PROBATION AND PAROLE:

INTERSTATE SUPERVISION AND ENFORCEMENT

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CHAPTER I

INTRODUCTION

While the extent to which probationers and parolees move from one Australian State to another during the continuance of the orders made against them cannot be estimated with accuracy, some figures are available concerning their interstate supervision. In South Australia, for example, 65 parolees and probationers were received for supervision from interstate in the last financial year (1973-1974), while 74 similarly placed South Australians were permitted to move interstate during the same period. More detailed figures concerning New South Wales, Queensland and Western Australia are set out in Tables A, B and C respectively.

TABLE A

Interstate Supervision: New South Wales

1. Supervision within New South Wales as at 31 December 1973

Type of Offender	Sending State or Territory						
	A.C.T.	Qld.	S.A.	Tas.	Vic.	W.A.	Total
Probationer	12	39	19	1	28	30	129
Parolee	3	8	3	1	21	21	57
Total	15	47	22	2	49	51	186

2. Supervision interstate of New South Wales' probationers and parolees as at 31 December 1973

Type of Offender	Receiving State or Territory						
	A.C.T.	Qld.	S.A.	Tas.	Vic.	W.A.	Total
Probationer	5	31	5	4	29	5	79
Parolee	1	18	6	1	17	18	61
Total	6	49	11	5	46	23	140

TABLE B

Interstate Supervision: Queensland*

1. Supervision within Queensland as at 30 November 1974

Type of Offender	Sending State or Territory							
	N.S.W.	Vic.	S.A.	W.A.	Tas.	A.C.T.	N.T.	Total
Probationer	59	18	7	8	2	1	0	95
Parolee	57	9	1	11	0	0	1	79
Total	116	27	8	19	2	1	1	174

* Queensland also has similar informal arrangements with New Zealand

2. Supervision interstate of Queensland probationers and parolees as at 30 November 1974*

Type of Offender	Receiving State or Territory							
	N.S.W.	Vic.	S.A.	W.A.	Tas.	A.C.T.	N.T.	Total
Probationer	68	27	4	8	0	3	2	112
Parolee	16	3	0	1	0	0	0	20
Total	84	30	4	9	0	3	2	132

* The figures do not include probationers or parolees who had absconded or were in prison interstate at 30 November 1974

TABLE C

Interstate Supervision: Western Australia

1. Supervision within Western Australia as at 30 June 1973

Type of Offender	Sending State or Territory							
	Vic.	N.S.W.	Qld.	S.A.	Tas.	N.T.	A.C.T.	Total
Probationer	11	7	6	2	0	0	1	27
Parolee	2	6	1	1	0	0	0	10
Total	13	13	7	3	0	0	1	37

Table C (contd.)

2. Supervision interstate of Western Australian probationers and parolees as at 30 June 1973.

Type of Offender	Receiving State or Territory							
	Vic.	N.S.W.	Qld.	S.A.	Tas.	N.T.	A.C.T.	Total
Probationer	31	22	15	22	2	5	2	99
Parolee	12	16	7	9	3	1	3	51
Total	43	38	22	31	5	6	5	150

Although these statistics are incomplete and not profitably comparable with one another, they do indicate that there is significant interstate movement of probationers and parolees within Australia. Probationers and parolees, like many others in the community, may have legitimate reasons for moving from one State to another, whether to seek reunion with their families, to obtain suitable employment, or to advance their interests in other appropriate ways. Movement of this type may, moreover, be clearly desirable from the point of view of penal policy. Reform or resocialisation of the offender is usually best sought within the context of a family group and adequate employment opportunities.[1] Nonetheless, there are factors which militate against the ready agreement of parole and probation authorities to requests for permission for transfer from one State to another. These factors are both legal and administrative in nature. They arise from the difficulties which exist in securing that the physical transfer of the probationer or parolee reduces neither the effectiveness of the supervision[2] nor the enforceability of the original order in the event of its violation.

Australia is not unique in this respect, similar problems having arisen in a number of other countries. In the United States, there exists a detailed set of interlocking State provisions[3] which establish a formal system for interstate supervision of probationers and parolees. In Europe, there exists a convention for the supervision of persons conditionally sentenced or conditionally released.[4]

In Canada, the Canadian Corrections Association has recommended that a system be established which would enable courts to transfer their jurisdiction over probationers to any court of equivalent jurisdiction elsewhere in Canada.[5] More recently, the Association has recommended that for parolees, there should be introduced a provision for the exchange of supervisory responsibilities between the provincial governments.[6] The question that arises is whether there is a need for Australian legislation to deal with the interstate movement of probationers and parolees or whether the present arrangements which, save in the case of Western Australia and Queensland, are quite informal and unbacked by legislative authority, are sufficient to ensure that neither supervision nor enforceability is prejudiced by interstate movement.[7]

FOOTNOTES

1. Penal policy similarly suggests that imprisonment of offenders should itself be located as close as possible to the offender's home and family. There is no present means of ensuring this within Australia. Cf. the European Convention on the International Validity of Criminal Judgements, (1970) *European Treaty Series* No.70. See also *Sentencing and Corrections*, First Report of the Criminal Law and Penal Methods Reform Committee of South Australia, 1973 at 101-2. See further *infra*, VI.

2. It is clear, for example, that personal supervision is preferable to supervision by letter. Present informal movements may well increase the incidence of attempts to supervise by letter, either from the sending, or within the receiving, State. There is certainly a high incidence of supervision by letter of interstate parolees and probationers from South Australia. Thirty-two of a total of 74 persons were supervised in this manner in the last financial year.

3. The Interstate Compact for the Supervision of Probationers and Parolees. See The Council of State Governments, *The Handbook on Interstate Crime Control* (Revised Edition, 1966)(hereinafter, *Handbook)*.

4. European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, *European Treaty Series*, No.51.

5. 'Proposals for Development of Probation', Official Statement of Policy of the Canadian Corrections Association (1967) 9 *Canadian Journal of Corrections*, 152 at 162.

6. 'The Parole System in Canada', Official Statement of Policy of the Canadian Corrections Association (1973) 15 *Canadian Journal of Corrections*, 144 at 148.

7. The South Australian Criminal Law and Penal Methods Reform Committee, *op. cit.*, at 139, saw 'no present need' for reciprocal legislation.

CHAPTER II

THE DISADVANTAGES OF INFORMAL ARRANGEMENTS

The basic defect in a system of informal arrangements is that in the absence of legislative provision within the receiving State there is no lawful authority for the supervision of the offender in that State nor, indeed, for the apprehension of one who there violates an order in a manner falling short of an offence against the receiving State's laws. And power is similarly lacking with respect to the variation or revocation of the relevant order by the authorities of the receiving State. The receiving State's officers are powerless in respect of the enforcement of the original order either because no offence against the laws of that State has been committed or because, although such an offence has been committed, the receiving State's authority only extends to that offence *qua* a breach of its own law. This defect might not be so critical were it not for the fact that considerable difficulty also attends the alternative mode of enforcement of the order. Only if there is specific controlling legislation are the sending State's officers entitled to apprehend or in some other way regain control over a violator in the receiving State.[1]

Controlling federal legislation is, however, to be found in the *Service and Execution of Process Act*, 1901-1968 (Cth), even though it makes no express mention of probation or parole. Part III of that Act is concerned with interstate arrangements concerning the execution of warrants and of writs of attachment. Until 1953, Part III was in rather restricted terms. The crucial section, section 18, provided procedures for the extradition from one State to another of any person who fell within a series of enumerated categories, none of which was appropriate to cover extradition from the receiving to the sending State of a person violating one of the conditions of an order for probation or parole made in the latter State. The most nearly appropriate categories were each limited to offences which had been committed within the extraditing State or part of the Commonwealth.[2] Only by the Commonwealth, the Tasmanian, the Western Australian and the Queensland legislation does a breach of an order constitute an offence *per se*,[3] and even these offences could hardly be said to have been committed within the extraditing State in cases where the actions in question occurred within the receiving State.

In 1953, however, Part III was amended and section 18 was replaced by a new section expressed in more general terms. The purpose of this alteration was clearly to widen the classes of case in which extradition was available.[4] The replacement section abandons reference to the earlier, limited, categories, prescribing procedures for extradition whenever a warrant has lawfully been issued 'for the apprehension of a person'. There seems little doubt that this provision is drawn widely enough to embrace the possibility of extraditing a probation or parole violator from the receiving State.[5] Certainly, the South Australian legislature has acted on this assumption in enacting section 42m (4), *Prisons Act*, 1936-1974. Until 1974, when this provision was first enacted, the *Service and Execution of Process Act* could not have been utilised for the recovery of an out-of-State violator owing to the fact that section 18 operates upon the lawful issue of a warrant by certain specified officers, not including members of a parole board, who

were by South Australian law, the only persons authorised to issue such a warrant. Under the recent amendment, a justice of the peace is empowered to issue such a warrant, thus rendering available the process of extradition contained in section 18 of the federal Act, when the offender is not within South Australia at the time of the issue of the warrant.[6]

While the recent South Australian legislation has not itself been the subject of judicial comment, the New South Wales Supreme Court (O'Brien J.)[7] has recently approved the use of Part III of the *Service and Execution of Process Act* to extradite to South Australia one Bissett who had been declared an habitual criminal in South Australia but had subsequently been released on licence on three separate occasions by the Governor of that State pursuant to section 323, *Criminal Law Consolidation Act* (S.A.), and had been recalled to imprisonment on each of the three occasions for breaches of the said licences. On the last occasion, his extradition was sought from New South Wales on his being released from gaol after serving a sentence for crimes committed in that State. The basis of the challenge made to the Court's power to authorise extradition lay in the fact that only a warrant of apprehension is mentioned in section 18, not a warrant of commitment as was suitable in *Bissett's* case, the licence to remain at large having been validly revoked by South Australian law. The Court's decision against Bissett's application was based on the fact that the term 'warrant of apprehension' covered, in the context of section 18, not only warrants to apprehend and return for trial, but also warrants to apprehend and return to gaol. Probation violations are, of course, dealt with by the courts, and an out-of-State violator will be subject to apprehension in the strict sense. But parole violators may either be brought before the parole board on a similar warrant, or summarily returned to gaol on a re-imposed sentence, a procedure strikingly similar to that involved in the case of habitual criminals. Despite the differences in the procedures which may be followed, *Bissett* is clear authority for the availability of section 18 for the recovery of out-of-State violators, even though the violations which formed the basis for the revocation of the licence in that case had apparently occurred within South Australia itself.

