defendant undergo psychiatric treatment or other medical treatment;
- (d) a requirement that the defendant participate in a program of personal development, training or rehabilitation;
- (e) a requirement that the defendant not commit any act which would constitute domestic violence within the meaning of the *Domestic Violence (Family Protection) Act 1989* (as amended);
- (f) a requirement that the defendant not possess a weapon while on bail;
- (g) a requirement that the defendant not contact a specified person;
- (h) a requirement that the defendant not harass or molest, or cause another person to harass or molest, a specified person;
- (i) a requirement that the defendant not be in or on premises in or on which a specified person resides or works;
- (j) a requirement that the defendant not be in, on or near premises frequented by a specified person;
- (k) a requirement that the defendant not be in a locality in which are situated premises in or on which a specified person resides or works;
- (l) a requirement that the defendant not approach within a specified distance of a specified person;

---

<sup>173</sup> Bail Act section 11(2).

<sup>174</sup> See Bail Act (ACT) section 25; Domestic Violence (Family Protection) Act (1989) as amended, sections 4B, 4C and 5(3).

- (m) where the defendant resides with another person - a requirement that the defendant not enter or remain in the place of residence while under the influence of liquor or a drug; and
  - (n) a requirement that the defendant refrain from making an application for a passport or that the defendant surrender any existing passport.
7. A provision should be inserted into the *Bail Act* to allow the appointment of a surety who is not resident in Queensland where, in the opinion of the court, it is appropriate to do so.



## CHAPTER 11

**Recommendations of the Royal Commission  
into Aboriginal Deaths in Custody**

On 7 August 1991 the Attorney-General wrote to the Queensland Law Reform Commission requesting that the recommendations of the Royal Commission into Aboriginal Deaths in Custody relating to bail be considered in the Commission's review of bail legislation in Queensland.

The Royal Commission found that '(t)he lack of flexibility in bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody.'<sup>175</sup>

The Report made three recommendations concerning bail legislation.<sup>176</sup> These were:

*Recommendation 89*

*That, the operation of bail legislation should be closely monitored by each government to ensure that the entitlement to bail, as set out in the legislation, is being recognised in practice. Furthermore the Commission recommends that the factors highlighted in this report as relevant to the granting of bail be closely considered by police administrators.*

*Recommendation 90*

*That in jurisdictions where this is not already the position:*

- a. *Where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact;*

---

<sup>175</sup> Royal Commission into Aboriginal Deaths in Custody, Report Vol 3, 47. Canberra, Australian Government Publishing Service, 1991.

<sup>176</sup> Vol 3, 54-55.

- b. *An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail; and*
- c. *There be a statutory requirement that the officer in charge of a station to whom an arrested person is taken give to that person, in writing, a notification of his/her right to apply for bail and to pursue a review of the decision if bail is refused and of how to exercise those rights.*

#### *Recommendation 91*

*That governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation:*

- a. *to enable the same or another police officer to review a refusal of bail by a police officer;*
- b. *to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people; and*
- c. *to enable police officers to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station.*

Accordingly, the Commission has considered these recommendations. The views of the Commission in relation to each recommendation are set out below.

#### **1. Recommendation 89**

*That, the operation of bail legislation should be closely monitored by each government to ensure that the entitlement to bail, as set out in the legislation, is being recognised in practice. Furthermore the Commission recommends that the factors highlighted in this report as relevant to the granting of bail be closely considered by police administrators.*

The Commission endorses the proposition that bail procedures should be monitored by government and by police administrators to ensure that entitlement to bail is recognised in all cases. This does not require an amendment to the *Bail Act*.

## 2. Recommendation 90

- a. *Where police bail is denied to an Aboriginal person or granted on terms the person cannot meet, the Aboriginal Legal Service, or a person nominated by the Service, be notified of that fact.*
- b. *An officer of the Aboriginal Legal Service or such other person as is nominated by the Service, be granted access to a person held in custody without bail.*

The Report of the Royal Commission highlighted the risks encountered by Aboriginal people in custody. These risks included self-harmful behaviour which could be triggered by factors such as intoxication and isolation. Other risks were the generally poor level of health of Aboriginal detainees, often as a result of hazardous use of alcohol, and the extent to which potentially life-threatening conditions could be masked by alcohol.<sup>177</sup>

The Report also noted the importance of the role of the Aboriginal Legal Service in safeguarding the rights of Aboriginal people.<sup>178</sup>

The Commission therefore recommends that the proposals outlined by the Royal Commission in Recommendations 90(a) and 90(b) be specifically incorporated into the *Bail Act*.

