

Chapter 1

Introduction



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Chapter 1

Introduction

SCOPE OF REPORT

This is the commission's Final Report on the review of the *Bail Act 1977* and its operation. The Attorney-General, the Honourable Rob Hulls, gave the commission its terms of reference in November 2004 and the review began in March 2005.

This report contains the commission's recommendations to government for procedural, administrative and legislative changes to ensure the bail system functions simply, clearly and fairly. In keeping with our terms of reference, this review has not been confined to the Bail Act but has also looked at the wider bail system in Victoria, including the bail decision makers, bail support programs, and issues for particular groups. The full terms of reference are on p5.

In June 2006 the Attorney-General requested the commission consider two additional matters. On 6 June he requested we consider how possible preparatory offences would be treated under any new Bail Act. On 13 June he asked us to consider the adequacy of the penalty for failing to meet a surety. The terms of reference do not ask us to consider particular offences or penalties, we have therefore not done so apart from these two requests.

PREVIOUS REVIEWS

The Bail Act came into effect in September 1977. It has been amended many times to remedy particular problems or implement new policies. However, it has not been comprehensively updated or modernised and the drafting style and structure are much as they were in 1977.

The Bail Act was reviewed by the former Law Reform Commission of Victoria (LRCV) in 1992. The review was partly completed, with one report produced, when the LRCV was abolished. The recommendations from the first report, a review of the Bail Act, were never implemented. The second part of the review, to look at the operation of the Act within the criminal justice system, was not undertaken. Many of the issues raised in the LRCV report are still relevant today and are considered in this report.

One of the commission's functions is to undertake minor law reform projects suggested by the community. In 2002 we produced a community law reform report on bail. The Victorian Aboriginal Legal Service (VALS) suggested the commission review section 4(2)(c) of the Bail Act, which required decision makers to refuse bail for accused people who were in custody for failing to answer bail, unless satisfied that the failure was due to causes beyond their control. This provision was having a disproportionate impact on Indigenous Australians and other people from disadvantaged groups. Our report recommended the Victorian Government repeal section 4(2)(c). The provision was repealed on 18 May 2004. This is discussed in chapter 10.

VICTORIAN CONTEXT

There has been significant adoption of *therapeutic jurisprudence* in criminal justice in Victoria over the past decade, initially driven by the Magistrates' Court. This has resulted in the establishment of diversionary programs within the Magistrates' Court and, more recently, specialist courts such as the Koori Court and Drug Court. Some diversionary programs are instituted as part of an accused's bail, such as the Court Referral and Evaluation for Drug Treatment (CREDIT) Bail Support program. Whether utilising the CREDIT program or not, decision makers tend to impose bail conditions that encourage accused people to obtain support and treatment for drug and alcohol use, mental illness and behavioural problems.

In 2006 the government committed to a human rights charter with which all new legislation must comply, including any new Bail Act. *The Charter of Human Rights and Responsibilities Act 2006* enshrines the presumption of innocence and the right to liberty. It states that accused people must not be 'automatically detained in custody', but may be released subject to a guarantee they will appear for trial.¹ The charter is discussed throughout this report.

Also in 2006, the government introduced a charter of rights for victims. *The Victims' Charter Act 2006* aims to direct the criminal justice system's response to victims. It recommends prosecuting agencies provide information to victims about bail on request, including the outcome of any bail application and special conditions to protect the victim. The charter is discussed in Chapter 4. These measures aim to support and assist vulnerable people, who may be victims or defendants or both, as well as outlining basic rights for the entire community.

A number of high profile criminal cases have drawn attention to bail. Between 1998 and 2006, nine 'underworld' figures were murdered while on bail. Several underworld figures suspected of involvement in those murders were on bail at the time the murders occurred. Further attention was drawn to bail when gangland identity Tony Mokbel absconded at the conclusion of his trial over importation of a traffickable quantity of cocaine in March 2006. This has led to calls by Victoria Police for a more prescriptive approach to the consideration of bail.

OUR APPROACH

Under the current Bail Act and Human Rights Charter, accused people have a general entitlement to bail and the presumption of innocence. In keeping with these entitlements, the commission believes focusing on 'risk' when considering bail is the best way to determine whether release of a particular offender is appropriate or not.

Good policy should be informed by the broad range of cases that come before our justice system, not one particular case or type of case. An effective Bail Act must be able to respond to the diverse circumstances of accused people so decision makers can determine whether they present an unacceptable risk if released. It should therefore provide an effective response to everyone from the intellectually disabled young person to high profile organised crime figures.

