LAW REFORM COMMISSION OF HONG KONG

REPORT

BAIL IN CRIMINAL PROCEEDINGS

[TOPIC 16]

We, the members of the Law Reform Commission of Hong Kong, present our report on Bail in Criminal Proceedings.

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THE LAW REFORM COMMISSION OF HONG KONG

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Introduction

1.1 Terms of reference

On 19 March 1985 the Chief Justice and Attorney General referred to the Law Reform Commission the question of "Bail in Criminal Proceedings" under the following terms of reference: -

(1) To consider whether any changes in the law are desirable and to make proposals in relation thereto;

(2) To prepare and propose a comprehensive and explicit statement of the whole of the law, if possible in one self-contained code;

(3) To incorporate into the proposed code any proposed changes in the law.

1.2 The sub-committee

In April 1985 a Sub-Committee was appointed to consider the matter, under the chairmanship of the Honourable Mr Justice Liu, a Judge of the High Court of Hong Kong. The other Sub-Committee members were:-

Mr Peter Nguyen	Barrister
His Honour Judge Longley	District Court Judge
Assistant Commissioner Peter SO Lai-yin	Deputy Director Management Services Royal Hong Kong Police Force
Mr Richard W Davies	Principal Magistrate
Mr Graham Cheng JP	Chairman Taching Petroleum Co Ltd
Mrs Gloria Chan	University of Hong Kong General Counselling Services
Mr Sun Wai BUT	Senior Court Liaison Officer

Secretary

Mr Neill T Macpherson (up to 17 July 1985)	Attorney General's Chambers
Mr G H Rosenberg (up to 22 January 1987)	
Mr Michael Darwyne (up to 30 May 1988)	
Mr Peter Yau (from 1 June 1988)	

In September 1988, the Sub-Committee submitted its draft report to the Commission for preliminary consideration at its 63rd meeting. In December 1988, the Sub-Committee submitted its final report to the Commission which considered the subject at its 65th and 66th meetings.

1.3 Aim of the report

Our aim in this report has been to make recommendations which maintain the presumption of innocence and the liberty of the subject and at the same time bring our bail system into line with that practised in other common law jurisdictions. We recognise the importance of liberty to the accused, that of security to the community and that of feasibility to the bail authority. If our recommendations sometimes seem to lean towards the defendant, this is because we believe our common law system prefers liberty and due process, to preventive custody and detention without trial. We believe that defendants who can be expected not to abscond, interfere with witnesses or commit offences should be released.

In this report we examine the factors which affect the decision whether to release a person on bail or not, and the procedures which should be followed in making and reviewing that decision. We propose certain changes for inclusion in a code on bail law and practice.

During our deliberations we noted the absence of wide-spread dissatisfaction with the present bail system in Hong Kong. Indeed, it can be said that Hong Kong's bail system compares favourably with other jurisdictions' bail systems, even those recently reformed. This may be largely due to the fact that Hong Kong is a small and compact society. The regular review of longer remands and the generally shorter waiting time before trial provide less opportunity for bail injustice or hardship to arise.

Nearly all the suggestions we make have been adopted elsewhere. Many are in fact already practised in Hong Kong. We explain in the body of this report the reasons for our preferences. If legislation results from this report, it is not expected to bring radical changes to our bail system,

but it will provide us for the first time with a clear and consistent code, setting out the basic concepts and making the law more accessible.

1.4 Structure of the report

The report consists of 16 chapters, of which the last is a "Summary of Principal Recommendations". Within each main chapter we have considered: -

(1) The Present Law
(2) The Question of Reform
(3) The Content of the Proposed Code

We have examined the bail laws of other jurisdictions and studied the criticisms made before and after their reform. In our deliberations, we noted the special features unique to their own environment.

1.5 Scope of the report

The question of bail arises after every arrest and at three separate stages: shortly after arrest, immediately after the suspect is charged by the police, and finally upon his appearances at court. At the first two stages the decision whether or not to grant bail is made by the police; at the third it is made by the court. Bail at the first stage is known as "police operational bail", at the second "police court bail" and at the third "court bail". This report is concerned with bail at the second and third stages namely police court bail and bail granted by the court. At both those stages the suspect is required to attend at court, rather than at a police station or the offices of any other law enforcement agency. The main reason for excluding police operational bail from this report is that a separate reference concerned with powers of arrest and detention in the course of a criminal investigation is currently being considered being considered by this Commission. Police operational bail forms part of the criminal investigation process and more appropriately falls to be dealt with in our report on that reference.

1.6 Public consultation and research

The limited extent of the resources did not allow us to conduct any empirical research into the local practices relating to bail. We were however able to carry out the following surveys:

(1) We sought the views of a large number of organisations and individuals involved in the bail process.

(2) We caused to be surveyed all our Principal Magistrates, who are those primarily responsible for bail decisions in the judicial system.

(3) We obtained such statistics as were available on the granting of bail in the Hong Kong court system, and the lengths of remands in custody, and compared these figures with those of other jurisdictions.

1.7 Definitions and terminology

Some of the terms used in this report are broadly explained as follows:-

Bail - means the release of a person arrested or imprisoned, with or without security for his appearance at a later date.

Estreat - means forfeit.

Recognizance - is a promise made to the court. Sometimes the promise is backed by an obligation to pay a sum of money to the court. In the content of bail, a recognizance is a promise or to appear at a certain court at a certain time.

Remand - means disposing of an accused person either on bail or in custody, on the adjournment of a court hearing.

Surety - is a person who guarantees the performance of an accused person's obligations and agrees to forfeit a sum of money if the accused person defaults. A surety may be required to deposit cash in a required amount. If the accused fails to appear at court, the cash may be forfeited.

1.8 Acknowledgements

We are heavily indebted to the members of the Sub-committee who over a period of four years have given unstintingly of their time and energy. Their detailed consideration of the law and practice in Hong Kong and of the wealth of material on the subject from other jurisdictions enabled them to put forward a set of proposals which were adopted virtually unamended by the Commission.

We wish also to express our gratitude to all those individuals and organisations both locally and overseas who have assisted the Sub-committee in its deliberations.

Chapter 2

The present position

2.1 Introduction

The law of bail in Hong Kong is at present based on the common law of England, and provides a procedure by which those who are awaiting trial for criminal offences can be released from custody. The law and practice relating to bail in Hong Kong has developed from numerous judicial decisions in the United Kingdom and other common law jurisdictions. There is however no equivalent in Hong Kong of the English Bail Act, 1976.

This common law is affected by the many statutory provisions on the subject to be found in the Laws of Hong Kong.

2.2 Hong Kong Law influenced by local conditions

"The law of bail in Hong Kong has been a product of the unique local environment and social conditions," said Sir Alastair Blair-Kerr who was critical of the effectiveness of bail conditions in Hong Kong. He observed in his "First Report of the Commission of Inquiry July 1973" relating to Godber's disappearance that "the grant of bail by the courts in serious cases of corruption is fraught with the greatest danger". A Principal Magistrate in 1979 commented that if bail were to be liberally granted, "the tasks of finding defendants who have gone into hiding and failed to answer to their bail, yet remain in Hong Kong, would be difficult." (1979) 6 'Obiter Dicta' 19.

2.3 When the need for bail arises

When a person appears in court in answer to a criminal charge, his case may not, for a variety of reasons, be dealt with immediately. If he pleads guilty, and the penalty is inconsequential, fixed or obvious, he may be sentenced at once, but very often the court will need more information and may require an adjournment to obtain it. In some cases, the court is obliged to inquire into the kind of detention most suitable to the defendant and his personal circumstances. Frequently, there will not be a plea of guilty on his first or subsequent appearance in court, and sometimes the case may not be ready to proceed. Even after a trial has begun, it may have to be adjourned for other reasons. Finally after a custodial sentence, he may file an appeal and he will have to be appropriately catered for before the appeal is concluded.

In any one of these situations, a decision will have to be taken as to whether, pending the next stage in the proceedings, the defendant should be allowed to be or remain at large, or should be held in custody. If it is decided to allow him to be or remain at large, he will be released on bail. Once released on bail, it is a serious violation of the criminal process to abscond.

Therefore, the need to consider whether an accused person should be released, or detained in custody, arises at several stages of the criminal trial process. Briefly, the need for bail may arise after the accused: -

Pre-conviction

(a) **is arrested** - when he may be bailed by the police to appear before the police again, pending a charge or pending further enquiries, referred to as "police operational bail" - see Police Force Ordinance, section 52(3);

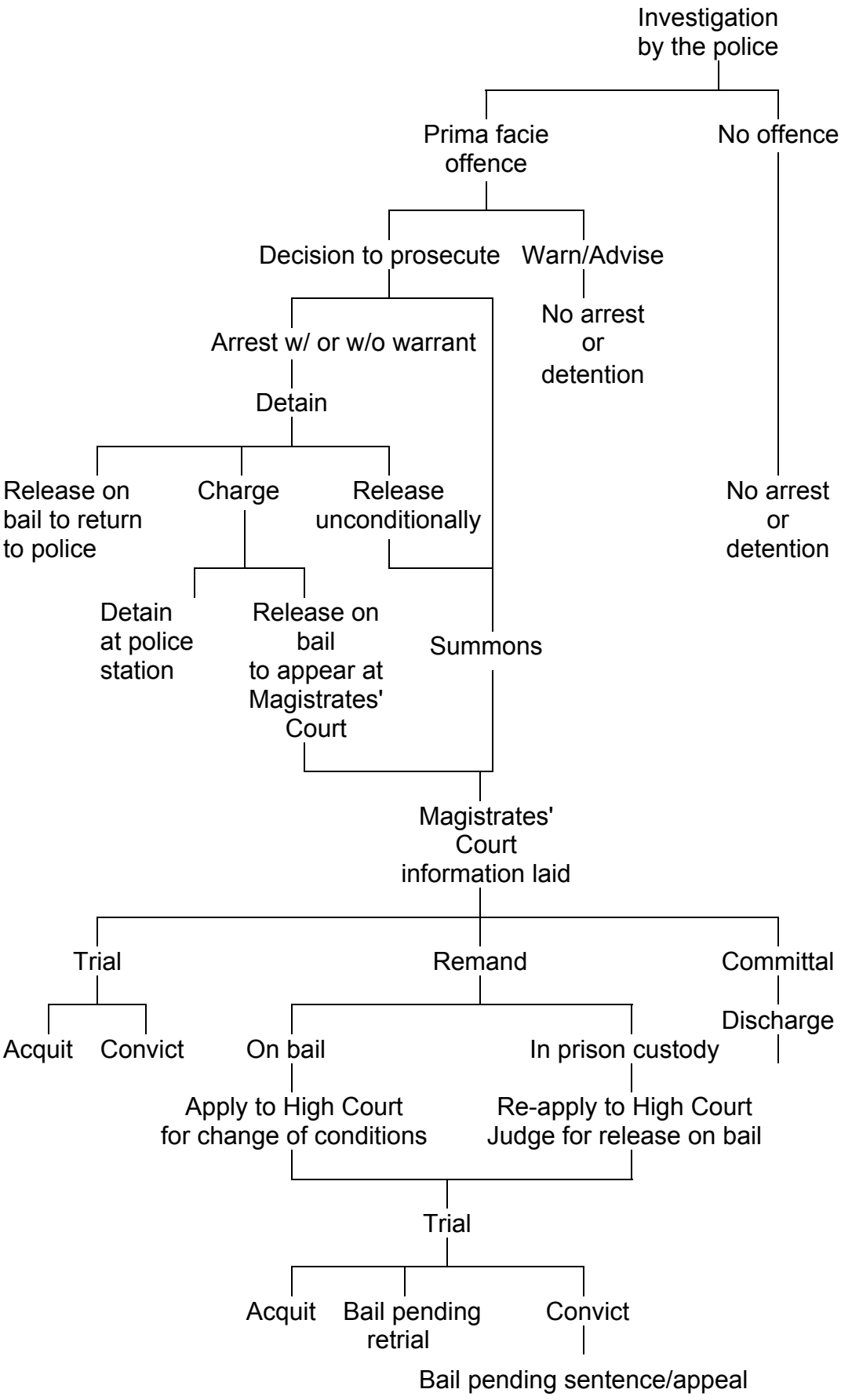
(b) **is arrested on a charge or charged after arrest** - when he may be bailed by the police to appear at court, referred to as "police court bail" - see Police Force Ordinance, section 52(1).

(c) **fails to appear in court** - when the court may issue a warrant for his arrest "backed for bail", allowing the police to release the defendant on bail when they arrest him (Magistrates Ordinance, section 102(3));

(d) **first appears in court** - when he may be bailed by the magistrate pending the next court appearance. There the question of bail arises after committal for trial, or after an adjournment to allow the case to be prepared or while the case progresses, referred to as "court bail" or "remand on bail";

(e) **is not convicted or not acquitted** - because the trial is aborted, when he may be bailed by the court pending a re-trial, referred to as "court bail" or "bail pending retrial".

Various stages at which the need for a decision on bail arises



Post-conviction

(f) **is convicted** - when he may be bailed by the court pending sentence, referred to as "bail pending sentence" or "court bail";

(g) **is convicted and sentenced** - when he may be bailed by the court pending appeal, referred to as "bail pending appeal", or pending review of sentence, referred to as "court bail".

2.4 Powers of the police and other authorities to grant bail

The police

The principal police powers to grant bail are set out in section 52 of the Police Force Ordinance. The police also derive power to grant bail from other Ordinances in special cases - e.g. Juvenile Offenders Ordinance, section 4 - considered in chapter 15.

There are two separate provisions in section 52 to be considered. The first is section 52(3) which enables the police to release an arrested person on bail to appear at the police station again at some future time. This covers the case where no charges have yet been laid and "it appears ... that the inquiry into the case cannot be completed forthwith."

This power is particularly useful where, for example, the decision to charge rests on the results of scientific tests which may take some time to be conducted, or in complex commercial cases where there are large quantities of documents to be examined.

The second is section 52(1) which covers the case (it seems) where charges have been laid. It provides that whenever a person is arrested the officer in charge of the police station, or another officer authorised by the Commissioner of Police, may release him on bail to appear before a magistrate unless -

(a) the offence is "of a serious nature"; or

(b) it appears that the person "ought to be detained".

If a person is not released he must be brought before a magistrate "as soon as practicable". Our enquiries show that generally an arrested person comes before a magistrate well within 48 hours - usually within 24 hours and frequently on the same day as his arrest.

This subsection sets different criteria for the grant of bail from those which apply to the courts. The police officer is given by law a wider discretion, first to decide what is a "serious" offence, and further to determine whether a person "ought to be detained". The police work to guidelines in the Police General Orders issued in consultation with the Attorney General.

Persons arrested in connection with offences which are sufficiently serious to merit transfer to a higher court for trial will, in most cases, not be granted bail by the police. Where an offence is suitable for trial in the Magistrates Court the accused will normally be offered bail by the police if he has a fixed abode or sufficient community ties to make it likely that he will appear at the place and time required.

The police may grant bail on recognizance, or for cash and with or without sureties. They have no power to require any of the many other conditions which the courts have power to impose. Those conditions must be sought from a magistrate.

Other authorities

ICAC

Section 10A of the Independent Commission Against Corruption Ordinance gives the ICAC powers equivalent to those possessed by the police. This section follows a different pattern from that in the Police Force Ordinance. On arrest by the ICAC a suspect may be taken to a police station or to the ICAC offices. If taken to a police station he will be dealt with under the Police Force Ordinance. If taken to the ICAC offices he must be bailed unless his detention is necessary for the purpose of further enquiries.

Immigration

Certain members of the Immigration Department have power to release on bail persons detained under section 36 of the Immigration Ordinance.

Health Officers - Quarantine

Under sections 4 and 5 of the Quarantine and Prevention of Disease Ordinance, a person may be released from isolation upon giving a written undertaking to attend for examination at a certain time and place.

Coroners

Section 17 of the Coroners Ordinance empowers a coroner to admit to bail persons he orders to be arrested by warrant under section 16. Bail granted in this instance is similar to police court bail.

Emergency Tribunals

The President of a Tribunal set up under the Emergency (Deportation and Detention) Regulations, Cap 241, r. 8 has certain powers to bail.

Commissions of Inquiry

Section 10 of the Commissions of Inquiry Ordinance gives the Commission the powers of a judge for the purposes of giving effect to any warrant of arrest or sentence of imprisonment or for other like purposes. This would include the power to grant bail since a commissioner has the jurisdiction of a High Court judge.

Juvenile Offenders

Under section 4 of the Juvenile Offenders Ordinance a police officer of the rank of inspector or above may grant bail to children and young persons arrested and charged to attend the hearing of the charge.

2.5 Bail granted by a court

Before trial

The first application for bail by a person who has been charged and brought to court will usually be made by him when he first appears before a court. The period of release on bail will vary according to whether the trial is to take place before the magistrate, or in the District Court or High Court.

During trial

Bail may be granted, varied or refused during the course of the trial depending on the evidence which emerges. A defendant who has been previously remanded in custody, for example, may be successful in a renewed application for bail if the evidence given against him is patently weak and there is a real likelihood of his being acquitted. Conversely, a defendant who was on bail before the trial may find himself remanded in custody if he is likely to receive a custodial sentence because the evidence against him is strong and the judge considers that there is an unacceptable risk of his absconding as a result.

After conviction, before sentence

After a person has been found guilty then, except in cases where there is no danger of a custodial sentence, the magistrate will usually remand him in custody so that reports on him can be prepared. For the purpose of preparing reports on suitability for attendance at a Training, Detention or Drug Addiction Treatment Centre he cannot usually be assessed unless he is in custody. In the case of probation reports the question of remand in custody or on bail is within the discretion of the magistrate. For pre-sentence reports the prosecution have no say in the matter of bail and never comment one way or the other.

Four of the eight Principal Magistrates we surveyed said they would refuse bail only if the defendant was likely to go to prison. One said he

almost always granted bail, two made no comment, and one applied the principles for bail pending appeal.

In some situations, legislation may preclude bail being granted after conviction and before sentence, e.g. section 4(3) of the Training Centres Ordinance.

After trial pending appeal

Once a defendant has been convicted and sentenced to imprisonment or other detention, the grounds for refusing bail are clearly stronger than before conviction. Nevertheless the defendant may apply to the trial magistrate for bail pursuant to section 119 of the Magistrates Ordinance pending appeal. There is also a right to apply to a High Court Judge for bail pending appeal, and this right is exercised:

(1) generally after a first application has been made to the trial magistrate;

(2) where the appeal is against conviction, generally not before the grounds of appeal have been formulated in detail;

(3) where the appeal is against sentence, generally not before the disclosure on affidavit of sufficient facts to enable the judge to form a fair opinion of the gravity of the offence;

(4) since there is no presumption of innocence, only upon sufficient grounds shown for a successful appeal or for possible injustice or undue hardship.

(5) The Court of Appeal may, if it thinks fit, on the application of any appellant, admit him to bail pending the determination of his appeal.

2.6 Summary of bail after a court appearance

No magistrate or Justice of Peace may admit any person to bail for treason or murder (section 102(1) of the Magistrates Ordinance) and subject to that limitation, under section 102(2) of that Ordinance where a person is charged with an indictable offence the magistrate may admit him to bail, with or without sureties, whether the defendant is committed for trial under section 79, transferred to the District Court under section 90 or remains in the Magistrates Court. The remand terms are largely at the magistrate's discretion (e.g. see section 79 which applies in the course of committal proceedings). Under section 20(3) during the hearing of a complaint or information in the Magistrates Court a defendant may be bailed whenever the hearing is adjourned.

The small area of Hong Kong, the high density of population and the planned distribution of the courts mean that judges and magistrates are readily available at all times to hear bail applications. During any statutory holiday period members of the Judiciary are available to ensure that the courts never close for more than 48 hours. Hence there is always a special sitting of Magistrates Courts on the second day of any holiday period for the principal purpose of facilitating bail application. There is at all hours a High Court judge serving as a duty judge.

2.7 The practice regarding bail applications in the magistrates' courts

2.7.1 Introduction

The vast majority of bail applications are dealt with by magistrates. There are eight Magistracies in Hong Kong. In each Magistracy there is a Principal Magistrate who is responsible for dealing with all initial appearances and routine remands. As all those charged with an offence make their first appearance in the magistrate's court, the eight Principal Magistrates see every bail applicant. What goes on in these courts therefore gives a good picture of the Hong Kong bail system at work. The following summary is a generalised account which draws in part upon perceived practice and in part upon responses to a questionnaire which was sent to the eight Principal Magistrates.

The magistrate sits every day except Sunday and some public holidays. Each morning those defendants who have been arrested since the last court sitting are brought before him by the police to face the charge or charges against him. It is likely that at this point the defendant will make his first application for bail. If the application is opposed by the prosecution, it is probable that this is the first occasion on which the defendant is informed of the ground of objection to bail.

When the defendant first appears before the court the charge is explained to him. In cases eligible for legal aid he is told of his right to take advantage of it. In most cases he is asked to plead guilty or not guilty to the charge. If he pleads guilty the magistrate hears a summary of the facts and any plea in mitigation of sentence. If the charge is minor or one for which a standard sentence is routinely imposed, he will either be released or, if his sentence is custodial, taken back into custody. An adjournment may, however, be necessary where an accused pleads not guilty. In these circumstances an adjournment is routinely sought to give the police time to prepare their case and arrange for their witnesses to attend court.

Where the charge is serious, he will be dealt with in the District or High Court. The police will need an adjournment, first to prepare the necessary documents and later to obtain a suitable date of appearance either for the preliminary hearing in the magistrate's court or in the District Court for plea. Even where a plea of guilty in the magistrate's court is indicated, the

police may sometimes need an adjournment because they have not fully prepared their case or because they wish to consider further charges.

If the defendant wants legal advice he may need an adjournment to get it. Sometimes, following a plea of guilty, the magistrate wants a report from the probation service or other agency, or the defendant asks for time to obtain reports or references to help him in his plea in mitigation. Whenever there is an adjournment the question of bail arises. The magistrate always has the power to grant bail unless the defendant is facing a charge of murder or treason, in which case bail can only be granted by a High Court judge.

We understand that in practice the magistrate invariably consider bail in every case, whether or not the defendant specifically asks for it. He will either assume the defendant wants bail, and ask the prosecutor if the police have any objection, or ask the defendant himself if he wants to apply for bail. Where a defendant says he does not want bail, the magistrate usually accepts that situation and does not pursue the matter any further. If the prosecutor says the police have no objection to bail, the magistrate will ask the defendant how much bail he can afford, and will then set bail taking into account the seriousness of the offence, the normal level of bail in such cases, and any representations by the defendant and the police. Magistrates prefer cash bail. Some occasionally order bail in the defendant's own recognizance, while others might order own recognizance bail if the defendant says he has no cash. The vast majority of bail is cash bail. Most of the magistrates usually require sureties. Exceptionally, magistrates impose a condition requiring the defendant to report regularly at a certain place, such as a police station, while he is on bail. Even if the police do not oppose bail, a magistrate retains an overriding discretion to refuse bail and may occasionally do so.

2.7.2 Bail conditions

If the police agree to bail only if subject to conditions, the magistrate will hear the defendant before deciding whether to impose them. Some magistrates regard as too restrictive a condition that a defendant should report daily to the police. Many magistrates agree to the conditions suggested by the police if after due enquiry they find good reason to impose them. There is a strong tendency for defendants to agree to whatever terms the police seek, obviously in the belief that to do otherwise would jeopardise their chance of bail or at least cause delay.

2.7.3 Bail opposed by police

Where the police object to bail, magistrates will hear argument from both sides before deciding the issue. Although the facts may be in dispute, only rarely do magistrates hear evidence on such issues. In practice

they have to make an instant assessment of bail risk on information given them by the police and the defendant or his counsel.

Magistrates generally regard it as the responsibility of the police to advance reasons why bail should not be granted. In this sense it can therefore be said that a right to bail already exists in Hong Kong.

2.7.4 Estreatment

If the defendant fails to answer to his bail or breaks a bail condition, he becomes liable for estreatment of his bail bond. There are two different approaches followed by magistrates in estreating bail bonds. Some estreat immediately on the non-appearance and then reconsider if and when the defendant appears and offers an explanation. Others do not estreat immediately but wait until the defendant appears, hear his explanation and then make their decision. The former procedure appears to rely on the magistrate's right to review his own decisions. Since that right extends for 14 days only and it must often be much longer than that before the defendant re-appears, it is doubtful that a magistrate has the power to reconsider his decision if it was made more than 14 days previously.

2.7.5 Bail pending appeal

There seems to be a difference in approach between magistrates who treat alike applications for bail pending appeal and other bail applications, and those who do not. The latter group will grant bail only where there is an arguable point of law involved or the prospects of success on appeal seem good. A grant of bail pending appeal is sometimes thought of as an invitation to allow the appeal.

2.8 The practice regarding bail applications in the district courts

The questionnaire that was circulated to Principal Magistrates was also sent to the three District Court judges who handle the Plea Courts in the District Court and who therefore deal with the great majority of bail applications in that court.

The District Court deals only with cases which are transferred to it by the Attorney General. All defendants will have already appeared in a Magistrates' Court and have been remanded either on bail or in custody. Although the District Court judge's power is not expressed in these terms, he will in practice always be reviewing a bail decision made by another judicial officer. Two of the District Court judges say they reconsider bail in every case, but the third says he reconsiders bail only where it has previously been refused or, if previously granted, the prosecution renews its objection. All three judges say they sometimes amend bail terms.

There are no significant differences in the way in which District Court judges and magistrates handle the bail procedure. As in the magistrates court, the prosecution is in practice expected to raise and sustain any objection. Only one of the judges has ever heard evidence on oath in a bail hearing. Two of the judges think information supplied in a form (as discussed in Chapter 14 of this report) might help them. The same two think guidelines as discussed in Chapter 6 could help. None wants a points system as in the Manhattan Bail Project scheme (described at paragraph 6.3.3) or to be strictly bound by guidelines. None regards more formal procedures as desirable.

Two of the three say the prosecution have never been known to raise improper objections, the third says they occasionally do. Two of the three judges sometimes refuse bail because the police need to make further enquiries, and think this is permissible.

All three prefer cash bail. One gives as his reason that it is usually offered. This judge also says he always requires a surety. All feel they have adequate power to impose conditions.

One judge says he would revoke bail after conviction and before sentence if a prison sentence is probable. One says he would grant it if the appropriate sentence was a suspended one or a probation order. The third says he applies principles no different from those applied in other bail applications. On bail pending appeal, two judges have no specific comment, but the third says he never grants it.

Chapter 3

Creating a right to release on bail

3.1 Introduction

The right to apply for bail is in practice afforded to every defendant but there is currently no provision giving an accused person the right to bail. We believe that there should be such a right to bail as opposed to a right simply to make an application for bail.

As noted in Chapter 2, there is no right to bail at common law. Under the Criminal Procedure Ordinance, an accused has a right to apply for bail but is not given a right to bail. There is nothing in the Ordinances in Hong Kong (as there is in England) conferring any right to an accused person to have bail. In addition, the onus of proof lies upon the accused person to satisfy the court that he should have bail, not upon the Crown to satisfy the court that the accused person should not have bail. Most courts in Hong Kong do give weight to the presumption of innocence and recognize that defendants ought to be granted bail unless good reasons can be shown for them to be held in custody. This concept is, however, nowhere stated in the law.

If, as we recommend, a right to bail is created the grounds upon which such right might be displaced should be clearly set out in the law.

3.2 The question of reform

3.2.1 The importance of bail in Hong Kong

The right to personal liberty is woven into the fabric of Hong Kong society. It is, in our view, a crucial and valued right and it should be preserved. The common law traditions in Hong Kong are guaranteed by an international agreement. The right to personal liberty will continue to be protected. Detention by the executive without trial is not a part of the common law tradition. No man in our society should be kept in custody unless and until he has been found guilty of a breach of the law, or (with stringent safeguards) certified on medical grounds. Detention before one of these pre-requisites is met is, in principle, an encroachment upon this aspect of our way of life.

The consequences of detention before or during a trial or hearing are undesirable. The detained individual suffers from a loss of self-respect, social image or reputation. He will lose his income, possibly his

employment. There will be a disruption to his work or career and family life. For him and his family the experience may be traumatic. The preparation of his defence may be inhibited. The costs of detention and of family support fall on the community.

Bail provides a mechanism for allowing accused persons freedom before trial and during the course of it. Without bail, there would be only two options available - detention or unconditional release. Clearly, that would be an unsatisfactory state of affairs. There has to be some way of restraining those accused persons who even though they are innocent before the law until convicted, are likely, if unconditionally released, commit further crimes, or interfere with witnesses or hamper the investigation or flee the jurisdiction before trial. On the other hand, a great many accused persons can be trusted not to do any of these things and to appear in court when required. It is contrary to the interests of justice for accused persons to be unnecessarily held in custody.

3.2.2 A clear bias in favour of liberty

The need for interim custodial remands must be well supported. Justification may be found in the fear of non-attendance at a trial or hearing, the likelihood of re-offending while on bail, the probability of interference with the due course of justice, the need for protection of an accused and other reasons. Between a universal absolute right to personal liberty and indiscriminate custody, a middle course must be steered among the competing interests. Notions of fair play, concepts of personal liberty, public opinion, practical considerations, experience and common sense must all be considered. Guidelines for custodial remands and bail must be left fluid, particularly when the forecast of risk on admitting a person to bail is not an exact science. The decision to grant bail is fraught with dangers and is by no means infallible. We must not allow ourselves to be deflected by the adverse consequences arising from the occasional wrong decision. Those who have wrongly taken advantage of our bail system have not succeeded in demonstrating that the bail system is not workable but only that no system is perfect. The right to personal liberty can be upheld without exposing the public to harm or bringing the rule of law into disrepute. Inevitably, some compromise has to be made: not all defendants can be allowed to roam free pending their court appearance. However, we feel that the basic principle is that every accused person is innocent until proven guilty, and as such is entitled to his freedom, unless there are compelling causes, reasonably substantiated, for detaining him. The onus should be on the police or prosecution to show why a defendant should be kept in custody, rather than upon the defendant to show why he should continue to enjoy his freedom.

3.2.3 Practical considerations

On a practical level, it must be remembered that any significant tightening up of bail conditions or making bail more difficult to obtain could

have an impact on prison accommodation and resources. If more defendants are released on bail, the pressure on the correctional services will be less but the strain on police resources will be greater.

3.2.4 International treaty obligations

The right to bail is recognised in Article 9(3) of the International Covenant of Civil and Political Rights, to which the United Kingdom is a signatory and which she has applied to Hong Kong. We believe that our recommendation that a right to bail should be created is consistent with Article 9(3).

3.2.5 The need to consider bail in every case

As there is no right to bail under the existing laws, a magistrate is not strictly obliged to consider the question of bail unless an application is made. In theory, therefore, the ignorant or the uninformed may fail to get bail simply because they do not apply or do not know that they can, and have to, apply. However as we have said in Chapter 2, magistrates as a matter of practice invariably consider bail in every case. Once the law provides a right to bail, it will be for the prosecution to displace it by establishing one of the grounds specified by law. Only after the prosecution has done so need the court consider whether bail should be granted or refused. It follows that if a right to bail is given by law, in effect bail cannot be refused without a determination, and no specific provision is necessary to oblige a magistrate to address his mind to bail.

3.2.6 The burden of proof

It would be highly impracticable if the court were to be left with no residual discretion as to whether or not to refuse bail even if the right to bail is successfully displaced.

The concept of a displaceable right to bail therefore also means that, even if the prosecution establishes one of the specified grounds, it will still have to persuade the court to refuse bail. If the prosecution fails to persuade the court, the accused will have to be released despite the fact that one of the specified grounds exists. It will be not for the accused to establish his right to freedom but for the prosecution to satisfy the court that he should be deprived of it.

We considered whether the right to bail should be wholly and automatically excluded for certain offences e.g. certain conspiracies, riot, drug trafficking, use or possession of firearms, murder, sedition, treason or for crimes of violence of a particularly serious or heinous nature regardless of the circumstances of the offence or the accused.

In Hong Kong a person charged with murder or treason may not be granted bail except by order of a judge of the High Court. This does not affect his right to bail. It is simply a procedural requirement. Section 102 of the Magistrates Ordinance prohibits a magistrate from admitting a person to bail for treason or murder. In England a magistrates' court, while prevented in a case of treason, is not so precluded from granting bail in cases of murder. The Hong Kong prohibition first appeared in our Magistrates Ordinance in 1890. Despite a thorough search of the legislative history of this provision, we were unable to discover why Hong Kong chose to prohibit magistrates from granting bail for murder. For lack of justification and because of the wish of the magistrates as can be seen later in this Report, we prefer not to interfere with section 102 Magistrates Ordinance.

There is a need to approach the matter of automatic exclusion cautiously. We felt disturbed by the idea of a list of offences for which bail could never be granted, particularly since such a list is liable to grow, once introduced. Exclusion of bail runs counter to the concept of the right to liberty. We considered that the possibility of abuse in the use of such a list would outweigh the very insignificant further protection to the public.

