Bail in Australia[1]

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This paper is a comparison of selected topics in the bail laws of all Australian jurisdictions as of 1 December 1988. Although in most jurisdictions several statutes and their amendments have some bearing upon bail the relevant laws consist principally of the: *Bail Act 1977* (Vic.), *Bail Act 1978* (NSW), *Bail Act 1980* (Qld), *Bail Act 1982* (WA), *Bail Act 1982* (NT), *Bail Act 1985* (SA), *Justices Act 1974* (Tas.), *Magistrates Court Ordinance 1930* (ACT). New bail legislation is under consideration in the latter two jurisdictions. The focus of the paper is pre-trial bail as it pertains to the lower courts.

A Constitutional Issue

One provision of the Australian Constitution has been applied to a bail matter in two states. In *R v. Loubie* (1985) the Supreme Court of Queensland declared invalid a provision of that state's Bail Act which prohibited granting bail to a person ordinarily residing outside Queensland, unless cause was shown why it should be granted. This amounted to reversing the normal burden of proof to the disadvantage of the out-of-state resident.

The Court found that such a reversal violated s117 of the Australian Constitution, which requires that a subject resident in any state not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a resident of the other state. Both distance of residence from the court in which the defendant is to appear and intent to leave the state of jurisdiction are accepted by the Court as relevant considerations in granting bail. However, the Court reasons, the problem with the provision at issue is not its purpose. The problem is that, by selecting residence as the criterion for applying the statutory disadvantage, the legislation chooses the exact standard prohibited by s117, residence in another state. It is therefore contrary to the Australian Constitution and hence invalid.

Later the Supreme Court of Victoria in *DPP v. Spiridon* (1988), agreed with the reasoning in the Queensland case and declared the existing Victorian provision constitutionally invalid. It was subsequently repealed by the *Magistrates Court (Consequential Amendments) Act 1988*.

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[1]. This is a greatly condensed version of Professor Devine's major monograph *Bail in Australia* published by the Australian Institute of Criminology in 1989 and written while Professor Devine was a Fulbright Scholar at the Institute.

Eligibility For Bail

Most Australian jurisdictions have some form of right to bail or presumption in favour of bail. However, these differ considerably in extent and forcefulness.

The bail laws in two jurisdictions, New South Wales and the Australian Capital Territory, create certain nearly unqualified rights to bail for lesser offences. The New South Wales Bail Act [s8, s51] creates a right to bail for all offences not punishable by imprisonment and any other summary offence specified by regulation. In the ACT the Magistrates Court Ordinance [s99(1)(b)] provides for the mandatory granting of bail to those committed for trial for an offence for which the possible imprisonment upon a first conviction does not exceed six months.

In addition to the right to bail for minor offences, New South Wales [s9(1),1A,(2)] creates a presumption in favour of bail being granted for all other offences except those of failing to appear to answer bail for other than certain minor offences, robbery with violence or an offensive weapon, serious drug charges, and domestic violence charges. This presumption is removed [s9(1)-(2); s32] if the court is satisfied that it is justified in refusing bail based on the specified criteria (examined below) which are to be considered in assessing bail applications.

The combination of right and presumption of bail in New South Wales has contributed to a fairly constant rate of release on bail over the three calendar years 1984-1986. Based on the bail status at final appearance in local courts for general offences, about 7 per cent of defendants remain in custody (7.1 per cent, 7.1 per cent, and 6.9 per cent respectively), just over 64 per cent are released on bail (64.4 per cent, 64.9 per cent, and 64.4 per cent respectively), and about 28 per cent are allowed at large without bail (28.5 per cent, 28.0 per cent, and 28.7 per cent respectively) (NSW Bureau of Crime Statistics and Research 1985-87).

The law in the ACT [s9(1)(a)] creates no comparable presumption of bail. Non-capital cases not covered by the right are treated in purely discretionary terms. However, a common law presumption of bail applies. As stated at page 78 in *Burton v. R* (1974), 'In any ordinary case bail should be granted and it is for the prosecution to make a clear and positive case for refund of bail'. Those charged with capital offences may be admitted to bail only by a judge of the Supreme Court [s98]. No presumption of bail exists in capital cases.

