

Chapter 2

New Bail Act

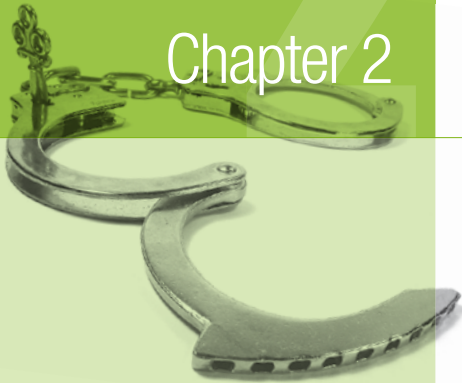


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Legislation should be drafted so that people who are affected by it can understand it.

The most consistent theme to emerge during the course of our review was the need to redraft the Bail Act to simplify its language, improve its presentation and structure, and make it more accessible. Every submission the commission received to its Consultation Paper supported a Bail Act rewrite. In this chapter we consider the problems with these aspects of the Act and other reasons for rewriting it.

ACCESSIBILITY

The Bail Act is largely applied by decision makers who do not have formal legal qualifications: bail justices, police and to a lesser extent, sureties. Bail has a profound impact on the tens of thousands of people who are arrested every year and the many victims of crime affected by their actions. Despite this, it appears little regard was given to the needs of the Act's audience when it was drafted. The Act is littered with obstacles which make it difficult for the average reader to gain a clear overview of the bail system. In 1991 the LRCV reported on the 'great difficulty' that people have in understanding the Bail Act.¹

Legislation should be drafted so that people who are affected by it can understand it. This is especially so in the case of bail because the legislation includes many important legal rights and responsibilities. However, the current language and structure of the Bail Act does not have the layperson in mind. Laypeople reading the Act for the first time would be confronted with terms and concepts they would find largely unintelligible. They would be equally confused with the structure of the Act and how the various sections 'fit together'.

The current Bail Act is written in legalese yet those who use it the most will never have had any legal training. It would seem that it is high time for it to be re-written with it being kept in mind that its target audience will not be lawyers.²

Youthlaw, a specialist young people's legal centre, submitted that the Bail Act is 'complicated, overly legalistic and difficult to interpret'. The Commonwealth Director of Public Prosecutions argued: 'While some people may feel satisfied that they have mastered the complexities of the current Act, the current Act does not assist in making the law accessible to the general community'.

When legislation is difficult to comprehend, decision makers may develop customs and shortcuts that undermine the intention of the legislature. There is even a risk that provisions will be ignored. Many decision makers, especially police, do not regularly look at the Act. Instead, they rely on their existing knowledge of the system and collective knowledge of their peers. We are unable to say whether this is because of the nature of the Act or other reasons.

There are social and economic benefits to be obtained from an accessible Bail Act. Less time spent dealing with bail applications will free valuable court and police resources. Less time will also be spent finding provisions, cross-referencing, interpreting sections and consulting with peers. More importantly, an Act that is easier to use will also help accused people, victims and sureties exercise their rights.

Most drafters recognise the need to tailor laws to their audience, including the federal Office of Parliamentary Counsel:

If laws are hard to understand, they lead to administrative and legal costs, contempt of the law and criticism of our Office. Users of our laws are becoming increasingly impatient with their complexity. Further, if we put unnecessary difficulties in the way of our readers, we do them a great discourtesy.³

A new Bail Act will still assume its audience has existing knowledge of the area. It is not always possible to reduce words or phrases to their most basic level. However, it is possible to draft a Bail Act that is intelligible to a much wider audience and easier for lay decision makers, lawyers and judicial officers to use.