Provided that extradition is available as a means of recovery of an out-of-State violator of the sending State's order, the problem of enforcement may seem to be a relatively minor one. But certain considerations should be borne in mind. First, there are many who believe that where an individual belongs to, or has better chances of rehabilitation in, one society rather than another, then, as a matter of general penal policy, his transgressions should be dealt with in the context of the former rather than the latter social group. Secondly, a system whose enforcement is dependent on extradition will inevitably tend to produce inequality of treatment between in-State and out-of-State violators. The point is well made in the Official Statement of Policy of the Canadian Corrections Association, 1967:[8]

> 'The cost of the return of a violating probationer to the court may be considerable, especially when he has been transferred to another province. The cost may be so great that it, rather than the nature of his subsequent violation, tends to be the criterion upon which breach proceedings are instituted or not.
>
> This results in certain inequity because a probationer, who stays within the jurisdiction of the originating court and subsequently violates his recognisance, is liable to punishment, whereas a transferred probationer may escape facing the consequences of his broken promise to the court for economic reasons.'[9]

It is hardly surprising that only in the most extreme circumstances is use made of the extradition process for this purpose in Australia, and that one of the most important reasons is the great cost involved by the sending State in enforcing its orders in this way.[10]

A further consideration is that while the cost factor will generally favour the out-of-State violator, other circumstances may, on the contrary, prejudice him. In the case of a probationer or parolee who is in breach of his order but who has not moved interstate, the court may have discretion in relation to two separate matters. First, it may have a discretion whether or not to impose imprisonment in respect of the breach; secondly, in the event of imprisonment being imposed, it will have a discretion whether or not its order that the term for the breach runs concurrently with any other term which is imposed in respect of the later offence. If, however, the violator has moved interstate, the court in the receiving State will only have jurisdiction to deal with the later offence. It may impose a term of imprisonment in respect of that offence but has no power to deal either concurrently or cumulatively with the breach of the original order as such. If the violator subsequently returns, whether voluntarily or not, to the sending State, that State may institute (or may already have instituted) breach proceedings, and may see fit, or be obliged, to impose a term of imprisonment. Such a term cannot be made to run concurrently with that imposed by the receiving State, although the sending State may well take into account the fact that a term of imprisonment has already been served in the receiving State. Even so it may well feel that an entirely nominal penalty will do nothing but reduce its authority and encourage further disregard of its orders.

FOOTNOTES

1. *Cf.* the *Uniform Act on Interstate Fresh Pursuit*, enacted by the great majority of American States since 1936. *Handbook*, at 119 ff. The text (and, indeed, the *Service and Execution of Process Act* itself), assumes that there is authorisation in the original State for the issue of a warrant. In some cases, State laws allow, for example, cancellation of parole without a specific breach of the conditions of the order having been committed. Where, however, a breach is required, there may be doubt whether an offence against the laws of another jurisdiction constitutes a breach of condition that the offender not, subsequent to his release, commit a criminal offence. Where the condition is expressed, rather, in terms of good behaviour, this difficulty probably does not arise. Cf. *Bennett* v. *State of Texas* 476 S.W. 2d 281 (1972).

2. Section 18(1) (a) and (b).

3. See *infra*.

4. In its earlier form, the circumstances in which a warrant might be issued and executed outside the State or Territory of issue were specifically enumerated. No warrant issued in cases where the circumstances were not specified might be executed under the Act. It was considered desirable that the section should be recast in more general terms to enable any warrant to be executed in another State or Territory. See Harrison, Second Reading Speech, Service and Execution of Process Bill, 1953, [1953] *Parliamentary Debates (Commonwealth)* 2 Eliz. II., H.R. I, 1161.

5. Neither of the disqualifications derived from the prior legislation has been continued in the new section; see *supra*.

6. For the purposes to be served by the amendment, see [1974] *South Australian Parliamentary Debates* at 2566, 2662.

7. *Bissett* v. *Giles* (unreported, 23rd October, 1972).

8. See *infra*.

9. (1967) 9 *Canadian Journal of Corrections* 152 at 163.

10. *Id.* at 163. See also *Handbook* at 8, discussing the use of the Out-of-State Incarceration Amendment, and administrative cooperation return agreements as a means of eliminating or reducing transportation costs. The authors note that '... violators (particularly those who have only a few months left to serve) are sometimes permitted to remain on supervision because their states can only afford to retake the most serious cases.' (*Ibid*).

CHAPTER III

THE TYPES OF FORMAL ARRANGEMENTS

1. Western Australia and Queensland

The legislation providing for formal arrangements is substantially the same in Queensland and in Western Australia. The provisions are not limited to reciprocal assistance between Queensland and Western Australia, but operate upon the presence within the enacting State of a probationer or parolee with the consent of the original State.[1]

(1) Probationers

A probation order made in another State or Territory under which the probationer is required or permitted to reside in the enacting State has the same force and effect as if it had been made in Western Australia or Queensland.[2] In such a case, the receiving State is bound to remit to the sending State periodical reports concerning the probationer.[3] In both States it is an offence to fail to comply with any of the requirements of such a probation order, whether they be express or implied.[4] If the conviction for such an offence is by a court of summary jurisdiction, the court may, without prejudice to the continuation of the order, impose a fine not exceeding $100. If the original order was made by a court of similar jurisdiction in the sending State, the court in the receiving State may order that the probationer be returned to the sending State or Territory[5] or, if it appears to the court in the receiving State that the appropriate authority in the sending State does not require his return, it may deal with the probationer as if the act or omission constituting the original offence had taken place within the receiving State itself. However, the penalty imposed in such a circumstance may not exceed the maximum prescribed for the offence in the sending State.[6] If the original order in the sending State was not made by a court of similar jurisdiction, the court of summary jurisdiction in the receiving State must commit the probationer to custody or release him on bail to be brought before a court of similar jurisdiction.[7]

Separate but similar provisions apply if the probationer is convicted of an offence other than one of failing to comply with the requirements of the order. The probationer may be returned to the sending State forthwith, or before or at the expiration of any term of imprisonment which may be imposed upon him.[8] There is also provision for a court to deal with the probationer as if the original order had been made in the receiving State.[9] However, the penalty must not exceed the maximum that could have been imposed by the sending State and the power may only be exercised if the court believes the appropriate authority in the sending State does not require the return of the probationer.[10] In 1974, the relevant subsection in the Queensland Act was amended to give courts in that State, following the probationer's conviction, the option to fine him without prejudice to the continuation of the order.[11]

Provisions also exist for the discharge[12] and amendment[13] and out-of-State probation orders. Application must be made to a court in the receiving State which has similar jurisdiction to the court which originally made the

order. The applicant may be the probation officer in the receiving State who has been assigned to the case or, alternatively, the probationer himself. Before the court makes the order, it must have given 'due consideration' to any report made by the appropriate authority in the sending State and, once the order is made, notice must be given to that State. There are, nonetheless, certain restrictions on the power of the court in the receiving State to amend such a probation order. It may not amend the order to reduce the probation period below the minimum, nor extend it to exceed the maximum permissible in the sending State. Further, the court may not, without the consent of the probationer, require him to reside in an institution nor to remove to another State or Territory.

(2) Parolees

In substance, the provisions which relate to parolees are similar to those concerning probationers. There is the same basic provision that a parole order under which the parolee is required or permitted to reside in the enacting State shall have the same force and effect in the receiving State as if it had been made in that State, subject only to such modifications as the circumstances require.[14] As with probation, reports of the parolee must be made by the appropriate authority in the receiving State and conveyed to a similar authority in the sending State.

As with probationers, a parolee who fails to comply with the express or implied terms of an order is guilty of an offence.[15] On finding that such an offence has been committed, a court of summary jurisdiction may, without prejudice to the continuation of the order, fine the parolee a sum not exceeding $100 or imprison him for a term not exceeding three months.[16] Where a parolee is convicted of an offence committed during the parole period other than the mere failure to comply with the terms of his order, and is sentenced to imprisonment for that offence, or where his parole is cancelled in the sending State, his parole is automatically cancelled in the receiving State.[17] This provision applies even if, in the meantime, the parole period has expired. Once parole has been cancelled, the options available to the parole board in the receiving State are similar to those available to a court in the receiving State following a probationer's conviction. The board may order that the parolee be returned to the sending State forthwith, or before, or at the expiration of, the term of imprisonment imposed on him for the new offence.

If it appears to the board that the sending State does not require the return of the parolee then it may issue a warrant for his apprehension and commitment to a prison or institution in the receiving State to serve the unexpired term of his sentence; if he was previously detained during Her Majesty's pleasure, he must be so detained again. Even in a case where no offence has been committed, the parole board in the receiving State may, at any time before the expiration of the parole period, after 'due consideration' of any report from the Chief or Principal Parole Officer in the sending State, cancel, suspend, amend or vary the parole order.[18] Probably the most remarkable aspect of the operation of the Queensland and Western Australian legislation is that it is so rarely applied. As at 15 February 1974, there had been only one instance in which a Western Australian court had dealt with a Queensland probationer and there was no case in which similar action against a Western Australian had been undertaken in Queensland.[19] It seems in some quarters to be assumed that the legislation is only in force in relation to reciprocal movements between Queensland and Western Australia. That is patently not the case, for the legislative

provisions in each State operate upon the presence within those States of probationers and parolees who are required or permitted to be there by the terms of their orders. Their operation is not dependent upon the existence of reciprocal legislation in other States.

