

Bail Legislation: Objectives and Achievements

Jeffrey Miles
Chief Justice
Supreme Court of the
Australian Capital Territory

*Taken from the county jail
By a set of curious chances;
Liberated then on bail
On my own recognizances.*

W.S. Gilbert 1885

We do not know the 'curious chances' that resulted in the liberation on bail of the prisoner who subsequently became Lord High Executioner to the Mikado. The law and procedures relating to bail have, at least until recently, always been something of a mystery. Terms like recognizance, remand, respite and estreat are not understood by everybody in the community, including lawyers, and probably least by those most closely affected by them.

This paper is not an exposition of the law on bail. It attempts to identify some of the problems that arose out of the old law on bail, examines how they have been tackled in recent Australian legislation, notably in New South Wales and Victoria, and looks at possible approaches for bail legislation in the future.

Background to the Bail Acts

Lord Devlin wrote of the right to bail that it was 'indeed curious that fundamental questions concerning bail have never been settled' (Devlin 1960, p. 71). McClemens J, a Judge greatly experienced in the criminal law and procedure of New South Wales, remarked that 'the lack of a history of bail is reflected in the lack of written practice as to the exercise of jurisdiction in the Supreme Court' (McClemens 1969, p. 43).

For whatever reason, it may be taken that the Supreme Courts of the Australian states and territories have an inherent power to grant bail (although it may be argued that where the law on bail has been codified as in New South Wales the inherent power has been abolished). The power of all other courts, relating to bail, derives from statute, including the power of the High Court to grant bail to a prisoner committed to prison in execution of a sentence pending appeal or application for special leave to appeal (*see Chamberlain v. R* (1983) 46 ALR 608).

In the *Queen v. Rochford; ex parte Harvey* [1967], Fox J., as he then was, sitting in the Supreme Court of the Australian Capital Territory, said at p. 141:

The Supreme Court of New South Wales originally had the same jurisdiction in relation to bail as was possessed by the superior common law courts at Westminster (19 Geo. IV c. 83, s.3). As to the jurisdiction of those courts, Stephen, *History of the Criminal Law of England* (1883), vol. I p. 243 says:

'The power of the superior courts to bail in all cases whatever, even high treason, has no history. I do not know, indeed, that it has ever been disputed or modified. It exists in the present day precisely as it has always existed from the earliest times . . .'

However, as Roulston points out (1972, p. 469) legislation on bail in England in 1826 and 1835 superseded all previous legislation on the subject and resulted in a sole criterion of the risk that the accused will not appear to take his trial.

These statutes were never regarded as part of the inherited law which, according to Roulston, was not surprising 'if one reflects on the conditions of the colony of New South Wales in 1835'—another reminder of the origins of the Australian criminal justice system in the penal colony.

Classic definitions of bail fail to accord with the reality. According to Halsbury (4th edn):

The effect of granting bail is not to set the defendant free, but to release him from the custody of the law and to entrust him to the custody of his sureties who are to produce him to appear at his trial at a specified time and place. (para 166)

According to Archbold (24th edn):

If the terms of the bail require a surety or sureties, the defendant is placed in custody of such sureties, who at common law, could re-sieze him. (para 291)

The idea that a capable adult person may be held in the custody of another person, apart from where the detention is pursuant to the established powers of a police officer or prison authority, is quite contrary to notions of civil liberties and human rights. Uncertainty on this aspect of the law is said to have been one of the matters which led to the reform of bail law in Victoria (Lynch 1987).

Whatever the precise state of the law before the Bail Acts, the situation had been reached where defendants who could, at least in some situations, be released on bail were released without the need for a surety. A person who acted as surety simply stood to forfeit a sum of money if the person bailed did not appear at the hearing at the required time and place, and was not expected to exercise the power of a true custodian.

The reason for bail reform legislation in recent years in Australia derives from a number of sources. There has been general recognition of the disadvantages facing an accused person who has to remain in custody until determination of the charges. There has been recognition that the incarceration of a person unconvicted runs contrary to the fundamental principle of the presumption of innocence. There has been concern that persons to whom bail had been granted nevertheless remained in custody because they were unable to meet the financial conditions imposed as terms of the grant of bail, which meant that the existing bail system discriminated against the poor (see generally Stubbs 1984).

Mr Justice Roden of the New South Wales Supreme Court wrote, shortly after the introduction of the New South Wales *Bail Act 1978*:

It has long been a matter of grave concern to many that the system now replaced, with its strong emphasis on means, frequently offered to serious offenders the opportunity of purchasing a chance to abscond, whilst many persons charged with trivial offences were deprived of their liberty before trial because of their inability to find a surety in some paltry sum. The greatest achievement of the legislation, in my view, lies in the considerable downgrading of means as a relevant factor and of money or surety as a bail condition. The consequence of failure to appear is now, as it always should have been, that the absconder has committed a punishable criminal offence.

The presumption in favour of bail, subject to stated exceptions, is now formally recognised as a natural concomitant of the presumption of innocence. The s.9 presumption can, of course, be displaced, and frequently is; but it serves as a valuable reminder that, subject only to the circumstances specified in s.32(2), refusal of bail is no longer available as a disguised form of preventive detention. Preservation of the rights of those who come before the courts unconvicted and protection of the community from unacceptable risk of serious crime, are the prime goals of the legislation (Donovan 1981, ix).