The Commission invites comment on this issue.

- c. *There be a statutory requirement that the officer in charge of a station to whom an arrested person is taken give to that person, in writing, a notification of his or her right to apply for bail and to pursue a review of the decision if bail is refused and of how to exercise those rights.*

The Commission endorses this recommendation and is of the view that such a provision should be applied to all people who are arrested.

In Chapter 3, the Commission recommended changes to section 7 of the *Bail Act*, which confers on members of the police service the power to grant bail in certain circumstances.<sup>179</sup> At present, there is no duty on a member of the police service

---

<sup>177</sup> Vol 3, 174-179.

<sup>178</sup> Vol 3, 85-90.

<sup>179</sup> There are at present certain offences for which the police do not have power to grant bail. See *Bail Act* section 13.

to grant bail, even where there is a power to do so. Under the existing legislation, there is merely a duty to consider whether bail should be granted. The Commission has recommended that this duty should be replaced by a presumption in favour of bail.<sup>180</sup> This recommendation is consistent with the view of the Royal Commission.<sup>181</sup> The presumption in favour of bail would be displaced only if one or more of the proposed criteria for refusal of bail<sup>182</sup> were satisfied.

The Commission has also recommended changes to section 7 that would require that a person taken into custody be informed of the right to apply for bail; to communicate with a legal officer or other person who could assist in making the bail application and, in the case of a person with language difficulties, an interpreter; and to have a refusal of bail by a member of the police service reviewed by a higher ranked police officer.

The Commission has recommended that written notification of the defendant's rights, in plain English, be provided but that, because of the high percentage of defendants with literacy problems, the notice should also be read to the defendant. The notification form should be endorsed with the date and time of reading, and signed by the police officer or watch-house keeper.<sup>183</sup>

### 3. Recommendation 91

*That governments in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation:*

- a. *to enable the same or another police officer to review a refusal of bail by a police officer*

At present, a decision by a member of the police service to refuse bail can be challenged only by a court application. The Royal Commission commented that the absence of any power of subsequent review of a refusal of bail by a police officer created a situation of potential abuse.<sup>184</sup>

---

<sup>180</sup> See pages 10-12.

<sup>181</sup> Vol 3, 53.

<sup>182</sup> See Chapter 5.

<sup>183</sup> See pages 13, 14.

<sup>184</sup> Vol 3, 53.

The Commission agrees that, for the community as a whole, the provisions for review of a police refusal of bail are in need of reform. The Commission has addressed this issue in Chapter 7, and has recommended that there should be a right of review by an Inspector of Police in the relevant region.

- b. *to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people*

The Royal Commission identified as the major factor restricting access to bail for Aboriginal persons detained in custody, their inability to meet the criteria for release.<sup>185</sup>

However, under the Commission's proposals, a defendant will not have to satisfy criteria for release. Rather the police will have to establish that bail should be refused. This involves two changes to the present legislation, namely imposing a duty on members of the police service to grant bail<sup>186</sup> and removing the reversal of onus of proof which presently exists in some situations.<sup>187</sup> This will create a presumption in favour of bail for all defendants taken into custody prior to standing trial.

Under the Commission's proposals, only certain factors may be taken into account in refusing a bail application. One of the proposed criteria for the refusal of bail is the probability of the person failing to appear in court. The Royal Commission noted prior failures to appear in court as one of the factors contributing to the denial of bail to Aboriginal detainees.<sup>188</sup> The Report commented that failure to attend did not necessarily indicate a disregard for the obligation to attend but, rather, may be attributed to reasons such as physical disability, communication difficulties, life style and cultural differences or lack of education.<sup>189</sup>

The Commission has specified the factors which may be taken into account in assessing whether or not a defendant is likely to appear. One of the permitted criteria is the history of any previous bail grants. While this factor may be potentially disadvantageous to Aboriginal defendants, the Commission considers that previous bail history is a serious matter and cannot be ignored. However, the Commission is of the view that, since previous bail history is raised only as a factor,

---

<sup>185</sup> Vol 3, 51.

<sup>186</sup> See pages 10-12.

<sup>187</sup> See page 32.