LANGUAGE

Simple language is essential for accessibility. The current Bail Act was drafted in 1977 when Victorian legislation was not drafted in a plain English style.⁴ As the LRCV noted, it was often the case that laws drafted in the 1970s were unnecessarily convoluted, 'complexity and longwindedness reached their height in the 1970s ...'.⁵ Today's Bail Act remains testament to the drafting style characteristic of the 1970s and 1980s.⁶ Much of the content of our Bail Act remains largely the same as it was when first enacted.⁷

The language used in legislation is important. The Bail Act conveys rights and responsibilities which have the potential to affect many people in our community. The use of 'legalese' and concepts that are difficult to understand allows only those with 'inside knowledge' to understand the law. Those whom the Act directly affects—accused people and victims—are given secondary status. If readers struggle to understand what a section of the Bail Act means, they are likely to lose the message behind a provision. This leads to frustration for the reader and eventual defeat.⁸

In our Consultation Paper we asked about concepts and words in the Bail Act.⁹ Several submissions addressed the words, phrases or concepts that required greater clarification, redrafting, amendment or deletion.¹⁰ Those that came up most often were 'court', 'remand', and 'surety'. Problems with the term 'surety' are discussed in Chapter 8; 'court' and 'remand' are discussed in this chapter.

PRESENTATION AND STRUCTURE

Presentation and structure are equally important to the plain English style. Material should be presented in sequential manner that is logical to the reader and assists in absorbing information. Even if written simply, an Act may still be difficult to comprehend if its structure is not intuitive and orderly.

The organisation of the Bail Act has been the subject of particular criticism:¹¹

- Provisions that are conceptually related to one another are spread throughout the Act rather than grouped together.¹²
- Provisions are difficult to find due to a lack of headings and index and inaccurate headings.¹³
- Sections are too lengthy, requiring readers to revise material they have already read to understand it.¹⁴
- There is constant referencing to other legislation, particularly in section 4.
- Provisions do not follow the sequence of events that occur during a bail hearing.
- There is insufficient use of aids to assist the reader, such as headings, subheadings, examples, tables, the placement of information in schedules and cross-referencing to other sections or definitions.

Dr Chris Corns, a senior criminal law lecturer, raised the difficulties in teaching students in his submission. Part of his concern is the structure of the Act:

It has been my experience that the Victorian statutory law relating to bail is a difficult aspect of criminal procedure to teach, and for students to understand. This is because of the structure of the Bail Act and the way in which provisions have been interpreted. This is not simply an academic issue. It is important that law students have a clear and comprehensive grasp of the law relating to bail and remand, particularly those who go on to practice in the criminal jurisdiction.

This criticism is particularly important because the Act is taught widely, not only to law students, but to bail justices and police.

- 1 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Discussion Paper No 25 (1991) 27. In 1990 the Legal Aid Commission of Victoria drafted a report about what it considered to be a badly drafted and confusing Bail Act that lacked clearly defined procedures and definitions: Legal Aid Commission of Victoria, *Bail Report* (1990).
- 2 Submission 9.
- 3 Office of Parliamentary Counsel, *Plain English Manual* (undated) <www.opc.gov.au/about/html_docs/pem/chap_1.htm> at 2 February 2007.
- 4 The Victorian Office of the Chief Parliamentary Counsel now drafts legislation consistent with plain English principles: Office of the Chief Parliamentary Counsel, *The Legislative Process* (January 2007) <www.opc.vic.gov.au> at 28 February 2007.
- 5 Law Reform Commission of Victoria, *Access to the Law: The Structure and Format of Legislation*, Report No 33 (1990) 55.
- 6 The movement towards plain English drafting gained currency in Australia in the mid 1980s, following developments in the United States and England. In 1985 the LRCV was given a reference on plain English covering both legislation and other government documents: see *ibid*; Law Reform Commission of Victoria, *Legislation, Legal Rights and Plain English*, Discussion Paper No 1 (1986); Law Reform Commission of Victoria, *Plain English and the Law*, Report No 9 (1987).
- 7 Between November 1977 and February 2007 there were 35 Acts of Parliament that made amendments to the *Bail Act 1977*. None have made extensive changes to the Act's contents. Section 4 has been subject to the majority of changes. The layout of the Act has also been changed with the inclusion of section headings (as opposed to marginal notes), a table of provisions and endnotes.
- 8 Robert Eagleson, *Writing in Plain English* (1994) 3–4.
- 9 Chapter 11.
- 10 Submissions 11, 14, 18, 23, 24, 29, 30, 32, 33, 38, 41, 45, 46.
- 11 Submissions 9, 11, 13, 17, 18, 21, 22, 23, 24, 29, 30, 32, 33, 38, 39, 41, 45, 46.
- 12 See, eg, *Bail Act 1977* ss 9(3A), 9(3B), 15(2), 27 all concern where and how to execute documents for bail.
- 13 See, eg, *Bail Act 1977* s 18 headed 'Appeal against refusal of bail or conditions of bail' which also concerns variation and revocation of bail.
- 14 See, eg, *Bail Act 1977* s 4(4) which is long and badly drafted so it is hard to determine which parts of the section apply to each other. Section 12 is also a good example.