The NSW Bail Act 1978 was enacted after the presentation to the Government of a report by a Bail Review Committee constituted by Mr K.S. Anderson S.M., and Ms Susan Armstrong some two years previously. The passage of the Act was expedited by the fatal shooting of a bank manager during a bank robbery by a person then on bail on a charge of armed robbery and the final legislative product bears witness to those events surrounding the latter period of its gestation. By contrast the impetus behind bail reform legislation in Victoria seems to have come mainly from the Victorian Statute Law Revision Committee and certain academic writers, with a particular concern about the uncertain state of the law (Lynch 1987). This led to the Victorian *Bail Act 1987*. The principal difference between the two Acts is that the New South Wales Act is a codification of the law relating to bail (*R v. Hilton* (1986) 7 NSWLR 745) whereas the Victorian Act is not, and some common law principles survive.

Bail legislation has been enacted in all the Australian states (except Tasmania) and in the Northern Territory. In Tasmania the subject of bail is treated, although not comprehensively, in a number of statutes. To some extent the situation in the Australian Capital Territory is similar to that in Tasmania. Apart from common law, the law on bail in the ACT is to be found scattered through the *Australian Federal Police Act 1979*, the *Children's Services Ordinance 1986*, the *Domestic Violence Ordinance 1986*, the *Magistrates Court Ordinance 1930*, the *Crimes Act 1914*, the *ACT Supreme Court Act 1933*, and probably elsewhere.

No one would argue that bail legislation in Australia has solved all the problems, and whilst a number of significant achievements have been recognised, major problems remain. One is that whilst the reforms have facilitated the granting of bail, prison overcrowding in Australia, particularly New South Wales, is worse than ever. The delay between charge and hearing by the court has become greater, contributing to the overcrowding. The other main cause for concern is that, again whilst the reforms have shifted the emphasis away from money bail, substantial numbers of persons remain incarcerated pending trial because they cannot meet the financial conditions of bail.

These two particularly acute problems have led to further efforts to ensure that fewer persons are kept in custody on remand. On the other hand, because of public perception of an increase in serious crime, countervailing measures have been taken to restrict the granting of bail, at least to persons charged with certain categories of offences and to appellants.

Is there a Need for Bail Legislation in the ACT?

A consideration of the matters just mentioned leads to the preliminary question whether bail legislation for the ACT would simply provide a solution in search of a problem. The delay in reaching a date for hearing of a criminal matter is not as great as in most other parts of Australia. Prisoners on remand are, generally speaking, not held in the overcrowded conditions of the New South Wales prisons (where ACT offenders are sent in order to serve terms of imprisonment after conviction). Conditions in the ACT Remand Centre at Belconnen are not ideal, but are generally regarded as reasonably satisfactory. Canberra legal practitioners have easy access to persons on remand in custody. Bail is granted comparatively readily both in the Magistrates Court and the Supreme Court of the ACT, and if a magistrate refuses bail or imposes conditions that cannot be met, an application to the Supreme Court may be made speedily and easily. The draft Criminal Investigation Bill recommended by the Australian Law Reform Commission (1975) in its report, *Criminal Investigation*, included provisions for police bail. These would have applied to the Australian Capital Territory if the Bill had been enacted, and similar provisions were contained in the *Domestic Violence Ordinance 1986*. Hence some of the provisions which would be expected to be contained in general bail legislation for the ACT are already in place.

A matter which does cause some concern, however, is the percentage of ACT prisoners made up by persons on remand. Figures compiled by Biles of the Australian Institute of Criminology for September 1988 show that while the ACT remand rate is low (7.1 per cent), the percentage of remandees is the highest in Australia (25 per cent). This suggests that a significant number of persons granted bail are unable to meet the conditions imposed. The statistics, however, do not disclose the proportion of the total number of persons granted bail constituted by persons who nevertheless remain in custody.

Given that the Australian Law Reform Commission has already addressed many of the problems relating to bail which have been dealt with by bail legislation in the states (and its recommendations have to some extent been written into the ACT Domestic Violence Ordinance 1986), and given that some at least of the uncertainties of the law which were believed to exist in Victoria still presumably exist in the ACT, it is unlikely that the ACT will remain forever the bastion of the common law relating to bail.

An initial decision needs to be made whether bail legislation should be a codification as in New South Wales or a vehicle to deal with particular questions only, as elsewhere in Australia. As there does not appear to be any particularly acute problem in the ACT, except insofar as an inordinate proportion of persons granted bail seem unable to meet the conditions imposed, it appears that legislation might as well address all the problems rather than only some of them, and codification is, in effect, the preferable course.

This means that the legislation would deal with the question of bail at all stages of the criminal process, from police bail pending appeal. For that reason, during the course of this paper, the reference to a court should be taken to include a police officer authorised to grant bail. It may be that constitutional questions prevent a bail ordinance making provision for bail pending appeal beyond the ACT system, for instance to the Federal Court of Australia or the High Court of Australia.

A 'Right' to Bail?