<sup>188</sup> Vol 3, 51.

<sup>189</sup> Vol 3, 53, 54.

the mitigating circumstances of which can be taken into account, failure to answer bail in the past would not of itself preclude bail on a later occasion.

The Royal Commission also pointed to lack of employment and lack of a fixed residential address as indicators of possible non-attendance at court which may disadvantage Aboriginal defendants.<sup>190</sup> The Commission has recommended changes in the criteria to be taken into account in determining a bail application by removing references to specific factors such as home environment and family situation, which could unfairly disadvantage groups such as the homeless, the unemployed and those who live in extended communities. The Commission has recommended that, instead, the reference should be to the broader context of 'background and community ties'.<sup>191</sup> The Commission considers that these factors should be sufficient to enable an assessment to be made of the likelihood of the person absconding.

The Commission considers that its recommended approach to the grant of bail - that is, a general presumption in favour of bail, limited by specified criteria - enhances the prospects of all defendants detained in custody getting bail, consistently with ensuring that defendants appear to stand trial and with protecting the interests of the general community. The Commission is of the view that none of the proposed criteria inappropriately restrict the granting of bail to Aboriginal people.

The Commission invites comment on this issue.

- c. *to enable police officers to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station*

Often offenders, whether members of the Aboriginal or general community, are arrested for minor street offences, such as obscene language and vagrancy, as a result of drunken behaviour in a public place. The reason for their arrest is often to remove them from the public place because, to other members of the community, their conduct may be offensive or intimidating. The Commission agrees with the view of the Royal Commission that the practice of transferring the offender to a police station is not an appropriate response.<sup>192</sup>

---

<sup>190</sup> Vol 3, 51.

<sup>191</sup> See pages 19, 22.

<sup>192</sup> In 1989, an amendment to the *Bail Act* allowed a person arrested on a drunkenness charge to be released into the custody of an 'authorised person' and taken to a 'declared place'. However, this provision was expressed to have effect for only three years from its date of commencement. It ceased to operate in May 1992.

The Commission understands that consultations are presently taking place between a number of government departments, including the Queensland Police Service, the Department of Family Services and Aboriginal and Islander Affairs and the Department of Health with a view to finding a solution. (Footnote continues on next page).

The Commission recognises that there are additional factors which make it inappropriate for a defendant to be taken to a police station or watch-house. In remote areas, for example, there may be a considerable distance from the place of arrest to the nearest police station. As the Royal Commission indicated, transferring an arrested person could have oppressive consequences for both police officers and offenders. The police would have the logistical problems and financial costs of transport, and the person, if released on bail, would be left stranded without any support network and, in all probability, money to return to his or her community.

The Commission therefore recommends that section 7 of the *Bail Act* could be further amended to provide that, where it is not practicable for a member of the police service to deliver an arrested person to a police station or watch-house, the member of the police service may release the person on bail at or near the place of arrest.

---

Pending the outcome of these consultations, the Commission does not consider it appropriate to comment further on this issue, other than to stress the importance of involving members of the Aboriginal community in the process.

## CHAPTER 12

## Young Offenders

For young offenders who are arrested and charged with an offence, bail arrangements are to be determined in accordance with Part 3 of the *Juvenile Justice Act 1992*.<sup>193</sup>

That Act requires that an arrested child<sup>194</sup> be taken promptly before a Children's Court to be dealt with according to law.<sup>195</sup> However, where it is not practicable to take the child before a court, the child must ordinarily be released from custody. The police officer in charge of the place where the child is detained or the watch-house keeper must grant bail and release the child from custody unless the *Bail Act* otherwise provides.<sup>196</sup>

Under the existing provisions of the *Bail Act* bail would not be available for offences such as murder, or offences under the *Drugs Misuse Act* for which bail may not be granted by a member of the police service.<sup>197</sup> For any other offence, the only criteria on which bail could be refused would be those listed in section 16 of the *Bail Act*.<sup>198</sup>

Where a child has been arrested and charged with an offence for which bail cannot be granted by a member of the police service or a watch-house keeper, the question of bail would have to be considered by an appropriate court. At present, under the *Bail Act*, the appropriate court would be the Supreme Court. The Commission has recommended that the Magistrates Court should also have power to grant bail for these offences.<sup>199</sup> In any event, the only criteria which would justify a refusal of bail would again be those set out in section 16.