We also considered, but rejected, arguments for denying the right to bail to certain categories of persons - such as non-residents, fugitives, deportees, members of the Armed Forces, or persons liable to extradition. Such persons may, it is true, be considered as transient and more likely to abscond. The English Bail Act 1976, by its section 4(2), excludes fugitive offenders. However, we preferred not to deny them the right to bail or a bail decision on the sole ground of belonging to a particular category. Like everyone else they are entitled to have their applications considered on the merits. No doubt their status may be an important factor in deciding whether any of the exceptions is established. We prefer an approach based on the principle that freedom is indivisible and non-discriminatory. We deprecate any approach which discriminates by reference to class or status. Even a fugitive offender is entitled to a determination on bail, for there may be circumstances which make his attendance at court to answer to the charges against him highly probable.

3.2.7 Exceptions to the right to bail

There cannot be an absolute right to bail. For a variety of good reasons, some accused persons have to be detained. This is a reality that is easy to state though difficult to regulate.

3.2.8 Safeguarding the right to bail: legal advice

A legal right may be worthless if legal representation cannot be readily obtained to safeguard or enforce it. We consider that the code should provide that a person who has been arrested by the police has a right to be

informed that he is legally entitled to seek the assistance of a lawyer whether before or after being charged.

3.2.9 The scope of the right to bail: after conviction

Up to the moment of conviction or acquittal, an accused enjoys a right to bail. After conviction, he should not have a right to bail. He no longer is presumed innocent but has been found guilty. His future lies in the hands of the court. It is true that he may appeal. However, until his appeal is heard, he remains guilty in the eyes of the law. In England the right to bail ceases to apply once a person is convicted of an offence, as regards proceedings in respect of that offence (Bail Act 1976, section 4(2)).

We consider that a convicted person should still be entitled to apply for bail, but that it would then be up to him to satisfy the court that he would not abscond, commit further offences or interfere with the course of justice in conjunction with the other factors set out in Chapter 2 at para 2.9 for release pending appeal.

3.2.10 Remands and the grant of bail

It sometimes happens that a defendant is brought before a magistrate from police custody or in answer to bail, only to be remanded to a future hearing date. An adjournment may be necessary where, for example, the prosecution is not ready to proceed or where a witness is temporarily unavailable.

In such cases it is not uncommon for the Crown to ask for an adjournment for up to 8 days. The magistrate may grant a request for an adjournment and remand the defendant, either on bail or in custody (Magistrates Ordinance, section 79).

In our view the more willing the courts are to allow the prosecution time to prepare its case, the more readily they should release the defendant on bail. However, we would not wish the readiness of a court to grant bail to be relied upon by the prosecution to seek adjournments as a matter of course.

3.2.11 What magistrates and judges think

Five of the eight Principal Magistrates surveyed thought a right to bail should be created - the rest were against. Three felt there should be no change regarding bail applications for murder and treason, which are currently excluded from their jurisdiction. Two favoured excluding all cases to be tried in the High Court. One thought nothing should be excluded unless the death penalty is again carried out. Two thought there should be no exclusions.

The three Judges who take pleas in the District Court were not in favour of the creation of a right to bail. However the present practice of these District Court judges is that a defendant should be granted bail unless there is good reason for refusing it.

3.2.12 The right to bail as a central issue

There is a perception in certain quarters in Hong Kong that the bail laws work harshly against many defendants. It would perhaps be more accurate to say there is a perception that the criminal prosecution process works harshly against accused persons, and that the existing law on bail does little to ameliorate the situation. If the bail system operated smoothly, accused persons would be assured of being released pending appearance in court, unless there were valid reasons for detaining them. There is a perception that this is not the case in Hong Kong. The reasons for this are similar to those which have been raised in England:-

> *"Bail is refused following a very brief hearing when the court has little or no information about the defendant. There are wide local variations in practice. The magistrates almost invariably accede to police objection. The defendant is often not told of the reasons for refusing bail or of his right to appeal. He is usually unrepresented. If he appeals to the judge in chambers he will not get assistance, nor legal aid, there will be delays, there will probably be little information placed before the judge, and the application will probably be refused - whereas legally represented applicants have five times more chance of success. Even if bail is offered there may be considerable difficulty and delay while the police check on proposed sureties." (Alec Samuels, Book Review, [1972] Crim L.R. 797)*

There are various steps which should be taken to improve the situation. These include specific changes to various aspects of the bail system, namely: (1) the grounds on which bail may be refused should be clearly spelled out by law; (2) the factors which may be considered in deciding whether the grounds are established should also be clearly spelled out in the law; (3) the defendant should always be asked if he wishes to apply for bail; (4) the onus should be on the prosecution to prove the case for refusing bail; (5) applications could if necessary be heard in private so that a more thorough inquiry could be made into police objections but we do not think that attempts to resolve factual disputes or hearings in private should be encouraged; (6) more use could be made of bail conditions instead of sureties; (7) there should be clearer guidance for approving sureties; (8) absconding should be made a specific offence in order to provide a better deterrent for non-appearance; (9) applicants should complete a form giving personal information, data, particularly details of their community ties; (10) magistrates should be required to give reasons for refusing bail; (11) less emphasis should be placed on cash bail.

We consider that such proposals, if implemented, would go a long way towards resolving or alleviating some of the problems we have mentioned. However, compared with the creation of a right to bail, they represent relatively minor changes. Once the concept of a right to bail is firmly implanted in the law and in the minds of the bail authorities, there would probably be a radical shift in emphasis and attitude concerning the grant of bail. We would expect more deserving defendants to be released on bail than at present. We believe that this would promote greater public confidence in the criminal justice system, without seriously undermining the powers of the police or the courts to supervise criminals awaiting trial, provided the safeguards we seek to introduce to the proposed system are adopted.

3.3 The content of the proposed code

The Code should confer a general right on all persons to be released on bail pending a first appearance, and pending further appearances in the same proceedings. The situation of a defendant who has been convicted, pending sentence, pending review of sentence, and pending appeal is slightly different and does not call for a right to bail in the same terms. A convicted person should be entitled to apply for bail, but it should be for him to persuade the court that he should be released.

The bail authority should always consider whether to grant bail whether or not an application is made. This would follow as a matter of course, if a right to bail were created.

The general right to bail which we recommend is not absolute. There are situations in which a defendant must be held in custody pending trial. The right to bail is, in reality, the right to have the prosecution's objection to release properly considered and the right to have bail granted unless certain specified exceptions can be established. (For these exceptions, see chapter 5). Even if these specified exceptions are raised and proved, the bail authority would still retain a residual discretion whether or not to grant bail.

Bail applications in murder and treason trials should continue to be dealt with only in the High Court as at present.

All offences should be bailable. There should be no offences or classes of persons in respect of which bail can never be granted.

Chapter 4

Police court bail

4.1 Introduction

We have recommended in Chapter 3 that an arrested defendant should in principle be entitled to be released on bail. In this chapter we consider whether he should have this right not only when he is held in court custody but also when he is held by the police.

We decided not to include any form of operational bail in our deliberations. The ICAC bail procedure before a magistrate under section 18(3) of the Prevention of Bribery Ordinance is a special set of rules for admitting to bail a person under ICAC investigation. That caters for an exceptional situation. We see no need to recommend any change to it. A person who is arrested and detained by ICAC, unless granted operational bail, must "be brought before a magistrate as soon as practicable and in any event within 48 hours after his arrest" (section 10A(6) of the Independent Commission Against Corruption Ordinance).

Most persons who are accused in criminal proceedings pass through police custody - whether briefly or for a longer period of time.

The way in which a person is taken off the street or out of his home, the access he has to his family and legal advice, and the rights he has to seek and be considered for release on bail, say more about the true state of liberty and civil rights in a society than recitations of rights contained in international treaties or guarantees of liberal democracy in constitutional documents. The law of bail - the rules as to when an arrested person awaiting trial may be detained or released and what conditions may be imposed on his release - is an indicator of the degree of respect for liberty in a society.

We use the term "police court bail" to refer to the release by the police of a person from police custody after he has been charged and upon his undertaking to appear at court. The present law is outlined in chapter 2.

4.2 The question of reform

4.2.1 General criticisms of the present law

As in every branch of our law, there is room for improvement in the law on police court bail. The Police General Orders provide guidelines for

the grant of bail, broadly following the criteria which apply in the courts. The underlying statutory provision upon which the grant of police court bail is based (section 52(1) of the Police Force Ordinance) is less than specific and is unsatisfactory in that release on bail is made to depend on the police's view of whether an offence is "of a serious nature" or whether a suspect "ought to be detained". What is lacking is a set of settled procedures and boundaries.

The main questions that arise are: -

(1) Should the same criteria apply to police court bail as to the grant of bail in the courts?

(2) If the answer is no, what special criteria should apply?

(3) Should there be provisions for a review or appeal of police court bail decisions?

(4) If the answer to (3) is yes,

  (a) should there be a requirement that prisoners be informed of this right?

  (b) should the right be one of access to a superior officer, or to a justice of the peace or a magistrate?

  (c) at what times should the prisoner have the right to ask for a review?

(5) Should the police have power to impose conditions that are the same as, or different from those imposed by the courts?

(6) If the police should be able to impose different conditions, what should those conditions be?

(7) Which police officers should have the power to grant bail?

(8) Should the police have power, after charging, to -

  (a) summon, or give notice to attend?
  (b) dispense with bail?

More fundamental, however, is the question whether a person arrested by the police should also enjoy a right to bail after being charged with an offence.

Some reports on the attitude of the police towards release on bail suggest that the police in some districts are less willing than in others to grant bail, even where the offence is minor, the accused has a record and where cash is available. It has been suggested that the police should be more willing to offer bail to persons charged with minor offences. The police

themselves have initiated a trial scheme in two representative areas, encouraging greater use of recognizances, instead of cash bail.

4.2.2 A right to bail

Should the right to bail which we have recommended in chapter 3 apply to police court bail? We see no reason in principle why it should not. It is sometimes suggested that operational constraints, necessitate different rules for police court bail. We do not share that view. After charging, most of these operational constraints disappear, and we see no reason why the same procedures and boundaries which apply to bail granted by the courts should not be adopted. The grant or refusal of police bail is known to influence an accused person's prospect of obtaining bail before a magistrate. Studies in England and New South Wales have shown that nearly all defendants previously released by police were granted bail by magistrates, while only 38.40% of those detained by the police were subsequently granted bail by the magistrates. ([1974] Crim. L.R. 451; (1987) 11 Crim L.J. 333.) Moreover, in due process of law after a person is charged, a uniform set of criteria should apply to his personal liberty for the same offence at whatever stage it falls to be determined. Consequently, police court bail and bail granted by the courts are best determined on the same basis. We also consider that the police should be obliged to inform a person in their custody of his right to bail.

4.2.3 The advantages of laws that are clear and easy to understand

The police would welcome a uniform system for police court bail and expect no difficulties in issuing and administering new directives in their General Orders. We note that in England the Home Office Working Party concluded it was "desirable that, as far as possible, the police should follow the same principles (modified as necessary to take account of the special features of police bail) as magistrates" (Report of the Home Office Working Party on Bail Procedures in Magistrates' Courts, London, 1974, para 179.) The Cobden Trust recommended that "well defined restrictions are needed on the power of police officers to withhold bail", (King, M. "Bail or Custody", The Cobden Trust (1971), p. 8)

4.2.4 Police general orders

The Police General Orders contain the following provisions on bail (see Annexure 1 for the full text):

(1) The authority to grant bail is given to the officer in charge of the case (OC case), provided he is not below the rank of inspector. In other cases it is given to the duty officer (DO).

(2) Section 47 - 02 of the Order provides as follows:

Bail should normally be granted except: -

(a) in a serious case;

(b) where the offender has been arrested on a warrant which contains no directions regarding bail;

(c) where there is a likelihood the offender will abscond;

(d) where there is a likelihood the offender will repeat the offence;

(e) where there is a likelihood that the offender will interfere with witnesses, impede the investigation of the case or otherwise attempt to obstruct the course of justice;

(f) where it appears to the DO or OC case that the offender should be detained in his own interest, to protect him from the acts of himself or others;

(g) where the offender cannot produce reasonable bail; or

(h) for any other good reason the offender should be detained.

Exceptions (c), (d), (e), (f) and (g) are our recommended grounds on which the proposed statutory right to bail is to be displaced (see Chapter 5). Exception (b) is no more than compliance with the instruction contained in a court warrant. Exceptions (a) and (h) are considered further in the light of our recommendations in Chapter 5.

As the law stands, the two reasons (a) and (h) used by the police for refusing bail are not part of the criteria applied by the courts. Such matters as the seriousness of the offence, the defendant's criminal record or other good reason merely constitute information or evidence to indicate the applicability of some of the acknowledged criteria applied by the courts. Direct reliance on these matters could cause confusion because defendants may be left to speculate as to which recognized criterion the police rely on to refuse bail when they are told simply of the evidential matters, such as the seriousness of the offence, the defendant's criminal record or other good reasons. This would hamper the defendant's preparation to meet the police objections before a magistrate. The police are not alone; the courts do not always specify the correct criteria in a bail determination but merely make reference to evidential matters tending to establish these criteria. We considered the different background, functions and goals of law enforcement agencies. We were informed that the police would not encounter insurmountable difficulties in the realignment of their General Orders when the bail law is enacted. Our recommended criteria for the courts seem sufficiently flexible to be used also by the police. We therefore recommend, that the same criteria should apply to police court bail. This would mean that there

would be the same right to bail from police custody after charging as from the courts, and that this right would be displaced only if one of the exceptions set out in chapter 5 were shown to exist.

We know of no problems in practice arising from decisions being made at the level of responsibility stated in the General Orders. In this respect we recommend no change.

4.2.5 Limited right to impose conditions on bail

The only power the police have is to grant bail on recognizance, or for cash and with or without sureties. There is no power to grant bail subject to a reporting requirement, to require surrender of travel documents, or to apply one of the many other conditions which the courts have power to impose.

We have recommended the courts be given wide discretion to impose conditions when granting bail. This contrasts markedly with the very limited powers at present enjoyed by the police.

We recognise that there are two possibly competing considerations at play. On the one hand, it may be to the advantage of the accused for the police to have power to impose conditions more stringent than at present. The police would probably be more prepared to consider bail if they could impose conditions. On the other hand, there must be some fear that, given the power to impose harsher conditions than at present, the police may not have adequate manpower to see that the conditions are met or the necessary experience to operate the system or check abuses.

During consultation, the police indicated to us that they would not object to being given wider powers if they are usable in practice. The police officer member of the Sub-committee felt that the only practical and workable power that might be of benefit would be one which requires the surrender of travel documents.

We consider that the deposit of cash for police court bail was not objectionable, although we would prefer to see less use made of the practice.

4.2.6 Appeals or reviews

In making a decision for bail, there is always a risk that a police officer may make a mistake or abuse the system or impose conditions that are unnecessarily harsh.

At present under section 52 of the Police Force Ordinance there is no right of appeal from a police decision. In a number of other jurisdictions we surveyed, a right of appeal is given, usually to a magistrate or justice of

the peace. In one jurisdiction the appeal can be made immediately over the telephone.

We do not feel that a review system extending outside the police force would be justified. Those refused bail would have been told that they had a right to bail, that they were being refused bail and that they had the right to appeal. To the ordinary person in Hong Kong the first two statements could appear contradictory and give rise to the misunderstanding that an accused who has a right to bail should always be given bail. A large number of untenable appeals would follow, and there would thus be a considerable burden placed on judicial resources with no real benefit to an accused person. We feel that the detention period involving the police can only be brief and is too brief to warrant an outside review. Moreover, by the time an outside review can be set up, the accused person would probably have been brought before a magistrate to whom a bail application may be made.

We do feel, however, that within the establishment there should be some sort of review system that would be expeditious. There is a risk that an officer in charge of an investigation will be less than objective when faced with having to make a bail decision in respect of a person whom he has just charged with a crime. The ICAC already recognise the need for consultation with a person not directly involved in the case. Although under the ICAC Ordinance bail decisions can be made by a Senior Commission Against Corruption officer, the ICAC's Standing Instructions on Bail Procedures provide that in practice the power is to be exercised by Group Heads of the Operations Department, in consultation with Assistant Directors. This practice is followed in all decisions as to whether to grant bail and when to grant it. We recognise, however, that it would be quite impractical for the police to require all bail decisions to be made at this level of authority. We consider that a senior officer designated for the purpose of review but otherwise uninvolved with the case should conduct the review. Such review should be carried out promptly in the presence of the prisoner and within three hours after the bail decision. The accused should be told of his right to an immediate review by another officer.

4.2.7 Minor offenders - powers to summon or dispense with bail

There is no provision for defendants who are charged with minor offences to be released without bail on trust to appear in court on a later occasion. In several other jurisdictions such persons can be released on "summons"; they are simply given a document prepared by the police directing them to appear at court on a specific date. This saves police time and effort in following bail procedures, and avoids embarrassment and inconvenience to the alleged offender.

We considered whether the police should have either of those options. The aim of each of them would be to secure the early release of those who had been charged with trivial offences.

As to unconditional release upon trust to appear at court later, the police would be unlikely to release a person once the decision to charge him had been taken. Where unconditional release was contemplated, the police would release a person before, and not after, charging him. For these reasons we believe that there would be little purpose in giving the police the power to summon or release unconditionally a person whom they have charged.

4.3 The content of the proposed code

We recommend that our proposed right to bail should apply to police court bail.

The police should have the power to impose the following conditions when granting police court bail.

(a) recognizance by the defendant (unless abolished - see Chapter 7) and any sureties (Chapter 9);

(b) cash deposit by the defendant;

(c) cash deposit by any of the sureties;

(d) surrender of the defendant's travel documents;

(e) reporting to a police station.

We noted that the requirement to report to a police station was said to be not very effective and difficult to supervise, and to cause administrative and other inconveniences. We believe that, despite these drawbacks, a reporting requirement does in some circumstances serve a useful purpose. We recommend that it should be retained, but used only in good grounds.

Anyone refused bail or granted bail on certain conditions should be entitled to have the decision reviewed by a superintendent of police designated for the purpose but otherwise uninvolved with the case. The defendant should be informed at the time of the decision that it can be reviewed. The superintendent should see and hear the defendant before making a decision and should reach his decision as soon as is practicable but in any event not later than three hours from the original decision.

Police bail should continue to be granted by officers of the same rank as at present.

The Police should not be given additional power to dispense with bail or to serve a summons after they have charged a defendant but should retain the present system of release on bail.

The Code should provide that the police are obliged to advise persons entitled to seek bail that they have a right to bail unless and until a ground for refusing bail is established.

Chapter 5

Grounds for displacing the right to bail

5.1 Introduction

This chapter is concerned with when bail may be refused. We have already said that the right to bail cannot be absolute, and that the law must give the relevant authority the right in certain cases, to refuse bail and hold an accused in custody.

5.2 The present law

5.2.1 Before and after conviction

The rules as to when release on bail may be refused differ according to whether the defendant is seeking release before or after conviction.

5.2.2 Pre-conviction: the right to freedom: presumption of innocence

Before conviction the defendant has the benefit of a presumption of innocence. It can be said that prior to conviction the defendant is bailable "as of right".

However, the right to bail does not have the status of a constitutional right as in the United States. Nevertheless, the Bill of Rights 1688 forbids "the demanding of excessive bail". In the 18th and early 19th centuries, the writ of habeas corpus was often used for the purpose of obtaining bail on the ground of a contravention of that Bill. As a legal concept, presumed innocence has long been respected. In addition, an accused person's need adequately to prepare his defence is a recognised good ground for granting bail.

The consequence of having regard to the presumption of innocence is that on a bail application the court generally looks to the prosecution to oppose bail, not to the accused to support the application.

5.2.3 Five situations when release on bail may be refused

The fundamental principle is that a person's liberty should not be taken away from him unless it is necessary in the interests of justice, including

the prevention of crime. An accused may be remanded in custody if the court is satisfied that there are reasons which would render it probable that he: -

(1) would fail to surrender for his trial; or

(2) would commit further offences if remanded on bail; or

(3) would obstruct the course of justice, for example by alerting co-offenders, destroying evidence, interfering with witnesses or otherwise hindering the investigation; or

(4) should be remanded in police custody to enable inquiries into related offences to continue, or identification parades to take place; or

(5) should be remanded in custody for his own protection.

A remand in custody is sometimes necessary in order to prepare medical, social or detention reports. This situation usually arises after conviction and before sentence.

We were not able to envisage any situation which would not fall within one of these grounds.

It is often said that the most important ground is the first - whether the defendant is likely to abscond during the adjournment. Its practical importance is that a person may leave Hong Kong and either cannot be brought back at all or can be brought back only after lengthy and costly extradition proceedings.

It is for the prosecutor who appears in court on the accused's first appearance to make known to the magistrate the factors which are relevant to the considerations listed above. It is usual for the court to ask the prosecutor whether bail is objected to by the prosecution and, if so, upon what grounds. Where minor offences are concerned, the magistrate may simply ask the accused, or his legal representative if he has one, how much he proposes to put up for bail by way of recognizance or surety.

5.2.4 Post-conviction

The consideration of release on bail arises at the post-conviction stage:-

(1) where a person has been convicted, following either a guilty plea or a trial, and cannot be sentenced immediately; or

(2) where, having been convicted and sentenced, he lodges an appeal.

In both cases the presumption of innocence no longer applies and it is for the defendant to justify his release. (see R v TAM Chun-wah (1976) HKLR 831).

5.3 The question of reform

The present law is uncertain and can cause injustice. The uncertainty is principally due to the fact that there does not exist a well-defined set of criteria. The consideration and interpretation of every conceivable factor has been left to individual bail authorities, and their approach has not been consistent. We have recommended the creation of a statutory right to bail. As long as that right subsists, bail must be granted. There is a need to set down the precise grounds on which the right to bail can be displaced. We have proposed to call these grounds "exceptions" under which the statutory right to bail is displaced. It would also be desirable to specify the factors that may be taken into consideration in judging whether any of these exceptions exists. We do so in Chapter 6. Even where the right to bail is displaced by one or more established exceptions, the bail authority would ultimately be left with a residual discretion whether bail should still be granted. In this chapter we consider what the exceptions or grounds for displacing the right to bail should be. Of the grounds mentioned above, the fourth, (inquiry into related offences, need for identification parades) is perhaps the most controversial.

Other subsidiary issues needing attention in this area are as follows:-

5.3.1 Remand in custody or on bail pending appeal by Crown to the Privy Council

At present there is no power to detain a defendant whose conviction has been quashed by the Court of Appeal where the Crown seeks leave to appeal against the judgment of the Court of Appeal to the Judicial Committee of the Privy Council. In England section 37 of the Criminal Appeal Act 1968 provides that, if a defendant would be liable to be detained but for the decision of the Court of Appeal quashing his conviction, the Court of Appeal may order his detention or his release on bail while the prosecution's appeal to the House of Lords is pending. If it is decided to provide similarly in Hong Kong, we feel that the accused's right to bail as an acquitted person should revive and that the general principles for bail application after conviction pending appeal should not apply.

5.3.2 Ambiguity in the term "warrant executed"

Our attention has been drawn to an administrative problem arising out of the practice of using the phrase "warrant executed". A good ground for the Crown's objection to bail is the observation that an accused

person has jumped bail on a previous occasion; that is to say, the accused has wilfully failed to appear for his trial. The prosecutor makes this objection on the basis of a document in front of him which, in relation to the accused, says "warrant executed".

A magistrate or judge has, at the accused's trial date when he failed to appear, issued from the bench a warrant for the accused's arrest. Unfortunately, it appears that this phrase "warrant executed" is capable of two other meanings.

First, it may mean that the accused was absent not because he jumped bail but because he was in jail, or police custody, relating to other matters at the time. Here, "warrant executed" means not that a magistrate has given a warrant for the accused's arrest, but that he has given an order for the accused to be brought up from custody.

Second, it may mean that the accused has not paid a fine in respect of a previous offence. The non-payment of the fine results in a warrant being issued for the arrest of the offender.

When the prosecutor looks at the accused's record, he has therefore no knowledge whether the accused has: -

(a) wilfully jumped bail to stand trial (e.g. for loitering);

(b) been brought up from custody to stand trial for loitering; or

(c) been arrested for non-payment of a fine imposed for loitering.

The prosecutor can only find out the answer by sending for the accused's full criminal file. That, of course, means that the accused has to remain in prison a few more days until the matter can be sorted out, when his bail application will be heard again.

This is a potentially serious problem which ought to be settled by administrative guidance, rather than by statutory reform. We highlight it here in the hope that it will be addressed by the appropriate authorities.

5.3.3 The standard of proof

For there to be a displacement of the right to bail, there must be sufficient evidence to support one or more of the exceptions. In considering the standard, of proof, we discussed whether the bail authority has to be satisfied beyond reasonable doubt or upon the balance of probabilities or by some other standard. The matter is considered, and our conclusion set out, in Chapter 14.

5.4 The content of the proposed code - pre-conviction

We recognise that in certain situations an accused person must be kept in custody pending trial. The problem is to define the circumstances which justify this action. As we have said above, the removal of the right to bail affects the right to liberty. It must therefore be confined to demonstrably deserving cases.

We considered a substantial number of situation which could justify removing an accused person's legal right to bail and therefore could provide a basis for a discretionary refusal of bail.

We recommend the following:

5.4.1 Grounds (exceptions) for displacing the right to bail

Exception 1

The defendant, if released on bail, would be likely to fail to surrender to custody in answer to his bail

This is crucial in any bail decision, and we think it unarguable that bail need not be granted in this situation.

Exception 2

The defendant, if released on bail, would be likely to commit further offences while on bail

We think this is a valid and proper ground for detention. We considered whether it was too broadly stated. We considered the lack of legal justification for this exception and the criticism that it is tantamount to preventive detention. On balance, however, we believe that this ground is a valid justification for refusing bail.

Exception 3

The defendant, if released on bail, would be likely to interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.

This is central to the consideration of bail, and we have no hesitation in recommending its adoption.

Exception 4

Where it has not been practicable to obtain sufficient information to enable the bail decision to be taken - limited to detention up to a total of 72 hours

A similar provision is also found elsewhere. (See Western Australia Bail Act, section 12; Queensland Bail Act, section 16(1); Victoria Bail Act, section 4). We note that a similar provision, but without a time limit exists in England (Bail Act 1976 Schedule I, para 5) and we consider that such a provision is desirable. There are occasions when the prosecution can show valid grounds for further time to gather or verify information relevant to a bail decision. This exception should be circumscribed to ensure that it is not open to abuse. The Code should provide that remands in custody on this ground shall not exceed, in total, 72 hours.

Four of the eight magistrates we surveyed thought that a remand in custody for further enquiries could never be justified. One thought it could be - for no more than 3 days. Two thought it was justified - if the enquiries related to the case before the court. One thought it was justified only in "suitably serious cases." We should emphasise, however, that we recommend this ground only for further enquiries needed for a decision on the bail application. We are not suggesting that bail could be refused because the police are minded to make further enquiries into the offence itself, still less into other offences.

5.4.2 Exceptions for special situations

The above four exceptions would apply to all accused persons, pending a first appearance, or pending further appearances. In addition, we recommend the following exceptions for the special situations noted:-

Exception 5

Where there is a need for the defendant to be remanded in custody for his own protection or, if he is a child or young person, for his own welfare or in his own interests.

In the course of the day to day work of the courts, situations arise in which, although on all the known facts a person ought not to be refused bail, a release would clearly be contrary to his interests. The most obvious examples are where the defendant is mentally ill, incapacitated or intoxicated or requires separation from bad influence or environment, or is an uncared for infant. There may also be occasions when shelter is needed from rival criminals or revenge. A power to remand in custody in these circumstances should only be invoked in clear cases, but it is nonetheless necessary.

Exception 6

Where the defendant is in custody pursuant to the sentence of a court

Clearly a person should not be released on bail if he is serving a sentence for previous offences at the time of his bail application. His right to bail should be displaced under this head, but it would still be permissible for him to apply for bail. We recommend the obvious that any grant of bail in the exercise of residual discretion should not take effect before the defendant's current sentence is served or set aside. We recommend that for the sake of consistency and sound policy the legal right to bail should be withdrawn from an accused during the time he is undergoing a custodial sentence. A bail application made during the currency of an existing sentence should not be entertained until after that sentence has been completed. This could be achieved in the exercise of judicial discretion, and we do not see the need to introduce new law.

Exception 7

Where the defendant is in custody following his arrest for failing to fulfil conditions of bail granted in any proceedings

After a person fails, without reasonable excuse, to answer to his bail we think it would be wrong in principle for him to continue to enjoy any statutory presumption in favour of bail on his further application for bail. The effect of this provision would not bar a defaulting defendant from having his bail considered within the residual judicial discretion, but in effect it would then be incumbent upon him to persuade the court to grant bail by establishing either that there were extenuating circumstances for his failure to answer bail or, if none existed, that bail should nevertheless be granted, having regard to all the material considerations. The same should apply where the defendant is detained after his arrest for breach of other bail considerations.

5.4.3 Other exceptions for displacing the general right to bail considered and rejected

In addition to the above grounds (exceptions) for lifting the general right to bail, we also considered and, for the reasons we set out below, rejected certain others: -

(a) The defendant, if released on bail would commit an offence which is likely to involve violence or is serious by reason of its likely consequences

The exception is encompassed in exception 2 above. The latter is of course broader and would mean that bail could be refused whatever kind of further offence might be expected, even if it did not involve violence or other serious consequences. Some jurisdictions have adopted the narrower approach. We felt some sympathy for this more limited exception, which ensures that the legal right to bail would not be taken away and chances of a defendant's successful bail application would not be diminished merely

because a minor or trivial further offence was feared. The majority of the Sub-committee felt that in practice bail would only be denied on ground number 2 for fear of serious offence being committed. We agree. Rather than fettering the courts with a stricter formula which would be difficult to devise, we felt that the general right to bail would be sufficiently protected by our earlier recommendation, which relies on the safeguard of the residual discretion. However, we noted that two members of the Sub-committee disagreed and expressed the view that since this exercise was one of codification, the power to deny the general right to bail should be circumscribed by specifying all the serious offences the risk of committing which would justify denying the right to bail.

(b) In the case of bail during a trial, where there is a substantial risk that the fairness or integrity of the trial process might or might appear to be prejudiced.

A sweeping provision to this effect applies in Western Australia, but members noted that in that jurisdiction some of the courts were located in small and isolated communities where there could be a real risk that a defendant would unavoidably mingle with the judge, jury members or witnesses if released during his trial. In Hong Kong, we do not envisage that kind of risk. Furthermore, the sort of situation which might give rise to the need for such an exception in Hong Kong would be adequately dealt with under Exception 3.

(c) In a case involving serious personal injury, where the nature of the defendant's offence has yet to crystallise because of uncertainty as to whether the injured person will live or die

This exception is designed to cover the situation where an injured victim may die. In that event, a relatively minor charge might be replaced by a serious charge of murder or manslaughter. This obviously has a bearing on the bail decision. We agree that the possibility that the victim will die should have an effect on the bail decision, but we do not see a need for introducing a more stringent exception to this effect. The defendant would have to be re-charged and bail could then be re-considered. His prospect of bail should not be jeopardised before the event. The question is whether or not the threat of a more serious charge will enhance the likelihood of the defendant absconding, interfering with witnesses or possibly committing further offences to enrich himself to meet bail or future expenses. In our view, the probability of facing a more serious charge does not warrant this additional exception. Furthermore, the situation is adequately, though not quite directly, dealt with under our Exceptions 1, 2 and 3.

(d) The defendant is under a temporary incapacity of a nature which prevents his immediate release

While we agreed that this could be a ground for a separate exception, we felt that it was, in effect, included in the special exception for persons in need of protection under Exception 5.

(e) The victim requires protection from the defendant

A provision to this effect has obvious attractions, particularly in the context of an offence involving domestic violence or vindictiveness. Nonetheless, we do not recommend its adoption as our Exception 3 is sufficiently broad to enable the courts to deal with the problem.

(f) The defendant has been charged while on bail with the commission of another indictable offence

We feel that this is unnecessary. Charging a person with an offence does not mean that he has in fact committed it. It would make little difference for this purpose whether the further offences was allegedly committed before or after the offence in respect of which the defendant was bailed. We place more importance in the presumption of innocence. There may be valid reasons why bail should not be given for the second alleged offence, but these should not include the mere fact that the person is already on bail awaiting trial for the first alleged offence. We do not recommend this as a separate exception.

(g) A need to be remanded in custody after conviction where it would otherwise be impracticable to make inquiries or obtain a report

The defendant need not be granted bail if it is shown that it would be impracticable to complete inquiries or make a report without keeping the defendant in custody after conviction. We would support this, but as we have decided not to recommend a continuation of the proposed right to bail after conviction, this exception would not be necessary. After conviction, the defendant's bail would be left to the discretion of the court, and the matter in this exception would be a material consideration.