2. The United States

By the 1930s it had become clear that the volume of movement of probationers and parolees across State borders demanded the introduction of formal and enforceable agreements at least between some States.[20] In 1934, Congress enacted the *Crime Control Consent Act* (Title 4, U.S.C. 111) which granted the consent of Congress to any two or more States entering into agreements or contracts for mutual assistance in crime prevention.[21] Soon after that date, eight States had entered into agreements with at least one other State. This development gave impetus to the Interstate Commission on Crime which drafted the Interstate Compact for the Supervision of Parolees and Probationers and a *Uniform Enabling Act*. The Commission recommended that all States should enact the legislation and execute the Compact. By 1951, all 48 States were members. Subsequently, the new States of Alaska and Hawaii joined. The Compact was also ratified by the Virgin Islands and Puerto Rico.[22]

The Compact constitutes a legally binding agreement by which the parties to it act as agents for each other in the supervision of probationers and parolees. The sending State may permit a probationer or parolee to reside in the receiving State if he is a resident of, or has family in, the receiving State and can find employment there.[23] The probationer or parolee who does not satisfy these conditions may, nonetheless, be permitted to move to the receiving State if that State itself consents to his presence. It is specifically set out in the Act that the receiving State shall be given the chance of investigating the home and employment opportunities of the offender before it grants its consent to his transfer.

Once the offender has moved, the receiving State must assume the duties of supervision and in doing so, it must apply the same standards which it uses for its own offenders. Whether or not violation of the original order has occurred, accredited officers of the sending State may themselves apprehend and retake the offender in the receiving State. The purpose of this provision is clearly to avoid the necessity of cumbersome and costly extradition proceedings and the decision of the sending State is final, not being subject to review in the receiving State. The only restriction on the power of the sending State is where criminal proceedings in the receiving State are pending in which case the offender cannot be retaken without the consent of the receiving State.

One of the important alterations to the Interstate Compact is the Out-of-State Incarceration Amendment[24] which is designed to permit offenders to be incarcerated for breach in the receiving State. To implement the scheme, every State which has adopted the Amendment must designate at least one of its institutions as a 'Compact Institution' and shall incarcerate interstate offenders there at the request of the constituted authorities of the sending State unless specific contractual arrangements are made to the contrary between the sending and receiving States. Persons confined in compact institutions are at all times subject to the jurisdiction of the sending State and may at any time be transferred to a prison or correctional institution in the sending State for return to probation or parole, for

discharge, or for any other purpose permitted by the laws of the sending State.

There is a specific provision in the Amendment which provides that the fact of incarceration in the receiving State shall not deprive the individual of any rights to which he would have been entitled if incarceration had taken place in the sending State. Also, no agreement to submit to incarceration in the receiving State shall be construed as waiver of any rights which the prisoner would have had if he had returned to the sending State. However, the hearing (if any) to which the offender may be entitled before incarceration by the laws of the sending State may take place before the appropriate judicial or administrative authorities in the receiving State. If such a hearing occurs the judicial or administrative officers of the latter State shall, after consultation with appropriate officers in the sending State, act as agents of that State.[25]

3. Europe

In 1964, the European Agreement on the Supervision of Conditionally Sentenced or Conditionally Released Offenders[26] was opened for signature. One of the basic purposes of the Convention was to enable contracting parties to grant each other the mutual assistance necessary for the social rehabilitation of offenders, and in certain circumstances to enforce orders against them.[27] The Convention applies, as the title indicates, to those who have been found guilty and have been placed on probation, as also to those upon whom a sentence involving deprivation of liberty has been wholly or partly conditionally suspended.[28] The offence involved must be one which is punishable both under the legislation of the sending and receiving States[29] (described in the Convention as the 'requesting' and 'requested' States).

A request for cooperation may be made between contracting States if the offender has been dealt with for an offence in one State and 'establishes his normal residence' in another.[30] The request may be merely for supervision of the offender, or for supervision and enforcement, or for the assumption of entire responsibility for the application of the sentence.[31] There are only limited circumstances in which the requested State may refuse to accede to a request. Some circumstances give rise to mandatory refusal. In other cases the requested State has a discretion to refuse. The circumstances which give rise to mandatory refusal include situations in which the requested State considers the request may prejudice its sovereignty or the fundamental principles of its legal system. Refusal is also mandatory if the offence is regarded by the requested State as political[32] or purely military, or if the offender has been granted an amnesty or a pardon in either the requesting or requested State.[33] Refusal is discretionary, on the other hand, in a variety of circumstances including cases in which the requested State deems the sentence incompatible with principles governing the application of its own penal law as, for example, where the offender could not have been dealt with in the requested State because of his age.[34]

If the requested State deems that the particular request is less appropriate than one of the others which might have been made, it may refuse to accede to the particular request but indicate its willingness to follow another course.[35] Whether the refusal is total or partial, the requested State must communicate its reasons for refusal without delay.[36] Once the requested State has acceded to the request, different provisions of the Convention

apply depending upon whether the request is for supervision only, for supervision and enforcement, or for complete assumption of responsibility.

If the request is for supervision only, the requesting State must inform the requested State of the conditions imposed on the offender and of any supervisory measures with which he must comply.[37] In complying with the request, the requested State must, to the extent necessary, adapt the prescribed supervisory measures to correspond with its own law. However, in no case may the supervisory measures be more severe, either in nature or duration, than those prescribed by the requesting State.[38] If the offender becomes liable to revocation of conditional suspension, either because he has been prosecuted or sentenced for a new offence or because he has failed to observe the prescribed conditions, the requesting State must be informed immediately.[39] On the information supplied, the requesting State alone may take any further steps provided by its own legislation.[40]

If the request includes enforcement, on the other hand, the requested State is competent to enforce the sentence.[41] If necessary, the requested State may substitute the penalty provided by its own legislation for the particular offence but the substituted penalty must correspond as closely as possible with the sentence to be enforced. In any event, the substituted penalty must not exceed the maximum provided in the legislation of the requesting State nor may it be longer or more rigorous than it could be in that State.[42] The requesting State may not take any enforcement measures which fall within the scope of the request unless the requested State indicates that it is unable or unwilling to do so.[43] Once enforcement measures have been taken in the requested State, that State alone may grant the offender conditional release although, somewhat anomalously, either the requesting or the requested State may grant the offender pardon.[44]

Predictably, no rights remain in the requesting State to enforce the sentence if the request has been for complete assumption of responsibility for the offender.[45] The requested State must adapt to its own penal legislation the penalty prescribed as if the sentence had been passed and the offence committed within its own territory. The only limitation on the adaptation by the requested State is that the measure may not be more severe than that pronounced in the requesting State.[46]

4. Australian Federal Offenders

Although the provisions of the *Commonwealth Prisoners Act* 1967 arise from the fact that there are no federal prisons in Australia rather than from the existence of formal arrangements between neighbouring States or countries, those provisions remain pertinent to the present discussion. Section 8(3) applies where a federal parolee is arrested in a State or Territory other than the one in which he was imprisoned before his grant of parole and the prescribed authority before whom he is brought is either satisfied that the parole order has been revoked or itself cancels the order. Section 15(3) applies where a federal parolee is sentenced to imprisonment in a State or Territory other than the one in which he was imprisoned before he was granted parole for an offence committed during the parole period, and where, in consequence, the order is deemed to have been revoked.

By section 8(3) the prescribed authority must, if so requested by the Attorney-General, issue a warrant authorising the imprisonment of the parolee in the State or Territory in which he was arrested rather than the one in

which he was previously detained. By section 15(3) the prescribed authority in the State or Territory in which the parolee has been sentenced to further imprisonment must, if so requested by the Attorney-General, issue a warrant authorising the completion by the parolee of the unserved part of the original sentence in the State or Territory in which he was detained before his release on parole.

5. Some Comparisons

Even since the introduction of the Out-of-State Incarceration Amendment, the United States Compact, like the Queensland and Western Australian systems, ensures the retention of significant authority by the sending State. By contrast, the European Convention is more flexible. While the authority of the requested State may be limited to mere supervision, greater power may be conferred upon it by an appropriate request. In the case of complete assumption of responsibility by the requested State, the latter must use its own penal legislation and the sole restriction on its authority is that the penalty must not be more severe than that provided by the law of the requesting State.

If the request made under the European Convention has been for supervision only, the powers retained by the requesting State are not dissimilar from those necessarily retained by the sending State in Australia or in the United States. In Europe, the requesting State must be informed if there is any breach of the conditions imposed upon the offender, and, on the basis of such information alone, the requesting State may take further steps provided by its legislation. In Australia, also, there is an obligation on the receiving State to keep the sending State generally informed and in the event of breach of the conditions of the order, the right of the receiving State to deal with the breach is severely limited unless it is satisfied that the sending State does not require the return of the violator.

Although the European Convention is more flexible than the other systems in that the distribution of authority between the requesting and the requested States may vary from case to case, the European Convention tends to be more restrictive in other respects. It apparently does not apply to those who have been sentenced and then placed upon probation, the offence must be one which is punishable in both States and a request may only be made if the offender 'establishes ordinary residence' in another State. Furthermore, there are wide-ranging circumstances in which the requested State may refuse to cooperate with the requesting State. It may be that these qualifications on the applicability of the European Convention flow predictably from the fact that the treaty exists between different countries with disparate laws and customs rather than between the more homogeneous States of a federation like Australia. Nonetheless, the limitations are substantial and may tend to frustrate opportunities for rehabilitation of many offenders, including those who, while not satisfying the 'ordinary residence' criterion, wish to avail themselves of superior employment opportunities elsewhere.

The United States Compact offers a wider range of circumstances in which a probationer or parolee may be allowed to move. Permission may be given unilaterally by the sending State if the offender is a resident of, or has family in, the receiving State and can find employment there. Even if he does not satisfy these requirements he may still move if the consent of the receiving State is obtained. A most surprising feature of the United States scheme is that regardless of whether a violation of the original order has

occurred, the accredited officer of the sending State may apprehend and retake the offender from within the receiving State itself. This provision is designed to avoid the formality and cost of ordinary extradition proceedings. The need for ease of retaking offenders arises, of course, from the basic assumption behind the Compact, that it is for the sending State to exercise ultimate control over interstate offenders, the role of the receiving State being limited to the provision of supervision and information and, in the case of breach, imprisonment of the violator, but only at the specific request of the sending State itself.

FOOTNOTES

1. The legislation may also operate, in some cases, upon probationers present in the enacting State without the consent of the original State. No such provision exists with respect to parolees. See *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50F(2); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36F(2).

2. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50B; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36B.

3. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50C; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36C.

4. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50G; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36G.

5. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50H(1); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36H(1).

6. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50H(4) and (5); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36H(4) and (5).

7. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50G(4)(c); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36G(3)(c).

8. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50K(1)(a); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36K(1).

9. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50K(4).

10. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50K(5); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36K(5).

11. *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36K(4).

12. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50E; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36E.

13. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50F; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36F.

14. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50N; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36N.

15. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50R; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36Q.

16. The power to deal with the parolee does not exist, however, in the receiving State if he has been dealt with in another State or Territory for the breach (*Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50R(7); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36Q(6)).

17. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50Q(6); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36P(6).

18. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 50Q; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 36P.

19. *Per* letter from the Chief Probation and Parole Officer.

20. *Handbook* at 1.

21. For the constitutional implications, see *Handbook*, at 20.

22. The terms of the *Uniform Enabling Act* are set out fully in *Appendix A*.

23. A resident is defined in the *Uniform Enabling Act* as 'an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceeding the commission of the offence for which he has been convicted'. Section 1(1)(b).

24. The terms of the Amendment are set out in *Appendix B*.

25. Although the term 'receiving State' is used in the Amendment, it is given a wide definition and extends to any State other than the sending State in which the probationer or parolee may be found, provided that State is a party to the Amendment. The broad definition is apparently intended to be particularly useful for dealing with offenders who have left the State in which they were under supervision (*Handbook* at 34).

26. *European Treaty Series*, No. 51. The English translation is set out as *Appendix C*.

27. Article 1.

28. Article 2.

29. Article 4.

30. Article 5.

31. *Ibid*.

32. *Cf*. the common exception to extradition. See, e.g., Shearer, *Extradition* (1972) at 166ff.

33. Article 7(1).

34. Article 7(2).

35. Article 5(3).

36. Article 9.

37. Article 10.

38. Article 11.

39. Article 13.

40. Article 15.

41. Article 16.

42. Article 19.

43. Article 20.

44. Article 21.

45. Article 25.

46. Article 23.

CHAPTER IV

FORMAL COOPERATION: SOME PROBLEMS

One difficulty facing the introduction of formal interstate supervision and enforcement arises from the fact that the numbers of probation officers or persons acting in that capacity are not evenly distributed throughout Australia. There is little information readily available concerning case loads carried by probation and parole officers in Australia,[1] but there can be little doubt that these already exceed the desirable limits in most cases. One result of this inadequacy in the available services is that some States are obliged to supervise offenders by correspondence in a number of cases. One State might well be reluctant to enter formal arrangements for supervision if it believed that the supervisory services of the receiving State were inferior to its own. Similarly, a more populous receiving State with ample employment opportunities might well be concerned at the risk of becoming a target for interstate supervision, when its probation manpower resources are already overstrained. It must also be remembered that the parolling authorities vary from State to State, some possessing parole boards, others still using direct governmental or bureaucratic control in these matters,[2] and that, for this and other reasons, disparities in attitudes towards supervision and enforcement particularly in the case of relatively minor violations of supervisory orders, will exist as between the various States and Territories.

Furthermore, differences in the substantive laws of the relevant jurisdictions create problems for formal interstate supervision and enforcement. It is doubtful if any problem is caused by differences in the technical limits of substantive offences. It should matter little to South Australia, for example, that a probationer or parolee whom it receives has been found guilty of an offence under the *Crimes (Theft) Act*, 1973, in Victoria on facts which may not constitute the same, or, indeed, any, offence in South Australia. Nor should the Australian Capital Territory, (*qua* receiving Territory) be concerned by the fact that the offender has been convicted of obtaining credit by false pretences in circumstances which would not have constituted the analogous, more limited, offence in the Australian Capital Territory.[3] But it might matter a great deal to South Australia if the offender has been found guilty in Victoria of homosexual offences or ones relating to abortion which are no longer punishable in the receiving State.[4]

But the most important differences between the laws of the various States and Territories are the very considerable ones concerned with supervision and enforcement themselves. Differences in the existence of the power to place offenders on probation[5] may not be crucial in this context, but ones relating to the extent of that power are certainly not without significance. In some States, for example, probation is effectively limited to a maximum of three years,[6] while in another it may range between one and five years.[7] In only two States may a probationer or a probation officer apply for an order to be discharged before the expiration of the term set by the court.[8] More important, again, is the result prescribed by the law for breach of a probation order. In two States, it is an offence to fail to comply with the requirements of a probation order[9] and a federal offender also commits an offence if he is in breach of conditions of an order which has been made

following conviction.[10] If an offender does fail to comply with the conditions of a probation order the general position throughout Australia is that there is a discretion in the court to determine the penalty. Exceptionally, however, a federal offender who has been convicted before being placed on probation and is subsequently in breach of the conditions of his order is liable to a fixed penalty of imprisonment 'for the period provided by law in respect of the offence of which he was previously convicted'.[11]

In the case of parole, too, there are variations which are far from insubstantial. The receiving State might be concerned, for example, if a parolee has been released in the sending State much earlier than would have been possible in the receiving State. In each jurisdiction in Australia the parolling authority has wide discretion as to the date on which offenders are released although in some States, subject to minor exceptions, the discretion only arises if the sentencing court has set, or is deemed to have set, a non-parole period or a minimum term, and that period has expired.[12] Exceptionally, in South Australia the Parole Board may release an offender at any time unless a non-parole period has been set, in which case that period must have expired before the Board may release him.[13] Again, problems might arise from disparity in the powers to cancel, or vary the terms of, the parole order, although the differences in this respect are less wide-ranging than in some others. Each parolling authority has wide discretion as to the variation and cancellation of the terms of a parole order although the details are not identical. Power exists to vary the terms before, as well as after, release from imprisonment or detention. Failure to comply with the terms of a parole order is an offence in three States[14] and in most cases a parolee who is sentenced to imprisonment for an offence committed during the parole period will automatically have his parole order cancelled. However, the Victorian provision only relates to parolees who are sentenced for more than three months for the new offence.[15]

FOOTNOTES

1. The only clear and recent information comes from Victoria. In the 1973 Annual Report of the Department of Social Welfare, it is stated at 46 that a case load of 80 has been introduced.

2. All States except Tasmania have parole boards. The Northern Territory has the legislative machinery for the establishment of a board but as yet it has not been set up. In the Australian Capital Territory, the parolling authority is the Governor-General and he acts in the same capacity in respect of federal offenders and at present in respect of offenders from the Northern Territory. The State Governor is the parolling authority for Tasmania. Even where parole boards exist, they vary in constitution although in practice a judge or a retired judge is the chairman of each. *Prisons Act*, 1936-1974 (S.A.), section 42A; *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 21(2); *Parole of Prisoners Act*, 1966-1970 (N.S.W.), section 3(2); *Social Welfare Act*, 1970-1973 (Vic.), sections 156 and 178; *Offenders Probation and Parole Act*, 1951-1974 (Qld.), section 20; *Parole of Prisoners Ordinance*, 1974 (N.T.), section 3B. Victoria has a special youth parole board which deals exclusively with the cases of young people under the age of 21 who have been detained in a youth detention centre. (See *Social Welfare Act*, 1970-1973 (Vic.), Part VII Division 3.) Presumably the youth parole board has built up some special expertise in dealing with such cases.

3. *Canberra Times*, 11 October 1974.

4. *Criminal Law Consolidation Act Amendment Act*, 1969 (S.A.); *Criminal Law Consolidation Ordinance (No.2)*, 1973 (N.T.).

5. In some States and in the Australian Capital Territory and the Northern Territory, for example, courts of summary jurisdiction have power to place an offender on probation without proceeding to conviction. (*Offenders Probation Act*, 1913-1971 (S.A.), section 4(1); *Probation of Offenders Act*, 1973 (Tas.), section 7(1); *Crimes Act*, 1900 of the State of New South Wales, as amended to apply to the Australian Capital Territory, section 556A; *Criminal Law (Conditional Release of Offenders) Ordinance*, 1971 (N.T.), section 4(1). In New South Wales, all courts have such power. (*Crimes Act*, 1900-1974 (N.S.W.), section 556A.) In some other States courts must proceed to conviction but may use a probation order instead of sentencing the offender. (*Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 9; *Crimes Act*, 1958-1973 (Vic.), section 508; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 8.) Probation, in some jurisdictions, is a condition of a recognisance, (*Offenders Probation and Parole Act*, 1913-1971 (S.A.), section 5; *Crimes Act*, 1900-1974 (N.S.W.), section 556A; *Criminal Law (Conditional Release of Offenders) Ordinance*, 1971 (N.T.), section 4); in others orders can be made independently. Most States have legislative requirements that the probation order must be explained to the offender in terms he is likely to understand (*Offenders Probation Act*, 1913-1971 (S.A.), section 5(2); *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 9(8); *Crimes Act*, 1958-1973 (Vic.), section 508(5); *Probation of Offenders Act*, 1973 (Tas.), section 7(6); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 8(6)) but in three States, the order only operates if he has expressed his willingness to comply (*Offenders Probation and Parole Act*, 1963-1971

(W.A.), section 9(8); *Crimes Act*, 1958-1973 (Vic.), section 508(5); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 8(6)). Three States provide expressly that the Court may require the offender to live in an institution as a condition of a probation order (*Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 9(6); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 8(5); *Crimes Act*, 1958-1973 (Vic.), section 508(4)).

6. *Offenders Probation Act*, 1913-1971 (S.A.), section 4(2c); *Crimes Act*, 1900-1974 (N.S.W.), section 556A; *Probation of Offenders Act*, 1973 (Tas.), section 6(3).

7. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 9.

8. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 12; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 11.

9. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 16(1); *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 15(1).

10. *Crimes Act*, 1914-1973 (Cth.), section 20(2).

11. *Crimes Act*, 1914-1973 (Cth.), section 20(2).

12. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 41(1)(a); *Parole of Prisoners Act*, 1966-1970 (N.S.W.), section 6; *Social Welfare Act*, 1970-1973 (Vic.), section 195(1).

13. *Prisons Act*, 1936-1974 (S.A.), section 42K (7).

14. *Offenders Probation and Parole Act*, 1963-1971 (W.A.), section 41A; *Prisons Act*, 1908 (Tas.), section 15; *Offenders Probation and Parole Act*, 1959-1974 (Qld.), section 32A.

15. *Crimes Act*, 1958-1973 (Vic.), section 197(2).