Bail legislation in Australia generally does not recognise a 'right' to bail. Given, however, that one of the aims of bail reform legislation was, consistent with the due recognition of the presumption of innocence, that persons ought not be detained in custody pending trial unless there was reason, the New South Wales legislation introduced the concept of a presumption in favour of bail, a presumption which, however, does not apply in all cases and a presumption which may be rebutted. In contrast, the approach of the Victorian Bail Act

was to impose on the court, in effect, a *prime facie* duty to grant bail; thereby conferring a correlative 'right' to bail on the applicant. At the same time there were prescribed criteria against which an accused person could be assessed to constitute an 'unacceptable risk', so that not only was the 'right' lost but a reverse onus was placed on the defendant to prove circumstances which justified his release (Lynch 1987).

For minor offences as defined in s.8 of the NSW Bail Act 1978 a person is entitled to be granted bail except in certain defined circumstances, and such bail is to be granted either unconditionally or subject to the imposition of such bail conditions as are reasonably and readily able to be entered into to the extent that the person shall be released as soon as possible after giving the necessary bail undertaking. This is as close as the NSW Act goes to creating a 'right' to bail.

Under s.9(1) of the NSW Bail Act 1978 the presumption of bail is excluded in cases of certain specified serious offences which were, initially, confined to the offence of failing to honour a bail undertaking (which offence was introduced into the law by the NSW Bail Act itself) and armed robbery. In 1986 the section was amended so that offences of drug trafficking, as defined, also fell outside the scope of the presumption in favour of bail.

Under s.9(4) of the New South Wales Bail Act 1978 the presumption of bail is also removed where the prisoner is in custody serving a sentence of imprisonment in connection with some other offence and is likely to remain in custody for that offence for a longer period than that for which bail would be granted.

Subject to those exceptions, the presumption in favour of bail operates to the advantage of an unconvicted person unless the court is satisfied that it is justified in refusing bail upon a consideration of a number of matters set out in s.32 of the Act, and only those matters.

In contrast, the approach of the Victorian Bail Act 1977 under s.4 is to require the court, generally, to grant bail. Notwithstanding that general provision the court is required to refuse bail in the case of a person charged with treason or murder or certain offences of drug trafficking, unless the court is satisfied that exceptional circumstances exist which justify the grant of bail. The court is also bound to deny bail to an accused person in custody pursuant to another sentence or pending a charge of failing to answer bail, unless the person satisfies the court that the failure was due to circumstances beyond his control. Further, the Victorian Bail Act 1977 (s.4(2)(d)) removes the right to bail in cases of 'unacceptable risk', that is to say, if the court is satisfied that the accused would fail to answer bail, or would commit an offence whilst on bail or would endanger the safety or welfare of members of the public, or interfere with witnesses or otherwise obstruct the course of justice.

The right to bail is further denied to a person whom the court is satisfied should remain in custody for his or her own protection or welfare or where the court is not in possession of sufficient information for deciding any matter relating to bail. There is further provision in the Victorian Bail Act 1977 (s.4(4)) that where the accused is charged with an indictable offence alleged to have been committed whilst on bail for another indictable offence, or where the accused charged with an indictable offence is not ordinarily a resident in Victoria or is charged with an offence of aggravated burglary and similar offences involving the use of a firearm or charged with certain offences of drug trafficking, then the court shall refuse bail unless the accused shows cause why his detention in custody is not justified.

Lynch (1987) offers the criticism of the provisions in the Victorian Bail Act 1977:

That there are not one but three sets of criteria upon which bail can be refused: where an accused person is an 'unacceptable risk' within the meaning of ss.4(2)(d) and 4(3); when an accused person is in a 'reverse onus situation' under s.4(4); and when the accused person comes under one of the exceptions to the general presumption in favour of bail found in ss.4(2)(a)-(c) (Lynch 1987, p. 1126).

It would certainly appear arguable that whilst the Victorian legislation provides for a 'prime facie right' to bail, that right is so hedged in by exceptions and the reverse onus

provisions, that the result emerges with less clarity than is desirable. The provisions with regard to the criteria for bail are enmeshed with the provisions relating to the curtailment of the 'right' to bail and this does not assist to clarify the position. In contrast the provision in the New South Wales legislation that there be a presumption in favour of bail enables the question of the presumption and exceptions to it to be dealt with separately from the question of the application of criteria.

Rowland (1979) writes of the differences between the two approaches:

The basic difference lies in s.4(4) of the Victorian Act where use of a reverse onus has the effect of taking away the fundamental presumption which the New South Wales Act is at great pains to maintain. As soon as a person is charged with an offence coming within s.4(4)(c), the onus is reversed and the nature of the offence allegedly committed becomes the sole criterion for refusing bail. It would appear that such a provision is enacted as a means of preventive detention. As such, it has no place in a Bail Act and is contrary to one of the basic presumptions of our (NSW) Act. It is considered that the criteria of the New South Wales Act more accurately reflect the proper concerns of a Bail Act, namely the probability of a person released on bail appearing in court, the interest to the accused himself and the interests of the community. Preventive detention is not a proper function or purpose of bail. If preventive detention is to be countenanced, it should be provided for specifically by preventive detention legislation as such (Rowland 1979, p. 144).

Leaving aside Rowland's contention that legislation having the effect of preventive detention should be enacted separately, there is merit in the argument that a Bail Act should not have the effect of authorising preventive detention unless it is clearly intended to do so. One of the three major criteria for bail to be considered pursuant to s.32 of the NSW Bail Act 1978 is 'the protection and welfare of the community'. In deciding whether or not an alleged offender is dangerous to the extent that bail should be refused to him or her on that ground, a consideration of the specified criteria is, it is suggested, sufficient to meet that test. That is a more appropriate method for assessing the alleged danger of the person concerned than by categorising the type of offence he or she is alleged to have committed.

