

CRIMINAL LAW REFORM COMMITTEE

REPORT ON BAIL

December 1982

Wellington
New Zealand

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CRIMINAL LAW REFORM COMMITTEE
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To: The Minister of Justice

INTRODUCTION

This report is the result of more than two years deliberation and consultation. A comprehensive background paper was prepared by a Wellington barrister, Mr R.A. McGechan. That paper formed the starting point for our deliberations. We gratefully acknowledge the assistance which we derived from it. Subsequently, we consulted with members of the Judiciary and Crown Prosecutors in a number of areas. We have also considered submissions from members of the public and the legal profession, together with a paper prepared for the committee by the Planning and Development Division of the Department of Justice. In formulating our proposals we have paid close attention to a number of recent overseas statutes on bail.

We recommend 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. A central feature of this new Code is a presumption in favour of bail rebuttable by three risks. These are the risks that the defendant will abscond, commit an offence or offences while on bail, or interfere with witnesses or otherwise obstruct the course of justice.

Our report goes on to consider a number of ancillary topics including: the power to remand for psychiatric examination, bail as of right, conditions of bail, sureties, financial bonds, powers of arrest, the variation or revocation of bail, judicial review of bail decisions, the bail hearing, the forfeiture of bonds, successive applications for bail, police bail, deportation, extradition and juveniles. Some of our more important recommendations include:

- i. The retention of a category of offences bailable as of right;
- ii. The abolition of financial bonds for defendants and the creation of an offence of absconding;
- iii. Giving the courts wide powers to impose conditions when releasing defendants on bail;
- iv. Requiring the courts to automatically reconsider every case where a surety is ordered but cannot be found within 24 hours;
- v. Empowering the prosecution to apply for the revocation or modification of a grant of bail;

2.

vi. Requiring the courts to give written reasons whenever bail is refused and, in certain circumstances, when it is granted;

vii. The reform of estreatment procedures.

A detailed summary of recommendations can be found at the back of our report.

PART ITHE PROBLEM OF BAILTHE NATURE OF BAIL

1. The law recognises three principal ways of dealing with a person who has been charged with an offence but whose case has not been finally disposed of by the courts.
2. At one extreme, the defendant may be detained in custody. This ensures his attendance in court but means he is imprisoned although it may subsequently be found that either guilt or the need for a custodial sentence is not established.
3. At the other extreme, during the adjournment of a hearing the court may simply allow the defendant to go at large. In such a case no special condition is imposed to compel his subsequent attendance before the court. In the District Court, this is expressly authorised by s.46 of the Summary Proceedings Act 1957, and although the Crimes Act 1961 is silent on the point such remands are occasionally made in the High Court.⁽¹⁾ The police have a comparable power under s.19A of the Summary Proceedings Act 1957: when a person arrested without warrant and charged with an offence triable summarily cannot be brought immediately before a court a constable may release him upon a summons to answer the charge.
4. The middle course is for the defendant to be granted bail. This is the most common alternative to detention when a serious offence is charged and is a process by which a defendant is released from custody under certain conditions which are primarily designed to ensure his subsequent attendance before the court. More precisely it has been described as:

"the process by which a person awaiting trial or sentence or the hearing of an appeal is released from custody on entering, with or without a surety or sureties, into a bail bond ("recognisance") for a sum or sums of money, conditioned for his appearance at the time and place required."⁽²⁾

5. In some respects the rules governing bail in New Zealand remain uncertain, but three salient features of the process emerge from this concise definition:
 - (i) The disposition of a case ordinarily takes place in a number of distinct stages, with remands between stages, so that the bail decision is a recurring one. The police have power to grant bail to some arrested persons before they first appear in court, and the courts may have to consider the question a number of times - both before and after any finding or plea of guilty, or committal for trial, and also during the appeal process.

- (ii) Before a defendant is released on bail he is required to enter into a bond which specifies a sum of money which he is liable to forfeit if he fails to perform any of his obligations stated in the bond. The process of forfeiture is known as "estreatment", for which formal procedures are provided. Generally, it appears that the courts may not require a cash deposit, although this may be a condition of police bail.
 - (iii) Sureties may or may not be required. A surety is a person who, in addition to the defendant, also enters into a bond for a specified sum of money which he is liable to forfeit if the defendant fails to perform any of his obligations. Originally sureties were essential to bail at common law, the process being one whereby the defendant was released into the custody of his sureties who were responsible for producing him at the specified time and place.⁽³⁾ In the nineteenth century, however, legislation in both England and New Zealand authorised Justices of the Peace to dispense with sureties, and now the Summary Proceedings Act 1957 expressly gives District Courts, Justices and constables a discretion as to whether sureties are required, their number, and the amount of their bonds (ss.49(2) and 51(2) Summary Proceedings Act 1957). The practice of the High Court has followed suit.
- 6. There are serious doubts as to the extent of the courts' powers to impose other conditions upon a grant of bail. The existing law is discussed in paragraphs 56-60.
 - 7. The relevant New Zealand legislation does not impose any limits on the amount of a bail bond, or the number of sureties that may be required. Nevertheless, the New Zealand statutes do not appear to be inconsistent with the vague limitation in section 1 of the Bill of Rights (1688) (1 Will and Mar. sess. 2 c. 2), which provides that "excessive bail ought not to be required". This is in force in this country.⁽⁴⁾

THE IMPORTANCE OF BAIL

- 8. The importance of the subject is not in doubt. Denial of bail means a person is imprisoned although he has not been tried, convicted, or sentenced to imprisonment, or has not exhausted his rights of appeal. This is a serious qualification of generally accepted principles favouring personal liberty.

"Bail is important ... because it affects the liberty of the subject .. it is the only example in peacetime where a man can be kept in confinement for an appreciable period of time without a proper sentence following on conviction after a proper trial. It is therefore the solitary exception to Magna Carta".⁽⁵⁾

In one sense, therefore, denial of bail is always an injustice to the individual, in that the presumption of innocence (and the corresponding right to liberty until guilt is proved by due process of law) is outweighed by conflicting demands and values which may have little or nothing to do with the strength of the evidence against the individual. As we note later (paragraphs 46-50) the present law is uncertain as to how far the bail process does overturn the presumption of innocence.

9. Such imprisonment can have obvious adverse effects on the defendant and others. It may mean loss of employment, inability to support dependants, disruption of family and business relationships, and difficulties in preparing an adequate defence. At a less tangible level, there may be loss of self-respect, and for the impressionable (particularly the young) the contagious effects of association with criminals. Moreover, the conditions under which remand prisoners are detained are sometimes unsatisfactory. In the Report of the Penal Policy Review Committee, paragraph 210, it is said that:

"While they are not subject to the same restrictions on clothing, visitors, etc. as other inmates, often they do not fit into the normal prison routine and, as a result, may be locked away for far longer periods and, through sheer lack of facilities for them, be subject to harsher treatment than the rest."

Of course the community must bear the cost of confining and maintaining remand prisoners, and perhaps the cost of maintaining their dependants.

10. It is a fact that a number of offenders released on bail do not reappear in court on the required date. It is also a fact that some offenders released on bail offend before their subsequent court appearance. This may be particularly likely where the offender realises that conviction is almost certain and that this will be followed by a substantial term of imprisonment. In some such cases the defendant will embark on a series of offences, either to improve his financial position or simply for the enjoyment he will obtain. Public concern has been voiced at various times that persons arrested for serious crimes, sometimes involving injury to others, are released on bail and very quickly reoffend in a manner similar to the offence for which they were initially arrested. Respect for the law suffers when offences are committed by persons on bail.
11. The law of bail must attempt to accommodate these various and sometimes competing considerations, and in every case the decision directly affects the liberty of the subject. The law must also take account of the fact that the bail decision is one which the courts must make daily in numerous cases, and it must be made speedily, often on very limited evidence or information.

PART II

AN OUTLINE OF THE PRESENT LAW

12. Later in this Report we recommend substantial changes to the law relating to bail. These must be considered in the light of the existing law and in the following paragraphs we summarise the present rules governing jurisdiction to grant bail, the decision whether bail should be granted, and the conditions that may be imposed. More particular aspects of the present position are dealt with in the context of our recommendations in relation to them. Police bail is dealt with separately in paragraphs 250-267.

JURISDICTION

13. The following is a summary of the general powers to grant bail presently vested in the courts. It must be read subject to special rules which are provided by various statutes for particular offences or circumstances (e.g. Crimes Act 1961, s.318 (treason and communicating secrets), Misuse of Drugs Amendment Act 1978, Immigration Act 1964, Extradition Act 1965).

District Courts (Summary and Preliminary Hearings)

14. Section 46 of the Summary Proceedings Act 1957 authorises the court to remand a defendant in custody whenever a hearing is adjourned, if he is liable on conviction to a sentence of imprisonment or has been arrested. This, however, is expressly made subject to s.47 of the Criminal Justice Act 1954 and s.319 of the Crimes Act 1961. Section 47 of the Criminal Justice Act 1954 applies only to persons under 21 (see paragraphs 272-274), but s.319 of the Crimes Act 1961 contains rules of general application. It provides that every one charged with an offence is "bailable", either as of right or in the discretion of the court (for the details, see paragraphs 31-33).
15. In this rather indirect way a District Court is empowered to bail a defendant when it has power to remand in custody. Sections 47-50 of the Summary Proceedings Act 1957 provide for such matters as the release of persons admitted to bail, the form and content of the bail bond, and variation of the conditions of bail.
16. In the case of a summary hearing s.46 clearly applies up to the point of conviction, and if the defendant is convicted and remanded for sentence it is assumed that s.46, which authorises bail "whenever any hearing is adjourned", also empowers the court to grant bail pending sentence. If the defendant appeals against conviction or sentence, then if he is in custody only under the conviction to which the appeal relates s.125 of the Summary Proceedings Act 1957 authorises

the District Court to grant bail pending the hearing of the appeal in the High Court. Similarly, should the District Court decide that a rehearing is necessary or should the High Court order a rehearing the District Court may grant bail pending the rehearing: ss.75(4) and 131(2) Summary Proceedings Act 1957.

17. The power to grant bail in s.46 applies to all summary hearings, whatever the plea. When a defendant is to be proceeded against on indictment the effect of s.153(a) of the Summary Proceedings Act 1957 is that the District Court has the same power throughout the preliminary hearing. If at the conclusion of that hearing the defendant is committed for trial or sentence s.46 will not be applicable, because it applies only "whenever any hearing is adjourned". However, the procedural provisions of s.171 of the Act treat the committing Court as having jurisdiction to grant bail in these cases. Subsection (1) applies where a defendant committed for trial "is granted bail"; and subs.(2) expressly provides that where the defendant is committed for sentence "he shall be granted bail only if the committing Court so directs", notwithstanding s.319 of the Crimes Act 1961 but subject to s.47 of the Criminal Justice Act 1954. No doubt the technical source of the jurisdiction in these cases is s.319 of the Crimes Act 1961, which applies to a person charged with any "offence", and which is expressly applied to summary proceedings by s.3 of the Summary Proceedings Act 1957.
18. Anyone admitted to bail in the District Court may be arrested on a warrant if he absconds, or is about to abscond, or if he fails to comply with a condition that he report to the police. In any such case the District Court has a discretion to remand him in custody or again grant bail: ss.53(2) and 54(2) Summary Proceedings Act 1957. Section 350 of the Crimes Act 1961 provides for arrest in certain cases under a bench warrant issued by the High Court, or a District Court exercising jurisdiction to conduct trial by jury, and if the court is not then sitting for the trial of criminal cases a Justice may either remand in custody or grant bail.
19. Generally, a District Court's powers to grant bail may be exercised by a District Court Judge or by one or more Justices of the Peace.

District Courts (Trial by Jury)

20. In 1981 the criminal jurisdiction of District Courts was extended to include trial by jury in respect of all electable and most indictable offences. Section 28E(2) of the District Courts Act 1947, introduced by s.9 of the District Courts Amendment Act 1980 (and amended in 1982) expressly authorises a court exercising this jurisdiction to adjourn the trial and grant bail, and provides for the application of the procedural provisions in sections 46 to 50, 54, 57 and 58 of the Summary Proceedings Act 1957. In addition, the effect of section

28D(3) of the District Courts Act 1947 is that the High Courts' statutory powers summarised below in paragraphs 21-23 are also available to the District Court in cases of trial by jury.

High Court (Statutory Jurisdiction)

21. The position of the High Court is more complex because it has both statutory powers and an inherent jurisdiction. Section 319 of the Crimes Act 1961 provides that "everyone who is charged with any offence" is "bailable" at the discretion of the court, or in some cases, as of right. Pursuant to this the High Court has power to grant bail to anyone who appears for trial on indictment or (it is assumed) for sentence. The power to bail will be available throughout any adjournments or postponements of the trial, and in the event of a change of venue bail is expressly authorised by s.323. If after conviction the defendant is not sentenced in that sitting of the Court, s.371(6) empowers the Court to remand in custody or on bail pending sentence at a later sitting. A defendant on bail who absconds or is about to abscond may be arrested on warrant, whereupon a High Court Judge may remand in custody or again grant bail: s.320.
22. If a defendant appeals to the Court of Appeal against conviction or sentence the Judge who presided at the trial may grant bail pending the determination of the appeal (s.397(2)) and if a question of law is reserved and sentence is either respited or postponed the defendant may again be detained in custody or granted bail pending the decision of the Court of Appeal (s.380(5)). In any case where the Court of Appeal orders a new trial the High Court may grant bail pending the trial, if no application is made to the Court of Appeal (s.399(6)).
23. On an appeal from a District Court to the High Court the convicted appellant may apply to a Judge of the High Court to review any decision in the District Court granting or refusing bail, and the Judge may "confirm, modify, or reverse the decision" (s.125(4) Summary Proceedings Act 1957).

High Court (Inherent Jurisdiction)

24. Pursuant to s.16 of the Judicature Act 1908, which retains the effect of s.4 of the Supreme Court Act 1860, the High Court has an inherent jurisdiction to grant bail equivalent to that exercised at common law by the High Court in England. This jurisdiction was described by the Privy Council on appeal from India in Lala Jai Ram Das v. King-Emperor⁽⁶⁾

"Apart from statutory provision, there is an inherent jurisdiction in the High Court to admit to bail any person awaiting trial on a criminal charge whether before Magistrates or a Court of Quarter Sessions or Assizes."

25. The important limitation is that the defendant must be "awaiting trial". It has been held that there is no inherent jurisdiction to bail a person who has been convicted and imprisoned, whether by an inferior or superior court, and who appeals; nor is there an inherent jurisdiction to vary the terms of a grant of bail made to such a person by another court.⁽⁷⁾ Nor would there seem to be any inherent jurisdiction when a defendant has been convicted in the District Court and is remanded in custody pending sentence, the distinction apparently being drawn between bail before and after conviction.⁽⁸⁾
26. The most important effect of the inherent jurisdiction is that the High Court may grant bail when this has been refused in the District Court, or even if no application has been made there, provided that the defendant has not been convicted. The practical effect of this limitation, however, is avoided by the High Court's statutory power to review any District Court decision concerning bail pending an appeal: s.125(4) Summary Proceedings Act 1957. Technically, neither of these jurisdictions involves an appeal from the decision in the District Court and the appropriate procedure is by way of originating application in the High Court.⁽⁹⁾

Court of Appeal

27. When a person appeals to the Court of Appeal after trial on indictment the Court of Appeal may grant bail pending the determination of the appeal (s.397(2)), and whenever the Court orders a new trial it may grant bail pending the trial (s.399(6)). These powers may be exercised by any Judge of the Court of Appeal, subject to review by the Court if he refuses (s.393).
28. Section 379A of the Crimes Act 1961 allows for appeals to the Court of Appeal in relation to certain matters arising before trial, but as a general rule there can be no such appeal against bail decisions made before conviction. A recent exception is found in the Misuse of Drugs Amendment Act 1978 which provides that for some drug dealing offences only a High Court Judge may grant bail, but on appeal by either party the Court of Appeal may reverse or modify the decision if it is satisfied that the Judge "exercised his discretion wrongly".

Cases where no Court has Jurisdiction

29. There appear to be two circumstances in which there is no jurisdiction to grant bail notwithstanding that a case has not been finally disposed of in the courts.
- (i) Should there be a petition for special leave to appeal to the Privy Council neither the High Court nor the Court of Appeal has power to grant bail, even after the Privy Council has granted special leave.⁽¹⁰⁾ Probably the Privy Council has no such jurisdiction either, and in any event its practice is to refuse to consider any such application.⁽¹¹⁾

- (ii) Where a person has been convicted in a District Court after a summary hearing and has unsuccessfully appealed to the High Court, section 144 of the Summary Proceedings Act 1957 provides for a further appeal (with leave) to the Court of Appeal on a point of law. Before the hearing of the High Court appeal the District Court may grant bail and the High Court may review any such bail decision (s.125 Summary Proceedings Act 1957), but it seems that no court has jurisdiction to grant bail pending the further appeal to the Court of Appeal.
30. There are also instances where one court has power to grant or refuse bail, but there is no right of appeal or review. Usually the High Court has power to review the refusal of bail in a District Court, either as a result of its inherent jurisdiction or, when there is an appeal against conviction or sentence, under s.125(4) of the Summary Proceedings Act 1957. But there appears to be no such jurisdiction when the District Court commits for sentence and refuses bail (s.171 Summary Proceedings Act 1957) or when it convicts and refuses bail pending sentence in the District Court (there being no appeal against conviction). As a general rule there is no right of appeal against refusal of bail in the High Court, although statute may create exceptions (as in the Misuse of Drugs Amendment Act 1978), and when there is an appeal after conviction on indictment bail may be granted by either the presiding Judge or the Court of Appeal (s.397(2) Crimes Act 1961).

BAIL AS OF RIGHT

31. Section 319 of the Crimes Act 1961 lays down general rules governing the grant of bail. It categorises cases into two classes: those where a defendant is "bailable as of right", in which case he must be released on bail if he is willing and able to meet such conditions as are lawfully imposed by the court, and those where the defendant is "bailable at the discretion of the Court", in which case the court may or may not allow his release on bail. Unless it is excluded by another statutory provision section 319 will apply whenever any court has jurisdiction to grant bail.
32. Pursuant to section 319 a person is bailable as of right if he is charged with:
- (i) an offence not punishable by death or imprisonment;
 - (ii) an offence for which the maximum punishment is less than three years' imprisonment;
 - (iii) an offence against any of the following sections of the Crimes Act 1961, which allow for three or more years' imprisonment: sections 111 (false statements or declarations), 151-153 (breach of duty to provide the necessities of life), 154 (abandoning child under 6), 190

(injuring by unlawful act), 202 (setting traps etc.), 249 (acknowledging instrument in false name), 262 (taking reward for recovery of stolen goods), 280-281 (imitating authorised or customary marks).

However, a person is not bailable as of right if the charge is assault on a child or assault by a male on a female, contrary to s.194, although the maximum penalty is less than three years' imprisonment (s.139(2)), and no-one is bailable as of right who is charged with any offence punishable by imprisonment if he has been previously convicted of any offence punishable by death or imprisonment (s.319(4)).

BAIL AT DISCRETION OF THE COURT

33. Everyone not bailable as of right is bailable at the discretion of the court: s.319(5). From the terms of s.319 it follows that in many cases the court has a discretion: whenever the offence is punishable by three or more years' imprisonment, and is not one of the miscellany listed in s.319(3), or whenever some term of imprisonment is possible and the defendant has any previous conviction for an imprisonable offence. Moreover, in some circumstances bail is always discretionary and not as of right, whatever the offence. A number of statutory provisions achieve this result with varying degrees of clarity. Where a person has been granted bail and has been arrested for actual or apprehended absconding, or failure to report to the police, sections 53(2) and 54(2) of the Summary Proceedings Act 1957 expressly provide that further bail is discretionary only, notwithstanding anything in the Crimes Act 1961; and s.350(2) of the Crimes Act 1961 expressly excludes bail as of right when a person fails without reasonable excuse to attend court according to his bond. Section 171(2) of the Summary Proceedings Act 1957 seems to have the same effect in providing that when a District Court commits a defendant for sentence in the High Court, then "notwithstanding anything in s.319 of the Crimes Act 1961 ... he shall be granted bail only if the committing Court so directs"; in contrast there is nothing in s.171(1) to exclude bail as of right when a defendant is committed for trial. Bail as of right would also seem to be impliedly excluded by provisions which make no reference to s.319 but which expressly provide that the court may "in its discretion" grant bail pending an appeal against conviction or sentence (s.125 Summary Proceedings Act 1957, ss.380(5), 397(2) Crimes Act 1961), pending retrial ordered by the Court of Appeal (s.399(6) Crimes Act 1961), or pending sentence upon conviction on indictment (s.371(6) Crimes Act 1961). In contrast s.319 governs bail pending the rehearing of an information in the District Court (ss.75(4), 131 Summary Proceedings Act 1957) and it also appears to apply after summary conviction and pending sentence in the District Court.

Finally, whenever a person under 21 is remanded or committed for trial or sentence s.47 of the Criminal Justice Act 1954 applies, and this does not appear to allow for bail as of right (s.47 is set out in paragraph 272).

34. Generally the statutes are silent as to the principles to be applied in the exercise of the discretion to grant or refuse bail, so whatever guidance is available must be found in the decisions and practices of the courts. There are few New Zealand cases in which the question has been considered in any detail and these do not provide a complete or entirely consistent account of judicial practice. Nevertheless two grounds for refusing bail are clearly established, and it is safe to add a third.

In summary these are:

- (i) the risk that the defendant will not appear;
- (ii) the risk that the defendant will offend while on bail;
- (iii) the risk that the defendant will interfere with the course of justice.

The Risk that the Defendant Will Not Appear

35. Bail may be refused if the court considers that there is too high a risk that the defendant would not appear at the appointed time and place. This has always been the first question on any opposed application although some doubts have existed as to the factors which should be considered by the court in deciding it. The reported cases indicate that from the beginning of this century New Zealand courts accepted, at least as a starting point, the rule laid down by Coleridge J in In re Robinson(12):

"The test ... is whether it is probable the party will appear to take his trial ... but ... though I lay down that test, I think it ought to be limited by the three following considerations ... The first is, what is the nature of the crime? Is it grave or trifling? ... The second question is, what is the probability of a conviction? What is the nature of the evidence to be offered by the prosecution? ... The third question is, is the man liable to a severe punishment."

This was applied in Valli(13) where Stout CJ refused bail on a charge of arson, then punishable by up to life imprisonment, and in In re Hewer(14) where Fair J, in a decision upheld by the Full Court, refused bail on charges relating to abortion, the maximum penalty again being life imprisonment. In Hewer Fair J rejected an argument that the tests in Robinson were no longer appropriate because successful absconding had become much more difficult as a result of the increase in population, improved communications and passport legislation.

36. The terms of the oral judgment in Robinson suggest that the question whether the defendant would probably appear should be answered by reference to three considerations only - the seriousness of the offence, the strength of the prosecution evidence, and the severity of the possible punishment. Coleridge J expressly stated that the court could not consider the defendant's character or behaviour at a particular time. On the other hand, in Hewer, Fair J qualified his judgment by saying that the general rule and tests in Robinson applied "when the Crown opposes bail" and "in the absence of very exceptional circumstances". The implication is that even if the Robinson tests point to refusal of bail it may be granted if the Crown does not oppose, and in other "very exceptional circumstances". No examples of such circumstances were given, but in Hewer it was held not to suffice that the defendant was married with four children, and the Crown had no "special reason" for supposing he would abscond; and a submission that detention would prejudice preparation of the defence was rejected on the basis that it should cause no more than "some inconvenience".
37. It now seems clear that the court may properly consider all factors which are in fact relevant to the risk of non-appearance. In Benfield⁽¹⁵⁾ the Court of Appeal had to consider whether the bail discretion had been wrongly exercised in the High Court in relation to certain drug dealing offences. The Court reaffirmed an earlier decision⁽¹⁶⁾ that the "ordinary principles" apply in such cases, and held that no error had been established in this case. In the course of the judgment it was noted that Robinson had been acted on from time to time in New Zealand but that the Court of Appeal had never been required to consider whether those tests "are adequate at the present time". The urgency of the case had prevented detailed argument and consideration of the matter and the Court was not laying down any definite rule about it, but it added:
- "We content ourselves with saying that as at present advised it would seem to us permissible and desirable that it should be open either to an accused person or to the Crown to put forward evidence of character and behaviour or other material relevant to the likelihood of the particular offender appearing to answer his bail."
38. This tentative view accords with daily practice in the District Courts where it is common for factors not mentioned in Robinson to be put before the court on the basis that they increase or decrease the risk of non-appearance. For example, in opposing bail the Police will commonly point to such matters as lack of permanent address, lack of employment or previous breach of bail,⁽¹⁷⁾ and conversely counsel for the defendant will emphasise personal factors suggesting he is likely to appear, such as home ownership, employment and family ties.

39. There are also Australian authorities where courts with a discretion akin to that in New Zealand have recognised that regard should be had to the presence or absence of such matters as family and community ties, property, employment or business involvement, the defendant's character, previous bail record,⁽¹⁸⁾ and even the fact that his co-accused have absconded.⁽¹⁹⁾ In Ireland it has been held that the court may have regard to an apparent risk that the effectiveness of the bail bond will be nullified by sureties being indemnified.⁽²⁰⁾
40. It is safe to conclude that the court may take into account any factor that is relevant to the risk of non-appearance. But it may be that, at least in most cases, the three Robinson factors remain the principal criteria.⁽²¹⁾ For the most part the effect of these factors is perhaps self-evident. It is assumed that the temptation to abscond increases with the seriousness of the offence, the severity of the penalty, and the probability of conviction. However, in at least two respects some refinement of these criteria may be necessary. First, so far as the information before the court allows it, the court should consider the penalty likely to be imposed and not merely the maximum available,⁽²²⁾ although if there is a mandatory penalty it may still be the case that the court should ignore mitigating circumstances that might warrant the exercise of the Crown's prerogative of mercy.⁽²³⁾ Second, the nature of the offence may sometimes be relevant, as well as its seriousness, for there may be reason to believe that absconding is common in respect of the type of offence charged. For example, there are recent cases where this has been recognised in relation to serious drug dealing offences.⁽²⁴⁾

The Risk that the Defendant Will Offend While on Bail

41. It might be inferred from Robinson that Coleridge J thought that the risk of non-appearance was the only ground upon which bail might ever be refused, and in Hewer Fair J did not rely on the Magistrate's view that if bailed the defendant would commit offences of the same kind as those charged. But the courts have since accepted that, even if it is assumed that the defendant will appear, bail may sometimes be refused because of the risk that he will commit offences while on bail. In Vincent and Spring⁽²⁵⁾ Blair ACJ refused bail on a charge of burglary, which carried a maximum penalty of 14 years. In addition to the Robinson criteria it was held to be relevant that the defendant might commit similar offences if released. On this question the Court took account of the nature of the offence, the strength and nature of the prosecution evidence, and a police affidavit which referred to earlier offences and expressed the opinion that Vincent was an expert in safe blowing who was likely to repeat that type of crime if released on bail.