CHAPTER V

CONSTITUTIONAL MATTERS

1. The Commonwealth

There is no apparent means whereby the Commonwealth may legislate over the whole field of probation and parole presently controlled by the various States and Territories. The latter, of course, are subject to Commonwealth control, and the Commonwealth could also legislate in this field for all those charged with, or convicted of, federal offences. The *Crimes Act*, 1914-1973, and the *Commonwealth Prisoners Act*, 1967, already make provision with respect to probation and parole[1] although some conditions of the incarceration of federal prisoners are those applicable to State offenders in the State or Territory where a given federal prisoner is held.[2] This method of dealing with federal offenders involves substantial anomalies. The conditions applicable to equivalent offenders against the one federal provision will vary to some extent from State to State, but this anomaly could only be avoided at the cost of aggravating the other anomaly whereunder separate sets of provisions may be applied to different prisoners in the one institution.[3]

Despite its lack of power over the general fields of probation and parole in Australia, there seems little doubt that the Commonwealth might validly legislate to control their interstate aspects. Under section 51(XXIV) of the *Constitution*, the Commonwealth has power to make laws with respect to

> '[t]he service and execution throughout the Commonwealth of the civil and criminal process and the judgements of the courts of the States.',

while section 51(XXV) grants power with respect to

> '[t]he recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.'

The former power has already been exercised in Part III of the *Service and Execution of Process Act* in such a way as to permit the extradition of an out-of-State violator.[4] It might similarly be used to authorise legislation looking to the out-of-State enforcement of probation and parole orders, since these probably form part of the 'criminal process' and derive mediately or immediately from the 'judicial proceedings'.[5]

Arguably, it would be competent for the Commonwealth to require of States and Territories that they supervise interstate parolees or probationers in accordance with the terms and conditions of the original order, subject to such modifications as might be necessitated by the interstate nature of the task. Whether the Commonwealth might go further and decree that the receiving State supervise offenders on the basis of the general law of that place relating to in-State probationers and parolees might seem rather more problematical since it involves not so much the out-of-State execution of the criminal process of the sending State (with respect to which the

Commonwealth clearly does have power), as the in-State execution of the criminal and penal laws of the receiving State (with respect to which the Commonwealth's power is far from immediately apparent). Even so, it is not impossible that an attempt by the Commonwealth to legislate in this manner might be justified by reference to the 'incidental power' in section 51 (XXXIX), a power with respect to 'matters incidental to the execution of any power vested by this *Constitution* in the Parliament or in the Federal Judicature'. The execution of criminal 'process' (including supervisory orders) is within the Parliament's power under section 51 (XXIV) and the determination of the State wherein supervision and, in the event of violation, punishment, is to occur is a matter 'incidental' to the execution of that power, as also is the law which is to be applied in relation to such matters as the revocation or variation of orders.

It should be borne in mind that a system of interstate enforcement of civil judgments is already in force throughout Australia under Part IV of the *Service and Execution of Process Act*, whereunder an out-of-State judgment is to be treated as if it were a judgment of the courts of the enforcing State itself. The enforcement, discharge and variation of such judgment debts is made dependent upon the enforcing State's laws, however much they may be at variance with those of the original forum. There seems no reason in principle why a similar scheme for interstate enforcement of probation and parole orders might not be established by the Commonwealth. Here, it is the alternative head of power, section 51(XXV) of the *Constitution*, which is probably best relied upon. Probation is clearly covered by the term 'judicial proceedings' in section 51(XXV), although parole might be considered to raise an additional problem in light of the fact that it is normally under the control of an administrative body such as a parole board. There could hardly be said to have been a wealth of discussion in Australia on the subject of full faith and credit to administrative acts and orders.[6] Possibly the best means of bringing them under the aegis of section 51(XXV) is by reference to the fact that they are determinations made under 'public Acts', which are themselves entitled to the protection required by section 118 of the *Constitution*, and whose recognition by other States is, without doubt, a fit subject for the Commonwealth Parliament.

2. Limitations Upon State Power

One difficulty raised by a system of interlocking State provisions for supervision of offenders and treatment of violators concerns the doctrine of extraterritoriality. The status of this limitation upon the powers of colonial legislatures is hardly pellucidly clear. Whether it rests on an implication in the grant of power to legislate 'for the peace, welfare and good government' of a given State, or is, on the contrary, a doctrine operating *ab extra* the grant of authority qualifying it in relevant respects, is not here a matter of concern. Certainly, since *McLeod* v. *A.-G. for N.S.W.*[7] the notion that crime is territorial or local has been taken as a limitation upon State legislatures to the extent that for an act to be punishable, it must occur within the territory of the legislating State. Outside the field of the criminal law, the limitation on State power has subsequently been taken to be satisfied remarkably easily. As Dixon J. said in *Wanganui-Rangitikei* v. *A.M.P. Society*,[8]

> 'Under the State Constitution the Legislature of New South Wales might validly enact a law reducing the interest upon any debt which was for any reason so connected with New South Wales that

> the statute could not be treated as wholly relating to a subject with which New South Wales had no possible concern. So long as the statute selected some fact or circumstance which provided some relation or connection with New South Wales, and adopted this as the ground of its interference, the validity of an enactment reducing interest would not be open to challenge. The residence or domicile in New South Wales of debtor or creditor would, for instance, suffice.'

But, in the context of the criminal law, notions of strict territoriality have held sway.[9] There is certainly no reported case wherein State legislation has been held valid when directly penalising acts committed outside the enacting State. Indeed, the two most recent High Court decisions indicate that not only must the act or omission take place within the enacting State, but the offender must also be, in some sense, amenable to its jurisdiction. In *McLeod's* case, of course, the alleged offender was neither resident nor domiciled in New South Wales, and the prohibited act took place abroad.[10] But in *Welker* v. *Hewett & Marsh*[11] and *Cox* v. *Tomat*[12] the 'act' prohibited, the failure to pay road maintenance charges in respect of journeys in New South Wales was clearly one which occurred within the territory of the enacting State. However, in each case, the legislation construed was held invalid for extraterritoriality. The controlling reason appears to have been that the legislation sought to penalise the directors of the company which owned the relevant vehicle, the particular provisions requiring no other connection with the enacting State than the mere possession of a directorship at the time of the journeys in question:

> 'It is the physical operation itself of the vehicle which forms the territorial basis for the power in this case to impose the liabilities at all upon persons not otherwise relevantly connected with the territory of the State. The stretch of the State's legislative power, founded on that territorial event does not reach, in my opinion, beyond those who are in a substantial sense participants in that event. Of course, the participation may be found in an ability to control the vehicle in relation to that event. It is that ability derived from actual ownership which warrants the imposition of such liabilities on the out-of-State owner, corporate or personal.
>
> The question therefore in the case of this statute is whether a Director as such has the ability to control the operations of the vehicle in Western Australia. That he may attend a board meeting and join in decisions of the board as to such operations does not establish that he may himself control them nor involve him in being relevantly concerned in those journeys of the company's vehicles.'

In view of the High Court's present stance, it might seem unlikely that it would hold valid an attempt by the sending State to render an act in the receiving State in breach of the parole or probation conditions an offence by the former State's law,[13] justifying the violator's extradition from the receiving State. After all, while the violator had, in the past, a close connection with the enacting State, the act in question took place outside that State. But *Welker* v. *Hewett & Marsh* and *Cox* v. *Tomat* were not concerned with the locality of the act as such and there are two significant dicta suggesting that the doctrine of extraterritoriality, so far as it concerns

penal law, may not be as strictly territorially limiting as previously understood. On the one hand, there is the statement of Brereton J. in *ex parte Iskra*:[14]

> 'To my mind, the effect of the decision is that a legislature may give a statute extraterritorial operation if that statute is for the peace, order and good government of the State ...; it may even, for that purpose, enact that an act done outside the State is a punishable offence, provided there is in the prohibited act an element sufficiently connected with the State.'[15]

And Walsh J., sitting as a member of the Full High Court in *Freehold Land Investments Ltd.* v. *Queensland Estates Pty. Ltd.*[16] clearly had a similar possibility in mind when dealing with Queensland licensing provisions and commission rates with respect to the sale of land:

> 'The Parliament of Queensland could have legislated validly for the control of agents who engaged, either in Queensland or elsewhere, in selling or buying or otherwise dealing with land or other property situated within the State of Queensland. It might have selected the locality of the property rather than the locality of the activites of the agents as providing a sufficient territorial connection between the legislation and the State of Queensland. However the Act does not contain any express statement by which its general words are confined by some territorial limitation.'[17]

Consequently, it may well be permissible for a State legislature to attach penalties to the breach of a probation or parole order even where the breach in question takes place outside the State. Particularly will this be so where the enacting State simply treats the interstate breach of condition as a ground for revoking or varying the original order[18] rather than as an offence in its own right against the law of that State.

What of the alternative means of dealing with interstate supervision, by allowing the receiving State to deal with violations of the original order? The relevance of the doctrine of extraterritoriality might not seem immediately apparent, since the receiving State may surely regulate the conditions under which interstate probationers or parolees may remain at large within the receiving State. In the United States some doubt has been felt, however, concerning the power of the receiving State to enforce the penal laws of other States. Consequently the Out-of-State Incarceration Amendment is so drafted as to make the receiving State the agent of the sending State in such a way that 'it is the sending State which is enforcing its own law at all times'.[19] The doubts in the United States arise from the rule in *Huntington* v. *Attrill*,[20] concerning the non-enforceability of penal laws of another State.[21] There seems little reason for treating this rule as other than a matter of common law conflicts policy, quite unconnected with questions of power and legislative authority. But extraterritoriality might be thought a difficulty for an Australian State legislature, since the application of a State's supervisory laws is, on the present hypothesis, made dependent upon acts and events which took place outside the receiving State. However, there is some authority which supports the view that extraterritoriality is no bar in this context.