The same objection is available with regard to the denial of the right of bail under the Victorian legislation to a person ordinarily resident outside the state. Again, if the criteria to be applied in deciding whether or not bail should be granted are directed towards the probability of whether or not the person will appear in court then residence outside the state is a relevant matter and normally one which would be expected to be weighed against the person concerned being granted bail. But it is not, it is suggested, a matter which of itself should take away a right to bail otherwise conferred.

Furthermore the question may be asked whether, even under the New South Wales legislation, it is necessary to remove the presumption in favour of bail to persons charged with specified offences. The report of the Bail Review Committee in 1976 (Parliament of NSW) did not recommend the removal of the presumption in such cases. Rather, it appears that the contemporary political climate was such that it was expedient to deny the presumption in favour of bail to persons charged with armed robbery, and that decision having been made it was expedient further to deny the presumption to persons charged with failing to answer bail. The decision to amend the New South Wales Act in 1986 removed the presumption in favour of bail for persons charged with possession or supply of commercial quantities of prohibited drugs. The amendment came at the same time as a new *Drug Misuse and Trafficking Act 1987* which itself followed royal commissions into drug trafficking. The history of these matters is traced by Weatherburn and others, who after examining statistics from the NSW Bureau of Crime Statistics and Research, came to the conclusion that persons charged with drug offences were amongst the least likely of defendant groups to abscond. They concluded:

No reliable evidence of a relationship between type of drug charge and likelihood of absconding was found. Nor was any evidence obtained suggesting that those allegedly found in possession of large quantities of a drug were more likely to abscond. (Weatherburn et al. (1987, pp. 107-8).

The authors go on to comment:

The consequences of an inadequate system of bail are plainly unsatisfactory, both for the defendant and for the administration of justice. For the defendant the results of the present study confirm those of earlier studies in showing that persons for whom bail is refused are more likely to be convicted than those granted bail as well as being more likely (if convicted) to suffer a longer sentence. It is true that these effects may not flow from bail refusal per se but may stem from factors relating to bail refusal. Nevertheless, as long as the possibility exists that bail refusal itself may increase the risk of conviction or of a more severe sentence, bail decisions are inextricably linked with the defendant's prospect of a fair trial (p. 108).

The authors also emphasised the rapid increase in the New South Wales remand population with consequent prison overcrowding between July 1984 and June 1985, an increase from a total prison population of 3,000 to nearly 4,000. The figures compiled by Biles (1988) for 1 September 1988 show a total of 4,182 prisoners in New South Wales of whom 1,001 were on remand, which represents 23.9 per cent.

It is to be noted that the New South Wales legislation did not make provision for removing the presumption of bail in cases of persons charged with murder. Bail in murder before the Act was granted only in cases involving special circumstances (see *R v. Walters*). In this respect it may be noted that even in the present state of law in the ACT, bail is granted in murder cases in appropriate circumstances. As Weatherburn et al. point out (1987, p. 95), persons charged with armed or violent robbery are not known to be more likely to abscond or commit further offences while on bail than persons charged with other offences, and under the NSW Bail Act offences which are more serious, such as murder, carry a presumption in favour of bail. Of course the presumption may be removed by proper application of the criteria under s.32, such as the seriousness of the charge, the number of previous convictions, and evidence of prior bail absconding, because the application of the criteria points to the perceived likelihood that the defendant will not attend to stand trial or may present such a danger to the community that the defendant should remain in custody until the question of guilt is determined.

The removal of the presumption in favour of bail in the case of a person who has been convicted of another offence and is serving a term of imprisonment for that other offence is another question that deserves consideration. Clearly as a matter of law a person is not relieved from serving a sentence of imprisonment because of a subsequent decision that he is entitled to bail for a separate offence. However, a term of imprisonment must come to an end some time and may come to an end for a variety of reasons. The question is whether when a sentence of imprisonment does come to an end, the person should be immediately and automatically entitled to release on bail for another offence in accordance with a bail decision already made, or whether the person should remain in custody after the termination of sentence until the question of bail for any outstanding offence may be dealt with. The question is, of course, answered to some extent by s.9(4)(b) of the NSW Bail Act which removes the presumption of bail from a person in custody serving a sentence of imprisonment in connection with another offence only if the person is likely to remain in custody for the other offence for a period longer than that for which bail would be granted.

Criteria for Bail

Once it is accepted that bail legislation will make provision for the entitlement, even if in certain circumstances only, to release on bail, or that bail should be refused in certain circumstances, the criteria for granting or refusing bail need to be defined. This is done in the New South Wales Act under s.32, and there are similar provisions in s.52 of the Criminal Investigation Bill and 2.23 of the ACT Domestic Violence Ordinance. The approach of the Victorian Act with its 'unacceptable risk' criteria has already been indicated.

All examples divide the criteria into three main groups:

- Matters related to the probability of the person appearing in court in respect of the offence;
- Matters related to the interests of the person; and
- Matters related to the protection of the community.

Within the first group, the probability of answering bail, requires consideration by the court of the following:

- The background and community ties of the person having regard to the nature of his residence, employment and family situation and to his police record, if known; and
- The circumstances in which the offence was committed, the nature and seriousness of the offence, the strength of the evidence against the person and other information relevant to the likelihood of his absconding.