---

<sup>193</sup> The Juvenile Justice Act received the Royal Assent on 19 August 1992. Section 2 of the Act provides that the Act is to commence on a date to be proclaimed. The Act has not yet been proclaimed.

<sup>194</sup> For the purposes of the Act a 'child' is a person who has not turned seventeen years, or, after a date to be fixed by the Governor in Council by regulation, a person who has not turned eighteen. See Juvenile Justice Act sections 4, 6. No date has as yet been fixed.

<sup>195</sup> Juvenile Justice Act section 39.

<sup>196</sup> Juvenile Justice Act section 39(1).

<sup>197</sup> Bail Act section 13. But see page 6.

<sup>198</sup> See Chapter 5.

<sup>199</sup> See pages 6-7.



The *Juvenile Justice Act* provides that bail may also be granted to a child by a judge of a Children's Court, even for those offences for which, at present, bail may be granted only in the Supreme Court.<sup>200</sup> The *Juvenile Justice Act* does not specify criteria for refusal of bail by a judge of a Children's Court. However, unless the Act provides otherwise, the *Bail Act* is to continue to apply to a child charged with an offence.<sup>201</sup> The consequence of this would be that a judge of a Children's Court would be bound by the criteria in section 16 of the *Bail Act*.

Section 16 refers to the interests of the defendant, having regard to the defendant's need for protection. As a result of the *Juvenile Justice Act*, specific reference to the welfare of a child has been deleted.<sup>202</sup> The Commission received submissions advocating that the child welfare basis for refusing bail should be abolished. After careful consideration the Commission remains of the view that, for a young offender, there may be circumstances in which limited, temporary detention may be in his or her best interests. For example, a young defendant who is released on bail from a police station or watch-house may have no money and no means of transport. It may be late at night; the child may be affected by alcohol. The Commission considers it undesirable that young people should be placed in such a vulnerable situation.

However, the Commission is concerned that a police watch-house or lock-up is not an appropriate place for a child to be kept in custody.

The Commission therefore recommends the insertion in the *Bail Act* of a provision directed specifically to the duty to grant bail to young offenders. The provision should include a requirement that, when bail is refused only on the ground of the welfare of a child, notification of the refusal should be given, where reasonably possible, to the child's parents. Because of the wide range of family situations which exists in the community, the definition section of the *Bail Act* should be amended by the insertion of the definition of 'parent' contained in the *Juvenile Justice Act*.<sup>203</sup> This definition includes a person who has custody of the child or looks after the child on a day to day basis. Notification should also be given to the Department of Family Services and Aboriginal and Islander Affairs.

---

<sup>200</sup> Juvenile Justice Act section 46.

<sup>201</sup> Juvenile Justice Act section 37(1).

<sup>202</sup> Juvenile Justice Act section 235.

<sup>203</sup> Section 5 of the Juvenile Justice Act defines 'parent' to mean -

- (a) a parent or guardian of a child; or
- (b) a person who has lawful custody of a child other than because of the child's detention for an offence or pending a proceeding for an offence; or
- (c) a person who has the day-to-day care and control of a child.

The *Juvenile Justice Act* contains provisions relating to the custody of a child who is not released after being arrested on a charge of an offence.<sup>204</sup>

Until the child appears in court, arrangements must be made between the Police Service and the Department of Family Services and Aboriginal and Islander Affairs for the child to be placed in a detention centre wherever practicable.<sup>205</sup>

The Commission is of the view that, where the only ground for bail being refused is the welfare of the child, a less formal arrangement may be appropriate. The Commission therefore recommends that the *Bail Act* should require that, where practicable, a child who has been refused bail only for his or her own protection, should be released into the custody of a parent or other responsible adult nominated by a parent. If this is not possible or appropriate, the child should be released into the custody of a person nominated by an officer of the Department of Family Services and Aboriginal and Islander Affairs. The Commission understands that the Protective Services and Juvenile Justice Division of the Department of Family Services and Aboriginal and Islander Affairs is currently working on the development of a range of alternative models for the detention of young offenders. The Commission supports this initiative.

Only where no alternative arrangements can be made, should the child be detained by the police.

The provision should also specify that the period of detention should be no longer than necessary to protect the child's immediate welfare. For example, if a young offender who is obviously affected by alcohol is arrested late at night, and it is not possible to arrange for his or her release into the custody of a responsible adult, protection of the child's welfare may require that he or she is not released between the time of arrest and 6 am the following morning.

