Queensland Bail Laws

Kelly-Anne Collins

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ABSTRACT

This paper aims to provide a survey of the current Queensland bail laws, the issues that arise from them and summarise some recommendations for reform made by the Queensland Law Reform Commission in their 1993 Report and others. Any decision regarding the granting of bail to a defendant raises questions fundamental to our justice system: a person's right to the presumption of innocence and to liberty and society's right to ensure that those charged with a criminal offence are appropriately detained and, if necessary, punished. It is through the use of the system of bail that this balance is generally maintained and, thus, its importance within the justice system is reinforced.

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1. INTRODUCTION

On 1 February 2000, the Premier, Hon Peter Beattie MLA, announced that the government intended to make changes to police powers to arrest people who have been released on bail. He stated that this was "*a further demonstration of* [his] *Government being tough on crime and tough on the causes of crime*".[1] This statement by the Premier indicates how important bail issues are to the community's concern regarding the effectiveness of the criminal justice system. This paper aims to provide a survey of the current Queensland bail laws and the issues that arise from them, and to summarise some recommendations for reform made by the Queensland Law Reform Commission in their 1993 Report and others. Any decision regarding the granting of bail to a defendant raises questions fundamental to our justice system: a person's right to the presumption of innocence and to liberty and society's right to ensure that those charged with a criminal offence are appropriately detained and, if necessary, punished. It is through the use of the system of bail that this balance is generally maintained and, thus, its importance within the justice system is reinforced.

2. CALLS FOR REFORM

Complaints have been voiced in the community regarding the effectiveness of the *Bail Act 1980 (Qld).* These calls have been particularly strong from victims of crime and their advocates. For example, the Queensland Victims of Crime Association have in the past argued that the "*law is skewed towards the rights of the accused* [and that] … *community safety is a low priority*".[2] The Association has, in the past, argued that it should be made tougher for accused criminals to get bail where they are accused of violent crimes.[3]

However, other commentators have disagreed with this assessment arguing that they believed "*the* [Bail] *Act put a heavy onus on people charged with violent crime to prove they would not re-offend while on bail*".[4] In addition, in January 1998, the Criminal Justice Commission (CJC) released a Status of Recommendations Report on their Reports on Aboriginal Witnesses and Police Watchhouses. In that Status

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1 Hon Peter Beattie MLA, Premier of Queensland, 'Police Powers Bill to give police greater arrest powers', *Ministerial Media Statements 26 January 2000 to 1 February 2000*, 1 February 2000, pp 15-16.

2 Ian Davies in Kara Lawrence, 'Victims fear bailed thugs', *Sunday Mail*, 19 July 1998, p 3.

3 Davies in Lawrence, p 3.

4 Terry O'Gorman in Lawrence, p 3.

Report, the CJC reiterated their earlier remarks that they continued to believe that the *Bail Act 1980 (Qld)* provisions were in need of reform. They stated that in their initial report they had found conditions in police watchhouses "*were below acceptable standards. Poor conditions were exacerbated by overcrowding and lengthy stays by prisoners awaiting placement in a prison*".[5]

In response to these calls for reform, it is important to note that the new Brisbane City Watchhouse was recently completed. It has been designed to hold 200 prisoners in "*secure and dignified*" surroundings and that the cells have been especially designed to be:

> *secure, comfortable and suicide-proof. The new watchhouse will include three court rooms and 67 cells, ranging from bulk holding cells for up to 15 people to single-person cells. The operators will be provided with closed-circuit television surveillance, access control systems, uninterruptible power supplies and strictly controlled public access.*[6]

3. PHILOSOPHY UNDERLYING THE GRANTING OF BAIL

When it was conducting its review of Queensland Bail laws, the Queensland Law Reform Commission (QLRC) was guided by four principles it considered as important elements when determining the structure and framework of the bail system. These were the need to ensure the:

(a) maintenance of the presumption of innocence;

(b) protection of the public from harmful behaviour;

(c) protection of people from "*unlawful or unnecessary deprivation of liberty*"; and

(d) effective "*administration of the criminal justice system requiring that people accused of an offence are tried and (if appropriate) punished*".[7]

The granting of bail allows a defendant who has been charged with a criminal offence to be released from custody until he or she stands trial. Underlying the availability of bail is that, until a person has been tried and convicted by a court,

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5 Criminal Justice Commission, *Reports on Aboriginal Witnesses and Police Watchhouses: Status of Recommendations*, Brisbane, November 1997, http://www.cjc.qld.gov.au, p 25.

6 Hon R Schwarten MLA, Minister for Public Works and Housing, 'Police get fingertip control of watchhouse security', *Ministerial Media Statements 24 November to 30 November 1999*, 24 November 1999, p 56-58 and Bob Wilson, 'Watch out for this project', *The Courier Mail*, 27 August 1999, p 37.

7 Queensland Law Reform Commission, *The Bail Act 1980: Report No 43*, Brisbane, June 1993, p 2. This report was the culmination of an extensive process to examine reform possibilities to the *Bail Act 1980* (Qld). The final report was preceded by a Discussion Paper in March 1991 and a Working Paper in February 1993.

they are presumed to be innocent unless the prosecution proves otherwise beyond a reasonable doubt. Thus, a grant of bail, allowing the defendant to go free until their trial, respects that defendant's right to liberty as a free individual. However, in order for a determination to be made regarding a defendant's guilt, the defendant must be available to stand trial and allow the prosecution to make their case. Hence, the criminal justice system needs to ensure that the defendant will be available and, often, the only way to ensure this is to hold a defendant in custody until they can stand trial. It is also necessary to ensure that, if the defendant is guilty of the offence, they can be punished accordingly. This requires that the defendant can be brought before a court to have that punishment determined.

If a defendant has been accused of a criminal offence, there is a need to be able to bring that defendant before the court to have the matter heard: to ensure a just and fair trial for the defendant. However, if the defendant has not been convicted of any offence, to hold the defendant in custody could be seen as an unjust deprivation of their liberty. The preparing of their case also becomes more difficult. They have limited access to their legal representative and limited time to prepare for their trial. The defendant is separated from their support network and, consequently, their resolve to put up their best defence may weaken. In addition, where an adult defendant is not granted bail, they are remanded into custody and can be kept in the police watchhouses, lockups and prisons until their trial.[8] This stay on remand may be lengthy, loosening the defendant's ties with his/her family, community and employment and further weakening their resolve. It is especially important that these ties are maintained because they become considerations in the sentencing process, where "*the greater a defendant's individual and community responsibilities, the greater the pressure on judicial officers not to impose a jail sentence*".[9] Therefore, the bail process is designed to ensure that a balance between the rights of the individual and the efficacy of the criminal justice system is achieved.

However, in recent times, the desire to protect the community, and to acknowledge the effect of crime on the victim, has become a significant issue in determining the question of granting a defendant bail. This desire is particularly focused on ensuring that a defendant does not commit a further offence while on bail or interfere with any potential witnesses or victims. For a victim, especially where the crime was of a violent nature, the release of a defendant on bail can be a traumatic event. They may fear retribution or intimidation from the defendant and that the system has failed to consider their plight while respecting the rights of the

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8 Queensland Law Reform Commission, *To bail or not to bail – a review of Queensland's bail law: Discussion Paper No 35*, Brisbane, March 1991, p 1.

9 QLRC, *The Bail Act 1980: Report No 43*, p 4.

defendant.[10] These are additional matters that are necessary to consider when developing any reform in this area.

4. OVERVIEW OF CURRENT BAIL PROVISIONS IN *BAIL ACT 1980* (QLD)

The issue of granting bail to the defendant arises once a defendant has been taken into police custody to be charged with an offence. Depending on the seriousness of the offence, the police may grant the defendant bail if they are satisfied that, given all the factors to be considered, the defendant is suitable to be released from custody to await their court appearance (**Section 7**). Only the officer in charge of the watchhouse, where the defendant is being held, is permitted to make this determination. While the defendant is not entitled to be granted bail by police, the relevant officer is required to consider whether or not the defendant can be released on bail.[11] In addition, the police are permitted to grant bail to a defendant where it is not practicable for them to bring that person before a court within 24 hours after first being taken into custody. Therefore, where practicable, unless the defendant is released by police, the defendant must be brought before a court to have the decision regarding their bail determined within 24 hours of their being taken into custody. During this period of time, the defendant can be held in a police lock up or the local watchhouse depending on where there are facilities for them.

Section 8 gives to every Queensland court a power to grant bail to any person appearing before it. **Section 9** states that a defendant shall be granted bail, prior to being convicted of the offence with which they are charged, subject to the provisions of this Act. These include **section 16** which sets out the criteria by which a Queensland court can make the decision that the defendant should be refused bail. Then if bail is granted, it may be made subject to certain conditions. For example, all grants of bail are made subject to the defendant undertaking to appear before a court at a specified date and time (**Section 20**). Where a defendant fails to comply with that undertaking, they are liable to being found guilty of an offence (**Section 33**). A defendant may be apprehended, without a warrant, by any

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[10] Queensland Law Reform Commission, *To bail or not to bail*, p 1.

