THE CRIMINAL LAW REFORM COMMITTEE'S REPORT ON BAIL

I. INTRODUCTION

Following two years of deliberation the Criminal Law Reform Committee completed its report on bail in December 1982. The Report was published early in 1983 and recommends, as its central thesis, the enactment of "a comprehensive Code; a new Bail Act which, with certain very limited exceptions, will deal exhaustively with the grant of bail to persons aged 17 or over".[1] To date the Report has not been subjected to rigorous examination or criticism, although many of its recommendations are likely to meet with substantial approval insofar as they purport to relieve the uncertainty and inconsistency of the present rules governing bail in New Zealand.

The Report advocates the implementation of a more liberal policy towards bail by establishing, within a restructured system for the operation of bail, a Code of Practice for the determination of bail applications. While, as the Report notes, there has been little criticism of the principles governing the discretion to grant bail, "they are uncodified and must be extracted from a rather ill-developed body of case law".[2] Its recommendations are largely coherent and practicable and, if enacted, will greatly assist the courts in the exercise of their discretion as to whether or not to grant bail by specifiying and clearly defining principles. The effect of such clarification of principles together with other recommendations, such as the presumption in favour of bail,[3] will, it is submitted, ensure that custodial remands in future are substantially reduced in number and that injustices resulting from anomalies within the present rules should be eliminated.[4]

II. SCHEME OF THE RECOMMENDATION

Fundamental to the proposed bail code is a presumption in favour of bail rebuttable by three risks. In adopting the presumption, the Report appears to follow closely the statutory presumption in favour of bail contained in s 4(1) Bail Act 1976 (England and Wales), which provides for a general, presumed right to bail for all accused persons. It is submitted that the significance of this principle is that the courts will now have a duty to consider the question of bail, even in circumstances where the accused did not actually apply for bail:

> The Code should lay down a general rule that bail must be granted unless there is sufficient reason to the contrary, and as far as possible it should define that sufficient reason.

In addition, the choice by the majority of the Committee of a standard of "reasonable gounds for believing that the defendant" would fail to surrender,

1 *Report*, 1.

2 *Ibid*, 21. See also Oxley, *Remand and Bail Decisions in a Magistrates' Court*, Dept of Justice. 1979. "But much interpreted vagueness still exists in applying these rules to specific cases." (p 12).

3 *Report*, 23.

4 The *Report* notes two circumstances in which there is presently no jurisdiction to grant bail. (a) In the case of a petition for special leave to appeal to the Privy Council, neither the High Court nor the Court of Appeal has the power to grant bail. (b) On unsuccessful appeal to the High Court from the District Court, intending further appeal to the Court of Appeal, no Court has jurisdiction to grant bail.

commit further offences while on bail, or interfere with witnesses, as the appropriate test for calculating the degree of risk of offence occurring should bail be granted, may suggest the imposition of an additional onus upon the police of showing good cause why bail should not be granted.

In any event, the presumption in favour of bail is the central focus of the Committee's recommendations and the remaining recommendations need to be evaluated in this light. Although some might seek to argue that such a provision is likely to prove ineffectual and is unnecessary, granted the traditional discretion enjoyed by the courts to grant or refuse bail, such an attitude fails to take account of the fact that the underlying philosophy of the Report's proposals is the maximisation of the grant of bail to the extent that this does not conflict with the interests of the community.

Although it is true that the courts have traditionally enjoyed a discretion in relation to the grant or refusal of bail, New Zealand law has never attempted to restrict by statute the discretion of the judicial officers to refuse bail, far less to define the general criteria to be applied when determining bail applications. In advocating a presumption in favour of bail, the Criminal Law Reform Committee proposes, in line with the English legislation, that the presumption in favour of bail should be rebuttable on the grounds supported by the common law authorities, namely:

1. The risk that the defendant would fail to attempt to answer his bail.
2. The risk that he would commit an offence or offences while on bail.
3. The risk that he would interfere with witnesses or otherwise obstruct the course of justice.

Of course, such limitations upon the presumption do not affect the category of offenders bailable as of right,[6] which, the Committee recommends, should be retained subject to certain modifications to the existing provisions. These modifications do not affect the substance of the bail as of right provision and are primarily geared at rationalising and simplifying the provision. Included are proposals that the courts have the same power to impose conditions as is proposed in respect of other cases, and that the anomalous s 319(3) Crimes Act 1961 (containing a list of offences punishable by 3 or more years imprisonment that are amenable to bail as of right) be repealed and not replaced.

In its Report the Committee also addresses itself to the question of the factors which should be taken into account at any bail decision as secondary or evidential considerations in determining the likelihood of a defendant surrendering to custody to stand trial. These effectively mirror the statutory considerations contained in the Bail Act 1976,[7] which include, (1) the nature and seriousness of the default; (2) the character antecedents and associations and community ties of the defendant; (3) the defendant's record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings; (4) the strength of his evidence of his having committed the offence or having defaulted, as well as other relevant matters. Insofar as the English legislation is concerned, the stating of the considerations relevant to any of the risks in the

5 *Report*, 23.