42. The potential relevance of this factor is confirmed in Benfield⁽²⁶⁾ where the Court of Appeal concluded its judgment by noting that in that case it had not been asked to consider the risk of offending while on bail, but added: "We have no doubt ... that there will be cases when this aspect is very important". There are also numerous cases in England, Scotland and Australia which recognise that the existence of such a risk may be decisive against the grant of bail,⁽²⁷⁾ although in one modern Australian case it was said that possible offending should not readily be assumed and it will not normally carry much weight unless there is a substantial risk of offences which would have serious consequences to the community.⁽²⁸⁾
43. The courts will usually be concerned with the possibility of offences of the same kind as that in respect of which bail is sought, but they do not seem to have laid down a rule restricting the inquiry to such offences. It would seem that regard may be had to any material that is relevant to the risk of offending while on bail, including the evidence in the case, the nature of the offence, and the known associates, character and record of the defendant (especially his previous record while on bail). In England it has been said that justices have a duty to inquire into the defendant's record before granting bail,⁽²⁹⁾ and even that bail should not normally be granted if the defendant has a long record of offences of the kind charged, at least if it is a serious offence and there is no obvious defence to the charge.⁽³⁰⁾ In one Australian case the Judge took the view that save in very exceptional circumstances persons committed for trial who apparently commit serious offences on bail cannot hope for further bail, and suggested that legislation preventing bail in such cases might be desirable.⁽³¹⁾ As already mentioned, in Vincent and Spring the Court took into account police opinion of the risk of re-offending, although in Pascoe⁽³²⁾ an Australian judge rejected similar evidence when the witness did not point to any factual foundation for the opinion.
44. These authorities appear to be consistent with the practice in the District Courts where in opposing bail the police will sometimes rely on the likelihood of further offences, an argument that will often be supported by reference to the defendant's record and, sometimes, the fact that he is known to the police as a criminal, or is known to associate with criminals.⁽³³⁾

The Risk that the Defendant will Interfere with the Course of Justice

45. This has not been expressly recognised as a ground for refusing bail in any reported New Zealand case, and in Robinson Coleridge J refused to take into account affidavits suggesting that the course of justice might be impeded if bail was granted. In Valli it appears that Stout CJ accepted that apparent harassment of witnesses might have to be ignored. Against this a number of overseas authorities recognise that bail may properly be refused because the defendant might obstruct the course of justice by interfering with evidence, witnesses, or jurors.⁽³⁴⁾ In practice such a risk is occasionally relied upon by the police in opposing bail and there seems little doubt that it would now be accepted as a proper ground for refusing to release the defendant. Such a risk will almost always involve the risk of an offence of some gravity, in which case it could well be regarded as merely a particular example of that ground for refusing bail. In argument in In re R⁽³⁵⁾ Smith J took the view that he could give no weight to police concern that bail might hinder their investigations, but if there is acceptable material suggesting a danger of positive interference by the defendant the position may now be different.

Evidentiary Requirements

46. One of the Robinson tests requires the court to consider the probability of conviction, having regard to the nature of the prosecution evidence. But in most cases the District Courts have to decide the question without any oral or written sworn evidence. When the defendant has been arrested without warrant and makes his first appearance before the Court it may be that neither party will have had time to assemble any such evidence, and on subsequent remands the material available may be insufficient for any satisfactory assessment of the probability of conviction (or, indeed, the likely penalty). Moreover, it would be unreasonable to require the police to present affidavits on all opposed applications for bail.
47. Nevertheless there is one New Zealand case which suggests that bail must be granted if there is no evidence on the charge and no evidence on the risk of non-appearance. In In re R⁽³⁶⁾ the defendant was charged with an offence relating to abortion and the Magistrate refused bail on the first remand. Application was made to the Supreme Court for the grant of bail in the exercise of its inherent jurisdiction. Smith J noted that the Magistrate had had before him a statement from the police that the evidence showed a considerable practice of abortion offences on the defendant's part, but held that bail must be allowed because there was no evidence before the Court:

"My view is that where a person is brought up on a bailable offence and no evidence is offered on the charge, he should be admitted to bail unless there is

something in the circumstances to show that he is unlikely to appear when the evidence is offered. If no evidence is offered on the charge, and if no direct evidence is given upon the question of probability of appearance, the presumption of innocence entitles an accused to be released on bail"

48. In In re D (37) the charges were burglary and theft and Barrowclough CJ accepted that he should follow In re R if the circumstances were the same. However, the police had filed an affidavit stating that some of the stolen property in question had been found in the defendant's possession, as had other apparently stolen property. It was held that the affidavit was "evidence offered on the charge" and the fact that it was before the court sufficed to distinguish In re R. If such material did not suffice all offences would be effectively bailable as of right until the hearing or preliminary hearing, which was untenable. There was no suggestion that the court must have all the prosecution evidence before it (as had been argued In re R) and with the filing of the single affidavit it was held that the principles in Phillips, Vincent and Robinson applied; bail was refused.
49. In re R has not been discussed in subsequent cases. It was an oral judgment which seems to lay down a rule applicable to all crimes (including, for example, murder) which would require bail unless and until there was "evidence", which apparently means sworn evidence, before the court. No doubt the absence of such evidence may increase the likelihood of bail, for it inhibits the application of the Robinson tests, but it must be doubted whether there is any such absolute rule. We understand the practice in the District Courts supports the reservations of Sir Francis Adams who, in commenting on these cases, wrote: (38)

"Quaere, however, whether sworn testimony is necessary at all in the proceedings in the lower court, our impression being that the regular practice on applications to magistrates for bail is to rely on the verbal statements of the Police and the accused. It would be strange indeed if an application for bail could be turned into a pre-trial, on evidence, of the question of guilt or innocence. As to the presumption of innocence, we know of no other authority for its relevancy on an application for bail"

Burden of Persuasion

50. If the presumption of innocence has any application at all in this context its force is limited in that sworn evidence rebutting it appears not to be essential. On the other hand, there is persuasive overseas authority that before conviction there is a presumption in favour of bail, so that bail should be granted unless sufficient reason against it is shown. For example, in Scotland in Mackintosh v. M'Glinchy (39) the Lord

Justice-General, while preferring not to treat the matter as a question of "presumption", thought that it was self-evident that when a defendant applied for bail "bail he must get, unless a sufficient ground is brought forward requiring the court to exercise its discretion by refusing it ... unless the court has before it some good reason why bail should not be granted, bail ought to be allowed". In Australia, in Light⁽⁴⁰⁾ Sholl J concluded that there is a presumption in favour of bail, it resting on the Crown to show that effect should not be given to the defendant's prima facie right to liberty before conviction, and in Burton⁽⁴¹⁾ Fox J perhaps went further: "In an ordinary case bail should be granted and it is for the prosecution to make a clear and positive case for refusal of bail".

51. Apart from In re R such a principle has not been explicitly stated in the reported New Zealand cases but it may be implied in all of them in that the courts justify refusal of bail by pointing to factors which are thought to show a risk of absconding or offending while on bail; and in Thorn v. Police⁽⁴²⁾ Jeffries J remarked that "it is in the interests of justice generally that persons facing charges be bailed until their cases are dealt with". The courts have not however formulated a definite rule defining the degree of risk required for refusal of bail. In Robinson Coleridge J said that the question was whether it was "probable" the accused would appear, while in Lunn v. Police⁽⁴³⁾ the Court of Appeal allowed bail when there was "no appreciable risk that he will either fail to attend or re-offend", and in Benfield the court held there was no error in the High Court when the Judge considered "whether there was a substantial risk" of non-appearance. It may be added that the degree of risk may depend on the nature and stringency of the conditions that may be imposed by the court in allowing bail.
52. In the case of some offences the seriousness of the offence and possible penalty may in themselves rebut or reverse any presumption in favour of bail, and the principle may be that bail should be granted only in exceptional circumstances. For example, there are Australian decisions holding that this is still the position on charges of murder when the death penalty has been replaced by a mandatory sentence of life imprisonment.⁽⁴⁴⁾ Also, there is overseas authority that exceptional circumstances are needed for bail on an appeal against conviction on indictment,⁽⁴⁵⁾ although it has been suggested that the same strict rule does not apply on an appeal from a summary conviction.⁽⁴⁶⁾ In England it has been held that if a court of summary jurisdiction convicts and commits to a higher court for sentence, so that a penalty beyond the jurisdiction of the lower court might be imposed, bail should rarely be granted.⁽⁴⁷⁾ There are also Australian cases suggesting that a power to review a Magistrate's bail decision should be "carefully and sparingly exercised",⁽⁴⁸⁾ but it may be doubted whether such a view would be appropriate here if counsel and the District Court had little opportunity to investigate thoroughly the question when it was first decided.

Other Relevant Factors

53. The consequences of refusing bail may be more or less serious according to the circumstances of the particular defendant. This has been recognised in a number of overseas cases where factors have been regarded as relevant although they may have little or no effect on the risks of non-appearance or offending while on bail. For example, the court may sometimes have regard to the defendant's health, the prospects or otherwise of a speedy trial, or the probability of significant prejudice to the preparation of the defence; similarly, the needs of dependants, and the disruption of the defendant's employment or business may increase the importance of the bail decision.⁽⁴⁹⁾ In New Zealand the potential relevance of such factors was not rejected in Hewer and in practice they are commonly put before the courts. In Police v. Adams ⁽⁵⁰⁾ Savage J. accepted that the court may take account of the likelihood of a speedy or delayed trial and the possibility of prejudice in the preparation of the defence.
54. Hewer recognises that the absence of opposition from the prosecution may have an important bearing on the decision. The court retains power to refuse bail in such cases, but no doubt such decisions will be rare.
55. Decisions in other jurisdictions emphasise that bail is not to be withheld in order to punish the defendant or coerce him into doing something he is not bound in law to do (such as changing his mode of dress).⁽⁵¹⁾ There is no doubt that New Zealand courts would accept this principle. However, it may be noted that in at least one case bail may be refused because a defendant refuses to comply with a statutory requirement. The Misuse of Drugs Amendment Act (No. 2) 1979 authorises a court to refuse to consider an application for bail for up to two days if a defendant fails to permit an internal examination which was properly required on reasonable grounds.

CONDITIONS OF BAIL

56. It is a condition of every bail bond that the defendant attend personally at a specified time and place, and he and any sureties are liable to forfeit the specified sums should he fail to perform this obligation. In addition, s.49(1) of the Summary Proceedings Act 1957 authorises a District Court to add a condition that the defendant report to the police at such times and places as the Court orders. Such a "reporting clause" is commonly imposed, and breach of it renders both defendant and sureties liable to forfeit their bonds.

57. These are the only conditions that may be lawfully imposed in a District Court, under the Summary Proceedings Act 1957, and s.49(2) of that Act requires the release of a bailed defendant upon he and any required sureties entering into a bond subject to the conditions outlined above.
58. The grant of bail in the High Court is not subject to detailed statutory provisions of the kind applicable to District Courts and it is thought that the High Court has a wide discretion to impose conditions. In Nelson v. Braisby⁽⁵²⁾ bail was made subject to a number of conditions of a kind that do not seem to be generally available to District Courts. In that case the Supreme Court was sitting as an appellate Court from the High Court of Western Samoa, but the particular statutory provision applied by Blair J. simply authorised release "on bail". The legislation generally applicable to the High Court is no more specific and in practice bail in that Court is sometimes subject to a variety of conditions (for example, surrender of passports).
59. In Nesbitt v. Patterson⁽⁵³⁾ Somers J. held that, at least as a general rule, District Courts have no power to require a cash deposit as a condition of the grant of bail. This was held to be the rule at common law and so, in the absence of statutory provisions to the contrary, the same limitations would appear to apply to the powers of the High Court.
60. The limitations and doubts discussed in the preceding paragraphs are subject to a number of statutory provisions which authorise a wide variety of conditions in particular circumstances. Section 47 of the Criminal Justice Act 1954 applies to all courts in cases where persons under 21 are remanded or committed for trial or sentence. In any such case the court may release the defendant "on bail or otherwise subject to such conditions as it thinks fit". Similarly when a person has been convicted on indictment bail may be granted pending a decision of the Court of Appeal "subject to such conditions as the Court or Judge thinks fit" (ss. 380(5) and 397(2) Crimes Act 1961). More specifically, pursuant to s.31 of the Misuse of Drugs Amendment Act 1978, when a person is bailed in respect of a drug dealing offence the court is authorised to impose a reporting clause, and any other conditions that appear to be likely to result in the defendant attending, or that appear to be necessary or desirable in the interests of justice or the prevention of crime. But it is expressly provided that sureties may be required only in relation to the obligations to attend and report. Each of the above provisions seems to be wide enough to allow a condition requiring the deposit of cash or some other security.

PART IIIRECOMMENDATIONSCODIFICATION

61. The rules as to jurisdiction and discretion to bail have evolved in a haphazard way, resulting in a rather incoherent patchwork of statutory provisions and common law. Clarification and rationalisation are desirable and some substantive changes are necessary.
62. As to jurisdiction, the mere fact that general powers to grant bail are scattered through different parts of different statutes obscures the scope of existing jurisdictions and this is exacerbated by a significant part of the High Court's jurisdiction being "inherent", or without statutory foundation. Indeed, in the High Court, even the obligations that may be imposed as a condition of release depend on the common law and practice of the Court.
63. Subject to the possible need for special rules in respect of particular offences or circumstances it is desirable in the interest of clarity that the powers of different courts to grant bail at different stages in the judicial process should be collected in one statute. We also think that bail should be possible whenever rights of appeal have not been exhausted. In two cases the present law does not give any court such a power - when a defendant petitions the Privy Council for special leave to appeal, and when a defendant convicted after a summary hearing in a District Court seeks leave to appeal from the High Court to the Court of Appeal (see paragraph 29). Neither case is very common but giving the power to grant bail to the court from which the defendant seeks to appeal would reduce the risk of injustice, and the grant of such bail could avoid the problem of compensating a successful appellant for what later turns out to have been an unjustified imprisonment. Whether the same principles should apply at all stages is a different question which is discussed below at paragraphs 110-112, and the extent to which there should be rights of appeal against the bail decision is dealt with in paragraphs 209-212.
64. There has been little criticism of the principles governing the discretion to grant bail, but they are uncodified and must be extracted from a rather ill-developed body of case-law. The three risks which now appear to be accepted as relevant - non-attendance, offending while on bail and interference with the course of justice - seem to us to be appropriate, but we are satisfied that codification of the applicable principles is desirable. This would provide clarity in the law which is presently lacking, and it would promote consistency of decision. As to clarity, laypeople unfamiliar with the practice of the courts have no guide to the law on this

important subject, and even for lawyers the principles can only be discovered by examining and assessing a number of cases, some of which suggest rules which are at odds with modern practice. There are also at least two areas of principle where there is real uncertainty - the rule applicable when there is no sworn evidence before the court (paragraphs 46-50) and the degree of risk required for refusal of bail (paragraph 51). The present difficulty in determining just what the legal principles are is particularly undesirable when the decision is one that must often be made by lay Justices of the Peace. As to consistency, the questions which a court must decide on an opposed bail application will inevitably be of a rather speculative nature and this makes it very difficult to achieve consistency of decision. However, codification providing statutory criteria to be applied in all courts would give clearer guidance than is now available and it is reasonable to expect that this would minimise inconsistency.

65. These reforms would best be achieved by the enactment of a comprehensive Code - a Bail Act - which would replace the existing law and would deal with all matters relating to bail, including jurisdiction, the principles to be applied in exercising a discretion to admit to bail, conditions which may be imposed, procedure, enforcement, and appeals. The Code should cover police bail as well as court bail. With one or two exceptions which we specify later it should apply to all courts exercising criminal jurisdiction, although not to members of the armed forces being dealt with under military law.
66. The enactment of such a code would be in line with modern developments in a number of overseas jurisdictions. We have given particular attention to the legislation in the United Kingdom (Bail Act 1976), Victoria (Bail Act 1977, as amended in 1978), New South Wales (Bail Act 1978), and Queensland (Bail Act 1980). The practices and requirements of other jurisdictions may differ from those in New Zealand but we are satisfied that there is a manifest need for comparable codification in this country.
67. We are recommending legislation which would effect substantial changes in the law, which will be explained as we deal with the detailed content of the proposed Code. We have not had the resources which would enable us to produce a draft bill, but there is one general matter relating to drafting which we must emphasise. In its Report on Criminal Investigation, at paragraph 174, the Australian Law Reform Commission commented:

"The Commission regards it as extremely important that the language of legislation, and criminal legislation in particular, should be intelligible to those governed by it. The language of the law of bail, perhaps more so than any other single area of criminal law or procedure, has been replete with archaisms unintelligible to men in the street and indeed many professional lawyers".

There are limits to the extent to which a statute can concisely state the law in simple terms, but we agree that in relation to bail there is definite room for improvement. For example, in agreement with the Australian Commission we think that the terms "recognisance", and "estreat" should be replaced by more modern words such as "undertaking" and "forfeiture".

A PRESUMPTION IN FAVOUR OF BAIL

68. The central provision of the Code should be a presumption in favour of the grant of bail. Such a presumption is dictated by the importance of individual liberty. Other considerations are the presumption of innocence before conviction, the adverse effects of imprisonment, and its cost. On the other hand, the public interest will sometimes require pre-trial detention, so the presumption must be rebuttable by sufficient grounds for custodial remand being established. Statute already establishes a presumption to similar effect in the case of persons under 21 (see paragraphs 272-274) and in other cases it is probably true that in practice New Zealand courts now adopt such an approach, at least in relation to most offences. We believe it is important that this now be given statutory effect. The aim should be to clarify the law, to promote consistency of decision, and to achieve the release of as many defendants as is consistent with the public interest. To this end, 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.
69. Such a rule has been enacted in a number of overseas jurisdictions, in particular the United Kingdom, Victoria, New South Wales and Queensland, although these statutes provide presumptions which vary in scope and in the manner in which they are rebutted.

Excluded Offences

70. Some of the overseas statutes exclude specified offences from the operation of the presumption. For example, in Victoria, it does not apply to charges of aggravated burglary or indictable offences involving the use of weapons or explosives and in New South Wales offences in the nature of robbery with violence are excluded. The presumption in favour of bail which we are recommending will be rebuttable on various grounds, and the nature and seriousness of the alleged offence will be relevant factors. We think that to go further and exclude particular offences from the presumption is unnecessary and would result in arbitrary distinctions. Arguably an exception could be justified in the case of offences carrying severe mandatory penalties (murder being the main example). However, the likely penalty will always be a relevant factor when the court considers whether the presumption is rebutted and even in these cases we do not

believe that absolute exclusion from the presumption is warranted merely because of the penalty which will follow in the event of a conviction. It follows that we also reject the rule in some of the overseas statutes that in respect of certain charges there is a presumption against the grant of bail (e.g. Victoria, s.4(4)).

71. The Victorian and Queensland Acts also exclude the presumption when the defendant is not a resident of the State. We do not think that by itself this fact justifies non-application of the presumption in the New Zealand context. It is no more than a fact that may be relevant to the risk of absconding (see below paragraph 132), and in many cases it may be largely negated by a requirement that the defendant surrender his passport.

Jurisdiction

72. A related question is whether District Courts should have jurisdiction to grant bail in relation to every kind of offence, or whether in certain cases the jurisdiction should be reserved to the High Court. At present, on a charge of treason or communicating secrets, bail may be granted only by a Judge of the High Court, or, curiously, the Governor-General (s.318 Crimes Act 1961). This is of little practical significance and we do not think it is necessary or desirable to retain this restriction.
73. A much more important question arises in relation to drug dealing offences. Pursuant to the Misuse of Drugs Amendment Act 1978 a person charged with an offence relating to dealing in Class A or B controlled drugs may be granted bail only by a Judge of the High Court. The Court of Appeal has held that the object of this is to ensure that careful consideration is given to any such bail application, but that such cases are governed by the same general principles as apply to the other offences⁽⁵⁴⁾. We recommend that this should continue to be the case, so that the presumption would apply to such offences, although we recognise that here the nature of the offence will often be a vital factor on the question whether the presumption is rebutted.
74. We received a strong submission that this special exclusion of the District Courts' jurisdiction was unnecessary and wrong in principle, and that it should be abandoned. It can cause inconvenience and delay, particularly in centres without resident High Court Judges. Moreover, it was suggested to us that there is no reason why such cases should not be given adequate consideration by District Court Judges: they have far greater experience in such matters; we have recommended that they should have jurisdiction in all other cases; and our majority recommendation (paragraph 209) that the prosecution should have the right to apply to the High Court for review should provide an adequate safeguard. We recognise the force of these arguments. However, since we do

not recommend that there should be an automatic stay of the bail decision in the event of an application for review by the prosecution, we are not convinced that the prosecution's right in this respect is an adequate safeguard. We have also been informed that prior to the 1978 Act the level of absconding in these cases had reached disturbing levels; and that this has apparently ceased to be so since the change in the jurisdictional rule. On the pragmatic ground that the 1978 amendment appears to have worked, therefore, we take the view that there should be no change to the existing rule that the High Court has exclusive jurisdiction in these cases, subject to the present right of appeal to the Court of Appeal.

REBUTTING THE PRESUMPTION

75. A determination of the circumstances in which the presumption in favour of bail will be rebutted requires consideration of three inter-related matters. First, it is necessary to decide the grounds on which bail may be refused. Second, a finding that such grounds exist will inevitably involve a calculation of the degree of risk of events occurring should bail be granted, and it is necessary to frame a test which describes the degree of risk the court must find for bail to be refused. Third, consideration must be given to what matters may be considered in assessing the risks.

Grounds for Refusing Bail

76. In agreement with the overseas legislation we have considered, our view is that the three risks that the common law authorities support as grounds for refusing bail should continue to justify refusal under the proposed Code.
- (i) The risk that the defendant would fail to attend (or "surrender to custody") in answer to his bail. A primary object of the law relating to bail is to ensure that the defendant will appear when and where required and this ground of refusal requires no further explanation.
 - (ii) The risk that the defendant would commit an offence or offences while on bail. Where there is significant risk of offending in the immediate future it would be wrong to require the court to ignore it. Taking account of this risk will involve giving little weight to the presumption of innocence in respect of the instant charge and requires the court to speculate as to possible offending while on bail but we believe that to prohibit this would seriously depart from most people's view of what the law should be, and would sometimes involve unjustified danger to the community.

- (iii) The risk that the defendant would interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other persons. Such conduct would almost inevitably involve an offence of some seriousness.

The committee was divided on one matter concerning the second of the above risks (the risk that the defendant would offend). It has been suggested that even a high risk that the defendant will commit trivial offences should not by itself justify custodial remand. If such offences are in fact committed a custodial sentence will not be appropriate and it is wrong that a person should be imprisoned merely because of the risk of such conduct. To avoid this two members (Mrs Lowe and Dr Young) favour a statutory rule to the effect that the apprehended offence or offences must be such as to be likely to have serious consequences for an individual or the community.⁽⁵⁵⁾ This would give some statutory guidance to the courts. The majority, however, are opposed to any such qualification, believing that it would be too uncertain as a statutory test. They anticipated rather fruitless debate on whether, for example, the presumption is rebutted if what is foreseen is an assault without a weapon, or a number of relatively minor cheque frauds. Some also felt that there would be a danger that some Judges would regard the presumption as rebutted only by a risk of the most serious kind of offence. We later recommend that even when the presumption is rebutted the court should have a residual discretion to grant bail (paragraphs 79-81), and the majority of us believe that this will allow adequate regard to be had to the seriousness or otherwise of anticipated offences. The ultimate decision may well require consideration of the uncertain question of "seriousness", but the majority view is that the court's right to refuse bail should not depend on such a determination.

Degree of Risk

77. The decision whether or not any of these three grounds for refusing bail exist requires the court to make a prediction of the defendant's future conduct. Inevitably the decision is speculative and this underlines the importance of the presumption, which prohibits a remand in custody unless the court is positively persuaded that there is a sufficient risk of specified conduct. But we had considerable difficulty in agreeing on a formula to describe the degree of risk which the court must be persuaded exists. The following are possibilities which were considered and debated:

- (i) Bail may be refused if the court is satisfied it is "probable that the defendant" would fail to surrender, would offend, or would obstruct justice. We rejected this. "Probable" is a somewhat ambiguous term. It is capable of being interpreted to include events which are "likely" or which "could well" occur ⁽⁵⁶⁾,

although perhaps its more natural meaning is "more probable than not". Some felt that the latter interpretation required too high a risk and others thought it inappropriate because it is doubtful whether future conduct can be quantified as being more probable than not.

- (ii) Bail may be refused if the court is satisfied there are "substantial grounds for believing that the defendant" would fail to surrender, would offend, or would obstruct justice. This is the formula in the United Kingdom statute, and in Benfield⁽⁵⁷⁾ the Court of Appeal assumed that "substantial risk" was an appropriate test. It was favoured by Mrs Lowe and Dr Young but other members rejected it because they felt that the word "substantial" would make it excessively difficult to rebut the presumption.
- (iii) Bail may be refused if the court is satisfied there is "an appreciable risk that the defendant" would fail to surrender, would offend, or would obstruct justice. "Appreciable risk" is a formula used by the Court of Appeal in Lunn v. Police⁽⁵⁸⁾ and received some support as a compromise between "some risk" which must always be present, and a "probability", which could seldom be demonstrated. We rejected it as making the presumption too weak: if "appreciable" were literally interpreted any perceptible risk would suffice, but even if that were rejected it would be open to a court to act on any risk that could not be regarded as remote.
- (iv) Bail may be refused if the court is satisfied there is "an unacceptable risk that the defendant" would fail to surrender, would offend, or would obstruct justice. This is the formula adopted in Victoria and Queensland, and is comparable to the New South Wales provision which requires the court to be satisfied that refusal of bail is "justified", having regard to specified risks and factors. Such a test has advantages. It enables the court to weigh the seriousness of the consequences of custody to the defendant and his family, and it allows for different decisions according to the seriousness of the consequences should an anticipated risk in fact eventuate (for example, the chance that the defendant might commit a serious assault may make bail an "unacceptable" risk although a similar chance that burglary might be committed might be an "acceptable" risk). This test also avoids the need for the court to explicitly quantify the probability of future conduct - a calculation that may be unrealistic if expressed in terms of "more probable than not", or meaningless if expressed in such vague terms as "appreciable" or "substantial". We rejected this

solution on the ground that it gives individual Judges and Justices too little guidance and too much discretion in deciding whether the presumption is rebutted. What is an "acceptable" risk to one Judge may be plainly unacceptable to another who, furthermore, might regard a rather slight risk as unacceptable. Indeed, it is tautologous to say that a risk should not be accepted because it is unacceptable. The belief that such tests provide insufficient guidance, and would undermine our object of reasonable consistency in decisions, was strengthened by the relatively unrestricted factors which we propose the court should be able to have regard to in making its decision (paragraphs 82-84 below), although some members felt that the rights of review which we recommend (paragraphs 207-211) might provide an adequate safeguard.