These recommendations are generally consistent with guidelines issued by the Commissioner of Police in consultation with the Department of Family Services and Aboriginal and Islander Affairs.<sup>206</sup> The Commission is firmly of the view, however, that a reform of this nature should be entrenched in legislation.

Where a court orders that a child be remanded in custody rather than released on bail, the *Juvenile Justice Act* provides that the court must remand the child into the custody of the Director-General of the Department of Family Services and

---

<sup>204</sup> *Juvenile Justice Act* sections 41, 43.

<sup>205</sup> *Juvenile Justice Act* section 41.

<sup>206</sup> Queensland Police Service Commissioner's Circular, Circular No 100/91, 18 December 1991. The circular specifies a longer maximum permissible period of detention. However, the guidelines relate to situations where the defendant has been refused bail on grounds other than the need for his or her own protection.

Aboriginal and Islander Affairs. This provision is expressed to have effect, despite the provisions of any other Act to the contrary.<sup>207</sup>

The proposed provision could read as follows:

*Refusal of bail to a child*

**16A(1)** *In making a determination regarding the grant of bail to a person who is a child within the meaning of the Juvenile Justice Act 1992, a court or member of the Police Service must have regard only to the matters referred to in section 16.*

**(2)** *Where a child is refused bail only on the ground set out in section 16(1)(b)(iii):*

- (a)** *the court or member of the police service who refuses bail must, forthwith, give notice of such refusal to -*
  - (i)** *a parent of the child, unless a parent cannot be found after reasonable inquiry; and*
  - (ii)** *the chief executive of the Department of Family Services and Aboriginal and Islander Affairs, or a person who holds an office within the department nominated by the chief executive for the purpose.*
- (b)** *a court which refuses bail must remand the child in custody in accordance with section 43 of the Juvenile Justice Act 1992;*
- (c)** *a member of the police service who refuses bail must, notwithstanding the provisions of section 41 of the Juvenile Justice Act 1992 -*
  - (i)** *release the child into the custody of a parent or other responsible adult nominated by a parent;*
  - (ii)** *where it is not reasonably practicable to release the child into the custody of a parent or other responsible adult nominated by a parent, release the child into the custody of a person nominated by an officer of the Department of Family Services and Aboriginal and Islander Affairs;*
  - (iii)** *where it is not reasonably practicable to release the child into the custody of a parent, another responsible adult nominated by a parent or a person nominated by an officer of the*

---

<sup>207</sup> Juvenile Justice Act section 43.

*Department of Family Services and Aboriginal and Islander Affairs, detain the child at the police station or watch-house.*

- (3) *Where a child is detained in a police station or watch-house or is released into the custody of a person nominated by an officer of the Department of Family Services and Aboriginal and Islander Affairs, any period of detention or custody must not be longer than necessary to protect the child's welfare.*

## CHAPTER 13

### Bail After Conviction

A person who has been tried and found guilty of an offence may wish to appeal against the conviction or against the severity of the sentence. The present provisions of the *Bail Act* clearly envisage that courts should have power to grant bail to a convicted person pending the outcome of the appeal.<sup>208</sup>

However, in contrast to the position which exists before determination of a charge, a court does not have a duty to grant bail in these circumstances. The duty to grant bail is confined to a person held in custody on a charge of an offence 'of which he has not been convicted'.<sup>209</sup> The reason for the distinction lies in the fact that a person who has been lawfully tried and has been found guilty is no longer entitled to the presumption of innocence.

While the *Bail Act* clearly distinguishes the situation of a person who has been convicted, it does not deal with the effect of the distinction. It does not spell out the principles to be applied when a convicted person seeks bail pending an appeal. As a consequence, it is not clear whether the grounds for refusing the application are limited to those specified in the Act,<sup>210</sup> or whether additional factors may be taken into account.

Historically, courts have taken a cautious approach to a bail application made by a convicted person. They have viewed the fact of conviction as giving rise to serious considerations which have the effect of limiting the grant of bail.

These considerations include:<sup>211</sup>

- the respect which ought to be accorded to jury verdicts;
- the fact that a jury verdict should not be regarded as merely a provisional step effective only after all avenues of appeal have been exhausted;
- the prospect that appeals would be launched simply to ensure prompt release from custody;

---

<sup>208</sup> See for example *Bail Act* section 20(2)(b).