[11] QLRC, *The Bail Act 1980: Report No 43*, p 5.

police officer who has reasonable grounds for belief that the defendant is likely to break, is breaking or has broken, any condition of their bail (**Section 29(1)**).[12]

The defendant is then brought before a court and is required "*to show cause*" "*then and there*" why they should not be convicted under this Act (**Section 33**). Bail may also be revoked or varied in such a case (**Section 30**).

4.1 SUMMONS/NOTICE TO APPEAR PROCEDURE

A preliminary comment to make in this paper on options for reform to the Queensland *Bail Act 1980 (Qld)* is that the question of granting bail only arises where a defendant is arrested, charged with an offence and taken into custody. Alternative procedures are provided by the summons process and by the issuing of 'Notices to Appear' to a defendant. Under these processes, the police take a defendant's details and then send them a notice to appear in court at a later date or a court can issue a summons stating likewise.[13] Police would only make use of this process where they could be sure of the defendant's details and that the defendant would appear at court when summoned to do so.[14]

In 1993, the Criminal Justice Commission recommended that a scheme providing an alternative to the traditional arrest and bail process be introduced into Queensland. They suggested the adoption of a scheme similar to that in use in NSW where police were "*empowered to issue Field Court Attendance Notices for prescribed offences*".[15] The current 'Notice to Appear' provisions adopted in response to this recommendation are generally similar to those operating in NSW except that, in Queensland, these notices can be used for dealing with defendants charged with any offence.[16]

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[12] Also *Police Powers and Responsibilities Act 1997* (Qld), section 35; Section 29(2) provides: *"A defendant (other than a defendant who is a child within the meaning of the Juvenile Justice Act 1992) who breaks any condition (other than the condition that the defendant surrender into custody) of the undertaking on which the defendant was granted bail requiring the defendant's appearance before a court commits an offence against this Act"*.

[13] See *Police Powers and Responsibilities Act 1997* (Qld), Part 7, Division 2 and E Colvin, S Linden and L Bunney, *Criminal Law in Queensland and Western Australia* (2nd ed), Butterworths, Sydney, 1998, pp 534-535.

[14] QLRC, *To bail or not to bail – a review of Queensland's bail law: Discussion Paper No 35*, p 34.

[15] Criminal Justice Commission, *Police Powers in Queensland: Notices to Appear*, Research Paper Series, Vol 5, No 2, Brisbane, May 1999, p 3.

[16] CJC, *Police Powers in Queensland*, p 3.

If the defendant does not appear under these alternative processes, a warrant can be issued for their arrest. However, it is not an offence to fail to appear. The arrest and bail procedure, therefore, provides an additional coercive power to ensure the defendant's compliance, especially where the offence is a serious one.[17] However, if the offence is serious, it is likely that the defendant would be arrested, charged and brought into custody. Therefore, as the QLRC pointed out in 1991, guidelines should be developed with respect to where a defendant should be processed by summons/notices to appear or arrested as, currently, the decision is at the discretion of the officers involved.[18]

5. RIGHT TO BAIL ?

Generally in Queensland, there is a presumption in favour of granting bail to a defendant.[19] That is, that the defendant be granted bail, unless after a consideration of certain relevant matters, the bail officer considers that it should be refused. This presumption is outlined as "*a duty*" on the judicial officer to grant bail. However, bail must be refused, unless the defendant can show cause otherwise, where the defendant is charged with certain offences, such as:

(a) any indictable offence while on bail awaiting trial;

(b) any offence for which only the Supreme Court can grant bail;

(c) any indictable offence which is alleged to have involved the use or threat of the use of a firearm, offensive weapon or explosive substance; or

(d) an offence against the *Bail Act 1980 (Qld)*, for example, a failure to appear under a bail undertaking (**Section 16(3)**).

Several other states also distinguish between more and less serious offences in determining the balance the decision maker must take in making a bail decision. For example, in the ACT, where the defendant is facing a minor offence, the defendant is "*entitled to be granted bail without any condition*".[20] This does not include where a defendant is facing an offence of contravening a domestic violence protection order.[21] For all other offences, there is an "*entitlement*" to bail only.[22]

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17 QLRC, *To bail or not to bail – a review of Queensland's bail law: Discussion Paper No 35*, p 33.

18 QLRC, *To bail or not to bail – a review of Queensland's bail law: Discussion Paper No 35*, p 34 and see *Police Powers and Responsibilities Act 1997* (Qld), section 40.

19 QLRC, *The Bail Act: Working Paper No 41*, p 11; s 9 of the *Bail Act* 1980 (Qld).

20 *Bail Act 1992* (ACT), s 7.

21 *Bail Act 1992* (ACT), s 7(3).

22 *Bail Act 1992* (ACT), s 8.

The NSW Act is worded as giving to a defendant a "*right to bail*" with respect to minor offences.[23] This 'right' to bail is, therefore, more difficult for the prosecution to override than a mere presumption in favour of bail or a duty to grant it as in the Queensland Act. However, this right is not absolute and is subject to a defendant not:

(a) having previously breached a bail condition;

(b) being incapacitated by alcohol, injury or drugs; or

(c) being otherwise in danger of physical injury or in need of physical protection.[24]

However, for all other offences in NSW, there is only a presumption in favour of bail.[25] A presumption against the granting of bail exists with respect to:

(a) certain drug offences outlined in section 8A of the Bail Act;

(b) various offences under the Crimes Act such as murder, manslaughter, attempted murder, sexual offences, kidnapping, grievous bodily harm, aggravated robbery, burglary and armed robbery; and

(c) certain domestic violence offences under section 9A of the Bail Act.[26]

In the Northern Territory, there is a presumption in favour of bail being granted except where:

(a) the offence is that of murder, treason or a serious drug offence under Northern Territory or Commonwealth law;

(b) the offence involves:

(i) grievous harm, sexual intercourse and gross indecency without consent;

(ii) the breach of a restraining order issued under the DVA and where the person has in the last 10 years been convicted of murder, grievous harm, bodily harm, common assault, sexual intercourse and gross indecency without consent;

(iii) any equivalent offence under any interstate laws or the laws of another country; or

(iv) if the offence occurred while the defendant was on parole or a suspended sentence of imprisonment.[27]

The Victorian Act states that bail shall be refused where the defendant is charged with:

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23 *Bail Act 1978* (NSW), s 8.

24 *Bail Act 1978* (NSW), s 8(2).

25 *Bail Act 1978* (NSW), s 9.

26 *Bail Act 1978* (NSW), s 9(1).

27 *Bail Act 1996* (NT), s 8.

(a) treason or murder;

(b) certain serious drug offences unless exceptional circumstances are found to exist; or

(c) where the defendant is awaiting sentencing for another offence.[28]

Bail should be refused, unless cause can be demonstrated that detention in custody is not justified, where the accused is charged with:

(a) an indictable offence while awaiting trial on another

(b) stalking and has a history of a conviction for such a previous offence and used violence in relation to that offence

(c) aggravated burglary with use or threat of use of weapon

(d) certain offences relating to drug trafficking, cultivating or conspiring to do any of these activities

(e) any offence against the *Bail Act 1977* (Vic).[29]

5.1 QLRC RECOMMENDATIONS

The QLRC has recommended that the Queensland legislation be amended to give a defendant a right to bail, that is, that they should be entitled to be granted bail rather than simply there being a duty on the officer to grant a person bail subject to certain conditions.[30]

6. THE DECISION TO GRANT/REFUSE BAIL

6.1 CURRENT LAW

The position in Queensland, therefore, is that a defendant is to be granted bail unless, after considering certain matters, a police or judicial officer believes that bail should be refused.

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28 *Bail Act 1977* (Vic), s 4(2).

29 *Bail Act 1977* (Vic), s 4(5).

30 Recommendation 5, QLRC, *The Bail Act 1980: Report No 43*, p 46.

The grounds on which bail may be refused are set out in **section 16** of the *Bail Act 1980* (Qld) and are as follows:

(a) that there is an unacceptable risk that if the defendant were to be released on bail, the defendant would:
  (i) fail to appear and surrender into custody;
  (ii) commit an offence;
  (iii) endanger the safety or welfare of the victim of the alleged offence or anyone else;
  (iv) interfere with witnesses of the alleged offence or any other alleged offence; or
  (v) otherwise obstruct the course of justice, and
(b) that for the defendant's own protection, it is necessary that the defendant remain in custody.

In deciding whether the risk of these events occurring is 'unacceptable', the decision maker may have regard to any matter which is relevant including, but not limited to, the following:

(a) the nature and seriousness of the offence;
(b) character, antecedents, associations, home environment, employment and background of the defendant;
(c) history of any previous grants of bail to the defendant; and
(d) strength of the evidence against the defendant (**Section 16(2)**).

These criteria apply to bail decisions regarding adults and child defendants alike.