78. After lengthy discussion a majority of the committee (Dr Young and Mrs Lowe dissenting) approved the following test: bail may be refused if the court is satisfied "there are reasonable grounds for believing that the defendant" would fail to surrender, would offend, or would obstruct justice. This is a compromise. It is open to the objection that what are "reasonable" grounds will probably not be less than "substantial" unless that word is given some special emphasis. Indeed, some will feel that the difference between "appreciable", "substantial" and "reasonable" is semantic only, and that none of these formulae offers much more guidance than an "acceptable" or "justified" risk test. But whatever phraseology is adopted, the test will involve a judgment on a question of degree which is incapable of precise calculation. "Reasonable" is the term traditionally resorted to by the courts in attempting to impose and describe an objective standard in such cases, and "reasonable grounds for believing" is a formula used in various statutes conferring powers which may be exercised when the facts may be in doubt. A minority of the committee (Mrs Lowe and Dr Young) considered that the test in the United Kingdom statute was appropriate, i.e. the court must be satisfied that there are "substantial grounds for believing that the defendant would" fail to surrender, offend, or obstruct justice. They see a principal purpose of bail reform as maximising the grant of bail to the greatest extent consistent with the public interest. To that end they consider that Parliament should give clear guidance to the courts on the standard of the test required to rebut the presumption in favour of bail. Unless this is done, a statutory presumption in favour of bail will have no great effect on current practice. They agree with the suggestion in paragraph 51 that it is probably true that in practice New Zealand courts now adopt such an approach (i.e. the approach of applying a *de facto* presumption in favour of bail). If that is so, there are important policy reasons for strengthening the law by adopting the formula proposed by the minority. The minority did not accept there was no difference in meaning between "substantial" and "reasonable".

A Residual Discretion

79. If the above test was satisfied the presumption would be rebutted with the result that bail would not have to be granted. But even when the presumption is rebutted, we recommend that the court should retain a discretion to allow bail. The test we recommend for rebutting the presumption is confined to an assessment of the risk of non-surrender, offending or obstruction of justice. We believe it is essential that the court retain the power to grant bail even when that test is met. At that stage, the court should have a discretion untrammelled by any presumption, and could take account of all relevant matters, including the degree of the apparent risk, the seriousness of any anticipated offence, and the seriousness to the defendant of the consequences of custody. In some cases, refusal of bail may have greater than usual adverse consequences - for example, the trial might be delayed, the defendant might be in ill-health, his family or employment may have special needs, or the adequate preparation of his defence might be seriously obstructed by custodial remand. Such a residual discretion also allows for the fact that some courts may find "reasonable grounds for believing" more readily than others, and yet place such a value on individual liberty as to regard the risk as justified.
80. A residual discretion exists under the United Kingdom statute which merely provides that bail "need not" be granted when the "substantial" risk exists, and under the New South Wales Act which provides that although a defendant ceases to be "entitled" to bail when refusal is "justified" by the risks he "may nevertheless be granted bail" (s.13 of the New South Wales Bail Act 1978). On the other hand, the Victorian and Queensland legislation requires refusal of bail when the risk is "unacceptable".
81. To some extent a residual discretion detracts from the objects of clarity of the law and consistency of decision. Nevertheless, we are satisfied that any resulting uncertainty is justified. It exists only in the interests of the liberty of the individual, and it does not affect the test that must be met before imprisonment is permissible - a test which is inevitably somewhat imprecise, but which we believe is significantly clearer than the "unacceptable risk" formula used in Victoria and Queensland. Under our proposal the uncertainty inherent in such a test would arise only after the presumption in favour of bail has been rebutted.

Matters Relevant to the Rebutting Risks

82. A wide variety of matters might be thought to support a conclusion that there are reasonable grounds for believing that the defendant, if released, would fail to surrender, would offend, or would obstruct justice. The decision is essentially speculative, but certainty and consistency would be enhanced if the Code were to lay down an exhaustive list of

matters which could be considered. A majority of us (Mrs Lowe dissenting), concluded however, that it would be wrong to draw up such an exhaustive list. The majority believe that it would have to be lengthy and from time to time additions would be necessary as unforeseen factors bearing on the risks were discovered.

83. At the other extreme the Code might not identify any particular factors but simply provide that the court should have regard to any matter relevant to the existence of the risks. We also rejected this. The statute should give as much guidance as is practicable to the numerous Judges and Justices who have to make bail decisions. To this end, the majority recommends that the Code should identify those matters which have been found to be of most frequent importance in practice, but that other cases should be accommodated by a provision that the court should have regard to any other considerations which appear to be relevant to the risks of absconding, offending, or obstructing justice. A similar provision is found in the United Kingdom, Victorian, and Queensland legislation.
84. We recommend that the Code should provide that the court should have regard to such of the following considerations as appear to be relevant to any of the risks, as well as any other relevant matters:
 - (a) The nature and seriousness of the offence or offences charged;
 - (b) The penalty likely to be imposed in the event of conviction. One member of the committee (Satyanand D.C.J.) favoured a formula which would refer the court to both the potential and the probable penalty, but a majority thought that while the likely penalty may have special significance the theoretical maximum adds nothing to the "seriousness" of the offence;
 - (c) The previous convictions of the defendant;
 - (d) The defendant's record in respect of his obligations under any previous grants of bail;
 - (e) The defendant's associates, and the history and details of his residence, employment, and family circumstances. Some of the overseas statutes include a reference to the defendant's "character". We accept that previous convictions and bail record will often be relevant but we do not favour express reference to such a vague consideration as "character". It would invite an excessively subjective appraisal of the defendant and his likely conduct;

- (f) The strength of the evidence against the defendant (Mrs Lowe and Dr Young dissenting). In practice this factor will often be of little help to the court. Where the decision has to be made before trial, or before the preliminary hearing, the court will know little about the evidence. Moreover, the defendant will usually be unwilling to disclose his defence or evidence supporting it, so that the court will be required to assess the strength of the evidence without considering both sides of the case. This consideration led to a suggestion that the court should be permitted to consider the strength of the prosecution case only if the defendant consents. We do not accept this. The apparent strength of the prosecution case is in fact relevant - at least to the risk of absconding - and when the court is able to assess it, it would be wrong and unrealistic to expect the court to ignore it. It is a specified relevant factor in each of the United Kingdom and Australian codes. Mrs Lowe and Dr Young consider that the strength of the evidence is too vague and speculative a factor to be taken into account in assessing whether the presumption should be displaced. They point out that with the possible exception of (b) the nature of the other risks mentioned is far more factual.
- (g) The fact that the defendant is charged with an offence committed while he was already on bail.

85. The last of the above factors requires further explanation. We were unanimous that there should be no presumption against bail merely because the defendant was already on bail at the time of the alleged offence. But some members suggested that the presumption in favour of release should not apply in such a case and that the court should have a discretion with no presumption either way. It was argued that commission of an offence means that one of the rebutting risks has actually eventuated and that public confidence in the courts suffers when bail is renewed after repeated offending. There are cases where the risks inherent in a further grant of bail should be taken, but a presumption in favour of this is inappropriate. Other members favoured the continued operation of the presumption. They emphasised that the fact that the defendant is charged with a number of offences cannot be equated with proof that he committed any of them.
86. After lengthy debate, a majority (Mrs Lowe dissenting) concluded that the presumption should apply but that the fact that the defendant was already on bail should be specified as a factor that may be relevant to the assessment of the risk of absconding, offending, or obstructing justice. The mere fact that such an offence is alleged does not justify the automatic exclusion of the presumption, and if the offence is comparatively minor this may be so even if it is admitted. On the other hand, we accept that the fact that further offending is charged, and the strength of the evidence in

support, will often be highly relevant to the question whether the presumption is rebutted, and in the case of serious offences the conclusion will often be that bail should not be renewed. Our proposal maintains the presumption but recognises that this factor may be of particular significance. As in other cases, the court would be able to consider all the circumstances in deciding whether the presumption is rebutted, including the number and nature of the charges, the dates of the alleged offences, and the strength of the evidence.

87. We see no need to further lengthen the statutory list of relevant factors. We do not support the inclusion of the fact that further charges are pending, or that police inquiries are continuing. These are occasionally put forward as reasons for opposing bail and they will sometimes be relevant to the rebutting risks, but this will depend on the circumstances of each case, which should be investigated by the court. We wish to avoid any suggestion that they are necessarily, or even usually, relevant. Nor do we accept that such grounds can in themselves justify refusal of bail. Neither the possibility of specified or unspecified further charges nor the facilitation of police investigations justify imprisonment of an unconvicted defendant.
88. Mrs Lowe does not consider it desirable to add an unrestricted "catch-all" to the effect that the court may take into account any other relevant matters. While appreciating the need not to be unduly restrictive, she considers that there is little point in having a list of specified matters if everything else can equally well be taken into account. She would therefore prefer a more restrictive type of wording, for example, permitting the court to take into account specific evidence indicating that the person is more likely than not to fail to answer his bail, to offend, or to obstruct justice.

OTHER GROUNDS FOR REFUSING BAIL

89. In addition to the three risks which we recommend should be capable of rebutting the presumption we considered a number of other matters which may be thought to justify refusal to release the defendant.

Breach of Bail Conditions

90. We were divided on whether the presumption in favour of bail should apply to a person previously released but arrested for an actual or anticipated breach of the conditions of his bail. Under the existing law, there are statutory provisions to the effect that bail is always discretionary (and never as of right) after the arrest of a bailed defendant if the court is satisfied the defendant had absconded or was about to abscond, or (at least in summary proceedings) where the defendant has been arrested for actual breach of a reporting clause (ss. 53 and 54 Summary Proceedings Act 1957, s.320 Crimes Act 1961).

91. We were again unanimous that there should be no presumption against the further grant of bail in such cases, but a majority concluded that it would be wrong for the defendant to continue to have the advantage of a presumption in favour of release. The majority thought that the commission of an offence unrelated to the specific terms imposed as a condition of release is in principle distinguishable from failure to comply with those terms. In the latter case, it was thought to be absurd to insist that the court must again begin with a presumption in favour of bail. Mrs Lowe and Dr Young dissented, and thought that in all cases the presumption should continue to apply. They argued that many breaches of bail conditions were relatively trivial; that in any further bail application breaches of conditions were not necessarily more relevant to the rebutting risks than the commission of further offences; and that therefore they should merely be taken into account in the assessment of those risks. They pointed out that in many cases breaches would undoubtedly be sufficient to displace the presumption, but that it would be both unnecessary and wrong in principle to exclude the presumption from such cases altogether.
92. Breaches of bail conditions may vary widely in their seriousness. For example, an isolated and possibly unintentional failure to report to the police should have little effect on the bail decision, but an unexplained failure to appear for trial is likely to outweigh all other considerations. Our majority recommendation is that upon the court being satisfied that the defendant has been in breach of any condition of his bail the court should have a discretion to grant or refuse further bail, there being no presumption either way. This should also apply when the court is satisfied that the bailed defendant is not likely to surrender to custody but in relation to other conditions the presumption should be automatically excluded only by actual breach. This is consistent with distinctions we draw elsewhere between the primary obligation to appear and other conditions (paragraph 140), and it is consistent with the distinctions presently drawn in relation to warrants to arrest under ss. 53 and 54 of the Summary Proceedings Act 1957.
93. Later in this report we recommend that any member of the police should have power to arrest without warrant a defendant he reasonably believes to have absconded, to be about to abscond, or to be in breach of any condition of his bail (paragraph 148). The majority recommends that after arrest without warrant the presumption in favour of bail should not apply if the court is satisfied by evidence on oath that the defendant had absconded, was about to abscond, or had been in breach of any conditions of his bail. In other cases, a warrant may be issued for the arrest of a defendant on these grounds, and here again the majority recommends that on the defendant's subsequent appearance the presumption should be excluded only if such a ground is

established by evidence on oath. However, should a defendant fail to appear before a court as required by the terms of his bail, a bench warrant may be issued for his arrest and of course no evidence on oath is required for this (see s.55 of the Summary Proceedings Act 1957 and s.350 of the Crimes Act 1961). In such a case the fact of the issue of such a warrant should suffice to exclude the presumption on the defendant's subsequent appearances and sworn evidence establishing his failure to appear should not be necessary.

94. Of the majority, Chief Superintendent McLennan disagrees with the requirement that the absconding, anticipated absconding or breach of condition must be established by evidence on oath. The Chief Superintendent considers that it is inconsistent, illogical and time wasting (particularly for police and civilian witness) to require the presumption to be set aside by evidence on oath. In contrast, the hearing itself would then proceed on unsworn information and submissions made by either party (see pages 72-74). He considers it sufficient for the court to have the right as we recommend for the bail hearing to require evidence on oath from either side when it considers this necessary. On the other hand, under the existing law these matters must be established on oath before a warrant to arrest the defendant is issued (ss. 53 and 54 Summary Proceedings Act 1957; s.320 Crimes Act 1961); on our proposals such a warrant will no longer be necessary but in the view of the majority there is no justification for a change which would allow a court to give significant effect to such allegations unless they are supported by sworn evidence.

Psychiatric Examinations

95. There are two statutory provisions under which New Zealand courts may order that a defendant be detained for psychiatric examination or observation. Under section 47A of the Criminal Justice Act 1954 where a person who is in custody is charged with or convicted of an imprisonable offence the court may make it a condition of bail that he attend an approved clinic for psychiatric examination, or it may commit him to a penal institution and order a psychiatric examination there, or it may order detention and examination in a psychiatric hospital if this last course is supported by a medical certificate or psychiatric report. There are specified time limits where bail is not granted, but otherwise the court's powers are subject to only the most general kind of limit: any of the above orders may be made if "it appears to the Court to be expedient that a psychiatric report on the person's mental condition should be made available to the Court".

96. Section 39B of the Criminal Justice Act 1954 contains a similar power, but one which applies in a much more limited class of case. Where a person charged with an imprisonable offence is in custody pending a hearing or trial the court may order that he be detained in a hospital for observation of his mental condition if the court is satisfied that such observation is necessary or expedient, and if it appears to the court that he may be under disability or that at the time of the alleged offence he may have been insane. Where the defendant has been convicted and appeals, the appellate court has the same power.
97. Section 42 of the Mental Health Act 1969 also affects remandees who may be mentally disordered, but it does not appear to be relevant to the decision whether or not bail should be granted. It provides for the transfer of remandees from a penal institution to a psychiatric hospital under a temporary reception order.
98. These statutory provisions have recently been the subject of a report by a committee established by the Minister of Justice following consultations with the Minister of Health in 1980: report of the Working Party on Psychiatrically Disturbed Prisoners and Remandees, Department of Justice, 1981. That report recommends a number of reforms with which we are not directly concerned, including proposals for reducing the numbers remanded to psychiatric hospitals rather than being released on bail or remanded to prison for examination. However, the Working Party also emphasised the importance of not depriving a remandee of his liberty unless this is necessary, and recommended that "where a defendant is to be remanded for psychiatric examination, a remand on bail should not be refused unless the defendant does not meet the legal criteria for bail" (paragraphs 10, 12-14, and recommendation 4, page 87). The appropriate "legal criteria for bail" are not discussed.
99. There are some aspects of sections 39B and 47A of the Criminal Justice Act 1954 that are not within our terms of reference. Thus, we make no recommendations on the question whether a person refused bail should be detained in a prison or a psychiatric hospital. We also note that any report under these provisions is made to the court. The question arises whether the report should be to the defendant or his advisers rather than the court, or to the defendant, the prosecutor, and the court. We do not consider this to be within our brief, but recommend that it be further investigated.
100. The first question for this committee is whether, before conviction, the presumption in favour of bail should be rebutted merely because psychiatric observation or examination is thought to be "necessary" or "expedient". There will be cases where the apparent mental condition of the defendant supports the conclusion that there are

reasonable grounds for believing that, if released, he would fail to appear, would offend, or would obstruct the course of justice. In any such case a remand in custody would, of course, be justified.

101. Where, however, none of these tests are met, a majority of us (Chief Superintendent McLennan dissenting) favour a clear distinction between cases where it appears the defendant may be under disability or may have been insane at the time of the offence, and other cases. We recommend that the court should be empowered to remand an unconvicted defendant in custody if it appears to the court that he may be under disability or may have been insane, and the court is satisfied that the necessary psychiatric observation or examination would not be practicable without such a remand. This is similar to the power at present found in s.39B of the Criminal Justice Act 1954, but provides a stricter test than the "necessary or expedient" formula in s.39B(3). In other cases the majority of us do not consider that the presumption in favour of bail should be rebutted merely because the court believes it is desirable that there should be a psychiatric report on the mental condition of an unconvicted defendant, and that a remand in custody is necessary for this purpose. We do not recommend that this by itself should continue to be a ground for refusing bail.

Chief Superintendent McLennan considers that the provisions relating to psychiatric examinations have been designed to deal with a special class of defendant. Those provisions should not be set aside to allow for rules of general application such as those we propose for bail hearings. He considers that the courts are courts of inquiry and should retain any powers they have to obtain information or detail which may assist in their determinations.

102. There may be cases where a custodial remand for psychiatric examination is sought by or on behalf of the unconvicted defendant. This may be sought in order that a decision can be made as to plea or, more rarely, fitness to plead. In many cases such an examination can be adequately made while the defendant is on bail, but this will not always be so, as, for example, when the necessary psychiatric services are not available in the locality of the court. We therefore recommend that on the application of the defendant or his counsel the court should be empowered to remand an unconvicted defendant in custody for psychiatric examination.
103. A defendant who has been convicted and is awaiting sentence or the determination of an appeal is in a different position. The mental condition of the defendant may be relevant to the disposition of the case and the majority of us propose that the presumption in favour of bail should cease upon conviction (paragraphs 110-112). We recommend that a convicted defendant should be liable to be detained for psychiatric examination and report to the sentencing

court, or the appellate court, if this appears to that court to be expedient. To this extent, the effect of s.47A of the Criminal Justice Act 1954 should be retained.

104. The extent to which the court should have the power to require the defendant to undergo medical examination as a condition of bail is dealt with in paragraph 139.

Safety of the Public

105. The Victoria and Queensland Statutes provide that bail should be refused if there is an unacceptable risk that the defendant would "endanger the safety or welfare of members of the public". We do not think it necessary to add this to the rebutting risks.

Given the rather speculative nature of the decision, we believe that a real risk of such a consequence will also provide reasonable grounds for anticipating an offence of some seriousness.

Protective Custody

106. Each of the United Kingdom and Australian statutes allows or requires refusal of bail on the basis that the defendant should be kept in custody for his own protection or, if a child or young person, for his own welfare. There may be cases where there is reason to believe that the defendant is in need of protective custody, but some members of the committee were strongly opposed to such a broadly framed provision. They thought that paternalistic imprisonment for the defendant's own good is inappropriate to the bail decision, at least when the defendant does not consent or the anticipated danger does not establish a sufficient risk of non-surrender. Eventually we agreed on a much more restricted provision to the effect that on the application of the defendant or with his consent the court may, notwithstanding the presumption, remand him in custody if it believes he is likely to suffer death or serious injury if released.

Temporary Incapacity

107. Occasionally, a defendant may appear before the court while suffering some temporary incapacity, for example, he may be intoxicated or under the influence of a drug. This may prevent an assessment of the risks of absconding or offending. We accept that this may justify delaying release but it will be sufficient if it is made clear that in such cases the court has power to adjourn the bail decision.

Insufficient Information

108. The United Kingdom, Victorian and Queensland Acts provide for refusal of bail if, because of lack of time, it has not been practicable to obtain sufficient information to assess the risks of absconding, offending, or obstructing justice. In principle, the presumption suggests the defendant should be released in such a case, for it has not been rebutted, and such a broad provision is open to the objection that it opens a loop-hole which could allow evasion of the object of the presumption. Nevertheless the Code must take account of practical difficulties that may sometimes arise. For example, there may be cases where there is real doubt as to the defendant's identity, and the defendant may refuse to co-operate in efforts to obtain information which is needed for a rational decision. We recommend that where there has been insufficient time to obtain the necessary information the court should be empowered to adjourn the decision but that each adjournment be for a maximum of 24 hours, unless the court is satisfied that a longer period is required.

Punishment

109. We regard it as axiomatic that it should never be proper to refuse bail in order to punish the defendant - to give him a "taste" of imprisonment - or to compel him to do something he is not legally obliged to do.

TERMINATION OF THE PRESUMPTION

110. There is room for different opinions on whether the presumption should operate only to the stage of conviction, or should extend further to sentence, or the determination of any appeal. We think that once a sentence of imprisonment has been imposed the presumption should cease notwithstanding the possibility of a successful appeal, but we were divided on whether it should continue after conviction and pending sentence. Custodial sentences are imposed in a relatively small number of cases and two members (Mrs Lowe and Dr Young) favour operation of the presumption until that time, but the majority recommend that it should cease upon conviction. We reject any suggestion that the mere fact that the trial has begun should be decisive⁽⁵⁹⁾, but the presumption of innocence is rebutted by conviction and in the view of the majority the mere fact that in most cases imprisonment will not be imposed does not justify a universal presumption in favour of release after that. Nor do we see sufficient value in the provision in s.4(1)(c) of the Victorian Act, that the defendant should be bailed while awaiting sentence "except where the Court is satisfied that it would not be desirable in the public interest".

111. Mrs Lowe and Dr Young took the opposite view that the presumption in favour of liberty should continue to operate in respect of a defendant upon whom no custodial sentence has yet been imposed. Rebuttal of the presumption of innocence is not the key consideration. It in no sense follows from rebuttal of the presumption that the defendant needs to be locked up. Relatively few people receive custodial sentences following conviction. Apart from considerations of personal freedom, an unnecessarily high rate of custodial remands wastes both money and resources.

They would therefore continue the presumption until sentence, with the sole exception of those cases in which the court requires a probation report or medical or psychiatric report for sentencing purposes and cannot obtain such a report by means other than a remand in custody.

112. Although the majority is opposed to a presumption, we recognise that in most cases the release of the defendant pending sentence is the appropriate course. It will often be apparent that a custodial sentence is unlikely, or there may be need for further inquiries which will not be unduly hindered, and may sometimes be assisted by release; there may also be cases where imprisonment seems unavoidable but bail is nevertheless justified - for example, to enable the defendant to settle his affairs, or where there is thought to be a substantial chance of a successful appeal. We therefore recommend that the court should have a discretionary power to grant bail whenever the defendant is remanded for sentence. As already indicated (paragraph 63) we also think that there should be a similar power whenever a convicted person is pursuing a right of appeal.
113. A related issue is whether time spent in custody before conviction or sentence should be deducted from any sentence of imprisonment which is ultimately imposed, or whether it should be taken into account in some other way. It appears that it is now the practice of most courts to take account of such time in imposing sentence.^(59a) On the other hand, if pending an appeal bail is refused but the appellant is specially treated as an inmate awaiting trial, that time will count towards sentence only if the appellate court so directs (s.397(3) Crimes Act 1961, s.127(3) Summary Proceedings Act 1957). We do not regard it as within our terms of reference to consider whether there should be further legislation on these questions, but we recommend that they be further investigated.

BAIL AS OF RIGHT

114. The United Kingdom and New South Wales statutes provide for a rather stronger presumption in favour of bail in the case of minor offences - generally, those that are not imprisonable. Our present law goes further in that s.319 of the Crimes Act 1961 defines a significantly wider range of

defendants as being entitled to bail as of right. The details are set out in paragraph 31. To summarise, the following are bailable as of right:

- (i) Everyone charged with an offence that is not punishable by death or imprisonment: s.319(1);
- (ii) Everyone charged with an offence for which the maximum punishment is less than three years' imprisonment unless the offence is one against s.194 of the Crimes Act 1961 (assault on a child, or by a male on a female): s.319(2);
- (iii) Everyone charged with an offence against any of eleven specified sections of the Crimes Act, all of which create offences punishable by three or more years' imprisonment: s.319(3).

The practical effect of these provisions is much reduced by the overriding provision in s.319(4) that no one is bailable as of right who is charged with an offence punishable by imprisonment, if he has been previously convicted of an imprisonable offence.

115. We first considered whether the separate category of offences bailable as of right should be abolished. This proved to be one of the most difficult issues that we have had to consider.

116. The following arguments were raised in favour of abolition:

- (i) The existence of such a category requires arbitrary distinctions. For example, there is no magic quality in the three year limit in s.319(2) and the listed offences in s.319(3) have nothing in common except that they are all punishable by three or more years' imprisonment.
- (ii) The proposed statutory presumption, and rights of review, will give a defendant sufficient protection. Most of those now bailable as of right will be released pursuant to the presumption.
- (iii) Abolition of the separate category would enhance the clarity and simplicity of the proposed Code.
- (iv) The bail decision should not be made by applying an arbitrary rule, without regard to the facts of a particular case. For example, s.319(2) covers some offences (such as unlawful assembly and riot: ss. 86 and 87 of the Crimes Act 1961) in respect of which immediate release may sometimes be undesirable because of the risk of further offending.

117. The following arguments were raised against abolition:

- (i) Abolition involves taking away the rights of some defendants and could result in the detention of some who are released under the present law. We have no evidence to suggest that experience has shown the need for such a change.
- (ii) Bail decisions must be made by numerous judicial officers, including Justices of the Peace, and the tests rebutting the presumption involve unavoidable speculation. Consistency of decision is furthered by retention of offences bailable as of right.
- (iii) Retention need not involve any great increase in the complexity of the legislation, particularly as it would seem highly desirable for there to be some special provision for non-imprisonable offences.
- (iv) In respect of imprisonment offences retention involves little risk to the community because such a defendant is never bailable as of right if previously convicted of any imprisonment offence; also, we later propose that the court have power to impose a wide range of conditions on any grant of bail.

118. After lengthy debate we reached the unanimous conclusion that a category of offences bailable as of right should be retained. We then considered what changes should be made to the existing rules, and make the following recommendations:

- (i) Where bail is available as of right there should be the same power to impose conditions as we recommend in other cases.
- (ii) The effect of s.319(1) should be retained, so that those charged with non-imprisonable offences should be bailable as of right, regardless of previous convictions.
- (iii) A person in breach of the conditions of his bail would be liable to arrest and would then be bailable in the discretion of the court, not as of right (the present law is to similar effect: see ss.53 and 54 Summary Proceedings Act 1957, s.320 Crimes Act 1961). Two members (Mrs Lowe and Dr Young) would apply the presumption in favour of bail at this stage, but the majority recommend that there should be no presumption either way.
- (iv) In the interests of simplicity and rationality, s.319(3) should be repealed and not replaced. This is the list of offences punishable by three or more years' imprisonment. In the Crimes Act 1908 various offences were identified as offences for which a

person could not be arrested without warrant, and there was an almost identical list of offences that were bailable as of right. The Crimes Act 1961 introduced simplified arrest provisions and in that context the previously listed offences were no longer treated separately, but a somewhat shortened list was kept in the context of bail as of right. For the most part these offences are not amongst the most common to come before the courts, and there seems to be no rational connection between them. We believe that nothing of value would be lost if they ceased to be bailable as of right.