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The structure of the Act's individual provisions is also problematic, as is the use of the passive rather than active voice, the expression of directions in negatives rather than positives, the use of unnecessary qualifications and sentence length. Sentences longer than 100 words in the Bail Act are the norm rather than the exception. Long sentences impose a strain on the reader's short-term memory, as the LRCV commented:

If we write long, meandering sentences, running on for clause after clause and embedding clauses within clauses, we force the reader into intricate syntactic analysis. The longer the sentence rambles, the greater the danger that a detail will be overlooked or a connection missed ... There is never any justification for a long sentence in a functional document.¹⁵

An example of the LRCV's concerns can be found in section 15(2) of the Bail Act. It is directed towards bail justices and sureties and deals with the witnessing of a surety's and accused's signature when the latter is being held on remand:

Where a certificate of bail is endorsed on a warrant and it is inconvenient for sureties to attend at the prison to sign the undertaking of bail any bail justice may make a duplicate of the certificate on the warrant and upon the certificate being produced to some other bail justice that bail justice may witness the signature of the surety or the signatures of the sureties on the undertaking in conformity with the certificate, and upon the undertaking being transmitted to the officer in charge of the prison and produced together with the certificates on the warrant to any bail justice attending or being at the prison the bail justice may thereupon witness the signature of the accused person on the undertaking and may order him to be discharged out of custody.

The section is written as one sentence, contains no punctuation and comprises 133 words. Aside from the vocabulary problems, the section could be redrafted into more sentences to break the material into manageable pieces. Many other sections of the Bail Act are similar to this section.

The 'show cause' test is a prime example of the difficulty caused by the structure of the Bail Act's sections. Section 4(4) starts on page eight of the Bail Act and concludes on page 11. It includes subsections (a), (b), (ba), (c), (caa), (ca), (cab), (cb), (cc) and (d). Within these subsections there are more subsections numbered (i) and (ii). After subsection (d), the section reverts to the first subsection level of 4(4). It then divides into subsections (i) and (ii) which apply to all the lettered subsections (a) to (d). This structure is extremely confusing. At first glance, the final subsections (i) and (ii) appear to apply only to section 4(4)(d), yet in fact apply to all the lettered subsections. The potential to mislead someone not familiar with the operation of the Bail Act is high.

DRAFTING

A recently released Australian Institute of Criminology (AIC) report on bail quotes an unnamed court: 'It's a shocking piece of legislation, probably one of the worst pieces of legislation you come across, in Victoria anyway. Get them to rewrite it in a user friendly form ...'.¹⁶

The commission has not included draft legislation in this report because drafting is a specialised area and drafting an entire Act is beyond our expertise. The Office of the Chief Parliamentary Counsel employs experienced drafters and is responsible for the drafting of Bills within Victoria. Any new plain English version of the Act would be drafted by the office.

RECOMMENDATIONS

1. The *Bail Act 1977* should be repealed. The Act and its Regulations should be rewritten and replaced by a new principal Act and new regulations which incorporate the recommendations in this report. All provisions dealing with bail should be in this Act.
2. The new Bail Act and Regulations should be written in plain English. The Act should be drafted with its audience in mind, especially the needs of lay decision makers.