6 Both the English and NSW Bail Acts, while providing for a stronger presumption in favour of bail in respect of minor (generally non-imprisonable) offences, fall short of granting an automatic entitlement to bail as does s 319 of the Crimes Act 1961 in respect of a wide range of defendants.

7 Schedule I, Part I, para 9.

statute is a recognition that the stated grounds on which bail may be refused are exhaustive.[8]

> The additional considerations may be relevant but they must be referable to one, usually the first, of the stated criteria.[9]

However, the approach of the Criminal law Reform Committee has been to reject the idea of an exhaustive list of statutory considerations, preferring instead to give statutory "guidance" by identifying matters bound to be of most importance in practice, but accommodating other cases by enabling the court to have regard to other relevant considerations.[10]

However, it is submitted that, whichever approach is preferred, the effect of a list of statutory considerations, whether exhaustive or not, will be to ensure that the prospective bail applicant's circumstances are looked at globally, and that any decision to refuse bail should be based on a consideration of the totality of the applicant's circumstances and not merely upon a narrow police concern based on the defendant's criminal record and the strength of the case against him/her. It is to be hoped that the implementation of such provisions would be effective in limiting unjustified objections to bail made by the police and the incidence of pre-trial preventive detention.[11]

III. OTHER FACTORS RELEVANT TO THE IMPLEMENTATION OF THE LEGISLATIVE SCHEME

The Report notes, in considering the bail hearing,[12] that most bail applications are dealt with informally in Chambers, with both defence and prosecution making verbal submissions. Sworn evidence is rarely presented and the informal nature of the proceedings allows for "speedy disposition".[13] However, an arguable defect of the existing procedures is the fact that most of the information about the accused tends to be negative in the sense that it relates to such matters as the seriousness of the offence charged, the strength of the prosecution case, and previous convictions. Rarely is sufficient positive information placed before the Court which might inform the Court of the accused's total circumstances, insofar as these are relevant to the bail application.

In recognition of this potential unfairness, the Report recommends that legislation provide that the Court be empowered to receive as evidence "any statement, document, information or letter which it considers relevant whether or not it would be admissable under the ordinary laws of evidence".[14] In addition, it recommends that the Court should have the power to receive evidence on oath upon which either party may cross-examine, although, if the accused elects to give evidence thereby opening himself to cross-examination, any admissions made by him in asserting his prima facie right to pre-trial liberty should not automatically be available against him at his trial.[15]

8 Gravells, 'Bail Act 1976', 40 MLR 561 at 563.
9 *Ibid.*
10 *Report*, 30.
11 Cf ". . . the police emerge as a very strong influence in the remand decision" Oxley, *supra*, 116.
12 *Report*, 72.
13 *Ibid.*
14 *Report*, 73. Oxley suggests that measures aimed at increasing the information available to the judiciary about the defendant's social responsibilities would tend to counterbalance the influence of the prosecution and assist the Court in making a realistic assessment of the suitability for bail. *Supra*, 116.
15 *Report*, 74.

However, in spite of the apparently liberal view towards the reception of evidence appurtenant to the bail application, the Report rejects the idea of implementing a Vera scheme,[16] whereby a voluntary agency or agents conduct a pre-trial investigation with a view to maximising any information available to the Court in determining the merits of an application for bail. The Committee considered that the New Zealand conditions do not justify the establishment of such a concept as part of the statutory scheme, but that the role of the duty solicitor could be expanded by giving duty solicitors a form to cover information relevant to the bail decision and that they should use their "best endeavours to obtain the information".[17] Such a proposal, of course ignores the extreme pressure under which duty solicitors in most police courts are already working and is unlikely to be met with much enthusiasm by most participants in the duty solicitor scheme.

In conformity with the English and Australian statutes, the Criminal Law Reform Committee has recommended that, whenever bail is refused, and in cases where bail is granted in spite of opposition by the police, a judge or justice must give his reasons in writing at the time the decision is made.[18] The requirement for reasons may be regarded as a safeguarding of the presumption in favour of bail in that it will, *inter alia*, assist in ensuring that proper consideration in accordance with the statutory criteria is given to the bail decision.[19] It is to be hoped, therefore, that in advocating a comprehensive statutory framework, as the Bail Report does, individual bail decisions would be subject to more careful scrutiny through the application of closely defined criteria; and that the discretion to refuse bail, currently vested in the courts, would be more severely circumscribed.

On the question of successive applications for bail, the Report expressly rejects the approach taken by the Divisional Court in *R* v *Nottingham Justices ex parte Davies*.[20] On one view, the Court in that case has seriously undermined the scope of the statutory requirement that an accused person should not be remanded in custody for a period exceeding eight days and has "significantly curtailed an accused person's right to have his remand in custody reviewed at frequent intervals".[21] In his judgment, Donaldson LJ held in effect that there could be no right to successive applications for bail, unless there had been a change in circumstances since the last court hearing.