- (v) Section 319(4) should be retained, so that an imprisonable offence would not be bailable as of right if the defendant has been previously convicted of an offence punishable by imprisonment. In the 1974-75 Wellington study, only 20% of arrested defendants were bailable as of right,⁽⁶⁰⁾ and there is little doubt that many cases are removed from this category by the previous conviction rule. One member (Dr Young) disagrees and would not allow the mere fact of previous conviction to have this effect. Another member (Mrs Lowe) considered that section 319(4) should be re-examined in the light of the statement at page 9 of the Planning and Development Division paper Remand and Bail that in the Wellington study only 20% of arrest cases were bailable as of right. However, the majority took the view that no case has been made for significantly broadening the category of offences bailable as of right.
- (vi) The effect of s.319(2) should be retained: a first offender should be bailable as of right if charged with an offence punishable by less than three years, with the exception of offences against s.194 of the Crimes Act 1961. This exception is justified by the high risk of re-offending which often accompanies the domestic setting of these offences. Two members dissent from the retention of the three year rule. Chief Superintendent McLennan considers that only those offences not punishable by imprisonment should be bailable as of right; Dr Young considers that if, but only if, previous convictions were to be irrelevant (as he proposes) the penalty limit would need to be substantially reduced, perhaps to twelve months. The majority view is that a sufficient case has not been made for such a substantial reduction in the scope of bail as of right.

119. Finally, we note that in a paper prepared by the Planning and Development Division, Department of Justice (April 1982), it is suggested that a "remand at large as of right" category of offence be created. This would apparently include those offences now bailable as of

right, although the previous conviction rule would be abolished or curtailed. Failure to appear after such a remand would make the defendant liable to remand in custody or on bail.

120. The object of this proposal is to substantially reduce the occasions on which a custodial remand is possible, and it also has administrative advantages in that the number of bail bonds to be processed would be significantly reduced. The proposal gives full recognition to the right to liberty of those charged with other than serious offences, but we do not believe that it gives sufficient weight to the other interests of society that are involved. We are not persuaded that it is necessary or desirable that a large number of defendants should become automatically entitled to release, subject only to the condition that they appear as and when required, regardless of the circumstances of each particular case.

Although defendants may be entitled to be released there should be some incentive for them to appear. The proposed category would not provide such an incentive as there would be no sanction whatever for their failure to do so.

NATURE OF BAIL AND AN OFFENCE OF FAILING TO ATTEND

The Effect of Bail

121. When bail is granted and preconditions satisfied (in particular, when the defendant and any required and approved sureties enter into the prescribed bond) the defendant is entitled to be at liberty. Of course, this is so only if the defendant is not in lawful custody for some cause other than the charge or charges in respect of which bail is granted, as, for example, when he is already in custody under sentence of a court. This is succinctly recognised in s.49(2) of the Summary Proceedings Act 1957 which requires the defendant's release "if he is in custody only under the warrant [for his detention] issued in pursuance of the remand". This should continue to be the effect of bail.
122. Under the present law it seems that a court is authorised to grant bail only if it remands "in custody" (as opposed to "at large"), bail being a device for the conditional removal of the physical constraints of such a remand (see, ss.46, 47 and 49 Summary Proceedings Act 1957). It would be more in keeping with common understanding of the position to allow a grant of bail without a technical remand in custody. Even so, provision would have to be made for the detention of a bailed defendant who does not meet preconditions, such as provision of an acceptable surety, surrender of a passport, or acknowledgement of

the bail notice we recommend (paragraph 230). At present this is authorised by the warrant for detention issued pursuant to a custodial remand and whatever the remand be called a similar process will be necessary.

Financial Bonds

123. Under the existing law it is a requirement of every release on bail that the defendant enter into a bond in which he acknowledges himself bound to forfeit a sum of money should he fail to attend or perform any other obligations under the bond. In the event of any such breach, the court may order forfeiture of the specified sum, or a lesser amount. But although breach of bail conditions renders the defendant liable to arrest on a warrant, failure to comply with the requirements of a bail bond does not constitute an offence. The law relies on the threat of forfeiture to secure performance of bail obligations.
124. Two criticisms have been made of the requirement that the defendant enter into a financial bond. First, it discriminates against the poor, who may be refused bail because it is obvious that any substantial bond would be unenforceable. Second, even when bail is granted the reality may well be that the defendant lacks the resources to meet his liability. Indeed, although estreatment proceedings are occasionally taken against sureties, it seems they are practically unknown against the defendant.

An Offence of Failing to Attend

125. The United Kingdom Act adopts the solution of abolishing the defendant's financial bond, but makes it an offence to fail to surrender to custody without reasonable cause. Each of the Australian statutes creates a similar offence, but the New South Wales Act also allows the court to require a financial bond.
126. Initially some members of our committee were attracted to this approach, but others argued that if an offence is created there would be no need for financial undertakings, and that imposition of both criminal guilt and civil liability to forfeiture opens the way to double punishment of the one wrong. Ultimately the committee decided by a majority that:
- (i) Financial bonds from defendants should be abolished; and
 - (ii) There should be an offence of failing to attend in accordance with the defendant's obligations. It would be a defence that the defendant had reasonable cause for such failure but, in line with all the overseas legislation, the defendant would have the onus of proving such reasonable cause on the balance of probability.

127. We gave close consideration to the appropriate maximum penalty for this "absconding" offence. In the United Kingdom and Victoria the maximum is one years' imprisonment, in Queensland it is two years, and in New South Wales the maximum is the same as the offence in respect of which the defendant is bailed, subject to a limit of three years and a fine of \$3 000. In many cases failure to appear will be a relatively minor offence for which a fine will be an adequate penalty. Indeed in some cases non-attendance may arise from indifference rather than an intention to evade justice, and no penalty will be called for. But in other cases absconding will be deliberate and might involve serious inconvenience to the court, the prosecution, and witnesses, and considerable public expense. In extreme cases successful prosecution of the principal offence may be impossible because evidence is no longer available when the defendant is finally caught. In view of these considerations, and in furtherance of our object of maximising the number of defendants released on bail, we concluded that the penalties available to the courts should be sufficiently severe to provide a convincing deterrent to absconding. The majority recommends that the penalty for the offence should 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 seven years. Given the relative ease with which absconding can be proved, it is thought that such a rule would provide a real incentive to the defendant to answer his bail, and should facilitate the granting of bail in respect of serious offences. On the other hand, we do not suggest that imprisonment would be appropriate when the defendant absconds in respect of relatively minor offences. One member (Dr Young) favoured a bar on imprisonment if the principal offence is punishable by a maximum of less than three years' imprisonment; other members rejected such an absolute rule.
128. We also considered whether non-attendance should be a summary or an electable offence, and concluded that it should be treated in the same way as other offences: the defendant should be entitled to elect trial by jury when the maximum penalty exceeds three months' imprisonment. Ordinarily the offence will be dealt with in the District Court, but where the High Court imposes sentence for the principal offence we would expect that the District Court would commit the absconder to the High Court for sentence. This will enable the one Judge to deal with both the principal and the absconding offences, this being desirable because it enables the case to be dealt with by a Judge familiar with all the circumstances, and it avoids the risk of the imposition of unintended cumulative sentences. We considered, but rejected, a provision in the Queensland code which requires imprisonment for an absconding offence to be cumulative on any other sentence of imprisonment. The court should retain its ordinary discretion as to whether the penalties should be cumulative or concurrent, having regard to the totality principle.

129. It may be objected that there is little point in abolishing financial bonds if the penalty for absconding will usually be a fine - all that is achieved is the replacement of a maximum financial liability fixed in a bond with a maximum financial liability fixed in a statute. If the former is an unfair or unrealistic liability, so is the latter. We believe, however, that the wider range of penalties available upon conviction for an offence may act as a more effective deterrent, and suggest that cases where the exaction of a sufficient fine is not possible could often be met by the use of other non-custodial measures, such as community service or periodic detention. We also consider that in the case of serious offences the proposed offence is more appropriate and realistic than requiring large financial bonds.
130. One member (Mrs Lowe) dissents from these recommendations. She is not convinced by the argument of deterrence and does not think there is a sufficient case for creating a new offence. Instead, she would retain the present system of financial bonds. Mrs Lowe is concerned that the prosecution might concentrate on the absconding offence whenever the case on the principal offence is weak, especially in the light of the heavy maximum penalty proposed for the offence of absconding.
131. It is further recommended by a majority of the committee that where a person is convicted of the offence of failing to attend the court should have power to order him to pay the proved reasonable expenses incurred in finding and apprehending him. Sureties should not, however, be liable in this respect.

Cash Deposits

132. As previously explained (paragraph 59), under existing law and practice in New Zealand cash deposits are not taken from bailed defendants. As a general rule we do not favour their use because they discriminate against the poor and might stimulate unacceptable moneylending practices. But it would sometimes be useful for the court to have the power to require the deposit of cash or some other security. This might be necessary to provide a real incentive for a defendant to appear if he is not a New Zealand resident and has the opportunity of absconding overseas. Some members of the committee suggested that such a condition should be permitted whenever this is justified by "exceptional circumstances" but we rejected this as being too uncertain. A majority of us recommend that a court should have the power to require the deposit of cash or other security if, but only if, there are reasonable grounds for believing that in the absence of such a deposit the defendant would leave the country.

One member (Chief Superintendent McLennan) would give the court an unrestricted right to require the deposit of cash or other security. He emphasised the incentive to appear that it provides, and envisaged its use in cases of defendants with a history of absconding, as well as those who are likely to leave New Zealand.

One member (Mrs Lowe) did not favour conferring a power to require a deposit of cash or some other security. She considered that there was no evidence that such a power was needed. Once conferred the power could be used far more frequently than Parliament intended, with the harmful consequences indicated by the majority.

CONDITIONS

133. The present position is discussed in paragraphs 56-60. It is somewhat obscure, but probably a District Court is usually restricted to taking a financial bond, requiring a surety or sureties, and imposing a reporting clause, although in practice other conditions are occasionally added.⁽⁶¹⁾ The High Court is thought to have power to impose such conditions as it thinks fit, and in the case of persons under 21, s.47 of the Criminal Justice Act 1954 confers this power on all courts.
134. We have already recommended abolition of the defendant's financial bond, and the question whether sureties should be retained is dealt with in paragraphs 154-158. Every bailed defendant should be subject to a statutory obligation to surrender to custody at an appointed time and place, it being an offence for him to fail to do so without reasonable cause, but there will often be cases when the court wishes to impose other conditions. Apart from reporting clauses, examples include a requirement that the defendant surrender his passport, that he reside at a particular place, or that he not associate with certain people.
135. The more conditions that are imposed the greater the restriction on the individual's liberty, but power to impose a variety of conditions may increase the numbers who are released, for conditions may reduce the risk of absconding, offending, or obstruction of justice. Therefore, in agreement with the United Kingdom and Australian statutes, we recommend that the Bail Act contain a wider power to impose conditions than is generally conferred by existing legislation. An increased power to impose conditions was strongly supported by District Court Judges with whom we conferred.
136. We considered a number of different forms such a provision could take. One member (Mrs Lowe) favoured an exhaustive list of permissible conditions. She considered that Parliament should give guidance to the Judiciary, and in particular to JPs, on the nature of the possible

conditions. This would avoid the risk of unreasonable conditions being imposed. In the absence of evidence that anything further was required she favoured restricting the conditions to the surrender of a passport, non-association, residence where specified, and restrictions on movement. The majority of us rejected such a limitation on the court's powers, on the ground that even a lengthy list would inevitably omit conditions which would be useful in particular cases, or would have to be too generally worded to be really valuable. The New South Wales Act has an exhaustive list, although the first of the conditions - that the defendant agree "to observe specified requirements as to his conduct while at liberty" - is so general as to undermine the objects of clarity and consistency which might justify this approach.

137. Another suggestion was that the statute should list those conditions that can be foreseen as being often appropriate, but should add a general power to impose other reasonable requirements. This found some favour as providing guidance as to suitable kinds of conditions, while preserving flexibility. We had difficulty, however in, agreeing on the conditions that should be included in such a non-exhaustive list, and ultimately abandoned the idea.
138. We recommend, by a majority, that there be no statutory list of conditions, but that all courts be empowered to impose such reasonable conditions as the court considers necessary to secure that the defendant surrenders to custody, does not offend, and does not obstruct the course of justice. This is not quite as wide as the power proposed at a Magistrates' Conference in 1978 where it was resolved that the Summary Proceedings Act 1957 be amended to allow the imposition of such conditions "as the Court or Justice thinks fit". We think it essential that the Code should specify the permissible purposes of conditions. It should provide that the court may impose only those conditions that it considers necessary to avoid the risks that may rebut the presumption in favour of bail.
139. There is one special condition which should be permissible regardless of the bail risks. As is presently authorised by s.47A of the Criminal Justice Act 1954 the court should have the power to make it a condition of a grant of bail that the defendant shall attend for psychiatric examination at a clinic approved by the court.

Breach of Conditions

140. Apart from the automatic requirement that the defendant surrender to custody, the conditions the court will be able to impose will vary in their content, importance, and precision. We do not think it necessary or desirable that a breach of any of these other conditions should constitute an offence. It will suffice if the police are empowered to arrest the defendant in the event of any such breach.

POWERS OF ARREST

141. There is plainly a need for powers to apprehend bailed defendants who abscond or who are about to abscond, but this is one of the more obscure and unsatisfactory areas of the law. Subject to special statutory provisions relating to defendants bailed in respect of serious drug dealing offences, the present legislation does not authorise arrest for breach or anticipated breach of bail obligations except pursuant to a warrant issued by a Court or Justice of the Peace. The following paragraphs contain a more detailed account of the existing law.

District Courts

142. Where a defendant has been bailed pending summary trial or a preliminary hearing, section 53(1) of the Summary Proceedings Act 1957 authorises a District Court Judge or Justice to issue a warrant to arrest the defendant, if satisfied by evidence on oath that the defendant "has absconded, or is about to abscond for the purpose of evading justice". If after such arrest the Court is satisfied the defendant had absconded or was about to abscond, discretionary bail is again possible but bail as of right is excluded (s.53(2)). There are similar provisions for breach of a reporting clause, although in that case actual breach must be established for the issue of the warrant, anticipated breach being insufficient (s.54 Summary Proceedings Act 1957).
143. If a bailed defendant does not attend on the date set for a summary or preliminary hearing, section 55 of the Summary Proceedings Act 1957 authorises any District Court Judge or Justice to issue a warrant to arrest him (or, if the offence is not electable, the Court may proceed with the hearing: s.61). Nothing is said about further bail and presumably the usual rules apply, although it is hardly satisfactory that such a defendant should be bailable as of right. In contrast, sections 53 and 54 (with their provisions for discretionary renewal of bail) apply after a defendant is bailed upon committal for trial or sentence (s.171 Summary Proceedings Act 1957).
144. When a convicted defendant is bailed pending an appeal to the High Court, section 126 of the Summary Proceedings Act 1957 authorises a District Court Judge or Justice to issue a warrant to arrest the defendant if satisfied by evidence on oath that he has absconded, or is about to abscond. After the arrest the Court is empowered to commit such an appellant to prison pending the appeal; it is not clear whether discretionary bail remains possible, although it is if the the appellant is arrested on warrant for a mere breach of a reporting clause (s.125(3) of the Summary Proceedings Act 1957, which applies s.54 to such a case).

High Court

145. Section 320 of the Crimes Act 1961 applies "whenever any accused person is granted bail by the High Court" and would therefore appear to apply when the defendant is being tried in the High Court or when he is being proceeded against in the lower Court, but bail is granted in the exercise of the inherent jurisdiction of the High Court. Section 320 is similar to section 53 of the Summary Proceedings Act 1957: any High Court Judge can issue a warrant to arrest the defendant if it is proved on oath that he has absconded or is about to abscond, and subsequently the defendant is again bailable, but only in the discretion of the Court. Section 350 of the Crimes Act 1961 provides for bench warrants: when a defendant proceeded against on indictment (in the High Court or a District Court) does not attend to plead, or to be sentenced if committed for sentence, the court may issue a warrant for his arrest. After arrest such a defendant may again be bailed, but if he failed to attend without reasonable cause bail as of right is excluded.
146. There is no statutory power for the issue of a warrant to arrest a defendant in breach of any other conditions of High Court bail - for example, breach of a reporting clause - and it may be wondered whether the Court retains an inherent power to issue a warrant. Nor are there any statutory powers in relation to breach of bail granted by the Court of Appeal under sections 397 and 399 of the Crimes Act 1961.

Sureties

147. At common law a grant of bail in theory places the defendant in the custody of his sureties and they are entitled to discharge themselves at any time by seizing him and handing him over to the custody of the law.

"The bail have their principal always upon a string, and may pull the string whenever they please ... they may take him up even upon a Sunday and confine him until the next day and then render him."(62)

Under modern practice sureties are no longer essential to bail, but it has been suggested that the common law power of sureties to apprehend the defendant may survive in New Zealand - in relation to both High Court and District Court Bail.(63) This could be so only if this does not amount to "arrest" within section 315(1) of the Crimes Act 1961, the theory being that the defendant is at all times in the custody of his sureties.

Recommendations

148. The present position is unsatisfactory because of the uncertainty that exists in respect of some of the above matters, and we consider that existing police powers are too restricted. We are satisfied that where there is evidence establishing that the defendant has absconded or is about to abscond, a member of the police should be able to arrest him without warrant. The existing need to obtain a warrant involves the risk of successful absconding because of the delay involved. For the police to have sufficient protection from liability for wrongful arrest the power to arrest without warrant should be available if a member of the police believes on reasonable grounds that the defendant has absconded or is about to abscond. A majority of us further recommend that a member of the police should be empowered to arrest without warrant if he believes on reasonable grounds that the defendant has breached any other conditions of his bail. One member (Mrs Lowe) considers it sufficient in these cases if the police can obtain a warrant to arrest. A majority (Mrs Lowe, Professor Orchard and Dr Young dissenting) also think it desirable that the power to arrest should extend to reasonably anticipated breaches of such other conditions. These powers should apply to all cases, regardless of which court granted bail and regardless of the stage in the judicial process at which it was granted. In relation to serious drug dealing offences, similar powers have already been conferred on the police by ss.32 and 33 of the Misuse of Drugs Amendment Act 1978.
149. In some cases a breach of bail may occur or may be foreseen, but although further consideration by the court might be desirable, it may not be necessary to arrest the defendant. Arrest should not be the only way of getting the defendant back to court and we recommend that in any of the above cases the defendant should also be liable to be summoned to appear before the court for the question of bail to be further considered.
150. The statute should provide that wherever a defendant is arrested pursuant to the above powers he must be brought before a court as soon as possible. We do not accept that a presumption against a further grant of bail should arise in the above cases, but where the court is satisfied that the defendant has absconded, or was about to abscond, or had otherwise been in breach of his obligations, it would be wrong for him to be bailable as of right or for there to continue to be a presumption in favour of bail. Of course, when it is established that the defendant had absconded or was about to abscond bail will very rarely be renewed, and s.32(3) of the Misuse of Drugs Amendment Act 1978 actually prevents it. We do not think that such an absolute bar should be introduced for other cases. A majority (Mrs Lowe and Dr Young dissenting) recommends that whenever a bailed defendant appears before the court, on arrest or summons, and

the court is satisfied of any of these matters, the defendant should then be bailable in the discretion of the court, with no presumption either way. This is much the same as the present position under sections 53(2) and 54(2) of the Summary proceedings Act 1957, and it should be made clear that it applies to all courts and at all stages.

151. We are opposed to sureties having a right to arrest or seize the defendant. If such a power were to be given it should presumably be explained to sureties, but any suggestion that they must or ought to exercise it could lead to dangerous confrontations; it is also a power that might be open to abuse. Generally, the policy of our law is to allow private individuals only limited rights of arrest and we do not think it necessary or desirable that sureties should have the power. When they reasonably anticipate absconding or the like it should be a sufficient discharge of their obligations if they do what they can to inform the police. We later deal with the termination or variation of a sureties liability (paragraphs 200-202). The Code should make it clear that any surviving common law power of detention by sureties is abolished.⁽⁶⁴⁾
152. As is presently the case, the court before whom the defendant is required to attend should have the power to issue a bench warrant to arrest the defendant should he fail to appear. Again, it is the majority view (Mrs Lowe and Dr Young dissenting) that bail should thereafter be in the discretion of the court, with no presumption either way.

SURETIES

153. Under the existing law, when a District Court grants bail it has a discretion to require a surety or sureties in such sum or sums as the Court or Justice fixes. If the defendant fails to attend at the specified time and place, or fails to comply with any other conditions of his bond, any surety is liable to forfeit the amount fixed, or a lesser amount (ss.49, 56, 57, and 58 Summary Proceedings Act 1957). In the High Court bail is not subject to such detailed statutory provisions but in practice the Court now exercises a similar discretion as to whether sureties are required, and such sureties are similarly liable to forfeiture.
154. We received a submission that the power to require sureties should be abolished.⁽⁶⁵⁾ Two reasons were given for this somewhat radical change. First, the surety system discriminates against the poor because they are least likely to have friends with sufficient material assets or resources for them to be acceptable sureties. A stranger to the locality may also have difficulty providing a surety. Second, requiring sureties makes little or no difference to either the rate of absconding or reoffending, or at least it has not been shown to have any such effect.

155. This submission was supported by citation of figures in the publication of the Justice Department based on a study of bail cases in the Wellington Magistrate's Court between 8 October and 13 December 1974. These figures suggest that non-appearance and reoffending rates do not significantly vary according to whether a defendant is simply released on his own recognisance or whether further conditions are added. As to non-appearance, of those released on their own recognisance 6.4% did not appear; the figure for those released on their own recognisance plus a surety was 6.3%, for those released on their own recognisance plus a reporting clause it was 6.9%, and for those released on their own recognisance plus a surety and a reporting clause it was 5.1%. As to reoffending, 10.8% of those released on their own recognisance were charged with another offence allegedly committed while on bail. None of those released with a requirement of a surety were so charged, but for those released with a reporting clause the alleged reoffending rate was 11.7% and for those released with a requirement of both a surety and a reporting clause the rate was 18.5%.
156. More recently, between 6 and 26 February 1982 the Planning and Development Division of the Department of Justice conducted a survey of arrest cases in Auckland, Wellington, Christchurch and Dunedin, and we have been supplied with the results of this small sample. In comparison with figures produced by the 1974 Wellington study, there appears to have been some increase in the percentage of cases where sureties have been required as a condition of bail: from 18% in 1974 to an average of 23% in 1982, though there was considerable variation between the different centres. The average amount of sureties' bonds may have also increased: in the 1974 survey the bonds ranged from \$150 to \$500, with \$300 being the most usual amount, whereas in 1981 the range extended from \$250 to \$5,000, the most frequent amount being \$500, closely followed by \$750 and \$1,000. But the incidence of non-appearance also seems to have increased from 6.4% in 1974 to an average of 11.8% in 1982, while alleged offending while on bail also increased slightly from 11% in 1974 to an average of 13.5% in 1982. The 1982 figures do not, however, reveal what, if any, difference there was in the rate of non-appearance or alleged offending by those bailed with and without sureties.
157. We think that little reliance can be placed on the available statistics. They are the result of rather limited samples and although the 1974 figures are consistent with non-appearance and offending rates being independent of the conditions imposed, the author of the study acknowledges that they cannot be regarded as establishing this. Had the various conditions not been imposed it is possible that absconding and offending would have been more prevalent in these cases. We simply do not know whether the relative consistency in non-appearance and offending rates was because of or in spite of the conditions imposed.(66)

158. A number of members of the committee remain sceptical of the effectiveness of sureties in practice, but after lengthy consideration we concluded that the courts' power to require sureties should be retained. Their effectiveness has not been established, but nor has it been shown to be wrong to suppose that the risks of absconding or offending may be significantly reduced by the existence of third parties who have a material interest in preventing such conduct. In these circumstances there will be cases where courts consider the risks would be too high unless there are others with a stake in the defendant's conduct. Therefore prohibition of sureties could increase the numbers remanded in custody. They are retained in all the overseas legislation.

The requirement of a financial bond from the defendant's surety may sometimes operate unfairly where a defendant does not have friends who are willing to take the chance and who have the financial resources to cover the bond. But we see no satisfactory alternative. An unlimited financial liability would be as bad as or worse than liability to forfeit a fixed sum and it would be unacceptable to make the surety guilty of an offence should the defendant abscond. Criminal liability should not depend entirely on the conduct of another. Nor do we see sufficient value in a provision in the New South Wales Act which empowers the court to require that an acceptable person acknowledge that he is acquainted with the defendant and regards him as a responsible person who is likely to comply with his bail undertaking. There is no sanction in the event of breach.

159. Of course, there are many cases where a surety is not necessary and some members felt this should be emphasised by a statutory provision that it should not be a condition of first resort. This was not supported by the majority but we recommend that the requirement of sureties should be subject to the general provision that no condition should be imposed unless it appears to the court to be necessary for the purpose of preventing absconding, offending, or the obstruction of the course of justice. It follows that courts should not require sureties as a matter of course in borderline cases, but only in circumstances where there is good reason to believe that a surety or sureties will achieve the desired purpose. We also considered provisions in the Victoria and Queensland codes which require the court to follow a particular sequence in considering whether conditions of increasing severity should be imposed: for example, release of defendant on his own undertaking to appear, release on such an undertaking with a surety or sureties, release on such an undertaking with a surety or sureties and a deposit of money or other security. We rejected any such statutory sequences as being unduly rigid and mechanical. Nor did we consider it necessary to lay down maximum amounts in which a surety may be bound.