In relation to the second group of criteria, those concerned with the personal interests of the defendant, the Criminal Investigation Bill requires consideration of:

- The period that the person may be obliged to spend in custody if bail is refused and the conditions under which he would be held in custody;
- The needs of the person to be free to prepare for his appearance before the court, to obtain legal advice and for other purposes; and
- The need of the person for physical protection, whether the need arises because he is incapacitated by intoxication, injury or the use of drugs or arises from other causes.

In relation to the third group, concerned with the protection of the community, the Criminal Investigation Bill requires consideration of the likelihood of the person interfering with evidence, intimidating witnesses, or hindering police enquiries.

The detail of the provisions under s.32 of the NSW Bail Act 1978 go beyond those in the Criminal Investigation Bill. Some of the apparent differences would appear to have little substance. For instance, the New South Wales legislation requires consideration, on the question of the probability of the person appearing to answer bail, of 'any previous failure to appear in court pursuant to a bail undertaking' and of 'any specific evidence indicated whether or not it is probable that the person will appear in court'. These matters would

appear to be covered by the provision in the Criminal Investigation Bill of 'other information relevant to the likelihood of his absconding'.

Section 32 of the NSW Bail Act 1978 also makes provision that the court take into consideration a rating obtained in accordance with a prescribed test intended to provide an assessment of the person's background and community ties. The test derived from procedures devised in New York and known as the Manhattan Bail System (Donovan 1981, p. 114). It is understood that the time and expense involved in administering the test was not justified by its utility, and it is apparently no longer being applied or taken into account. One significant difference, however, between the New South Wales legislation and the Criminal Investigation Bail is that under the former the court is required to take into account 'the likelihood that the person will or will not commit an offence while at liberty on bail', but may do so only if satisfied that the person is likely to commit it, satisfied that it is likely to involve violence or otherwise be serious by reason of its likely consequences and satisfied that the likelihood that the person will commit it, together with the likely consequences, outweighs the person's general right to be at liberty. The NSW Bail Review Committee recommended strongly against the 'further offences' test, arguing that it conferred a power of preventive detention. It may be, however, that the present provisions make, or should make, proof of likelihood of committing a further offence on bail, so difficult that it is of little practical importance as one of the criteria to be taken into consideration.

It may also be observed that s.32 of the NSW Bail Act 1978 provides that the matters referred to, and only those matters, should be taken into consideration. There is no similar provision in the Criminal Investigation Bill and this leaves open the question as to whether the court may, in the exercise of its discretion under the provisions of the Bill, take into account factors other than those expressly set out. It may be desirable to avoid this ambiguity by appropriate provision in the legislation.

Conditions of Bail

Although the NSW Bail Act under s.36(1) provides that bail may be granted unconditionally or subject to conditions imposed by instrument in writing, the effect of s.34(1) is that a person is not to be released on bail unless he or she undertakes in writing to appear at such time and place as may be specified. There may be some advantage in conferring a power to grant verbal bail, at least for short periods.

While s.36(2) of the NSW Bail Act 1978 provides that one of the conditions may be 'that the accused person enter into an agreement to observe specified requirements as to his conduct while at liberty on bail, other than financial requirements (whether for the giving of security, the depositing of money, the forfeiture of money or otherwise)' the substantial number of persons in custody awaiting trial suggests strongly that it is the imposition of financial conditions that is preventing such persons from being released. This conclusion is supported by the Australian Institute of Criminology Report, *The Outcomes of Remand in Custody Orders* (Walker 1985) which analysed the results of a survey of almost 1,200 persons Australia-wide whose periods of remand terminated in October and November 1984. The report found that in New South Wales 37.2 per cent of people remanded in custody were so remanded because they were unable to meet their bail conditions. Section 36(2)(b) provides that one of the conditions may be 'that one or more than one acceptable person (other than the accused person) acknowledge that he is acquainted with the accused person and that he regards the accused person as a responsible person who is likely to comply with his bail undertaking'. The only other available conditions under the legislation are in fact conditions which impose financial requirements. A person who is accepted for

the purpose of depositing money or providing security is in a position really very little different from that of a surety in New South Wales prior to the NSW Bail Act, or a surety under the Victorian Act.

The ACT Domestic Violence Ordinance (s.24(2)) makes express provision for a number of specific conditions of conduct that may be attached to a grant of bail. There is, however, very little about them which is novel. They include refraining from contacting or approaching a particular person (usually the alleged victim) and reporting to a police station at specified times or intervals. Those sorts of conditions were commonly imposed upon a person granted bail even before the state Bail Acts and may still be and are imposed under those Acts under the general powers to attach conditions as to the bailed person's conduct. There would appear to be little point in making the legislation as specific as it is under the Domestic Violence Ordinance.

The counterpart provisions in the Victorian Bail Act 1977 retain the requirement of sureties and in that respect are more restrictive. There is, however, provision under s.5(2) that where the court considers that the imposition of 'special conditions' is necessary to secure that the accused appears in accordance with his bail, does not commit an offence whilst on bail, does not endanger the safety and welfare of members of the public, or does not interfere with witnesses or otherwise obstruct the course of justice, the court shall require the accused person to comply with such conditions as the court imposes for all or any of such purposes.