(h) Granting of bail may hinder police investigations into the offence or related offences

We rejected this as a legitimate ground for displacing the right to bail. For bail to be refused because it may hinder police investigation into the offence or related offences would be to invite abuse. This situation is to be distinguished from enquiries into the defendant's suitability for bail, (see above Exception 4). We suggest the latter should be an exception for displacing the right to bail. It goes without saying that once enquiry is completed or at the expiration of the limited period, his right to bail revives. Nowhere in the legislation we have studied, however, is the power given to court to remand in custody merely on the ground that police enquiries into the charge or other suspected offences are continuing. But in England, under sections 128(7) and (8) of the Magistrates' Court Act 1980, where one or more of the grounds displacing the defendant's right to bail has been established, the defendant may be remanded in the custody of the police at any station for a period of not more than three days provided that there is a need for such police detention to facilitate police enquiry into other offences. We considered introducing

legislation equivalent to the English provisions. We feel that under the court's residual discretion, the defendant's interest would be sufficiently safeguarded. The English provisions allow the police to investigate other offences only where a defendant has already been refused bail under the code we recommend. We conclude that similar provisions would facilitate police enquiry on a fair basis with no foreseeable adverse effect. Accordingly, we recommend the adoption of equivalent provisions to section 128(7) and (8) of the Magistrates' Court Act 1980.

(i) Refusal of bail is necessary to enable an identification parade to take place

This ground is closely related to that considered in the preceding paragraph and should, in our view, be rejected for the same reason. Police operational convenience in carrying out investigations into a crime ought not to be considered as a valid ground of detention. After an accused has been positively identified at the identification parade, this could be a reason for the police to apply to the court to have his bail revoked. We recognize that the accused might abscond as a result of the identification and before the police could make their application, but we believe that that is a risk that must be run.

(j) Where, at a pre-trial review, the defendant indicates he will plead guilty

In a recent case (Chung Tse-Ching, Tsoi Kwok-Wai v. Commissioner of Correctional Services 1988, No. 57 (Civil), two men, one of whom obtained bail from a magistrate, the other one from a High Court judge, had their bail revoked when they told a High Court judge at a pre-trial review that they were going to plead guilty to one count of robbery. The precise grounds on which the bail was revoked are not known. The Court of Appeal made no comment on whether an express intention to plead guilty was sufficient reason to revoke bail. It did however observe that if it were to become established practice to revoke bail in like circumstances, the efficiency of pre-trial procedure might well be severely reduced. We agree with that observation and do not favour a general rule that bail should be revoked wherever a defendant indicates an intention to plead guilty.

5.4.4 The standard or degree of proof - ultimately a question of risk

In practical terms, the question of whether or not an exception to the right to bail has arisen in any particular case will depend upon what degree of risk the court is prepared to accept. To take an example: the magistrate may be suspicious, on the basis of the information he is given, that a person is considering absconding if granted bail. Should it be sufficient for the magistrate to consider the right to bail as displaced and to refuse bail on mere suspicion? Or should he only consider refuse bail if he is persuaded or satisfied up to a certain level that the defendant is likely to abscond?

We considered a number of possible formulations based on the provisions of the law in the following jurisdictions:

(1) UK

"substantial grounds for believing that" the defendant, if released on bail would fail to surrender, would offend or would obstruct the course of justice.

(2) New South Wales, Australia

(i) "satisfied that the person is likely" to commit an offence while at liberty on bail. (Section 32(1)(c)(iii) and section 32(2), New South Wales Bail Act 1978).

(ii) "the probability of" whether or not the person will appear in court ... (Section 32(1)(a), New South Wales Bail Act 1978).

(3) Western Australia

"having regard to" the questions whether, if the defendant is not kept in custody, he may fail to appear, commit an offence, obstruct the course of justice etc. (Schedule PART C of the Western Australia Bail Act 1982).

South Australia

"having regard to" the gravity of the offence, the likelihood that the defendant would, if released, abscond, offend again or interfere with evidence (Section 10(1)(a) & (b), South Australia Bail Act 1985)

(4) Victoria, Australia

"an unacceptable risk that" the accused person if released on bail would fail to surrender, would commit an offence, would obstruct the course of justice etc. (Section 4(2)(d)(i), Victoria Bail Act 1977)

Queensland, Australia

"an unacceptable risk that" the defendant if released on bail would fail to appear, would offend, would obstruct the course of justice etc. (Section 16(1)(a), Queensland Bail Act 1980)

(5) New Zealand

"reasonable grounds for believing that" the defendant would fail to surrender, would offend, or would obstruct justice.

In the end, with one member dissenting, the Sub-Committee agreed on a recommendation that the test should be "an unacceptable risk that ...".

The dissenter preferred the test of "substantial grounds for believing". He argued that the unacceptable risk test was nebulous whereas the "substantial grounds for believing" test is clear, straightforward, easy to apply and leaves less room for speculation or personal difference on what "substantial grounds" are. This argument is in line with the view ultimately adopted by the House of Commons in the United Kingdom.

However, the majority of the Sub-committee disagreed with this view. It thought that "unacceptable risk" is a test of common sense reaction to a risk, not based purely on an estimate of chance. It also thought that the test of "reasonable or substantial grounds for believing" that a person will or might fail to answer his bail is inflexible. It does not enable the court to assess both the nature and the degree of risk in granting a person bail.

For example, the one in ten chance that a suspect rapist will or might rape again while on bail might be regarded as an unacceptable risk while a much higher chance of a pickpocket committing a further offence of pickpocketing while on bail might be regarded otherwise. In contrast, the tests that speak in terms of belief, probability, possibility or likelihood fail to gauge or capture these realistic situations. The Bar Association suggested that the test should be: "Is there a strong likelihood that the defendant would fail to comply with the conditions of bail?" This test too fails to recognise that "a strong likelihood" may be acceptable in some circumstances, while in others a much less strong likelihood will be unacceptable.

The test should be, "Is there a risk?" If the answer is "No", bail must be granted. If the answer is positive, the next question to be asked should be "Is the risk unacceptable?" This is a test which would make sense to the ordinary man in the street and which a court would have no difficulty in applying.

By a majority we endorse the views of the Sub-committee and recommend that the test should be "an unacceptable risk that ...". Three of us expressed support for the "strong likelihood" test.

5.5 The content of the proposed code - post-conviction

5.5.1 General

After a person has been convicted, he is no longer presumed innocent. He has been proved guilty. He may, nonetheless, wish to be set free pending sentence or pending an appeal. In our view the legal right to bail i.e. the statutory presumption in favour of bail, should cease to operate upon conviction, but the court should be left with a residual discretion to grant release pending sentence or appeal. It should have particular regard to whether (pending sentence) a custodial sentence is likely or not and (pending appeal) whether the prospects of a successful appeal are good and the whole or a substantial part of the sentence is likely to be served before the disposal of the appeal. On rare occasions, the court may consider whether the

defendant should be given time to sort out his affairs on compassionate or other grounds. But generally speaking, once a man is no longer innocent in the eyes of the law, the strength of the argument in favour of a right to bail is diminished. We were anxious to avoid any unnecessary disruption to a convicted person's right to liberty pending his appeal. We considered the possibility of but finally rejected a continuation of his right to bail after conviction. Extending the right to bail beyond conviction would enhance a convict's chance to remain at large pending his appeal. We gave full weight to likely public anger at seeing a convicted man set free on bail, and the reality that a convicted person would be more tempted to abscond. A continuation of the right to bail could provide an incentive to pursue a hopeless appeal in order to prolong the period of bail. We recommend that the right to bail should cease upon conviction but that the court should retain a residual discretion to grant bail, the exercise of which should have regard, among other things, to (1) (pending sentence) the unlikelihood of a custodial sentence and (2) (pending appeal) the prospects of success and the possibility of having the whole sentence served before the disposal of the appeal.

5.5.2 Appeals to the Privy Council

A particular problem arises when the Crown obtains leave to appeal to the Privy Council against a judgment of the Court of Appeal quashing a conviction. There is no statutory provision enabling the court to remand the defendant in custody or on bail. In England, when the Crown appeals to the House of Lords following the quashing of a conviction by the Court of Appeal (Criminal Division), section 37 of the Criminal Appeal Act 1968 provides for the accused's detention either in custody or on bail where the prosecutor gives notice of his intention to appeal to the House of Lords. However, the application must be made immediately and if the accused has been released he is not liable to be again detained at all (D.P.P. v Merriman (1973) AC 584). No similar provision to section 37 of the Criminal Appeal Act 1968 is found in Hong Kong in the Criminal Procedure Ordinance, the Judicial Committee Rules Order 1982 or the Criminal Appeal Rules.

It appears therefore that no power exists, pending the outcome of the appeal to the Privy Council to re-arrest the defendant. There is undoubtedly power to re-arrest if the Privy Council allows the prosecutor's appeal. We believe that a provision similar to section 37 of the Criminal Appeal Act 1968 is desirable. We had considered if this matter should wait until the establishment of a Final Court of Appeal in Hong Kong but found no compelling reason why similar legislation could not be introduced now and amended as appropriate when the Court of Final Appeal replaces the Privy Council in due course.

Likewise, Hong Kong does not have the equivalent of section 36 of the Criminal Appeal Act 1968 which enables the defendant to obtain bail from the court of Appeal pending his appeal to the House of Lords. We feel

that similar provision in this regard is also desirable and should be introduced now and amended as appropriate later.

5.5.3 A warning note: exceptions not to be confused with material factors

There are many factors which the bail authority may take into account in deciding whether any of the grounds (exceptions) is established. These factors are examined in chapter 6. They include the seriousness of the offence and the previous convictions of the defendant. They must not become confused with the seven grounds on which the right to bail is displaced. The Code should carefully distinguish the seven grounds for displacing the right to bail and should make clear that the factors are merely subsidiary matters which do not, of themselves, justify detention.

Chapter 6

Factors for deciding whether an exception displacing the right to bail is established

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6.1 Introduction

After a statutory right to bail is created, in any bail determination, the general principle should be that only objections (or factors) which relate to the grounds (exceptions) on which release may be refused can be advanced. If an objection is not relevant to one or more of the grounds for displacing the right to bail, it should not be put forward.

Bail determination requires both a decision of the existence of a possibility and an assessment of a risk, the "unacceptable risk" in our recommendation. On those determinations the displacement of the statutory right to bail depends. The bail authority must first decide whether the defendant (1) may fail to surrender, or (2) may commit further offences, or (3) may obstruct the course of justice etc. Predicting the likelihood of one of those events occurring is a difficult task. Guidance would be helpful as to what factors are relevant, would usefully serve as a check list in an often brief bail hearing, and would reduce the risk of inconsistency in deciding whether a situation exists for the right to be displaced and bail to be refused.

A danger to be guarded against is that relevant factors may be inadvertently elevated to the status of grounds for displacing the right to bail instead of being treated as indicators of the existence of a ground. For example the defendant may be denied bail because the charge is a serious one, rather than because the court considers he is likely to abscond, having regard to the seriousness of the offence. The charge may be serious, but it does not mean that the defendant will abscond. A factor may exist but it does not always follow that one of the grounds is established. Seriousness of the charge is only one factor which may indicate some likelihood of non-appearance. Furthermore, the proper approach should be to decide firstly whether the right to bail is displaced by one or more of the exceptions being established according to our recommended standard of proof, and secondly whether bail should be granted or refused in the overall circumstances. We realise that matters affecting judicial discretion could be wide-ranging, but considerations not relevant to the exceptions we recommend should be of only peripheral importance to the exercise of that discretion.

6.2 The present law

6.2.1 Factors relevant to establishing the ground for displacing the right to bail

These fall into two main categories:

(a) Factors arising from the offence(s) charged and
(b) Factors stemming from the circumstances of the accused

To a certain extent these factors overlap.

6.2.2 Factors arising from the offence

(1) The nature of the charge;
The more serious the offence, the more likely it is that the accused will abscond.

(2) The number of charges, and the period of time over which the offences were committed;

(3) The number of participants in the offence reflecting the extent of involvement or organised crime;

(4) Aggravating features of the offence such as excessive violence, breach of a position of trust, abuse of public duty, seriousness of injury inflicted upon victims;

(5) Involvement with a syndicate which might suggest the ability to conceal identity to travel internationally without proper travel documents;

(6) Involvement with forgery - same as (5), by forging a travel or other document;

(7) Whether the offence was spontaneous or planned, short-lived or orchestrated over a period of time;

(8) Whether the accused was arrested after a long and intensive investigation into his activities which might suggest that the police had a strong case against him.

(9) The probability of conviction given the available evidence. That is, the extent and weight of the evidence, including any admissions, positive identifications, and incriminating real evidence such as signed documents or fingerprints. The prosecutor should assess the evidence and be prepared to state that the case is not a strong one of its kind, if that is so. If the case is a strong one, a brief explanation of the evidence should be available. See: R v Wakefield (1969) 89 W.N. (Pt. 1) (N.S.W.) 329

(10) The likely, rather than the maximum, penalty must be considered. Obviously, a prisoner's poor criminal record, where related to the present charges, will affect this question - especially where the record indicates previous sentences have been of a "last chance" nature. Equally, other matters which the defendant would in due course ask the court to take into account such as other offences, not the subject of the charge, particularly where their extent is likely to increase or alter the sentence. Equally, other pending charges may be of relevance.

(11) The existence of suspects at large is not a ground in its own right and can only be valid if it relates to one of the main exceptions mentioned above. If there is a reasonable fear that the defendant will take steps to ensure the fabrication of a false defence or the safe escape of those still at large, this may be a relevant factor in considering the risk of interference with the course of justice.

(12) Where stolen articles are the subject of a charge, and consist of either cash or easily liquidated assets, there may be some validity in a submission that the fact they have not yet been recovered, in total or in part, is relevant as tending to show that the defendant has an incentive to escape or the means to do so. There will also be a possibility of destroying or concealing relevant evidence. It is to be emphasised that this, and the previous ground, will generally be extremely tenuous.

(13) The prosecution regularly oppose bail on the ground that a further remand in custody is required to enable the police to complete their enquiries or to bring additional charges. The latter explanation cannot be a legitimate ground. The majority of magistrates would probably accede to these requests provided the remand sought is for no longer than three to seven days. On the other hand, there are magistrates who will rarely refuse bail on this ground.

6.2.3 Factors stemming from the personal circumstances of defendant

These circumstances are infinitely variable and only a few examples are suggested here. Such circumstances may include:-

(1) address of defendant
- stable or otherwise;
- close to victim or witnesses.

(2) Financial situation (including property commitments)
- access to travel;
- means to conceal identity;

- means to keep out of circulation.

(3) employment.

(4) family ties and responsibilities.

(5) national background (including overseas ties)
- illegal immigrants.

(6) social background
- including triad involvement;
- relationship to victim;
- travel document offences.

(7) criminal record
- disregard of authority;
- knowledge of consequences;
- propensity for illicit activities.

(8) medical condition

(9) drug or other addiction.

(10) age or other infirmity.

(11) A deliberate material non-disclosure on the part of the defendant in order to obtain bail.

(12) Conduct in relation to the proceedings: evasion of detection or arrest.

(13) Any attempt to resist arrest or escape from lawful custody.

(14) The relationship of any sureties specifically proposed by the defendant especially insofar as their ability to supervise him is concerned.

(15) The consent or opposition to bail by the Crown as an independent factor though this must be a weak consideration by the court, and should certainly not stand if more specific matters contradict the Crown's stand.

(16) Wealth and influence of the accused and the risk of his using them to influence witnesses.

6.2.4 Court's assessment of police objections

In practice, many of the above factors may be brought to the attention of the court through the objections to bail lodged by the police or

prosecutor. Most magistrates' courts have a regular prosecutor. It is probably true to say that the attitude the prosecutor adopts on bail applications has a minor effect on the court's decision. If he tends to oppose the majority of bail applications equally emphatically, it probably detracts from the grounds of his objections. If, on the other hand, he is more selective and objects to fewer and less arguable applications, his objections probably tend to be given greater weight.

6.2.5 Factors considered in other jurisdictions

We considered the following main factors on which bail authorities in other jurisdictions had focused in determining whether any of the basic exceptions for displacing the right to bail was established:

(1) the nature and seriousness of the offence;

(2) the probable penalty if he is convicted;

(3) the defendant's character, behaviour, health, previous convictions, antecedents, associations, home environment, background, place of residence, financial affairs or position, community ties;

(4) the defendant's record as regards the fulfillment of his obligations under previous grants of bail;

(5) whether he is alleged to have committed any further offences while on bail;

(6) the strength of the prosecution case;

(7) the prejudice or delay to defence preparation;

(8) other valid opposition from the prosecution.

In one jurisdiction, assessment of risk is sought to be made easier by adopting a risk assessment chart based on the work of the Manhattan Bail Project of the Vera Institute of Criminal Justice in New York. In two other jurisdictions, in addition to assessment of risk, emphasis is placed on reducing the degree of risk by meeting it with commensurate bail conditions in what is called a Priority List so as to facilitate possible release.

6.3 The question of reform

6.3.1 The problem of improper objections to bail

We received criticisms of the type of objections to bail raised. One objectionable feature was the uncorroborated speculative nature of the

prosecution's objection to bail on many occasions. Apparently the Crown's usual preface to every objection is the words "we think that he may". This, together with the absence of evidence and what is often criticised as the prosecution-mindedness of some members of the judiciary, produces in some instances a most prejudicial atmosphere for a bail application. True or false, it matters little. We prefer to see that no reasonable excuse is provided for such criticism. There is a further dissatisfaction with the Crown's alleged tendency to lay charges in the High Court in order to frustrate bail applications. Also certain types of charges are said to be sometimes laid, which objectively are unsustainable, again with what seems to be the intention to frustrate bail. However these criticisms are rarely substantiated.

It was put to us that applications for bail are too often opposed on the simple grounds that the accused has many previous convictions and the charge in question carries a heavy maximum sentence. The strength of these objections varies with different magistrates. It was suggested that the number of previous convictions should not be held against the accused. But the fact that an accused never absconded in any of his previous trials should be a strong factor in the accused's favour. It would however prejudice his application that he has a propensity to re-offend while on bail. Both would be relevant.

The argument on maximum sentence was also said to be misconceived. We accept that the magistrate should consider only the likelihood of conviction and a realistic possible sentence in the light of the prosecution case.

By contrast, matters which it was suggested do not appear to carry much weight in Hong Kong (though they do elsewhere) are:-

(i) the employment of the accused: this is one of the most important factors. The fact that an accused has a job and is presumed innocent, should mean he should be permitted to return to his job pending the hearing of the charges. In addition, if he returns to his job, others would be relieved of the burden of supporting his family. The majority of blue-collar workers once remanded in custody lose their jobs and a subsequent acquittal does not mean an automatic return to their former employment;

(ii) the age and character of the accused;

(iii) the connections of the accused with Hong Kong (i.e. length of residence, family connections, etc);

(iv) the previous record of the accused in answering to his bail and/or not committing further offences whilst on bail;

(v) The amount of surety offered in proportion to the family's financial position: a relatively modest surety in relation to a low-income family may be just as acceptable a security as a much

higher surety for a wealthier accused. Invariably however the greater the amount of surety offered the greater the likelihood that bail will be granted.

Perhaps the greatest danger in all of this is that the objection may itself be treated as a ground for detention instead of merely a relevant fact to assist in determining whether one of those grounds is established.

Some objections commonly raised by the prosecution are not relevant to the grounds on which the right to bail may be displaced and bail refused. The possibility of further charges being laid or the need to make further enquiries or carry out investigations or conduct identification parades are not, and never have been, grounds for refusing bail. In some circumstances, however, they could have some slight relevance to the decision, in as much as the fact that enquiries were continuing or that further evidence might come to light might be an incentive for a defendant to abscond, and could therefore provide some support for an objection to bail on that ground, but that is an entirely different matter.

6.3.2 A model list as a possible solution

We have considered whether it would be helpful to provide in the Code an exclusive list of material factors to be considered by the bail authority. Although the 1974 English Home Office Working Party Report (paragraph 87) took the view that no advantage would be gained in laying down such factors in any exhaustive list, we have concluded that in the Hong Kong situation it would be helpful, for guidance only, as a check list. The guidelines would set out basic considerations or factors relevant to be taken into account so as to minimise arguments and facilitate determination. They are the factors described in para 6.2.3 above and summarized in para 6.4.1.

6.3.3 The Manhattan bail project in America

In this context, we feel that we should make brief reference to the valuable work carried out in the Manhattan Bail project. This project was launched in 1961. The essence of the scheme was that defendants were interviewed before their appearance in court and that certain standard information about them, particularly their community ties was obtained and independently verified. Points were then allocated in accordance with a fixed scale and a recommendation based on points scored made to the judge as to the defendant's suitability for bail. The project has been widely accepted and still operates. Experience has shown that the scale provides a reasonably accurate means of predicting bail risk. For this reason, it has attracted the interest of reformers inside and outside the United States. The British Journal of Criminology, Vol. 25 page 263 wrote: "The use of the scheme in American cities has resulted in four times as many defendants being released on bail, whilst the rate of bail-jumping has dropped from 3% to 1.6%." However, the 1974 English Home Office Working Party Report, in a sentence in its

paragraph 136 rejected the points system in the American project with the criticism that its purpose was "to assist the interviewer to formulate a recommendation; the judge does not see the score."

The American scheme is tied in with commercial bonding practices. It has been criticized as "a single dimensional score" because each aspect is simply given scoring points. It lacks the depth of the multi-dimensional evaluation such as that in our recommended test of "unacceptable risk".

Of the jurisdictions we have surveyed, only one has made use of the Manhattan scoring system. In New South Wales the scoring form is included in regulations made under the Bail Act but only as an optional aid for the bail authority. It may be completed by the defendant with the assistance of the police. The magistrate may take the score into account if he so wishes.

Although the Manhattan scoring system is workable, it is expensive and cumbersome to operate. In England, a preliminary trial of that system in the Camberwell Green Magistrates' Court was not successful. It is necessary to have independent and reliable staff available to collate the information and check its accuracy. We have the added problem of language in Hong Kong. Like the other law reform agencies which have considered using but declined recommending the system, we recognise that the benefits of the introduction of such a system would not justify its cost.

An alternative, recommended in England, but also not adopted, is the use of a much simpler information form which would be completed by court staff and given to the magistrate. If the magistrate had the basic information, judicial time would be saved. Once again, however, we doubt that the already stretched resources of our court system could be further burdened to carry out a function in a way sufficiently reliable and efficient to make it effective. We therefore reluctantly make no recommendation to this effect either.

6.3.4 Information provided by prosecution

The police and prosecution play a crucial role in relation to the material available to the bail authority. This is because they are the main source of information. Some magistrates we surveyed expressed dissatisfaction with the level of information supplied by the prosecution. It was suggested that a short summary of the allegations would help an assessment of the seriousness of the case. Even a few words such as "robbery with weapon" would help. Often the prosecutor does not even have this information. Sometimes even the criminal record is not available. None of the magistrates, however, thought there was time in their normal schedule to allow full hearings of all bail applications, and in all but one case they thought a full or fuller hearing unnecessary.

As for guidelines in the form of a check list, three thought that some written guidelines would or might help; five thought they would be better assisted by the provision of relevant information about the defendant's background in written form; the remainder were opposed to such an idea.

One option to increase the amount of information available would be to set out the reasons for opposing bail in a standard form which could be completed by the OC case whenever bail is to be resisted.

6.3.5 Special rules for minor offences

In considering whether there should be special rules in respect to refusal of bail for minor offences, we note in both England and New South Wales, special and more liberal rules apply in the case of certain specified minor offences. In the UK the right to bail will not be taken away even if one or more of some of the normal exceptions exist unless (for non-imprisonable offences):

(1) the defendant has previously failed to surrender to his bail in other criminal proceedings and the court believes that in view of that he would probably fail to surrender again;

(2) the defendant needs to be kept in custody for his own protection or, if a child, for his own welfare;

(3) the defendant is serving a current sentence; or

(4) the defendant already released on bail on this charge has been re-arrested for breaking bail terms.

In other words, the likelihood of further offences being committed or witnesses being interfered with does not take away the legal right to bail in non-imprisonable offences.

In passing, we would also refer to the position in New South Wales where defendants in minor offences continue to enjoy a legal right to bail unless -

(1) they have previously failed to comply with a bail undertaking in respect of the offence;

(2) they are in need of physical protection or in danger of physical injury;

(3) they have been convicted of the offence;

(4) an order or a direction is made by the court to dispense with bail so that the accused can remain at liberty until he is required to appear before a court in respect of the offence;

(5) they are already in jail and are likely to remain longer than the period of the remand.

We do not recommend a division of bail considerations into one for imprisonable offences and one for non-imprisonable offences as in the United Kingdom. We are aware of very few offences in Hong Kong which are not punishable with imprisonment. In this territory, it would be difficult to apply different exceptions to the general right to bail for different offences. We believe that some exceptions, such as the likelihood of committing further offences or of witnesses being interfered with cannot be valid justification for displacing the right to bail in respect of a defendant charged with an offence which is not expected to result in a term of imprisonment. The risk of committing further such offences does not warrant detention. The likelihood of a bailed defendant committing more serious offences expected to attract a prison term would seem too unfair or drastic an assumption to make in any case. In reality, facing a charge not expected to receive a custodial sentence would not usually provide an incentive to embark on a course of grave misconduct such as perverting justice or intimidating witnesses. Although person accused of minor offence in Hong Kong does not enjoy the same right as his counterpart in New South Wales, his interests are nevertheless adequately safeguarded by Magistrate's residual power to grant bail.

We considered it impractical if not impossible to have different rules for dealing with offences in groups. It is difficult to define and separate some offences as minor offences. We know of no problem area in bail for trivial offenders. Our bail system has worked reasonably well with all the offences considered under one set of rules.

We recommend that no special guidelines be made for minor offences.

6.3.6 Evidential proof of objections and procedure

In 1971 before the new English Bail Act 1976, Lord Hailsham in his address to the Gloucester Branch of the Magistrates' Association said, in his capacity as Lord Chancellor, that "in granting or refusing bail you are bound to come to a decision on the basis of probabilities and not certainties". (Law Guardian, November 1971, p. 9).

A similar proposition was apparently accepted in Hong Kong in TANG Hon-chai where the Court spoke of "a reasonable probability that the accused would tamper with witnesses if free to do so."

If a system of bail incorporates a need to establish matters for displacing the statutory right to bail, the kind of evidence required and how it can be given are obviously of importance. Certain opinions were expressed.

(1) Although in an ideal world admissible evidence would have to be adduced to establish the grounds of objections to the grant of bail, this is not practical in the Magistrates' Courts given their workload. Care is always taken to ensure accuracy, but information is more often than not given without complying with the rules of evidence.

(2) Whatever procedure is followed all steps possible should be taken to ensure that an accused is not prejudiced at his trial by disclosures made in support of an objection to bail. This requires that bail applications be dealt with by a judicial officer other than the one who presides at the trial. At times, it may even warrant hearings in camera so that prejudicial material is not reported.

(3) The procedure should not be adversarial because it is essentially an enquiry by the bail authority into a forecast of risk rather than facts. The presiding officer should be able to raise matters whether or not the parties do so.

6.3.7 Previous convictions

The question of previous convictions caused us considerable difficulty. Our concern arose from the problem that an accused would be prejudiced by a disclosure of his criminal convictions. It is a cardinal rule in our criminal law that a person's convictions may not be revealed to the tribunal prior to the outcome of the trial, except in very special circumstances.

On the other hand, we recognise that previous convictions are relevant to an assessment of the risks involved in releasing him on bail.

We therefore had to consider how these competing interests could be reconciled.

The practice of the courts in Hong Kong is such that it is rare for problems to arise. Bail applications are almost invariably dealt with by the Principal Magistrate who will probably not be sitting at the trial of those cases.

Nonetheless, we considered a number of options which might provide additional safeguards.

<u>Option 1</u>

<u>Bail should not be dealt with by the trial magistrate:</u>

For : This would prevent any risk of prejudice.

Against : There would be administrative problems in making another magistrate available at short notice during a trial. To forbid the

trial magistrate to consider bail could cause delay and prejudice the defendant. In most cases, the magistrate would hardly have recollection of matters in the preliminary hearing of one of many cases.

Option 2

The trial magistrate should be able to deal with bail, but only if previous convictions are not relevant or revealed.

For : This would enable the trial magistrate to deal with an application and avoid prejudice to the defendant. As soon as previous convictions were sought to be introduced, the bail hearing would be transferred to another magistrate, and the trial magistrate would not know the reason why or the nature and number of these convictions.

Against : Sometimes previous convictions are very relevant. The prosecution should not be so fettered. Furthermore in the middle of a trial, the state of the evidence may be crucial to the bail decision. Only the trial magistrate can best assess what the chances of conviction are and this must have a bearing on any bail decision. If the application has to be dealt with by another magistrate. This would cause delay and disruption to the trial. The trial magistrate, though being unaware of the nature of the previous convictions, would know or suspect that there are some previous convictions when proceedings before him are momentarily held up.

Option 3

There should be a general provision that all matters prejudicial to a fair trial including the defendant's previous convictions cannot be raised on his bail application before the trial magistrate.

The same arguments apply as to Option 2.

Option 4

Disclosure of Previous convictions before the trial magistrate should be avoided, but without making it a binding rule.

For : Although there is a risk of prejudice if the magistrate becomes aware of previous convictions, the magistrate's professionalism can usually be relied upon not to allow himself to be affected by them. In the case of alleged confession statements, magistrates and District Court Judges are told of their contents. If these confession statements are rejected even on technical grounds, magistrates and District Judges ignore their contents and go on to make findings of fact and, if justified, guilt. Judicial officers

sitting alone can be relied upon to separate their judge and jury functions with fairness to all. In practice, the occasions when a magistrate is told of previous convictions are infrequent, because the prosecution is aware of the risk that the defence may make capital of such a disclosure on an appeal. In the rare cases where the magistrate does learn of the convictions, the magistrate himself or, if necessary, a court on appeal has to decide whether the defendant's case has been unduly prejudiced, and the law provides adequate remedies in this event. To have a flexible procedure with the checks and balances already built in is preferable to the introduction of a set of new and rigid rules.

Against : If any amount of flexibility is allowed, the law becomes uncertain in operation

In the final analysis, we preferred the fourth option, but we would make no recommendation for any change.

6.4 The content of the proposed code

6.4.1 Proposed list of relevant factors

We recommend that the following factors (not in any order of importance) should be listed in the code, as relevant to a decision whether any of the exceptions exists which would displace the right to bail and warrant a consideration of detention: -

(1) The nature and seriousness of the offence or offences and the probable penalty;

(2) The character, behaviour, previous convictions, antecedents, associations, home environment, background, place of residence, employment, financial position and community ties of the defendant;

(3) Any other personal factors, such as pregnancy, old age, or poor mental or physical health.

(4) The history of any previous grants of bail to the defendant and his performance;

(5) The strength of evidence in the case;

(6) Other relevant matters.

6.4.2 How the proposals will work in practice

At first glance, the above list may seem to duplicate some of the exceptions to the right to bail, but in fact they play a different role in the system. To give a practical example: a magistrate may be considering bail for a person accused of a serious crime, say, robbery. If a right to bail is created, he will ask the prosecution whether in their view any of the exceptions applies. The prosecution may suggest that the defendant will not answer to his bail, if it is granted. In terms of our recommendations, the magistrate is then expected to decide whether there is an unacceptable risk that he will fail to attend. He naturally prefers to have a checklist, and this is where our recommended set of guidelines comes into play. Working through those set out above, the magistrate will consider the nature and seriousness of the offence. He may wish to know the general circumstances of the offence: Was the defendant armed? Were any injuries caused? How much money was taken? This will give him some insight into the behaviour of the defendant in the alleged offence. He will also have an idea, on the basis of this information, how long the sentence will be likely to be if the defendant is convicted. Obviously, the prospect of a long sentence will provide an incentive to abscond. Next he will consider the various personal factors listed. There are many possible permutations, but to take the two extreme positions, a person with strong family and community ties, and in regular employment is clearly less likely to run away than one who lacks these stabilizing factors. The defendant's previous compliance, or otherwise, with bail grants is also a valuable predictive factor. A quick assessment of the strength of the evidence - Were there any eye-witnesses? Has the defendant made a confession? - Did he leave any finger-print impressions? - Will help the magistrate reach an informed opinion as to the likelihood of conviction, and thus of whether the defendant has an incentive to remain and face the proceedings, hoping for an acquittal, or to flee from an inevitable consequence. Regard should always be paid to possible prejudice to the preparation of the defence - Would he be hampered in locating witnesses or giving proper instructions to his legal advisers?

The clear separation of exceptions from the factors affecting them will enable the bail authority, the prosecution and the defence to concentrate on areas of real substance. Presentation can be less disorderly, attention of the bail authority can be better directed, decisions made can be more specific and grievances can be readily focused upon.

We are convinced that in practice magistrates, consciously or otherwise, already go through such an exercise, but we still see great virtue in providing such guidelines in the legislation. They are not intended to be slavishly followed, but they would help to ensure that proper regard was paid to generally relevant issues in addition to other material considerations. The busy magistrates would benefit from such a checklist. Their clear separation from exceptions would serve as an instant reminder as to what the crucial issues are. Prosecution and defence counsel would likewise be assisted by a ready access to such a list of general factors. Overall we are confident this would introduce efficiency to the legal process.