We believe terms that are fundamental to the bail decision should be clear to all parties.

We recommend adopting a very simple drafting style, similar to the example provided by the LRCV in its 1991 report. Our recommendations should help create a simpler Act.

The needs of accused people must also be considered when drafting the new Act. The Bail Regulations contain forms used in bail hearings, including those that must be signed by accused people, such as the Undertaking of Bail. The current drafting of these forms is archaic and would be difficult for many accused people to understand. The Undertaking of Bail for Appearance at Trial form does not include the many pre-trial hearings that accused people will be required to attend in answer to their bail.

In our Consultation Paper we asked whether the forms contained in the Bail Regulations should be rewritten in plain English and what they should contain. Submissions that addressed these questions favoured redrafting the forms in plain English with headings that describe the next hearing accused people are required to attend.¹⁷ For example, mentions or contest mentions in the Magistrates' Court and case conferences or trials in the higher courts.

The Police Association and the Public Interest Law Clearing House (PILCH) thought the Undertaking of Bail form should also contain details of appropriate legal and other support services. PILCH suggested it contain the contact details of any bail supervisor, any organisation or individual with whom accused people have reporting obligations, and a contact at the court. The Police Association noted that new forms should take into account the needs of intellectually impaired people. The Criminal Bar suggested that the forms be available in different languages to ensure accused people and sureties are adequately informed of their rights and obligations.

The commission agrees that the forms need to be redrafted and should take into account language and literacy barriers and provide contact information.

RECOMMENDATIONS

3. The forms contained in the Bail Regulations 2003 should be redrafted in plain English, taking into account that a significant proportion of people who appear before the court have intellectual disabilities, poor literacy, or English is not their first language. The forms should contain the contact details of the registrar at the court to which the accused is bailed and support services within the surrounding area of the court to which the accused is bailed.
4. The new Bail Act should use the phrase 'remand in custody' when bail is refused, and 'bailed to appear' when bail is granted.

CLARIFYING IMPORTANT TERMS

The Bail Act uses the word 'remand' to refer to both remand in custody and remand while on bail. The modern use of remand means remand in custody. In the Consultation Paper we asked whether the legislation should only use the term remand to mean remand in custody.¹⁸ All submissions that answered this question, apart from the Office of Public Prosecutions (OPP), supported this proposal.¹⁹

We believe terms that are fundamental to the bail decision should be clear to all parties. The Criminal Bar Association submitted: 'The experience of our members is that the use of the expression "remand" is confusing and often troubling to accused who have been granted bail'.

In the new Bail Act the term 'remand' should only be used when bail is refused.

In our Consultation Paper we discussed the possible confusion caused by the different meanings of the word 'court' in the Bail Act and asked whether the definition should be retained.²⁰ The Bail Act sometimes defines court to mean only the court and at other times to include the court, police and bail justices. Most submissions thought this was confusing and that the Act should refer to individual decision makers where appropriate.²¹

We believe the current definition is confusing and should not be replicated in the new Act. The powers of each decision maker will also be considerably clearer if the Act refers specifically to police, registrars,²² bail justices and courts rather than 'court'. Where appropriate, individual courts should also be referred to, such as Magistrates', Children's, and Supreme Courts.

15 Law Reform Commission of Victoria (1986) above n 6, 19.

16 Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 78.

17 Submissions 6, 11, 15, 18, 23, 24, 29, 30, 32, 33, 38, 41, 45, 46.

18 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 161.

19 Submissions 6, 11, 18, 23, 24, 29, 30, 32, 33, 38 all supported. The OPP did not explain why it did not support this proposal.

19 Submissions 23, 24, 29, 30, 32, 33, 38, 41, 45. The only submissions that supported retention of the current definition were from bail justices: 11, 18, 46.