Approval of Sureties

160. The court's requirement of a surety will not necessarily be satisfied merely because there is someone who is willing to act as such. Although the statutes are silent on the point the courts have always exercised a discretion to reject some people as unsuitable. But there is authority suggesting that the permissible grounds for rejecting sureties are limited. It appears that minors, persons in custody, and those who are indemnified will be rejected, but otherwise a person should be accepted if he has the means to meet the contingent obligations under the bond. There is express authority that the court is not at liberty to investigate the "character or opinions" of the proposed surety.⁽⁶⁷⁾ In practice the decision whether or not to accept a surety will usually be made by the person who takes the bond - usually the Registrar or a Deputy Registrar - and it is he who will make the inquiries as to means. We understand that there used to be a practice whereby the police vetted proposed sureties, but that this is no longer usual. We do not know the extent to which such a practice may have survived, although one New Zealand practitioner has written that it is "commonplace" for courts to require sureties to be approved by the police.⁽⁶⁸⁾ This would almost certainly entail inquiries into such matters as character and criminal record which authority suggests may be improper, and it has also been suggested that this is a delegation of the court's powers without any legal justification.⁽⁶⁹⁾
161. It is commonsense that not everyone will be acceptable as a surety and the Bail Act should make provision for the acceptance or rejection of proposed sureties. We considered a suggestion that before a surety was required the court should have to make inquiry as to the availability and suitability of a surety. We rejected this because it would be impracticable and would lead to unjustified delays in disposing of the business of the court. We approved what is in effect the present practice and recommend that the decision as to the suitability of a surety should be made by a Judge, Justice of the Peace, or Registrar (which would include a Deputy Registrar). While resort may be had to police information, police approval should not be a prerequisite to the acceptance of a surety. Should the defendant or prosecutor dispute the decision of a Registrar as to the suitability of a surety he should have the right to apply to the Judge who granted bail for a review of that decision.
162. As to the grounds upon which this decision may be made, we do not think the inquiry should be limited in the way suggested by some common law authorities. For example, a person of manifestly bad character might be so obviously unreliable that the object of requiring a surety would be inevitably frustrated, whereas if the defendant can show the court he has an available surety of demonstrably good character who

can be expected to take his obligations seriously bail will be a better risk, and might enable the court to fix the surety's bond at a lower amount than would otherwise be thought appropriate. We think that all relevant matters should be able to be considered in assessing the suitability of a surety and recommend that the statute provide that a Judge, Justice of the Peace, or Registrar, when deciding whether or not to approve a surety may have regard to:

- (a) the financial resources the intended surety has or may reasonably be expected to have;
- (b) his character and any previous convictions;
- (c) his proximity (whether in kinship, place of residence or otherwise) to the defendant;
- (d) any other relevant circumstances.

This is similar to provisions in the United Kingdom, Victorian, and Queensland statutes, while the New South Wales Act simply requires that the surety be an "acceptable person".

163. We considered but rejected a provision which would require the surety to have sufficient means to meet the obligation in the bond. Such a requirement would be calculated to disqualify those of limited means, and this would aggravate the difficulties some defendants already have in providing sureties, and it would be rather unrealistic because the fact that the surety has the means on entering the bond does not guarantee he will still have them later. Any such absolute requirement would also necessitate inquiries into the extent to which his property was encumbered. Our proposal is more flexible in making "financial resources" a relevant factor only, and it directs attention to the reasonable expectations of the surety, as well as his present position. Thus, account may be taken of the surety's expected earnings and ability to meet the contingent obligations by payment in instalments.
164. We favour preserving a high degree of flexibility in this area and do not think the Act should absolutely exclude any class of person - such as a spouse - from eligibility as a surety. Some of the overseas Acts disqualify persons under a specified age, but we think this arbitrary and unnecessarily rigid. We think that the general obligations and liability under the bond should be explained to the surety, who would not be suitable if he did not apparently understand them. This, and common sense, will suffice to exclude the very young and the mentally disordered. On the other hand, a surety is supposed to take steps designed to ensure the appearance of the defendant, and only human beings can qualify for this task; incorporated bodies should not be eligible.

165. There is an obvious risk that in order to secure his acceptance as suitable a proposed surety may provide misleading information, for example by exaggerating his financial resources. If estreatment proceedings are later instituted a very different picture will emerge, with financial hardship being pleaded in an attempt to reduce the amount forfeited. It is essential that in the estreatment proceedings the Court should know what was said at the time the bond was entered into and to facilitate this we recommend that there be a requirement that at the time a surety is approved the person taking the bond should have recorded in a certificate countersigned by the surety the information provided by the surety. This certificate would be available to the court at the estreatment hearing and would be prima facie evidence of its contents.
166. At present the courts have power to require a number of sureties and we recommend that this continue to be the law, with no statutory limit on the number. There may be cases where an imaginative use of this power could assist the grant of bail to those without acquaintances of substantial means. A number of sureties of good character but limited means, each bound in a small sum, might well provide as much or more protection as one surety bound in a large amount.

Failure to Obtain Sureties

167. One of the problems with a requirement of a surety is that it involves the imposition of a condition which the defendant may only later discover he cannot fulfil. Until an acceptable surety appears and enters a bond the requirement set by the court has not been met and the defendant is kept in custody. In the result, it is by no means uncommon for defendants to be granted bail by the court but to nevertheless then spend substantial periods in custody because they are unable to produce an acceptable surety. The problem appears to be most evident in large urban areas. For example, the Superintendent of Mt Eden Prison supplied us with the following information:

"From 10 February 1980 until 22 September 1980 out of a total of 528 defendants granted bail and held in custody in Mt Eden gaol, 376 obtained sureties or made a successful application for a variation of bail conditions. The remainder, who could not obtain either a surety or a variation in their bail conditions, were held in custody until their next appearance at court."

More recent figures obtained by the Justice Department confirm that this is a continuing problem. In the four week period 12 October to 6 November 1981 there were in New Zealand prisons 108 bailed defendants who were unable to meet the terms of their bail.

168. We believe there is need for a provision that would ensure that all such cases be reconsidered by the court, with as little delay as possible. This would enable the court to give particular consideration to the case and to the question whether it is possible to vary the terms of bail, perhaps by reducing the amount of the surety or even by dispensing with the requirement altogether. A majority (Chief Superintendent McLennan dissenting) recommend that the Bail Act provide that where a court grants bail with a requirement of a surety or sureties and that requirement has not been met within 24 hours, the case should be automatically reconsidered by that court. The Act should place a duty on the person having custody of the defendant to report such cases to the Registrar who will refer the matter to the Judge. The defendant and his counsel would have the normal right to appear and make submissions, so that a physical return of the defendant to court would be necessary. Should the court refuse to vary the terms of bail there would be no further automatic return until the next remand date. Chief Superintendent McLennan considers that too many defendants would take advantage of the 24 hour automatic return rule. They would make little effort to obtain the surety knowing their application would be reviewed with some pressure then on the court to remove the surety requirement or reduce what it has already decided is the correct amount for the surety. He considers that the situation is adequately met by leaving it to the defendant to find an alternative surety who will take the responsibility seriously, albeit for a lesser amount. The defendant can then seek an order to vary the original surety requirement, and at the same time, provide an acceptable alternative.

Cash Deposits

169. The possibility of requiring a cash deposit, or other security, from the defendant is discussed in paragraph 132. There the majority recommendation is that it should be possible only where there is a risk of overseas absconding. We see the position of a surety as being different for unlike the defendant he has a real choice as to whether he is to be involved in the bail process. In some cases the court should have the power to make it a condition of bail that a surety deposit with the court either cash or some other security, which would be liable to be forfeited should the defendant fail without reasonable cause to surrender to custody. Some members felt that such a power would be essential if the surety was the spouse of the defendant and there was a danger that both might leave the country. Another example is where the intended surety resides overseas, so that his bond would probably be unenforceable without such a deposit. In such a case bail might be impossible unless the court can impose such a requirement.

170. We recommend that the Bail Act provide that the court have power to require the deposit by a surety of cash or some other security where the court is satisfied this is justified by exceptional circumstances related to the surety or intended surety. We believe that such a qualified power would be sufficient, and should be sparingly exercised. It should be exercisable only by a Judge, not by Justices of the Peace.

Indemnification of Sureties

171. The object of requiring a surety is frustrated if the surety's interest in the fulfilment of the defendant's obligations is removed by the defendant or another compensating him for any loss he might later suffer in the event of estreatment. The surety has no right of action against the defendant to recover any such loss,⁽⁷⁰⁾ and at common law such an agreement has been held to be an indictable conspiracy.⁽⁷¹⁾ It has been suggested that it is also a criminal contempt of court.⁽⁷²⁾ In New Zealand the position is debatable. Such agreement might be a criminal conspiracy to obstruct or pervert the course of justice, contrary to s.116 of the Crimes Act 1961,⁽⁷³⁾ and similarly, actual indemnification before the breach of the defendant's bail might be an offence against s.117(d). In line with overseas legislation we recommend that such transactions be offences under the Bail Act, so that it would be an offence for anyone to compensate or agree to compensate another for any liability he may later incur as a surety.

Scope of a Surety's Liability

172. Under s.58 of the Summary Proceedings Act 1957 a surety is liable to forfeit his bond, unless sufficient cause to the contrary is shown, if the defendant fails to attend or fails to perform any other condition of the bond (although a reporting clause is probably the only other condition that can generally be imposed in a District Court). When bail is granted in the High Court liability may arise under sections 21 and 23 of the Crown Proceedings Act 1950 whenever "the recognisance is forfeited", and presumably this occurs upon breach of any condition of the bond. Under s.31 of the Misuse of Drugs Amendment Act 1978, however, a surety may be required only in respect of the conditions that the defendant surrender to custody and report to the police, so that a breach by the defendant of other conditions cannot lead to forfeiture by the surety.
173. The primary duty of a surety is to take reasonable steps to ensure that the defendant surrenders to custody at the appointed time and place, such surrender being the principal object of the conditions imposed on a grant of bail. Under our proposals the courts will be able to impose a wide variety of conditions and it will often be unrealistic to expect a surety to see that they are complied with at all

times. Indeed, even requiring a surety to ensure that a reporting clause is complied with will often impose an unduly onerous burden on him. We therefore recommend that the Act should provide that a surety is under a duty to take all reasonable steps to ensure the attendance of the defendant at the appointed time and place and that the surety be liable to forfeiture only in the event of a failure by the defendant to surrender, and not in the case of breach of any other condition (including a reporting clause). We believe this to be more realistic than what appears to be the present position, and it is consistent with the provisions of the United Kingdom and Australian statutes, although some of these allow for limited liability in respect of other conditions when the surety is the parent or guardian of a defendant who is under 17, and has consented to the condition in question. In the United Kingdom such a surety may be liable to a maximum of 50 pounds in such a case, and in Victoria to a maximum of \$200.

FORFEITURE OF BOND

174. Should a defendant be in breach of his obligations under the bail bond he and any sureties become liable to pay to the Crown the amount of their respective bonds, although the courts have a discretion to remit part or all of this liability. The process whereby a court orders payment of all or part of a bond is known as "estreatment". In substance, the governing principles are the same in District Courts and the High Court, but a complicating feature of the present law is that different procedures apply according to the court in which a bond is estreated.

High Court

175. Estreatment in the High Court is governed by ss.21 and 23 of the Crown Proceedings Act 1950. Section 21(1) provides that a Judge before whom a recognisance is forfeited "may" cause it to be estreated, but notwithstanding this wording it is established that the Judge has no discretion at this stage. Forfeiture arises from a breach of the conditions of the bond, and the person bound at once owes a debt to the Crown. Under s.21 when such breach is proved the Judge must cause the bond to be estreated.⁽⁷⁴⁾ This is done by the Judge certifying that the forfeiture has taken place and delivering the recognisance and certificate to the Attorney-General, who is then required by s.21(2) to cause final judgment to be signed in the High Court for the amount of the recognisance, plus a sum not exceeding \$10 for costs. Judgment is in a prescribed form and there is no right of appeal. It is only after this that a defendant or surety is able to seek remission of his liability. He may do this by applying to the High Court for an order that satisfaction be entered on the judgment, it being provided by s.23 that the Court may, after giving notice to the Attorney-General, enter satisfaction on one of two grounds: either because of actual satisfaction (i.e. the full amount

has actually been paid), or because it is proved that "according to equity and good conscience and the real merits and justice of the case" satisfaction ought not to be required. This allows the Court to remit all or part of the liability.

District Courts

176. Sections 57 and 58 of the Summary Proceedings Act 1957 lay down the applicable procedures when a person has been bailed to appear for a summary or preliminary hearing in a District Court. Under s.57, if the defendant at any time fails to comply with any conditions of his bond, any District Court Judge or Justice of the Peace may certify the breach on the back of the bond. When this has been done, s.58(1) requires the Registrar to fix a time and place for consideration of the estreatment of the bond. Then he must, at least 7 days before the time fixed, have served on the defendant if he can be found, and any sureties, notice that unless at that time and place some person bound by it "proves to the satisfaction of the Court that it ought not to be estreated, the bond will be estreated". Before the Court can order estreatment non-performance of a condition of the bond must be proved, but s.58(2) provides that the certificate under s.57 shall be sufficient prima facie evidence of this. If at the hearing such a breach is proved, then, if "no sufficient cause to the contrary is shown", a Court presided over by a District Court Judge may order estreatment of the bond "to such an amount as it thinks fit" as to any person bound and on whom notice has been duly served. If the defendant cannot be found the order may be made against him notwithstanding non-service (s.58(2)). Section 58(3) describes the amount payable as a "penalty" and provides that it shall be "recoverable as if it were a fine".
177. For the most part the technical differences between the High Court and District Court procedures are of little practical importance. Under the Crown Proceedings Act 1950 estreatment is automatic once default is shown, but the Court may subsequently remit liability. Under the Summary Proceedings Act 1957 it is possible that the Court has an initial discretion whether or not to certify a breach (although it is difficult to imagine a certificate being refused in respect of an unexplained breach of any importance) and the discretion to remit is exercised before estreatment is formally ordered. Under the Crown Proceedings Act 1950 it will be necessary for the debtor to take the initiative and apply for relief, whereas under the Summary Proceedings Act 1957 it seems that the Court is never required to estreat, and is empowered to do so only after notice to sureties. But if no one appears to show cause to the contrary it is hardly likely - and it might well be improper - that estreatment would not be ordered.

178. On the other hand, after estreatment has been ordered there are differences in the enforcement procedures which might be more important. In the High Court, upon signing of final judgment under s.21(2) of the Crown Proceedings Act 1950 the defendant and any sureties become judgment debtors for the full amount of their recognisances, and the judgment may be enforced in the same manner as an ordinary civil judgment.⁽⁷⁵⁾ In contrast in the District Court the sum payable is "recoverable as if it were a fine". This makes available a number of provisions of the Summary Proceedings Act 1957 which involve inquiry into the means of the person from whom payment is sought, and which give the Court various powers - for example, to direct payment by instalments, allow further time to pay, make an order attaching salary or wages or even remit the amount owing. Although doubts might arise from the word "recoverable" in s.58(3), it has been assumed that, as with a fine, non-payment of a bond in a District Court might lead to a sentence of periodic detention.⁽⁷⁶⁾

Discretion to Grant Relief

179. Section 58 of the Summary Proceedings Act 1957 and section 23 of the Crown Proceedings Act 1950 each gives the court the power to decide how much of a bond must be paid. The former does this by providing that if "no sufficient cause to the contrary is shown, a court ... may ... estreat the bond to such an amount as it thinks fit", whereas the latter allows relief after judgment if it is proved this ought to be given "according to equity and good conscience and the real merits and justice of the case". These provisions were recently considered by the Court of Appeal in Murdoch,⁽⁷⁷⁾ where it was held that there is no material difference in their effect, so that the same principles apply in District Courts and the High Court.
180. In Murdoch the Court reviewed the principles that apply to the exercise of the discretion in relation to sureties. The onus of proving grounds that justify relief is on the surety. McMullin J emphasised that a bail bond "represents a solemn undertaking on the part of the surety and is not to be lightly entered upon", and that:
- "Accordingly, the starting point in any proceedings for estreatment must be a recognition that the surety is obliged to pay the amount of the bond unless it is shown that there are factors which make it fair and just that estreatment should not take place in full in accordance with the terms of the bond".
181. As to the grounds that may justify remission, it was held that the primary consideration must be whether the surety took all reasonable steps to ensure that the defendant complied with his bail bond. As has been held in previous cases, a surety has a duty to take "positive steps" to ensure that the defendant appears as required by his bail, such as

checking on his continued residence, and notifying and assisting the police should he disappear. The extent to which the bond might be remitted will depend largely on the degree of fault of the surety. If he connived at the absconding, or did nothing positive to prevent it, the whole amount will usually have to be paid. If he took some steps but not all he reasonably could, the court is likely to grant no more than a partial remission, but if he was guilty of no want of diligence and used every effort to secure the defendant's attendance the entire amount might be remitted.(78)

182. Although this must be the primary consideration, and McMullin J thought that in most cases it would be the only relevant matter, it was also held that because the statutes do not limit the grounds on which relief may be given all the other circumstances of a case may also be considered, at least in so far as they are relevant to what is "fair and just". The particular question in Murdoch was whether the means of the surety at the time of estreatment could be taken into account. It was held that they could be, particularly if estreatment would cause hardship because of a change in the circumstances of the surety occurring after the bond was signed and through no fault of his. But such hardship will rarely have much impact on the decision - "hardship from want of means can generally have no more than secondary weight at best at the estreat stage", (79) it is "not a factor which ... is likely to receive much weight", and cases where a change in means justifies relief will be "few indeed".(80) Naturally, it will have very little weight if when entering the bond the surety exaggerated his means.
183. It is impossible to list all the factors that may be relevant to what is a "fair and just" order. As examples, the cases show that at least some relief might be allowed if the surety helped the police find the defendant after he absconded, or had reasonable grounds for believing the defendant would appear, or had been encouraged by a person in authority to act as surety. It is doubtful whether the fact that the defendant eventually appeared and was acquitted would be material, and judges have taken different attitudes to this in considering estreat of the defendant's bond.(81) The expense to the Crown in finding and arresting the defendant has often been mentioned against allowing relief,(82) but the means of a spouse should not tell against the surety.(83)

Recommendations

184. We have recommended, by a majority, that the court should not be empowered to take a financial bond from the defendant, but an estreatment procedure will still be needed in respect of sureties. This should be provided for in the Bail Act and there should be a single procedure applicable to all cases. The procedure in the Summary Proceedings Act 1957 seems to us to be adequate and appropriate and we recommend that it be adopted rather than that in the Crown Proceedings Act 1950.

185. We recommend two further substantive changes to the existing law of estreatment. First, a surety should be liable on his bond only if the defendant fails to surrender to custody as required. The defendant will often be subject to other conditions (e.g. reporting), and if the surety does not make reasonable efforts to see that he meets them and the defendant absconds, that will weigh against the surety in estreatment proceedings - probably he will not have done all he reasonably could to secure attendance. But it is unrealistic to expect a surety to act as an around the clock watch-dog, and he should not be liable to forfeiture merely because the defendant is in breach of a subsidiary condition.
186. Second, should the defendant fail to appear, in the absence of a sufficient explanation the presiding Judge should be required to certify this on the surety's bond. There is concern that at present estreatment proceedings may not be brought as consistently or often as they should be. For the requirement of a surety to be effective proceedings to enforce forfeiture should follow as a matter of course when the defendant apparently absconds. To this end we recommend that, upon an unexplained failure to attend, the presiding Judge should have no discretion but should be required to certify the fact of non-attendance.
187. Thereafter in all courts a procedure equivalent to that in s.58 of the Summary Proceedings Act 1957 should apply. Thus the Registrar of the court before which the defendant has failed to appear will be required to fix a time and place for an estreatment hearing, of which he must give the surety notice and at which the certificate will be prima facie evidence of the defendant's failure to appear. At the hearing, once the non-appearance is proved, the court will be empowered to estreat the bond to such an amount as it thinks fit unless sufficient cause to the contrary is shown. We do not recommend any codification of the principles governing the court's discretion. The surety's bond creates a presumptive liability but we see no need for statutory fetters on the court's power to grant relief. The amount payable should be recoverable as if it were a fine.
188. The same procedure and principles would apply before forfeiture of any cash deposit.

DURATION, VARIATION AND REVOCATION

Duration of Bail

189. A bailed defendant binds himself to attend at a specified time and place. In some cases, however, the hearing will then be adjourned again. To require a fresh bond will involve more paper work and inconvenience, which will usually be pointless. Section 49(2) of the Summary Proceedings Act 1957 takes account of this in providing that it shall be a condition of the bond that the defendant "attend personally

at the time and place to which the hearing is adjourned or, at the discretion of the Court or Justice, that he attend personally at every time and place to which during the course of the proceedings the hearing may be from time to time adjourned". Although this makes continuous bail a matter for the discretion of the Court or Justice, the prescribed form of the bond includes such a condition unless it is deleted. We understand that in practice the High Court also grants such continuous bail and, at least in some centres, District Court forms are used for convenience.

190. Where, however, a defendant is charged indictably or elects trial by jury, or a District Court declines summary jurisdiction, and the hearing is concluded by the defendant being committed for trial or sentence, the present rules do not provide for the automatic continuation of bail: a fresh grant and a new bail bond are needed upon committal. On committal for sentence the bond requires attendance at a specified time and place; on committal for trial it requires attendance at a specified time and place or at a time and place to be notified by the Registrar of the court of trial, and on such other days as may be notified by that Registrar. Such notification should be given in writing to the defendant or his counsel, and (in the case of the first notice, when the bond does not specify a date) any sureties (s.171 Summary Proceedings Act 1957).
191. As is presently the case, we recommend that the court should have the power to grant or refuse bail upon committal for trial or sentence, after the commencement of the trial, and upon conviction. But when the court decides that bail should continue on the same terms as before we do not think it should be necessary for the defendant to receive a new bail notice or sureties to enter new bonds in any of these cases. Whenever a defendant is granted bail his obligation should be to attend at every time and place to which any hearing of the charge may be adjourned, and at any time and place to which he may be committed for trial or sentence (including those of which the Registrar gives him written notice). The defendant and any sureties should receive written notice of this obligation.
192. In some rather more exceptional cases bail will again be granted pending an appeal after conviction and sentence. In such a case a full reconsideration of the question will normally be required before bail is allowed, and we think that the formalities necessitated by requiring new notices and bonds are justified. Police bail is also a special case and, as now, it should always require attendance at a specified time and place, upon which it should terminate.

Variation of Bail

193. There may occasionally be cases where the defendant desires some variation of the conditions of his bail. For example, conditions may have been imposed requiring him to live and work at specified places and he may have good reason for wanting to change these, or compliance with a reporting clause may have become excessively burdensome because of a change in residence or employment. At present, there is no statutory provision dealing with variation of High Court bail but changes may be made to District Court bail pursuant to s.49A of the Summary Proceedings Act 1957. When bail has been granted any District Court Judge may, on the application of the defendant, vary the terms or conditions of the bond which has been entered into or is to be entered into, and the Registrar may, on the application of the defendant, vary the times and places specified in a reporting clause.
194. Section 49A provides an unqualified power of variation on an application by the defendant. We unanimously recommend that this should be retained, and extended to cases in the High Court. The power given the Registrar in relation to the details of a reporting clause is convenient and should be retained; indeed in some cases there should be no need for an application to the court and we recommend that, with the consent of the defendant, any member of the police should be able to change the time and place but not the frequency of reporting by filing a memorandum in the court which granted bail. As under the present law (s.49A(2)) no variation should take effect until any sureties have consented. The importance of such a requirement is highlighted by a recent English decision where estreat of a surety's bond was resisted on the ground that the surety had not been informed of a variation in the terms of bail. It was held that this did not render his bond void.⁽⁸⁴⁾ We think it essential in fairness to the surety that he be given notice of any proposed change in the terms of conditions of bail and should not remain bound unless he consents in writing to any change.
195. The next question is whether the prosecutor or police should be able to apply for variation of the terms or conditions of bail. The statutes in the United Kingdom (s.3(8)), Victoria (s.18(6)) and New South Wales (ss.44-48) confer an unrestricted power of variation on the courts upon an application by the prosecution or the defendant.

A majority of the committee favour a similar power in New Zealand, although two of us (Professor Orchard and Dr Young) would confine prosecution applications to cases where there has been a substantial change in the circumstances or known circumstances since the original grant of bail. One member (Mrs Lowe) would allow only the defendant to apply for variation.

Revocation of Bail

196. A related issue, but one on which we had more difficulty in reaching agreement, concerns the revocation of bail. At present bail will terminate when the defendant surrenders to custody at the time and place specified in his bond or (if the bond so provides) at such other times and places to which the hearing in question is adjourned. It is also effectively revoked when the defendant is arrested for a new offence, or on a warrant for absconding, anticipated absconding, or breach of some other condition of his bail. It also seems that the defendant may voluntarily cut bail short by surrendering to custody at any time during its currency, although where he has been released after conviction in the District Court and pending appeal to the High Court, this seems to depend on the discretion of the District Court (s.128 Summary Proceedings Act 1957).
197. We do not think that an unconvicted defendant should have an unrestricted right to elect to be held and maintained by the State and recommend that termination by surrender before the appointed time should be abolished in such cases and replaced by a power in the court to revoke bail on the application of the defendant.
198. It must remain the case that a defendant ceases to be entitled to release under an earlier grant of bail if he is arrested for another offence, or under the powers of arrest granted in respect of absconding, anticipated absconding, or breach of the bail conditions, but we divided on whether the police should be able to apply to the court for revocation of bail in other cases. Some members pointed to the fact that the court may grant bail pursuant to the presumption but there may be a change in circumstances, or new information may become available which makes a custodial remand appropriate. For example, the offence may increase in seriousness because of the death of the victim, or the police may be able to point to an increased risk of non-appearance because they have learned of earlier breaches of bail obligations, or because family or employment changes have decreased the defendants's community ties. Cases may also occur where bail is granted by different courts in respect of a series of charges, each court being ignorant of the other charges, which may have arisen while the defendant was already on bail. Should the full picture then be discovered even the power of the High Court in relation to revocation is at least doubtful.⁽⁸⁵⁾ Therefore, some members propose that, on the application of the police, the court granting bail should be able to revoke it upon being satisfied that there has been a substantial change in known circumstances, and that the presumption in favour of bail is rebutted on the statutory tests.

199. Other members opposed such a provision. Some felt that enabling the police to go back to court on such general grounds gave insufficient finality to the grant of bail, and would be a power which could be abused. These members thought that the powers of arrest and appeal which we propose are adequate for the protection of the community, and that bail should continue when the defendant has complied with its terms and the police are unable to establish a belief on reasonable grounds that he will in fact abscond. After lengthy debate we remained evenly divided on this issue although a majority would accept a much more restricted provision enabling the police to apply for revocation on the ground that the court was misled as to the circumstances at the time of the initial grant of bail.
200. The position of sureties requires separate consideration. We have already recommended against a citizen's right of arrest being conferred on a surety. If a surety suspects that the defendant has absconded or is about to abscond, or will otherwise breach conditions, it should be a sufficient discharge of his obligations if he promptly informs the police, and provides them with any relevant information. We have discussed at paragraph 148 the powers the police should have where a member of the police believes on reasonable grounds that the defendant has been in breach of any terms or conditions of his bail, or is about to abscond. A majority (Mrs Lowe dissenting) recommend that he should be entitled to arrest him without warrant, and should be protected from both civil and criminal liability in doing so.
201. Occasionally there will be other cases where a surety has good reason for wishing to be discharged from his obligations and liability. Even when he has no reason for anticipating absconding, his circumstances may have so changed as to justify termination of his suretyship. For example, family or employment may require his absence from the defendant's locality, physical incapacity may prevent his taking positive steps to check on the defendant, or a decline in his financial circumstances might make his continued liability unacceptable or unenforceable. On the other hand, once a surety has entered into formal obligations we do not think it right that he should have an unrestricted power to jeopardise the defendant's liberty by cancelling his undertaking. The court should retain a discretion. Therefore, we recommend that the court which granted bail should be able, on the application of a surety, to discharge the surety from the liability, or vary that liability. On making any such application the surety should be required to give notice to both the defendant and the police, who would be entitled to be heard on the matter. The court would be empowered to refuse the application, leaving the bail to continue unchanged, or allow it, in which case the court would be empowered (but not required) to require a new surety in the absence of which the defendant would be remanded in custody. The court should also be able to impose other conditions on any continuance of bail. Provisions to similar effect are found in s.23 of the Victorian statute.