In *Thwaites* v. *O'Sullivan*[22] the accused was charged in South Australia with unlawful possession of goods reasonably suspected of having been stolen,

contrary to section 41, *Police Offences Act*, 1953-1961. The goods had been found in the accused's possession in South Australia, but were suspected of having been stolen in Victoria and New Zealand. It was argued on his behalf that the South Australian Parliament could not penalise the possession in South Australia of goods stolen elsewhere. Chamberlain J. found a simple answer to this contention in the fact that the provision in question punished only what occurred within the State:

> 'As a matter of legislative power it is clearly for the "peace, welfare and good government" of the State to legislate with regard to persons possessing or dealing with property within its borders which they had obtained unlawfully elsewhere, and to which they may well be unable to pass a good title, and which therefore may be an instrument of fraud in their hands.'[23]

Thwaites v. *O'Sullivan* is not the only such case. In *Goodwin* v. *Jorgensen; Goodwin* v. *Cordell*,[24] for example, the High Court applied New South Wales penal provisions dealing with repossession of goods to articles which were subject to a hire purchase contract which had been formally entered into in the Australian Capital Territory. The penal provisions of New South Wales law were dependent for their operation upon the existence of a hire purchase contract, but it was not necessary that the contract itself be entered into within New South Wales. Moreover, statutes throughout Australia concerned with the declaration of the status of habitual criminals either expressly or impliedly take account of convictions elsewhere in determining the conditions for the making of such a declaration.[25] Consequently, the supposed difficulty of extraterritoriality with respect to supervision and enforcement of probation and parole orders in the receiving State seems to evaporate. The receiving State may take as the constitutionally requisite connection the simple presence within the State of a person who is regarded as requiring supervision for his own, and for society's, help and protection.

FOOTNOTES

1. The term 'parole' is not itself used.

2. *Commonwealth Prisoners Act*, 1967 section 19, pursuant to *Constitution*, section 120.

3. Assuming that the establishment of federal prisons is neither practical nor desirable.

4. *Supra*, II.

5. The power in section 51(XXV) applies only in relation to the States. There is no problem with power in these matters in relation to the Territories. The power in section 51(XXIV) is not limited to civil and criminal processes in the courts: *Ammann* v. *Wegener* (1972) 46 A.L.J.R. 638.

6. See Pryles & Hanks, *Federal Conflict of Laws* (1973) at 94-95; Able, 'Administrative Determinations and Full Faith and Credit' (1937) *22 Iowa L.R.* 461; Pryles, 'Full Faith and Credit: Administrative Determinations' (1971) *24 Alabama L.R.* 87.

7. [1891] A.C. 455.

8. (1934) 50 C.L.R. 581 at 600.

9. *R.* v. *Hansford* (1974) 8 S.A.S.R. 164. Notions of strict extraterritoriality have also influenced courts dealing with provisions involving avoidance of contracts as a penalty for non-compliance with statutory regulation. See, e.g., *Kay's Leasing Corporation* v. *Fletcher* (1965) 116 C.L.R. 124; *Freehold Land Investments Ltd.* v. *Queensland Estates Pty. Ltd.* (1970) 44 A.L.J.R. 329.

10. On McLeod's domicile, see *R.* v. *McLeod* (1890) 11 N.S.W. L.R. 218 at 225.

11. [1972] Aust. Argus L.R. 664.

12. (1972) 126 C.L.R. 105.

13. This is already the case in Western Australia and Queensland. See *supra*, II.

14. [1963] N.S.W. R. 1593.

15. *Id.*, at 1605.

16. (1970) 44 A.L.J.R. 329.

17. *Id.*, at 338.

18. In *Bissett* v. *Giles* (unreported, New South Wales Supreme Court, O'Brien J., 23 October 1972, discussed *supra*, II) the Governor had revoked the licence of Bissett and sought his extradition from New South Wales. But the breach of conditions had taken place in South Australia not New South Wales. See *supra*, II. Cf. *Bennett* v. *State of Texas* 476

S.W. 2d 281 (1972) where a conviction in Oklahoma was treated by the Court of Criminal Appeal as a breach of a condition of probation in Texas. The result was clearly dictated by the terms of the original order which specified that the offender 'commit no offense against the laws of this or any other state or of the United States.'

19. *Handbook* at 35-6.

20. 146 U.S. 657 (1892).

21. *Cf. Huntington* v. *Attrill* [1893] A.C. 150.

22. [1965] S.A.S.R. 34.

23. *Id.*, at 37; see, also, *per* Travers J. at 43, and *per* Bright J. at 44. See *Foster* v. *The Queen* (1967) 118 C.L.R. 117; *R.* v. *Sawyer* (1970) 16 F.L.R. 354; *R.* v. *Brennan* (1970) 16 F.L.R. 358.

24. (1973) 47 A.L.J. 376.

25. See Shearer, 'Recognition and Enforcement of Foreign Criminal Judgments' (1973) *47 A.L.J.* 585. But see *R.* v. *Wilson and Flanders* (No.2) [1969] S.A.S.R. 293 in which Bright J. expressed the view that section 319 of the South Australian *Criminal Law Consolidation Act* 1935-1966 is directed at persons who are likely to be continuing offenders against South Australian criminal laws. He said, at 295: '[t]here ought to be some continuing nexus actual or contemplated between the offender against whom the declaration is sought and the citizens of South Australia for whose peace order and good government the criminal laws have been enacted.'

CHAPTER VI

RECOMMENDATIONS

It is certainly true that the present rate of movement of probationers and parolees from one jurisdiction to another within Australia in no way parallels the rate of movements of a similar type which take place within the United States. Even allowing for population differences, interstate transfer of probationers and parolees is much less frequent in the former country than it is in the latter. Geographical factors, no doubt, account in part for this phenomenon; another partial explanation may well lie in the absence of an Australia-wide formal scheme for interstate cooperation like those which exist, in varying forms, in the United States and in Europe. The view that rehabilitation is often furthered by encouraging probationers and parolees to re-establish stabilising family and social relationships is hardly open to question. Nor can it be doubted that improved employment opportunities similarly promote resocialisation. When either or each of these factors indicates that interstate movement is desirable, that course of action should not be frustrated by the lack of adequate administrative machinery.

In some rare situations, circumstances may be present which offset the general desirability of interstate movement, as, for example, where the receiving State would be obligated to treat as an offender one whose general conduct is not regarded as reprehensible by the law of that State. A probation officer might well find either intolerable or ridiculous the burden of supervising such an offender; refusal of supervision should probably be mandatory in such a case. Differences between the laws of the States concerned with probation and parole, on the other hand, should provide, at the most, a discretionary bar. If movement of an individual offender from one State to another should deprive him of substantial opportunity for early termination of the order affecting him, that is a factor to be taken into account in deciding whether movement is, after all, desirable.[1] So also is the fact that, in the event of subsequent breach of a parole order involving imprisonment for a new offence, the receiving State's laws may require automatic reimposition of the original sentence. On the other hand, one State might well look with disfavour on a projected movement to a State with laws and practices which the former regards as too lenient in these respects.

It is clear that any decision to permit interstate movement must involve the exercise of a wide discretion, involving consideration not only of differences in the laws relating to supervision and enforcement of orders, and differences in the standards of supervision available in individual cases, but also of the more general problem of assessing comparative employment and rehabilitative factors. It is undesirable that decisions of this type should be made directly by those immediately entrusted with the responsibility of supervision. A probationer or parolee should have the means of application to a tribunal, whether a parole board or, in the case of probation, an appropriate court, which should be invested with jurisdiction adequate for the purpose.

Even so, the decision whether to permit interstate movement in a given case

must be dependent on the types of service available under the terms of the formal arrangements. Given the bases upon which interstate movement is to be regarded as desirable, a transfer from the sending to the receiving State of total control of both supervision and enforcement would seem to be desirable in the majority of cases, where the offender is seeking to establish or re-establish his permanent home in the receiving State. Application of the law of the receiving, rather than the sending, State seems entirely appropriate in such a case. But interstate movement of a rather less permanent nature might well be justified, as, for example, in the case of a shearer or fruitpicker who must move from one State to another for strictly limited periods if he is to maximise his employment opportunities. Where the offender contemplates early return to the sending State, total transfer of responsibility to the receiving State seems entirely inappropriate. The sending State should retain ultimate control, while the role of the receiving State should be strictly limited to supervision of the offender, and report thereon to the sending State. The present formal provisions in Western Australia and Queensland allow some flexibility in this respect, for the receiving State may apply its own law in cases of breach once it is satisfied that the sending State is not seeking return of the interstate violator. But they give excessive protection to the interests of the sending State in allowing it prime control even where the receiving State is the permanent home of the offender in question. The American model is similarly defective; indeed it is even less satisfactory in this respect than the Western Australian and Queensland system, for the receiving State is in all respects reduced to the role of an agent. It moves when the sending State orders it to do so; even when the receiving State imprisons a parole or probation violator it does not at the request of the sending State and in accordance with the requirements of the Out-of-State Incarceration Amendment. The European Convention seems designed for greater flexibility, distinguishing between supervision alone and a transfer of greater responsibility, and, in cases of total assumption of responsibility, acknowledging the exclusive control of the requested State. But it differs from the present recommendation in the fact that whether supervision alone or an assumption of further responsibility may be undertaken is dependent upon the appropriate request being made by the original State. Not even in cases where it is clear that the offender has successfully re-established his home in the requested State is it mandatory upon the original State to make any request let alone one for assumption by the receiving State of full responsibility for the offender.

Although officers and Ministers of the Council of Europe play some part in the administration of the Convention, no separate authority has been constituted for this purpose. By contrast, the main business of the United States Compact is performed in each State by a compact administrator who is appointed by the Governor. The administrator with deputies whom he may appoint, is responsible for the administration of the compact between his State and other contracting States. By virtue of his office, he is the State's representative in the Parole and Probation Compact Administrators' Association, a body which is responsible for the determination of matters of policy concerning the compact and the promulgation and amendment of the compact's rules and regulations. The Council of State Governments now acts as Secretariat of the Administrators' Association which serves as a clearing house for all general business and maintains files on all important compact matters. The Secretariat also deals with enquiries from interested parties concerning the compact and keeps administrators informed of all compact news.