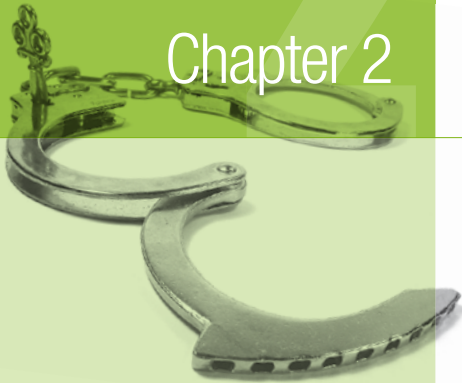
20 Victorian Law Reform Commission (2005) above n 18, 159–160.

21 Submissions 23, 24, 29, 30, 32, 33, 38, 41, 45. The only submissions that supported retention of the current definition were from bail justices: 11, 18, 46.

22 Registrars do not make bail decisions but are responsible for other decisions relevant to bail, such as the suitability of sureties.

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Police, prosecution and defence agencies favoured the inclusion of a purposes or objects provision.

DELETING REDUNDANT TERMS OR PROVISIONS

The Bail Act refers to both warrants of commitment—a warrant to commit a person to prison—and warrants of remand. A warrant is a document, usually issued by a court, that directs or authorises someone to do something, in this case to remand an accused person in custody. In the context of the Bail Act, the two warrants direct the same thing, and warrants of commitment are no longer used.²³ Continued reference to both warrants in the Act causes confusion.

In our Consultation Paper we asked whether the Bail Act should continue to make reference to a warrant of commitment, and whether removing the reference to it would cause any problems.²⁴ All but two relevant submissions said the reference should be deleted.²⁵ Only the OPP and Magistrates' Court favoured retention. The OPP did not give any reason for retention. The Magistrates' Court thought it should be retained because it relates specifically to the document generated to hold a person in custody. However, the warrant is no longer used and the *Magistrates' Court Act 1989* makes it clear that the term warrant of commitment is obsolete.²⁶ We therefore recommend against continued reference to warrants of commitment in the Bail Act.

The Bail Act refers to telegrams and cablegrams.²⁷ These forms of communication are no longer used. In our Consultation Paper we asked whether the Bail Act should continue to refer to telegrams and cablegrams.²⁸ All submissions that answered this question favoured removal of these terms.²⁹ We recommend the new Bail Act refer to modern forms of communication in line with other Victorian legislation.

In our Consultation Paper we discussed section 4(2)(b) of the Bail Act, which requires a complete denial of bail for someone already in custody serving a sentence.³⁰ It was superseded by the inclusion of section 4(2A) in the Bail Act in 1989, which provides that a court is not required to refuse bail in that situation but accused people cannot be released on bail until they finish their prison sentence. The two provisions conflict and section 4(2)(b) is no longer required. In our Consultation Paper we asked whether section 4(2)(b) should be repealed. Most submissions agreed³¹ though two bail justices submitted that the section should not be repealed, but did not provide any reason.³² We also asked whether there were any other sections of the Bail Act that are no longer relevant but received no response.

RECOMMENDATION

5. The new Bail Act should be drafted to refer to 'court', 'police', 'bail justice', and 'registrar' where appropriate to make the powers of each decision maker under the Act clear. Where different courts have different powers, individual courts should also be referred to.
6. The term 'warrant of commitment' should not be used in the new Bail Act.
7. The new Bail Act should refer to modern forms of communication in line with other Victorian legislation.
8. Section 4(2)(b) of the *Bail Act 1977* should not be re-enacted in the new Bail Act.

INCLUSION OF A STATEMENT OF PURPOSES

In our Consultation Paper we asked whether the Bail Act needs a statement of purposes or an objects provision to broadly detail its main purposes.³³ We also asked what purposes people believed should be served by the Bail Act.³⁴

Police, prosecution and defence agencies favoured the inclusion of a purposes or objects provision.³⁵ The OPP submitted: 'Yes. The purpose should seek to balance the rights of defendants with the legitimate expectations of the community'.

A recent AIC study detailed what constitutes good practice in bail decision making. One of the issues it identified was the need for bail legislation to include 'a statement of principles, objectives and criteria guiding decision making'.³⁶ It also suggested distinguishing the criteria for assessing eligibility for bail (risk) from the objectives of bail.