A judge, therefore, has certain options at the end of this decision-making process. Firstly, they can grant the defendant bail and set out the particular conditions upon which that bail is granted. Secondly, the judge can refuse bail. The defendant is entitled to apply for bail again (**Section 19**) but generally the outcome will not be different if the defendant's circumstances have not changed.

Where a defendant is charged with an offence that carries the possibility of life imprisonment that cannot be mitigated or varied, or the possibility of an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Qld), then their bail application can only be heard by the Supreme Court (**Section 13**).[31] **Section 163(1)** of the *Penalties and Sentences Act 1992* (Qld) states that a court may impose an indefinite sentence on an offender who is, firstly, convicted of a violent

[31] Section 46(3) of the *Juvenile Justice Act 1992* (Qld) permits a Children's Court judge to grant a child bail despite s 13 of the Penalties and Sentences Act.

offence and, secondly, is considered "*a serious danger to the community*". The reason for this limitation is presumably because:

> *the tensions between the competing public interests of law enforcement and* [that] *of individual freedoms and liberties are greater,* [and because of the] … *concern that the accused may fail to appear, re-offend or expose others to risk of harm.*[32]

However, the QLRC in one of its recommendations questioned whether a Magistrates Court should also be able to hear the bail applications of defendants facing these charges. While recognising the seriousness of these offences, the Commission considered it anomalous that a Magistrates Court could decide whether or not to commit such a defendant to trial but could not hear their bail application.[33] The QLRC made a further recommendation that an appropriate police officer should be able to make bail decisions with respect to these offences.[34] There was an additional recommendation made by the QLRC that argued generally for an extended power to grant bail to be given to senior police officers and magistrates; their argument being that if the criteria in the legislation is clear enough, the decision regarding granting bail should not be beyond those officers.[35]

6.2 ADDITIONAL FACTORS THAT COME INTO PLAY

Despite all these criteria being set out, the making of this decision can be difficult. In 1991, the South Australian Chief Magistrate at the time, Nick Manos, outlined some factors that he believed makes this decision so. For example, he stated that:

(a) an offence usually looks worst when it has just been committed and there is a lot of community and victim anger;

(b) there may not be enough time between the offence and the bail application for the officer to make an in-depth assessment of the application; and

(c) there is often very limited, and often fairly shallow, material or information available to assist a magistrate to make the bail decision.[36]

These matters are important to be acknowledged when considering any need for reform to the Queensland bail laws.

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32 E Colvin, S Linden and L Bunney, p 542.

33 QLRC, *The Bail Act 1980: Report No 43*, p 45 and Queensland Law Reform Commission, *The Bail Act: Working Paper No 41*, Brisbane, February 1993, pp 6-7.

34 QLRC, *The Bail Act 1980: Report No 43*, pp 26-27 & 45 and QLRC, *The Bail Act: Working Paper No 41*, p 6.

35 QLRC, *The Bail Act 1980: Report No 43*, pp 26-27.

36 Nick Manos, 'A view from the Magistracy' in *Bail or Remand?*, ed Dennis Challinger, Conference Papers, Australian Institute of Criminology, Canberra, 29 November – 1 December 1988, p 3.

6.3 THE LAW IN OTHER STATES

The bail legislation in all the other Australian jurisdictions also sets out criteria to guide the bail decisions of the authorised police and judicial officers. Generally, the criteria used for determining the granting of bail to an adult and a child are the same. However, some jurisdictions provide for some additional criteria where the bail decision involves the custody of a child. These considerations usually concern ensuring that the best interests of the child are protected.[37]

All the jurisdictions require a consideration of the probability of a defendant appearing before the courts to have the matter heard. This is the most fundamental of all considerations given that the efficacy of the bail system is undermined without it. Most of the jurisdictions go on to elaborate what matters should be considered when examining the question of the likelihood of a defendant appearing before the court. While the Queensland, Victorian, Western Australian and New South Wales Acts provide for these matters to be considered along with any other matters that are considered relevant,[38] the ACT and NT Acts state that the listed matters are the **only** ones that can be considered,[39] thereby, narrowing the scope of the court's examination in this matter.

The next consideration is to ensure that the defendant not commit an offence while on bail. This is dealt with under the heading of "*the protection of the community*" in the ACT, NT and NSW Acts which gives an indication to the official making the bail decision, as to the context in which this factor is to be considered.[40] An interesting qualification exists in the New South Wales Act which refers to the likelihood of the defendant committing a 'serious offence' as a factor to be considered rather than just an offence.[41] A serious offence is loosely defined as including, but not limited to, considerations that the offence is of a violent or sexual nature, of the effect or likely effect the offence committed would have on a victim and of the number of offences likely to be committed.[42] The Act then goes on to say that to determine this question, the officer must consider whether they are satisfied that the defendant is likely to commit such an offence and that likelihood

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37 For example *Bail Act 1992* (ACT), s 23 and *Children's Services Act 1986* (ACT), s 5.

38 *Bail Act 1980* (Qld), s 16(2); *Bail Act 1977* (Vic), s 4(3); *Bail Act 1982* (WA), Schedule 1; *Bail Act 1978* (NSW), s 32.

39 *Bail Act 1992* (ACT), s 22; *Bail Act 1996* (NT), s 24.

40 *Bail Act 1992* (ACT), s 22(1)(c)(ii); *Bail Act 1996* (NT), s 24(c)(iii); *Bail Act 1978* (NSW), s 32(1)(c)(iv).

41 *Bail Act 1978* (NSW), s 32(1)(c)(iv).

42 *Bail Act 1978* (NSW), s 32(2A).

coupled with the consequences of the offence outweighs a defendant's right to liberty.[43]

Given the level of community concern, pressure is on law makers to tighten up bail criteria to prevent any offences being committed while a defendant is on bail, especially if that defendant is already facing similar charges. However, in doing so, there is a risk that other defendants are unreasonably detained.

The Northern Territory *Bail Act 1996* includes a specific provision to deal with the bail application of a defendant facing a domestic violence offence (**Section 24(d)**). In this situation, the court officer is also asked to consider the likelihood of injury to any specific person, their property or the likelihood of the defendant breaching the peace. While not specifically referring to domestic violence offences, other jurisdictions refer to 'protecting the victim' as a factor when considering any endangerment to a person's safety, the welfare of victim or anyone else.[44]

Several jurisdictions detail what matters may be considered when looking at the interests of the defendant. The ACT, NSW and NT detail the need to examine the:

(a) period of time the defendant would spend in custody if bail were to be refused;

(b) a person's need to be free to prepare their defence or for any other lawful purpose; and

(c) a person's need for physical protection due to an incapacitation by intoxication, injury or use of drugs or any other cause.[45]

SA legislation also recognises the need to consider this third factor.[46] The WA and NSW Acts go further and include an extra element requiring an examination of the severity of the penalty or probable penalty the defendant may be given upon conviction.[47]

The Victorian legislation generally mirrors the Queensland definition of "*unacceptable risk*" in **section 16** of the *Bail Act 1980* but adds a further consideration which provides for the attitude of the alleged victim of the offence to

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43 *Bail Act 1978* (NSW), s 32(2).

44 *Bail Act 1992* (ACT), s 22(1)(c); *Bail Act 1977* (Vic), s 4(2)(d)(i)(C) and (D); *Bail Act 1985* (SA), s 10(b); *Bail Act 1982* (WA), Schedule 1, Clause 1(a)(iii) and (iv) and *Bail Act 1978* (NSW), s 32(1)(b1) and (c)(iii).

45 *Bail Act 1992* (ACT), s 22(1)(b); *Bail Act 1978* (NSW), s 32(1(b) and *Bail Act 1996* (NT), s 24(b).

46 *Bail Act 1985* (SA), s 10(d) and (e).

47 *Bail Act 1982* (WA), Schedule 1, Clause 3(a) and *Bail Act 1978* (NSW), s 32(1)(a)(iii).

be taken into account.[48] In a similar vein, the NT Act states that where the victim is a child or juvenile, the likelihood of injury or danger being caused to that victim should be considered.[49]

6.4 QLRC RECOMMENDATIONS

The QLRC has recommended the adoption of the categories outlined in the ACT, NT and NSW legislation as appropriate for Queensland, that is, an officer will be required to consider:

(a) the probability of the person appearing in court;

(b) the interests of the person charged; and

(c) the protection of the community,

when making a decision about granting a defendant bail. They further suggested that these categories be expanded by the listing of additional factors related to each category.[50]

6.5 BAIL ASSESSMENT PROGRAMS

There was a suggestion that Queensland could adopt a 'ratings system' like that in operation in NSW to assist in the making of more informed decisions regarding the granting of bail. This system applies a standard test "*which allocates points for itemised answers to questions concerning background, associates and community ties. A person is assessed as a good or bad risk depending on the points that are attained*".[51] However, the QLRC rejected this system as inappropriate because "*of its potential for discriminating against those defendants already disadvantaged by a lack of accommodation, employment and a social support network*".[52]

Another option would be the adoption of a Bail Assessment Program such as that which commenced in South Australia in November 1988. Under that program, in order to assist the officer to make their decision regarding the defendant's bail, a

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48 *Bail Act 1977* (Vic), s 4(2)(d) and (3).