In Western Australia and Queensland, certain obligations are imposed upon the Chief Probation Officer and the Parole Boards but no specially constituted authority has been entrusted with the general administration of the schemes. There can be no doubt that the implementation of the present recommendations would be greatly facilitated if an appropriate authority were to be made responsible for its administration. Such an authority might consist of representatives of the Commonwealth, States and Territories. It should deal with the general business of the scheme much in the manner of the American body. It might even prove to be desirable that it also take over the function of determining whether or not particular orders for interstate transfer should be made. While this would clearly be best from the point of view of consistency of approach to applications from different areas, and would tend to the development of a body expert in the factors to be assessed in relation to such applications, the cost of regular meetings for this purpose might not be thought to be justified by the present rate of interstate movement. Even if this were to be so, the administrative authority might well assume responsibility for determining whether any financial recompense should be made by the sending State in respect of the cost incurred by the receiving State for supervision and enforcement. There would be cases in which there would be little justification for such recompense, as, for example, where the offender's home was in the receiving State and the offence in the sending State occurred on a mere visit. However there would be other cases in which the receiving State might well feel that recompense was justified, particularly where the offender wished to go to the receiving State for better employment opportunities, having had no prior nexus with that State. The need for financial recompense might well become a pressing one if there were disproportionate movement of offenders to a particular State or States, for the resources of most jurisdictions are already strained to the limit. Recompense, of course, assumes the existence of a fund for the purpose. However this might be provided, its administration should be entrusted to the administrative authority.

The interstate supervision of probationers and parolees should not be considered in isolation from the question of the place of imprisonment of offenders who are most closely connected with a State other than the sentencing one. At the present time, imprisonment takes place in the State where the offence is committed and the offender is sentenced. The only exceptions relate to the laws concerning territorial prisoners.[2] In the case of the Territories, specific provision has been made to enable transfer in a limited number of cases. *The Removal of Prisoners (Territories) Act*, 1923-1968 (Cth.), envisages this possibility where:

> (a) by reason of there being no prison in the Territory in which the prisoner can properly undergo his sentence, the removal of the prisoner is expedient for his safer custody or for the more efficient carriage of his sentence into effect;
>
> (b) it is likely that the life of a prisoner undergoing sentence of imprisonment in the Territory for any offence will be endangered or his health permanently impaired by further imprisonment in the Territory;
>
> (c) the offence was committed wholly or partly beyond the limits of the Territory;
>
> (d) the prisoner belongs to a class of persons who under the law of the Territory are subject to removal under this Act ...[3]

In the case of the Australian Capital Territory, where no appropriate prison exists, special provision is made by the *Removal of Prisoners (A.C.T.) Act*, 1968 (Cth.), for the transfer to New South Wales prisons of offenders sentenced to imprisonment in the courts of the Territory.[4] The need for wider powers can hardly be doubted if it be accepted that visiting and family contact is valued by offenders and generally desirable in the interests of rehabilitation.[5] Europe has already advanced far in this direction.[6] It is to be hoped that Australia will give due consideration to the introduction of a similar scheme. Naturally, the existence of arrangements of that type would significantly reduce the need for application by parolees for interstate transfer. However, the need for a system of interstate transfer would be unaffected in the case not only of probationers, but also of parolees whose desire to move interstate is prompted by factors which become relevant during, or after the completion of, the relevant terms of imprisonment.

FOOTNOTES

1. *Cf. European Treaty Series,* No.51, Article 23(2), which provides that the penalty imposed by the requested State not exceed that of the requesting State.

2. *Cf.*, in respect of federal parolees, the provisions of the *Commonwealth Prisoners Act,* 1967, *supra.*

3. Section 3.

4. Section 5(1). See further, *The Queen* v. *Turnbull* (1968) 123 C.L.R. 28; *Ex parte Freyer; Re Grahame* (1968) 42 A.L.J.R. 358.

5. See, e.g., Criminal Law and Penal Methods Reform Committee (South Australia) *Sentencing and Corrections* (1973) at 101.

6. Convention on the International Validity of Criminal Judgments (1970) *European Treaty Series,* No.70.

APPENDIX A

Taken from *The Handbook on Interstate Crime Control*, The Council of State Governments, Chicago, Illinois, Revised Edition, August, 1966.

THE UNIFORM ENABLING ACT

(Contains the exact wording of the Interstate Compact for the Supervision of Parolees and Probationers)

AN ACT PROVIDING THAT THE STATE OF .... MAY ENTER INTO A COMPACT WITH ANY OF THE UNITED STATES FOR MUTUAL HELPFULNESS IN RELATION TO PERSONS CONVICTED OF CRIME OR OFFENSES WHO MAY BE ON PROBATION OR PAROLE

Be it enacted, etc.:

SECTION 1. The governor of this state is hereby authorised and directed to execute a compact on behalf of the state of ..... with any of the United States legally joining therein in the form substantially as follows:

A COMPACT

Entered into by and among the contracting states, signatories hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes."

The contracting states solemnly agree:

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state"), to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state"), while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state, *Provided, however,* That if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

(7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other state party hereto.

SEC. 2. If any section, sentence, subdivision or clause of this act is for any reason held invalid or to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act.

SEC. 3. Whereas an emergency exists for the immediate taking effect of this act, the same shall become effective immediately upon its passage.

APPENDIX B

Taken from *The Handbook on Interstate Crime Control*, The Council of State Governments, Chicago, Illinois, Revised Edition, August, 1966.

TEXT OF THE OUT-OF-STATE INCARCERATION AMENDMENT

(a) Whenever the duly constituted judicial and administrative authorities in a sending state shall determine that incarceration of a probationer or reincarceration of a parolee is necessary or desirable, said officials may direct that the incarceration or reincarceration be in a prison or other correctional institution within the territory of the receiving state, such receiving state to act in that regard solely as agent for the sending state.

(b) As used in this amendment, the term "receiving state" shall be construed to mean any state, other than the sending state, in which a parolee or probationer may be found, provided that said state is a party to this amendment.

(c) Every state which adopts this amendment shall designate at least one of its correctional institutions as a "Compact Institution" and shall incarcerate persons therein as provided in Section I hereof unless the sending and receiving state in question shall make specific contractual arrangements to the contrary. All states party to this amendment shall have access to "Compact Institutions" at all reasonable hours for the purpose of inspecting the facilities thereof and for the purpose of visiting such of said state's prisoners as may be confined in the institution.

(d) Persons confined in "Compact Institutions" pursuant to the terms of this compact shall at all times be subject to the jurisdiction of the sending state and may at any time be removed from said "Compact Institution" for transfer to a prison or other correctional institution within the sending state, for return to probation or parole, for discharge, or for any other purpose permitted by the laws of the sending state.

(e) All persons who may be confined in a "Compact Institution" pursuant to the provisions of this amendment shall be treated in a reasonable and humane manner. The fact of incarceration or reincarceration in a receiving state shall not deprive any person so incarcerated or reincarcerated of any rights which said person would have had if incarcerated or reincarcerated in an appropriate institution of the sending state; nor shall any agreement to submit to incarceration or reincarceration pursuant to the terms of this amendment be construed as a waiver of any rights which the prisoner would have had if he had been incarcerated or reincarcerated in any appropriate institution of the sending state, except that the hearing or hearings, if any, to which a parolee or probationer may be entitled (prior to incarceration or reincarceration) by the laws of the sending state may be had before the appropriate judicial or administrative officers of the receiving state. In this event, said judicial and administrative officers shall act as agents of the sending state after consultation with appropriate officers of the sending state.

(f) Any receiving state incurring costs or other expenses under this amendment shall be reimbursed in the amount of such costs or other expenses

by the sending state unless the states concerned shall specifically otherwise agree. Any two or more states party to this amendment may enter into supplementary agreements determining a different allocation of costs as among themselves.

(g) This amendment shall take effect when ratified by any two or more states party to the compact and shall be effective as to those states which have specifically ratified this amendment. Rules and regulations necessary to effectuate the terms of this amendment may be promulgated by the appropriate officers of those states which have ratified this amendment.

EUROPEAN CONVENTION ON THE SUPERVISION OF CONDITIONALLY SENTENCED OR CONDITIONALLY RELEASED OFFENDERS

PART 1

Basic principles

ARTICLE 1

1. The Contracting Parties undertake to grant each other in the circumstances set out below the mutual assistance necessary for the social rehabilitation of the offenders referred to in Article 2. This assistance shall take the form of supervision designed to facilitate the good conduct and readaptation to social life of such offenders and to keep a watch on their behaviour with a view, should it become necessary, either to pronouncing sentence on them or to enforcing a sentence already pronounced.

2. The Contracting Parties shall, in the circumstances set out below and in accordance with the following provisions, enforce such detention order or other penalty involving deprivation of liberty as may have been passed on the offender, application of which has been suspended.

ARTICLE 2

1. For the purposes of this Convention, the term "offender" shall be taken to mean any person who, in the territory of one of the Contracting Parties, has:

(a) been found guilty by a court and placed on probation without sentence having been pronounced;

(b) been given a suspended sentence involving deprivation of liberty, or a sentence of which the enforcement has been conditionally suspended, in whole or in part, either at the time of the sentence or subsequently.

2. In subsequent Articles, the term "sentence" shall be deemed to include all judicial decisions taken in accordance with sub-paragraphs *(a)* and *(b)* of paragraph 1 above.

ARTICLE 3

The decisions referred to in Article 2 must be final and must have executive force.

ARTICLE 4

The offence on which any request under Article 5 is based shall be one punishable under the legislation of both the requesting and the requested State.

ARTICLE 5

1. The State which pronounced the sentence may request the State in whose territory the offender establishes his ordinary residence:

(a) to carry out supervision only, in accordance with Part II;

(b) to carry out supervision and if necessary to enforce the sentence, in accordance with Parts II and III;

(c) to assume entire responsibility for applying the sentence, in accordance with the provisions of Part IV.

2. The requested State shall act upon such a request, under the conditions laid down in this Convention.

3. If the requesting State has made one of the requests mentioned in paragraph 1 above, and the requested State deems it preferable, in any particular case, to adopt one of the other courses provided for in that paragraph, the requested State may refuse to accede to such a request, at the same time declaring its willingness to follow another course, which it shall indicate.

ARTICLE 6

Supervision, enforcement or complete application of the sentence, as defined in the preceding Article, shall be carried out, at the request of the State in which sentence was pronounced, by the State in whose territory the offender establishes his ordinary residence.

ARTICLE 7

1. Supervision, enforcement or complete application shall be refused:

(a) if the request is regarded by the requested State as likely to prejudice its sovereignty, security, the fundamentals of its legal system, or other essential interests;

(b) if the request relates to a sentence for an offence which has been judged in final instance in the requested State;

(c) if the act for which sentence has been passed is considered by the requested State as either a political offence or an offence related to a political offence, or as a purely military offence;

(d) if the penalty imposed can no longer be exacted, because of the lapse of time, under the legislation of either the requesting or the requested State;

(e) if the offender has benefited under an amnesty or a pardon in either the requesting or the requested State.