<sup>209</sup> *Bail Act* section 9.

<sup>210</sup> See *Bail Act* section 16.

<sup>211</sup> *Ex parte Maher* [1986] 1 Qd R 303.

- . the demands which would be placed on the criminal justice system;
- . the proliferation of unmeritorious appeals; and
- . the public interest in seeing an offender penalised as soon as circumstances permit.

In general, the power to grant bail pending an appeal has not been exercised unless exceptional circumstances have been shown to exist.<sup>212</sup> In the absence of any clear statutory directive, this is the approach which has been adopted in Queensland.<sup>213</sup>

Courts have recognised that such special or exceptional circumstances may exist if the term of imprisonment imposed on the convicted person is relatively short - for example, less than twelve months - and if delays in hearing the appeal are likely to mean that the person will have to serve a significant portion of the sentence before the appeal is heard.<sup>214</sup> Special or exceptional circumstances may also exist if it is immediately possible for the court to identify an obvious error in the proceedings at the trial of the convicted person.<sup>215</sup> It is unlikely that a court would grant bail on the basis of special or exceptional circumstances personal to the convicted person. Applications which rely on the health or financial circumstances of the convicted person or on other factors involved in his or her personal life, have generally been unsuccessful.<sup>216</sup>

In cases where bail applications have succeeded, the special or exceptional circumstances have usually included, in addition to personal matters, factors such as the length of the sentence imposed,<sup>217</sup> the apparent likelihood of success on appeal,<sup>218</sup> and delay in the hearing of the appeal.<sup>219</sup>

---

<sup>212</sup> See for example *Chamberlain v The Queen* (No 1) (1983) 153 CLR 514.

<sup>213</sup> See for example *Ex parte Maher* [1986] 1 Qd R 303.

<sup>214</sup> See for example *R v Pottage* [1917] VLR 317; *R v Carbone* (1976) 14 SASR 176; *Watton* (1978) 68 Cr App R 293; *Ex parte Maher* [1986] 1 Qd R 303.

<sup>215</sup> See for example *R v McMenamin* [1917] VLR 552; *R v Giordano* (1982) 31 SASR 241.

<sup>216</sup> See for example *R v Ryan* [1930] SASR 125; *R v Patmoy* (1944) 62 WN(NSW) 1; *R v Giordano* (1982) 31 SASR 241.

<sup>217</sup> See for example *R v Southgate* (1960) 78 WN(NSW) 44.

<sup>218</sup> See for example *James Adam Gray* (1908) 1 Cr App R 154.

<sup>219</sup> See for example *R v Carbone* (1976) 14 SASR 176.

Bail legislation in both New South Wales<sup>220</sup> and the Australian Capital Territory<sup>221</sup> makes specific provision for bail pending appeal where there are special or exceptional circumstances. The Commission recommends that a provision empowering courts to grant bail to a convicted person in special or exceptional circumstances pending an appeal should be introduced into the Queensland *Bail Act*. The Commission does not consider that the discretion of the court should be fettered by any attempt to define what constitutes special or exceptional circumstances, other than to provide that the risk that a significant part of the sentence will be served before the appeal is heard may be a special or exceptional circumstance.

A provision could also be included to allow bail to be granted to a person who has been convicted but not sentenced if there is a strong likelihood that a non-custodial sentence will be imposed.<sup>222</sup>

---

<sup>220</sup> Bail Act (NSW) section 30(AA).

<sup>221</sup> Bail Act (ACT) section 9.

<sup>222</sup> Bail Act (WA) Schedule Part C section 4; but see also *R v Giordano* (1982) 31 SASR 241, 242.

## CHAPTER 14

### Bail During Trial

A defendant who has been released from custody on bail will ultimately be required, in accordance with his or her bail undertaking, to appear in court and surrender into custody to stand trial.

At this stage, a defendant may seek to have a previous grant of bail enlarged or, if bail has previously been refused, may make a fresh application for bail. Bail during trial may be granted by a magistrate<sup>223</sup> or a judge of the District Court or the Supreme Court.<sup>224</sup> If a trial is in progress, the judge's decision is final and the defendant may not bring a further application.<sup>225</sup>

It would appear from submissions received by the Commission that some disparity exists in the approach of individual magistrates and judges towards the grant of bail during trial. The Commission is of the view that such a situation is undesirable.