Chapter 7

Recognizance

7.1 Introduction

A recognizance is a promise made to the court. Sometimes, the promise is backed by an obligation to pay a sum of money to the court if the promise is not kept. The defendant undertakes to attend court at the stated time by a formal undertaking (or "recognizance"). This is to be contrasted with "cash bail" where the defendant may be required to deposit actual cash before being released, which sum will be forfeited if he does not attend.

7.2 The present law

The power of a bail authority to require a defendant to give a personal undertaking with or without sureties to appear or pay a sum of money in default, appears in various Hong Kong Ordinances, e.g.: -

(a) Criminal Appeal Rules, Rule 44
- power given to Court of Appeal

(b) Criminal Procedure Ordinance, section 12A
- power given to "the court or a judge";

(c) Magistrate Ordinance, section 79(1)
- power given to "the magistrate";

(d) Police Force Ordinance, section 52
- power given to police officer;

(e) Juvenile Offenders Ordinance, section 4
- power given to police officer;

(f) Immigration Ordinance, section 36(1)
- power given to an immigration officer and any police officer;

(g) Independent Commission Against Corruption Ordinance, section 10A(2)(b)(ii)
- power given to a designated ranking officer;

(f) and (g) are concerned solely with operational bail and are therefore outside the scope of this report.

The procedure for taking recognizances in the various courts, in descending order of hierarchy, may be summarized as follows: -

(1) Court of Appeal

Rules 44 and 45 of the Criminal Appeal Rules provide that the court may direct before whom a recognizance be taken. If it does not so direct, then -

(a) the appellant's recognizance may be taken before a justice of the peace or an officer acting with the authority of the Commissioner of Correctional Services;

(b) the recognizances of the appellant's sureties may be taken before the Registrar or a justice of the peace.

By section 83Y(2)(e) of the Criminal Procedure Ordinance, a single judge has the same powers as the Court of Appeal on admitting an appellant to bail. The single judge in question is a single judge of either the Court of Appeal or the High Court. As the provision refers to "an appellant" and is found in Part IV of the Ordinance, relating to appeals and reviews, the judge's powers must be construed as relating only to those cases where he sits in an appellate jurisdiction.

It is also a necessary inference from the wording of section 83Y of the Ordinance that the provisions of Rules 44 and 45 of the Criminal Appeal Rules apply equally to a single judge sitting in an appellate jurisdiction.

(2) High Court

Section 12A of the Criminal Procedure Ordinance apparently applies to judges of first instance. The section is found in Part II headed "proceedings preliminary to trial," and an appeal on a refusal of bail by a High Court judge is anyway not permitted.

The section states that the recognizance of bail may "if the order so directs" be taken before a magistrate or a justice of the peace or before the Commissioner, Deputy Commissioner, or a Senior Superintendent or Superintendent of Correctional Services. Presumably, if the order does not so direct, only the judge himself may take the recognizance.

There is of course a distinction between approving a surety and taking a recognizance. The approval of a surety is not strictly necessary, merely desirable to ensure that a surety's recognizance would be effective. The taking of the recognizance, however, is a formal act and can only be done validly in the manner stipulated in the Ordinance.

It would hence be in order (although undesirable) for a judge's clerk to approve a surety. In no circumstances, however, may the clerk take

the recognizance. In the High Court, the Clerk of Court and the Assistant Registrars have also been assisting in approving sureties.

(3) The District Court

The District Court Ordinance, does not contain any bail provisions peculiar to that court. Section 79, however, provides that the procedure and practice of the High Court in relation to criminal proceedings shall be followed in the District Court "so far as the same may be applicable" and "as nearly as may be".

There are exemptions to this provision listed in Part I of the Second Schedule to the Ordinance. Such do not however include the bail provisions in the Criminal Procedure Ordinance, which are contained in sections 12A to 13B inclusive. The District Court, like the High Court, will accordingly be governed by the provisions of section 12A.

(4) The Magistracy

Section 102(2) of the Magistrates Ordinance provides that a magistrate, in granting bail on an indictable offence, "shall take the recognizance of the accused and his surety or sureties". These are earlier defined as "such ... as in the opinion of the magistrate, will be sufficient to ensure the appearance of the accused ..." Accordingly, in the case of the magistrate acting under section 102, both the assessment of the surety and the taking of the recognizance are primarily to be done by that official himself. There is an exception under section 102(3) in favour of inspectors of police in the case of warrants of arrest backed for bail.

Section 102 as a whole is both confused and confusing, as it appears to be largely directed at indictable offences. "Misdemeanours" for which one must presumably read "summary offences", are mentioned specifically only in the latter part of section 102(4). The full meaning of the section is very difficult to follow.

The position is further complicated by section 63 of the Magistrates Ordinance. This section authorises the taking of a recognizance before the magistrates' clerk or a superintendent or inspector of police. If a person is in prison his recognizance may be taken before the Commissioner of Correctional Services. The powers to take recognizances under this section are paradoxically wider than those exercisable under 12A of the Criminal Procedure Ordinance in that -

(a) they may be exercised even without the direction of a magistrate; and

(b) those authorized include a magistrate's clerk, whereas section 12A does not include a judge's clerk.

The section has other bizarre aspects which are listed for ease of reference -

(i) it refers to "the magistrates' clerk" (note the position of the apostrophe) as if there were only one of them. Bearing in mind that the section originated in 1933, this may well have been the case. The phrase is defined in section 2 somewhat unhelpfully as -

> *".... includes (where there is more than one) either or any of such clerks or such other person as a magistrate directs to do anything required by this Ordinance to be done by the magistrates' clerk."*

The power to take recognizance under section 63 is hence even wider than it appears at first glance, since a magistrate may "direct" literally anyone to do so from the office attendant upwards. It is understood that in practice the first or second Clerk of a Magistracy tends to take recognizances, but it may be the magistrate's clerk (i.e. the clerk to the particular magistrate in Court) or even the case clerk. This last alternative raises the possibility of unenforceable recognizances as this official may not be within the phrase "magistrates' clerk".

In origin the phrase was clearly meant to cover simpler circumstances than we have today; possibly a supervisory clerk and the magistrate's own clerk were intended. Its meaning in today's context is anyway uncertain and this could lead to abuse, albeit unintentional.

(ii) Section 63 appears in that part of the ordinance dealing with recognizances for keeping the peace or to be of good behaviour (section 61). However the wording of the bail forms prescribed in the marginal note indicates that recognizances on bail are also comprehended. Whilst these are not necessarily of interpretative value, the wording of the section is also wide enough to cover recognizances on bail and there is little doubt that this is its effect.

(iii) The provisions of section 63 are permissive, "subject to rules made under section 133". No such rules as to either bail or recognizances have been made under that section, which empowers the Chief Justice, with the Legislative Council's approval, to make rules for carrying into effect the Ordinance or any matter ancillary thereto.

(5) <u>The police</u>

Section 52(1) of the Police Force Ordinance, empowers a designated police officer to discharge a person "upon his entering into a recognizance, with or without sureties, for a reasonable amount, to appear

before a magistrate ..." There is no guidance in the section about how the recognizance is to be taken or what it may require.

If a person is released on recognizance, without surety or cash deposit, to return to a police station on a particular date but fails to appear, how do the police recover the monies committed under the recognizance?

The power of the police to discharge a person upon his own recognizance and to order him to report back to a police station is given under section 52(3) of the Police Force Ordinance which states: -

> *"... and any such recognizance may be enforced as if it were a recognizance for the appearance of the said person before a magistrate."*

The procedure for enforcing a recognizance, to appear at a police station on a given date, is the same as that used to enforce a recognizance for the appearance of the said person before a Magistrate. The relevant procedure is given in the section 65(1) of the Magistrates Ordinance, which states:

> *"..., such Magistrate, if the recognizance appears to him to be forfeited, may declare the recognizance to be forfeited and enforce payment of the sum due under it in the same manner as if the sum were a fine adjudged by a Magistrate to be paid and the amount of the same were ascertained by a conviction: ...."*

Therefore the amount under the recognizance can be enforced as if it were a fine. The enforcement of a fine is under section 101A of the Magistrates Ordinance which empowers the Magistrate to issue a summons for the appearance of the individual or a warrant of arrest.

In summary the enforcement procedures are:

(a) When the person under a recognizance fails to appear, the police officer can apply by summons to a magistrate for the forfeiture of the sum under recognizance.

(b) If the person fails to satisfy this adjudicated sum, he will be brought before a magistrate either by summons or by warrant.

(c) He will then be dealt with by a magistrate in accordance with section 101A of the Magistrates Ordinance.

7.3 The question of reform

The Home Office Working Party Report considered that in England the system of personal recognizances was for all practical purposes largely ineffective. There were several reasons for this. If a defendant is

considering whether to abscond or not, the fact that he has given an undertaking to appear is not much of an inducement to appear. No punishment, other than forfeiture of the stated amount, is liable to be imposed. Since no deposit has been paid, he will not even have to pay the stated amount if he manages to escape detention. The report noted that even where the defendant was subsequently caught, it was unusual for him to be required to pay the stated amount.

In Hong Kong it is rare for a defendant to be released on bail solely on his personal recognizance - i.e. without a cash deposit, and / or cash or recognizances from sureties. The weaknesses noted above are equally applicable in Hong Kong today. This raises the question whether personal recognizances ought to be retained.

Assuming recognizances are retained, the following observations may be made, regarding the procedures contemplated for each of the court levels.

For the Court of Appeal and for single judges - either of that Court or of the High Court sitting alone in an appellate capacity, the position is simple and satisfactory. The court or judge may direct before whom the recognizances be taken and may accordingly direct not only that the sureties be approved by the Clerk of Court or by a Master but also that the recognizances be taken by them. Where such direction is not given, the recognizances may only be taken before those persons listed in Rule 45 of the Criminal Appeal Rules.

A judge of the High Court may order that the Clerk of Court or a Master should approve a surety. He may be, however, order that a recognizance be taken by anyone other than those persons listed in section 12A of the Criminal Procedure Ordinance save that he may also take the recognizance himself. It follows that a recognizance taken otherwise would be worthless.

A solution would be a simple amendment to section 12A to allow recognizances to be taken before a Master, a Principal Judicial Clerk, a Chief Judicial Clerk or a Senior Judicial Clerk I.

The amendment suggested above to section 12A would also allow recognizances to be taken before the Registrar, District Court and all Deputy and Assistant Registrars thereof, by virtue of their respective ranks of Principal Judicial Clerk, Chief Judicial Clerk and Senior Judicial Clerk I.

In the magistrates' courts the situation as to bail and recognizances is confused and there appears to be a serious risk that invalid recognizances are being taken.

The problems of the magistracies should be isolated as they are both greater and different in kind from those of the other courts. This distinction arises from the far larger turnover of cases, coupled with the more

noticeable inadequacy of the present legislation. Rules under section 133 of the Magistrates Ordinance should, however, be enough to remedy the position, rather than substantive legislation.

7.4 The content of the proposed code

If an offence of absconding is created, which we recommend, we further recommend that the system of personal recognizances be abolished. The Code should not empower a court or police officer to require a personal recognizance from a defendant as a condition of granting bail. It is an unnecessary formality which may cause confusion and result in an element of double punishment. It provides little additional deterrent. This is the approach adopted in England and proposed in New Zealand. We think the approach is correct and should also be applied to Hong Kong.

If our recommendations for the abolition of recognizances is not accepted, procedural reforms along the lines outlined in paragraph 7.3 above, are suggested. There may be implemented by amendments to the relevant Rules, and need not affect the content of the Code.

Chapter 8

Cash bail

8.1 Introduction

"Cash bail" is a deposit of cash with the bail authority as a pre-condition to release. The amount of cash to be deposited is usually left to the discretion of the bail authority - e.g. the magistrate.

Cash bail is an integral part of the Hong Kong bail system. We have re-examined the situation, with a view to determining whether, and in what circumstances, cash bail should be required.

8.2 The present law

In Hong Kong, a defendant or a surety or both may be required to deposit money as a condition of the defendant's release. This has been the case in Hong Kong for as long as people can remember. It has therefore come to be accepted as fair, normal and proper. It has become a way of life - something to be expected. When viewed against general practice elsewhere, however, it stands out as being rather mercenary.

8.2.1 Cash bail in its true perspective

There are a number of options available to a bail authority in granting cash bail namely: -

(1) release the defendant on his own recognizance (undertaking) to appear, in an amount of money (i.e. which becomes payable if he wilfully fails to appear);

(2) release the defendant on his depositing of a sum of money, (i.e. cash bail) - which is repaid to him if he appears. If however he is convicted, it is used to meet an imposed fine;

(3) release the defendant on the recognizance of one or more sureties, in a certain amount, (i.e. an undertaking by them to ensure the attendance of the defendant; if he fails to attend they become liable to pay the stated amount);

(4) release the defendant on the depositing of a sum of money by one or more sureties, (which is repaid to the surety if the defendant attends, but is liable to be forfeited if he does not.)

(1) and (3) have already been dealt with in Chapter 7. In Hong Kong, the most common requirements are money from the defendant (2), and money from sureties (4). This is the long-standing practice.

On every bail application the court may, and usually does, enquire into the financial position of the defendant and a proposed surety. The bail sum should be realistic having regard to the accused's means to pay. Normally, a simple departmental non-statutory form is completed in respect of income and resources. Bank passbooks and Hong Kong Identity Cards in respect of sureties are usually tendered before surety is approved. The balance in the passbook should at least be equal to the amount of the recognizance. Even where cash bail is not required, there is a widespread practice of the court retaining the bank passbooks of a defendant and his surety, until he subsequently answers to his bail. The practice of professional bondsmen, prevalent in America is not acceptable. However, it is known that money lenders operate in the vicinity of some courts, who advance to defendants the sums stipulated by the court. The Chinese concept of the extended family and their deep-rooted principle of the family being the basic social unit, mean that in most cases relatives will quickly pool their cash funds to help one of their members granted bail.

The common law principle that no one should be effectively deprived of bail by having to meet a sum in excess of his means has gained acceptance in Hong Kong. The Bill of Rights (1688), Section 1 provides that "excessive bail ought not to be required". "But what is excessive will vary with the type of case" and is not to be judged merely by the defendant's ability to pay. See e.g. Ex. P. Goswami [1967] Crim. L.R. 235. R. v. Cheng Poon-kei (1978) H.K.L.R. 1, is an unusual case where bail fixed at HK$500,000 cash and a surety of HK$500,000 were initially within the means of those bound, but the Inland Revenue Department immediately took action with the result that the bail terms could no longer be met. On a further appearance before the judge, bail was brought down to HK$250,000 which could be paid. Li, J., reiterated the time-honoured rule:

> *"It is a cardinal principle of justice and in matters of granting bail that the conditions should not be such as amount to a total negation of bail."*

As a common feature of our bail system, the Hong Kong experience has been that less weight is attached to the hardship that may be caused by the demand for cash than in other Commonwealth jurisdictions. A common criticism has been that the amount of cash bail imposed is ineffective in cases such as drug trafficking, corruption or fraud where enormous sums are involved. In these cases the amount of cash bail has been substantially increased in recent years and considered with more circumspection.

In some Magistracies, a rough rule of thumb has been conveniently applied in the run of the mill cases involving small quantities: for a charge of simple possession of drugs, e.g. $500; for possession of drugs for trafficking, e.g. $1,000. Cash bail is normally not demanded if the defendant is unemployed or very old.

It was pointed out to us that many defendants have to attend in person at the bank for withdrawal but that some Magistrates are not prepared "to pamper the defendants" by allowing them time to make the withdrawal.

A defendant should be given reasonable time to raise bail money. This is particularly important during short days, such as Saturdays and holiday sittings. A detainee may be brought to court at about 11.00 a.m. or later, and he is likely to risk being kept in custody during the lunch recess unless he has sufficient ready cash. Some detainees may have to wait until a magistrate is available. We have statistics to show that the number of defendants kept in custody for not being able to raise cash bail is small. These suggest that in practice the vast majority of persons offered bail are able to raise it within a relatively short time. A member of this Sub-Committee, who is associated with the Duty Lawyer Scheme, suggested that delays in release seem to have been caused more by the lunch break than by the defendant's inability to raise bail.

8.2.2 The history of cash bail in Hong Kong

Although cash bail is a well-established practice in Hong Kong, demand of cash from a surety by magistrates has only been authorized by law since the 1976 Criminal Procedure (Amendment) Ordinance. It is now Section 13AA of the Criminal Procedure Ordinance. The section was passed as a result of an English decision which held that sureties could not be required to deposit cash: R v Harrow Justices, ex parte Morris, [1972] 3 AER 494. That decision cast doubt also on the legality of demanding cash bail from defendants.

The Police Force Ordinance has also been amended by adding to it a new sub-section, section 52(3A), giving the police power to require the deposit of money as a pre-condition of bail from either the defendant or his surety or both. The Sub-Committee is aware that ICAC's power in this regard is narrower than the police. It has no power to require the deposit of cash from a surety.

8.3 The question of reform

8.3.1 The English Home Office Working Party Report (1974)

The question of cash bail was reconsidered in England by the Home Office Working Party on Bail Procedures in Magistrates' Courts. The Working Party noted Morris. They weighed the advantages and

disadvantages of the system of money bail used in America, and firmly rejected the concept.

The English Working Party was against the use of such cash deposit on at least three grounds:

(1) discrimination against the less well off and less well connected members of society;

(2) difficulty in fixing an appropriate amount; and

(3) hardship of raising the amount set on short notice.

The Working Party proposed an alternative approach - namely to make absconding an offence, which they thought "would be a more effective deterrent .... if it were a criminal offence for a person to fail to answer his bail."

The English Bail Act 1976 has made it an offence for a bailed person to fail without reasonable cause to surrender to custody at the time appointed or (if he had reasonable cause for such failure) as soon as reasonably practicable thereafter. The burden of proving reasonable cause lies on the accused.

8.3.2 Arguments for and against cash bail

We considered and rejected the U.S. system of money bail as being inappropriate for Hong Kong.

Cash as a bail condition has advantages and disadvantages. It may be helpful at the outset to summarize the arguments on both sides, as they were presented to us: -

<u>For retaining cash bail</u>

(1) It is a well-tried and simple system.

(2) Because of its long usage, it is accepted and well understood by the general public.

(3) The system has been, and still is, very effective in achieving its objectives.

(4) It is specially suitable for overseas offenders.

(5) The magistrates prefer this system as it can be easily administered.

(6) There are no or no serious ill-effects.

(7) If the system were abolished or restricted, the public may be misled into believing that absconding is no longer a serious matter.

(8) If cash bail were abolished, more defendants would be likely to abscond.

(9) Serious offenders would not be deterred by making absconding an offence.

(10) Without cash bail, more defendants would be remanded in custody.

(11) The defendant does not seem to find it difficult to raise the necessary cash, as the magistrate takes into consideration the means of the defendant, and sets an amount he can raise. In most cases, the defendant volunteers an amount he can pay.

(12) The magistrate makes other arrangements if the amount set cannot be met by the defendant.

(13) In Hong Kong, the family of the defendant is generally involved in cash bail, thereby providing an added incentive for the defendant to appear in court as required.

(14) It provides an immediate source of available cash from which to collect subsequent fines, thus reducing administrative work.

(15) Other bail authorities, such as the police and ICAC, may have to have new powers if cash bail is de-emphasised, thereby creating more administrative processing and causing delay in release.

<u>For abolishing or de-emphasising cash bail</u>

(1) If the presumption of innocence is accepted, then it is wrong in principle that a defendant has to pay a cash deposit to gain freedom.

(2) Even though the amount of bail is commensurate with the seriousness of the offence, having regard to the defendant's ability to pay, the amount set is largely still very arbitrary.

(3) For the more serious cases, it is difficult to set the right amount.

(4) The arbitrary nature of setting the amount for bail can easily lead to abuse.

(5) Defendants with little means may find it difficult to raise cash for bail resulting in the poor being penalised.

(6) Some defendants may be forced or tempted to raise the amount from criminals or unlicensed money lenders, thus stimulating illegal bondsmen or money lending practice.

(7) Triads may be given more opportunity to extend their influence over defendants.

(8) In order to repay illegal bondsmen or moneylenders, the defendant may be driven to commit further offences.

(9) Cash bail may not be effective if a wealthy or syndicated defendant is involved, because he may be able to afford to lose the cash put forward.

(10) Although in most cases cash is forthcoming, the need to produce instant cash can create hardship on the defendant or the defendant's family.

(11) Making absconding a statutory offence would diminish the importance of cash bail.

The question arises whether the same arguments for and against cash bail apply in relation to cash being demanded from sureties. Some do not. For examples, the fact that the defendant is poor does not necessarily mean that all his friends are also poor; a defendant may be tempted to steal or commit other crimes in order to raise cash bail; sureties are unlikely to be so tempted.

Other arguments apply with equal force to a requirement of cash from sureties. The defendant should not have to persuade third parties to "buy" his freedom, prior to conviction. The amount of bail is likely to be arbitrary. Poor defendants are perhaps more likely to have poor friends, so that poverty is penalised. Sureties may feel obliged to borrow money at high interest rates. Hardship may be caused to sureties.

On the other hand, most of the arguments in favour of cash bail from a defendant may also be said to apply to sureties. The advantages of cash bail hold true whether cash is required from the defendant or his sureties.

The question whether it is desirable to require sureties to make a deposit of cash ultimately rests on the view one takes of the effect this has on the performance by the surety of his duties, and the ability of the court to make the surety pay if the defendant fails to appear.

We believe that given the small geographical area of Hong Kong, the universal numbering, finger-printing and photographing of individuals through identity cards, and the ability to locate assets, it should not be difficult

to devise procedures to safeguard the surety's obligation, without requiring the actual deposit of cash. Nevertheless, we recognise that in the present climate magistrates will be more inclined to grant bail where they can demand actual cash from sureties.

We received a submission from the ICAC suggesting that provision be made to enable the ICAC to demand a cash deposit from a surety. We can see no reason against this.

8.3.3 What is best for Hong Kong?

The question arises whether the Hong Kong practice should be changed. Basically, the question is whether Hong Kong should move away from its preference for actual deposits of cash from defendants and sureties, towards a statutory duty to appear in court. A breach of this duty would constitute a new criminal offence of absconding. There are various measures which could be introduced to facilitate the move away from dependence on cash bail. These include: -

(1) Abolition

abolish the taking of cash from defendants and / or sureties, altogether; or

(2) Escape Hatch for Poor Defendants

retain the power as presently exercised and require the deposit of cash from defendants and sureties, but introduce mechanisms for ensuring that no defendant is kept in custody merely because he lacks the financial resources to "purchase" his freedom; or

(3) Narrowly Defined Power

restrict the power, as presently exercised, to require the deposit of cash from defendants and sureties, by defining and limiting the circumstances in which cash bail may be demanded; or

(4) De-emphasise Cash Bail

attempt to reduce the exercise of the power to require cash, by exhorting the bail authorities to look upon this as a matter of last, rather than first, resort.

There appears to have been a move away from the requirement of cash bail in many jurisdictions, certainly in relation to all but minor offences, and towards the introduction of a specific offence of absconding. Rather than setting harsh terms in advance and thus penalising the person who has no intention of absconding, the view has been adopted that bail should be granted more freely and absconding should be made an offence. Elsewhere,

the traditional cash deposit taken from the accused is in decline. In its place there is a simple undertaking to appear, with or without monetary consequences. The uniform emphasis is upon a statutory duty to appear backed by an offence in the event of non-appearance, unless the accused can show reasonable cause for such failure.

8.3.4 The competing arguments considered

It is not an easy task to balance the competing arguments. On the one hand, it is generally accepted that the deposit of cash is a simple and effective method of ensuring court attendance in Hong Kong. It is well understood, easy to administer, and provided that the magistrates are alert to cases of hardship and abuse, it need cause little injustice. Additionally, it is a ready source of cash for the payment of fines and compensation should the accused be convicted, and forfeiture should the accused abscond.

On the other hand, common complaints against a cash bail system are that it discriminates against the poor, that it causes hardship, that it encourages the commission of further offences and / or loan sharking, as means of raising the cash, and that there is great difficulty in determining the right amount which may well be arbitrary, or unreasonable or excessive. In setting the amount of cash bail "in most cases, it is impossible to pick a figure which is high enough to ensure the accused's appearance in court and yet low enough for him to raise: the two seldom, if ever, overlap." See p. 176, Professor Friedland's "Detention Before Trial", University of Toronto Press, 1965. There are serious objections in principle to the use of bail as a form of advance levy of fines. The requirement of cash bail also creates the impression that bail is an indulgence and, worse, an indulgence that can be bought. It often operates unfairly against particular defendants, not just because they have no money but also because they may have money but not in cash upon their person or liquid asset at the time they are arrested. Another criticism is that the sums now imposed in Magistrates' Courts are amounts which do little to deter a person determined to abscond and such sums, in any event, bear little relation to the administrative costs involved in re-arresting the absconder. Concern was expressed by some of us that there is excessive reliance on cash bail and that amounts are often unrealistic and imposed without proper enquiry into the ability of the accused to raise it. We were also reminded of the situation that just because some one is employed, it does not necessarily mean, that he can raise money. He may be on a daily wage and have no savings. This is particularly the case with drug addicts who will spend all their wages on drugs. Also, there are a great many defendants who have been abandoned by their families and have no one else to turn to.

8.4 The content of the proposed code

8.4.1 The solution: absconding as an offence

We feel that if absconding is made a statutory offence, punishable by fine and / or imprisonment, there will be little need to rely upon a cash deposit as an inducement to appear in court except in unusual cases. This will pave the way towards less reliance upon cash bail as the standard practice in Hong Kong. We do not expect that magistrates will cease to demand cash bail overnight. We envisage a gradual shift of emphasis away from the rather crude levy of a cash deposit, towards a system which offers more alternatives, particularly for dealing with impoverished defendants.

On one hand, we have a system that is well tried and working well in Hong Kong, though it is undesirable in principle and will become unnecessary and ineffective once the statutory offence of absconding is introduced. It also runs counter to the changing trends around the world against cash bail.

On the other hand, de-emphasis of cash bail, though sound in principle and a natural consequence of an offence of absconding, may bring with it changes which may result in an increase of administrative and executive work-load and new responsibilities. The cost ramifications of these unknown results cannot be assessed at present. However, the Sub-Committee was not deterred by these possible repercussions in advocating what has to come i.e. de-emphasis of cash bail. We agree with its conclusion.

Because of these considerations, while we are in favour of a new offence of absconding, we do not wish to see the abolition of the use of cash bail in appropriate cases.

8.4.2 The recommendation

We recommend that cash bail should be retained as one of the options available to the bail authority, but that its use should be de-emphasised.

The Code should impose a statutory duty upon a defendant to appear in court. Breach of this duty should be made a criminal offence, (absconding). The Code should make it clear that a cash deposit may be demanded only where the magistrate is satisfied that it is necessary to ensure the appearance of the defendant.

The Code should give the police, the ICAC, magistrates and judges power to require the deposit of cash from a surety or sureties. The Code should also provide that a demand for cash can only be made where there are reasonable grounds to believe that this is necessary for ensuring that the surety will honour his obligation. Where there are no grounds for supposing that the surety may be unable or unwilling to pay the amount of a

recognizance in the event of the defendant's non-appearance, then a demand for a cash deposit should not be authorised.

Chapter 9

Surety

9.1 Introduction

A surety is a person who guarantees the performance of an accused person's obligations and agrees to forfeit a sum of money if the accused person makes default.

9.2 The present law

Sureties may be required to deposit cash in the stated amount as an earnest (section 13AA(1) Criminal Procedure Ordinance). A surety cannot be required to guarantee performance of any special conditions e.g. reporting to a police station (section 13A(2)(ibid)).

A person who offers himself as a surety for an accused has a duty to see to it that the accused will attend court on the day appointed and to have him brought to court if necessary. He thus expresses his confidence in the accused's not absconding and offers to risk the money required on his confidence being justified. The bail authorities rely heavily on the confidence so expressed by the undertaking of the surety.

In England the question whether a person should be accepted as a surety is dealt with by the court - whereas in Hong Kong the examination of sureties is usually left either to the Registrar or to the Superintendent of the Reception Centre where the accused is detained. Specific guidelines in England include the financial resources, character and social standing of the proposed surety and the nature of his relationship with, and proximity to, the defendant.

9.2.1 Discharge of surety

If at some time between standing surety and the date set for the accused's appearance, the surety feels that he can no longer guarantee the appearance of the accused he can, at common law, make application to the court to discharge him. This may have the effect of putting the accused into custody if the accused is unable to find another surety. It is open to the surety physically to bring the accused to court and there apply to be released from his obligations.

Another route for discharge is provided by section 13B(1)(b) of the Criminal Procedure Ordinance which enables a police officer to arrest a person who has been admitted to bail "on being notified by any surety for that person .... that the surety believes that that person is likely to break the condition that he will appear at the time and place required and for that reason the surety wishes to be relieved of his obligations as surety."

9.2.2 Qualifications of a surety

According to Archbold, sureties must be of sufficient ability, and may be examined on oath as to their means; infants and persons in custody cannot be sureties. Equally a person whom the defendant has agreed to indemnify will not be accepted. Additionally, the magistrate may impose such terms as he chooses, the most common of which will be to require all sureties to be approved by the First Clerk.

In England, specific guidelines have been set down, and these are of practical relevance in Hong Kong. They include: -

(i) the sureties' financial resources;

(ii) character and previous convictions;

(iii) proximity (relationship, residence etc) to defendant.

9.2.3 Consequences of non-appearance by defendant

Typically, three consequences follow for the surety if the defendant does not appear: -

(i) a warrant will be issued for the arrest of the defendant;

(ii) the recognizance of the defendant will be estreated (forfeited);

(iii) the surety will be summonsed to appear before the court to explain why the defendant failed to attend court and / or failed to comply with any condition imposed by the court.

9.2.4 Forfeiture of surety's recognizance

Where the defendant fails to appear at the appointed time and place, the sum specified in the recognizance may be forfeited (estreated) and may be levied on his goods and chattels, lands and tenements. The provisions for enforcing the recognizance are set out at section 65 of the Magistrates Ordinance. Estreatment is considered further in Chapter 13.

9.2.5 Procedure for surety standing bail for a defendant

Any person who wishes to stand surety for a defendant may approach the Bond Clerk of the Magistracy who will assist him in filling in the application form. The First Clerk will then interview him.

Before accepting the surety, the First Clerk will explain to him the obligations of a surety and the consequences of a breach by a defendant of the condition(s) of bail.

The First Clerk will also ask the surety whether he has confidence that the defendant will attend court to stand his trial and will ascertain from him whether he will agree to stand surety for the defendant.

At present, the surety is under an obligation to attend court each time the defendant appears in order to renew his obligation to stand as surety. He can apply to the court, however, at any time to be discharged from standing as surety.

If an option is to be given to a surety to stand surety until the proceedings against the defendant are concluded, together with an option not to attend court with a defendant on each appearance, the surety's obligation to ensure the defendant's appearance at court without the surety's attendance is explained to the surety in the clearest terms and a note to this effect is included on the recognizance form. Also, it continues to be the surety's duty to discover the date of any adjourned hearing.

It is important for the Court to ensure the nomination of someone to be responsible for informing the surety of the date and venue of trial particularly where a defendant is transferred to the District Court or committed to the High Court for trial.

9.3 The question of reform

9.3.1 Amount required of surety

One complaint made to us was that too much money may be required of a surety. It was suggested that this might work hardship on a poor defendant, considering that the money to be put up by the surety might in practice often come from the pocket of the defendant.

The size of a recognizance is not a matter which can be regulated in advance by rule, since it depends on the discretion of the bail authority. It should always, however, be an amount that can reasonably be met. An excessive recognizance is no less a denial of bail than excessive bail itself.

It is a crime for a defendant to indemnify his surety (R v Porte [1910] 79 L.J.K.B. 241, as explained in DPP v Withers [1974] 3 A.E.R. 984).

It is also contrary to public policy (R. v. Southampton Justices, Ex p. Green, [1976] 1 QB 11 at p. 20 Letter E). Therefore, this is a problem that should not, in theory, arise. However, it is recognised that in practice it must occur, especially in connection with offences of conspiracies, drug trafficking, prostitution, gambling or hawking, where there is a close-knit gang, group or family involved.

9.3.2 Attendance at court

Sureties must, at present, attend court to sign surety forms every time that the accused appears in court. The accused customarily appears in court every 7 days unless each of the accused consents to remain in custody. Each of the accused and their sureties must be present in court. This is considered very inconvenient for sureties. The situation is aggravated when the defendant is remanded repeatedly over a period of several months and his bail extended.

We considered whether the surety should be expected to be present on each and every such occasion. We concluded that it is necessary, for the following reasons. First, it is a workable practice. Second, it ensures that the surety learns the nature of any amended or new charges, whereby the risk may be increased. Third, the surety may be called upon to consider an increased amount. Fourth, the inconvenience to the surety is small compared to the danger of incurring greater risks than he appreciated.

One Sub-committee member was in favour of allowing a surety an option to put up cash, in lieu of personally attending on each occasion. This would save him the inconvenience of having to attend at court when he was prepared to run a risk of the accused's absconding. However, the suggestion was not accepted.