2. Supervision, enforcement or complete application may be refused:

(a) if the competent authorities in the requested State have decided

not to take proceedings, or to drop proceedings already begun, in respect of the same act;

(b) if the act for which sentence has been pronounced is also the subject of proceedings in the requested State;

(c) if the sentence to which the request relates was pronounced *in absentia*;

(d) to the extent that the requested State deems the sentence incompatible with the principles governing the application of its own penal law, in particular, if on account of his age the offender could not have been sentenced in the requested State.

3. In the case of fiscal offences supervision or enforcement shall be carried out, in accordance with the provisions of this Convention, only if the Contracting Parties have so decided in respect of each such offence or category of offences.

ARTICLE 8

The requesting and requested State shall keep each other informed in so far as it is necessary of all circumstances likely to affect measures of supervision or enforcement in the territory of the requested State.

ARTICLE 9

The requested State shall inform the requesting State without delay what action is being taken on its request.

In the case of total or partial refusal to comply, it shall communicate its reasons for such refusal.

PART II

Supervision

ARTICLE 10

The requesting State shall inform the requested State of the conditions imposed on the offender and of any supervisory measures with which he must comply during his period of probation.

ARTICLE 11

1. In complying with a request for supervision, the requested State shall, if necessary, adapt the prescribed supervisory measures in accordance with its own laws.

2. In no case may the supervisory measures applied by the requested State, as regards either their nature or their duration, be more severe than those prescribed by the requesting State.

ARTICLE 12

When the requested State agrees to undertake supervision, it shall proceed as follows:

1. It shall inform the requesting State without delay of the answer given to its request;

2. It shall contact the authorities or bodies responsible in its own territory for supervising and assisting offenders;

3. It shall inform the requesting State of all measures taken and their implementation.

ARTICLE 13

Should the offender become liable to revocation of the conditional suspension of his sentence referred to in Article 2 either because he has been prosecuted or sentenced for a new offence, or because he has failed to observe the prescribed conditions, the necessary information shall be supplied to the requesting State automatically and without delay by the requested State.

ARTICLE 14

When the period of supervision expires, the requested State shall, on application by the requesting State, transmit all necessary information to the latter.

ARTICLE 15

The requesting State shall alone be competent to judge, on the basis of the information and comments supplied by the requested State, whether or not the offender has satisfied the conditions imposed upon him, and, on the basis of such appraisal, to take any further steps provided for by its own legislation.

It shall inform the requested State of its decision.

PART III

Enforcement of sentences

ARTICLE 16

After revocation of the conditional suspension of the sentence by the requesting State, and on application by that State, the requested State shall be competent to enforce the said sentence.

ARTICLE 17

Enforcement in the requested State shall take place in accordance with the law of that State, after verification of the authenticity of the request for enforcement and its compatibility with the terms of this Convention.

ARTICLE 18

The requested State shall in due course transmit to the requesting State a document certifying that the sentence has been enforced.

ARTICLE 19

The requested State shall, if need be, substitute for the penalty imposed in the requesting State, the penalty or measure provided for by its own legislation for a similar offence. The nature of such penalty or measure shall correspond as closely as possible to that in the sentence to be enforced. It may not exceed the maximum penalty provided for by the legislation of the requested State, nor may it be longer or more rigorous than that imposed by the requesting State.

ARTICLE 20

The requesting State may no longer itself take any of the measures of enforcement requested, unless the requested State indicates that it is unwilling or unable to do so.

ARTICLE 21

The requested State shall be competent to grant the offender conditional release. The right of pardon may be exercised by either the requesting or the requested State.

PART IV

Relinquishment to the requested State

ARTICLE 22

The requesting State shall communicate to the requested State the sentence of which it requests complete application.

ARTICLE 23

1. The requested State shall adapt to its own penal legislation the penalty or measure prescribed as if the sentence had been pronounced for the same offence committed in its own territory.

2. The penalty imposed by the requested State may not be more severe than that pronounced in the requesting State.

ARTICLE 24

The requested State shall ensure complete application of the sentence thus adapted as if it were a sentence pronounced by its own courts.

ARTICLE 25

The acceptance by the requested State of a request in accordance with the present Part IV shall extinguish the right of the requesting State to enforce the sentence.

PART V

Common provisions

ARTICLE 26

1. All requests in accordance with Article 5 shall be transmitted in writing.

They shall indicate:

(a) the issuing authority;
(b) their purpose;
(c) the identity of the offender and his place of residence in the requested State.

2. Requests for supervision shall be accompanied by the original or a certified transcript of the Court findings containing the reasons which justify the supervision and specifying the measures imposed on the offender. They should also certify the enforceable nature of the sentence and of the supervisory measures to be applied. So far as possible, they shall state the circumstances of the offence giving rise to the sentence of supervision, its time and place and legal destination and, where necessary, the length of the sentence to be enforced. They shall give full details of the nature of duration of the measures of supervision requested, and include a reference to the legal provisions applicable together with necessary information on the character of the offender and his behaviour in the requesting State before and after pronouncement of the supervisory order.

3. Requests for enforcement shall be accompanied by the original, or a certified transcript, of the decision to revoke conditional suspension of the pronouncement or enforcement of sentence also of the decision imposing, the sentence now to be enforced. The enforceable nature of both decisions shall be certified in the manner prescribed by the law of the State in which they were pronounced.

If the judgment to be enforced has replaced an earlier one and does not contain a recital of the facts of the case, a certified copy of the judgment containing such recital shall also be attached.

4. Requests for complete application of the sentence shall be accompanied by the documents mentioned in paragraph 2 above.

ARTICLE 27

1. Requests shall be sent by the Ministry of Justice of the requesting State to the Ministry of Justice of the requested State and the reply shall be sent through the same channels.

2. Any communications necessary under the terms of this Convention shall be exchanged either through the channels referred to in paragraph 1 of this Article, or directly between the authorities of the Contracting Parties.

3. In case of emergency, the communications referred to in paragraph 2 of this Article may be made through the International Criminal Police Organisation (Interpol).

4. Any Contracting Party may, by declaration addressed to the Secretary-General of the Council of Europe, give notice of its intention to adopt new rules in regard to the communications referred to in paragraphs 1 and 2 of this Article.

ARTICLE 28

If the requested State considers that the information supplied by the requesting State is inadequate to enable it to apply this Convention, it shall ask for the additional information required. It may fix a time-limit for receipt of such information.

ARTICLE 29

1. Subject to the provisions of paragraph 2 of this Article, no translation of requests, or of the supporting documents, or of any other documents relating to the application of this Convention, shall be required.

2. Any Contracting Party may, when signing this Convention or depositing its instrument of ratification, acceptance or accession, by a declaration addressed to the Secretary-General of the Council of Europe, reserve the right to require that requests and supporting documents should be accompanied by a translation into its own language, or into one of the official languages of the Council of Europe, or into such one of those languages as it shall indicate. The other Contracting Parties may claim reciprocity.

3. This Article shall be without prejudice to any provision regarding translation of requests and supporting documents that may be contained in agreements or arrangements now in force or that may be concluded between two or more of the Contracting Parties.

ARTICLE 30

Documents transmitted in application of this Convention shall not require authentication.

ARTICLE 31

The requested State shall have powers to collect, at the request of the requesting State, the costs of prosecution and trial incurred in that State.

Should it collect such costs, it shall be obliged to refund to the requesting State experts' fees only.

ARTICLE 32

Supervision and enforcement costs incurred in the requested State shall not be refunded.

PART VI

Final provisions

ARTICLE 33

This Convention shall be without prejudice to police regulations relating to foreigners.

ARTICLE 34

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary-General of the Council of Europe.

2. This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

ARTICLE 35

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

2. Such accession shall be effected by depositing with the Secretary-General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

ARTICLE 36

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting Party may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary-General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose

international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 39 of this Convention.

ARTICLE 37

1. This Convention shall not affect the undertakings given in any other existing or future international Convention, whether bilateral or multilateral, between two or more of the Contracting Parties, on extradition or any other form of mutual assistance in criminal matters.

2. The Contracting Parties may not conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, except in order to supplement its provisions or facilitate application of the principles embodied in it.

3. Should two or more Contracting Parties, however, have already established their relations in this matter on the basis of uniform legislation, or instituted a special system of their own, or should they in future do so, they shall be entitled to regulate those relations accordingly, not withstanding the terms of this Convention.

Contracting Parties ceasing to apply the terms of this Convention to their mutual relations in this matter shall notify the Secretary-General of the Council of Europe to that effect.

ARTICLE 38

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, declare that it avails itself of one or more of the reservations provided for in the Annex to this Convention.

2. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary-General of the Council of Europe which shall become effective as from the date of its receipt.

3. A Contracting Party which has made a reservation in respect of any provision of this Convention may not claim the application of that provision by any other Party; it may, however, if its reservation is partial or conditional, claim the application of that provision in so far as it has itself accepted it.

4. Any Contracting Party may, on signing the present Convention, or on depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the Council of Europe that it considers ratification, acceptance or accession as entailing an obligation, in international law, to introduce into municipal law measures to implement the said Convention.

ARTICLE 39

1. This Convention shall remain in force indefinitely.

2. Any Contracting Party may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary-General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary-General of such notification.

ARTICLE 40

The Secretary-General of the Council of Europe shall notify the member States of the Council, and any State that has acceded to this Convention of:

(a) any signature;

(b) any deposit of an instrument of ratification, acceptance or accession;

(c) any date of entry into force of this Convention in accordance with Article 34;

(d) any notification or declaration received in pursuance of the provisions of paragraph 4 of Article 27, of paragraph 2 of Article 29, of paragraph 3 of Article 37 and of paragraph 4 of Article 38;

(e) any declaration received in pursuance of the provisions of paragraphs 2 and 3 or Article 36;

(f) any reservation made in pursuance of the provisions of paragraph 1 of Article 38;

(g) the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 38;

(h) any notification received in pursuance of the provisions of Article 39, and the date on which denunciation takes effect.