Some people who participated in this review suggested a prescriptive approach to bail. This would focus on the alleged offence and rely on complex formulas to determine risk. The commission believes a prescriptive approach would not achieve the breadth of response needed for the Bail Act to work effectively and that it is inappropriate when an accused is yet to be convicted. Prescriptive legislation is inevitably complex, which is undesirable for legislation that is predominantly applied by people without legal training. Instead, we have focused on simplifying the Act to make it more accessible for the lay decision makers who are its main users, police and bail justices, and easier to understand for those affected by it. These issues are discussed further in Chapter 3.

It is impossible to talk about bail without also considering the related issues of the decision to arrest or summons, and remand. Bail is only an issue for about half of cases before the court. This is because police have the discretion about whether to arrest, charge and bail accused people, or issue them with a summons to attend court.² This decision is not guided by formal police policy nor is it dependent on the offence. The commission thinks there should be greater transparency in this decision, including guidelines about when charge and bail or summons should be used. This is discussed in Chapter 4.

This review does not comprehensively consider remand issues. In our Consultation Paper we provided an overview that included data on bail and remand patterns. In this report we provide updated information on remand trends and briefly discuss other issues if they are relevant to bail decisions. The characteristics of accused people who are remanded do not appear to support its increasing use.³ The Victorian Ombudsman released a report in July 2006, *Conditions for Persons in Custody*, which looks at overcrowding and other problems caused by the increased incarceration rate in Victoria.

We also look at the impact of the bail system on particular groups—Indigenous Australians, young people, women, people experiencing homelessness and people with cognitive impairments. Although we believe there should be one simple test for bail, consideration for particularly disadvantaged groups can form part of that test.

- 1 *Charter of Human Rights and Responsibilities Act 2006* s 21(6).
2. For more detail see Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 19–22.
- 3 A Criminology Research Council study, *Factors that Influence Remand in Custody*, was considered in detail in Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 11–13.



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OUR PROCESS

CONSULTATION PAPER

Between April and July 2005, the commission consulted widely with people who come into contact with the bail system to assess the need for reform. Forty-nine meetings were held with individuals and organisations, including police, bail justices, courts, defence and prosecution lawyers, bail service providers, and victims' agencies. As is generally the case with law reform, it is important to examine the processes that surround legislation as well as the legislation itself.

In November 2005 the commission released a Consultation Paper that drew on initial consultations and other extensive research. The paper asked 86 questions and invited submissions—48 were received.

VICTIMS BOOKLET

When the Consultation Paper was released, we also released a booklet seeking the views of victims of crime about bail law. It provided information about bail law generally, and on particular aspects that affect victims of crime. The booklet contained a few questions about issues such as: how victims' views are represented at bail hearings; provision of information about bail to victims; whether bail should be harder to get for some crimes; and what victims thought of the Victims' Charter, which was in draft at that time.

The booklet was distributed by the Victims Support Agency through its network of agencies that provide Victims Assistance and Counselling Programs (VACPs). The agencies were requested to distribute the booklets to victims. Three submissions were received from VACP agencies, but none from victims themselves.

ADDITIONAL TERMS OF REFERENCE

We received the additional terms of reference after our Consultation Paper was released. We wrote to everyone who had made a submission to the paper to seek their views on the penalty for failing to meet surety. We sent information about the current law, Justice Gillard's remarks in *R v Mokbel and Mokbel* [2006], other cases of failing to meet surety, and legislation in other states.⁴ We received 18 further submissions on this issue.

We did not seek submissions on whether there should be a presumption against bail for the proposed preparatory offence for armed robbery. Our approach to the presumptions against bail and the factors we considered in making recommendations in this area are discussed in Chapter 3.

CONSULTATIVE COMMITTEE

The commission established a consultative committee early on to provide advice about our approach and the direction of the review. The committee comprises individuals with relevant expertise and/or experience, including police, court workers, prosecutors, defence lawyers, bail support workers, a victim of crime, and an Indigenous bail worker. The committee met four times throughout the reference.

FURTHER CONSULTATION AND ROUNDTABLES

Between March and May 2006, the commission held roundtable discussions on some of the big issues considered by this reference: reform of the reverse onus provisions in the Bail Act; consideration of children in the Bail Act; reform to the bail justice system; Indigenous bail issues; and victims and bail. Criminal justice participants with expertise in these areas were invited to the roundtables. The discussions at the roundtables helped the commission develop the recommendations in this report but not all of those who participated in the roundtables agree with the commission's recommendations.

Throughout 2006 and in early 2007 we conducted 18 more consultations with individuals, agencies and government departments to gather information and refine recommendations.

⁴ The material is contained in Appendix 1.