9.3.3 Release of surety

At common law, a surety may bring the defendant before the court and ask to be discharged, otherwise forfeiture of the amount he has put up would be automatic when the defendant fails to attend his trial. In England, the severity of the common law rule of absolute forfeiture of a surety's amount has been obviated by a section equivalent to our section 13B(1)(b) of the Criminal Procedure Ordinance by giving the court a discretion to release the surety on the surety's written request. Such statutory discretion has worked well and would seem to be necessary. Of the court's statutory discretion in forfeiture, Lord Denning observed in R v Southampton Justices, ex parte Green, [1975] 2 AER 1073: "The court is enabled to do what the justice of the case requires." What has to be considered is whether we should, by a written law, allow a surety to have other means of having himself discharged. The position of a surety in the Hong Kong context does not seem to be any different from that in England. It would seem, therefore, that further legislation is not needed towards this end.

9.3.4 Indemnification of sureties

At present, indemnification of sureties is dealt with at common law, under which it is an offence, as explained above, (para 9.3.1). We considered the difficulties of enforcing legislation in relation to indemnifying sureties. We feel, nonetheless, this matter should be covered by the code. We recommend a provision analogous to section 9 of the UK Bail Act making it an offence to indemnify or agree to indemnify a surety.

9.3.5 Abolition of sureties

We considered whether sureties might be dispensed with altogether. The argument for this is that there is no need for sureties once there is an offence of absconding. In Chapter 7 we recommend the abolition of recognizance from the defendant. It does not follow however that recognizances from sureties should also be abolished. It seems reasonable to conclude that the appearance of the defendant is not better secured by his own bare promise to attend. But his appearance is made more likely if someone else promises that he will attend, and agrees to pay a sum of money if he does not do so. A law-abiding citizen who has much to lose is likely to take steps to secure the attendance of the defendant instead of letting him abscond. We are not persuaded that the new offence totally eliminates the advantages of a surety. The fact that a person comes forward and assumes responsibility for the defendant's appearance is an important factor, enabling the court to release a defendant with some confidence that he will attend.

9.4 The content of the proposed code

We recommend that the Code should give the bail authority power to require, as a pre-condition to release on bail, that one or more sureties give undertakings to ensure the attendance of the defendant, supported by a promise by the surety to pay a sum of money in the event of non-appearance. There should be some provision to ensure that the amount is reasonable in all the circumstances. The means of a surety should in general be taken into account in determining the amount of his recognizance.

Administrative procedures should be devised to ensure that the surety is advised of changes in bail terms which could affect his willingness to continue as surety.

A court should have power, clearly spelled out in the Code, to release a surety from his obligations, upon application by the surety, similar to that contained in section 13(B)1(b) of the Criminal Procedure Ordinance. The power should be in addition to the police power of arrest under section 13(B)(1)(a) of that Ordinance. Such a power is needed because otherwise a surety's task would be too onerous. He is liable to forfeiture if the defendant

does not appear. The court should be satisfied that the surety has genuine reasons for wishing to be released.

There should be a provision analogous to section 9 of the English Bail Act making it an offence to indemnify or agree to indemnify a surety.

Chapter 10

Restrictions attached to release on bail

10.1 Introduction

After it has been decided that a defendant may be released on bail, and, if cash bail is warranted, once the amount is set, it is necessary for the bail authority to consider whether there should be other restrictions imposed upon his release. The purpose of this chapter is to examine what pre-conditions for release are presently authorised and whether any changes should be made to them or to the method of deciding whether to impose them, and how these matters should be reflected in the Code.

10.2 The present law

10.2.1 Statutory authority for the police to impose restrictions

The Police Force Ordinance does not explicitly authorise the imposition of restrictions by the police on release on bail. However there seems to be an implied power in section 52(2) which provides: -

> *"The respective names, residences and occupations of the person so apprehended and of his surety or sureties, if any, entering into such recognizance, together with the condition thereof and the sums respectively acknowledged, shall be entered in a book. ....."*

The police are also given power to take photographs, finger-prints, weight and measurements of an arrested person, by section 59 of the Police Force Ordinance.

10.2.2 Statutory authority for magistrate to impose restrictions

Section 13A of the Criminal Procedure Ordinance grants magistrates a wide discretion in the imposition on a defendant of conditions of bail which are "likely to result in his appearance" or "necessary in the interests of justice or for the prevention of crime." Such conditions may include the surrender of any passport or travel document.

Although the court has a wide discretion as to the conditions which may be imposed, these must not be oppressive or such as to amount to a negation of bail (CHENG Poon-kei v R. [1978] HKLR 1). Thus it would be

wrong to set bail at a sum which is far beyond the accused's reach or to require the accused to surrender his driving licence when his livelihood depends on it (LAU Chi pui v R. [1980] HKLR 30). It is not, however, for the prosecution to suggest the amount of bail to the court.

The most common conditions are:

(1) Reporting at a police station at intervals which should not be such as would in effect become a harassment or punishment.

(2) Surrender of travel documents.

(3) Agreeing not to leave Hong Kong.

(4) Residence at a stated address.

(5) Curfews - prohibition from being away from home during stated times.

(6) Prohibition from approaching victim or any witness, whether personally or through others.

(7) Prohibition from entering a prescribed area or zone.

(8) Any other reasonable condition provided it falls within the ambit of section 13A of the Criminal Procedure Ordinance.

10.2.3 Variation of conditions

At any time before the date on which the accused is to appear, the accused or the prosecution may apply to the magistrate to amend the conditions of bail. It is unusual for such an application to be made by the prosecution, although it is not unknown. Clearly, it would only be in the event of an extreme change of circumstances that the Crown would seek to apply but a lesser change might lead the defence to apply.

Usually the applications are: -

(1) for a change of reporting times or location, perhaps to fit in with a change of address or place of work; or

(2) for a reduction in the number of sureties; or

(3) for a reduction in the sum of money lodged with the court.

Whenever the defence make such an application the prosecution are entitled to have their say. Generally variations are only opposed if the variation would reduce the effectiveness of the bail. Usually

changes falling within the first category will not be opposed unless of course it is sought to reduce the frequency of reporting.

10.2.4 Statutory authority for the High Court and Court of Appeal to impose restrictions

Section 12 of the Supreme Court Ordinance gives the High Court the same jurisdiction in criminal matters as that held and exercised by the High Court and Crown Court in England. Section 15 of the Ordinance gives generally appellate jurisdiction to the Court of Appeal.

10.2.5 Statutory authority for the District Court to impose restrictions

By virtue of section 79(1) of the District Court Ordinance, the District Court has the same jurisdiction and powers as the High Court.

10.2.6 Statutory authority for the Coroner to impose restrictions

Section 17 of the Coroners Ordinance confers power on a coroner to admit a person to bail and to take a recognizance of such person or his surety or sureties. No specific power to impose restrictions is conferred by section 17.

10.2.7 Statutory authority for the ICAC to impose restrictions

We should mention in passing that the ICAC has power to release a defendant on bail under section 10A of the Independent Commission Against Corruption Ordinance but has no statutory power to impose restrictions, such as surrender of travel documents or reporting requirements.

10.2.8 Breach of conditions

Breach of conditions is a form of breach of bail. Under section 13B(1) and (2) of the Criminal Procedure Ordinance a defendant in breach or reasonably suspected of a likely breach may be arrested without a warrant and brought before the court.

The defendant may be remanded in custody or again admitted to bail on the same or new terms. In either case, the court may order the defendant or the sureties to forfeit recognizances or cash.

We have recommended elsewhere that absconding should itself be made an offence (see Chapter 12). A primary reason for the proposal is to create conditions for minimising or doing away with reliance on cash bail. If

defendants know they face a certain penalty for non-appearance, this itself should provide sufficient inducement to appear. Similar reasoning could be applied to restrictions. If breach of restrictions is itself made a punishable offence, compliance is more likely. The problem with this approach is that it may be difficult to prove non-compliance with some restrictions - e.g. to remain in residence during certain hours. Even where there is such evidence, the time and effort required to establish in court the commission of such an "offence" may outweigh the benefits obtained from this deterrent factor.

On balance we prefer to rely upon the revocation of bail and / or forfeiture of recognizances and / or cash of the defendant and / or sureties as sufficient penalties for breach of any of the restrictions imposed on a defendant. The Code should contain a procedure whereby the penalties are not imposed unless and until the defendant is given a reasonable opportunity to present his side of the case. Where the defendant has absconded, this will be impossible. Nevertheless, in so far as forfeiture would affect sureties, they should be given an opportunity to be heard, and the procedures recommended in Chapter 13 for estreatment and forfeiture should be followed.

10.3 The question of reform

The present law appears deficient in two aspects: -

(i) It fails to spell out clearly the authority of the various bail authorities to impose restrictions.

(ii) It fails to indicate precisely what restrictions or conditions may or may not be imposed.

As for the condition of reporting to a police station, the police take the view that the efficacy of such requirement is doubtful and that the end does not often justify the means in administrative and other expenses.

From a police point of view, the only benefit accruing from the reporting condition is that the police can start looking for a defendant sooner than the date set for him to appear in court.

We recognise the reluctance of the police to accept reporting conditions. Certainly, we can appreciate the extra work and administration which it entails. However, we feel that it would provide the courts with an alternative method of keeping a check on a defendant, short of detaining him. Were it not for this option, many defendants might find themselves in detention. We are in agreement that a reporting condition should be more selectively imposed.

We had no strong views on the requirement of surrendering travel documents. It was noted that some magistrates require the deposit of travel documents before the accused is released, whereas others would allow

the surrender of travel documents within twenty four hours after the accused is released.

A recent change in immigration law may render the practice of merely surrendering passports obsolete. Under the new law any person whose identity card carries three asterisks can go to Macau and China without any other travel document. However, it is possible for a defendant to be watch-listed within an hour of the Director of Immigration being notified. Moreover it has been suggested that magistrates should specifically forbid a defendant to attempt to leave Hong Kong, in addition to requiring surrender of a passport.

10.4 The content of the proposed code

We recognize the merits of conferring a discretion upon the court to decide where conditions are appropriate in particular cases. At the same time we think it is desirable that the Code should specify the type of conditions that may be imposed. The Code should provide that, for ensuring attendance and preventing interference with the course of justice, the magistrate and the higher courts may attach to the grant of bail a condition or conditions whereby the defendant may be: -

a) required to surrender his passport;

b) prohibited from leaving Hong Kong;

c) required to report to the police station nearest to his residence at specified regular intervals;

d) required to reside at a stated address;

e) required to be in residence at certain times each day;

f) prohibited from entering into certain areas or premises;

g) prohibited from approaching certain persons.

The Code should also contain a general power to cater for situations not specifically covered above and to impose such conditions as would be reasonably necessary for achieving the objects of bail, without being punitive or incapable of being met.

We feel that no power to impose restrictions should be given merely for preventing the commission of (further) crimes. Such a power would smack of preventative justice and is inconsistent with the doctrine of presumed innocence. Nor do we agree that there should be a power to send defendants for compulsory psychiatric examination. The possible benefits of such an examination are outweighed by its intrusive nature. Quite apart from its undesirable connotations of compulsory psychiatric treatment, we feel that

such examinations are more appropriately handled under the carefully safeguarded procedures of the Mental Health Ordinance as recently amended.

We recommend that the power to impose the above restrictions be conferred upon the courts. Our recommendations for police court bail are set out in 4.3. We believe that this will lead to a greater willingness to grant bail, in circumstances where it may at present be refused. We think it is preferable to have more persons granted liberty, albeit with some restrictions.

Chapter 11

Appeals against bail decisions and renewed applications

11.1 Introduction

Appeals against bail decisions can take any of the following forms:-

a) Appeals against a decision to release a defendant on bail "appeals against release".

b) Appeals against refusal to release a defendant on bail "appeals against bail refusal".

c) Appeals against the conditions or restrictions on which bail is offered "appeals against conditions".

d) Renewed applications for bail following a refusal of bail at a previous application.

(b) and (c) can be conveniently discussed together. The other categories require separate treatment.

PART A : APPEALS AGAINST RELEASE

11.2 The present law

The following provisions of the Criminal Procedure Ordinance have a bearing on the right of the prosecution to appeal against the grant of bail: -

(i) Where a magistrate or District Judge grants bail the Crown can apply to the High Court to review the District Judge or magistrate's decision - section 12C.

(ii) Pending such review the defendant, although initially granted bail, is remanded in custody - section 13.

Section 12C, empowers the Attorney General to apply to the High Court to review the grant of bail by a magistrate or a District Court judge either pending trial or pending appeal. The consequences of making such an

application are that the accused or appellant must be remanded in custody pending consideration of the matter by a High Court judge. These provisions are rarely invoked and require the personal authorisation of the Director of Public Prosecution. This section and section 13 represent the legislative response to the public criticism voiced after two of the principal defendants in R. v MA Sik-chun and Others, (H.C. Criminal Case No. 57/78) failed to surrender to their bail. These sections, together with section 12B, also represent an endeavour to make our bail provisions meet "the circumstances of Hong Kong".

The effect of section 13 is far reaching. As soon as bail is granted in the lower court, the Attorney General may forthwith apply to the District Court judge or magistrate who has granted bail, whereupon that judge or magistrate "shall" again remand the defendant into the custody from which he had just been released. The provision is mandatory. So the mere making of an application by the Attorney General has the effect of suspending the court's prior grant of bail. This gives to the prosecution, in effect, a right of appeal against a grant of bail.

Such decisions are not lightly taken by the Attorney General. In serious cases, Crown Counsel will normally appear on the bail application. Where the Crown is represented by a Court Prosecutor, if the police firmly oppose the granting of bail, the officer in charge of the case normally attends court. Should either the Court Prosecutor or the officer in charge of the case feel that bail has been unreasonably granted, one or other contacts the Legal Department without delay. Therefore an application under section 13 to "suspend" the grant of bail is made after proper appraisal.

There is a possibility that the Legal Department may not be notified of the release at the earliest possible time so as to prevent absconding. However, all the court results are checked by a Senior Court Prosecutor and, after the file is returned to the Police, these results are further checked by the Assistant Division Commander of Crime.

11.3 The question of reform

There does not appear to be any major impetus for reform in this area.

11.4 The content of the proposed code

We recommend that in the circumstances of Hong Kong, the Code should affirm the rights of the Attorney General to seek review of the grant of bail as presently contained in sections 12C and 13 of the Criminal Procedure Ordinance.

PART B : APPEALS AGAINST BAIL REFUSAL AND CONDITIONS

11.5 The present law

There is no right of appeal to the Court of Appeal from the decisions of the High Court, or to the High Court against a refusal by the police or by a magistrate to grant bail. However, a defendant has a right to apply for a writ of habeas corpus and, subject to the restrictions under section 12B of the Criminal Procedure Ordinance where bail has been refused by a magistrate or a District Court judge, to apply for bail directly to a judge of the High Court. He may also renew his application for bail. It is also possible to seek judicial review in the High Court of an inferior court's decision under Order 53 of the Rules of the Supreme Court on the grounds of "illegality", "irrationality", or "procedural impropriety". (C.C.S.U. v Minister for Civil Service [1985] 1 A.C. 374, per Lord Diplock at p. 410, Letters D-E.)

The powers of the High Court to grant bail were originally derived from the common law (Re Wong Tai [1911] 6 H.K.L.R. 67). These powers have been extended and largely codified by section 12A of the Criminal Procedure Ordinance to allow any accused person (including one charged with murder) to apply to a High Court judge for bail after refusal by the magistrate.

Such applications are made by way of summons and are usually supported by an affidavit by the accused. Applications may be made to any High Court judge available and take place in his chambers.

Where bail is refused, the defendant is remanded in custody. There is no limit on the length of remand in custody in the Magistrates' Court, if the case is ultimately to be heard there. If, however, the remand takes place during the course of committal proceedings (i.e. the preliminary hearing for trial in the Supreme Court) the magistrate may not remand a person in custody for more than 8 days without his consent and the consent of the prosecution pursuant to section 79 of the Magistrates Ordinance. If a person is remanded by a magistrate on transfer to the District Court for trial there, the maximum remand in custody is 20 days (Section 90 of the Magistrates Ordinance). There are no time limits for remands in the District and High Courts. Especially when a person is remanded pending his trial, there may be a lengthy delay before the criminal proceedings are finally resolved. If the remand is one in custody, the defendant may thus face a substantial period in prison. A notice is displayed in the prisons where persons awaiting trial are held, informing them of this right to apply for bail. (See Annexure 3). We are told that the Correctional Services personnel will invariably inform a person of such right on his admission and give him every assistance if he chooses to apply for bail.

11.6 The question of reform

The question to be considered is whether there should be a general right to appeal against a refusal to release on bail, and if so, to whom such an appeal should lie, and how it should lie.

11.6.1 Police Court Bail

In the case of persons who are refused bail by the police, there is no statutory appeal process and no method whereby the defendant can take the matter to a High Court judge, unless he proceeds independently under section 12A of the Criminal Procedure Ordinance. In practice, it would be very difficult for an accused detained in police custody to make such an application, unless he had legal representation. Although the police are supposed to bring the defendant before a magistrate "as soon as practicable", he can be detained for up to 72 hours if within 48 hours a warrant for his arrest and detention under any law relating to deportation is obtained. What in any case is "as soon as practicable" is left to the police to decide. We have decided that no appeal mechanism against police detention is necessary or desirable but that there should be a review by the superintendent of police.

11.6.2 Court Bail

We considered whether the Code should contain a statutory right of appeal against bail refusal. It may be argued that no such right is necessary since section 12A already effectively provides for a direct approach to a High Court judge. Arguably this is superior to a standard appeal since it is quicker and more simple and straightforward. But that is normally only possible with legal representation. On the other hand, it may be thought that there should in principle be a clear and precise statutory appellate procedure in the Code. We believe that a specific right to appeal is desirable despite the right to re-apply and access to a High Court judge.

We think, on balance, that it is unnecessary for there to be a right of appeal against bail refusal by the High Court or Court of Appeal.

Likewise, we felt that there should be a clearly defined statutory procedure whereby a defendant can apply to have any of the conditions or restrictions lifted or reduced. There is none at present.

11.7 The content of the proposed code

The proposed Code should expressly provide for the right of a defendant refused or granted bail with conditions by a magistrate or court to apply to the High Court for a fresh consideration of his bail application. There should be a similar right to apply to have the amount of bail reduced, and / or

any restrictions modified or lifted. The High Court should have a copy of the reasons given by the magistrate for refusing bail.

The right should be available to defendants who have been remanded in custody pending further hearings in the magistrate's court, prior to conviction, to those who have been committed for trial in other courts, and to those who have been remanded pending retrial under section 83F of the Criminal Procedure Ordinance. We do not recommend that it be available where bail is refused (or conditions imposed) pending sentence following conviction, pending appeal, or pending review of sentences under section 81A of that Ordinance.

In the case of refusal of bail by the police after charging, the Code should provide that a defendant has a right of appeal to a Superintendent unconnected with the case, who should see and hear the defendant before making a decision and should reach a decision as soon as is practicable but in any event not later than three hours from the original decision to refuse bail.

PART C : RENEWED APPLICATIONS

11.8 The present law

During the course of criminal proceedings it is common for an accused to make many appearances before a court. He first appears as soon as practicable following his being charged by the police. In many cases no plea is taken on that occasion and he is remanded for a week or more to seek legal advice. On his re-appearance he may plead guilty or not guilty. In the case of a guilty plea he may be further remanded while the court obtains information, such as a probation report, which is relevant to sentence. In the case of a not guilty plea he is remanded to a date for a hearing. It is common for that date to be further postponed, so it is possible he will face further remands.

If bail is refused at any of these appearances, the accused may wish to renew his application on a later occasion. The common law rule used to be that a defendant could always continue to apply to a judge for bail. This right has now been severely curtailed.

As far as applications to the High Court are concerned, the former wide general power of a judge to entertain renewed applications for bail, even though earlier applications may have been refused by magistrates or other judges, is now substantially whittled down by the new section 12B of the Criminal Procedure Ordinance which places restrictions on multiple bail applications.

In the event that bail is refused by a High Court judge, section 12B provides that he is not thereafter entitled to make further applications for bail, save where there has been "a material change in relevant circumstance".

As far as magistrates are concerned, on the face of the law there is nothing to prevent an accused in the magistrate's court from making renewed bail applications. However, in R v Nottingham Justices Ex p. Davies [1981] QB 38, the court ruled that on and after the third successive application magistrates should refuse to consider an application unless there has been a change of circumstances. It was held that where the application for bail has been refused, 'the principle of res judicata or something analogous to it' applies, so that a magistrate need not and indeed should not consider a subsequent full bail application unless there are new considerations culminating in a change of circumstances.

In Hong Kong, unlike the United Kingdom, there is no obligation on magistrates to consider the grounds of refusing bail and to record them. In the absence of specific finding of facts or grounds for refusing bail, the principle of 'res judicata or something analogous to it' may not be easily invoked. Thus, it is more difficult here to bar an accused from arguing a renewed bail application on each subsequent remand hearing.

It has been suggested that the application of 'res judicata or something analogous to it' is misconceived. The effect of res judicata is to prohibit a person from raising facts or points of law which have previously been decided against him by a court of competent jurisdiction. A bail decision is very different in nature. It affects the right to liberty on the basis of predictions about the future behaviour of an accused. The court does not make a finding of what the accused has done but it makes a prediction about what the accused may do. Evidence adduced by the prosecution and the defence is a mixture of fact and opinion. The whole reasoning process is a highly personal and speculative exercise to which the doctrine of res judicata cannot really be said to be appropriate.

Moreover, the strict application of the res judicata doctrine would mean that in the absence of any change of circumstances only one application for bail would be entertained. However, even in the Nottingham case the court was prepared to entertain the application twice - once on the accused's first appearance in court and once when the accused had had time to marshal his arguments and find sureties. (See further, [1988] Crim L.R. 152).

11.9 The question of reform

Should multiple, renewed applications for bail be allowed? Should they be prohibited altogether? Should they be permitted only in certain circumstances? What circumstances should be held sufficient to warrant renewed applications?

There are at least 8 possible approaches: -

(1) To forbid further applications after the first one has been refused unless there are new facts or circumstances which have arisen since the refusal - a change of circumstances.

(2) To forbid further applications after the first one has been refused unless there are additional facts or circumstances which were not brought to the attention of the first court (i.e. either arising before or after the first appearance).

(3) As (1) or (2) but with the additional alternative factor that the accused was not legally represented at the first hearing.

(4) As (1) or (2) but with the additional alternative factor that the accused's case was not fully prepared at the first hearing.

(5) Unlimited further applications before the first bail authority, but not before others unless new facts or circumstances have arisen.

(6) Unlimited further applications before the first bail authority, but not before others unless there are additional facts or circumstances which were not brought to the attention of the first court. (i.e. arising before or after the first appearance.)

(7) Unlimited further applications at the same level of court, unless an application for review has been rejected by a higher court. In that event a return to a lower court is possible only if there are new facts or circumstances.

(8) Unlimited further applications.

The Nottingham Justices decision has been severely criticised both from a practical and a legal point of view. From a practical point of view it puts the defendant at a severe disadvantage and effectively nullifies the effect of his right to demand that a remand last no more than 8 days. It requires the court, when considering a third or subsequent bail application, to make two decisions instead of one. First it must decide whether there are new circumstances, and then it must decide whether bail is justified. If it finds bail justified but cannot find new circumstances, bail cannot be granted. From a legal point of view, critics have argued that the decision is wrong in that it deprives the later court of a discretion which it is clearly given in the law.

The policy arguments in favour of the decision are that it is a time-saving measure.

The law has to balance two competing interests, namely, the primacy of personal liberty and the efficiency in the administration of justice. While it may not be desirable to flood the court with numerous bail application or review, there is much to be said for a periodical review of any decision of

refusal to grant bail. Such review could be conducted either upon the request of the accused or, in the absence of such request, on the motion of the court itself. Any pre-trial detention must be viewed with caution. It is only right that such decision should be subject to periodical review.

We are in favour of the last option for unrepresented defendants - unlimited further applications. For defendants legally assisted, we have decided to recommend the first option.

11.10 The content of the proposed code

The Code should provide for the defendant who has been refused bail the right to be brought before a court at regular intervals, and thus to have his application reconsidered. This should be weekly - i.e. once every seven or eight days. The defendant should have the option to waive his return to court in writing. Where there is more than one defendant, every defendant should be returned to court unless all agree to waive this requirement. We also recommend that unless a person is legally represented on his application for bail, there should be no limit on the number of subsequent applications that may be made. However, once a person is legally represented, the magistrate must refuse to entertain a second or further application unless there has been a change of circumstances. One member of the Sub-Committee preferred to give all defendants an unlimited right to reapply for bail, whether or not they are legally represented.

Chapter 12

Offence of absconding

12.1 Introduction

Absconding may be defined as the failure, without reasonable cause, to surrender to bail after release in criminal proceedings. In Hong Kong, failure to answer to bail (absconding) is not in itself an offence even though such an act (especially when it is in relation to court bail), is tantamount to defiance of a court order, punishable by contempt. However, contempt proceedings are not known to have been ever invoked for absconding.

12.2 The present law

12.2.1 General

By section 13AA(2) of the Criminal Procedure Ordinance if a person admitted to bail does not appear at the time and place required by the court, a court may order that the sum of money deposited with the court by the accused as a condition of the admission to bail be forfeited. In addition, the court may issue a warrant for the arrest of that person. In this section "court" includes the District Court and a magistrate.

12.2.2 Magistrates' powers over absconders

By section 20(4) of the Magistrates Ordinance where an accused who is bound by recognizance to appear at the time and place appointed for the adjourned hearing fails to do so, a magistrate may declare any recognizance to be forfeited and may issue a warrant for his arrest. Section 20(6) goes on to provide that if at the time and place to which the hearing or further hearing is so adjourned, the accused does not appear, either personally or by counsel, the magistrate may -

(1) issue a warrant for his arrest;

(2) declare any recognizance to be forfeited; and

(3) adjourn the hearing for such time as he may think fit.

By section 102(3) of the Magistrate Ordinance, "It shall be lawful for a magistrate, on issuing a warrant for the apprehension of any person

charged with a bailable offence, to certify on the warrant his consent to the accused being bailed and thereupon it shall be lawful for an inspector of police to admit the accused to bail ... conditioned for the appearance of the accused at the time and place of hearing and that he will then surrender and take his trial and will not depart the court without leave." More often than not a warrant of arrest for an accused who has failed to answer bail will not be backed for bail. In such a case the accused will be detained following his arrest and brought to court the following morning at which time the facts of his failure to answer bail will be provided to the court. If the magistrate accepts that there was a good reason for the accused's failure to report then he may allow him bail again. Alternatively, he may revoke his bail and remand him in custody.

12.2.3 High Court's powers over absconders

Section 46 of the Criminal Procedure Ordinance states that where the accused against whom an indictment has been duly preferred and who is then at large, does not appear to plead to the indictment, whether he is under recognizance to appear or not, the High Court may issue a warrant for his apprehension. By virtue of section 79(1) of the District Court Ordinance, section 46 is also applicable to the District Court.

12.2.4 Police power to arrest likely absconders

Even the likelihood of failure by an accused to surrender to his bail at the appointed time can result in his arrest. Section 13B(1)(a) & (b) of the Criminal Procedure Ordinance gives a police officer the power to arrest an accused who has been admitted to bail if the police officer has reasonable grounds for believing that the condition of bail has been or is likely to be broken. One reasonable ground is that the police officer has been notified in writing by the surety that he (the surety) believes that the accused is likely to break the condition that he will appear at the time and place required and for that reason the surety wishes to be released of the obligations as surety. This section also applies to the District Court and the Magistracy.

12.3 The question of reform

Currently, the courts are resorting to conditions of cash bail in the belief that this measure deters absconding. This may not be sufficient. In the case of a serious crime, even the fear of losing money will not dissuade absconding. A recent example is the forfeiture of $10 million and $11 million after the Low brothers' disappearance in February 1988 on charges of conspiracy to defraud. If absconding is made a statutory offence, the deterrent effect will be greater. The police could then afford to use cash bail more sparingly or dispense with it altogether. It would have the effect of de-emphasising cash bail, sureties and recognizances. However, some of these measures may still be used as additional incentives where necessary. It has

been proposed in New Zealand that recognizance in respect of the accused should be abolished if the statutory offence of absconding is created. The rationale is that the statutory offence of absconding and civil liability to forfeiture of a recognizance would expose an accused to double punishment for the one wrong.

As to the maximum penalty for absconding, this should vary according to the circumstances. In many cases failure to appear will be a relatively minor offence for which a fine will be an adequate penalty. Others may be the result of a deliberate act of absconding which would very likely involve serious inconvenience to the court, the prosecution and witnesses and considerable public expense. Therefore, it is suggested that the maximum penalties should be sufficiently severe to deter a would be absconder. It can be a fine and / or a period of imprisonment. The offence of absconding and the principal offence should be heard by the same court. This is desirable because the case can be dealt with by a court most familiar with the circumstances. The New Zealand Criminal Law Reform Committee does not favour the term of sentence on the absconding offence being automatically cumulative on the term of sentence for the principal offence. They prefer that the court retain its discretion as to whether the penalties should be cumulative or concurrent, having regard to all the circumstances of the case. It is submitted that this should also be the case for Hong Kong. It may be said that the prosecution might concentrate on getting a conviction on the offence of absconding whenever the case on the principal offence was weak. It should not be a cause for concern since no minimum penalty on the offence is proposed, and the court should be able to impose a proper penalty as it sees fit, having regard to the seriousness of the principal offence.

Two of the eight Principal Magistrates we surveyed believed there should be an offence of failing to answer bail. One thought such an offence might be appropriate for bail breaches in the higher courts and one was equivocal. Four were against, commenting that a further offence would only clog the already busy courts.

12.4 The content of the proposed code

On the surface, it may not seem to be very important to ensure the appearance of an offender who has disappeared probably abroad forever especially in the case of minor offences. After all, for the sake of the community, many people would like to see the back of those offenders once and for all. But the rationale is that criminal justice must be seen to work. Defendants must face their trial and if they are allowed to disappear at will without proper sanction, the law will fall into disrepute. It is therefore suggested that in the proposed code, absconding should be made a statutory offence. An accused who fails to appear in accordance with his undertaking and who fails to show reasonable cause of his failure commits a summary offence. We believe that the risk of carrying the stigma of a criminal conviction is a better deterrent. The public expense incurred as long as they are quantifiable, should be reflected in an additional fine. The Court should

retain a discretion as to whether the penalties for imprisonment for the absconding offence should be cumulative or concurrent on the sentence of imprisonment of the offence for which the accused was originally charged.

As recommended in Chapter 7, personal recognizances should be abolished because they would provide little additional deterrent after absconding is made a statutory offence and they could be criticised as a double jeopardy for non-appearance - a criminal conviction and a forfeiture of a sum.

The Commission recommended that the new offence for absconding should carry a maximum penalty of three months' imprisonment when charged summarily and 12 months if dealt with as if it were a contempt of court. The proper procedure to be followed in respect of the absconding offence is set out in a Practice Direction delivered by Lord Lane C.J. on 19 December 1986 in the light of the decision of Schiavo v. Anderton [1986] 3 WLR 176, D.C. The practice direction stated inter alia,

> *"Where a person has been granted bail by a court and subsequently fails to surrender to custody as contemplated by section 6(1) or 6(2) of the Bail Act 1976, on arrest that person should be brought before the court at which the proceedings in respect of which bail was granted are to be heard. It is neither necessary nor desirable to lay an information in order to commence proceedings for the failure to surrender. Having regard to the nature of the offence which is tantamount to the defiance of a court order, it is more appropriate that the court itself should initiate the proceedings by its own motion, following an express invitation by the prosecutor. The court will only be invited so to move if, having considered all the circumstances, the prosecutor considers proceedings are appropriate. Where a court complies with such an invitation, the prosecutor will naturally conduct the proceedings and, where the matter is contested call the evidence. Any trial should normally take place immediately following the disposal of the proceedings in respect of which bail was granted."*

We recommend that this guidance be implemented in the proposed code.

We further recommend the retention of sureties. Cash bail, in a proper case, and sureties may be resorted to as an additional incentive. We do not rule out the possibility that in some cases cash bail and sureties may be the best means of ensuring attendance over and above the offence of absconding.

Chapter 13

Penalty non-appearance: Forfeiture/Estreatment

13.1 Introduction

When a defendant is granted bail, he and any sureties may be required to deposit a certain amount in cash to ensure his attendance at his trial. As an alternative, the defendant and any sureties may be required to give a formal undertaking called a recognizance to attend court at the stated time under penalty of payment of a certain sum. If the defendant should fail to appear in court as scheduled, he and any sureties would become liable to have their cash or recognizance forfeited to the Crown. The court process of recovering payment of cash and / or recognizance is known as "estreatment". Broadly speaking, forfeiture and estreatment are quite often used interchangeably blurring the stages of accrual and recovery. We will see that in Hong Kong the laws governing forfeiture / estreatment are complicated and confused and need to be improved.