49 *Bail Act 1996* (NT), s 24(c)(iv).

50 Recommendation 7, QLRC, *The Bail Act 1980: Report No 43*, pp 29-31 & 47 and QLRC, *The Bail Act: Working Paper No 41*, pp 17-20.

51 QLRC, *The Bail Act 1980: Report No 43*, p 30.

52 QLRC, *The Bail Act 1980: Report No 43*, p 31.

Correctional Services report is provided which includes such details as:

(a) the defendant's living arrangements;

(b) any accommodation available to a defendant;

(c) the employment status of the defendant;

(d) any "*relevant information about the health, medical or psychiatric, drug or alcohol use if necessary to enable the Court to determine any need for assessment and/or treatment of the defendant*";

(e) a "*response to current or previous supervision inclusive of any interstate involvement*";

(f) details of guarantors; and

(g) "*suitability of the defendants for supervised bail*".[53]

The purpose of these reports is to provide verified information to the court to assist in the making of their decision regarding the defendant's bail. No opinion is to be expressed in these reports as to whether or not bail should be granted but the defendant's suitability for home detention may be commented on as well as their willingness to comply with these conditions.[54]

This system is modelled on the 'Manhattan Bail Project' which was launched in the early 1960s in the New York suburb of Manhattan. The focus of the project was on:

> *… ensuring the courts were provided with comprehensive and verified information on defendants who would be good bail risks. It was access to this information …that enabled courts both to reduce the numbers of defendants remanded in custody and to lower breach-rates by those granted bail.*[55]

The QLRC stated that it believed the introduction of a scheme based upon these initiatives could be considered for Queensland. The courts would benefit from the provision of more accurate information in their bail decision and more time would be available for the information to be used "*to fashion meaningful conditions upon which a defendant is bailed to alleviate concerns that the court would or could have about a defendant's release*".[56]

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53 Martin Bailey, 'Bail Assessment Program' in *Keeping People out of Prison*, ed Sandra McKillop, Conference Papers, Australian Institute of Criminology, Canberra, 27-29 March 1990, p 212.

54 Bailey, p 212.

55 Adam Sutton, 'Research, Policy and Bail' in Challinger, p 10.

56 QLRC, *To bail or not to bail*, p 49.

6.6 LIMITS ON REFUSAL OF BAIL

The Commission believes that the detention of a person before their trial, where they are charged with an offence for which a sentence of imprisonment is not likely to be imposed, is unjustified.[57]

Furthermore, the QLRC expressed concern that in 4 of the 165 cases they had reviewed, the defendant had spent a period of time in gaol prior to trial, and then following the trial, no further penalty was given to the defendant.[58] The Commission pointed out that the:

> … *refusal of bail has been effectively the punishment given to the defendant – a punishment given before a court could give proper consideration to the evidence to the circumstances of the defendant, and to what, if any, term of imprisonment would be appropriate*.[59]

It suggested that in response the bail legislation could state that "*bail should be granted when there is a likelihood that if convicted of the charge, the defendant would not be ordered to serve a term of imprisonment*".[60] In support, it was argued that the adoption of such a principle would not increase the number of potentially violent defendants being released on bail. A defendant with a demonstrated propensity towards violence who was convicted of a violent offence would likely to be ordered to serve a period of imprisonment and, thus, the principle would not apply.[61]

In cases where an offender is sentenced to a term of imprisonment, the Court has a duty under the *Penalties and Sentences Act 1992*, to deduct from the term of the sentence any period spent in pre-sentence custody for the offence to which the bail relates and for no other reason. The court may also exercise an inherent general sentencing discretion to consider a period of such custody as a factor in mitigation of the sentence.[62]

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57 QLRC, *To bail or not to bail*, p 14.

58 QLRC, *To bail or not to bail*, p 16.

59 QLRC, *To bail or not to bail*, p 16.

60 QLRC, *To bail or not to bail*, p 16.

61 QLRC, *To bail or not to bail*, p 16.

62 *Penalties and Sentences Act 1992*, ss158, 161; *R v Skedgwell* [1999] 2 Qd R 97; *R v Jones* [1998] 1 Qd R 672.

7. CONDITIONS THAT MAY BE ATTACHED TO A GRANT OF BAIL

7.1 CURRENT QUEENSLAND CONDITIONS

Section 11 of the *Bail Act 1980* (Qld) states that conditions may be imposed on a person's bail grant where they are necessary to ensure that a defendant:

(a) appears in accordance with their bail;

(b) does not commit an offence;

(c) does not endanger the safety and welfare of members of the public;

(d) does not interfere with witnesses while on bail, or

(e) otherwise obstruct the course of justice.

The conditions imposed may not be more onerous than "*are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest*".(**Section 11**)

The section then goes on to list the conditions that can be imposed, and in the order that they can be imposed, to meet the stated objectives. They involve releasing the defendant:

(a) on their own undertaking to appear before the courts at a later specified date and time;

(b) on such an undertaking together with a specified monetary or other security;

(c) on an undertaking and with the cooperation of a surety;[63] and

(d) subject to an undertaking and the requirement to provide security and a surety.

7.2 THE LAW IN OTHER STATES

The legislation in all Australian States and Territories apply conditions to a defendant's bail for generally the same reasons as under the Queensland Act. The conditions imposed on defendants are also generally the same as those under the Queensland Act. However, there are some additional requirements which are worth considering for any application in Queensland. In the ACT, NT, SA and NSW, a

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[63] *Bail Act 1980* (Qld), s 21(2): *"A person who enters into an undertaking as a surety becomes bound, upon its forfeiture, to pay to Her Majesty the sum of money set forth in the undertaking with respect to that surety."*

court is entitled to place specific requirements on a defendant's conduct while they are on bail.[64] These requirements as to conduct include:

(a) periodic reporting to a local police station;

(b) residence at a specified place;

(c) undergoing medical or other necessary treatment;[65]

(d) participating in a program of personal development, training and rehabilitation;

(e) where a domestic violence offence is involved:

(i) a requirement not to harass, or cause another to do so, a specified person;

(ii) to avoid their place of residence, workplace or place they frequent or the general locality of these places;

(iii) not to approach a specified person within a certain distance; or

(iv) to refrain from being under the influence of alcohol or a drug in the residence in which they reside with another.

Another condition is for the defendant to provide to the court "*an acceptable person*" to vouch for the defendant as a "*responsible person who is likely to appear*".[66] This is a requirement similar to that of requiring the defendant to provide a surety but here the 'acceptable person' is not required to compel the defendant to meet their bail requirements or to suffer any loss if the defendant fails to comply. The court is also able to gather more information regarding the character of the defendant and is able to make a more informed decision as to the conditions upon which a defendant can be released.

There is also often a provision for a defendant to surrender any passport in their possession. In the NT, this requirement can only be imposed where the defendant is facing an offence which is punishable by 2 or more years in prison or by the payment of a $10 000 or more fine.[67]

7.3 QLRC RECOMMENDATIONS

In their recommendation 25, the QLRC outlined a set of conditions that could be adopted in Queensland such as a requirement to:

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64 *Bail Act 1992* (ACT), s 25(1)(a); *Bail Act 1996* (NT), s 27(2)(a); *Bail Act 1985* (SA), s 11(2)(a)(vi); *Bail Act 1978* (NSW), s 36(2)(a).

65 See also *Bail Act 1977* (Vic), s 5(4).

66 *Bail Act 1992* (ACT), s 25(1)(b); *Bail Act 1996* (NT), s 27(2)(b); *Bail Act 1985* (SA), s 11(2)(b); *Bail Act 1978* (NSW), s 36(2)(b).

67 *Bail Act 1996* (NT), s 27(2)(i).

(a) report periodically or at specific times at a specified place;
(b) reside at a specified place;
(c) undergo psychiatric treatment or other medical treatment;
(d) not commit any act which would constitute domestic violence;
(e) not possess a weapon while on bail, surrender a firearm licence and deliver up any firearm held;
(f) not to contact a specified person;
(g) not harass or molest, or cause another person to harass or molest, a specified person;
(h) not be in or on premises in, or on, which a specified person resides or works;
(i) not be in, on or near premises frequented by a specified person;
(j) not be in the locality of premises in, or on, which a specified person resides or works;
(k) not approach within a specified distance of a specified person;
(l) where a defendant resides with another person, not enter or remain in the place of residence while under the influence of liquor or a drug; and
(m) refrain from making an application for a passport and to surrender any current passport.[68]

7.4 CASH BAIL

Under **section 14A** of the Queensland *Bail Act 1980*, a defendant is permitted to be released on bail on the condition that a cash bail is paid. This system is only employed where the defendant faces a relatively minor charge and not where the defendant faces an indictable offence or any offence detailed in Schedule 2 of the *Bail Act 1980* (Qld), including that of drink driving (**Sections 14** and **14A**).[69] The rationale regarding drink driving is that the shame or inconvenience of a court appearance is considered a necessary part of the defendant's punishment so that the defendant is fully aware that the offence is considered a serious one.[70]

Under the cash bail system, the defendant pays a deposit of money on the granting of bail which is or would be the equivalent value of the likely penalty the defendant would receive if convicted of the offence for which they are charged. If the defendant then fails to appear when required, the money is surrendered to the court. However, the defendant is not expected to return to court and will not be arrested or brought before the court for that failure to appear.