The combination of right and presumption in the ACT contributed to a result at final appearance in the Court of Petty Sessions during the calendar year 1986 whereby bail was denied to 2 per cent of the defendants for whom it was considered (74 of 3741).

What is variously termed a prima facie right or a presumption is provided by the legislation governing bail in four additional jurisdictions. Regardless of the terminology used, the legislation is cast to direct that the accused shall be granted bail unless specified conditions apply. In Victoria this is conceptualised as a prima facie right. In South Australia and the Northern Territory it is viewed as a presumption. Both concepts have been applied in Queensland.

The exceptions to the prima facie right to bail in Victoria [s4(2)(a)] and Queensland [s13(a)] have large areas of similarity. Both reserve treason and murder cases for Supreme Court judges only. Queensland [s13] adds to this reservation piracy with violence or wounding, aggravated demands upon government agencies with menaces and specified drug offences. However, it provides an exception when both the prosecutor and the court are satisfied that the case can be dealt with summarily. Victoria [s4(2)(aa)] also creates an exception for specified drug offences but rather than reserving them for the Supreme Court the relevant provision directs that bail shall be refused unless exceptional circumstances

justify bail. In both Victoria [s4(4)(a),(c),(ca)] and Queensland [s816(3)] alike, further exceptions to the presumption of bail apply to persons who have been charged with an indictable offence while at large awaiting trial on an indictable offence, or who have been charged with an indictable offence involving the use or threatened use of firearms, offensive weapons, or explosives. In these instances the court is to refuse bail unless the accused can show cause why detention in custody is not justified. Victoria [s4(4)(c)] specifically mentions aggravated burglary in this context.

Similarly under the Victorian law [s4(2)(c)] bail is to be refused to persons in custody for failing to answer bail unless they can satisfy the court that the failure was beyond their control, while Queensland [s16(3)(d)] applies the same approach to all Bail Act offences.

Both Bail Acts [Vic. s4(2)(d) and Qld s16(1)] additionally direct that bail shall be refused if the court is satisfied that release of the accused would entail an unacceptable risk of one of the situations resulting which are explained below as considerations in granting bail.

South Australia [s10] handles the exceptions to its presumption of bail with a less detailed statement, which combines elements of both the exceptions and the considerations in granting bail. The result is a statement which leaves courts more discretion both to grant and deny bail in the circumstances covered. According to the South Australian statute, bail is to be granted unless, in light of the factors given below as considerations in granting bail, the court considers it should not be granted. No crimes are specifically exempted from bail.

The South Australian presumption of bail contributes to the result for 1986 that, of defendants who are dealt with in courts of summary jurisdiction regarding bail (that is those with two or more court hearings), 92.2 per cent were granted bail while 7.3 per cent were remanded in custody. Of those committed for trial, following the final committal hearing, 85 per cent were released on bail, 3.4 per cent had been refused bail, and 11.6 per cent were otherwise in custody (SA Office of Crime Statistics 1987a, 1987b).

In the Northern Territory a presumption of bail is created [s8(1)-(2); s24] in terms very similar to the presumption section of the New South Wales legislation. In contrast to New South Wales, no right to bail is provided for minor offences. However, only murder and treason are exempted from the presumption. In murder cases, because of the gravity of this offence and its punishment, if the evidence is such that the accused might be convicted, bail is rarely to be granted. In this situation the presumption is reversed. Unless the accused can show special or unusual circumstances indicating that it should be granted, it will be refused.

Two states, Tasmania and Western Australia, have no statutory presumption regarding bail being granted. However, in *R v. Fisher* (1964), the Tasmanian courts adopted the reasoning of *R v. Light* (1954) regarding bail applications. That last case states that, 'if there is any presumption here, it is a presumption in favour of the granting of the bail' (p. 157). It goes on to find a prima facie right to be at liberty until convicted, and concludes, therefore, that the burden of showing that this right should not be given effect rests on the Crown.