13.2 Present law

13.2.1 Estreatment of recognizance by accused

(a) Magistrates' powers over the accused's recognizance

By sections 20(4) and (6) of the Magistrates Ordinance where a defendant who is bound by recognizance to appear at the time and place appointed for the adjourned hearing fails to do so, a magistrate may declare any recognizance to be forfeited. Section 65 of the same Ordinance sets out the procedure by which a forfeited recognizance for appearance can be enforced as if it were a fine against the accused.

(b) High Court's power over the accused's recognizance

By section 45(1) of the Criminal Procedure Ordinance the accused's recognizance may be forfeited on his non-appearance.

Sections 110 - 113 of the Criminal Procedure Ordinance set out the procedure by which a forfeited recognizance can be enforced. In the absence of sufficient property found by the bailiff, the accused may be arrested.

Section 114 of the Ordinance provides that where a recognizance (including an accused's recognizance) is forfeited before a court (including a District Court), an order may be made -

(a) allowing time for the payment of the amount due under the recognizance;

(b) directing payment of the said amount by instalments of certain amounts and on certain dates;

(c) fixing a term of imprisonment which the person liable to make the payment is to undergo if any sum which he is liable to pay is not duly paid or recovered;

(d) discharging the recognizance or reducing the amount due thereunder.

On appeal from a magistrate's decision, the High Court as an appellate court may also enforce a forfeited recognizance under section 121 of the Magistrates Ordinance against the defendant. The Court of Appeal has ruled in AG v Dawe (Crim App 960/82 C.A.) that section 114 of the Criminal Procedure Ordinance, which empowers the Court to deal with fines and forfeited recognizance, applies not only to the High Court but also to the Court of Appeal.

Estreatment of the defendant's recognizance could be cancelled if the defendant appeared and gave a satisfactory explanation of his absence. (R. v Davey (1896) 2 A.L.R. 55; R. v Tomb (1715) 10 Mod 278; 88 E.R. 727).

13.2.2 Estreatment of recognizance by surety

The sections which are applicable to defendant in respect of estreatment of recognizance also apply to the surety. A surety may also be arrested under section 111 of the Criminal Procedure Ordinance if he does not have sufficient property to meet his liability.

Where the court considers estreating a surety's recognizance, he may show cause why it should not be estreated on the ground that he has taken all reasonable steps to secure the attendance of the defendant. (R. v Sangiovanni [1904] 68 J.P. 55). Where a defendant has been permitted to leave the jurisdiction, as in the case of AG v Dawe, Crim App 960/82, C.A., the reasonable steps would be those directed towards ensuring the defendant's return. What is a reasonable step is a question of fact for the court's consideration.

In considering an application for relief against forfeiture the court has to start from the position that the surety had entered into a serious obligation to pay the money (Horseferry Road Magistrates Court [1976] 2 ALL ER p. 264). The surety begins from a point of disadvantage since his monies

are already in law, forfeited (In Re King and Scott [1931] N.Z.L.R. 162). In principle, the fact that the defendant was subsequently caught and tried (even if he was found not guilty) should be irrelevant unless the apprehension flowed from the sureties own actions - see Ware v Attorney General [1961] N.Z.L.R. 694.

13.2.3 Forfeiture of cash deposit by accused

By section 13AA (2) of the Criminal Procedure Ordinance, a court may order the forfeiture of the sum of money deposited by the accused as a condition of his admission to bail.

13.2.4 Forfeiture of cash deposit by surety

By virtue of section 13AA(2) of the Criminal Procedure Ordinance, a surety's cash deposit with the court may be forfeited if the accused does not appear at the time and place required by the court.

13.3 The question of reform

13.3.1 Problems on the forfeiture of cash bail

A practice of local magistrates, as recounted in the article in Obiter Dicta (1979) Vol. 6 No. 2, is that of disposing of minor summary offences by forfeiting bail without proceeding to issue a warrant. The practice is limited to the defendant's own bail money. Such practice among our HK magistrates, if prevalent, would pose problems not just for the magistrates but also for the police. The police would have to decide if they should levy cash bail on the assumption that this would be forfeited as a "fine" if the defendant did not appear and was not convicted in the end. The next question is whether it is proper for the police to levy cash bail taking such eventuality into consideration. The problems posed for the magistrates are even more complex. Views on the above practice of magistrates to simply forfeit the defendant's bail without proceeding to issue a warrant of arrest against him were sought in 1966 by the Registrar of the Supreme Court in a circular to the magistrates. There was a divergence of opinion. One magistrate, now Mr Justice O'Connor, objected to the proposal on the grounds, inter alia, that the charge would still be undisposed of; it would result in the prosecution deciding the penalty for a particular offence; the court would be conniving at a procedure which verged on contempt; it opened the door to corruption; it would in effect, without legislative approval, institute a fixed penalty system. A contrary view was taken by another magistrate. He contended that, since R. v. Rose (1943) J.P. and L.G.R. 89 permitted a warrant of arrest to be withdrawn, there would be no objection to none being issued and a case disposed of in its entirety by forfeiture of bail; the magistrate's continuing discretion not to permit forfeiture would override any apparent increase in prosecution powers; the magistrate could still call for a defendant's record; the exercise of a judicial

discretion could not be classified as conniving at contempt; it was not the arresting officer but the duty officer who fixed bail so that reduced the chance of corruption. The matter was not resolved and the magistrates were left entirely to use their own judgment as to which procedure they would like to follow.

We support the views expressed by Mr Justice O'Connor.

13.3.2 Problems with forfeiture / estreatment of recognizance

The Court of Appeal in AG V. Dawe voiced its concern that "the statutory provisions relating to the forfeiture of recognizance entered into upon the granting of bail" were "in a state of some disarray".

A review of the current statutory framework for enforcing recognizances shows that it is difficult to understand and some sections have fallen into disuse. This includes sections 45, 110, 111, 112, 113 and 114 of the Criminal Procedure Ordinance. Section 45 enables forfeiture of recognizance of the defaulting defendant and his surety on the motion of the prosecution. It was originally enacted in Hong Kong as section 46 of the Criminal Procedure Ordinance of 1899. It has no predecessor in England. This provision seems to be a statutory encapsulation of the prevailing practice of the higher criminal courts both in Hong Kong and England. Ordering estreatment following non-appearance of the accused was well established, without specific statutory backing, in Assize Courts, Kings Bench and Quarter Sessions.

In AG V. Dawe, it was the view of the Court of Appeal that section 45 applied only to trials, as distinct from appeal hearings. Accordingly, it was not examined in detail. The section applies in the District Court, as well as the Supreme Court, by virtue of section 79(1) of the District Court Ordinance. The section while a statutory embodiment of a long established practice, may be said to impose unnecessarily rigid requirements. These include the need for reference to the bailiff's return (specifically) to prove service of notice of trial and the charge sheet or indictment (as appropriate) and the need to call the defendant three times. Further, the lack of cross reference to the court's powers of dealing with the forfeited sum in sections 111-114, the absence of a specific requirement to serve notice on sureties and the restriction of section 45 to non-appearance on "the day appointed for trial" only, all introduce potential uncertainty as to its scope and create opportunities for inconsistency and error.

Section 110 of the Criminal Procedure Ordinance is derived from section 31 of the Criminal Law Act 1826. It was originally enacted in Hong Kong as section 99 of the Criminal Procedure Ordinance 1899. Section 31 of the 1826 Act represented a statutory embodiment of the practice followed in estreatment of recognizances at the English Quarter Sessions. The Hong Kong equivalent is somewhat wider than the earlier English provision which was restricted to defendants. Section 110 clearly applies to

sureties as well as defendants. In effect, the section calls for the making of a return of cases of forfeiture, as a pre-requisite to enforcement. It is understood that the procedure laid down in section 110 has fallen into disuse. It has added further uncertainty in this area of the law. In a recent case, having failed to locate any return made by the Registrar under section 111, the judge was obliged to initiate the procedure so as to forfeit $5,000 from a keeper of an illegal massage establishment. Section 113 is directed at action which may be taken against sureties, yet includes as a proviso an independent power for the court to remit the whole or part of a surety's forfeited recognizance. The general power of remission is already given in section 114.

Section 114 of the Criminal Procedure Ordinance is not complemented by an equivalent to section 15 of the Criminal Justice Act 1948. Such a provision would have shown how and when section 114 was intended to work in practice - it would have more clearly shown the two stages in enforcement and that section 114 is not a section authorising forfeiture at the first stage but simply a provision allowing various courses to be considered at the subsequent stage when recognizance is actually estreated.

Archaic terminology has caused some confusion. The word "recognizance" means "undertaking" in modern usage. The two words "forfeiture" and "estreatment" are also confusing. The words 'forfeited' and 'estreated' have been said not to be synonymous. When a person breaches a term of his recognizance, the argument is that the recognizance is automatically 'forfeited' as a result, without any intervention by the courts. This crystallises a debt as between the Crown and the person bound on recognizance. Subsequently, the Crown may or may not seek to enforce this debt and the process of enforcement is said to be the 'estreatment'. Looking at the situation as a continuum, there will be first a broken recognizance followed by the automatic forfeiture and it may in turn be followed by the process of enforcing the forfeited recognizance called 'estreatment'. See King v. Scott, [1930] N.Z.L.R. 162. Despite this fine distinction, we think that "forfeited" should be substituted for "estreated" for general use. Such adaptation would not affect the stages through which the process of enforcement progresses.

13.4 The content of the proposed code

If absconding were made a statutory offence, cash bail would be de-emphasized and the problems with its forfeiture would become less acute. The absconder would be subject to a fine and / or imprisonment for committing an offence.

We propose that the Code should clearly distinguish the two stages in the enforcement of recognizance - first, at which the sum is declared or has in law become forfeited and the later stage at which the sum or part of it is actually recovered.

The word "forfeited" should be substituted for "estreated" and used uniformly.

The Code should discard the existing highly unsatisfactory statutory provisions and replace them with a set procedure which would provide for: -

(i) proof of default;

(ii) a declaration of forfeiture; and

(iii) discretion as to partial or total enforcement (incorporating an opportunity for sureties to show cause why estreatment should not follow in a particular case).

The existing provisions for estreatment of recognizances, sections 45 and 110-113 of the Criminal Procedure Ordinance should be accordingly overhauled.

In relation to enforcement of recognizances under the Magistrates Ordinance the proposals outlined above should also apply. Accordingly, existing sections 117(2)(c) and 121 of Cap. 227 should be likewise remodelled.

Chapter 14

Evidence, procedure and administration

14.1 Introduction

In this chapter we look, particularly, at the following issues: -

Part A. Restrictions on Press Reporting of Bail Hearings

Part B. Rules of Evidence

Part C. Reasons for Bail Decisions

Part D. Standard Forms

Part E. Administrative Procedures

PART A : PRESS REPORTING RESTRICTIONS FOR BAIL HEARINGS

14.2 The present law

In Hong Kong, unlike in England, there is no presumption in favour of bail. The decision whether to grant bail lies in the discretion of the Court. And to assist the Court in this decision, counsel on both sides are obliged to reveal a number of matters to be weighed either in favour of or against the accused. Except in certain areas, there is no legislative prohibition on publication and broadcast of such disclosure.

The matters for a bail decision include:

(a) the nature and seriousness of the offence and the likely sentence;

(b) the character, antecedents, association & community ties of the accused;

(c) the accused's previous record;

(d) the strength of evidence against the accused.

Bearing in mind that these matters, when published or broadcast, may be seen by all members of the public, a large part of whom are potential jurors, information which is revealed in the application for bail could inadvertently have a prejudicial effect on the accused if he were eventually to be tried by a jury.

The previous record of the accused when made public may disclose or suggest to potential jurors that they are dealing with a hardened criminal who has been caught by the police for yet another offence.

Furthermore, when bail is refused, some members of the public may conclude that the refusal indicates that the court believes he is guilty.

Media reporting of factual events highlights the sensational features and is quite often inaccurate. After editing, the report is even more likely to be different from the version given at the proceedings. An edited report, even if substantially accurate, may cause bias in the reading public if it, for instance, gives more coverage to the prosecution's contention or prejudicial allegations.

When an accused seeks to make a further application for bail, the prejudice to the accused is increased.

In two areas the law protects an accused's interest by restricting the publication and broadcast of trial proceedings. Section 20A of the Juvenile Offender Ordinance protects the interest of any child or young person by prohibiting the publication or broadcast of anything that would identify the parties or witnesses in Juvenile Court proceedings. However the Court may lift these restrictions in the interest of justice.

Section 87A of the Magistrates Ordinance restricts the publication and broadcast of any committal proceedings except the following matters - the venue, the name of the magistrate, the particulars of parties and witnesses, a summary of the offences, the decision of the magistrate to commit or otherwise, the charge, the venue of adjourned proceedings, any arrangement for bail and whether Legal Aid is granted. In addition, reports of committal proceedings may also be published and broadcast in any of the following situations: -

(i) where the magistrate decides not to commit the accused for trial (section 87A(5)(a));

(ii) where the magistrate commits the accused for trial, then only after the conclusion of that trial (section 87A(5)(b));

(iii) where under sections 91 and 92, the magistrate assumes the power to deal with the offence summarily, that part of the committal proceedings may be so published and or broadcast as particulars of the summary trial (section 87A(6));

Section 87A of the Magistrates Ordinance thus aims to protect the accused persons from any prejudice which may arise from the committal proceedings being made public.

In addition, judges have the power to exclude the public from criminal proceedings, by virtue of section 122 of the Criminal Procedure Ordinance. However section 122(3) specifically exempts anyone representing a newspaper or news agency. Section 123 of the same Ordinance gives the court power to hold proceedings in camera in certain cases, or to conceal the identity of any "witness in the proceedings".

Bail applications before the magistrates are normally held in open court, and in a number of these the arguments relevant to the particular application are reported by the news media. In a minority of cases, an application will be adjourned and concluded in chambers. The defendant himself is generally not required to be present at bail applications to a judge in chambers and at appeals against bail refusals. In the Hong Kong situation, there is a tendency to have as few matters as possible affecting the liberty of the subject argued or determined in chambers. There is judicial reluctance to invoke prohibitory powers against reporting and publication of matters in court proceedings unless the situation clearly warrants it. If instead prejudicial matters were excluded by law with a residual discretion in the court to lift the statutory restriction, little adverse publicity would be attracted. The exercise of the court's discretion would result in information being released, not withheld.

Media reporting is an important adjunct to the precept that justice must always be seen to be done. The right to an open, public trial means that, save for justifiable exceptions, all legal proceedings are heard in open court to which any member of the public has free access, and any member of the press can attend and take notes of the proceedings for publication. "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny ... of ordinary men" (Ambard v Attorney General for Trinidad and Tobago [1936] A.C. 322, 335. per Lord Atkin).

However, there are valid arguments against all bail applications being held in open court.

The foremost argument is that the defendant himself may be prejudiced by the public dissemination of information which puts him in a bad light. His fair trial may be prejudiced. His reputation may be irretrievably tarnished by disclosure even if he is ultimately acquitted. Allegations made may not be rebutted readily or instantly. These, and other arguments, must be taken into account.

Nevertheless we are conscious of the importance of justice being seen to be done. Public, open trials are an integral feature of our legal system. It is true that bail hearings are not trials. A bail hearing is an interim proceeding which has no effect upon the determination of the substantive issue of guilt or innocence. However, the spotlight of the public eye ensures

fairness, impartiality and propriety at all stages in the administration of justice. The defendant himself may well prefer privacy in a bail hearing to avoid embarrassment, humiliation and public scorn or if only to avoid having the public eye focused on his predicament.

The question arises whether Hong Kong legislation provides adequate protection for an accused from the inherent dangers of prejudice when details of his case are revealed in bail proceedings and subsequently published or broadcast.

The following suggestions were considered:

(1) to leave things as they are;

(2) to enact legislation totally forbidding the publication and broadcast of all bail proceedings;

(3) to enact legislation forbidding publication or broadcast of evidential matters or previous records which may be revealed in the bail proceedings;

(4) to enact legislation allowing publication or broadcast of matters disclosed in bail proceedings similar to those in section 87A(7) of the Magistrates Ordinance.

For (2), (3) and (4), a proviso could be added to enable the bail authority to release further matters for publication in the interest of justice or for the benefit of the defendant.

14.3 The content of the proposed code

The Criminal Law Reform Committee in New Zealand recommended in 1982 that their proposed Bail Act should prohibit publication of all matters relating to any bail hearing, except for (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 - subject always to a proviso that for special reasons of public interests or in the interests of the defendant, the court may make an order allowing publication of further details. We think such proposals would go a long way towards protecting an accused from possible prejudice as a result of revelations made at bail hearings.

The proposal has the merit of preserving the need for publicity by allowing basic details to be reported, while at the same time avoiding disclosure of a prejudicial and emotive nature. It is a compromise. We believe it deserves serious consideration. We would recommend its adoption in the proposed code.

PART B : RULES OF EVIDENCE

14.4 The present law

In theory the general rules of evidence apply to bail hearings in Hong Kong. The law on evidence in bail proceedings is not separately stated. The rules forbidding the judge or magistrate acting on his own knowledge, or on hearsay evidence, seem to apply. In practice, there is rarely a hearing when evidence is formally called. Usually this is because the facts as alleged by the prosecution are not contested by the defence. But there must be instances where the magistrate or judge accepts as a fact an assertion (one not strictly proved) made by the prosecutor or the defendant or his counsel over the objection of the other party. This may not be legitimate.

We have not found any reported instance where the actions of a magistrate or judge who has behaved this way have been challenged in the higher courts. The reality is that if the prosecution or defence object to such behaviour, the magistrate or judge can simply insist that witnesses be called to prove any allegations and grant an adjournment for that purpose. Given the short time available it will often be difficult to produce witnesses for bail hearings. As a defendant normally wishes to incur no delay or legal expense in a protracted bail hearing, assertions from either side are mostly agreed or withdrawn. Sometimes, consensus is reached because the prosecution is in difficulty in producing evidence or witnesses at short notice. It may also be impossible to prove such claims as that "the evidence is strong" without calling a number of witnesses and effectively having a trial before a trial. Both parties are usually content to just make their own observations leaving it to the court to forecast the risk freely. This practice should be regulated. There are therefore practical reasons for special, more liberal rules of evidence in bail proceedings.

14.5 The question of reform

The problem arises in this way: if the prosecutor opposes bail, or wishes the court to impose conditions, he will make certain relevant allegations to support his belief that the defendant will fail to answer his bail.

It is then for the magistrate to decide whether there is an unacceptable risk that the person will fail to answer his bail, or that there is a need to impose conditions, as the case may be.

But the magistrate cannot act without facts. And in our legal systems there are strict rules governing the facts which magistrates and judges may take into account in making their decisions. These rules are known as the rules of evidence. In criminal proceedings, a fact has generally to be proved beyond reasonable doubt.

We considered whether these rules of evidence should be relaxed, and if so to what extent, in the hearing of bail applications. This would be in recognition of the reality that the purpose of a bail hearing is not to make findings of fact for judging the guilt or innocence of the defendant, but merely to assess whether his risk of absconding is acceptable. The main issues we considered were whether or not:-

(1) the normal rules of evidence should be modified. If so, who should carry the burden of proof, the prosecution or the defence;

(2) the standard of proof should be beyond reasonable doubt or on the balance of probabilities;

(3) the court should be at liberty to apply a "credibility and trustworthiness" test;

(4) affidavit (sworn written statements) should be permitted;

(5) the accused should be protected against cross-examination about the offence;

(6) the defendant should be entitled to give evidence in rebuttal of prosecution evidence about the offence.

14.6 The content of the proposed code

We recommend that rules of evidence for bail proceedings be codified. We believe that Section 8 of the Bail Act 1977 of Victoria, Australia or section 15 of the Queensland Bail Act 1980 provides a suitable model.

The Victoria and Queensland models give the court considerable latitude in deciding what evidence it will accept. We considered the following possible criticisms of that legislation: -

(i) The prosecutor may give evidence relating to the defendant's previous convictions, his other pending charges, his bail performance and "circumstances of the alleged offence, particularly as they relate to the probability of conviction", but the defendant has not been expressly given any right to rebut it. We were concerned that the defendant has no right to give his version of the circumstances of the offence and his assessment of the probability of a conviction.

(ii) There is no indication of the standard of proof required - beyond reasonable doubt, or on the balance of probabilities.

The Victoria and Queensland models could be made fairer by giving the defendant the right to give evidence either in rebuttal or generally, if

he so wishes, on the alleged offence, as to both the factual circumstances and his assessment of the probability of a conviction.

The "credible or trustworthy" approach would have the effect of dispensing with any standard of proof. This seems to be more in line with our recommended "unacceptable risk" test for bail decisions, which is not a finding of fact but a forecast of chances quite distinct from standard of proof.

The introduction of a statutory right to bail would throw the burden of displacing it on the prosecution.

In essence, we recommend for bail proceedings that: -

(1) normal rules of evidence be modified;

(2) the prosecution have the duty of substantiating the exception;

(3) the standard of proof be superseded by a test of credibility or trustworthiness for every relevant consideration brought to the notice of the court;

(4) consequently, affidavit evidence would not be necessary;

(5) the defendant should not be questioned as to his alleged offence subject to the right on both sides to adduce "credible or trustworthy" evidence of the circumstances relating to it and the probability of conviction.

We believe that the Victoria or Queensland legislation implements all our recommendations and achieves a clear and sensible result. Therefore, it should serve as the model in our own proposed code.

PART C : REASONS FOR BAIL DECISIONS

14.7 The present law

Hong Kong law does not require a magistrate or judge to keep notes of bail hearings or record reasons for a bail decision. However, magistrates and judges invariably do keep personal notes of the hearing and reasons for their decisions. These personal notes are not, as a rule, available to the parties.

14.8 The question of reform

14.8.1 The issues

We considered: -

(1) whether or not there should be a requirement to record reasons for bail decisions on (a) refusal; (b) conditional grant; and (C) unconditional grant;

(2) if the answer to any of the above is yes, whether or not the requirement should only come into force at the request of (a) the prosecution, or (b) the defendant, or (c) any party, or (d) automatically;

(3) whether or not there should be a prescribed form.

14.8.2 Advantages of reasons

There are four main reasons in support of a requirement that the court gives reasons for its decision: -

(1) it would enable a defendant to make an assessment of his chances on reapplication, review or appeal;

(2) it would enable a subsequent court to understand the bail court's reasons for making its decision;

(3) if repeated applications are made for bail, it would give subsequent courts a reliable source as to what material has been canvassed and acted upon;

(4) it would remind the court to consider the relevant statutory criteria (exceptions and factors) for bail decisions.

14.8.3 Disadvantages of reasons

Against a requirement for recorded reasons, it may be argued that: -

(1) many bail decisions are routine and the necessity to record reasons will involve unnecessary paper work;

(2) often the recording will consist of little more than a repetition of the statutory criteria;

(3) magistrates may not have enough time to make such a record.

Two of the magistrates we surveyed objected to such a requirement. One of them said the reasons could be prejudicial to the accused. The other gave no reason.

14.9 The content of the proposed code

We recommend that the proposed Code should contain a requirement that written reasons be recorded for all bail decisions except for unconditional bail, and that they should be provided to the prosecution and the defendant upon request. We believe that it would cause confusion to include giving reasons for unconditional bail. The Code should include prescribed forms for magistrates, which could be modelled on the English prescribed forms (See Magistrates Courts Rules, 1981, rr, 66, 90, Forms 149 - 154) or the New South Wales forms prescribed under the Bail Act 1978.

PART D : STANDARD FORMS

14.10 We think that the administration of bail applications would be made more efficient and fair if standard forms were available for use in bail applications. These would include a bail information sheet compiled by the court.

There are certain basic facts which ought to be recorded in all bail applications. It would assist in the proper handling of appeals and subsequent bail applications if this information could be recorded in standard form. Such a form would include: -

(i) name, age, nationality and (if applicable) length of residence in Hong Kong;

(ii) family circumstances, whether the defendant is married, has dependent children or other personal responsibilities and whether he lives with his wife, parents or other relative;

(iii) residence, type of accommodation and recent addresses with length of stay;

(iv) employment, including present job, position, place of work and income;

(v) possible sureties, any relative, friend or employer in attendance;

(vi) other available assets; and

(vii) any other matter the defendant wishes taken into account, for example medical considerations, employment or domestic difficulties if bail is refused.

The suggested format is set out as follows: -

BAIL AUTHORITY'S RECORD SHEET

1. DEFENDANT:
   REPRESENTED/UNREPRESENTED

2. CHARGE(S):

3. OBJECTIONS TO BAIL: PLEASE "X"

   (1) LIKELIHOOD OF ABSCONDING
   (2) LIKELIHOOD OF INTERFERENCE WITH WITNESSES
   (3) LIKELIHOOD OF COMMITTING FURTHER OFFENCE(S)
   (4) FOR FURTHER POLICE ENQUIRIES
   (5) FOR OWN PROTECTION
   (6) ALREADY IN CUSTODY FOR ANOTHER OFFENCE
   (7) PREVIOUSLY ABSCONDED

4 INFORMATION IN SUPPORT OF BAIL

DEFENDANT

(1) BORN HK / VISITOR / RESIDENT YEARS
(2) SINGLE / MARRIED / DIVORCED / SEPARATED

CHILDREN

(1) DEPENDENT:-
(2) NON-DEPENDENT:-

OCCUPATION

(1) SELF-EMPLOYED/EMPLOYED/UNEMPLOYED/HOUSEWIFE/ RETIRED
(2) LENGTH OF PRESENT EMPLOYMENT:

DOMESTIC CIRCUMSTANCES

(1) HOUSE/FLAT/PARENTS HOME/ROOM/SHARING
(2) OWNER OCCUPIER/TENANT
(3) PERMANENT/TEMPORARY

INCOME
(1) EARNINGS -
(2) SICKNESS/SOCIAL WELFARE BENEFIT -
(3) OTHER INCOME/EARNINGS -
(4) EARNINGS OF SPOUSE –

5. POSSIBLE SURETIES

(1) PARENT/RELATIVE/EMPLOYER/COLLEAGUE/FRIEND/FIRM/ ASSOCIATION

6. BAIL AMOUNT(S) - CASH / RECOGNIZANCE -

DEFENDANT
SURETY
OTHER ASSETS

7. OTHER MATTERS TAKEN INTO ACCOUNT

(1)
(2)
(3)

COURT- (1) BAIL GRANTED / REFUSED

(2) GROUNDS ON WHICH BAIL REFUSED

(1) LIKELIHOOD OF ABSCONDING
(2) LIKELIHOOD OF INTERFERENCE WITH WITNESSES
(3) LIKELIHOOD OF COMMITTING FURTHER OFFENCE(S)
(4) FOR FURTHER POLICE ENQUIRIES
(5) FOR OWN PROTECTION
(6) ALREADY IN CUSTODY FOR ANOTHER OFFENCE
(7) PREVIOUSLY ABSCONDED

(3) BAIL GRANTED ON CONDITIONS

DEFENDANT - (i) CASH / OWN RECOGNIZANCE -
SURETY - (ii)CASH / OWN RECOGNIZANCE -

(4) OTHER CONDITIONS

(1) REPORTING/SURRENDER OF TRAVEL DOCUMENTS
(2)

MAGISTRATE:

Such a form would help ensure that the magistrate has sufficient information about the defendant to enable him to make a rational decision as to bail. This seems preferable to leaving the magistrate with little to go on beyond a "mute and over-awed defendant and a police officer intent on

keeping him under lock and key", [1974] Crim L.R. 453. Court officials should be given the responsibility for investigating the background of the defendant for the purposes of completing the form. Such a form might also be used to compile a data base for future reference.

PART E : ADMINISTRATIVE PROCEDURES

There are various, miscellaneous problems which were brought to our attention. Many of these could be resolved administratively so as to improve operation of the bail system. We felt we should endorse some as our recommendations. These are: -

(a) Prisoners at remand centre, court cell and police stations should have a right of access to a telephone to contact family or friends to raise bail. Presently such right is limited and is subject to the discretion of the authorities. We recommend that better facilities be provided for genuine calls for which police standing orders should give clear guidelines.

(b) Delay in producing conviction records by the authorities should be minimised by the introduction of facsimile facilities.

(c) Where a magistrate grants bail, the financial terms of which cannot be met within 48 hours, the defendant should automatically appear for the terms to be re-considered.

(d) When a defendant, though granted bail, has been unable to take it up, such a case should be reviewed regularly.

(e) For juveniles appearing in Magistrates Courts, it should be the standard practice for their parents to be summoned to attend and invited to act as sureties.

(f) The defendant should be given a form giving the result of his bail application and reasons, and if appearing in person, have his rights to seek a reconsideration, review or appeal explained to him.

(g) An officer in charge of the case (OC case) should be available on call to help facilitate the provision of evidence or information to avoid unnecessary delay.

(h) Defendants remanded for more than 14 days in custody should have priority for an early trial.

(i) A daily report of all defendants in custody for more than 14 days should be made to the Chief Justice or Registrar, Supreme Court, who should be given power to relist, at his absolute

discretion, any such defendants for a court appearance with or without any change of circumstances.

(j) A magistrate should make the decision as to whether a defendant should be remanded in police or jail custody on the basis of the submissions presented to him.

(k) Subject to the circumstances of the offence in any given case, elderly defendants, with lengthy criminal records but without a record of absconding, should not lightly be denied police bail.

Chapter 15

Juveniles

15.1 Introduction

We considered bail for juveniles and the recent proposal to lower the age of majority to 18 years.

15.2 The present law

The Juvenile Offenders Ordinance makes special provision for the bail and remand of juveniles who are categorised as "young persons" (14 or upwards but under 16) and "children" (anyone under the age of 14). (There is a conclusive presumption that children under the age of 7 cannot be guilty of an offence.)

Section 4 of that Ordinance is the first of these special provisions. It provides for the case of a juvenile who has been arrested but who cannot be taken forthwith to a juvenile court. In such a case an inspector of police or someone of superior rank, or the officer in charge of the police station where he has been brought, must inquire into the case, and must release him on recognizance (with or without sureties) to attend at court unless:

(a) the charge is one of homicide or other grave crime;

(b) it is necessary in the interests of the juvenile to remove him from association with any undesirable person;

(c) the officer has reason to believe that the release of the person would defeat the ends of justice.

It is to be noted that section 4 is mandatory in its terms and that the only discretion permitted to the officer is to set the amount of the recognizance. It is provided also that a parent or guardian or some other responsible person can enter into the recognizance on the juvenile's behalf.

If the juvenile is not released on bail at this stage, section 5 of the Ordinance requires the officer in charge of the police station where he is kept to arrange for him to be detained in "a place of detention" until he appears before the court.

However, section 5 provides for detention in a place other than "a place of detention" pending appearance in court if the police officer in charge of the station where the juvenile is being kept certifies: -

(i) that it is impracticable to detain him in a place of detention; or

(ii) that the juvenile is of so unruly or depraved a character that he cannot be safely so detained; or

(iii) that by reason of his state of health or of his mental or bodily condition it would be inadvisable to detain him in a place of detention.

If the police officer takes the step of so certifying, the certificate must be produced to the court before which he is due to appear. The section is silent as to where the juvenile can be placed in these circumstances.

When detained in a police station or when waiting there, before or after a court appearance, section 6 of the Ordinance requires the police to ensure that a juvenile is not permitted to associate with adult detainees other than those who may have been charged jointly with him.

When the juvenile is brought before the court the magistrate has no special powers he can exercise in deciding to grant or withhold bail; it seems that the court's powers are derived, via section 3A(4) of the Ordinance, from sections 102 and 103 of the Magistrates Ordinance. The power to impose special conditions to bail by virtue of section 13A of the Criminal Procedure Ordinance would seem to apply also.

If the court decides to withhold bail, section 7 of the Juvenile Offenders Ordinance provides that if the juvenile is a child (i.e. under 14) he must be committed to a place of detention; if he is a "young person" (over 14 but under 16) he may be sent to a place of detention or a training centre under the Training Centres Ordinance. Sub-section 2 of section 7 further provides that the original order of commitment can be varied and, in the case of someone over 14 who "proves to be either so unruly that he cannot be safely detained in such a place or is so depraved that he is not fit to be so detained", he can be sent to a prison for detention.

Section 14 of the Ordinance permits a magistrate to order a convicted juvenile for whom there is no suitable alternative to be detained at a place of detention for a period not exceeding 6 months. In choosing the place of detention the court (or the police officer who acts under section 5) is bound to have regard as to whether the place, "is suitable for the reception of convicted or unconvicted persons, or of persons charged with serious offences or minor offences, as the case may be, and also, where practicable, to the religious persuasion of the child or young person" (Section 16(4)).

Section 17(3) provides the formal basis for detention in such a place and also for the "classification, treatment, employment and control" of

the juveniles. Places of detention also have visitors who are justice of the peace and any other such persons as may be appointed by the Governor (see the Juvenile Offenders (Visitation of places of Detention) Rules).