202. Obviously the object of requiring a surety is entirely defeated if the surety dies. The Code should provide that in the event of the death of a surety his estate should not be liable in respect of any later breach of bail, and another surety may be required (s.20 of the Victorian Statute is to the same effect). We also recommend that, on application to the court, it should be empowered to require substitution of a surety if it is satisfied that he has become physically or mentally incapacitated to such an extent as to be unable to discharge his obligations.

JUDICIAL REVIEW

203. Whenever a defendant is refused bail in a District Court before he has been convicted the High Court may nevertheless grant bail in the exercise of its inherent jurisdiction. This in effect gives an unconvicted defendant a right of appeal to the High Court against any refusal of bail in the District Court, although technically it is not an appeal, the procedure being that the defendant makes an application for bail to the High Court which hears the matter in the exercise of its original jurisdiction. In theory an alternative procedure might be to apply to the High Court to review the lower Court's decision, pursuant to the Judicature Amendment Act 1972, but this is generally inappropriate as it enables the High Court to interfere only if some error in principle is established, whereas on an application for bail the Court deals with the case on its merits.⁽⁸⁶⁾
204. When a defendant has been convicted after a summary hearing in a District Court that Court may grant or refuse bail pending an appeal to the High Court. The appellant has a statutory right to apply to a Judge of the High Court to review any such grant and refusal, and the Judge "may in his discretion confirm, modify, or reverse the decision" (s.125(4) Summary Proceedings Act 1957). Presumably, the High Court will consider the merits of the application on any such "review". It appears that the High Court has no inherent or statutory power to review a refusal of bail in a District Court when the defendant has been convicted and is remanded for sentence in the Court, or is committed for sentence in the High Court. Nor does the inherent jurisdiction allow it to modify a grant of bail made in the lower Court, s.125(4) apparently providing the only example of such a power (see above, paragraphs 24-26).
205. Where a defendant is convicted after trial by jury, in the District Court or the High Court, and he appeals against conviction or sentence, either the trial Judge or the Court of Appeal may grant bail pending the determination of the appeal (s.397(2) Crimes Act 1961).

206. As a general rule, the prosecution has no right of appeal against a grant of bail, nor any right to apply for variation of its terms. An exception is found in the Misuse of Drugs Amendment Act 1978 which gives both the defendant and the Crown a right of appeal to the Court of Appeal against the refusal or grant of bail in the High Court. The Court of Appeal may confirm the decision appealed against, or "if it is satisfied that the Judge in making that decision exercised his discretion wrongly" it may reverse or modify the decision (s.36(1)).

Recommendations

207. The bail decision involves an attempt to predict the future and there will often be room for different assessments of the risks. Moreover, the District Court may have only limited time in which to consider the decision, which will sometimes be made before all relevant information is available. In these circumstances it is clearly appropriate that a defendant refused bail in the District Court should have the right to have the question reviewed on the merits in the High Court. This should extend to all cases where bail is refused in a District Court, whether before or after conviction, and it should include a power to modify a grant of bail. Although the High Court should be able to consider and take account of the reasons why bail was refused in the lower Court, the proceedings in the High Court should take the form of a rehearing, the presumption in favour of bail applying in those cases coming before the Court before conviction or, in the case of the minority recommendation, before sentence. Both the defendant and the prosecution should be entitled to call evidence, but we do not support suggestions that the statute should lay down formal procedural requirements, such as the supply of affidavits by the defendant or proposed sureties. Mandatory formal requirements of that kind can cause unnecessary delay.
208. We believe that the above objects would best be achieved by legislative adoption of the procedure presently appropriate when resort is had to the inherent jurisdiction of the High Court. In all the above cases the defendant should have a statutory right to make an original application to the High Court to grant bail or modify an existing grant of bail. This should be available when bail has been refused or granted, or if for some reason the question has not been considered in the District Court. Such a rule would cover all cases in which the inherent jurisdiction is now available, and it could be abolished.
209. The next question is whether the prosecution should have a similar right to challenge a grant of bail, or its terms. Such a right is effectively conferred by ss.44-48 of the New South Wales Act. In view of the nature of the bail decision, the circumstances under which it is commonly made, and the proposed presumption in favour of bail, a majority of

us (Mrs Lowe dissenting) recommend that the prosecution (except private prosecutors) should have the same right as the defendant to apply to the High Court for an order modifying or revoking a grant of bail in a District Court. In 1976, in an unpublished report to the Minister on certain aspects of bail, a majority of this committee made a similar recommendation, but suggested that the High Court be confined to considering whether the District Court Judge or Justice of the Peace had exercised his discretion wrongly. With the introduction of a presumption in favour of bail a majority now recommend that on the prosecution's application, as on a defendant's, the High Court should consider the case on its merits. We do not think that the prosecution should require leave of the Solicitor-General before applying to the High Court; we agree with the 1976 majority's view that this would cause unnecessary delay in a proceeding which by its very nature requires speed and quick dispatch. Some check on unwarranted applications will exist in any event because the application will have to be handled by a Crown Solicitor.

210. The District Court order granting bail should remain in force pending the determination by the High Court of the prosecutor's application, so that the defendant would be at liberty unless and until the High Court revoked bail. The committee made a similar recommendation in 1976 and such a rule applies when the Crown appeals under the Misuse of Drugs Amendment Act 1978. Where the offence is bailable as of right the prosecution's right to apply in respect of any such case should be confined to disputing the terms of bail.
211. Where the District Court has jurisdiction to grant bail a decision of the High Court, on application by the defendant or prosecution, should be final with no further right of appeal. In other cases where bail may in the first instance be granted only in the High Court (for example, when the defendant is convicted there and appeals to the Court of Appeal, or in cases of serious drug dealing) we recommend, that both the defendant and the Crown should have a right of appeal to the Court of Appeal. We do not consider it necessary or appropriate that the Court of Appeal should be required to consider the question *de novo* and recommend that, as under the Misuse of Drugs Amendment Act 1978, such an appeal be limited to the question whether in granting or refusing bail the Judge exercised his discretion wrongly. As in other cases, the defendant should be released in terms of his bail pending determination of an appeal by the Crown.
212. Mrs Lowe has reservations about paragraph 209 of the foregoing. She accepts that, because of undue pressures and the lack of relevant evidence, some bail decisions are open to criticism. However, she is attracted to the idea of keeping bail applications in the District Courts as far as possible and avoiding successive bail hearings. The objective of greater consistency might be achieved by permitting the police to give notice of their intention to

oppose bail and establishing procedures, such as exist in the High Court in relation to alleged drug dealers, to see that all relevant material is before the court making the initial decision. This may make for a more economical use of resources and judicial time than would the institution of Crown appeal rights. Though some defendants would be released on bail less speedily their release would be certain; it would not be subject to revocation by a higher court. Mrs Lowe would like to see this system tried out before any final decision is taken on a right of appeal for the Crown.

If there is to be a right of appeal for the Crown, Mrs Lowe considers that it should be limited to the question whether in granting bail the Judge exercised his discretion wrongly. In a criminal matter it is an important principle that the court stands as a protection between the State and the individual. A judicial decision in favour of the liberty of the subject should not be reversed simply because a higher court would have come to a different decision. This is especially so as most bail proceedings concern a defendant against whom no offence has yet been proved.

THE BAIL HEARING

213. The proposed presumption in favour of bail means that the defendant must be released unless sufficient cause to the contrary is established or he is unable to meet conditions imposed by the court. It follows that there should be no need for an application for bail, for the matter will have to be investigated by the court if a custodial remand is to be justified. The defendant may apply, but even if he does not it would be the duty of the court to consider the question.
214. At present, when bail is opposed by the prosecution the matter is often heard in Chambers, with relative informality. In particular, the courts do not insist on material being confined to sworn or admissible evidence and much of it is presented in the form of submissions by defence and prosecution. This practice might offend the purist but it allows for speedy disposition. If procedural nicety was insisted upon decisions to release defendants from custody might have to be substantially delayed, or the courts might become clogged by the presumption requiring priority to be given to bail hearings. These considerations together with the safeguard provided by review in the High Court (see paragraph 203), lead us to reject any requirement that a more formal hearing procedure should be imposed. There are, however, a number of procedural provisions which should be incorporated in the Code.

Chambers hearings and publication

215. As a general rule it is undesirable that the circumstances of a case should be publicly examined at a pre-trial bail hearing. We therefore favour the practice of hearing disputed cases in Chambers. A mandatory requirement to this effect would be too rigid but we recommend that there be a statutory provision which expressly empowers the court to conduct any bail hearing in private. The possibility that such questions may be heard in open court means that there will have to be provision relating to wider publicity, and this is also necessitated by doubts relating to the propriety of publishing proceedings in Chambers, and the court's power to prohibit their publication.⁽⁸⁷⁾ Some of the overseas statutes (for example, Victoria, s.7; Queensland, s.12) empower the court to forbid the publication of the details of a bail hearing, but we would go further. We do not think that the mere fact that a court deals with the matter in public justifies wider publication of details which may be damaging to the defendant. We recommend that the Bail Act prohibit publication of all matters relating to any bail hearing except (i) the identity of the defendant (unless his name is suppressed) and the offence or offences charged, (ii) the decision to grant or refuse bail, and (iii) the conditions of bail if it be granted. This should be subject to a proviso that for special reasons of public interest or in the interests of the defendant the court may make an order allowing publication of further details.
216. The preceding recommendation is designed to prevent prejudice from pretrial publicity. A related problem arises when the same Judge presides at the bail hearing and at the later substantive hearing. In considering bail he may be informed of various matters (e.g. previous convictions) which are quite inadmissible at the later hearing, and there is a danger that he will form or appear to form a view. Ideally, a Judge who decides on bail when it is opposed should not preside at the hearing of the substantive offence, but we accept that in New Zealand conditions it would be unrealistic to provide that he be disqualified.

Evidence

217. The bail decision will often be a matter of some urgency and the parties may not have the opportunity of marshalling material in a form that would be acceptable at a trial, or a hearing on affidavits. We recommend that current practice be confirmed and that the statute expressly provide that the court may receive as evidence any statement, document, information or matter which it considers relevant, whether or not it would be admissible under the ordinary laws of evidence.

It may be suggested that there should be a proviso that if objection is raised evidence must be sworn and admissible. We do not agree that the statute should incorporate such an absolute rule. Even if the possibility of frivolous defence objections would be adequately met by a power to adjourn and remand in custody meantime, there would remain the chance of police objections causing the defendant difficulty and leading to delays.

218. Although evidence on oath should not be essential either party should be entitled to present it, and the court should be entitled to require it on particular matters should it consider this necessary.

The defendant might elect to give evidence and it would be desirable for provision to be made as to the extent to which it might later be used against him. The Victorian and Queensland statutes (sections 8(b) and 15(b) respectively) prohibit questioning the defendant as to the offence with which he is charged, but we think this is too restrictive. In exceptional cases the defendant may wish to go into the question, either to assert his innocence and chance of acquittal, or to minimise his possible guilt. He should be liable to cross-examination on any matter on which he gives evidence, but we think it wrong that any admissions he might make in asserting his *prima facie* right to pre-trial liberty should automatically be available against him at trial. We think there is some analogy with the position of a defendant who gives evidence on a voir dire when the admissibility of a confession or admission is contested. (88)

We favour a rule that any sworn or unsworn statements or evidence given by the defendant at the bail hearing should not be admissible in any subsequent proceedings, with two exceptions. First, should he later give evidence inconsistent with any such statement or evidence he should then with leave of the Judge be liable to be cross-examined on it; if he denies the earlier statement or evidence it should be admissible in rebuttal. Second, should he give sworn evidence at the bail hearing it should be admissible against him on a charge of perjury.

Vera scheme

219. The "Vera scheme", initially known as the Manhattan Bail Project, was started by the Vera Institute of Justice in 1961 in New York City, and variations of it have since been used in the United States, Canada, and in some courts in England. These schemes aim at minimising the numbers remanded in custody by providing systematic means of gathering objective information about a defendant, in particular his community ties, which may indicate a low risk of absconding. Typically such systems involve an independent (often voluntary) person obtaining information from the police and the defendant as to his previous criminal

record, his family, his past and present employment, and residence. Where possible the information is verified, often by telephone, and the results are presented to the court, often with a recommendation based on likelihood of appearance. The court is free to accept or reject the report - it is merely relevant material along with any other matters before the court.

220. The advantage of such a scheme is that it ensures that the court does not have information of a negative kind only, supporting custodial remand, but also has verified information about the defendant which might point to his suitability for bail. Such information is not always put before the court today. (89)
221. Nevertheless we do not recommend that the Bail Act should require the implementation of such a system. In the first place, probably it would be practicable only if it had to be followed in a relatively small proportion of cases. The cases in which it might be useful are those where the police oppose bail and although a Vera system confined to those cases should be workable if those administering it were given notice of police opposition we do not think it would be practicable for the law to make it mandatory for the police to give such notice. For a variety of reasons a decision on opposition will sometimes not be made until shortly before the defendant's appearance in court. We would add that because the court at the bail hearing is not subject to technical limitations as to the material it may take into account it would be able to consider information gathered in this way, or pursuant to any other system that might be tried. Section 33 of the New South Wales Act authorises regulations providing for a "bail test" to establish a defendant's rating in relation to his "background and community ties", and s.32 requires the court to take account of any such rating in considering the risk of absconding. We see no need for such a statutory rule in New Zealand.
222. Nor are we persuaded that in New Zealand conditions such a scheme would be sufficiently useful to justify its establishment by statute. In some cases when bail is opposed the defendant will be represented by privately instructed counsel, in which case a separate information gathering service should not be necessary. Of course, many will be represented by a hastily instructed duty solicitor who may not obtain all the relevant information, and who will rarely have the means of verifying whatever he is told. In these cases the system would help. But even if more information about the defendant's personal and social circumstances was always available it would not follow that the numbers receiving bail would significantly increase, for opposition to bail very often relates to other matters, such as the nature of the offence and the defendant's previous record. Thus, a report on a trial scheme in England found that "whatever the scheme's effect on the outcome of

individual cases its effect on the frequency of custodial remands was negligible".(90)

223. While we do not recommend any statutory implementation of a Vera scheme we believe it would be desirable for the duty solicitor to have a standard form to cover information relevant to the bail decision, and that he should use his best endeavours to obtain the information. Dr Young also believes that as a matter of practice the police should take responsibility for advising duty solicitors as soon as possible of those cases in which bail will be opposed.

Degree of proof

224. The circumstances in which the bail decision is made and the nature of the information often presented are such that it would be wrong to apply the very high standard of proof normally insisted upon in criminal cases. We recommend that whenever any court has to decide whether or not bail should be granted all questions of fact should be decided on the balance of probabilities. For the avoidance of doubt there should be a statutory provision to this effect (compare s.59 of the New South Wales Act).

Reasons

225. The United Kingdom and Australian statutes require a court which refuses bail to give reasons for that decision, and they require the court to make a "note" of the reasons (s.5 of the United Kingdom Act) or a written statement "of the grounds of refusal" (s.12 of the Victorian Act, s.18 of the Queensland Act). The United Kingdom and New South Wales statutes (ss.5 and 38 respectively) also require the court to give and record reasons for the imposition or variation of any conditions of bail.
226. Three reasons can be given in support of such a requirement. First, it assists the defendant and his advisers to make a decision whether an application to the High Court or, where appropriate, the Court of Appeal is worthwhile. Second, even where the application is to the High Court, so that the question whether bail should be allowed (and the conditions) will be considered de novo, it will not follow that the reasons of the lower court carry no weight, and a proper statement of them may assist the Judge.(91) Third, it will assist in ensuring that proper consideration in accordance with the statutory criteria is given to the bail decision. On the other hand, it has to be acknowledged that the bail decision and the statutory criteria are such that the reasons are liable to be rather general and will involve a significant element of speculation. There is a danger that they will be little more than a recitation of selected statutory criteria.

227. Notwithstanding these reservations we believe there will sometimes be value in requiring written reasons, (92) and it need impose no excessive burden on the court. We therefore recommend that whenever bail is refused the Judge or Justice must give his reasons in writing at the time the decision is made. There will be some occasional cases when bail is granted notwithstanding strong opposition from the police. Notwithstanding the presumption written reasons may sometimes be of assistance and we recommend that they should also be required when bail is granted if they are requested by the prosecution in such cases. A majority (Mrs Lowe dissenting) would go further and say that reasons should be recorded whenever bail is granted after a contested hearing. Apart from these cases we think that written reasons for conditions (or variation of conditions) should be given only if requested, by either party.

228. In proposing the requirements of written reasons we do not mean to suggest that a lengthy judgment should be given. Rather we believe that what is required is a concise memorandum which briefly identifies the evidence or submissions, and the statutory criteria or other considerations which were decisive.

Bail Notices

229. We have recommended that the Bail Act should include a statutory obligation to appear - a provision to the effect that whenever a court grants bail the defendant shall be under a duty to surrender to custody at the time and place specified by the court. The court should make a written record of its decision to grant bail, its terms and any conditions imposed. This record would be sufficient evidence of its content in any subsequent proceedings. We have also recommended abolition of the defendant's personal recognisance, so that release pursuant to a grant of bail will no longer involve the defendant entering into a bond. But it is essential for the avoidance of doubt that the defendant receive written notice of the terms of his bail.

230. We recommend that on the grant of bail the defendant must be given written notice that states in simple terms:

- (a) the effect of the grant of bail - i.e. that the defendant is released from custody but is under a duty to later surrender to custody;
- (b) the date, time and place at which the defendant is to next appear and that he is also required to attend at every time and place to which the proceedings may be from time to time adjourned;
- (c) the conditions (if any) attaching to the grant of bail;

- (d) the consequences of a breach of the terms of the bail - i.e. liability to arrest in every case, and liability to conviction of an offence in the event of failure without reasonable cause to attend as and when required, and liability of any sureties to forfeit their bonds should the defendant fail to attend.

The defendant should be required to sign on the court's copy an acknowledgement of receipt of this notice, and would thereupon be entitled to release, provided that any other conditions (such as provision of a surety or surrender of a passport) have been met.

- 231. This proposal is not open to the objection that it will unduly increase the administrative burden on the courts. The existing law requires that the defendant and sureties be given a written notice of the conditions of bail, in addition to their entering into a written bond (s.50(2) Summary Proceedings Act 1957). The notice we recommend takes the place of the bail bond presently required from the defendant, and we believe that such a notice is essential to bring home the terms and effect of the bail. Regulations should provide a printed form for the notice, which would be used in all courts - at present no standard forms are provided for bail in the High Court, a position which we do not regard as satisfactory. The drafting of this notice should aim at communicating the necessary information to the defendant with as much clarity and simplicity as possible.
- 232. Under our recommendations any surety required as a condition of bail will be required to enter into a bond as is presently the case. A copy of the bond, which should be in standard form for all courts, should be given to the surety. It should contain the same information as the notice given to the defendant, with prominence being given to the surety's statutory duty to take all reasonable steps to ensure the attendance of the defendant, and the surety's liability.
- 233. In addition to requiring written notices similar to those we recommend, s.17 of the Victorian statute provides that before releasing the defendant the court must be satisfied that he and any sureties understand the nature and extent of the defendant's obligations and the consequences of his failure to comply with them. We do not think it necessary for the Bail Act to go this far. Such an investigation by the court should be unnecessary when the defendant has retained counsel and in other cases where there may be doubt as to the degree of understanding we would expect the member of the court staff who gives the defendant his notice, or takes the surety's bond, would provide any explanation that seems necessary. A relatively informal communication of this kind is at least as likely to be effective as an explanation by the court. If it is thought necessary the Justice Department could provide administrative guidance on this question and in this respect consideration might be given to

language difficulties which may be experienced by some defendants. It has been suggested to us that such defendants sometimes have little understanding of the meaning of or the obligations involved in a grant of bail. The problem has probably become less acute with the introduction of a duty solicitor scheme, and the introduction of a presumption in favour of bail should at least ensure that lack of representation does not lead to bail not being considered. But we think there is a case, as an administrative matter, for the preparation of explanatory pamphlets in more common foreign languages with bail notices and surety's bonds prepared likewise.

Legal representation

234. Since the introduction of the duty solicitor scheme cases when bail is refused to a defendant who has no legal representation at all should be unusual. Nevertheless, by analogy to the rule applied by s.13A of the Criminal Justice Act 1954 to sentences of imprisonment it might be suggested that a custodial remand should be prohibited unless the defendant has, or has had the opportunity of obtaining, legal representation. We do not recommend such an absolute rule because there will occasionally be cases where compliance would be impracticable because of lack of time. Other possibilities would be a requirement of legal representation unless it is impracticable, or a rule allowing a custodial remand of no more than 48 hours in the absence of representation. We understand, however, that in practice short remands are the rule in those rare cases where the duty solicitor does not appear and a majority do not think legislation on the question is necessary. Two members (Professor Orchard and Dr Young) favour a 48 hour rule.

SUCCESSIVE APPLICATIONS

District Courts

235. Under the Summary Proceedings Act 1957, when a defendant is refused bail on one adjournment he may renew the application on each subsequent adjournment: s.46 authorises a custodial remand whenever any hearing is adjourned but this is expressly subject to s.319 of the Crimes Act 1961 and s.47 of the Criminal Justice Act 1954, both of which authorise the granting of bail.
236. Under s.45 of the Summary Proceedings Act 1957 where the defendant "is remanded in custody" the adjournment shall not be for longer than 8 days, unless both parties otherwise consent. Strictly, this might apply when the defendant is remanded in custody and is granted bail, such a remand being necessary for there to be a warrant authorising his detention

in the event of his failing to sign the bail bond or provide a required surety. This would enable the police to seek a regular review of a grant of bail, but we understand the common practice is not to apply the 8 days rule when the defendant is in fact released on bail. When a preliminary hearing is adjourned s.152 applies and this in turn requires consent to a period over 8 days in all cases, and again it is common practice not to require it when the defendant is in fact released.⁽⁹³⁾

237. In the present context the important point is that whenever there is an adjournment before conviction or committal and the defendant is in fact remanded in custody, the adjournment may not be for longer than 8 days unless both parties consent, and on every adjournment the court has power to grant (or refuse) bail.

But a recent decision in England limits the value of this, it being held that after the court has once gone into the matter and refused bail it should only reconsider the issue on subsequent applications if there are new circumstances or circumstances that were not previously brought to the attention of the court.⁽⁹⁴⁾ We know of no New Zealand authority on this but in practice District Court Judges commonly take a similar view.

238. Under the Summary Proceedings Act 1957 a defendant refused bail generally has no right to be returned to court for a fresh application until the date to which the hearing is adjourned. Section 46 authorises the court to remand the defendant "in custody for the period of the adjournment", and s.47 provides that when he is not released the Court or Justice "shall issue a warrant ... for his detention in custody for the period of the adjournment". There is a qualification to this in s.48. When a remand prisoner is bailable as of right he has a right to be returned to court to apply for bail if he so requests and if he did not apply for bail when he was remanded.

239. When a defendant is refused bail pending an appeal to the High Court, or upon committal for trial or sentence, the statutory provisions (ss. 125 and 171 Summary Proceedings Act 1957) do not plainly exclude successive applications to the District Court. However, it is doubtful whether the Court would entertain more than one application, at least in the absence of new circumstances. It seems likely that the right to apply to the High Court would be regarded as the only appropriate remedy; even that is absent when the defendant is committed for sentence, although in that case there will usually be little delay before the case is disposed of.

High Court

240. Where a defendant is refused bail by a Judge of the High Court it seems probable that the High Court would refuse to consider the matter again, at least in the absence of new circumstances. In In re Hewer⁽⁹⁵⁾ Fair J. refused bail and the application was renewed before a Court of three Judges. Bail was again refused and it was doubted whether successive applications were permissible. Similar doubts were subsequently expressed in England where such successive applications are now prohibited by Rules of Court.⁽⁹⁶⁾
241. There is one final point. If a defendant before a District Court applies to the High Court for a grant of bail in its inherent jurisdiction and this is refused, what effect does that have on a further application to the District Court on a subsequent remand date? We know of no authority but it seems safe to assume that a District Court would refuse bail unless persuaded there were new circumstances.

Recommendations

242. In R. v. Nottingham Justices ex parte Davies⁽⁹⁷⁾ it was accepted that when an arrested defendant first appears before the court he is likely to be represented by a hastily instructed duty solicitor, or may be unrepresented so that bail may be refused without an adequate investigation of the facts. But on his next appearance a week later the matter can be gone into thoroughly and, it was held, thereafter the court should investigate the merits of a bail application only if the applicant can point to a change in circumstances, or circumstances not previously brought to the court's attention. In other cases the earlier decision is to be treated as binding. "It is *res judicata* or analogous thereto". On the other hand, when the preliminary hearing is complete and the defendant is committed for trial there will commonly have been a "change in circumstances", for the court will be better able to assess the strength of the evidence and the nature and seriousness of the offence.⁽⁹⁸⁾
243. The Nottingham Justices judgment has been severely criticised.⁽⁹⁹⁾ The 8 day remand rule is of little value if bail, which under the Bail Act is the defendant's prima facie right, is not properly investigated on each remand. Quite apart from the possibility of a mistake of law or fact, the decision turns on a highly subjective evaluation of facts and guesswork, the reasons given are likely to be sparse, and there will not be a full note of the evidence and argument. Such a decision should not be ignored by the court on a fresh application but it affects personal liberty and it is inappropriate to regard it as binding. Requiring an investigation of the merits on successive applications will increase the workload of the court, but the importance of the bail decision should not be discounted, and where the system is abused by hopeless applications the courts should be able to dispose of them expeditiously, while still considering the whole case.

244. We think there is force in the criticisms of the Nottingham Justices decision, but the issue is complicated if applications for bail are to be permitted between remand dates, and separate provision should be made for cases where an unsuccessful application has been made to the High Court. In the following paragraphs we refer to "circumstances which were not previously before the court" in order to cover cases involving a change in circumstances and cases where previously existing circumstances were not drawn to the attention of the court.
245. We first recommend retention of the 8 day remand rule, which is valuable in that it ensures that the court is able to reconsider the question of bail. We further recommend that, where there has not been an application to the High Court, on every remand in a District Court, a defendant in custody should be entitled 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. Where bail was previously granted, however, it should be liable to be revoked only pursuant to the provisions discussed in paragraphs 209-212.