The Western Australian Bail Act of 1982 has not been proclaimed at the time of writing but is expected within the year. It contains no prima facie right to bail or presumption of bail, although the Law Reform Commission of Western Australia (1979) had recommended that a qualified right (though not a presumption) be introduced. An accused in Western Australia [ss 5-7] has only a right to be brought before a court as soon as practicable after arrest (unless granted police bail) and to have bail considered. This applies whether or not the defendant makes an application for bail. The statute explicitly states that, 'the grant or refusal of bail to a defendant, other than a child, who is in custody awaiting an appearance in court before conviction for an offence shall be at the discretion of the judicial officer . . .'.

Considerations to guide the exercise of this discretion are stated. However, these are in more negative terms than in those jurisdictions having a right or presumption. The format where a right or presumption exists is typically that bail shall be granted unless reasonable grounds exist to believe that a specified condition applies.

As in other jurisdictions, bail for certain offences in Western Australia is reserved [s15] for a judge of the Supreme Court. These include treason, piracy with violence, and murder.

Considerations in Granting Bail

As indicated when considering eligibility for bail, certain specified considerations are to be reviewed in the granting or denying of bail. In most jurisdictions these factors, where present, will defeat any existing presumption of bail. In all instances they are intended to guide decisions about bail.

Australian jurisdictions break down into four clusters based on similarity in the way these considerations are conceptualised and expressed in their respective bail laws. The first group consists of New South Wales and the Northern Territory. The second group comprises Victoria, Queensland and Western Australia. South Australia forms a unit in itself. Finally, Tasmania and the ACT depend upon case law to establish their considerations. Within clusters there are some noteworthy differences as well as similarities.

New South Wales [s32] and the Northern Territory [s24] have very similar presentations of the considerations which may be influential regarding bail and what can be used to evaluate the operability of each. The considerations named are intended to be the exclusive factors governing the decision, and what can be used in establishing whether the consideration is operative. In both jurisdictions presence of the specified considerations can defeat any presumption of bail which might otherwise exist.

Three considerations govern the determination of the granting of bail:

- the probability of the accused's appearance in court to answer bail;
- the interest of the accused; and
- the protection and welfare of the community [NSW s32; NT s24].

With regard to the first consideration, appearance, four factors may be taken into account:

- the accused's background and community ties as indicated by residence, employment and family history, and by criminal record;
- any previous failure to appear to answer bail;
- the circumstances (including nature and seriousness) of the offence, the strength of the evidence, and the severity of the probable penalty; and
- specific evidence indicative of the defendant's probable appearance.

Regarding the second consideration, the accused's interest, four factors are specified for consideration:

- the likely period of pre-trial custody;

- the need to be free to prepare for appearance in court or obtain legal advice;
- other lawful needs to be free; and
- any incapacitation by intoxication, injury or drug use or other danger of physical injury.

In assessing the third consideration, the community protection and welfare, three factors may be considered:

- any failure (or arrest for an anticipated failure) by the accused to observe a condition of bail for that offence;
- the accused's likelihood of interference with evidence, witnesses, or jurors; and
- the accused's likelihood of committing an offence while on bail.

For this last factor to apply in New South Wales, the likelihood, plus the violence or other serious consequence of the offence, must outweigh the accused's general right to liberty. This restriction is not specified in the Northern Territory [NSW s32; NT s24].

The Northern Territory [s24(1)(c)(iv)] adds one factor to the assessment of the community protection not specified in New South Wales. If the alleged offence was committed against a child, the likelihood of injury or danger to the child may be considered. In both jurisdictions [NSW s32(3); NT s24(2)] all evidence or information which the court considers credible or trustworthy may be considered. The Northern Territory law specifically includes hearsay.

The statements of the considerations governing bail in Victoria, Queensland, and Western Australia are substantially similar. However, their status in Victoria [s4(1)-(2)] and Queensland [s9, s16] differs from that in Western Australia [Sched. Pt. C(1)]. Whereas in the two former states these considerations are in the context of a presumption of bail which they may countervail, in the latter they are principles governing discretion. A further difference is that while Victoria and Queensland require a court to be satisfied before denying bail that an unacceptable risk exists of one of the considerations eventuating, Western Australia only requires that such a consideration may eventuate.