Under s.5(4) the court is given express power to grant bail on condition that the accused undergo medical examination, if necessary at an institution.

Although it was hoped that with the passing of the legislation, financial consideration would be of diminishing importance in the granting of bail and the securing of release in accordance with bail, the results have not been entirely satisfactory. Whether the problem lies in the legislation itself or is due to other causes is a matter for consideration.

Extension of Bail

A small but notable contribution of the bail legislation both in New South Wales and Victoria was that the courts were given the power to extend or continue bail, which avoided the time-consuming processes of lengthy documents having to be re-drawn and executed by the defendant and persons acting as sureties. This did not affect the right of the surety to decline in advance to agree to extensions or to apply for a discharge of the surety obligation.

Under s.10 of the NSW Bail Act 1978, it was provided that where no specific order or direction is made by the court in respect of bail, the court shall be deemed to have dispensed with the requirement for bail. If bail is dispensed with or deemed to have been dispensed with, it appears that the accused has the unconditional, and immediate, right to liberty. Experience suggests that it is not unknown for a court to remand a person already in custody and overlook mentioning that bail has been refused or that bail has been continued on the same terms as previously, when it is perfectly obvious to everybody concerned that such was the court's intention. Such is sometimes the case during the course of a lengthy trial, or where the defendant comes before the court on a number of occasions, or where there are a number of charges and the court overlooks to mention the matter of bail in relation to one or other of them. It may be preferable to provide that where the court makes no mention of bail and where bail has previously been granted, the bail is deemed to be continued on the same terms and conditions as previously. Whether bail should be deemed to have been refused when it was refused previously, is a matter for consideration, as is the question whether the omission to grant or refuse bail on the occasion when a person first comes before a court should be deemed to be a refusal or a dispensing with bail.

Review of Bail Decisions

The NSW Bail Act makes provision for written reasons to be given for the refusal of bail or the imposition of bail conditions. This requires the court to formulate its reasons for reaching a decision in relation to bail and also assists in bringing all relevant matters forward in any fresh application or review, reducing the need for repetition of presentation of evidence and argument. Provision is also made in the NSW Bail Act (Part VI) for review of bail decisions to be by way of re-hearing without the necessity of having to show any error in the decision being reviewed. Apart from review, a prior bail decision may be affirmed or varied or another decision substituted for it. An application for review can be brought about at the request of the accused, a police officer or the Attorney-General. A magistrate has the power to review a prior decision by him or her but, except as provided by regulation, no power to review a bail decision by another magistrate. Whether a magistrate should have the power to review the decision of another magistrate relating to bail may be open to question. It is understood that regulations extending this power of review by magistrates were proposed in New South Wales in order to relieve the load on the Supreme Court of applications there to review bail decisions by magistrates, but the proposal has, apparently, not been put into effect.

The Supreme Court has power to review all bail decisions although a single judge has, in the absence of a Rule of Court, no power to review a bail decision of the Court of Criminal Appeal. What amounts to old supervisory jurisdiction of the Supreme Court thus continues. Consideration often needs to be given also to whether an applicant should be able to make repeated applications for bail in the Supreme Court without a change of circumstances. Repeated applications by unsuccessful applicants for bail in the Supreme Court have been a cause of concern in New South Wales. As the judge refusing bail is required to give reasons for that decision, it may be sufficient to provide that any subsequent application may be dismissed on the ground that no change in circumstances has been shown.

Provision of a right of review would appear to be preferable to the right of appeal provided for in the Victorian Bail Act 1977 which, in addition to providing for the appeal preserves 'any right of application or appeal to the Supreme Court or county court which any person may have apart from the provisions in this section'. Presumably the latter was considered to be necessary because of the restriction of the right of appeal to an applicant who was not represented or who proves new facts or circumstances which have arisen since the decision appealed against. A right of review, as distinct from a right of appeal, would not be so circumscribed.

Abuse of the right to review by unwarranted, repetitive applications, may be avoided by giving the Supreme Court power to order that no further applications for review be made without leave and that such leave be granted only upon proof of change of facts or circumstances.

The present situation regarding the power of the Federal Court of Australia to entertain an appeal against a refusal of bail by the ACT Supreme Court needs to be clarified. There appears to be little point in allowing such appeals even by leave.

Bail Pending Appeal

It was uncertain whether, at common law, there was a truly inherent power to grant bail pending an appeal to a person serving a sentence after conviction. However, such a power came to be regarded as incidental to the powers of the court constituted to determine the appeal. If bail was to be granted to such a person then it was granted only upon proof of special exceptional circumstances sufficient to justify the grant of bail. The principle depends upon the basis that the presumption of innocence applicable to unconvicted persons can no longer be advanced by a convicted person when considering a bail application; (*R v. Hilton* (1986) 7 NSWLR 745 at p. 746 per Street C.J.). However, s.32 of the NSW Bail Act provides a code 'which defines exclusively, exhaustively and with precision the only matters

which may be considered by a court when determining an application for bail, whether the application be made prior to conviction . . . or whether it be made pending the hearing of an appeal against conviction or sentence' (per Hunt J. at p. 751). Hence neither conviction for the offence in respect of which bail is sought nor the imposition of a term of imprisonment consequent to that conviction is relevant except as one of the matters to which regard may be had in considering whether or not the applicant is likely to appear upon the hearing of the appeal. In those circumstances the New South Wales Court of Appeal decided that in the state of the Bail Act as it then was, the previous law was displaced and an applicant for bail pending appeal was not obliged to prove special or exceptional circumstances. Later in 1987 the NSW legislation was amended to provide that when an appeal against conviction or sentence is pending in the Court of Criminal Appeal or an appeal from the Court of Criminal Appeal is pending in the High Court, bail shall not be granted by the Court of Criminal Appeal unless it is established that special or exceptional circumstances exist justifying the grant of bail. It may be observed that as far as appeals from the Court of Criminal Appeal to the High Court are concerned then the legislation brings an application for bail to the Court of Criminal Appeal into line with the situation where the application for bail is made in the High Court (see *Chamberlain v. R* (1983) 46 ALR 608).