Where the defendant is committed for trial or sentence the court will have more information than was previously available to it. The question of bail should therefore be reconsidered on the merits, whether or not there is any application for bail and whether or not the High Court has previously refused bail.

246. There may be cases where a defendant has been remanded in custody and there is reason for supposing that bail would be allowed if he was brought immediately before the court. For example, on his first appearance the question might not have been adequately investigated. To require such a defendant to wait until the next remand may result in days of avoidable delay. There is a remedy in the form of an application to the High Court, but a Judge will not be available in every centre, and the formalities required may involve unnecessary delay. Ideally, a prisoner should be able to apply for bail at any time, on the merits of the case. But such a right could be so abused that we concluded that it would be wrong for every remand prisoner to be entitled to go to court on any and every day to pursue applications for bail that would often be hopeless. There is need for a procedure whereby particular cases can be brought before a court before the next remand date, but which provides a screening process to exclude cases that are clearly undeserving. We recommend that if a defendant has been remanded in custody by a District Court he shall, if he so requests and with the leave of a District Court Judge, be brought before such a Judge for the purpose of applying for bail on the ground that there are circumstances not previously before the court. It would not be administratively practicable for a prisoner to be entitled to appear personally before the grant of leave; applications for leave should be made by counsel or in writing.

Under s.48 of the Summary Proceedings Act 1957, where a defendant who is bailable as of right and who has been remanded in custody did not make application for bail he shall, if he so requests, be brought before a court for the purpose of applying for bail. We recommend that such a provision be retained but that it not be limited to the case where there had been no application for bail.

247. A majority of us think that separate provision must be made for a defendant who has been refused bail on an application to the High Court. Having regard to the hierarchy of the courts and the degree of consideration of a particular case that is to be expected in the High Court, the majority view is that it would not be right for a District Court Judge or Justice of the Peace to be able to take a different view on the same material. Therefore we recommend that after an application in the High Court, a further application in the same proceedings should be considered in a District Court only if there are circumstances that were not before the High Court. Mrs Lowe and Dr Young dissent from this view. They point out that in practice District Courts would take into account a decision of the High Court and, as in the present situation, would be unlikely to reverse it without good cause. They therefore propose that all defendants should be able to have successive bail applications heard in District Courts on the merits whether or not they have applied to the High Court for review, since it would be wrong for the law to give the appearance that a defendant's position is adversely affected by the exercise of a right.
248. On the other hand, we are unanimously of the view that the High Court should not be required to repeatedly review the bail question after every adjournment in the Court below, regardless of whether there are new circumstances. We therefore recommend that where the High Court has refused bail in any proceeding the defendant may make a further application to that Court only when there are circumstances not previously before the court.
249. We believe that the scheme which we propose should provide adequate opportunities for defendants to have the question of their continued custody examined and re-examined, but should avoid excessive pressure on the time of the courts. Some difficulty of this kind has apparently occurred in the New South Wales Supreme Court where bail applications on remand dates must be fully considered unless they can be seen to be "frivolous or vexatious".⁽¹⁾ In New Zealand, a defendant with real hopes of bail who is refused in the District Court will usually apply to the High Court; on the recommendations of the majority if he fails there subsequent applications would need to be supported by new circumstances. We believe this is the fairest way of seeking the necessary balance between individual liberty and the need for finality of decision.

POLICE BAIL

250. In some cases a person charged with an offence is not arrested and will appear before the court on summons. In those cases no question of custody or release arises until the first court appearance. Where, however, a defendant is arrested a decision must be made whether or not to keep him in custody until his first appearance. If a person is arrested but it is decided not to prosecute the police have a duty to release him immediately,⁽²⁾ and in the more usual case where a charge is to be proceeded with the policy of the law is to minimise police custody. Section 316(5) of the Crimes Act 1961 provides that: "Every person who is arrested on a charge of any offence shall be brought before a Court, as soon as possible, to be dealt with according to law". But often it is not possible to bring a defendant before a court immediately - for example, it may be too late in the day, or the weekend or some other holiday may prevent it. Current legislation provides two ways in which such a defendant may be released from police custody pending his appearance in court.

Police Bail

251. This is provided for by s.51 of the Summary Proceedings Act 1957. It is available only in relation to a person who has been arrested without warrant, who "cannot practicably be brought immediately before a Court", and who is charged with an offence "for which he may be proceeded against summarily". This formula covers all summary offences and the numerous indictable offences in respect of which a District Court has summary jurisdiction. In such a case, any constable (i.e. any member of the police) may, "if he deems it prudent to do so", release the defendant on bail. The defendant enters into a bail bond, with or without sureties as the constable thinks fit and in such sum or sums as he thinks "sufficient". A notable additional feature is that, if he thinks fit, the constable may require the defendant to deposit a sum of money equal to the amount of his bond (s.52(2)). If he later fails to appear and is convicted in his absence the cash deposit may be applied in payment of any amount payable under the conviction, in lieu of estreatment, the defendant being entitled to any surplus (s.52(3)). The single condition of a police bail bond is that the defendant must attend personally before a court at a specified time and place, being not later than seven days from the date of the bond (s.51(2)). If the defendant attends as required the bond becomes void, but if he does not it may be estreated in the usual way (ss. 56 and 58).

Police Summons

252. This is provided for by s.19A of the Summary Proceedings Act 1957, a provision inserted in 1973 and amended in 1976. It allows for release without any economic sanction in the event of failure to attend before the court. It is available in the same cases as police bail: where any person who has been arrested without warrant and who is charged with "a summary offence or an indictable offence that may be dealt with summarily" cannot practicably be brought immediately before a court, any constable may, if he deems it prudent, release him without bail to appear on summons to answer the charge. The procedure is that the constable, when he releases the defendant, signs and serves on him a summons in a prescribed form, and as soon as practicable, but not more than seven days later, an information charging the defendant with the offence in question is filed, with a copy of the summons. Whereas a police bail bond must require the defendant's attendance in court within seven days a police summons may provide for a much longer delay - it must require the defendant's attendance at court on a day not later than two months after the date of the summons.

Recommendations

253. It is necessary for the police to have power to release many arrested defendants pending their first court appearance and the appropriate place for the relevant statutory provisions is in the proposed Bail Act.

254. We see no reason why the discretionary power of the police should continue to be confined to cases where the defendant has been arrested without warrant but in a number of other respects we recommend that the substance of the present law be retained:

- (i) The Bail Act should retain both police bail and release on police summons, the only sanction in the case of breach of the latter being liability to arrest on a warrant.
- (ii) The existing time limits for the required attendance of the defendant should be retained (i.e. seven days for bail and two months for a summons). As is implicit in the present legislation these time limits should override the requirement in s.316(5) of the Crimes Act 1961 that arrested persons should be brought before a court "as soon as possible".
- (iii) The type of offence for which each kind of release is available should be as described in s.19A of the Summary Proceedings Act 1957 - "a summary offence or an indictable offence that may be dealt with summarily". We believe this has the same meaning as the formula in s.51 ("an offence for which he may be proceeded against

summarily") but prefer it as being more explicit. It excludes only purely indictable offences which are few in number and are, generally, the most serious offences for which police bail, if it were permitted, would be rare. Dr Young's dissenting view is that all purely indictable offences should not be excluded since there may occasionally be defendants charged with purely indictable offences who would not need to be kept in custody and it would therefore be wrong to limit police discretion in this way.

- (v) The statute should continue to authorise any member of the police to exercise the release powers. Overseas legislation often imposes a limit in this respect. In the United Kingdom the police officer must be of or over the rank of Inspector, or be in charge of the station, and in the Australian statutes he must be at least a sergeant, or in charge of the station or, in Queensland, the watch-house. We do not support the introduction of any such statutory rule. It is best left to internal police arrangements to determine the rank and identity of the officer who will be responsible for these decisions at each station.

The Presumption

255. We have recommended that in court there should be, before conviction, a presumption in favour of bail rebuttable only on specified grounds. Should the same rule apply to the police? The overseas statutes do not provide a uniform answer. In the United Kingdom, where a defendant has been arrested without warrant a police officer may grant bail, and must do so if it is not practicable to bring him before a court within 24 hours "unless the offence appears to the officer to be a serious one" (s.38 Magistrate's Courts Act 1952). This qualification is very wide, and we do not favour a rule which makes the "seriousness" of the offence the only relevant factor. The Bail Acts of Victoria and Queensland (ss.10 and 7 respectively) require the police to consider the question of bail whenever it is not practicable to bring the defendant before a court forthwith, and if this is not practicable within 24 hours bail must be granted unless the presumption is rebutted on the same rules and tests as apply to court bail. In respect of most offences this requires application of an "unacceptable risk" test which, if such a risk exists, requires refusal of bail. The New South Wales Act also requires the police to apply the same test as the courts, this involving the question whether refusal of bail is "justified" having regard to various considerations with a residual discretion to nevertheless grant bail. Application of the statutory presumption is not, however, made dependent on inability to get the defendant to court within 24 hours: when a defendant has been arrested and charged the bail decision must be made "as soon as reasonably practicable", and if he is not released he must be brought before a court "as soon as practicable" (ss.18 and 20 Bail Act 1978).

256. There is a persuasive case for a presumption that a defendant should be bailed or otherwise released from police custody. In principle, any detention before conviction needs positive justification and although refusal of police bail will often result only in the defendant being held in custody overnight, the period will sometimes be longer - if, for example, he is arrested in the weekend. Family life, and occasionally employment, may be disrupted. Moreover, it is possible that the mere fact that a defendant is in custody when he first appears in court may lessen his chances of bail at that stage.⁽³⁾

257. We therefore recommend that the present rule which authorises release only if a constable "deems it prudent" should be changed so as to require release unless a decision is made that this would be imprudent. This would create a presumption in favour of release, albeit a presumption rebutted by the rather general conclusion that it would be "imprudent", or unwise. A number of reasons were put forward for not further defining the grounds of rebuttal in the way we recommend in the context of court bail. Perhaps the principal one is that, while a court is an independent body, it is unrealistic to expect the police - the prosecutors - to make balanced, impartial decisions based only on specified criteria. Some of us also felt that it would be difficult to codify all the factors that may be properly considered by the police and some thought that the provision of more precise statutory criteria could not be expected to have a marked effect on the incidence of police custody, which seldom lasts for any great length of time. Even with more precise criteria, fairly applied, it would often be the case that the decision would be delayed because there had been insufficient time to acquire relevant information. The point was also made that we do not have evidence of abuse of police discretion under the present rules. Overseas there have been complaints of bail being promised in an effort to induce admissions,⁽⁴⁾ but we are not aware of such a practice in this country, and if it exists notwithstanding present rules on inducing confessions it is unlikely that it would be stopped by more precise bail criteria. Finally, providing a more general test for the police should minimise any impact their decision has on the court's consideration of bail, for the statute will require the court to apply a manifestly different test.

258. We therefore recommend a provision to the following effect:

Where any person who has been arrested and who is charged with a summary offence or an indictable offence that may be dealt with summarily, is in the custody of the police and cannot practicably be brought immediately before a court, the police shall release him unless it is considered imprudent to do so.

The person so released shall be released either on summons or on bail.

This leaves it to the discretion of the police whether bail or a summons is used. We do not think it necessary for statute to lay down any rules governing the choice. We add that we have deliberately used "considered" rather than "deemed", which has fictitious overtones. In some cases an initial decision not to release will result from the police having had insufficient information or opportunity to assess the risks. A duty to release arises once the responsible officer ceases to regard release as imprudent.

Duration of Police Custody

259. An arrested defendant must be brought before a court "as soon as possible" (s.316(5) Crimes Act 1961). As has been seen, what is "possible" may vary, and if bail is refused or is unavailable the defendant may spend some time in police custody before his first court appearance. We considered whether the Bail Act should specify a number of hours (for example, 48) within which the police would have a duty to get the defendant before a court. Various possible time limits were discussed, but in the end we rejected the idea. All of us agreed that custody on the basis of a police decision should not be for longer than is absolutely necessary, but circumstances vary so much from case to case and place to place that we concluded that a specific time limit would be impracticable. We were also concerned that such a time limit might result in lengthening the period of custody in some cases. There is a danger that some officers would steer by the maximum. We therefore recommend no change to the present rule that all arrested defendants, if not released, must be brought before a court "as soon as possible". On the other hand, where a defendant is otherwise eligible, our proposal imposes a presumption in favour of release whenever he cannot practicably be brought "immediately" before a court, in contrast with those jurisdictions where a presumption applies only when there will be a lapse of 24 hours.

Offence of Failing to Attend

260. As with court bail, we recommend that in the context of police bail the defendant's personal financial bond be abolished. Instead the defendant should be released upon his giving written acknowledgement of receipt of a notice setting out his obligations and liability, and it should be an offence for a bailed defendant to fail without reasonable cause to personally attend court at the specified time and place. However, we do not think that this offence should be as serious as failure to answer court bail might be. We recommend that it be a summary offence punishable only by a fine of up to \$500. It may be objected that under these proposals there would seldom be any reason for the police to employ the summons procedure. However, as is presently the case the summons will sometimes be advantageous in allowing more flexibility in specifying the appearance date, and in

not requiring the consent of the defendant. We favour maximum use of the summons procedure but doubt whether legislation can usefully do more to encourage it.

Sureties

261. Many defendants in police custody may be quite unable to produce any acceptable sureties in the limited time available. We understand that they are not often required for police bail and one member (Dr Young) favours their abolition. There may, however, be a few cases where sureties are thought to be necessary for the risks inherent in bail to be acceptable. The majority therefore recommend that the police should retain the right to require a surety or sureties to be approved by them. However, we do not think there is a need for liability in any great sum and recommend that sureties' liability should not in total exceed \$500.

Conditions

262. As mentioned, police bail is exceptional in that a cash deposit may be required. We understand that usually cash deposits have only been required from those charged with drunkenness, an offence which has been abolished by the Summary Offences Act 1981. We see no need for the continued right to require a cash deposit and recommend that it be abolished. Nor do we think it necessary that the police should be able to impose a wide range of conditions. On the other hand, a majority of us accept that there should be a limited power to impose a reporting condition. There will be cases where some days will pass before the defendant is due in court and such a condition would be calculated to give the police warning of an impending failure to attend. With one dissentient (Mrs Lowe) we recommend that when the time of the defendant's appearance before the court is not within 24 hours of his release, the constable granting bail should have the power to impose a reporting condition. Mrs Lowe considers that the need for this new power has not been demonstrated.

Arrest

263. At present a warrant is required for the arrest of an absconder or anticipated absconder, further bail being thereafter at the discretion of the court (s.53 Summary Proceedings Act 1957). The extended powers of arrest that we recommend in relation to court bail (above, paragraphs 148-150) should be equally applicable to a person released on police bail.

Judicial Review

264. When a defendant is not released by the police the question of his continued custody will be considered by the court before which he first appears - which should be "as soon as possible" after his arrest. Normally this will be at a regular sitting of a District Court although pursuant to sections 21(3) and 22(2) of the District Courts Act 1947 a District Court Judge or Justices constituting the Court would seem to be authorised to hold sittings of the Court for the dispatch of summary criminal business at any place or time; and s.203(2)(g) of the Summary Proceedings Act 1957 expressly authorises the grant of bail on a Sunday.
265. The question arises whether the defendant should have a right to have police refusal of bail reviewed when he cannot be brought immediately before a court. An example of such a right is found in s.10(2) of the Victorian Bail Act, under which a defendant refused police bail, or who objects to the amount or conditions fixed, is entitled to be brought before a Justice "as soon as practicable", and the Justice may direct his release or variation of the terms. After lengthy debate a majority of the committee decided against recommending any such right of review. It was emphasised that we have no evidence of abuse of their powers by the police, and the length of police custody is rarely long enough for such a right to be necessary or desirable. It is likely that recourse would be had to it in many cases when there was no real chance of the police decision being overturned. This would involve significant inconvenience for little return. The minority (Professor Orchard, Mrs Lowe and Dr Young) felt this placed too much faith in a fair police decision and too little weight on individual liberty in cases where a significant time will pass before the next regular sitting of the court. They suggested that where bail is refused and the defendant cannot be brought before a court within a specified time (for example, 24 or 48 hours) he should have the right to have the matter reviewed by a District Court Judge or Justice of the Peace as soon as reasonably practicable.
266. The overseas statutes generally require the police to make a brief record of their reasons for refusing bail. We do not recommend such a requirement. We believe it would be a somewhat formal exercise of little help to the defendant. When the court comes to consider bail it will have to do so in accordance with the Act and the presumption, and a terse record of earlier police reasons is not likely to be of much assistance. We think this would also be true on a review of the kind suggested by the minority.

Police Instructions

267. Consistency in police practice will be promoted if as much guidance as possible is given in the Police General Instructions. We do not think this is achieved at present. The existing instructions encourage bail unless there is "good reason" to detain, authorise release of drunks when they are "sufficiently recovered", and give some encouragement to bail when a local resident or person of good character is arrested on a "minor charge" unconnected with "disorderly or riotous conduct likely to be renewed". Not surprisingly, bail should not be granted "where a serious charge is involved, and it is considered that the prisoner may abscond". (Police General Instructions, B.13(1), B.13, B.14, B.15(1)). It should not be difficult to provide more guidance than this on the question whether release is imprudent, and guidance should be possible on when sureties might be desirable, or a reporting clause (if one is to be permitted). We recommend a review of the instructions to this end.

JUVENILES

268. The question whether a juvenile should be detained pending the decision of a court may arise in connection with two quite different kinds of proceeding - a criminal prosecution, or complaint proceedings under the Children and Young Persons Act 1974, which are brought to determine whether a child or young person is in need of care, protection, or control.

Criminal Proceedings

269. The Children and Young Persons Act 1974 defines a "child" as a person under the age of 14 and a "young person" as a person of or over the age of 14 but under 17 (excluding anyone who is or has been married). Pursuant to s.21 of the Crimes Act 1961 a person under 10 is never liable to be convicted of any offence, and a child's immunity is further extended by s.25(2) of the Children and Young Persons Act 1974 (as amended in 1977), the effect of which is that a person of or over 10 but under 14 may not be prosecuted for any offence other than murder or manslaughter.
270. In contrast, a "young person" may be prosecuted for any offence. With the exception of minor traffic offences and some cases where a young person is jointly charged with an adult, all summary proceedings against young persons are heard in a Children and Young Persons Court. If guilt is proved that Court may impose a number of non-custodial measures, or place the defendant under the guardianship of the Director-General of Social Welfare, without entering a formal conviction. Alternatively, in the case of a young person aged 15 or 16 the Court may enter a conviction and commit him for sentence in a District Court, where a custodial sentence may be imposed. Where the prosecution is

for a purely indictable offence (including cases where a child is charged with murder or manslaughter), or where a young person elects trial by jury, the preliminary hearing is normally held in a Children and Young Persons Court, which commits for trial or sentence in a District Court or the High Court according to which has jurisdiction (ss.25, 34 and 36 Children and Young Persons Act 1974). Should any of these proceedings result in a sentence of imprisonment being imposed on a young person (or a child, for murder or manslaughter), it may be served in a penal institution or a residence approved by the Minister of Social Welfare with the concurrence of the Minister of Justice (s.130A Children and Young Persons Act 1974, as amended in 1977).

Bail

271. In exercising the above jurisdictions a Children and Young Persons Court performs functions normally assigned to a District Court, and it is given the same powers as a District Court to grant bail on any adjournment of a hearing, upon committal for trial or sentence, and pending an appeal when the appellant is in custody under the conviction to which the appeal relates (this is the effect of ss.34(2), 57(1) and 99(1) of the Children and Young Persons Act 1974, applying Parts II, IV and V of the Summary Proceedings Act 1957). Normally such bail may be granted by a presiding District Court Judge or Justice, but pending an appeal only by a Judge (ss.43(9) and 57(2)(c) Children and Young Persons Act 1974). The High Court appears to have the same inherent and statutory powers as it has in relation to adults.
272. In addition there is the important provision in s.47(1) of the Criminal Justice Act 1954:

"Notwithstanding anything in any enactment, where any Court remands or commits for trial or sentence any person who appears to the Court to be under the age of 21 years it shall release him on bail or otherwise subject to such conditions as it thinks fit, or, if he is under 17 years of age, may remand him in the custody of the Director-General of Social Welfare under the Department of Social Welfare Act 1971:

Provided that: -

- (a) The Court may in any case direct that he be detained in a penal institution if in its opinion no other course is desirable, having regard to all the circumstances.
- (b) If he is 17 years of age or more, the Court may remand him in the custody of the Director-General of Social Welfare if in its opinion it is desirable to do so by reason of special circumstances, and if it is satisfied that the Director-General of Social Welfare is able and willing to keep him in custody according to this section".

273. This provision, which applies until the sentencing stage in all courts where a person under 21 is charged with any offence, does not appear to have been discussed in any reported case. It clearly sets juveniles apart from adults in conferring a discretion to remand in the custody of the Director-General of Social Welfare, although in the case of a defendant who is 17 or older this requires special circumstances and the consent of the Director-General. It also provides a presumption against remand in custody (other than Social Welfare custody if the defendant is under 17) although this is rebutted if the court considers that remand in a penal institution is the only desirable course "having regard to all the circumstances".
274. Section 47(1) is also significant because it applies "notwithstanding anything in any enactment", which seems to exclude the provisions in s.319 of the Crimes Act 1961 allowing bail as of right, and because it expressly allows the court to impose "such conditions as it thinks fit". It is unlike the other special provisions considered in this part of the report in that it applies to everyone under 21, not just those under 17.

Complaint Proceedings

275. Under s.27 of the Children and Young Persons Act 1974 any member of the police or a social worker may make a complaint requiring any child or young person to be brought before a Children and Young Persons Court for a determination whether he is in need of care, protection, or control. In the case of a child over 10 this might involve a finding that he committed an offence, but the proceedings are not criminal proceedings and complaints are addressed to parents, guardians or those having care of the child or young person. There is, however, provision for holding the juvenile in custody until the matter is dealt with.
276. Section 43(1) of the Children and Young Persons Act 1974(5) provides that where a child or young person who is the subject of complaint proceedings appears before a Children and Young Persons Court, a presiding District Court Judge or Justice may direct that he be held in custody pending disposal of the complaint if, in the opinion of the Court -
- (a) The child or young person is likely to abscond; or
 - (b) The child or young person is in need of care or control; or
 - (c) Custody is desirable in the interests of the child or young person.

Such a direction authorises the juvenile's detention in a residence approved by the Director-General of Social Welfare (this does not include any penal institution, psychiatric hospital, or health camp), or detention by a social worker, or by the police for up to 24 hours, or longer if the Court expressly permits police custody.

277. A direction under s.43(1) is not made in criminal proceedings and there is no provision for bail or conditional release as an alternative to custody, but subsequent release is provided for in that the direction may be reviewed from time to time by a Children and Young Persons Court presided over by a District Court Judge or a Justice, or by the High Court (s.43(2)).

Arrest and Other Detention

278. When a young person is arrested without warrant for other than a purely indictable offence, ss.19A and 51 of the Summary Proceedings Act 1957 apply to authorise the police to release on summons or on bail. No statutory provision excludes them and they are in a part of the Summary Proceedings Act 1957 which applies to Children and Young Persons Courts (s.99 and First Schedule of the Children and Young Persons Act 1974), and police bail is effectively preserved by s.43(9) of the Children and Young Persons Act 1974. But where a young person is arrested, with or without warrant, for an offence punishable by not more than three months imprisonment, s.43(4) of the Children and Young Persons Act 1974 further empowers the police to release the young person without bail, or to deliver him to the custody of parents, guardian, the person having care of him, or anyone else approved by the police.
279. The Act does not deal with the possibility of a child being arrested pursuant to a warrant but if a child is arrested without warrant for any offence, s.43(4) authorises the police to release without bail, or to deliver him to his parents, guardian, the person having care of him, or other person they approve. But in the case of a child neither bail nor release on summons are permitted alternatives. If neither of the alternatives in s.43(4) are "practicable or desirable" the child must be delivered to a social worker as soon as practicable, and in any event not later than 24 hours after the arrest (s.43(5)). This allows detention in an approved residence, or by a social worker, until the child is the subject of a complaint and is brought before a Children and Young Persons Court for it to decide on further custody, or until the expiry of three days, whichever first occurs.
280. There are a number of provisions in the Children and Young Persons Act 1974 which authorise the police to remove a child or young person from his surroundings and place him in an approved residence. The grounds for such action include such matters as suspected neglect, ill-treatment, lack of

care and control, and a harmful environment. Except in certain circumstances a warrant from a Judge, Justice or Registrar is required, and it may authorise a social worker to act. Custody in an approved residence is authorised until the juvenile is brought before a Children and Young Persons Court on a complaint, for the Court to decide on further custody, or for three days (or seven days if a complaint was made before a warrant), whichever period is the shorter. There is no provision for bail, but once a court directs custody it may be reviewed from time to time, as under s.43: see ss.7, 8, 12 (which applies to persons under 16, pursuant to s.50 of the Summary Offences Act 1981), and s.28 of the Children and Young Persons Act 1974.

Recommendations

Complaint Proceedings

281. Police, social workers, and Children and Young Persons Courts are given powers to detain persons under 17 pending a decision as to whether they are in need of care, protection, or control. A decision whether there is a need for change in the powers to release or detain in these cases would require a detailed review of the Children and Young Persons Act 1974, and its operation in practice. Account must be taken of cases where the juvenile is not accused of misconduct of any kind, the sole object being his welfare and protection, as well as of cases where for reasons of social policy (or discretion) alleged wrongdoing is not treated as a matter calling for prosecution. This committee lacks the resources needed for such a review. Detention in these cases does not depend on the alleged commission of an offence and we regard the relevant powers as lying outside the criminal law, and our brief. We therefore make no recommendation in respect of these powers, and suggest that it is appropriate that they be left in the Children and Young Persons Act 1974 rather than being transferred to the proposed Bail Act.

282. We note, however, the complexity of s.43 of the Children and Young Persons Act 1974. A substitution for it is currently before Parliament as part of a bill⁽⁶⁾ to amend that Act. For the most part it retains the substance of the present section, but presents it in a more coherent form.

Criminal Proceedings

283. The powers conferred on the police and the courts in respect of juveniles charged with offences involve the grant and refusal of bail. Generally, jurisdiction applicable to adults also applies to youngsters, although the Children and Young Persons Courts exercise the powers normally vested in District Courts. In relation to persons under 17 arrested on minor charges the police have an additional power to release without bail, or deliver to the custody of a parent,

guardian, or another; and in relation to persons under 21 the courts have unfettered power to impose conditions on bail, and have power to remand to Social Welfare custody, pursuant to s.47 of the Criminal Justice Act 1954. This is another provision which presents some difficulties in interpretation but it creates a presumption against remand to a penal institution if the defendant is under 21, and if he is 17 or more special circumstances are needed for a Social Welfare remand.