The study found that the rights of accused people underpin bail practice but are little discussed. It supports a statement of principles affirming:

- the seriousness of the decision to deprive a person of liberty
- the presumption of innocence
- the use of custodial remand as a last resort, only to be used when no appropriate alternative is available ...³⁷

WHY HAVE A PURPOSES STATEMENT?

The commission believes it is important that the purposes of the Bail Act, and in turn the purposes of bail, be articulated. Purposes statements are commonly included in new legislation. The need for them was recognised 20 years ago in a ministerial statement by the Victorian Attorney-General.³⁸ The statement announced changes to the format of new Acts, including the requirements to insert a statement of purposes or objects.

The purposes and objectives of bail have never been addressed in Victorian legislation. The commission believes many people do not understand what purposes bail serves and tend to believe that some purposes are more important than others. There also seems to be limited understanding in the community of the different purposes of bail and sentencing.

A decision maker has to balance two competing interests when making a bail decision:

- ensuring the accused will attend court and not interfere with witnesses or commit other offences
- ensuring the accused, who has not yet been found guilty of the offence and is entitled to the presumption of innocence, is not deprived of liberty unnecessarily.

It is important that these interests are balanced and one objective does not take precedence over another. Dr Corns addressed this issue in his submission:

A clear statement of the purposes of the act should help decision makers (judicial and non-judicial) not only in interpreting the act but in apportioning the weight that ought to be given to the various competing considerations.

Detailing the objectives of bail will help decision makers appreciate that bail serves several purposes, and the rights of the accused need to be balanced with the protection of the community.

23 Discussed further in Victorian Law Reform Commission (2005) above n 18, 160–161.

24 Ibid.

25 Submissions 11, 18, 23, 29, 30, 32, 33, 38, 45.

26 *Magistrates' Court Act 1989* sch 8, cl 11.

27 *Bail Act 1977* s 30(3); Form 2 in the Bail Regulations.

28 Victorian Law Reform Commission (2005) above n 18, 161.

29 Submissions 11, 18, 23, 24, 29, 30, 32, 33, 38, 46.

30 Victorian Law Reform Commission (2005) above n 18, 163.

31 Submissions 22, 23, 24, 29, 30, 32, 33, 39, 41, 45.

32 Submissions 11, 18.

33 An example of a purposes provision can be found in the *Sentencing Act 1991* s 1. A purposes/objects provision appears at the start of an Act. A purposes/objects provision is different from a short title to an Act or a preamble. In some Acts, individual parts or sections contain a purposes provision, detailing what the intended purpose of the specific part or section is.

34 Victorian Law Reform Commission (2005) above n 18, 16–17.

35 Submissions 8, 9, 11, 12, 13, 15, 23, 24, 29, 30, 32, 33, 34, 38, 41.

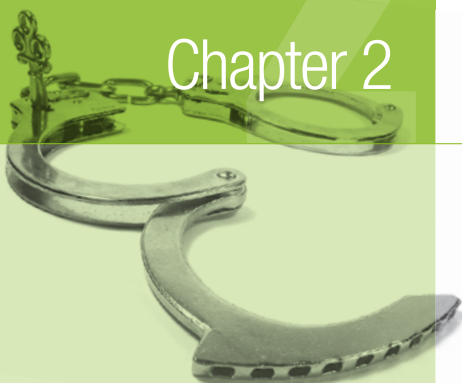
36 King, Bamford and Sarre (2005) above n 16, 108.

37 Ibid.

38 Victoria, *Parliamentary Debates*, Legislative Council, 7 May 1985, Vol 377, 432 (Jim Kennan).

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There are dangers if decision makers craft initiatives too far removed from the traditional objectives of bail.