The amending legislation was criticised by Brown (1987b) who referred to the 1976 Bail Review Committee recommendation that the presumption in favour of bail apply at all stages in the criminal justice system, including the stage between conviction and the determination of an appeal. The recommendation was rejected and the final position as expressed in the 1986 Act was that although there was no presumption in favour of bail for an appellant, a convicted person who otherwise satisfied the criteria of the Act should be granted bail.

The Victorian Act appears to make no provision at all for bail after conviction. The relevant section (s.4(1)) confers the right to bail upon 'any person accused of an offence and being held in custody'. A person convicted of an offence would not be regarded as a person 'accused of an offence'. (It should also be noted that in restricting the scope of the Act to persons being held in custody, the Victorian Bail Act 1977 is to be contrasted with its New South Wales counterpart under s.15(1) which extends the provisions of the Act to a person 'notwithstanding that he is not in custody'.)

Assuming that the Victorian Act is not a code and does not affect the inherent powers of the Supreme Court, it is presumably the case there that the inherent power of the court is sufficient to grant bail, but the common law principle that bail will be granted after conviction only in exceptional circumstances will be applied (see *Re Kulari* (1978) VR 276).

Miscellaneous Matters

There are several provisions in the NSW and Victorian Bail Acts which should be included in any statutory bail system. They include abolition of the common law power of the surety to arrest the bailed person upon breach or suspended breach of bail conditions or for fear that the bailed person will not attend court as required. At the same time the surety has the right to apply to be discharged from the obligation entered into. Whether a police officer should have the right to arrest the bailed person without warrant for reasons such as those just mentioned deserves consideration: the question is bound up with the right of a police officer or prosecuting authority to apply for revocation of bail or variation of bail conditions.

It is desirable that bail legislation provide that a person refused bail or granted conditional bail be given written notification of the decision and an effective opportunity to contact a lawyer or relative/friend within a reasonable or specified time.

Procedures to enable the enforcement of an undertaking to forfeit money upon failure to honour a bail undertaking should be simplified and clarified. A separate question is the creation of an offence of failing to answer bail or breach conditions of bail. Procedures for

reversing forfeitures and recovering money or property forfeited should also be simplified and clarified.

Developments in the United States

As the ability to raise money bail or surety bail still appears to be the reason why many persons are in custody on remand, recent developments with regard to pre-trial detention and release in the United States may be of interest. Although the systems vary from state to state and as between the state system and the federal system, there have been some cohesive developments in the federal judicial system in the United States with regard to bail.

The early American bail system followed the traditional English practice whereby in order to prevent prolonged detention in primitive gaols, the sheriff released the defendant into the custody of a friend or neighbour who was responsible for ensuring that the defendant would appear at trial (Wanger 1987). In time, however, the system evolved to permit the surety, who was usually a property owner, to forfeit a promised sum of money instead of himself if the defendant failed to appear at trial. Bail, or conditional release, under the surety system was referred to as 'the living gaol' and was considered more secure than turning the defendant over to the sheriff and holding the defendant in crowded and unsafe gaols.

While finding an acceptable personal custodian was easy in the small communities of the early 19th century (the judge would usually know both defendant and the surety) the increasing urbanisation of society during the late 19th and early 20th century made this task more difficult. The system developed whereby commercial bondsmen accepted financial risks for a fee; although the bondsmen may never have met the defendant previously, he was paid the fee by the defendant and was usually indemnified by contract or collateral by the defendant or the defendant's family in exchange for agreeing to forfeit the amount of the bond in the event of the defendant's non-appearance in court. The courts initially welcomed these commercial relationships between bail bondsmen and the defendants, as they prevented over-crowding of gaols and relieved the courts from enquiring into the relationship between the surety and the defendant. The excesses of the system, however, became notorious: a defendant may have no real financial stake in complying with the conditions of bail, and a higher amount of bail did not provide a greater incentive to answer bail. Further, a surety's vouching for a defendant was seen as a testimonial to the defendant's character and reliability (the sort of testimonial that may now be provided under s.36(2)(b) of the NSW Bail Act); a bail bondsman by contrast may prefer taking responsibility for the career criminal because if the suspect pays the money and shows up in court, his continual engagement in crime means that there will be more business for the bail bondsman.

In 1966 the Bail Reform Act revived emphasis on custodial supervision to facilitate safe release. It authorised release on one or more of a number of release conditions, of which a bail bond was only one option. It further provided a presumption in favour of release on personal recognizance and only when the court determined that such a release would not assure the appearance of the accused could further conditions be imposed. The 1966 Act however was seen not to work because the courts did not know enough about the circumstances of the persons accused and were unable to ensure that conditions of bail were met, except in the District of Columbia where a special agency was created with the task of supervising bail conditions for defendants released prior to trial.