284. As far as persons under 17 are concerned, we again think that a decision on their detention or release often involves special factors, particularly relating to their welfare, which the committee is not able to assess. Quite apart from the place to which they are remanded, it might not be appropriate for them to be subject to the same principles as we recommend for adults. Accordingly, we make no recommendation for any change to the present position as regards the release of persons aged under 17. We envisage that, at least initially, the Bail Act would be a Code dealing with the grant of bail to persons of or over the age of 17.
285. Implementation of our recommendations will necessitate substantial amendments to the Summary Proceedings Act 1957, the relevant parts of which at present apply in the Children and Young Persons Courts. It follows from this that the Children and Young Persons Act 1974 will require at least consequential amendments as a result of the new Bail Act. The position of children and young persons should be reviewed by the Departments of Social Welfare and Justice in the light of our report. It may well be that even in relation to criminal proceedings, bail rules for persons under 17 would best be included in the Children and Young Persons Act 1974 rather than the Bail Act. The age of 17 is no doubt a rather arbitrary dividing line. Nevertheless, it is the age which provides the limit of the jurisdiction of the Children and Young Persons Courts and this reflects recent policy decisions which seem unlikely to be overturned.
286. In the result, we confine our substantive recommendations to persons aged 17 or more. They fall outside the ambit of the Children and Young Persons Act 1974. At present, persons of or over 17 but under 21 are specially dealt with by s.47 of the Criminal Justice Act 1954. In relation to the grant of bail we see no need for a special rule for this age group. We recommend that they be subject to the same rules in relation to bail as we recommend in other cases. We have recommended a presumption and residual discretion which we believe is more favourable to a defendant than the rather general presumption presently found in s.47. A majority of us further recommend that the presumption should terminate upon conviction, and in this respect it is more limited than that in s.47, which applies until sentence. We do not think any special rule should apply for persons aged 17-20 in this

respect. We think it unrealistic for persons in this age group to automatically have any special advantage in relation to bail, for it seems clear that it is an age group with a high involvement in serious offending. Of the distinct prisoners received in New Zealand penal institutions in 1980, 41.4% of the males were aged 15-20, and for females the figure was 45.6%; and those figures are not exceptional.⁽⁷⁾

287. It was suggested to us that the Bail Act should require that age be a factor that the court must always take into account before remanding in custody. We do not recommend this. In many cases age will have obvious significance in the exercise of the residual discretion, but it is not always relevant to bail and the statute should not suggest that it is.
288. Assuming that a decision is made to remand a juvenile in custody, the question arises as to where he is to be detained. For those over 17 a Youth Prison will no doubt be appropriate in the few places where one is available, but in other cases it would probably be impracticable, and we think it unnecessary, for there to be separate remand institutions. Of course, we do not oppose the provision in s.47 allowing Social Welfare remand with the consent of the Director-General in these cases. We have already explained that we are not making recommendations for persons under 17.

DEPORTATION

289. Sections 20 and 20A of the Immigration Act 1964 provide a special regime in respect of immigration offences, covering the period between conviction and deportation. These provisions appear to be a self contained code which implicitly displaces more general provisions.

There is no question of an offender being bailable as of right under s.20. The essential feature of the deportation process is conviction, detention and removal from New Zealand with bail only being available at the discretion of the court.

Under s.20(1) and 2(a) the court is required to direct that a person convicted of an immigration offence for which he is to be deported should be detained in custody pending his deportation. However, if the defendant is not subject to any other sentence of detention the court may if it thinks fit release him on bail.

The release on bail may be for a sum not exceeding \$400 with not more than two sureties for a like amount. The offender will be subject upon release to a condition that he resides where directed by the police and report to the police at such intervals as the court decides, and to such other conditions as the court thinks fit to impose.

Although s.20 is unusually restrictive in relation to the amount of bonds and the number and amount of sureties which can be imposed as conditions, it gives a District Court Judge the widest possible statutory discretion in relation to other potential conditions. That discretion is even wider than the powers as to conditions vested in the High Court under the Misuse of Drugs Amendment Act 1978.

Custody Following Subsequent Court Appearance

290. Where, pending deportation, an offender is held in custody instead of being released on bail under s.20(2)(a), he must be brought back before the District Court pursuant to s.20(2)(b) if at the end of two months or the later expiration of another sentence of detention he has not been deported. The Court may release him on bail or again direct his detention in custody. If the offender has not been deported within four months of his conviction and he is not subject to any other sentence of detention he must be released on bail.

Breach of Bail Conditions

291. Section 20(3) provides that where a person is released on bail under that section, the breach of any condition of bail is an offence punishable by three months' imprisonment. Where a deportee is convicted of an offence against s.20(3) the Court must direct that he be detained in custody. Section 20(3) is unusual because in no other situation does a breach of bail conditions constitute an offence. The provision is a clear indication of the importance which is placed on the due completion of the deportation process.

Discharge from Bail

292. Section 20A allows an offender who has been convicted of certain immigration offences to request the Minister to make an order that he not be deported on the grounds that it would be unduly harsh or unjust to deport the offender from New Zealand. Where the Minister makes such an order it is filed in the court in which the conviction was entered and if the offender is on bail, the court must release the offender from his obligation under any bail bond.

Section 20(5) provides that where any person released on bail embarks or is placed on board any ship or aircraft and leaves New Zealand before any breach of the conditions of the bail bond has occurred then the bail bond ceases to have any effect. Similarly, where a person who is released on bail has not left New Zealand within the time prescribed by the section and there has been no breach of any conditions of his bail bond, the bail bond also terminates.

Recommendations

293. It will be apparent from the foregoing discussion that there are special considerations governing the provision of bail to persons who have been convicted of an immigration offence and are awaiting deportation. The distinction between pre-deportation detention and pre-trial detention lies chiefly in the very strong incentive for deportees not to turn up to be deported. The various conditions which may be placed on bail in relation to deportation indicate that the legislation was designed to ensure the due completion of the deportation process.

We consider that the question of bail in these cases should be dealt with in separate legislation. We suggest that at any future review of the immigration legislation the law governing the grant of bail to deportees should be considered in the light of our report.

EXTRADITION

294. Under the Extradition Act 1965, a person whose extradition to an overseas country from New Zealand is sought, is brought before a District Court under warrant. Pursuant to s.8, the Court then proceeds to hear the case as if it were a preliminary hearing of an indictable offence. Section 8 applies Part V of the Summary Proceedings Act, with necessary modifications, to those proceedings. Part V of the Summary Proceedings Act 1957 applies the bail provisions in part II which in turn refer to other provisions of general application. However, s.8(3) provides that the offender shall not in any case be bailable as of right or allowed to go at large without bail. It would therefore appear that the bail decision is fully discretionary, but with no additional powers to impose conditions.

If at the end of the hearing a case has been made out the Court is required under s.10 to commit the offender to a penal institution pending extradition. The defendant can only be bailed on the order of a High Court Judge under s.10(4). He may grant bail "in his discretion, on application and on such terms and subject to such conditions as he thinks fit".

295. The Fugitive Offenders Act 1881 (U.K.) deals with the return of offenders to Commonwealth countries. When read with s.10 of the Summary Proceedings Act 1957 it confers certain bail powers on District Court Judges. Section 5 provides that the Judge shall hear the case in the same manner and is to have the same powers, "including the power to remand and admit to bail", as if the fugitive were charged with an offence within New Zealand. Section 14 contains a similar provision. It seems that a District Court Judge has power to release defendants on bail pending the completion of the hearing pursuant to s.46 of the Summary Proceedings Act 1957. Section 47 of the Criminal Justice Act 1954 and s.319 of the Crimes Act 1961 will also apply.

Recommendation

296. As with deportation, special considerations must govern the grant of bail to persons awaiting extradition. In extradition cases there is a strong incentive to abscond.

We make no recommendation for any change in the law governing the grant of bail to persons who are either subject to extradition proceedings or fugitive offenders. In line with our recommendations on the Immigration Act 1964, we suggest that the question of bail in extradition cases can be reconsidered when the legislation is reviewed.

PART IV

SUMMARY OF MAJOR RECOMMENDATIONS

1. A Bail Act

This recommendation is found in paragraph 65.

The committee recommends the enactment of a comprehensive Code which would replace the existing law and would deal with all matters relating to bail including jurisdiction, discretion to grant bail, conditions which may be imposed, procedure, enforcement and appeals. It will cover police bail as well as court bail.

2. A Presumption In Favour of Bail

These recommendations are found in paragraphs 68 and 76.

There should be a presumption in favour of the grant of bail.

Three risks may rebut this presumption:

- i. The risk that the defendant would fail to appear;
- ii. The risk that the defendant would commit an offence or offences while on bail;
- iii. The risk that the defendant would interfere with witnesses or otherwise obstruct the course of justice.

3. Degree of Risk Necessary to Rebut the Presumption

These recommendations are found in paragraphs 78-81.

A majority of the committee recommend that bail may be refused if the court is satisfied there are reasonable grounds for believing that the defendant would fail to appear, would offend, or would obstruct justice. Where the presumption is rebutted the court should retain a discretion to allow bail.

4. Factors Relevant to Assessment of Risks

This recommendation is found in paragraph 84.

In assessing the risks the court should have regard to the following:

- (a) The nature and seriousness of the offence or offences charged;
- (b) The penalty likely to be imposed in the event of conviction (majority recommendation);

- (c) The previous convictions of the defendant;
- (d) The defendant's record in respect of his obligations under any previous grant of bail;
- (e) The defendant's associations and the history and details of his residence, employment and family circumstances;
- (f) The strength of the evidence against the defendant (majority recommendation);
- (g) The fact that the defendant is charged with an offence committed while on bail;
- (h) Any other factor which in the circumstances is relevant to the three risks (majority recommendation).

5. Psychiatric Examinations

These recommendations are found in paragraphs 101, 102 and 103.

With the consent of the defendant, the court should be empowered to remand the defendant in custody before conviction to facilitate a psychiatric examination.

The court should also be empowered to remand an unconvicted defendant in custody if it appears that he may be under disability or may have been insane and the court is satisfied that the necessary psychiatric observation or examination would not be practicable without such a remand (majority recommendation).

There should be power to detain a convicted defendant for psychiatric examination and report to the sentencing court.

6. Termination of Presumption

These recommendations are found in paragraph 110.

The presumption in favour of bail should cease upon conviction (majority recommendation).

7. Bail as of Right

These recommendations are found in paragraph 118.

There should continue to be a category of offences bailable as of right. The following recommendations are made:

- i. Where bail is available as of right there should be the same power to impose conditions as is recommended in other cases;
- ii. Those charged with non-imprisonable offences should be bailable as of right, regardless of previous convictions;

- iii. A person in breach of the conditions of his bail would be liable to arrest and should then be bailable at the discretion of the court, not as of right (majority recommendation);
- iv. Section 319(3) of the Crimes Act 1961 should be repealed and not replaced;
- v. Section 319(4) of the Crimes Act 1961 should be retained, so that an imprisonable offence would not be bailable as of right if the defendant had been previously convicted of an offence punishable by imprisonment (majority recommendation);
- vi. The effect of section 319(2) of the Crimes Act 1961 should be retained: a first offender should be bailable as of right if charged with an offence punishable by less than three years' imprisonment, with the exception of offences against s.194 of the Crimes Act 1961 (majority recommendation).

8. Nature of Bail and an Offence of Failing to Attend

These recommendations are found in paragraphs 126 and 132.

A majority of the committee recommend that:

- i. Financial bonds from defendants should be abolished; and
- ii. There should be an offence of failing without reasonable cause to attend in accordance with the defendant's obligations. The penalty for this offence should 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 seven years.

There should be power to require from the defendant a cash deposit or other security where there is a risk of absconding overseas (majority recommendation).

9. Conditions

This recommendation is found in paragraph 138.

There should be no statutory list of conditions, but all courts should be empowered to impose such reasonable conditions as are considered necessary to ensure that the defendant appears, does not offend and does not obstruct the course of justice (majority recommendation).

10. Powers of Arrest

This recommendation is found in paragraph 148.

Where there is evidence establishing that the defendant has absconded or is about to abscond, any member of the police should be able to arrest him without warrant. A majority recommend that

a member of the police should be empowered to arrest without warrant if he believes on reasonable grounds that the defendant has breached any other conditions of his bail, or where he reasonably anticipates such a breach.

11. Sureties

These recommendations are found in paragraphs 158-173.

The power to require sureties and bonds from sureties should be retained. The decision as to the suitability of a surety should be made by a Judge, Justice of the Peace, or Registrar or Deputy Registrar. The decision whether or not to approve a surety should be made having regard to:

- (a) The financial resources the intended surety has or may reasonably be expected to have;
- (b) His character and any previous convictions;
- (c) His proximity (whether in kinship, place of residence or otherwise) to the defendant;
- (d) Any other relevant circumstances.

Where a court grants bail with a requirement of a surety or sureties and that requirement has not been met within 24 hours, the case should be automatically reconsidered by the court (majority recommendation).

The court should have power to require a surety to deposit cash or some other security where this is justified by exceptional circumstances related to the surety or intended surety.

A surety should be under a duty to take all reasonable steps to ensure the attendance of the defendant at the appointed time and place. The surety should be liable to forfeiture only in the event of a failure by the defendant to appear, and not in the case of breach of any other condition.

12. Forfeiture of Bond

These recommendations are found in paragraphs 184 and 185.

There should be a single estreatment procedure applicable to all cases. The procedure in the Summary Proceedings Act 1957 should be adopted rather than that in the Crown Proceedings Act 1950. A surety should be liable on his bond only if the defendant fails to appear.

13. Duration, Variation and Revocation

These recommendations are found in paragraphs 194-200.

The power to vary conditions of bail which is conferred by s.49A of the Summary Proceedings Act 1957 should be extended to cases in the High Court. The prosecutor or police should be able to apply for the variation of the terms or conditions of bail (majority recommendation).

The court should be empowered to revoke bail on the application of the defendant.

If a surety suspects that the defendant has absconded or is about to abscond, or will otherwise breach conditions, it should be a sufficient discharge of his obligations if he promptly informs the police, and provides them with any relevant information.

14. Judicial Review

These recommendations are found in paragraphs 207-211.

Where bail is refused in a District Court, whether before or after conviction, the defendant should have a right to apply to the High Court for bail or the modification of the terms of bail.

The prosecution (except private prosecutors) should also be entitled to apply to the High Court for an order modifying or revoking a grant of bail in a District Court (majority recommendation).

In cases where bail may in the first instance be granted only in the High Court both the defendant and the Crown should have a right of appeal to the Court of Appeal (majority recommendation).

15. Bail Hearing

These recommendations are found in paragraphs 215, 217 and 227.

The court should be expressly empowered to conduct any bail hearing in private.

There should be a prohibition against the publication of all matters relating to bail hearings except:

- i. The identity of the defendant (unless his name is suppressed), and the offence or offences charged;
- ii. The decision to grant or refuse bail; and
- iii. The conditions of bail, if it be granted.

At the bail hearing the court should be empowered to receive as evidence any statement, document, information or matter which it considers relevant, whether or not it would be admissible under the ordinary laws of evidence.

Whenever bail is refused the Judge or Justice must give his reasons in writing at the time the decision is made. Reasons should also be required when bail is granted, if they are requested by the prosecution.

Written reasons for conditions (or variation of conditions) should be required only if sought by either party.

16. Successive Applications

These recommendations are found in paragraphs 245 and 246.

The eight day remand rule should be retained. On every remand in a District Court a defendant in custody should be entitled to apply for bail and have the question considered on the merits, except where there has been an application to the High Court.

Where a defendant is committed for trial or sentence the question of bail should be reconsidered on the merits regardless of whether there is any application for bail or the High Court has previously refused bail.

A defendant who is refused bail in the District Court should, with the leave of a District Court Judge, be able to apply at any time to that Court for bail, on the ground that there are circumstances not previously before the Court.

17. Police Bail

These recommendations are found in paragraphs 254-265.

The discretionary power of the police should be extended to cases where the defendant has been arrested pursuant to a warrant.

Release should be required unless a decision is made that this would be imprudent.

A failure to answer police bail should be a summary offence punishable by a fine of up to \$500.

The police should retain the right to require a surety or sureties to be approved by them (majority recommendation). The sureties liability should not exceed \$500.

When the time of the defendant's appearance before the court is not within 24 hours of his release, the constable granting bail should have power to impose a reporting condition (majority recommendation).

There should be no right of review in respect of a police bail decision (majority recommendation).

18. Juveniles

These recommendations are found in paragraphs 284 and 286.

Persons aged 17-20 should be subject to the same rules as adults in relation to bail.

A decision on the detention or release of persons under 17 often involves special factors, particularly relating to their welfare, which the committee is not able to assess. The committee has accordingly made no specific recommendation on the matter.

19. Deportation and Extradition

These recommendations are found in paragraphs 293 and 296.

Special considerations must apply to persons who have been convicted of an immigration offence and are awaiting deportation or persons who are fugitive offenders or the subject of extradition proceedings. The question of bail in these cases should be dealt with in separate legislation.



Chairman

Members

Mr P.G.S. Penlington Q.C. (Chairman)

Mr A.A.T. Ellis Q.C.

Mrs J.E. Lowe

Chief Superintendent R.J. McLennan

Mr D.P. Neazor Q.C.

Professor G.F. Orchard

Judge A. Satyanand

Mr D.A.S. Ward C.M.G.

Mr D.A.R. Williams

Dr W.A. Young

Mr W.A. Moore (Secretary)

Footnotes

1. But in some cases it seems the defendant may only be remanded in custody or on bail: e.g. Summary Proceedings Act 1957, ss.125, 171 (pending appeal to High Court, or on committal for sentence); Crimes Act 1961, s.323 (change of venue), s.350(2) (after arrest on bench warrant), s.371(6) (remand for sentence), s.380(5) (remand after question of law reserved), ss.397, 399 (pending appeal to CA or new trial ordered by CA).
2. Adams, Criminal Law and Practice in New Zealand (2nd ed) para 2535.
3. See, e.g. Halsbury's Laws of England (4th ed), Vol. 11, para 166; Report of Home Office Working Party, Bail Procedures in Magistrates Courts (HMSO 1974), pp. 3-5.
4. Fitzgerald v. Muldoon [1976] 2 NZLR 615; Adams, op. cit., para 2546.
5. Lord Hailsham L.C. addressing Gloucestershire Magistrates, September 11, 1971: see (1971) 121 New L.J. 825.
6. (1945) 61 TLR 245, 247.
7. Ex parte Blyth [1944] KB 532; Lala Jairam Das v. King-Emperor (1945) 61 TLR 245; Ex parte Speculand [1946] KB 48.
8. Adams, op. cit., para 2538.
9. Henry v. Police Department [1980] NZ Recent Law 354, Savage J.
10. In re Brown v. AG (1896) 15 NZLR 165 CA.
11. Lala Jairam Das v. King-Emperor (1945) 61 TLR 245, 245-246, 247.
12. (1854) 23 LJQB 286.
13. (1903) 23 NZLR 27.
14. [1935] NZLR 883.
15. [1980] 2 NZLR 754.
16. Lunn v. Police, Unreported, CA 26 October 1978.
17. See Remand and Bail Decisions in a Magistrate's Court, by Prue Oxley, Department of Justice, (1979), 54-55; hereinafter referred to as Oxley.
18. E.g. Light [1954] VLR 152; Pascoe [1960] NSW 481; Gay [1969] SASR 467; Cameron v. Millard (1978) 19 SASR 161.

19. Lawrence (1978) 22 ALR 573.
20. Butler (1881) 14 Cox C.C. 530 Ir.
21. Henry v. Police Department [1980] NZ Recent Law 354, Savage J.
22. Henry v. Police Department, *ibid.*
23. Ex parte Barronet and Allain (1852) 22 LJMC 25.
24. In Duffy v. Police, Unreported, S.C. Auckland. 4 December 1978
McMullin J. referred to a report of a Government Caucus
Committee which suggested this, and in Lawrence (1978) 22 ALR
573 statistics to like effect were referred to.
25. [1950] NZLR 653.
26. [1980] 2 NZLR 754.
27. E.g. England: Phillips (1947) 32 Cr App R 47; Armstrong
[1951] 2 ALL ER 219; Gentry (1955) 39 Cr App Rep 195;
Scotland: Mackintosh v. M'Glinchy 1921 JC 75; MacLeod v.
Wright 1959 JC 12; Australia: Light [1954] VLR 152; Pascoe
[1960] NSW 481; Appleby [1966] 1 NSW 35; Gay [1969]
SASR 467.
28. Burton (1974) 3 ACTR 77.
29. Armstrong [1951] 2 All ER 219.
30. E.g. Phillips (1947) 32 Cr App R. 47; Gentry (1955) 39 Cr App
R. 195.
31. Appleby [1966] 1 NSW 35.
32. [1960] NSW 481.
33. Oxley op cit, 54-55.
34. E.G. Butler (1881) 14 Cox C.C. 530 Ir; Mackintosh v. M'Glinchy
1921 JC 75; Pascoe [1960] NSW 481; Harrison [1950] VLR 20;
Martin (1980) 23 SASR 233.
35. [1944] NZLR 19.
36. *Ibid.*
37. [1956] NZLR 752.
38. Adams, op. cit. para 2543, citing MacLeod v. Wright 1959 JC
12, which denies the relevance of the presumption; in McIver
[1929] VLR 50 it was said the court could act on evidence or
"common knowledge".

39. 1921 JC 75,82; and see McLeod v. Wright 1959 JC 12.
40. [1954] VLR 152, 157.
41. (1974) 3 ACTR 77, 78.
42. Unreported, S.C. Wgtn March 1977. M 56/77.
43. Unreported CA 26 October 1978.
44. Higgs [1962] NSW 34; Re Anderson [1978] VR 322; but in Martin (1980) 23 SASR 233 Legoe J was more circumspect.
45. Howeson (1936) 25 Cr App R 167; Re Kulari [1978] VR 276; Lawrence (1978) 22 ALR 573.
46. Cameron v. Millard (1978) 19 SASR 161.
47. Coe (1968) 53 Cr App R 66.
48. Gay [1969] SASR 467, 468; Martin (1980) 23 SASR 233, 235.
49. Eg Light [1954] VLR 152; Pascoe [1960] NSW 481; Burton (1974) 3 ACTR 77; State v. Purcell [1926] I.R. 207.
50. [1981] NZ Recent Law 365.
51. Rose (1898) 18 Cox CC 717; Greenham [1940] VLR 236.
52. [1934] NZLR 228.
53. [1976] 1 NZLR 735.
54. Benfield [1980] 2 NZLR 754.
55. Cp. Burton [1974] 3 ACTR 77; s.32(3) of the NSW Bail Act.
56. Gush [1980] 2 NZLR 92.
57. [1980] 2 NZLR 754.
58. Unreported, CA 26 October 1978.
59. Contrast Adams op cit para 2540.
- 59a. The importance to sentencing of time spent in custody on remand was recognised by the Court of Appeal in Saifiti, Unreported 17 August 1982 CA 65/82.
60. Oxley op cit p.35.
61. Oxley, op. cit., p.91.
62. Anon (1704) 6 Mod. 231; 87 E.R. 982.

63. Adams, op. cit., para 2560.
64. Cp. s.61 of the N.S.W. Bail Act 1978.
65. For an earlier suggestion to this effect, see Hampton [1975] NZLJ 799.
66. Oxley, op cit, pp 82, 84.
67. Badger (1843) 4 Q.B. 468.
68. Hampton, op cit.
69. Michael King, Bail or Custody (The Cobden Trust, 1971), 52.
70. Jones v. Kirby (1896) 15 NZLR 48.
71. Porter [1910] 1 K.B. 369.
72. Glanville Williams, Criminal Law, The General Part (2nd ed), para 225.
73. Adams, op cit, para 2549.
74. Re King and Scott [1931] NZLR 162CA.
75. Murdoch [1981] 1 NZLR 249 CA, 260 per Mahon J.
76. Murdoch, ibid, 251, per Cooke J.
77. [1981] 1 NZLR 249 CA.
78. R. v. Southampton Justices, ex parte Green [1976] QB 11, 19 per Lord Denning; and see, eg. Re Fox and Fox [1949] NZLR 722, and The King v. Michael [1949] NZLR 1020, where total remission was granted to conscientious sureties.
79. [1981] 1 NZLR 254 CA, per Cooke J.
80. Ibid, 259, per McMullin J.
81. Compare Re Fox and Fox [1949] NZLR 722 and Ware v. AG [1961] NZLR 694; Adams, op cit; para 2558.
82. Eg The Queen v. Hopewell [1958] NZLR 523; Ware v. AG, ibid.
83. R. v. Southampton Justices, ex parte Green [1976] QB 11.
84. R. v. Wells St Magistrates Court, ex parte Albanese [1982] Q.B. 333.
85. But see Hall [1967] VR 556 where Adam J revoked bail granted by a number of other courts in such a case.
86. Henry v Police [1980] N.Z. Recent Law 354.

87. See Report of the Committee on Defamation (Govt Printer, December 1977), para 520; Burrows, News Media Law in New Zealand (2nd ed.) p.180.
88. See Brophy [1982] AC 476 HL (NI); Wong Kam-ming v. The Queen [1980] AC 247 PC.
89. Oxley, op. cit., Ch.6.
90. Simpson, Community Ties and the Bail Decision (1977) 141 JP 194, 213.
91. Henry v. Police [1980] NZ Recent Law 354.
92. In Smith, Unreported, 19 October 1982, CA 253/82, the Court of Appeal considered an appeal under s.35 of the Misuse of Drugs Amendment Act 1978 against a refusal of bail. The High Court Judge had not given any reasons and of this the Court said:

"In previous cases this Court has had occasion to mention that this is not a satisfactory practice. Quite apart from the normal desirability of giving reasons, it can tend in cases in this field to make it more difficult to exercise effectively the right of appeal which Parliament conferred by s.35".
93. And see Wily, Summary Proceedings and Police Court Practice (4th ed.), 130.
94. R. v. Nottingham Justices, ex parte Davies [1981] QB 38 DC.
95. [1935] NZLR 883.
96. R. v. Reading Crown Court, ex parte Malik [1981] Q.B. 451 D.C.
97. [1981] QB 38 DC.
98. R. v. Reading Crown Court, ex parte Malik [1981] Q.B. 451 D.C.
99. Alec Samuels (1981) New L.J. 132; Mary Hayes [1981] Crim L.R. 20.
1. The Bulletin, July 21, 1981.
2. Adams, op. cit., para 2492, citing Leachinsky v. Christie [1946] K.B. 124, 135 per Scott L.J.
3. Oxley, op. cit., pp 39-41.
4. Michael King, Bail or Custody (The Cobden Trust 1971), p.6.

5. Following the completion of the report s.43 was repealed and a new section substituted; s.10 of the Children and Young Persons Amendment Act 1982.
6. This bill has now been passed; see the Children and Young Persons Amendment Act 1982.
7. See, Justice Statistics, quoted in the Report of the Penal Policy Review Committee, 1981, pp. 224-228.