POLICY CONSIDERATIONS

The original purpose of bail or remand was to ensure accused people's attendance in court to answer the charges against them. However, bail legislation has increasingly been used to effect broader policy considerations, particularly the prevention of offending through imposition of bail conditions and bail support programs. Increased emphasis has been placed on the use of bail and remand in protecting the community from crime. The AIC study into factors affecting remand points out:

The last forty years has seen a move away from making the integrity and credibility of the justice system (for example, ensuring the defendant will attend court) the predominant outcome. Both legislative and operational policy changes have elevated the importance [of protecting the community] ... above the others.³⁹

In the past 10 years the number of services supporting people on bail has increased. Pre-sentence initiatives in Victoria were discussed in our Consultation Paper and are also addressed in this report.⁴⁰ The most well known initiative in Victoria is the CREDIT Bail Support program but there are other public and private services used by decision makers when setting bail conditions.

Initiatives that aim to address behaviour, such as drug rehabilitation, accommodation, and anger management, are now an accepted feature of our system. They provide more options for decision makers and help accused people to avoid further contact with the criminal justice system, appear in court as required, and stop offending.

While acknowledging the importance of current support services, the commission recognises concerns about bail becoming a vehicle for the imposition of myriad pre-sentence initiatives.⁴¹ Sentencing experts Arie Freiberg and Neil Morgan have discussed the traditional purposes of bail and the differences between bail and sentence:

Although bail based schemes have the benefit of flexibility and do provide an opportunity for innovation on a pilot basis, the primary purpose of bail should not be lost. Bail should be seen as essentially process orientated rather than performance based. Its main role is to ensure that the [alleged] offender appears in court, either to face charges or to be sentenced.⁴²

RECOMMENDATIONS

9. The Bail Act should contain a purposes provision. The purposes of the Bail Act should be to:
 - have within one Act all general provisions dealing with bail
 - establish processes to ensure the prompt resolution of bail after arrest
 - ensure bail hearings are conducted in a fair, open and accountable manner
 - ensure bail is not used to punish accused people
 - limit or prevent offending by accused people while on bail by providing for the imposition of conditions of bail commensurate with any such risk
 - promote transparency in decision making
 - ensure the safety of the community, including alleged victims and witnesses
 - ensure the bail system does not perpetuate the historical disadvantage faced by Indigenous Australians in their contact with the criminal justice system
 - promote public understanding of bail practices and procedures
 - reform the bail laws of Victoria.

The commission agrees that the distinction between the purposes of bail and sentencing must be maintained. There are dangers if decision makers craft initiatives too far removed from the traditional objectives of bail. There is a risk that accused people—who are presumed to be innocent—may find themselves subjected to lengthy and complicated orders that are more onerous than any potential sentence, and for which the possibility and consequences of breach are great. The sentencing process is a more appropriate mechanism for imposing such conditions.⁴³ In Chapter 7 we make recommendations about the imposition of bail conditions which aim to maintain this distinction.

WHAT SHOULD A PURPOSES STATEMENT SAY?

Many suggestions for objects or purposes were put forward in submissions, including:⁴⁴

- to provide a fair, efficient and consistent set of principles and procedures to ensure the appearance of all accused people in criminal proceedings⁴⁵
- the presumption that all accused people are entitled to bail unless the circumstances justify its denial⁴⁶
- the timely processing of bail applications⁴⁷
- the presumption of innocence⁴⁸
- the use of remand as a last resort⁴⁹
- bail powers not to be used punitively and bail conditions to be used sparingly⁵⁰
- the safety of the community, including victims, witnesses and the accused⁵¹
- bail decisions to be made free from discrimination of any kind⁵²
- transparency of decision making, including provision of reasons.⁵³

These suggestions informed the commission's consideration of what the purposes of the Act should be. Some suggestions fit more appropriately within the substantive provisions of the Act and will be discussed elsewhere. These include the presumption that bail be granted, sparing use of conditions, and provision of reasons. We do not consider it necessary to include a provision about decisions being made free from discrimination because this is part of the oath sworn by decision makers.