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68 QLRC, *The Bail Act 1980: Report No 43*, pp 52-53.

69 QLRC, *The Bail Act 1980: Report No 43*, p 6.

An important QLRC recommendation with respect to cash bail is that a clause could be inserted clarifying when this option can be employed. They suggested that it only be available where the maximum fine for an offence does not exceed 4 penalty units (which is currently $300). The QLRC made this recommendation by examining at the time the range of offences which allowed the use of this option and then maximum penalties that could be imposed. The cash bail option was used mainly with respect to offences such as use of obscene language, offensive or disorderly behaviour or resisting arrest.[71] Cash bail is also available in the ACT, Tasmania, Victoria and NSW.[72]

7.4.1 Financial Difficulties

The problem with this system is that the defendant must have the cash on them at the time of their arrest and that the granting of bail is still subject to a person's financial status.[73] While in Queensland, the conditions imposed on a defendant's bail should not be more onerous than are necessary having regard to the circumstances of the defendant, other Australian jurisdictions have specific provisions to deal with this issue. The ACT legislation states that a defendant is not required to provide security for a sum of money in order to secure bail where there are reasonable grounds for believing the accused cannot do so.[74] This is because to do so is technically a refusal of bail and, where the decision has already been made to grant bail, such a condition would seem unjustifiably harsh.[75] The matter can then be re-examined by the court. A provision in the South Australian legislation states that:

> *a financial condition must not be imposed … unless … the bail agreement cannot be properly secured by a non-financial condition or combination of such conditions.*[76]

To deal with this situation in Queensland, recommendation 24 made by the QLRC proposed that a provision be inserted into the Queensland *Bail Act 1980 (Qld)* stating that:

> *In determining the level of security required, the financial means of the defendant must be taken into account.*[77]

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70 QLRC, *To bail or not to bail*, pp 50-51.

71 QLRC, *The Bail Act: Working Paper No 41*, p 43.

72 *Bail Act 1992* (ACT), s 25(1)(e); *Bail Act 1994* (Tas), s 7(5); *Bail Act 1977* (Vic), s 11; *Bail Act 1978* (NSW), s 36(2)(g) and (h).

73 QLRC, *The Bail Act 1980: Report No 43*, pp 6-7.

74 *Bail Act 1992* (ACT), s 25(5).

75 QLRC, *To bail or not to bail*, p 53.

76 *Bail Act 1985* (SA), s 11(5).

7.5 ALTERNATIVES TO CUSTODY/REMAND

In addition to bail being granted subject to the various conditions already outlined in this paper, several Australian jurisdictions provide two other alternatives to remanding a defendant in custody. One of the many arguments advanced for decreasing the number of persons held in custody, after their bail application has been rejected, is that the State must carry the cost of keeping that person there. Options for home detention, or a confinement of the defendant to a bail hostel, offer alternatives to prevent such costs.

7.5.1 Home Detention Orders

Under **section 11** of the South Australian *Bail Act 1985*, as a condition of their bail, a defendant can be required to:

> *reside at a specified address being confined to such an address except for remunerated employment, necessary medical or dental treatment, to avert or minimise serious risk of death or injury or for any other purpose approved by the officer over seeing bail.*

In WA, the option of community bail is open to defendants not given bail or who can't meet the conditions set on their bail.[78] Therefore, instead of being remanded into custody, the defendant can apply for:

(a) home detention; or

(b) bail to a community hostel.

To participate in this type of bail, the defendant must be considered 'suitable'. A report is provided by a community corrections officer and is used to discuss the defendant's suitability and to provide information to the decision maker.[79]

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77 QLRC, *The Bail Act 1980: Report No 43*, p 51.

78 *Bail Act 1982* (WA), Schedule 1, Clause 3.

79 *Bail Act 1982* (WA), Schedule 1, Clause 3.

Under Western Australian legislation, **clause 3** of Schedule 1, Part D of the *Bail Act 1982* (WA) states:

> *A home detention condition may be imposed where the defendant is considered a suitable candidate for the imposition of such a condition given the situation of the defendant and their circumstances, that the proposed place of residence is suitable and that with the imposition of such a condition, the defendant would not be released on bail.*

While on these releases, the defendant must:

(a) not commit any offence;

(b) allow the community corrections officers into the home or place of work at any time to check on the defendant; and

(c) comply with every reasonable direction of a community corrections officer.[80]

Special conditions such as not drinking alcohol may also be imposed.[81]

Specifically, home detention in WA involves the defendant:

(a) living at a specified residence and remaining there unless the defendant must leave in order to work in approved gainful employment, to seek such work, to obtain urgent medical or dental treatment, to avert or minimise serious risk of death or injury, to obey a lawful order, such as a court order, to be elsewhere for any purpose approved by the community corrections officer supervising the defendant's home detention or under a direction given such an officer;

(b) not leaving the state; and

(c) complying with every reasonable direction of a community corrections officer.[82]

The defendant can be required to live at their own residence or at the residence of a sponsor and an electronic wristlet can be worn so the defendant's presence at home can be confirmed.[83]

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80 Western Australia. Ministry of Justice, 'Community Bail', http://www.moj.wa.gov.au/division/offend/combail.htm, last updated 16 February 1998, downloaded 8 February 2000.

81 Western Australia. Ministry of Justice, 'Community Bail'.

82 *Bail Act 1982* (WA), Schedule 1, Clause 3(3).

83 Western Australia. Ministry of Justice, 'Community Bail'.

7.5.2 Bail Hostels

During the QLRC investigation of bail issues, it was suggested that there be an "*introduction of bail hostels as an alternative to incarceration in Queensland*".[84] The use of bail hostels was a UK initiative and Australia's first bail hostel opened in Fremantle, WA in July 1983. It has been estimated that the cost of maintaining a person in a bail hostel was less than a third of the cost of keeping a person in prison.[85] In addition, it was "*noted that many women prisoners are responsible for children and will have to place them* [in care] *if bail is denied*".[86] Therefore, bailing such a defendant to a hostel may be more appropriate for women in these situations.

Further, it was "*suggested that* [these] *prisoners may benefit from being referred to a centre that is … suited to* [defendants with] *young children in particular*".[87]

It was also argued that:

> *a bail hostel for women who are refused bail would minimise the trauma of separation from their children and may allow women to deal with other issues in their lives such as domestic violence, need for parenting support and access to community resources.*[88]

In WA, under this type of order, the defendant must reside at the nominated hostel for the duration of the bail period. Hostels are run by charitable and non-government agencies. Generally, residents at the hostel are able to move around freely between the hours of 6 am and 11 pm but the defendant's residence at the hostel is monitored.[89]

An unemployed or homeless person is at "*a greater risk of being kept in prison before trial*" and, thus, is potentially disadvantaged by their poverty. Bail hostels assist in addressing this problem.[90]

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84 Taskforce on Women and the Criminal Code, *Discussion Paper*, Queensland. Department of Justice and Attorney-General and Queensland. Office of Women's Policy, Department of Equity and Fair Trading, Brisbane, September 1999, p 216.

85 QLRC, *To bail or not to bail*, p 30.

86 Taskforce on Women and the Criminal Code, p 216.

87 Taskforce on Women and the Criminal Code, p 216.

88 Taskforce on Women and the Criminal Code, p 216.

89 QLRC, *To bail or not to bail*, p 29 and Western Australia. Ministry of Justice, 'Community Bail'.

90 QLRC, *To bail or not to bail*, p 27.

8. BAIL REVIEWS

8.1 AUTOMATIC REVIEW OF THE DEFENDANT'S SITUATION

A further issue dealt with by the QLRC was the lack of clarity in the *Bail Act 1980* (Qld) regarding the rights of a defendant to have their bail situation initially heard and then reviewed to ensure that they are not being unreasonably held in detention. **Section 7(1)(b)** of the *Bail Act 1980* (Qld) ensures there is a duty on members of the police service or watchhouse keepers to consider the granting of bail to some defendants where they have the power to grant bail to that person. Therefore, defendants must be released on bail if they are not brought before a court to have their bail application heard within 24 hours of their first having been detained. The QLRC has argued this clause should remain to ensure that a defendant is still brought before the courts within 24 hours even if amendments are made to give a defendant a right to bail.[91]

Under **section 19B** of the *Bail Act 1980* (Qld), a bail review may be applied for by the defendant, complainant, prosecutor or person appearing on behalf of the Crown except where the decision has been made by the Supreme Court, made by a Magistrate acting as a reviewing court or with respect to bail decisions made under **section 10(2)** (General Powers of Bail). **Section 19C** allows the defendant or the Crown to seek a review of a Magistrate's decision by the Supreme Court if the Supreme Court agrees to do so.