However, the Criminal Law Reform Committee, with deference to the importance of the bail decision and the fact of bail as a *prima facie* right of a defendant, argues in favour of the right to successive applications in spite of the

16 The Scheme takes its name from the Vera Institute of Justice which initiated a bail project in 1961, aimed at minimising the number of custodial remands by providing a systematic means of acquiring objective information about a defendant.

17 *Report*. 76. The point is, however, not without significance. Oxley notes that, whereas only 3% of defendants privately represented were remanded in custody, 16.7% of those who consulted a duty solicitor were remanded in custody. The difference is attributable, amongst other things, to the fact that duty solicitors dealt significantly more with defendants who had no permanent address and in respect of whom presumably little information was available.

18 *Report*, 77.

19 The *Report* notes in addition that a requirement for reason may also assist the defendant in deciding whether to make an application to the High Court and that a proper statement of the lower court reasons for refusing bail may assist the High Court judge in determining a subsequent application.

20 [1980] 2 All ER 775; [1981] QB 38.

21 Hayes, 'Where Now the Right to Bail?' [1981] *Crim.L.R.*, 20.

inevitable increase to the workload of the court.[22] It recommends the retention of the 8-day remand rule and endorses the right of a defendant in custody on every remand in the District Court to apply for bail and have the question considered on the merits, whether or not there are circumstances which were not previously before the Court.[23] The right to successive applications for bail is, it is submitted, consistent with the philosophy of the proposed reforms and "even if such applications only rarely lead to the release of the accused, that is a proper use of the Court's time where citizens' fundamental rights are in issue".[24]

IV. SUPPLEMENTARY RECOMMENDATIONS

There are a number of important recommendations that should also be mentioned. Again, reflecting the position of the English legislation,[25] the Report recommends the abolition of financial bonds from defendants (para 126) and the creation of an offence of failing "without reasonable cause" to attend in accordance with the defendant's obligations. The penalty for this new offence would be a maximum of one half of the maximum penalty for the offence in respect of which bail is granted, subject to an upper limit of 7 years. It is anticipated that such a provision would provide an incentive for a defendant to answer his bail, and would facilitate the granting of bail in respect of serious offences.[26]

A further recommendation (para 158) advocates the retention of sureties, on the basis that, although their effectiveness has not been established, it has not, by the same token, been shown that the presence of sureties does not significantly reduce the risks of absconding or offending. However, to compensate for the potential unfairness of requiring a surety of a defendant who does not have the social contacts with the financial resources to cover the bond, the Report recommends, it is submitted wisely, that in the event of a defendant's inability to meet a surety requirement, he be brought back to court within 24 hours for the bail conditions to be reconsidered (para 168).

The Report also recommends that there should be a single estreatment procedure applicable to all cases, thereby avoiding the confusion of different procedures established in the Crown Proceedings Act 1950 (in respect of High Court bail) and the Summary Proceedings Act 1957 (in respect of District Court bail). It recommends the uniform adoption of the procedure in the Summary Proceedings Act 1957 (paras 184–185).

The Report further recommends that the discretionary power of the police should be extended to cases where the defendant has been arrested pursuant to a warrant, and that a failure to answer police bail should be a summary offence punishable by a fine of up to $500.

V. CONCLUSIONS

The Criminal Law Reform Committee Report advocates the creation of a codified scheme that will consolidate the incoherent statutory and common law rules and establish a uniform and appropriate procedure for the determination of bail. The expectation is that such rationalisation of the existing procedures will promote clarity in the law and consistency of decision. In addition, it is

22 *Report*, para 243.
23 *Ibid*, para 245.
24 Hayes, *supra*, 24.
25 Bail Act (1976) (UK), s 3(2).
26 *Report*, 45.

anticipated that such proposals as are contained in the Bail Report will enable the release of more suspects from bail while not adding appreciably to the burdens of the police, or diminishing the public protection afforded by the custodial remand.

Expressed in the Report's recommendation is a recognition that a custodial remand entails substantial consequences including loss of liberty, disruption to family life and employment, together with the effects upon the outcome of the trial through the difficulties in adequately instructing counsel. Custodial remands, therefore, should be kept to a minimum.

Bail, it must be acknowledged, is an important constitutional protection and is a particular outworking of the presumption of innocence, which lies at the heart of our criminal justice system. Clearly the use of the bail decision for the wider purpose of crime protection and prevention, being a matter of fundamental principle, would need to be very carefully considered and justified in the light of the Report's thoughtful and carefully articulated philosophy.

However, the tendency to use the bail decision for these wider purposes may well in future be countermanded by the requirement for adequate relevant information and the requirement for judicial officers to give reasons for decisions adverse to bail, in the context of an orderly albeit informal bail hearing.

On the basis of these considerations, bail should come to be recognised by all responsible for its administration, as an important stage within the criminal justice process justifying the most careful and rational decision-making, and not be viewed merely as an inconvenient imposition on valuable court time to be disposed of speedily and with frugal reasoning.

WARREN BROOKBANKS
Faculty of Law
University of Auckland