The first area of consideration in all three jurisdictions concerns the likelihood that the accused would fail to appear to answer bail, commit an offence while on bail, endanger the safety or welfare of members of the public (Western Australia adds here the property as well), or interfere with witnesses or otherwise obstruct the course of justice with respect to himself or another. The second consideration in all three jurisdictions is the need for the accused to remain in custody for his own protection. Thus, these two considerations form the basis of similarities among Victoria, Queensland, and Western Australia.

A third consideration added to the basic two in Victoria [s4(2)(ii-iii)] and Queensland [s16(1)(b)] is that the acquisition of sufficient information to decide about any of the considerations in granting bail has not been practicable. Queensland specifies that this consideration is to be used with a view to getting the requisite further information.

Western Australia [Sched. Pt. C] adds three considerations of its own to the basic two. Its third consideration is whether the prosecutor has put forward grounds for opposing bail. Its fourth consideration is whether during the period of trial there are grounds for believing that, if the accused is not kept in custody, the proper conduct of the trial might be prejudiced. The final and clearly desirable consideration is whether any condition of bail which might be imposed could eliminate a possible grounds for denying bail under the considerations already mentioned.

Victoria [s4(3)], Queensland [s16(2)], and Western Australia [Sched. Pt. C 4,63] additionally specify four similar factors to be used in evaluating the considerations for granting bail. Western Australia adds additional components to two of these. The first common factor concerns the nature and seriousness of the offence. Western Australia appends to this the probable method of dealing with the offender if convicted. The second factor to be used concerns the character, antecedents, associations, home environment, and background of the accused. Western Australia supplements this factor with the defendant's place of residence and financial position. The third factor is the history of any previous grants of bail to the accused, and the fourth is the strength of the prosecution's evidence.

In *R v. Sanghera* it was held that to be used in bail determinations evidence needs only to be credible or trustworthy under the circumstances. It need not be admissible under the rules of evidence. Virtually identical provision is made by both the Victorian [s8(e)] and the Queensland Bail Act [s15(e)]. The Western Australian statute [s22] provides for the use of evidence which would not normally be admissible.

The South Australia Bail Act [s10(1)] specifies as considerations for granting bail a mixture of what elsewhere are treated as bail considerations and factors to be used in assessing these. Included are provisions similar to those seen in other jurisdictions regarding the gravity of the offence, the likely conduct if released of the accused, the accused's need for protection or care, and the bail history of the individual. One consideration which deserves particular comment in South Australia is that if the offence had a victim, the victim's need or perceived need for physical protection from the accused should be regarded in the bail decision.

The considerations in the bail decision in Tasmania are systematically stated in *R v. Light*, which is adopted by the Tasmanian courts in *R v. Fisher*. The considerations thus established are generally similar to those established in the New South Wales legislation. The first of these is the likelihood of the accused's presence for trial. Subsidiary factors in this assessment are the nature of the crime, the probability of conviction or strength of the evidence, the severity of the possible punishment, and the bail history of the defendant. The second consideration is the safety of the public and the security of its property. Subsidiary to this are the character and antecedents of the accused, including any record generally, and, particularly, any record of offences whilst on bail. If the offence presently charged would have been committed whilst on bail the strength of the case becomes a factor in this assessment. The final consideration is any prejudice to the accused's defence if not free to prepare it, and perhaps if not free to legally earn money to pay for it.

The considerations given in *R v. Light* would also apply to bail in the ACT. In addition, a discussion of bail considerations by the Supreme Court of the ACT is provided in *Burton v. R* (1974). This case begins from the premise that, 'The principal consideration, and in many cases the sole consideration, should be whether, if granted bail, there is a reasonable likelihood that he will be present at the hearing of the charge'. The opinion goes on to explain that the fact that the accused may possibly commit a crime while on bail is not normally a factor of great weight adverse to bail. It should not be readily assumed that a defendant might commit a further offence. Moreover, if an offence is committed it can be dealt with by the normal criminal law. However, where the consequence of the crime that may be committed while the accused is on bail is sufficiently serious and of sufficiently widespread effect, the possibility can become an important consideration. The protection of the public overcomes the presumption of liberty on bail of the defendant.

Terms of Bail

Probably the single most important element in defining any bail system is the form that bail takes. In other words, what incentives or controls are relied upon to assure that the accused will appear when required and will behave as directed in the meantime? With regard to the principal form of bail employed, four types of systems can be identified in common law based countries, although completely unmixed examples of any form are rare.