After a police officer has refused a defendant bail, a court may override this decision at any time. Generally, a court does not re-consider the defendant's bail unless the defendant applies for it and those who do not apply for bail when they first appear continue to be kept in gaol.[92] This is problematic because the ability of some defendants to make bail applications is restricted. Many cannot afford to pay for a private lawyer and, therefore, often must rely on the Legal Aid Commission or the Public Defender's Office.[93] These organisations cannot always provide a defendant with any assistance and defendants wishing to apply for bail must present their own cases. This is a difficult task for most defendants because of a:

> … *lack of familiarity with what to say and do in court, lack of legal advice in presenting their best case, and restricted ability to communicate with those outside gaol whose assistance or evidence may sway a court to grant bail*[94]

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91 Recommendation 6, QLRC, *The Bail Act 1980: Report No 43*, p 47.

92 QLRC, *To bail or not to bail*, p 13.

93 QLRC, *To bail or not to bail*, p 13.

94 QLRC, *To bail or not to bail*, p 13.

and within the courtroom itself.

The QLRC, therefore, made a recommendation that a system of automatic review be adopted in Queensland. Under this system, a magistrates court is to be given the responsibility to review a defendant's bail status if the defendant is still being held by police or in a watchhouse after a period of eight days from the date of the grant of bail by a magistrate. The timeframe was chosen because it was not considered too short so as to prove a disincentive for a defendant to comply with any financial commitment imposed and it was consistent with other relevant legislation.[95]

The CJC has also suggested "*the enactment of a statutory provision to minimise the length of stay by prisoners in watchhouses"*.[96]

In South Australia, however, **section 11(9)** of the *Bail Act 1985* states that where a person is granted bail on certain conditions and cannot meet them, the person must be returned for a review of their position as soon as reasonably practicable and at least each five working days.

8.2 REVIEW FOLLOWING THE DEFENDANT'S CONVICTION AND/OR SENTENCING BUT PRIOR TO THE HEARING OF AN APPEAL

In this scenario, a determination by a court of the defendant's guilt adds an important factor to any decision regarding their bail status. Hence, a court will only grant a defendant bail in very limited circumstances; "*very exceptional*", "e*xceptional*", "*exceptional or unusual*" *or* "*special*" circumstances,[97] once they have been convicted of the offence.

The court will consider:

(a) whether there are special circumstances which show that an error was made in the proceedings that resulted in the conviction;

(b) the nature of the offence and the sentence received;

(c) whether there is a risk that all or most of the sentence received will be served before an appeal can be heard.[98]

Appeal bail is not granted very often because court proceedings and decisions are usually treated as correct unless they are proved wrong by the Court of Appeal.

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95 QLRC, *The Bail Act: Working Paper No 41*, p 40 and QLRC, *The Bail Act 1980: Report No 43*, pp 36 & 50.

96 CJC, *Reports on Aboriginal Witnesses and Police Watchhouses*, p 25.

97 QLRC, *To bail or not to bail*, p 66.

98 Prisoner's Legal Service and Legal Aid Office (Queensland), *Bail-by-Mail: Self-Help Kit*, Brisbane, 1998, p 37.

It was recommended by the QRLC in their final report that the *Bail Act 1980* (Qld) be amended to allow a convicted person to be granted bail "*in special or exceptional circumstances*".[99] While there is Queensland case law which gives some guidance as to when this type of bail has been granted,[100] the QLRC in their 1993 Working Paper indicated that it would not recommend "*any attempt to define what constitutes special or exceptional circumstances, other than to provide that the risk that a significant part of the sentence will be served before the appeal is heard*".[101]

8.3 DISTRICT COURT AS MAIN COURT OF REVIEW

With respect to the review of bail decisions, the QLRC has made a proposal to make the District Court the main court of review of bail decisions, that is, to extend that court's power to hear applications but only after the Magistrates Court has already dealt with any matter it is permitted to.[102] In support of this proposal, the QLRC argues that there are more District Court, than Supreme Court, sittings around Queensland to hear a review and it is often more convenient for it to do so. The Supreme Court would still remain the final court in this matter.[103]

9. BAIL ISSUES AND ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

Recommendation 90 of the Royal Commission into Aboriginal Deaths in Custody Report stated that where police bail is denied to an Aboriginal person, or granted on terms that cannot be met, the Aboriginal Legal Service should be notified and an officer granted access to that person.[104]

Recommendation 27 of the QLRC Report into the Queensland *Bail Act 1980 (Qld)* argued that this requirement be implemented in Queensland and should be extended

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99 QLRC, *The Bail Act: Working Paper No 41*, pp 69-71 and QLRC, *The Bail Act 1980: Report No 43*, p 54, Recommendation 30.

100 See for example *Chamberlain* v *The Queen (no 1)* (1983) 153 CLR 514; *Ex parte Maher* [1986] 1 Qd R 303.

101 QLRC, *The Bail Act: Working Paper No 41*, p 71.

102 QLRC, *The Bail Act: Working Paper No 41*, p 7 and QLRC, *The Bail Act 1980: Report No 43*, pp 27-28 & 45, Recommendation 3.

103 QLRC, *The Bail Act: Working Paper No 41*, p 7-8 and QLRC, *The Bail Act 1980: Report No 43*, p 45, Recommendation 4.

104 Royal Commission into Aboriginal Deaths in Custody, *Report Vol 3*, AGPS, Canberra, 1991, pp 54-55.

to include Torres Strait Islander people held in police custody. The argument made in support of this proposal is that Aboriginal defendants face disadvantages within the criminal justice system and care must be taken to ensure that they are not needlessly detained in police custody.[105] The RCIADIC Report suggested that Aboriginal defendants be given additional assistance because the disabilities that affect them are related to their Aboriginality. One way to do this is to ensure they have access to legal representation and not just when they request it.[106] The QLRC argued that since Torres Strait Islander defendants also face the same sort of disabilities as Aboriginal defendants, there is good reason to extend this consideration to them also.[107] The QLRC has also recommended that all defendants detained must be informed of their right to speak to a legal practitioner or another who can assist them with seeking bail.[108]

Section 96 of the *Police Powers and Responsibilities Act 1997* (Qld) outlines certain provisions to deal with these concerns. Prior to the questioning of an Aboriginal or Torres Strait Islander defendant, and unless the defendant has arranged their own lawyer, the police officer must inform a legal aid representative that such a defendant is being held in custody as soon as reasonably practicable. This section, however, does not apply if the officer reasonably suspects that the defendant is not at a disadvantage in comparison with the members of the Australian community generally, given their level of education and understanding. In addition, these rights are also subject to the proviso that the police officer does not reasonably suspect that, if they were to allow this communication, the defendant would be able to undermine the efficacy of the criminal justice process.[109]

10. BAIL AND VICTIMS OF CRIME

Under the *Criminal Offence Victims Act 1995* (Qld), **section 12** states that a victim of crime is entitled to be protected from violence and intimidation from an accused person. This entitlement extends to being informed of a bail decision regarding the accused person where it would help the victim to be protected in such a way.

Section 15 deals with the provision of information to a victim regarding any police investigation or the prosecution of the alleged offender. Under this section, a victim should be advised, upon request, if the defendant is released on bail or

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105 QLRC, *The Bail Act: Working Paper No 41*, p 57 and QLRC, *The Bail Act 1980: Report No 43*, pp 39-40.

106 QLRC, *The Bail Act 1980: Report No 43*, pp 39-40.

107 QLRC, *The Bail Act 1980: Report No 43*, pp 40 & 53, Recommendation 27.

108 QLRC, *The Bail Act 1980: Report No 43*, pp 46-47, Recommendation 6.

109 *Police Powers and Responsibilities Act 1997* (Qld), s 106.

otherwise, before the proceeding on the charge is finished. Details of the conditions and arrangements governing that release can be given. These rights, however, are not able to be legally enforced by a victim. They provide guidelines as to how a victim should expect to be treated by the those within the criminal justice system.

An example of a similar interstate provision is **section 23A** of the Bail Act in the ACT. That section outlines that, with respect to granting bail, a court can inform itself of the victim's expressed need for protection from violence or harassment by the accused. **Section 27A** goes on to say that where such concern has been expressed, all reasonable steps should be taken to inform the victim where any grant of bail to the defendant is made and on what conditions such a grant is made. **Section 46A** states that the victim must be likewise informed of any decision made under a review of a bail decision.