The Commission therefore recommends the inclusion of a provision which, subject to the other provisions of the *Bail Act*, clearly extends the presumption in favour of bail to a defendant during trial. This approach has been adopted in New South Wales, the Northern Territory and the Australian Capital Territory.

The New South Wales<sup>226</sup> and Northern Territory<sup>227</sup> provisions specify with particularity the periods for which bail may be granted. They have the advantage of certainty. On the other hand, the greater the degree of specificity, the greater the risk that some particular circumstance will not be foreseen.

The Commission prefers the simplicity of the Australian Capital Territory provision<sup>228</sup> which, by its reference to a period when the defendant is not required to attend court, makes it clear that bail is to be available after the trial has commenced. The provision does not apply in certain situations - for example, where the defendant has been convicted of the offence, is in custody for some

---

<sup>223</sup> Section 8(1)(a)(iii) of the *Bail Act* allows a court to grant bail to a person held in custody on a charge of an offence if the court has adjourned the proceedings. Section 8(1)(b) allows a court to enlarge bail.

<sup>224</sup> *Bail Act* section 10(2).

<sup>225</sup> *Bail Act* section 10(2).

<sup>226</sup> *Bail Act* (NSW) section 6.

<sup>227</sup> *Bail Act* (NT) section 6.

<sup>228</sup> *Bail Act* (ACT) section 5.



other offence for which he or she is not entitled to bail, or is serving a sentence of imprisonment.<sup>229</sup>

The Commission further recommends that the present provision about the finality of a trial judge's refusal of bail should be deleted, and that there should be a right to bring a fresh application to a judge of the Supreme Court.

---

<sup>229</sup> The Bail Act (ACT) provides, in section 5:

**Availability of bail**

5. (1) Subject to subsection (2) and section 9, an accused person may be granted bail in respect of any period during which he or she is not required to attend court in relation to the offence with which he or she has been charged.

(2) A person who has been accused of an offence and is being held in custody in relation to the offence is not entitled to be granted bail in respect of any period during which -

(a) he or she is in custody for some other offence or reason in respect of which he or she is not entitled to be granted bail; or

(b) he or she is in custody serving a sentence of imprisonment.

Section 9 relates to bail pending an appeal.

## CHAPTER 15

### Other Issues

#### A. Compensation

In the Discussion Paper,<sup>230</sup> the Commission expressed concern at the length of time spent in prison by some defendants who have been refused bail but who are ultimately not convicted. The issue of providing in bail legislation for compensation of such people was raised.

After further consideration, the Commission is of the view that there should be no provision for compensation.

In the first place, the Commission has widened the opportunity for bail to be granted. This has been done by extending the duty to grant bail to all situations except following conviction;<sup>231</sup> by limiting the grounds on which bail may be refused, by eliminating factors such as homelessness and unemployment which may unfairly disadvantage a defendant;<sup>232</sup> and by removing the reverse onus of proof which presently exists in some situations.<sup>233</sup>

In addition, apart from brief periods prior to a defendant's first court appearance, any decision to refuse bail is made by a magistrate or a judge on the basis of criteria specified in the *Bail Act*. One of the factors taken into account is the strength of the evidence against the defendant.<sup>234</sup> Much of what happens at the trial turns on the admissibility of evidence and the extent to which the evidence of the prosecution witnesses matches their original statements to the police. Any shortfall in the prosecution's case does not necessarily mean that the initial decision to refuse bail was incorrect.

In some cases, the charge ultimately brought against the defendant may be different from that alleged at the bail proceedings. Again, a decision that the defendant be acquitted does not mean that refusal of bail was not justified.

---

<sup>230</sup> Queensland Law Reform Commission, Discussion Paper No 35, March 1991, page 58.

<sup>231</sup> See page 12.

<sup>232</sup> See page 22.

<sup>233</sup> See page 32.

<sup>234</sup> See page 23.

## B. Providing an address within 25 km of the court

As a general rule, a defendant who is released on bail must sign an undertaking to appear in court when required to do so.<sup>235</sup>

At present, if a defendant has been committed by a magistrate for trial in either the District Court or the Supreme Court<sup>236</sup> or has been convicted and is appealing against conviction or sentence, the undertaking must contain an address where notices about future proceedings can be left for the defendant. If the defendant lives more than 25 km away from the court where appearance is required, the undertaking must contain, in addition to the defendant's home address, an address within 25 km of the court.<sup>237</sup>

This provision is intended to overcome difficulties experienced by the prosecution in serving notices on some defendants in remote areas. However, a defendant who is not able to provide an address within the 25 km limit may be unfairly disadvantaged.