15.3 The question of reform

We considered the following questions:

(i) whether the welfare of juveniles should be the primary consideration and stated in the law;

(ii) whether juveniles should enjoy a right to bail which is more difficult to displace than the ordinary right to bail applicable to adults;

(iii) whether assistance should be sought from the Social Welfare Department to handle bail applications for juveniles;

(iv) whether persons over 16 (especially in cases of crimes of violence) should or should not be subject to the same criteria as adults, particularly in view of the recent recommendation to lower the age of majority to 18 in Hong Kong.

15.4 The content of the proposed code

We consider that the law in Hong Kong regarding bail for juveniles is adequate and there is no need to introduce any special provisions to cater for the welfare of the child. We believe that the cardinal doctrine of a child's welfare being a matter of paramount importance is well entrenched in Hong Kong. The Code should, however, enshrine the principle that the general right to bail applies to juveniles, as well as to adults. We do not feel that any useful purpose would be served by making it more difficult to displace the right to bail in favour of juveniles. This would, if anything, only confuse issues, and possibly dilute the general right to bail as it applies to adults. The Social Welfare Department should be brought in whenever possible to assist in bail applications for juveniles. We believe that children over 16 in our society are very mature and we recommend that they should be treated in the same way as adults in all cases, as regards bail.

Chapter 16

Summary of principal recommendations

16.1 Introduction

This report makes a number of recommendations with a view to the improvement and codification of the law of bail in criminal proceedings. The report covers bail granted by the police and other agencies, ("police court bail") after a suspect has been formally charged, and bail granted by a court from the time of an accused person's first appearance in court, pending further appearances, pending sentence, pending review of sentence, pending a retrial and pending an appeal, ("court bail"). The report does not cover bail granted by the police and other agencies prior to the formal charging of a suspect - e.g. release on bail on condition that the suspect return to the police station for further questioning, ("police operational bail".) Police operational bail will be covered in another topic being studied by the Law Reform Commission - namely Arrest and Detention.

16.2 The present law in Hong Kong

The present law of bail in Hong Kong is summarised in Chapter 2. There are seven main stages at which the need for a person to be released on security for his appearance may arise, namely after an accused: -

a) is arrested but not charged - when he may be bailed by the police to re-appear before the police for questioning, ("police operation bail");

b) is arrested on a charge or charged after arrest - when he may be bailed by the police to appear in court, ("police court bail");

c) fails to appear in court - when the court may issue a warrant for his arrest "backed for bail" allowing the police to release the defendant on bail when they arrest him (Magistrates Ordinance, section 102(3));

d) first appears in court - when he may be bailed by the magistrate pending the next court appearances, ("court bail");

e) is not convicted or not acquitted - because the trial is aborted, when he may be bailed pending a re-trial, ("court bail");

f) is convicted - when he may be bailed by the court pending sentence, ("court bail");

g) is convicted and sentenced - when he may be bailed by the court pending appeal or review of sentence, ("court bail".) (Para. 2.3)

16.3 Creating a right to release on bail

The creation of a statutory right to bail is proposed in chapter 3. The Code would confer a general right on all persons to be released on bail pending a first appearance, and pending further appearances in the same proceedings. The situation of a defendant who has been convicted, pending sentence and pending appeal is slightly different and would not call for a right to bail in the same terms. The general right to bail would not be absolute. There would be some situations where release on bail could be denied. The right to bail would, in reality, be a right to have bail granted unless certain specified exceptions were established. Even then the bail authority would retain a residual authority to grant bail. All offences would be bailable. There would be no offences or classes of persons designated as ones for which bail could never be granted. (Para. 3.3)

16.4 Police court bail

Chapter 4 deals with police court bail. This refers to the release by the police of a person on bail after charge pending appearance in court. The general right to bail advocated in chapter 3 should apply to police court bail. (Paras. 4.2.2, 4.2.4, 4.2.1.) Moreover, the police should be entitled to refuse bail only on the same grounds the court. It is noted that Police General Orders would require to be amended since at present they permit refusal of bail in at least two cases where a court would not have such power (Para. 4.2.4). The police should be obliged to inform a person in their custody of his right to bail, (Paras. 4.2.2, 4.3).

The police should have power to impose the following conditions when granting bail to a person after charging pending a court appearance:

a) recognizance by the defendant, (unless this is abolished: see below), and any sureties;

b) cash deposit by defendant;

c) cash deposit by sureties;

d) surrender of defendant's travel documents;

e) reporting to a police station. (Para. 4.3).

Provision should be made for review of conditions or of a refusal of bail by a superintendent of police designated for the purpose but otherwise uninvolved in the case. (Paras. 4.2.6, 4.3).

Once a person has been charged, the police should not have power to dispense with bail and serve a summons for court attendance. (Para. 4.3).

16.5 Situations when release on bail may be refused

Chapter 5 deals with the grounds for displacing bail, or, in other words, with the situations when release on bail may be refused. These are considered at two stages - prior to conviction and after conviction.

Before a defendant is convicted, bail may be refused in four main situations, namely where there is an unacceptable risk (para. 5.4.4) that:-

a) the defendant, if released on bail, would be likely to fail to surrender to custody in answer to his bail;

b) the defendant, if released on bail would be likely to commit further offences while on bail;

c) the defendant, if released on bail, would be likely to interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;

d) it has not been practicable to obtain sufficient information to enable the bail decision to be taken. (This is limited to detention up to a total of 72 hours.) (para.5.4.1).

These exceptions would apply to all accused persons pending a first appearance or pending further appearances, (para. 5.4.2).

In addition, in certain cases, bail may be refused: -

e) where there is a need for the defendant to be remanded in custody for his own protection or if he is a child or young person, for his own welfare or interest;

f) where the defendant is in custody pursuant to the sentence of a court;

g) where the defendant has been arrested and is in custody for failing to fulfil bail conditions in present proceedings or others (para.5.4.2).

Bail ought not to be refused in any other situation, for example, because the granting of bail may hinder police investigations into the offence or related offences (para. 5.4.3).

As regards the position of the defendant after conviction, the statutory presumption in favour of bail should cease to operate upon conviction, but the bail authority should be left with a residual discretion to grant release pending sentence or appeal, having regard to the unlikelihood of a custodial sentence, the prospects of a successful appeal and the possibility of having the whole sentence served before the disposal of the appeal (para. 5.5.1).

16.6 Factors for deciding whether an exception displacing the right to bail is established

Chapter 6 offers guidelines as to what factors are relevant for deciding whether a ground for refusing release on bail is established. The Code should include the following factors as being relevant:

a) the nature and seriousness of the offence or offences and the probable penalty;

b) the character, behaviour, previous convictions, antecedents, associations, home environment, background, place of residence, employment, financial position and community ties of the defendant;

c) any other personal factors, such as pregnancy, old age or poor mental or physical health;

d) the history of any previous grants of bail to the defendant and his performance;

e) the strength of evidence in the case (para 6.4.1).

f) other relevant matters.

The law should provide in appropriate terms that it is permissible but undesirable for a trial magistrate or judge sitting alone to be told of a defendant's previous convictions during the course of a bail application (para. 6.3.7).

The report recommends that there be no special rules in respect to minor offences (para. 6.3.5).

16.7 Recognizance

The report recommends that if an offence of absconding is created, (as recommended in chapter 12), the system of personal recognizances should be abolished. Alternatively, if not abolished, certain procedural reforms outlined in Chapter 7 should be implemented (para. 7.4).

16.8 Cash bail

Cash bail should be retained as one of the options available to the bail authority, but its use should be de-emphasised. The Code should make it clear that a cash deposit may be demanded only where the magistrate is satisfied that it is necessary to ensure the appearance of the defendant (para. 8.4.2.)

As regards cash from sureties, the Code should give the police, the ICAC, magistrates and judges power to require the deposit of cash from a surety. However, it should provide that a demand for cash can only be made where there are reasonable grounds to believe that this is necessary for ensuring that the surety will honour his obligation (para. 8.4.2.)

16.9 Surety

The Code should give the bail authority power to require, as a pre-condition of release on bail, that one or more sureties give undertakings to ensure the attendance of the defendant, supported by a promise by the surety to pay a sum of money in the event of the defendant's non-appearance. There should be provision to ensure that the amount is reasonable in all the circumstances (para. 9.4). Administrative procedures should be devised to ensure that the surety is advised of changes in bail terms which could affect his willingness to continue as surety (para. 9.4).

The court should have power, clearly spelled out by the Code, to release a surety from his obligations, upon application by the surety (para. 9.4.)

There should be a provision analogous to section 9 of the English Bail Act making it an offence to indemnify or agree to indemnify a surety (para. 9.4.)

16.10 Restrictions attached to release on bail

The Code should provide that a magistrate and higher courts may attach to the grant of bail a condition or conditions whereby the defendant may be: -

a) required to surrender his passport;

b) prohibited from leaving Hong Kong;

c) required to report to the police station nearest his residence at specified regular intervals;

d) required to reside at a stated address;

e) required to be in residence at certain times each day;

f) prohibited from entering certain areas or premises;

g) prohibited from approaching certain persons (para. 10.4).

The Code should also contain a general power to cater for situations not specifically covered above and to impose such conditions as would be reasonably necessary for achieving the objects of bail. However, this should not extend the power to impose restrictions merely to prevent the commission of further offences. Nor should there be a power to send defendants for compulsory psychiatric examination (para. 10.4).

16.11 Appeals against bail decisions and renewed applications

As regards appeals by the prosecutor against a decision to release a defendant on bail, the report does not recommend any change to the existing law (para. 11.3). The Code should affirm the rights of the Attorney General to seek review of the grant of bail (para. 11.4).

As regards appeals by a defendant against a refusal of bail or conditions attached to release on bail, the Code should expressly provide for the right of a defendant refused bail or granted bail with conditions by a magistrate or court to apply to the High Court for a fresh consideration of his bail application. There should be a similar right to apply to have the amount of bail reduced, and any restrictions modified or lifted. The High Court should have a copy of the reasons given by the magistrate for refusing bail (para. 11.7).

The right of appeal should be available to defendants who have been remanded in custody pending further hearings in the magistrate's court, prior to conviction, to those who have been committed for trial in other courts and to those who have been remanded pending retrial under section 83F of the Criminal Procedure Ordinance. It should not be available where bail is refused or conditions are imposed pending sentence following conviction, pending appeal or pending review of sentences under section 81A of that Ordinance. There should be no right to appeal either from the High Court or the Court of Appeal (para. 11.7).

In the case of refusal of bail by the police after charging, the Code should provide that a defendant has a right of appeal to a superintendent unconnected with the case, who should see and hear the defendant before making a decision and should reach a decision as soon as is practicable but in any event not later than three hours from the original decision to refuse bail (para. 11.7).

As regards renewed applications, the Code should give a defendant who has been refused bail the right to be brought before a court at regular intervals, and thus to have his application reconsidered at weekly intervals. The defendant should have the option to waive his return to court. Where there is more than one defendant, each should be returned to court unless all agree to waive this requirement. Once an applicant is legally represented, the magistrate must refuse to entertain a second or further applications unless there has been a change of circumstances. There should be no limit in the case of unrepresented applicants (para. 11.10).

16.12 Absconding

There should be a new offence of absconding for failing to appear in accordance with the conditions attached to a release on bail. It should carry a maximum penalty of 3 months' imprisonment when charged summarily and 12 months if dealt with as a contempt of court (para. 12.4).

16.13 Forfeiture and estreatment

The Code should clearly distinguish between two stages of enforcing the terms of bail - first, the stage at which the sum is declared forfeited and second, at which the sum or part of it is actually recovered. The term "forfeited" should be used in place of "estreated". The Code should provide a procedure which would clearly cater for: -

i) proof of default;

ii) a declaration of forfeiture;

iii) discretion as to partial or total enforcement, (incorporating an opportunity for sureties to show cause why forfeiture should not follow in a particular case).

This would entail re-modelling existing provisions for forfeiture contained in the Criminal Procedure Ordinance, sections 45 and 110-113, and the Magistrates Ordinance, sections 117(2)(c) and 121 (para 13.4).

16.14 Evidence, procedure and administration

A. Press reporting restrictions for bail hearings

The Code should prohibit publication of all matters relating to any bail hearing, except for (i) the identity of the defendant, (unless his name is suppressed), and the offence(s) charged; (ii) the decision to grant or refuse bail, and (iii) the conditions of bail if it is granted. The court may however allow publication of further details for special reasons of public interest or in the interests of the defendant (para. 14.3).

B. Rules of Evidence

Rules of evidence for bail hearings should be codified along the lines of section 8 of the Victoria Bail Act 1977 or section 15 of the Queensland Bail Act 1980. The normal rules of evidence should be modified in bail hearings. The burden of proving a ground for refusing should lie on the prosecution. The standard of proof should not be beyond reasonable doubt, but instead be based on a test of credibility or trustworthiness. Affidavit evidence should not be necessary. The defendant should not be questioned about the alleged offence but both sides should have the right to adduce credible or trustworthy evidence of the circumstances relating to it and the probability of conviction (para. 14.6).

C. Reasons for bail decisions

The Code should require written reasons to be recorded for all bail decisions except unconditional bail. A copy should be given to the prosecution and the defendant upon request (para. 14.9).

D. Prescribed forms

Certain prescribed forms, including a bail information sheet, should be introduced (para. 14.10).

E. Administrative procedures

Various administrative improvements are recommended, covering miscellaneous matters (para. 14.11).

16.15 Juveniles

The Code should enshrine the principle that the general right to bail applies to juveniles as well as to adults (para. 15.4).

Annexure 1

Extract From Police General Orders on Bail Procedures

CHAPTER 47

BAIL

47- 01. Bail.

The authority for granting or refusing bail is vested in: -

(a) the OC Case provided he is not below the rank of inspector; or

(b) the DO in any other case, provided he is not below the rank as established for the post save his appointment is endorsed by the DVC or ADVC on the Occurrence Book.

2. Bail should normally be granted except: -

(a) in a serious case;

(b) where the offender has been arrested on a warrant which contains no directions regarding bail;

(c) where there is a likelihood the offender will abscond;

(d) where there is a likelihood the offender will repeat the offence;

(e) where there is a likelihood that the offender will interfere with witnesses, impede the investigation of the case or otherwise attempt to obstruct the course of justice;

(f) where it appears to the DO or OC Case that the offender should be detained in his own interest, to protect him from the acts of himself or others;

(g) where the offender cannot produce reasonable bail; or

(h) for any other good reason the offender should be detained.

3. A person delivered into Police custody by a member of the Immigration Department, Hong Kong Customs and Excise Service or Independent Commission Against Corruption shall not be granted bail unless the memorandum accompanying the prisoner states that this may be done. In such a case, bail shall only be granted in the amount stated in the memorandum for the person to report at a Police station or a court on the date

and time specified and shall be subject to any special conditions which may be enumerated therein.

4. Bail may be granted in the form of cash or surety provided either by the person to be bailed or by some other person on his behalf. Before accepting a surety the OC Case or DO shall satisfy himself that a person offering to stand as surety is of reliable reputation and sufficient substance to enable him to pay the sum involved in the event of the non-appearance of the defendant.

5. When a person is released on bail, the bail money shall only be collected in a report room. The amount and the bail book folio number shall be entered on the charge sheet.

6. A DVC (or an ADVC designated by the DVC) is responsible for ensuring the safe transport of bail money to the court where it shall be handed over to the senior court bail shroff by 08.30 hrs. on each day that the court is sitting.

7. The amount of bail should be reasonable and not excessive; the probable fine in the event of conviction being a fair guide to the sum which should be required.

8. For the more common offences, lists of suggested bail requirements are to be available in each station and subject to regular review by the DVC (or an ADVC designated by the DVC) concerned. Nevertheless, each case must be dealt with on its individual merits and lists of this kind must not be regarded as anything more than a broad guide.

9. Should a loss / surplus of bail money be discovered: -

(a) the officer discovering such loss / surplus shall make an immediate report to the DVC / ADVC;

(b) the DVC / ADVC shall: -

(i) cause a report to be made in the MRB;

(ii) as soon as possible during office hours make a telephone report to the CEO F;

(iii) make a written report to the CEO F within twenty four hours and in the case of a surplus also forward the surplus amount to the CEO F by hand and obtain a receipt which should be pasted to the relevant page of the Bail Control Register (PGO 47-03) for future reference;

(c) the formation commander in whose formation the loss was discovered shall, within seven working days, submit to his major

formation commander an MIR recommending what action should be taken; and

(d) if theft or other crime is suspected, a report shall be made in the CCR and this fact noted in the MIR.

10. The use of Police bail shall be restricted to persons who have been arrested and against whom THERE IS LIKELIHOOD a charge will be laid.

47 - 02. Bail books.

Two bail books (Pol 40) shall be kept in each station: -

(a) one for prisoners bailed to appear at court;

(b) one for prisoners released on Police bail.

The book covers shall be marked with "Court Bail" and "Police Bail" respectively.

2. Bail receipts shall be issued consecutively. A new book shall not be opened until the existing book has been completed. All entries in a bail book shall be made in ink or indelible pencil.

3. A bail receipt shall not be altered. If a mistake is made the form shall be cancelled by writing "CANCELLED" across all three copies in bold letters. A note shall be made on the form stating the reason for cancellation and shall include the date, time and signature of the cancelling officer.

4. If the amount of bail first granted is subsequently increased or decreased, the first amount deposited shall be refunded, the receipt surrendered, and a fresh form made out for the new amount.

5. Similarly, if it is necessary to extend a period of Police bail or transfer Police bail to Court bail, the original sum deposited shall be refunded, the receipt surrendered, and a fresh form made out stating the new date on which the person concerned is required to report to the Police Station or appear in court as the case may be.

6. A bail book shall be completed as follows: -

(a) Section 1 (To be completed at the Police station).

(i) this section of the form shall be completed in triplicate. The original shall be detached from the bail book and sent to court in case of court bail and the duplicate given to the prisoner or his surety. The triplicate shall remain in the book;

(ii) this section of the form is divided into two distinct parts, one for bail where cash is deposited by principal (i.e. person released on bail) or surety, and one for bail where no cash is deposited; only the relevant part is to be completed;

(iii) if the prisoner is his own surety, his name, address and occupation shall appear in the first two lines and the word "SELF" shall be inserted in the space after "person released on bail", and the duplicate shall be given to him;

(iv) if the prisoner and a surety are involved, names and addresses of both shall be entered in the appropriate space and the duplicate shall be given to the surety;

(v) if there are two, or more, sureties other than the prisoner, the name and address of each shall be entered in the appropriate space and the duplicate given to one of the sureties;

(vi) when preparing cases for court, DOs shall attach the original bail form (white copy of Pol 40) to the original or magistrate's copy of the charge sheet;

(vii) before the duplicate copy of the form is issued depositor he / she should be reminded to produce his / her identification document and the duplicate form at the time of refund, and be requested to give his / her signature, thumbprint or mark in the space provided on the reverse side of the original copy;

(viii) it is the OC Case or the DO who decides the amount of bail once this decision has been made the appropriate officer, who is usually the DO, shall then fill in the form, sign it and accept the money. In filling Pol 40 the OC case / DO should ensure that the space for identification in Section 1 of the form is completed whenever possible. It is necessary to have a third party (e.g. a report room PC) to sign as witness for the deposit.

(b) Section 2 (To be completed at court except Police bail).

(i) This section of the form is divided into five parts to be completed at court.

(ii) In the case of Police bail, Part B of this section shall be completed at the station of origin if the accused person observes the conditions of recognisance. The person shall present his duplicate and identification document to

the officer in charge of bail and receipt the original. The duplicate shall be attached to the original and the bail refunded. If the person has lost his duplicate or acknowledged receipt of bail money by thumbprint or mark, his signature, thumbprint or mark on the original must be witnessed by a Government officer other than the officer refunding the bail. If the person has sureties their responsibility lapses on the bailee's appearance and any cash deposit shall be returned to the surety on production of the duplicate Pol 40 (which shall be attached to the original) against receipt on the original. The DO shall certify on the original that the bail has been correctly refunded and shall attach the duplicate to the original.

7. The court shroff shall retain the original and duplicate Pol 40s, and the station of origin is not required to re-attach them to the triplicate (book copy). In the case of Police bail, the DO at the station of origin shall check the completed Pol 40s to see that they have been properly completed and there are no discrepancies. He shall then paste both the original and duplicate copies back into the bail book on top of the triplicate copies and also paste the bail receipt issued by court to the original Pol 40 in case of estreated or unclaimed bail.

47 - 03. Bail control registers.

Two Bail Control Registers shall be kept in each station, one for recording Police bail transactions (Pol 666) and one for recording Court bail transactions (Pol 667).

2. Bail Control Registers shall be maintained by a DO in his Report Room and shall be recorded in his safe register.

3. The book cover of Police Bail Control Registers (Pol 666) shall be indexed in alphabetical sequence. The book cover of Court Bail Control Registers (Pol 667) shall likewise be indexed.

4. A Police Bail Control Register shall be completed as follows: -

(a) Enter on the debit (cash in) side of the control register in consecutive sequence the bail receipt (Pol 40) numbers. Cash from DVC or ADVC for refund of bail should also be included.

(b) Enter on the credit (cash out) side of the control register the bail receipt numbers in respect of which refunds (including extended or estreated cases or cases transferred to Court bail) have been made. Bail money transferred to the DVC or the ADVC should be recorded against his signature in the appropriate column in the register.

(c) Bail granted in the form of surety and cancelled bail receipt numbers should be recorded in the control register with a nil amount on either the debit or credit side as appropriate.

(d) Rule off the total after each shift.

(e) Sign a handover / take-over statement in the Register after checking that the total amount, Pol 40s granted / refunded in the loose folders (PGO 47-08) and cash in hand are correct. The balance is then carried down.

(f) The following chop shall be used for the purpose of handing / taking over of Police bail by DOs on change of shifts: -

Certify that I have taken over
$_____ after checking
Pol 40s and the account.
Officer taking over _____
Officer handing over _____

(g) As soon as a DO has taken over from the DO in an earlier shift, he shall enter in the register the amount of Police bail brought down and the running total of Police bail, if any, held by the DVC and the ADVC.

5. A Court Bail Control Register shall be completed as follows: -

(a) Enter on the debit (cash in) side of the control register in consecutive sequence the bail receipt (Pol 40) numbers. Cash from DVC or ADVC for transfer of bail money to Court should also be included. Bail receipts cancelled should also be entered with a nil amount. Enter the Pol 458 numbers.

(b) Enter on the credit (cash out) side of the control register the bail receipt numbers and relating Pol 458 numbers in respect of bail money transferred to Court.

(c) Bail money transferred to DVC or ADVC, or handed to the officer who takes it to Court should be recorded against his signature in the appropriate column in the register.

(d) Rule off the total after each shift.

(e) Sign a handover / takeover statement in the register after checking that the total amount, the Pol 40s granted (whether transferred to Court or kept in a loose folder (PGO 47-08), the relevant Pol 458 and the cash in hand are correct. The balance is then carried down.

(f) The following chop shall be used for the purpose of handing/taking over of Court bail by DOs on change of shifts: -

Certify that I have taken over
$_____ after checking Pol 40s
Pol 458s and the account.
Officer taking over _____
Officer handing over _____

(g) As soon as a DO has taken over from the DO in an earlier shift, he shall enter in the register the amount of Court bail brought down and the running total of Court bail, if any, held by the DVC and the ADVC.

47 - 04. Bail Registers.

A Duty Officer shall maintain in his Report Room a Bail Register Pol 458 as a subsidiary control register of Court bail transactions. The entries in this register shall be made in duplicate.

2. He shall enter in columns (1) and (2) of the register the serial number and amount of each Bail Receipt Pol 40 completed during his tour of duty except when bail is granted for appearance at a Police Station. Particulars of Bail Receipts Pol 40 shall be entered in numerical sequence. If a Bail Receipt Pol 40 is cancelled an entry to this effect shall be made in column (6) of the duplicate of the appropriate Bail Register Pol 458 folio to account for its absence in columns (1) and (2).

3. Before taking over, a relieving Duty Officer shall: -

(a) check the Bail Receipt Pol 40 book(s) against the Bail Register Pol 458 to ensure that each used folio in the book(s) has been correctly entered in the register;

(b) draw a double line across columns (1) to (3) of the duplicate of the register under the last entry;

(c) add up the figures shown in column (2) of every Pol 458 folio completed since bail money was last sent to court and enter the total arrived at in column (3) (of the duplicate copy) immediately above the drawn double line;

(d) count the bail money being taken over and ensure that it agrees with the calculated total;

(e) sign the certificate in column (3) of the duplicate of the register above the drawn double line.

4. The Duty Officer being relieved shall witness these checks and shall also sign the certificate in column (3) of the duplicate of the register immediately above the signature of the relieving Duty Officer.

5. Before bail money is sent to court the Duty Officer shall:-

(a) draw a double line across columns (1) and (2) of the original of the final Bail Register Pol 458 folio and across columns (1) to (5) of the duplicate of that folio beneath the last entry, and a diagonal line across any unused spaces in columns (1) to (2) of both the original and duplicate;

(b) add up all figures in column (2) of completed Pol 458 folios, count the bail money to ensure that it tallies with the total arrived at and enter this total in the box at the foot of column (2) of both the original and duplicate copies of the final folio;

(c) complete the certificate under column (2) of the final folio.

6. The originals of all completed Pol 458 folios shall then be detached and handed to the escorting officers together with the bail money, original copies of related Bail Receipts Pol 40 and charge sheets. The Duty Officer shall prepare a GF 121 Despatch Schedule for signature by OC Court (or his representative) when he receives the Bail Receipts Pol 40 and charge sheets and another GF 121 for signature by the court shroff when he receives the Bail Register Pol 458 folios and bail money. The escorting officer shall check the cash and acknowledge receipt of the bail money and Pol 458 folios on the duplicate of the relevant GF 121 and of the Pol 40 receipts and charge sheets on the duplicate of the other. The serial numbers of both GF 121 shall be recorded on the duplicate copy of the final Pol 458 folio in column (4) beneath the double line.

7. The original of the GF 121 relating to the Pol 40 receipts and charge sheet shall be receipted by the OC Court (or his representative) when he receives these items and returned by the escorting officer to the station Duty Officer who shall file it and cancel the escorting officer's signature on the duplicate.

8. The OC Court shall allocate case numbers to the charge sheets and enter them in numerical sequence in a chit book (GF 53). The bail receipts (Pol 40) attached to the charge sheets together with the chit book (GF 53) shall be handed to the court shroff who shall acknowledge receipt of same in the chit book (GF 53).

9. The original of the other GF 121 will be receipted by the court shroff when he receives the money and the original copies of Pol 458 and returned by the escorting officer to the station Duty Officer who shall file it and cancel the escorting officer's signature on the duplicate. The court shroff will, in addition, issue a Court Receipt for Police Bail HKM 306 to the escorting officer for bail money received.

10. The HKM 306 receipt shall be handed to the Duty Officer who shall record the serial number in column (5) (beneath the drawn double line) of the duplicate copy of the final Pol 458 in the batch to which the receipt relates. The Duty Officer shall then affix the receipt to the back of this Pol 458 folio and complete the printed declaration "Bail Money delivered to the Magistracy concerned and Court Receipt for Police Bail (HKM 306) No(s) ..... obtained and attached overleaf / to the reverse of Pol 458 No. ....." on every Pol 458 folio to which the HKM 306 relates.

11. The original copy of Pol 458 will not be returned to the station of origin but will be retained by the court shroff.

47 - 05. Bail money

Police bail money shall be pooled together and kept in a cash box in the safe of the DO.

2. Court bail money shall be pooled together and kept, separate from the Police bail pool, in a cash box in the safe of the DO.

3. Bail transactions shall be recorded in the appropriate Bail Control Register maintained by the DO and not in his safe register.

4. When the total cash holding (including bail money) of the DO's safe is approaching the maximum cash holding permitted for that safe (see PGO 20-27) he shall notify the DVC or ADVC.

5. The DVC or ADVC shall take over from the DO, by signature in the relevant Bail Control Register, the bail money handed over to him and include this in his own safe. Should this result in the total cash holding of the safe of the DVC or ADVC exceeding the maximum permitted holding (PGO 20-27), he shall contact EO G and request instructions.

6. The DVC and ADVC shall each maintain two registers, one for recording Police bail money received from or returned to the DO and one for

recording Court bail money received from or returned to the DO. The format of these registers shall be as follows: -

Date	Cash in	Cash out	Running total	Recipient's Signature

7. Bail money returned to the DO must be recorded in the register against his signature in the last column.

47 - 06. Court bail.

Once a defendant appears before the court, whether he is in custody or on bail, the authority for the granting or extension of bail is vested in the magistrate.

2. When it is necessary for a case to be remanded the prosecuting officer shall inform the magistrate whether or not the Police are opposed to the granting of bail and, if bail is not granted, whether the Police request a remand in Police or jail custody.

3. Bail may normally only be opposed when: -

(a) the offence is serious; or

(b) the offender is likely to abscond; or

(c) the offender is likely to interfere with the course of justice; or

(d) the offender is likely to repeat the offence; or

(e) for any other good reason, the offender should be detained.

4. When the Police are not opposed to bail the prosecutor shall so inform the court irrespective of whether or not the defendant applies for it.

5. The amount in which bail is granted is a matter for the court but the prosecutor will be prepared to advise the magistrate if requested to do so. In a suitable case the prosecutor may ask that bail be granted conditional on the surrender by the defendant of his passport.

6. When a defendant who has been on bail is remanded in custody or on conviction is sentenced to a term of imprisonment and wishes to collect his bail money, he shall be requested to nominate a friend or relative to collect the money on his behalf by completing a form of authorisation which on presentation to the Shroff together with the bail receipt and proof of identity

will enable that person to obtain release of the money. Authorisations will be in the following style: -

From : Commissioner of Police. (O/C Magistracy) To : First Clerk, Magistracy

Ref. :

Tel. :

Date :

Name of Defendant :

CCR / MRB No. :

Case No. :

Bail Receipt No. :

The above-named has signed an Authorisation enabling …….. to apply for the release of, and to receive on his behalf, the money deposited with ……. Magistracy in respect of his bail in Case No. …… and on request of the above-named, the signed document with the bail receipt has been handed to the said …….

( )
for Commissioner of Police

AUTHORISATION

I, the undersigned, ... defendant in the case No. ..... do hereby authorise ..... whose signature / mark is appended hereunder, to claim the refund of, and to receive on my behalf the sum of Hong Kong Dollars ..... ($HK .....) deposited with …….. Magistracy in Case No. .....

( )
Defendant

( )
Signature or mark of
the authorised person.

Identity Card No. :

Address :

Witnessed by. :

( )
for Commissioner of Police

Dated this day of , 198 .

7. Authorisation forms shall be held by the O/C Court and signed by him personally on behalf of the CP. Forms shall be completed in duplicate, the original issued to the person executing the authorisation, the duplicate copy retained by the O/C Court for record purposes.

47 - 07. Police bail.

A person arrested in connection with an offence may, if inquiries are not completed, be released on bail to reappear at a Police station or offices of Crime Wing's formation at a date and time stated in the bail form.

2. The authority for granting or refusing Police bail is subject to PGO 47-01(1).

3. The OC Case or DO may grant Police bail for an initial period not exceeding one month. Any initial grant of Police bail for a period in excess of one month, or any extension or renewal of Police bail which will extend the period that any person has been on bail in excess of one month must be authorised by an officer of the rank of CIP or above. This instruction will not apply in cases where bail is granted in accordance with PGO 47-01 paragraph 3.

4. If a person fails to answer to his bail at the date, time and place appointed, an application shall be made to a magistrate for the bail to be estreated in accordance with section 52(2) of the Police Force Ordinance.

5. When Police bails are to be refunded, the bail moneys shall be refunded only to the depositors, i.e. the bailees or sureties. In the event that the depositors are untraceable, the bail moneys shall be treated as unclaimed and as such should be paid to CEO F who will:

(i) acknowledge receipt by issuing a receipt for pasting onto the original bail form (Pol 40) for audit purpose; and

(ii) place the bail moneys to a deposit account for eventual disposal to General Revenue.

6. The officer granting police bail shall ensure that the OC Case or a deputized officer is present to deal with the bailee at the appointed date, time and place stated on the form for bailee reappearance. Should the bailee fail to appear the matter is to be reported to the DVC and OC Case, and action will thereafter be taken to locate the bailee and to estreat the bail money in accordance with paragraph 4 of this order.

7. The DO on C shift duty will check all Police bail forms. He will inform the DVC and OC Case in the event that any bailee has failed to report on the specified date. The DVC will cause enquiry in any such case as to why the provisions of paragraph 6 of this order have not been adhered to.

8. In order to facilitate checks a floater shall be attached to the Police Bail Book (Pol 40) showing the MRB / CCR number, name of bailee, date he was first bailed, number of times bail has been extended, details of authorising officer, and date bailee is next due to answer to his bail.

47 - 08. **Bail Receipt Folders.**

A DO shall maintain in his Report Room three hard cover folders for bail receipts (Pol 40). The cover of these folders shall be marked as follows: -

(a) One folder to be marked "Police Bail Granted";

(b) One folder to be marked "Police Bail Refunded"; and

(c) One folder to be marked "Court Bail Granted".