In SA, **section 10(4)** of the *Bail Act 1985*, establishes that, in the making of a bail decision regarding the granting of bail to a defendant, the authority must give primary consideration to the victim's need, perceived or otherwise, for physical protection from the defendant. The Crown may make submissions on behalf of the victim regarding the granting of bail and the authority should give "*special consideration*" to these submissions when deciding the conditions of the bail grant (**Section 11(2a)**).

11. BAIL AND DOMESTIC VIOLENCE

The bail laws in most Australian jurisdictions generally provide that where a defendant is charged with domestic violence offences, with the breaching of a restraining order or where they are detained for the purposes of obtaining a restraining order in order to protect the victims of the offence, there is a presumption against granting that defendant bail.

The QLRC has recommended that a specific reference should be made in the *Bail Act 1980 (Qld)* detailing on what grounds bail may not be justified where the defendant involved has been charged with a domestic violence offence. The Commission went on to recommend that any definition of a 'domestic violence offence' be modelled on the NSW definition, which the QLRC argued at the time was broader in scope than Queensland's, but to modify it to reflect the differences of the *Queensland Criminal Code*.[110]

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[110] QLRC, *The Bail Act: Working Paper No 41*, pp 18-19 and QLRC, *The Bail Act 1980: Report No 43*, p 47, Recommendation 8.

The NSW definition currently states that a domestic violence offence is a personal violence offence committed against specific classes of persons.[111] A personal violence offence is considered to be any of a listed number of offences in the *Crimes Act 1900* (NSW). These offences include, for example, the commission of, or attempting to commit, an offence of manslaughter, wounding with intent to do bodily harm, malicious wounding or infliction of grievous bodily harm, assault, sexual assault, indecent assault, maliciously destroying or damaging property, to do so with the intent to injure a person or endanger life and contravening an apprehended violence order. Some of these examples are recent additions which have been passed by the NSW Parliament but not yet proclaimed. [112]

Section 11 of the Queensland *Domestic Violence (Family Protection) Act 1989* defines domestic violence as the committal against a 'spouse' of:

a) wilful injury;

b) wilful damage to the spouse's property;

c) intimidation or harassment of the spouse;

d) indecent behaviour to the spouse without consent; and

e) a threat to commit an act mentioned in paragraphs (a) to (d).

While these categories seem to cover all the offences listed in the NSW *Crimes Act 1900*, the NSW Act does extend its coverage to a wider range of people. A 'spouse', under the Queensland Act, currently covers married couples, heterosexual de facto couples and the biological parents of a child (**Section 12(1)**). Amendments passed late in 1999, but not yet proclaimed, now extend this coverage to same-sex couples.[113]

However, in NSW, the specific categories of people who can be protected include, in addition to those covered in Queensland,:

(a) "*a person who is living with or has lived ordinarily in the same household as the person who commits the offence (otherwise than merely as a tenant or boarder)*"; or

(b) "*a person who is or has been a relative … of the person who commits the offence*"; or

(c) "*a person who has or has had an intimate personal relationship with the person who commits the offence*".[114]

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111 *Crimes Act 1900* (NSW), s 4.

112 *Crimes Act 1900* (NSW), s 4 and *Crimes Amendment (Apprehended Violence) Act 1999* (NSW), Schedule 1, 2.

113 See *Domestic Violence (Family Protection) Amendment Act 1999* (Qld) and Hon AM Bligh MLA, *Queensland Parliamentary Debates*, 12 November 1999, p 5057.

114 *Crimes Act 1900* (NSW), s 4.

The new amendments in the *Crimes Amendment (Apprehended Violence) Act* 1999 (NSW) clarify that an intimate relationship does not necessarily have to be sexual in nature, omits the tenant/boarder qualification and adds the category of "*person who has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the person who commits the offence*".[115]

In addition, there was a recommendation that, in all domestic violence cases, certain persons should be notified where the applicant is granted bail, ie. those who would be at risk of further possible violence, for example, able to be protected by a domestic violence order under **section 15** of the *Domestic Violence (Family Protection) Act 1989* (Qld) which includes a spouse, their relatives or associates.[116]

Another option is to state that there should be no presumption of bail in any incidence of domestic violence. The QLRC considers that measures, which direct the bail-granting authority's attention to the seriousness of domestic violence and the community's concern with its incidence, are sufficient. For example, amendments could be included to allow the probability of any future breach of a reasonable bail condition or future breach of a protection order to be taken into consideration and to be a reason to refuse bail.[117]

A suggestion was also made that a complainant in a domestic violence matter be able to request a review of a decision to grant bail and/or the conditions on which that grant is made. The QLRC argued against this option on the basis that they believed the current provisions were sufficient. A victim is currently permitted to alert a police officer to any potential breaches of a protection order and that officer may arrest the defendant without a warrant. Further, the QLRC argued, the extension of such a right to a complainant for this type of offence only, is difficult to justify.[118]

A further suggestion was made by the QLRC that where bail is granted on a domestic violence charge, there should be a mandatory requirement that the defendant surrender any firearms they possess and have any current firearms licences revoked. Again, the QLRC argued that this should not be made a condition for one type of offence only but that it could be made a condition of the bail granted with respect to any defendant facing criminal charges.[119] However, **section 23** of the *Domestic Violence (Family Protection) Act 1989* (Qld) provides that a domestic violence order must include a condition that the defendant not be

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115 *Crimes Amendment (Apprehended Violence) Act 1999* (NSW), Schedule 1, 1.

116 QLRC, *The Bail Act 1980: Report No 43*, p 47, Recommendation 8.

117 QLRC, *The Bail Act: Working Paper No 41*, p 18.

118 QLRC, *The Bail Act 1980: Report No 43*, p 33.

119 QLRC, *The Bail Act 1980: Report No 43*, p 33 & 48, Recommendation 8.

allowed to possess a weapon for the duration of the order and that all weapons licences are to be revoked on the making of that protection order. **Section 74** of that Act provides that the defendant spouse must give any weapons they possess to the police when such an order is made against them.

More recently, the 1999 Discussion Paper released by the Women and the Criminal Code Taskforce commented that the Women's Legal Service had suggested, in its submission to the QLRC, that an "*investigation and analysis of the system*" operating in NSW at that time be undertaken.[120] In NSW, the presumption in favour of granting bail does not apply to domestic violence offences where the alleged offender has:

(a) a history of violence;

(b) been violent to the other person in the past (despite the lack of a conviction); or

(c) failed to comply with a bail condition in respect of the offence to which this section applies that was imposed for the protection and welfare of the other person.[121]

On a person being charged with such an offence, certain data is collected from the alleged offender to help in the development of prevention services.

In the ACT, **section 8A** of their Bail Act states that bail should not be granted unless, on the balance of probabilities, the officer making the bail decision believes no danger is posed to the victim or victims of the alleged offence.

12. RIGHTS OF A DEFENDANT WHILE IN CUSTODY

Recommendation 6 of the QLRC Report included that provisions be introduced to ensure that:

(a) a police officer must inform a defendant in custody that they are entitled to be released on bail subject to the refusal being justified on the basis of a consideration of matters set out in the Act; and

(b) if the person does not speak English, to inform the person of the right to an interpreter. One must be provided if requested by the person held in custody and if it is reasonably practicable to do so, in order for the person to be assisted in communicating with members of the police service.

(c) where bail is refused, the defendant must be informed of the reasons for the decision and right to have that decision reviewed.

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120 Taskforce on Women and the Criminal Code, pp 213-214.

121 *Bail Act 1978* (NSW), s 9A.

In addition, the person is to be allowed to speak or communicate with an interpreter, legal practitioner or any other person who might be able to assist the defendant make an application for a review of the decision to refuse to grant them bail. In order to assist in protecting these rights, there is to be an obligation on the part of those holding the person in custody, to provide appropriate facilities to allow this communication to take place. However, the exception to this would be where, to not do so, is believed to be reasonably necessary to prevent the escape of the defendant, of an accomplice of the defendant or the loss or destruction of evidence. This information provided to the person held in custody should be in written form and also be read to the defendant. It should be in clear and simple language.[122]

The NSW and ACT Acts refer to the provision of good facilities to enable the communication between the defendant and their interpreter or legal representative to take place. The cost for this is to be borne by the Police Service. The defendant is to be provided with facilities for washing and a change of clothing before their first court appearance where it is reasonably practicable to do so.[123] The reasoning behind the provision of these facilities is that it may improve a person's capacity to obtain bail because of enhanced physical appearance or presentation. It may also enhance a person's psychological capacity to deal with the process.[124] In Tasmania, the police must inform a defendant held in custody of their right to apply for bail and to meet and communicate with a legal practitioner or any other person about that application for bail.[125]

These measures were adopted in Queensland when the *Police Powers and Responsibilities Act 1997* (Qld) came into force in April 1998. A defendant, prior to being questioned by police, is entitled to communicate with a friend, relative or lawyer and the police are responsible for providing reasonable facilities for this to occur.[126] The proviso to this right is, if the police officer reasonably suspects that if they were to do so, it is likely that communication would result in:

a) an accomplice or accessory … taking steps to avoid apprehension; or

b) an accomplice or accessory being present during questioning; or

c) evidence being concealed, fabricated or destroyed; or

d) a witness being intimidated.[127]

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122 QLRC, *The Bail Act 1980: Report No 43*, pp 46-47 and QLRC, *The Bail Act: Working Paper No 41*, pp 13-14 and Chapters 7 & 10.