- Bail may rely for its incentive on a financial recognizance, a pledge of money which if the accused defaults the accused and/or his sureties will forfeit.

- It may rely upon the imposition of non-financial conditions of bail to control the defendant's conduct so as to reduce the chances that the accused will fail to appear or otherwise engage in misconduct while on bail.

- It may rely upon imposing a criminal penalty upon absconding.

- A cash deposit may be required of the defendant and/or sureties for the defendant which is forfeited if the accused fails to appear. Each of these approaches is employed in a primary or secondary capacity in some Australian jurisdictions.

Based on the provisions of the laws themselves, four Australian jurisdictions present predominantly recognizance-based systems: Victoria, Queensland, Western Australia and the ACT. All contain, however, varying degrees of mixture with other forms of bail. The recognizance system is the original common law system which existed in England from at least the seventeenth century until the 1970s. Because of its export with the common law in English areas of influence, it remains the most frequently encountered bail form in common law influenced countries.

Though by no means totally unmixed, probably the purest example of the recognizance system to be found in Australia exists in the ACT. However, legislation to restructure bail in the territory is currently being prepared.

If a defendant fails to appear in answer to bail under the current ordinance, the recognizance of any surety is also forfeited. An arrest warrant can be issued for the accused. If a security has been given either by the accused or by a surety, it is forfeited. In each instance the court has the authority to forfeit in whole or in part. Subject to certain limitations, the court may thereafter adjust or revoke the forfeiture on the application of the person against whom it was levied if cause is shown why this should be done. If the accused violates a non-financial condition of conduct while on bail or the magistrate is satisfied that reasonable grounds exist for believing that the accused will violate the condition, a warrant for the accused's arrest may be issued. The defendant may then be remanded in custody or released on the same or altered terms of bail [s77; s78; s80; s248B; s248C; s253; s254].

Three Australian jurisdictions have generally similar principally recognizance-based bail systems: Victoria, Queensland, and Western Australia. Each of these states provides a listing of the forms bail may take, graduated by the severity of imposition created by the form. Each then directs that no more onerous form shall be imposed on the accused than is warranted by the public interest considering the nature of the offence and the circumstances of the accused. In all three jurisdictions release of the accused on his own recognizance, or undertaking to forfeit a sum of money if he absconds, is the first and basic alternative. Second in Victoria and Queensland is the accused's undertaking supplemented by a deposit of money or other security of stated value, whereas in Western Australia the second alternative is that a surety or sureties enter into a recognizance-type undertaking for the

accused's appearance. This surety alternative becomes the third option in Victoria and Queensland. The final option in those two jurisdictions is the accused's undertaking plus a deposit of money or other security of fixed value plus a surety or sureties. The Queensland statute provides for a monetary deposit by a surety to demonstrate the sufficiency of his means. In Victoria this deposit may be in cash or asset and may be required by the court. The third option in Western Australia is the defendant's undertaking plus sureties, either or both with a monetary deposit. The fourth option provided is like the third but permits substitution of a passbook or its equivalent for cash. The final option in Western Australia is the possibility of the accused and sureties, either or both, entering into a mortgage, charge, assignment, or other transaction to secure bail with other property. In all three jurisdictions the financial provisions mentioned are supplemented by the possibility, where necessary, of non-financial conditions regarding conduct being imposed (Vic. s5(2); Qld s11(2); WA s17; Sched. Pt. D s2]. As with the financial components of bail, the imposition of these conditions regarding conduct and residence generally are similar in the three states.

When a defendant fails to appear as required by his bail, the court may in all three states issue a warrant for his arrest. In addition, any recognizance or security deposit by either defendant or surety is subject to forfeiture although some procedural differences exist among jurisdictions on this point.