2. When Police bail is granted, the DO shall detach from the bail book the original and the duplicate copies of the bail receipt. He shall give the duplicate copy to the bailee and place the original copy in the folder marked "Police Bail Granted". Bail receipts kept in this folder shall be placed in running order of the Pol 40 number.

3. When Police bail is refunded, the DO shall collect from the bailee the duplicate if the bail receipt. He shall retrieve from the folder marked "Police Bail Granted" the original copy of this bail receipt and obtain the bailee's signature in Section 2B. He shall then attach the original copy of this receipt to the duplicate copy and place them in the folder marked "Police Bail Refunded". Bail receipts kept in this folder shall be arranged in the order as they are recorded in the credit (cash out) side of the Police Bail Control Register (PGO 47-03 paragraph 4(b)).

4. The DO on 'A' shift shall each morning present the Police Bail Control Register and the "Police Bail Refunded" folder to the DVC (or the ADVC designated by DVC) for checking. After verification, the DVC (or the ADVC designated by the DVC) shall sign the original copy of all refunded bail receipts (including extended or estreated cases) to confirm completion of bail procedures. The following chop shall be used for this purpose: -

Bail verified _____ (DVC or ADVC)

5. In verifying the completion of bail procedures, the DVC (or the ADVC designated by the DVC) shall check all refunded bail receipts against their corresponding entries in the control register. He shall also ensure that all bail receipts have been properly completed in accordance with PGO 47-02.

6. When Court bail is granted, the DO shall detach from the bail book the original and the duplicate copies of the bail receipt. He shall give the duplicate copy to the bailee and keep the original copy in the folder marked "Court Bail Granted," until it is taken to court. Bail receipts kept in this folder should be grouped by the court of hearing and arranged in chronological order.

47 - 09. Bail related to offences under the Gambling Ordinance, Cap.148.

In order to ensure that persons arrested for gambling offences attend court, thereby alleviating the unnecessary commitment of Police manpower in the subsequent execution of bench warrants, it is important that the amount of bail be set at a realistic level having regard both to the fines imposed by the courts and the maximum penalty provided under the Gambling Ordinance.

2. If an accused person is genuinely unable to raise such an amount of bail and can be readily traced, a lower amount may be demanded at the discretion of the OC Case or the DO.

3/85 (Feb)

47 - 10. Persons reporting to police as a condition of bail.

Persons released by Courts on bail are frequently required to report to Police Stations as a condition of bail. This order sets out the procedures to be followed in respect of such bailees.

Action by OC Court or OC Case

2. When a Court makes an order that the bailee report to Police as a condition of bail, the OC Court in those cases in which the order is made by a Magistrate, or OC Case in other courts, shall deliver to the DO of the station concerned the original memorandum issued by the Court and provide the following details: -

(a) full name and address and telephone number (home and office) of bailee;

(b) full name and address (home and office) of sureties, if any. The OC Court or OC Case, as appropriate, will obtain this information from the Clerk of the Court from which the bailee is bailed;

(c) offence for which he is being investigated / charged, the police file reference, the case no., and the name / rank / formation of the OC Case;

(d) identity card no. / driving licence no. / travel document no.;

(e) reporting times / dates;

(f) date of last reporting day;

(g) bailee's specimen signature;

(h) Court at which bail was granted;

(i) date of next hearing;

3. When the above details are supplied to a DO by an OC Court, the latter shall copy them to the OC Case.

Other details to be supplied by OC Case

4. Whether he is responsible for supplying the details referred to at paragraph 2, or whether he is so informed by the OC Court's copy referred to at paragraph 3, the OC Case shall, as soon as possible, provide the DO with a photograph of the bailee, if available, and details of the officers to be informed, and any special action to be taken, should the bailee fail to report.

Action by duty officer, reporting station

5. On receipt of the above memorandum and information, the DO shall: -

(a) insert the memorandum in a loose folder kept for this purpose. The folder will contain a floater which will be maintained by the

DO showing the name, the file reference number and register page number; and

(b) enter the following information in a register kept for the purpose:-

(i) dates and times bailee is required to report;
(ii) dates and times bailee reports;
(iii) number, name, rank and signature of officer receiving bailee;
(iv) OB reference number; and
(v) file reference number.

6. When a bailee reports to the station at the appointed time, the officer receiving him shall: -

(a) ascertain the identity of the person reporting by comparing identity card no., photograph, signature, with the information supplied by OC Court or OC Case as appropriate, the signature being recorded against that relevant entry in the register, referred to at paragraph 5(b) above, each time he reports,

(b) record bailee's attendance in the OB and the register by filling out appropriate columns listed at paragraph 5(b) above.

Action when bailee fails to report

7. Supervisory officers should be continually alert to the possibility of breaches of bail conditions, however, the period approaching next hearing date is one of increased risk necessitating greater vigilance.

(a) DO shall check this register once per shift to ensure that all bailees have reported at the appointed times.

(b) In the event of a bailee failing to report at the appointed time the DO shall immediately inform the OC Case and make every effort to locate bailee.

(c) In the event of a bailee being in contravention of the conditions of his bail the OC Case shall: -

(i) inform the Court and apply for a warrant of arrest;

(ii) inform the sureties of the occurrence and ascertain if they are aware of the whereabouts of the bailee; and

(iii) initiate other action as necessary to locate the bailee.

Annexure 2

Extract from ICAC Standing Instructions on Bail Procedures

ICAC Operations Department Standing Instructions on bail procedures

9-59 ICAC bail procedures

1. Under Section 10A of the ICAC Ordinance, Cap. 204, a person who is detained in the offices of the Commission on the authority of an officer of or above the rank of Group Head must be taken before a magistrate as soon as practicable and in any event within 48 hours after his arrest unless he is sooner released, whether on bail or otherwise.

2. Persons arrested under Section 10 of the ICAC Ordinance, Cap. 204, who are not taken to a police station, to be dealt with in accordance with the Police Force Ordinance, but are taken to the offices of the Commission may be dealt with in one of the following ways: -

(a) they may be bailed for further enquiries; or

(b) charged and bailed to appear before a court; or

(c) charged and not released on bail but taken in custody before a court; or

(d) they may be unconditionally released.

9-60 Authority for granting ICAC bail

1. Section 10A of the ICAC Ordinance, Cap. 204 (as amended) vests authority for admitting detainees to bail in officers of the rank of Senior Commission Against Corruption Officer or above. In practice this power will be exercised by Group Heads of the Operations Department, in consultation with Assistant Directors, who will decide whether to grant bail, and when to grant it, according to the circumstances of the case.

9-61 Purpose and conditions of bail

1. The purpose of bail, in whatever form, is to secure the attendance of the bailee, at a specified place, date and time, on payment of penalty if failing to attend, and bail should be set with this

purpose in mind. Bail must never be withheld or set at such a high figure as to be a punishment.

2. When allowing bail to a person arrested by the ICAC an officer of or above the rank of Group Head may direct that the person be released: -

(a) on his depositing such reasonable sum of money as the authorising officer may require; or

(b) on his entering into a recognizance, with such sureties, if any, as the authorising officer may require; or

(c) by combination of (a) or (b);

to attend at the offices of the Commission for further enquiries, or to appear before a magistrate after being charged with an offence.

3. There is no provision for accepting cash from sureties for persons being admitted to ICAC bail. The cash, if cash is deposited, must be deposited by the person being bailed.

4. In practice recognizances will usually be satisfactory for most ICAC bail purposes, but whenever persons are charged with offences and bailed to court, then further consideration should be given to placing them on cash bail at an amount commensurate with their background, the gravity of the offences with which charged, and the need to have them properly respond to the bail.

5. Where persons previously subject to bail conditions involving recognizances or sureties are charged with offences and bailed to court, and it is decided for good reason not to place them on cash bail but to maintain the recognizances and sureties, they should be informed that on appearance at court a recommendation could well be made for a change to cash bail, and they should be asked to prepare accordingly for their appearance at court. If legally represented, then legal advisers will also be similarly informed.

9-62 Duties of detention centre staff

1. When an officer of or above the rank of Group Head authorises the release of a detainee he will communicate this decision to the Duty Guard Commander in the Detention Centre who will record in the Detention Centre Occurrence Book the decision and conditions of bail, if any, decided upon by the Authorising Officer.

2. Maintenance of bail books and forms, their completion and storage, is the responsibility of the Detention Centre staff. Investigating officers will not make entries themselves in these documents.

9-63 Bail books

1. Two bail books (ICAC 301), containing serially numbered bail forms in triplicate, are kept in the Detention Centre: -

(a) one for detainees bailed to appear at court;

(b) one for detainees released on ICAC bail.

The book covers are marked 'Court Bail' and 'ICAC Bail', respectively.

2. Bail forms will be issued consecutively. A new book will not be opened until the existing book has been completed. All entries in a bail book will be made in ball pen or indelible pencil.

3. Where appropriate the name in Chinese characters of the person being bailed or depositing money will be entered in the space provided under 'name' in Section 1 of the bail form. It will assist later identification, particularly at court, if the bailee / surety's name is written on the bail form using the same romanisation and same Chinese characters as are used on the I.D. card or other identification document produced by the bailee / surety at the time the bail form is completed.

4. A bail form will not be altered. If a mistake is made the form will be cancelled by writing "CANCELLED" across all three copies, in bold letters. A note will be made on the form stating the reason for cancellation, the date, and the time, and will be signed by the cancelling officer.

9-64 Bail for further enquiries

1. When a detainee is bailed for further enquiries, the "ICAC Bail" Book will be used. The details required on the forms will be completed by Detention Centre staff who will ensure that the bailee has signed the form in the appropriate place, and that the Chinese translation, where appropriate, has also been completed. Should a bailee accept the conditions of bail but decline to sign a bail form, the Guard Commander will endorse the form as follows: - "Declines to sign but accepts the recognizance". The Guard Commander will sign this endorsement, as will any person who was a witness to the procedure.

2. The three completed copies of the bail forms will be distributed as follows: -

(a) the original form (white) will be held by J4 in a bail form folder;

(b) the second copy of the form (yellow) will be handed to the bailee for his information and to serve as his receipt for

any bail money deposited. He is to be instructed to return the receipt when surrendering to his bail;

(c) the third copy of the form (blue) will remain in the Bail Book as a permanent record.

9-65 Sureties

1. When a detainee is bailed utilising a surety, a separate set of bail forms will be completed for each surety, entering on the form such personal particulars and details of the surety as are required. The distribution of the three forms will be as described except that the second (yellow) copy of the form will be handed to the surety and not to the detainee. A photostat of the second (yellow) copy will be handed instead to the detainee.

2. Before accepting a person as a surety, a case officer will make enquiries sufficient to satisfy an officer of or above the rank of Group Head that the proposed surety is able to exercise a degree of control over the bailee, and is of sufficient substance to enable him to pay the sum involved in the event of the bailee failing to comply with his recognizance.

9-66 Cash bail for enquiries

1. Where an officer of or above the rank of Group Head considers a detainee should be released for enquiries on cash bail, the detainee will be allowed every facility, such as the use of a telephone, to contact people and to enable him to have the cash brought to the Detention Centre.

2. Detention Centre staff will acknowledge receipt of cash on the bail form copy (yellow) handed to the detainee. Payment of cash bail is only acceptable in Hong Kong dollar currency. The cash will be placed in a 'Cash Bail envelope' currency which will be endorsed with the Bail Book reference and the amount deposited. The envelope will be sealed and stored in J4's safe. An appropriate entry will be made in J4's Safe Register.

3. Section Head J4 must ensure that the amount of cash in his safe does not exceed the maximum which he is permitted to hold. Where this is likely to occur, or where particular cash bail is likely to be retained for some considerable period, J4 will arrange for it to be transferred to the Treasury. In these circumstances, the sealed cash bail envelope will be placed in another sealed envelope or package and will be deposited with the Treasury Accounts Branch, C.G.O. West Wing, Ice House Street.

9-67 I.C.A.C. Bail - amendments to times or dates of surrender

1. When a person has entered into a recognizance and / or deposited cash to be released on I.C.A.C. Bail, that person is legally bound to appear at the place, date and time set out in the Bail Form, unless he has been formally notified by service of a 'voiding notice', as at Annex 9-19, that his conditions of bail have been cancelled.

2. In the event of a request being received from a bailee or his legal adviser for the bailee to surrender at a later time but on the same date as originally required, the Group Head or Directorate officer who authorised the bail may, at his discretion, agree to this. If he so agrees, the authorising officer must endorse the original Bail Form accordingly and sign it.

3. When a request is received from a bailee or his legal adviser to extend the bail to enable the bailee to report on a later date than the original reporting date, he should be informed that he must surrender to his bail before the existing reporting date and enter into a fresh recognizance or deposit cash to appear at the later date.

4. When a bailee is unable to surrender to his bail on the due date because of illness or injury, subject to him being fit enough to be seen arrangements may be made through J4 for the bail procedures to be carried out at the hospital or his home, as the case may be.

9-68 Procedure when detainee surrenders to bail

1. The bailee, when surrendering to his bail, will present his copy (yellow) of the bail form which will be attached to the original (white) bail form held in J4's bail form folder. Both copies of the bail form (white and yellow) will then be pasted to the third (blue) copy of the bail form in the Bail Book.

9-69 Return of cash bail

1. When a bailee who has deposited bail money surrenders to his bail on the specified date, his bail money will be returned to him, whether or not he is again to be released on bail. The cash bail receipt located on the reverse of the top (white) bail form will be completed.

2. It is essential that the bailee signs a receipt for his refunded cash, and that the refunding officer signs as witness to the transaction, at the same time comparing the signature given with that obtained when the bailee was first released, to ensure it is identical. If for some reason it appears different the bailee will be asked to sign again, in an identical manner.

9-70 Failure to produce bail form

1. When a bailee fails to produce his copy of the bail form (yellow) upon answering to his bail, his bail money, if any, will still be returned to him, but against signature in Part B of the original (white) bail form, with his signature witnessed by two officers. Whether cash bail, or recognizance only is involved, the bailee will be asked to sign the following certificate, to be affixed on the original (white) bail form, witnessed by two officers: -

> *"I hereby certify my attendance at the offices of the Commission as required by the conditions of my bail but declare that I am unable to produce the duplicate (yellow) bail form because it has been mislaid by me.*

_____
Bailee
Date :

Witnessed : Witnessed :

_____ _____
I.C.A.C. Officer I.C.A.C. Officer"

9-71 Extension of bail for further enquiries

1. If the bailee is to be re-bailed for further enquiries, then a fresh set of bail forms will be completed in accordance with the procedures outlined.

9-72 Release from conditions of bail

1. When enquiries have been completed, and no charge is preferred, a person will be released from the conditions of his bail as soon as possible. Should this be prior to the date on which he is to answer to his bail, a 'voiding notice' (Annex 9-19) will be served on him personally. This will mean he will not attend to surrender his (yellow) bail form copy, in which case a copy of the voiding notice, together with the original (white) bail form will be pasted to the triplicate (blue) copy of the bail form in the Bail Book.

2. If it is not practicable to serve a voiding notice the bailee will be informed of his release from the conditions of his bail, on his due date for surrender.

3. Any cash bail which has been deposited by a bailee must be returned against signature in Part C as described and it follows that, even though a bailee is being informed by a voiding notice that he is no longer to be held to the conditions of his bail, he will still be required to call at the Detention Centre for his cash bail to be refunded to him. In such cases, the voiding letter will contain the additional paragraph shown at Annex 9-19.

9-73 Failure to surrender to ICAC bail

1. It any person fails to attend at the offices of the Commission, or fails to attend before a magistrate in accordance with the conditions of his ICAC bail, a magistrate may order any sum of money deposited as bail with ICAC to be forfeited, or any recognizance entered into to be estreated, as provided for by Section 10A(5) of the ICAC Ordinance, Cap. 204.

9-74 Failing to appear before a magistrate when on ICAC bail

1. In the event of an accused who has been bailed by ICAC to appear at court failing to turn up at court, the prosecuting officer will inform the magistrate that the accused has failed to appear, and will explain the terms of his bail with ICAC. The prosecuting officer will make an immediate application for an adjournment to allow enquiries to be made as to the probable reasons for the non-appearance, if this is not already known, and when known will make a verbal application in court for the cash bail to be forfeited or the recognizance to be estreated.

9-75 Failing to attend Commission offices when on bail

1. In the event that a person who has been bailed out for enquiries fails to attend at the offices of the Commission as required, a case officer will initiate enquiries to determine the reason for the non-appearance and, where it becomes known to have been a deliberate and wilful non-appearance, will, with the approval of an officer of or above the rank of Group Head, prepare an application to a magistrate for a forfeiture of the cash bail, or estreatment of the recognizance, as appropriate.

2. A form HKM 251(S), specimen at Annex 9-20 or 9-21 as appropriate, will be made out as shown and taken to court to be laid before the magistrate, together with the necessary documentation which shows the bail and conditions, such as the original (white) bail form. The prosecuting officer will make his application in open court, being prepared to call a witness to the box if the magistrate requires evidence to be given.

3. All that any person is liable to for non-appearance at the offices of the Commission when on bail is forfeiture of any cash bail and

estreatment of any recognizance. No criminal offence is committed merely by the fact of failing to attend when on bail, and no arrest warrant will be sworn out unless there is evidence of a criminal offence on which to base the application for the warrant.

4. The forfeiture of the cash bail or estreatment of the recognizance is a discretionary power to be exercised by the magistrate on application being made under Section 10A(5) and prosecuting officers will be guided by whatever decision is made by the magistrate, after all the facts have been made known to him.

9-76 Action against sureties

1. Enforcement of a recognizance against a surety for a person who has failed to attend on his bail may have to be initiated, with the approval of a directorate officer, by obtaining a summons against the surety in the first instance to have him appear before a magistrate to show cause as to why his recognizance should not be estreated. Reference should be made to Sections 8(1) and 10(1) of the Magistrates Ordinance, Cap. 227, for the issue of this summons, and case officers will seek legal advice from Crown Counsel before taking action against a surety. A specimen information is at Annex 9-22. A specimen summons with Chinese translation is at Annex 9-23 and a specimen Certificate of Service with Chinese translation is at Annex 9-24.

9-77 Disposal of forfeited bail money

1. If the magistrate orders the bail money to be forfeited or the recognizance to be estreated, the original (white) bail form will be handed to the magistrate for signature in Section 2, Part A, of that form. The forfeited bail money will then be handed to the court shroff who will complete the remainder of Part A of the original (white) bail form. The court shroff will issue a receipt, which will be pasted to that form. The form and receipt will then be pasted to the relevant triplicate (blue) copy of the bail form in the Bail Book.

9-78 Court Bail Book

1. There is one Court Bail Book available for bailing detainees to court, identical except for the title on its cover to the Bail Book used for bailing detainees for further enquiries, and this will be completed by Detention Centre staff.

9-79 Forms required for bail to court in own recognizance

1. When a person is released in his own recognizance, with or without sureties, to appear before a magistrate the forms to be used are: -

(a) Bail Forms

The Bail Book forms will be made out in triplicate. The original (white) form will be held by J4 in his court bail form folder. The second copy of the form (yellow) will be handed to the bailee. The third copy of the form (blue) will remain in the Bail Book as a permanent record.

(b) Charge sheet

A charge sheet will be prepared, showing the ICAC reference (file number) and the date when the bailee is to appear at court. The charge sheet and the original (white) bail form will be taken to the court so that Section 2 may be completed by the court shroff and signed by the magistrate or the First Clerk. The amount of the recognizance, and the Bail Book folio number, will be entered on the charge sheet.

(c) Despatch Schedule G.F. 121

A form G.F. 121 (Despatch Schedule) will be completed in duplicate by Detention Centre staff listing on the forms the Bail Book folio number and ICAC reference number shown on the particular charge sheet. The Bail Register will not be completed in these circumstances, this being required only for cash bail. Receipt of the bail forms and charge sheet documents must be acknowledged by signature on the G.F. 121 when they are handed to the court, and after the hearing the original G.F. 121 will be returned to J4 for retention on file.

9-80 Forms required for bail to court when cash has been deposited

1. Forms to be used when a person is released on cash bail to court are: -

(a) Bail Forms)
)
(b) Charge Sheet) as for
) recognizance
(c) Despatch Schedule G.F. 121)

(d) Bail Register

The form in the Bail Register will be completed in triplicate by Detention Centre staff when a person is bailed to appear at a court and cash bail is involved. The Bail Register will record the details of all persons who

have been placed on cash bail to appear at a particular court on a specific date.

9-81 Procedures for despatch of bail money and documents to court

1. On the date of hearing, when bail money is being sent to court, J4 will ensure that the original and duplicate copies of the Bail Register are detached and handed to a nominated officer, together with the bail money, the original bail form (white) and original despatch schedule G.F. 121.

2. The officer nominated by J4 will check the bail cash and acknowledge receipt of the money by appending his signature in Column 3 of the triplicate copy of the Bail Register. He will also sign for the bail form (white) and the Bail Register forms, on the duplicate of the G.F. 121. The serial number of the G.F. 121, and date, will be recorded on all copies of the Bail Register in Column 2, beneath a double line to be drawn beneath the last entry made by the officer completing the form.

9-82 Cash Bail - procedure at court

1. The two copies of the Bail Register and the original Bail Form (white) and the cash bail will be handed to the court shroff on the date of hearing, but prior to the time the bailee is due to attend at court. The original G.F. 121 will be receipted by the court shroff when he receives the money, together with the bail form (white) and the two copies of the Bail Register. The court shroff will, in addition, issue a Court Receipt for the bail money (H.K. Govt. Misc. Receipt Try 44a until such time as a HKM 306 Receipt is brought into general use).

2. The signed Court Receipt for the bail cash, and the original G.F. 121 from the court shroff will be returned to J4 who will secure the Court Receipt to the third copy of the Bail Register and paste the original G.F. 121 back into the book of G.F. 121s with its duplicate.

3. At the conclusion of the case, the court shroff will complete Columns 3 - 7 of the Bail Register and retain the duplicate copy. The officer in charge of the case will obtain the original copy of the Bail Register from the court shroff who will cause the First Clerk to the Magistracy to endorse the document as follows: -

> *"I hereby certify that the above is a correct statement of fines paid to the court and balances refunded to the bailees. All unclaimed bail as stated above has been accounted for and kept in the Magistracy pending claim."*

The certified copy will then be returned to J4 and securely fixed to the triplicate in the Bail Register.

4. Section 2 of the bail form is divided into five sub-sections (A) to (E) which are completed at court when the form is being used for court bail. The court shroff is responsible for completing action, but an investigating officer should know exactly what happens and, if necessary, what to do in respect of bail terms at court in the circumstances outlined below: -

(a) When an accused fails to appear (Forfeited bail)

PART A will be completed if the prisoner fails to appear and the magistrate orders that the bail should be forfeited. The bail money will have already been handed to the Court Bail Shroff and a court forfeiture receipt obtained. The receipt number will be entered on the original Bail Form (white) and the receipt will be securely fastened to it.

(b) When an accused is committed to prison (Refund of bail on committal to prison)

PART B will be completed if the accused has been committed to prison. Any bail money put up by him in the possession of the Court Bail Shroff will be returned to him or to a person he has nominated to receive it. The Court Bail Shroff will arrange for the cash to be handed over against signature in PART B of the original Bail Form (white) and the second copy (yellow) will be recovered from the bailee.

(c) When an accused is discharged by the court (Refund - general)

PART B will be completed if the accused person is discharged by the court.

(i) The person will present his (yellow) second copy of the Bail Form to the Court Bail Shroff. The yellow copy will be attached to the original (white) and the bail cash refunded against signature on the original (white) copy.

(ii) If the person cannot produce his duplicate copy because he has mislaid it, he will be advised to make out a Statutory Declaration to the effect that the copy has been lost. Statutory Declarations may be sworn without the assistance of a solicitor at the office of the Commissioner for Oaths or at any C.D.O. To comply with the requirements of Judiciary and Audit Department, the Statutory Declaration must quote the ICAC Bail Form reference number, and the Director of Operations has agreed that the bailee concerned be provided with a certificate in memorandum form which, inter alia, will give the reference number. The memorandum will be prepared by the staff of the Detention Centre for the

signature of an officer of or above the rank of Group Head.

(iii) When claiming refund of the bail at court, the bailee will produce to the court shroff the memorandum issued by ICAC, the Statutory Declaration and his Identity Card (or any other documentary proof of his identity). The court shroff will then refund the bail money to the person on his acknowledging receipt at Part B of the original (white) copy of the Bail Form, to which the memorandum issued by the ICAC and the Statutory Declaration will be attached.

(d) <u>When an accused is fined (Bailee fined)</u>

<u>PART C</u> will be completed if the accused is fined. The fine may be: -

(i) equal to the bail;
(ii) less than the bail; or
(iii) more than the bail.

In whichever case the court shroff will issue a court fine receipt, handing the original of the receipt to the defendant. The defendant will hand over his yellow copy of the Bail Form to the court shroff. The court shroff will enter the court fine receipt number on the original (white) copy of the Bail Form. In the case of (ii), the court shroff will refund the balance of the bail to the defendant and obtain his signature in PART C of the original Bail Form (white). If the fine is more than the bail, the shroff will obtain the yellow copy of Bail Form together with the amount of fine money which is in excess of the original amount of bail money deposited by the defendant. The court shroff will then issue a Fine Receipt, equal to the amount of fine, to the defendant and complete the particulars in PART C.

If the defendant has insufficient cash to pay the fine, the magistrate is empowered under Section 101A of the Magistrates Ordinance, Cap. 227, to allow the defendant time to pay or issue a warrant for the arrest of the defendant should the fine remain unpaid. In such circumstances all administrative action is initiated by the court.

(e) <u>When an accused does not reclaim all bail money outstanding (Bail unclaimed, not guilty results, etc.)</u>

<u>PART D</u> will be completed in all cases where the bail money is unclaimed at the end of the court's business. Where the defendant is fined a sum of money equal to a proportion of his bail and neglects to claim the balance, the Court Bail Shroff will

complete and retain a Fine Receipt, the number of which will be entered on PART D of the original (white) Bail Form. He will then issue a Bail Receipt for the balance of the money to the officer in charge of the case, who will be responsible for returning the receipt to the defendant. In the event of the defendant being found "Not Guilty", the Court Bail Shroff will issue a receipt for the full amount of the bail to the officer in charge of the case who will be responsible for returning it to the defendant. When handing the Bail Receipt to the defendant the officer in charge of the case will advise him to collect the money from the Court Bail Shroff.

All unclaimed monies will be retained by the Court Bail Shroff.

(f) When an accused appears at court and is remanded on court bail (Extended bail)

PART E will be completed when the defendant appears at court, in accordance with the conditions of his bail, and the case is adjourned with the defendant being granted court bail by the magistrate. The defendant will hand his copy (yellow) to the court shroff who will issue him with a Court Bail Receipt which the defendant will surrender when eventual refund of bail is made.

9-83 Bail granted at court

1. Once a defendant appears before the court in custody, or on bail, the authority for the granting of bail is vested in the magistrate.

2. When it is necessary for a case to be remanded the prosecuting officer will inform the magistrate whether or not the ICAC is opposed to the granting of bail and, if bail is not granted, whether ICAC requests a remand in police, jail or ICAC custody.

3. Bail will normally only be opposed when: -

(a) the offence is serious; or

(b) the offender is likely to abscond; or

(c) the offender is likely to interfere with the course of justice;

and the approval of an officer of or above the rank of Group Head has been given to oppose bail, with advice from counsel if appropriate.

4. When there is no ICAC objection to bail being granted, the case prosecutor will so inform the court irrespective of whether the defendant applies for it or not.

5. The amount and conditions upon which bail is granted is a matter for the court, but the prosecutor will be prepared to advise the magistrate on conditions of bail, if requested to do so, and to suggest a suitable amount if asked.

9-84 Persons reporting to ICAC premises as conditions of bail

1. Defendants who are required as a condition of court imposed bail to report to ICAC at stated times, should be instructed to report to the 10th floor reception counter where they will be dealt with by J4 Section.

2. Where a court seeks advice as to the time convenient to ICAC for such reporting, the prosecutor should endeavour to have this fixed between 0800 and 1900 hours during which times the 10th floor reception counter is staffed. Where a court does not fix a specific time of day, case officers should instruct the defendants to report between the hours quoted. However, where the time is for some reason fixed outside these hours, and when defendants are to report at weekends etc., when the 10th floor reception counter is not staffed, defendants are to be advised to press the call button in the 10th floor lift lobby, following which Detention Centre staff will attend upon them immediately.

3. Officers in charge of cases, where persons are ordered by the courts to report to ICAC as a condition of bail, will immediately advise the J4 Guard Commander by completing a proforma (ICAC Form 469), as at Annex 9-25. The proforma makes provision for a photograph and the specimen signature of the defendant and, whenever possible, the case officer should supply these.

4. When reporting as required, defendants will sign the back of the proforma and the Guard Commander or Guard will countersign the entry. If a defendant fails to report at the required date and time the Guard Commander will inform the case officer concerned.

5. It is essential that case officers inform the J4 Guard Commander immediately the reporting conditions have been cancelled.

9-85 Surveillance by I.C.A.C. of persons on court bail

1. It is the duty of the prosecutor, appearing for the Crown in I.C.A.C. prosecutions, to draw the attention of the court to any evidence, information or circumstances which, in the opinion of the prosecution, would cause the court to remand an accused person in I.C.A.C. or jail custody, as opposed to granting him bail.

2. Should a court reject the opinion and recommendation of the prosecution and, despite such objections, grant bail to an accused person, there then is no legal responsibility placed upon officers of this

Commission to take steps to ensure his re-attendance at court or his behaviour other than the enforcement of any conditions which require I.C.A.C. action and which are placed upon the bailee by the court.

3. Should an investigator have reasonable grounds for believing that any condition on, or subject to which, such person was admitted to bail, has been or is likely to be broken, then the facts should be brought to the attention of the respective Assistant Director. If it is thought necessary a request can be made for that person to be arrested by the police, without warrant, and taken back before the court. The power to arrest without warrant is granted to a police officer for this purpose under the Criminal Procedure Ordinance, Cap. 221, Section 13B(1)(a), but is not granted to I.C.A.C. officers.

4. There is no general requirement for investigators to carry out surveillance of persons released by courts on bail despite objections; indeed, the Operations Department does not have the manpower to be able to do so. In the absence of any reasonable grounds for prior belief that a bailee plans to break the conditions of his bail, and should he abscond, no justified criticism or blame could be levelled at this Commission.

5. Therefore, once an accused person has been released on bail he will not be placed under surveillance unless the officer in charge of the case considers there are special circumstances requiring that the accused should be placed under surveillance, when he should report this to his Section and Group Head. The Group Head will, if he agrees, seek authorisation from his Assistant Director for surveillance to be carried out by his own staff or by 'H' Group personnel.

6. Such surveillance would be legally proper and need not be covert, though it may be. If overt, the surveillance must not amount to harassment - that is to say, there should be no verbal or physical contact with the bailee, nor may he be obstructed, or inconvenienced in any way, and the surveillance must be conducted at a reasonable distance.

Notice to Prisoners on Bail

INFORMATION

BAIL
NOTICE TO PRISONERS ON REMAND
OR
WAITING FOR TRIAL

保釋事項須知
申請
對還押或待訊囚犯
通告

P.D. 247 (11/73)

Notice to prisoners on remand or waiting for trial

BAIL

1. If the Magistrate who committed you to prison will allow you to be released on bail until you have to appear again in Magistrates' Court, you should ask your friends to go at once to the Magistrate and offer themselves as sureties or give such other security by deposit of money or otherwise as the Magistrate may have deemed necessary that you will appear in Court at the proper time. The police will tell them how to find the Magistrate. If the Magistrate allow your friends to become sureties for you, your friends will have to bind themselves in writing to pay a sum of money if you do not appear, and they will have to satisfy the Magistrate that they can pay it. If the Magistrate is satisfied he will send word to the Superintendent of Prisons. You will then have to give your undertaking to appear in Court at the proper time, and also, most likely, to pay a certain sum of money yourself if you do not. When this has been done, the Superintendent of Prisons will release you in compliance with an order issued by Court.

2. The court or a judge may at any time, on the application of any accused person whether he has been committed for trial or not, admit him to bail, and the recognizance of bail may, if the order so directs, be taken before any magistrate or justice of the peace or before the Commissioner of Prisons, the Deputy Commissioner of Prisons, or a Senior Superintendent or Superintendent of Prisons.

3. Appropriate forms of recognizance conditioned for appearance should be obtained from courts, and when completed in compliance with an order, immediately returned to the court, and the prisoner released, if held for no other cause.

4. Recognizance in respect of an appellant may be taken before the Commissioner of Prisons; when the procedure under Rule 25 will be followed.

5. If the Magistrates before whom you have appeared have refused to allow you bail, it is open to you to apply to a judge in Chambers at the Supreme Court for admission to bail. If you wish to make such an application you should do so through your own solicitor. If through lack of means, you are not able to employ a solicitor, you may make your application through the Registrar, Supreme Court, via the Prisons Authorities in a format for which you can obtain guidance from the Superintendent. You must clearly understand that unless you are really without means your proper course is to apply through your own solicitor.

6. You can have copies of this information on how to apply for bail sent to your friends if you so request.