In 1974 Congress passed the Speedy Trial Act which, amongst other things, directed the Administrative Office of the US Courts to set up demonstration pre-trial service programs in several specified federal judicial districts. Where this was done there was a significant drop in defendants held in custody. In particular a greater number of drug offenders were released, but failure to appear and arrest for breach of bail conditions rates did not rise.

In 1982 the Pre-Trial Services Act sought to expand pre-trial services in all federal judicial districts, but for the first time required the potential dangerousness of the defendant to be a factor considered for pre-trial enquiry and report. The 1982 Act has been seen as seeking to both maximise the number of defendants on bail and minimise the amount of crime committed by persons on bail (Wanger 1987, p. 329). The objectives are not necessarily consistent and the 1982 Act is not regarded as having achieved success. The chief reason appears to be the variable quality of the pre-trial services agencies, and the overall lack of resources provided for their effective working. The potential cost of effective pre-trial services is, however, believed to be less than that of detention pending trial.

The latest development is the 1984 Bail Reform Act which imposes restrictions upon pre-trial detention on the ground of dangerousness. There must be strict compliance with procedural requirements and a finding that no conditions of release can reasonably assure the appearance of the defendant for trial and the safety of the community.

Whilst social considerations and legal traditions in the United States vary tremendously from those in Australia, the United States experience may be of some relevance, in that it has occurred in a climate where the legislative effort has been directed towards avoiding persons being kept in custody pending trial for failure to meet financial conditions of bail. The Australian experience to date seems to be that despite substantial procedural reforms and the freeing up of the conditions which might be imposed by courts when allowing bail, an unacceptable number of persons remain in custody pending trial because they cannot meet the financial conditions of bail. There appears to be very little that can be done in this regard by further legislative amendment, at least beyond what has been done in New South Wales.

The system of pre-trial detention services now being developed in the United States could not be repeated here unless there was substantial injection of government funds, which is not very likely in the present political and economic climate. Furthermore there is the danger that courts may authorise the supervision and control of a defendant on bail to the extent that the person really does become a prisoner in the open community, and this raises civil liberty questions which need to be examined.

Finally, as Brown (1987a) observes it may be that 'the problems lie less in the Act than in police, legal and judicial practices, attitudes and interpretations which have combined to restrict its reformist potential—the reluctance of some magistrates to scrutinise critically police objections to bail and the specific problems of unrepresented defendants being cases in point' (p. 186).

References

- Archbold, J.F. & Roome, N.D. 1910, *Archbold's Criminal Pleadings, Evidence and Practice*, 24th edn, Sweet & Maxwell, London.
- Australian Law Reform Commission 1975, *Criminal Investigation*, Australian Government Publishing Service, Canberra.
- Biles, D. 1988, *Australian Prison Trends*, No. 148, Australian Institute of Criminology, Canberra.
- Brown, D. 1987a, 'Remanded in Custody: A NSW Refrain', *Legal Services Bulletin*, vol. 12, no. 4, pp. 185-6.
- 1987b, 'Appeal Bail in NSW: An Update', *Legal Services Bulletin*, vol. 12(b), p. 242.

- Devlin, P. 1960, *The Criminal Prosecution in England*, Oxford University Press, London.
- Donovan, B.H.K. 1981, *The Law of Bail*, Legal Books, Sydney.
- Halsbury's Laws of England* 1973, 4th edn, Butterworths, London.
- Lynch, J. 1987, 'The Bail Act Ten Years On', *Law Institute Journal*, vol. 11, pp. 1125-6.
- McClemens, J. 1969, 'Practice Reflecting The Law in the Supreme Court', in *Seminar on Bail*, University of Sydney, Institute of Criminology Proceedings No. 3, pp. 43-50.
- Parliament of NSW 1976, *Report of the Bail Review Committee*, Government Printer, Sydney.
- Roulston, R.P. 1972, 'The Quest for Balance in Bail: The New South Wales Experience', in *The Australian Criminal Justice System*, eds. D. Chappell & P. Wilson, (1st edn), Butterworths, Sydney.
- Rowland, C. 1979, 'The Bail Act 1978 (NSW): Some Observations and Comparisons with the Bail Act 1977 (Vic)', *Criminal Law Journal*, vol. 3, pp. 142-50.
- Stubbs, J. 1984, *Bail Reform in NSW*, NSW Bureau of Crime Statistics and Research, Sydney.
- Walker, J.R. 1985, *The Outcomes of Remand in Custody Orders*, Australian Institute of Criminology, Canberra.
- Wanger, B.K. 1987, 'Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act', *Yale Law Journal*, vol. 97, pp. 320-40.
- Weatherburn, D., Quinn, M. & Rich, G. 1987, 'Drug Charges, Bail Decisions and Absconding', *Australian and New Zealand Journal of Criminology*, vol. 20, pp. 95-109.

Cases

- Burton v. R* (1974) 3 ACTR 77.
- Chamberlain v. R* (1983) 46 ALR 608.
- R v. Hilton* (1986) 7 NSWLR 745.
- R v. Walters* (1979) 2 NSWLR 284.
- Re Kulari* (1978) VR 276.
- Queen v. Rochford; ex parte Harvey* [1967] 15 FLR 140.