In all three states conditions of bail regarding conduct and residence are enforced by the threat of arrest and revocation of bail. If the police have reasonable grounds to believe that the accused has broken or is likely to break the conditions of bail they may arrest that individual without a warrant. The accused must then be brought before a magistrate within 24 hours. The magistrate, if convinced that the defendant has broken or is likely to break a condition of bail, may revoke bail or alter its terms. For the accused to change his residence or occupation without notifying the court is a separate offence punishable by three months' imprisonment or $500 fine in Victoria. The other two states raise the maximum imprisonment to six months, and Western Australia specifies that both may be imposed. An additional sanction against a defendant's failure to appear when and where required is provided in all three jurisdictions by creating an offence of absconding.

The relevant legislation in New South Wales, the Northern Territory, and South Australia would be classified as predominantly within the non-financial conditions form of bail. In fact, in spite of mixtures of elements of other forms, these statutes are among the best examples of that form to be found in any country.

In New South Wales the Bail Review Committee (Parliament of NSW 1976) explicitly set out to reduce the reliance on monetary bail by providing for release on a variety of non-financial conditions which must be considered before monetary bail can be employed. This preference emerges in the legislation. The New South Wales law [s37] and that of the Northern Territory [s28] are identical in this respect. In both jurisdictions bail is to be unconditional unless the court is of the opinion that one or more conditions should be imposed to promote effective law enforcement or the protection and welfare of the community. No more onerous conditions are to be imposed than the nature of the offence and the circumstances of the accused warrant. Conditions are listed in order of their burdensomeness and no condition is to be imposed unless no prior condition or combination of conditions is likely to secure the objective sought. Upon the accused's request, however, any condition can be imposed.

Conditions available [NSW s36; NT s27] begin at the least burdensome, from specified non-financial requirements as to the conduct of the accused while on bail. They then escalate to providing one or more acceptable acquaintances who will state that the accused is a responsible person who is likely to comply with the terms of bail. Financial conditions then follow. These begin with the accused's own recognizance at the least burdensome level. They can then progress through one or more sureties by recognizance, the accused's deposit of security, and the sureties' deposit of security. At the most burdensome end of the schedule come the accused's cash deposit, and finally the sureties' cash deposit. The clear effect is to force preference to be given to non-financial considerations over financial.

The South Australian Attorney-General's Department's report (1984) prior to the legislation in that state similarly states that legislation 'should place emphasis upon non-financial conditions of bail'. This is reflected in the South Australian Act [s2(a)-(b)] which specifies in greater detail than the others what some of the non-financial conditions could be. These include, but are not limited to, residence at a specific address, not to leave that address except for specified purposes such as employment or treatment (to be used with Crown consent only), conditions relating to protection of the crime victim, supervision by a Department of Correctional Services Officer (with Crown consent), reporting to the police, and surrendering a passport.

Although no mandatory priority listing is given, no financial condition is to be imposed unless the bail agreement cannot be properly secured by a non-financial condition or combination of them. Moreover, no condition other than one as to the accused's conduct while on bail may be imposed unless it is reasonably necessary to ensure compliance with the terms of bail.

One non-financial condition not applying to conduct is provision of acceptable acquaintances who will state their confidence that the accused will comply with the terms of bail. Financial conditions that then follow are the accused's recognizance, the accused's deposit of security, third-party guarantee, and a third-party guarantee with security.

Provisions in all three jurisdictions for forfeiture of recognizances or deposits are similar to those in the jurisdictions which rely principally on recognizance, with a few noteworthy variations. The provisions for arrest of the accused, either with a warrant issued upon failure to appear or without a warrant by the police in cases of violation of other conditions of bail, are also similar, as is the power of the courts to deny or restructure bail in those instances. The most important variations in this area of the law are found in South Australia where conditions of bail can be enforced by forfeiture of any recognizance or security deposit that may have been in force [s11, s15]. This is in contrast to the other jurisdictions where arrest and alteration of bail status are the only sanctions provided. Like forfeitures elsewhere, the court may at any time for sufficient reason reduce the forfeiture or rescind it completely.

As in the primarily recognizance jurisdictions, New South Wales and South Australia supplement their non-financial conditions approach by creating an offence of absconding. The Northern Territory lacks such a provision. The New South Wales provision [s51] is worded so that an accused who fails to appear without reasonable excuse is guilty of the offence. The burden of proving the reasonable excuse rests on the accused. The absconding is punishable by up to the same penalties as the primary offence with, however, a maximum of three years imprisonment or $3,000 fine.