123 *Bail Act 1992* (ACT), s 18; *Bail Act 1978* (NSW), s 21.

124 QLRC, *The Bail Act: Working Paper No 41*, p 25.

125 *Criminal Law (Detention & Interrogation) Act 1995* (Tas), ss 5-6.

126 *Police Powers and Responsibilities Act 1997* (Qld), s 95.

127 *Police Powers and Responsibilities Act 1997* (Qld), s 106.

In addition, a defendant is entitled to an interpreter where the police officer reasonably suspects the defendant is unable to speak with reasonable fluency in English because of an inadequate knowledge of the English language or a physical disability.[128]

In addition, the QLRC considered whether or not those refused bail should be compensated for the time they were held in custody if they are eventually found to be innocent of the charges against them.[129] This suggestion was made because of a concern held by the Commission that some defendants were spending lengthy periods of time in jail while awaiting trial and, that where they were subsequently found not guilty, this deprivation of liberty should be compensated for. However, this option was rejected by the Commission in their final report. The reasoning of the Commission was that a failure to achieve a conviction at trial did not mean that the decision to refuse bail was incorrect. A decision regarding whether or not to grant bail is based on the criteria set out in the *Bail Act 1980 (Qld)* and not on whether or not the defendant was guilty of the offence beyond a reasonable doubt.[130]

13. BAIL AND SPECIAL CATEGORIES OF DEFENDANTS

13.1 WOMEN

Recommendation 24 of the QLRC Report states that there should be a consideration of the financial means of a defendant where considering the level of security required in order for the defendant to obtain bail. This recommendation is particularly important for female defendants. Women are often less financially well-off than men and, therefore, disadvantaged in being able to raise the money for this security to obtain bail.[131] The issues relating to domestic violence and bail are also particularly pertinent to women.

13.2 YOUNG OFFENDERS

While the provisions of the *Bail Act 1980* (Qld) apply to children as well as adults, the *Juvenile Justice Act 1992* (Qld) governs most of the dealings between the criminal justice system in Queensland and a child defendant. **Section 4(b)** of the

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128 *Police Powers and Responsibilities Act 1997* (Qld), s 101.

129 QLRC, *To bail or not to bail*, p 58 and QLRC, *The Bail Act: Working Paper No 41*, p 74.

130 QLRC, *The Bail Act 1980: Report No 43*, pp 23 & 54.

131 Taskforce on Women and the Criminal Code, p 213.

Juvenile Justice Act states that a child should be detained in custody only as a last resort and, if so held, it must be in a facility suitable to house a child. If the child is arrested they then must be either brought before the Children's Court promptly or, if it is not practicable to do so, the child must be granted bail or released from custody unless the *Bail Act 1980 (Qld)* otherwise provides.[132] The child may be released into the custody of a parent or allowed to go at large without bail.[133]

The *Juvenile Justice Act 1992* (Qld) is currently under review and there have been suggestions that reform might need to occur with respect to the bail framework in relation to young defendants. The issues raised included:

(a) the establishment of special bail provisions in the Juvenile Justice Act 1992;
(b) the inclusion of a presumption in favour of a child's release on bail, particularly for children under 14 years;
(c) the role of "show cause" provisions in relation to young people; and
(d) the ability to make applications through audio and audio visual links.[134]

In their final report in 1993, the QLRC recommended that:

(a) the *Bail Act 1980 (Qld)* should contain a duty to grant bail to young defendants;
(b) when the only ground for the refusal of bail is the welfare of the child, notification of the refusal should be given, where reasonably practicable, to the child's parents; and
(c) notification should be given to the relevant government department where a child is taken into police custody.[135]

The *Bail Act 1980* (Qld) states that bail may be refused to a person where the police or a court are satisfied that the person should remain in custody for their own protection or welfare (**Section 16(1)(b)**). However, if this section is applied to a young person, they may find that they remain in watchhouse custody if there are staff or bed shortages at the correctional centres where they might normally be held.[136]

In their submission to the QLRC review, the Youth Advocacy Centre Inc stated that:

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[132] Section 46(3) of the *Juvenile Justice Act* provides that a child charged with an offence mentioned in the *Bail Act 1980* under s 13 may be granted bail by a Children's Court judge, despite s 13.

[133] *Juvenile Justice Act 1992* (Qld), s 39(2).

[134] Queensland. Department of Families, Youth and Community Care, *Review of Juvenile Justice Legislation – Discussion Paper*, Brisbane, June 1999, p 2.

[135] QLRC, *The Bail Act 1980: Report No 43*, p 54, Recommendation 29.

[136] QLRC, *To bail or not to bail*, p 19.

> *The watchhouse experience increases the prospect of 'criminalising' young people, either in their own, their peers', or authorities' perception, and may lead to further involvement in the criminal justice system …. For homeless youth, the chances of detention in a watchhouse are, of course, greater, which means further stigmatising and problems for this doubly disadvantaged group*.[137]

The Commission also argued for the removal of the provision that allows a child to be denied bail on welfare grounds. They go on to say that the removal of this provision will not stop police from being able to commence care and protection applications to ensure a young person's welfare is provided for and that the question of the child's welfare should not be dealt with through the *Bail Act 1980* (Qld).[138]

Often, police have problems granting bail to young people because the youth has "*no fixed place of abode*" either because that is the case or they may not wish to give the officer their details. This is because there is a fear that, without an address, a young person would be difficult to find.[139] In the *Bail Act 1978* (NSW), it is stated that, having regard to the juvenile defendant's details of residence, the fact that the child does not live with a parent or guardian is to be ignored by the person making the bail decision (**Section 32**). Victorian legislation provides that bail cannot be refused because a young person has no, or inadequate, accommodation.[140] In addition, in 1989, the Human Rights and Equal Opportunity Commission report into homeless youth recommended that bail legislation should specifically state that lack of accommodation is not sufficient reason to refuse bail.[141]

It should be noted that conditions that can be applied to a grant of bail in Queensland are no different for adult and young defendants. This can create problems for young defendants in being able to meet their bail conditions. For example, securities and sureties are often used to secure the bail undertaking of adult defendants but it is unrealistic to expect that young defendants, particularly those who are homeless or with access to only limited financial resources, will be able to meet the same conditions. Conditions considered more appropriate to young defendants could include –

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

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137 QLRC, *To bail or not to bail*, p 19.

138 QLRC, *To bail or not to bail*, p 20.

139 QLRC, *To bail or not to bail*, p 20.

140 *Children and Young Persons Act 1989* (Vic), s 129(7).

141 Human Rights and Equal Opportunity Commission, *Our Homeless Children: Report of National Inquiry into Homeless Children*, Canberra, 1989, p 265.

- restrictions from attending particular places.[142]

13.3 BAIL AND PERSONS WITH DISABILITIES

The recent Report of the Women's Taskforce into the Queensland Criminal Code proposed that the *Bail Act 1980 (Qld)* might be amended to allow an accused person's disability (whether physical, sensory, intellectual or mental) to be taken into account when their conditions of bail are set. The Taskforce's Discussion Paper points out that persons with intellectual disabilities, in particular, have difficulty not breaching their bail conditions. This is generally because they may have difficulty understanding or not understand at all what their conditions of bail require of them. The Taskforce further argues that those defendants with other disabilities also face difficulties in abiding by their bail conditions and that, therefore, the same consideration should be given to these defendants as to those defendants with an intellectual disability.[143]

The NSW *Bail Act 1978* states that, before imposing any bail condition on a defendant with an intellectual disability, the police or judicial officer must be satisfied that it is appropriate regarding the capacity of the accused person.[144] However, it may be more important that an accused with a disability knows and understands what is required of them. This role can be undertaken by the defendant's legal representative, if they have one, but the police must also be responsible in ensuring that it is explained to the defendant.[145] In addition, the Queensland Taskforce suggested further action to assist such a defendant, for example, by allowing for the release of the defendant into the custody of a 'responsible person' where the person is judged not to have the capacity to understand the terms of their bail.[146]

14. CONCLUSION

After surveying the laws relating to bail in Queensland, it is apparent that the issue raises serious, complex questions about how our criminal justice system might operate. This is highlighted by the fundamental role bail plays in maintaining a balance between the rights of the defendant and those of the community in ensuring that the criminal justice system is effective.

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142 QLRC, *To bail or not to bail*, p 21-22.

143 Taskforce on Women and the Criminal Code, p 214.

144 Taskforce on Women and the Criminal Code, p 214.

145 Taskforce on Women and the Criminal Code, p 214-215.

146 Taskforce on Women and the Criminal Code, p 215.

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