The Commission is therefore of the view that the present requirement should be replaced by a discretion conferred upon the court to decide, in any particular case, whether the problems faced by the prosecution are sufficient to justify the imposition of an obligation to provide an address for service other than the defendant's usual residential address.

## C. Time remanded in custody

If a person who has been remanded in custody prior to trial is subsequently convicted, the question arises as to whether the period of time spent in custody should be taken into account in assessing an appropriate sentence.

In the Discussion Paper, the Commission commented on apparent sentencing anomalies arising as a result of this issue.<sup>238</sup>

This situation has now been addressed in the *Penalties and Sentences Act 1992*.<sup>239</sup> There is no need for the Commission to comment further.

---

<sup>235</sup> See pages 23-52.

<sup>236</sup> Committal proceedings are a preliminary hearing of more serious charges conducted by a magistrate to determine whether there is sufficient evidence to establish a case against the defendant for trial in the District Court or the Supreme Court.

<sup>237</sup> Bail Act section 20(2).

<sup>238</sup> Discussion Paper pages 67, 68

<sup>239</sup> See *Penalties and Sentences Act* sections 9, 158 and 161.

**D. Institution of proceedings by summons rather than arrest**

In some cases, the court attendance of a person charged with an offence may be obtained by issuing a summons rather than by arresting the person. In such a situation the question of bail does not arise.

Because the summons procedure does not involve detaining a person in custody before he or she has been tried, the Commission is of the view that it should be used in preference to arresting the defendant whenever possible.<sup>240</sup> However, the Commission does not consider the *Bail Act* to be the appropriate vehicle for amending the criminal law to reflect this preference.

**E. Restriction on publication**

At present, section 12 of the *Bail Act* allows a court to prohibit, in some circumstances, publication of information given to the court during the course of a bail application. However, the power of prohibition arises only when the grant of bail has been opposed. It has been drawn to the attention of the Commission that the scope of the power may not be sufficiently wide. For example, it would not prevent the publication of information which may be prejudicial to the defendant or may constitute an invasion of the defendant's privacy, if the prosecution did not oppose bail but merely sought the imposition of certain conditions. The Commission therefore recommends that section 12 be amended to remove the requirement that the bail application must be opposed before the court can make an order restricting publication.

The Commission also considers that section 12 should make it clear that an order restricting publication may be made by the court of its own motion, or on the application of either the defendant or the prosecution.

The Commission further recommends that the reversal of onus in subsection 12(2) should be removed. This provision makes it an offence to fail to comply with an order restricting publication of information given to the court in the course of a bail application, unless the person charged with the offence can prove that he or she had a lawful excuse for failing to comply. The Commission considers that the reverse onus thus created contravenes section 4(3)(d) of the *Legislative Standards Act*.<sup>241</sup>

---

<sup>240</sup> It is now the policy of the Queensland Police Service that, wherever possible, proceedings against a child should be commenced by summons rather than by exercising the power of arrest: Circular No 100/91, 18 December 1991.

<sup>241</sup> See note 96, page 32.

## CONCLUSION

The Commission recognises the importance of the bail procedure in the criminal justice system as a mechanism for upholding the presumption of innocence and for protecting the liberty of individuals who have been charged with committing offences but have not yet been convicted by a court.

However, the Commission is also mindful that circumstances may exist where societal interest in the protection of the community as a whole may override individual interests.

In formulating the recommendations and proposals contained in this paper, the Commission has attempted to maintain the delicate balance between these two sometimes competing goals. The Commission has endeavoured to make bail more accessible for defendants by creating a legislative presumption in favour of bail; by increasing the power of members of the police service, the Magistrates Court and the District Court to grant bail; and by a statutory requirement that defendants be informed, in a way that they are able to understand, of their rights concerning bail. At the same time, the Commission recommends inclusion in bail legislation of a set of criteria which would justify the refusal of bail in circumstances where the administration of justice, the welfare of the community may warrant a defendant's detention in custody.

\*\*\*\*\*