The criminalisation provision in South Australia [s17; s17a] differs from that in New South Wales and elsewhere in that the penalty is worded so as to apply not only for failure to appear but also to violation of conditions of bail. Although a guarantor (or surety) is not directly liable to punishments for the principal's failure to adhere to conditions of bail, a guarantor who knows or has reasonable cause to suspect that the principal has failed to comply with a condition included in his guarantee is obliged to take reasonable steps to inform the police. Failing to do so subjects the guarantor to a $1,000 penalty. These provisions give South Australia a unique range of alternatives with which to enforce non-financial conditions of bail.

In spite of the emphasis in these statutes on non-financial conditions, the limited and somewhat dated evidence available suggests questions as to the extent to which these systems do actually function principally as non-financial condition systems. A 1980 study by the New South Wales Bureau of Crime Statistics and Research (1984) of combined police and court bail indicates that bail is granted unconditionally in about 65 per cent of cases where a bail determination is made. It is refused in about 7 per cent of the cases and conditional bail accounts for 26 per cent of the determinations. Financial conditions (mostly recognizances), account for 70 per cent of conditional, or about 19 per cent of the total, bail determinations. Non-financial conditions of conduct were employed in only about 4 per cent of the conditional, or 1 per cent of the total, bail decisions. In the remaining 26 per cent of conditional bails, non-financial acknowledgement of the accused's responsibility by an

acceptable person was employed. This equals 7 per cent of the overall bail decisions. Clearly, non-financial conditions, particularly non-financial conditions regarding conduct, cannot be said to be the principal control.

Some indication that the criminal penalty for absconding is ultimately being relied upon is given by figures from the New South Wales Bureau of Crime Statistics and Research (1987) for persons appearing in the lower courts for the offence of failure to answer their bail. In 1986, over 73 per cent of non-appearance cases received a fine or imprisonment. Figures are given for only the most serious offence charged.

The low percentage of cases in which non-financial conditions are used suggests that, in spite of the fact that the law seems to favour this category of control, the New South Wales bail system is not in practice a non-financial conditions system. Conversely, the high percentage of unconditional bails combined with the indications of use of fines and imprisonment for absconding from trial on those less serious offences adequate to warrant bail suggests that in practice the criminalisation of absconding may be the operative part of the law. If this is so, then the New South Wales bail system may well be functioning as a criminalisation system where bail is extensively granted without conditions, but the threat of criminal punishments are chiefly relied upon as the motive to prevent absconding.

In South Australia such figures as are available suggest a quite different pattern than that of New South Wales, but nevertheless not one compatible with a system of bail based principally on non-financial conditions. No indication exists of a reliance on the criminalisation of absconding such as may be the case in New South Wales. Between July 1985 and March 1986, 35 prosecutions for non-compliance with bail occurred, for July-December 1986 30 occurred, and for 1987 20 occurred (SA Office of Crime Statistics 1986).

Based on the law itself, the primary form of bail in the lower courts in Tasmania is difficult to determine. The magistrate considering bail is given a general power to make orders relating to it [s35(2), (3)(ab)(b)(e)] which clearly permits broad discretion. Only some of the alternative possible orders provide controls to motivate the accused's appearance. No preferences or priorities are established among these. Pursuant to a 1986 amendment, after the order to be present itself, the first listed of these controls is the accused's cash deposit. This is followed by one or more sureties by recognizance. Finally, after two possible orders not directed to controlling appearance, the non-financial conditions controlling the conduct of the accused are listed, such as reporting requirements, or limitations on movements and social intercourse. The accused's own recognizance is not listed as an alternative, presumably to discourage its use after the 1974 amendment which de-emphasised it. However, it could be imposed under the general power to impose orders.

Insofar as any conclusion is possible as regards classification of Tasmanian bail, the law appears on its face to establish a principally cash deposit system. Since no priorities are indicated, this appearance is created in part by the primacy of place among the devices to compel attendance of the accused which is given to this alternative. The appearance is further confirmed by the much greater elaboration of the option [s35(3)(ab), (3A)-(3F)] when compared to that for the other alternatives. The deposit required is limited to an amount sufficient to ensure the presence of the defendant at the specified time and place. In addition, details of the forfeiture procedure are specified. If the accused does not appear as required the court is authorised to declare the deposit forfeited, although the possibility that this will not be done and that it will be refunded to the accused is also provided for. If the deposit is forfeited, a two-month period is allowed within which the accused can show cause to the court why it should be returned in whole or part.

Sureties: Duties and Rights

The possibility of sureties being required as a condition of bail exists in all Australian jurisdictions, although they are no longer routinely required in any. Some indication of the frequency of use of sureties can be derived from figures in the New South Wales Bureau of Crime Statistics and Research (1984) study where sureties were required in about 6.9 per cent of the cases examined. However, in spite of the relative infrequency of the use of sureties when they are employed a whole area of bail laws not previously discussed becomes involved. These are spelled out in full in Devine (1989) and not further discussed in this paper.

Recent Developments and Trends in Bail Laws

Developments in the law of bail since 1985 provide an insight into recent trends in this legal area. One of the most important such developments deals with the matter of domestic violence. The New South Wales *Bail (Personal and Family Violence) Amendment Act 1987* deals with the problem. One who is accused of an offence of domestic violence and who has previously failed to comply with a condition of bail imposed for the protection and welfare of the alleged victim of the offence loses the presumption in favour of bail. Instead, such an individual is not entitled to bail unless the court can be satisfied that the accused will comply with such bail conditions in the future.

Additional factors to be considered in the bail decision according to this amendment are not only given but are stressed. Courts considering bail for such offences are to have particular regard in domestic violence cases to two factors. The first is the protection and welfare of the alleged victim of the offence. The second is any previous conduct of the accused which affects the likelihood that the defendant will commit a further domestic violence offence on the particular victim if granted liberty on bail.

In justifying the level of onerousness of bail conditions, the interests of the victim are to be considered. In addition, in imposing conditions in domestic violence cases, the protection and welfare of the alleged victim and the previous conduct of the accused indicative of the likelihood of domestic violence against the victim are to receive particular consideration. The alleged victim also receives some standing to seek review of a bail decision in domestic violence cases.

The Bail Act in South Australia [s11(2)(a)(ii)] does not focus on domestic violence but does make provision for all victims of offences. Under the Bail Act 1985 itself, where an offence has a victim, conditions may be imposed on the bail of one accused of the offence relating to the protection of the victim. The 1987 Bail Act Amendment provides that, in deciding what conditions to impose, a bail granting authority should give special consideration to submissions made by the Crown on behalf of the alleged victim.

Bail provisions pertaining to domestic violence have also been added in the ACT. Since these pertain to police bail, however, they are outside the scope of this work.

A second category of offences where recent legislation has tended to restrict the granting of bail is that of serious drug offences. A 1986 amendment to the New South Wales Bail Act exempts from the presumption of bail various indictable offences under the *Drug Misuse and Trafficking Act (Bail Amendment Act 1986*). Several years earlier a 1981 amendment to the Victorian Bail Act had removed a variety of serious drug offences from that state's prima facie right to bail (*Bail Amendment Act 1981*). A 1986 amendment extended this to comparable drug offences under Commonwealth law. In Queensland the *Drug Misuse Act* of 1986 (s60 Sixth Sched.) updated the restrictions on bail in specified drug cases contained in the original 1980 Bail Act.

The only complete bail act enacted since 1985 is that of South Australia. Several provisions of that act should be singled out in the present context. One such provision [s17(1)-(2)] is the use of sanctions beyond arrest to enforce non-financial conditions of bail.

With regard to the accused, criminal penalties are available. In addition [s7(1)], a surety can be required to guarantee any specified terms or conditions subject to forfeitures. A surety under the 1987 Amendment [s17a] is also required under penalty to notify the police when the accused is known or reasonably suspected to have violated a term or condition of bail. Finally, one condition of bail specifically listed [s11(2)(a)(ia)] is noteworthy. This permits the accused to be required to reside at a specific address and to remain there and not leave except for specified purposes. On the one hand this is clearly highly restrictive. On the other, it might permit pretrial release in some cases that would be dubious otherwise. It might also lend itself to being monitored with electronic technology.

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