It is important to distinguish between the purposes of the Bail Act, and the purposes or principles of bail itself. We believe the principles of bail should be discerned from the substantive provisions of the Act, rather than drawn out in a separate provision. For example, the Act will contain a substantive provision establishing a general presumption in favour of bail. It is unnecessary and possibly confusing to repeat this in a 'principles' provision.

The commission believes the purposes provision in the *Sentencing Act 1991* provides a good model for the new Bail Act. The provision that 'all relevant law be in one Act' should be replicated in the new Bail Act, as should the purpose of 'promoting public understanding of practices and procedures'. These two purposes support our recommendations, which aim to simplify bail law and ensure it is accessible to those using it and affected by it. There is a poor understanding in the community of the different purposes of bail and sentencing. Having clear purposes provisions in both Acts may improve understanding of the different purposes.

Two of the purposes we recommend address particular groups: victims and Indigenous Australians. The reference to victims and witnesses reflects recommended changes to the unacceptable risk test made in Chapter 3. The safety and welfare of victims generally is discussed in Chapter 4. The inclusion of a specific provision about Indigenous Australians is discussed in Chapter 10.

39 King, Bamford and Sarre (2005) above n 16, 8.

40 See Chapter 7.

41 Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: The Conflation of Dispositional Options' (2004) 15(3) *Current Issues in Criminal Justice* 220. The views of Freiberg and Morgan were reinforced in a meeting with Professor Freiberg, Chairperson of the Sentencing Advisory Council, 5 January 2006.

42 Ibid 234. The PILCH submission also raised issues relevant to the potential 'conflict' between bail and sentence.

43 Ibid. In the course of their discussion, Freiberg and Morgan discuss the 'blurring' between pre-sentence initiatives and sentence that has occurred in other jurisdictions within Australia. The example of the Drug Court of Western Australia is presented. Unlike most Drug Courts in Australia, which follow the traditional model of a finding of guilt and then sentence, Western Australia uses a mechanism known as the Pre-Sentence Order. Under this scheme the court adjourns sentence for up to two years and imposes a range of conditions that accused people must comply with. The order is not based on the bail system, although it shares many features in common with bail. The authors contend that the order is problematic for a number of reasons: it has onerous conditions more appropriate to sentence, it distorts sentencing data, its place in the sentencing hierarchy is confused, it may not provide an additional benefit over the existing sentencing options, and the right to appeal against the imposition of an order is problematic. The same arguments could be applied to a similar use of onerous bail conditions.

44 Some of the submissions listed below did not directly suggest inclusion of these points in an objects and purposes clause, but the submission had a focus on the importance of the point in consideration of bail.

45 Submission 13.

46 Submissions 9, 13, 24, 29, 30, 32, 38.

47 Submissions 11, 13, 30, 38.

48 Submissions 13, 17, 21, 24, 29, 30, 31, 32, 33, 38, 40, 45, 47.

49 Submissions 9, 12, 24, 30, 32, 34, 38, 42.

50 Submissions 13, 15, 17, 24, 29, 30, 31, 32, 34, 40, 45.

51 Submission 34.

52 Submissions 15, 31, 32, 34.

53 Submission 34.

BAIL AND HUMAN RIGHTS

The commission believes a new Bail Act should approach bail from a human rights perspective. The fundamental legal rights that are common to all people include: protection from arbitrary detention, a fair trial, legal representation and the presumption of innocence.

International law recognises that as a general rule pre-trial detention is to be avoided. One of the main international documents outlining basic human rights is the International Covenant on Civil and Political Rights.⁵⁵ Australia has ratified the covenant; however, this does not mean it is legally binding.⁵⁶

Several submissions discussed the link between human rights and bail.⁵⁷ Youthlaw submitted that any reforms to the Bail Act 'must be consistent with the Victorian Government's human rights obligations'. Promotion and protection of human rights is one of the government's primary strategic aims.⁵⁸ It is important to recognise, however, that human rights are rarely absolute.⁵⁹ This is particularly true for bail. The rights of an accused must be balanced against competing interests—those of the State and the wider community.

HUMAN RIGHTS FOR ACCUSED PEOPLE IN VICTORIA

On 1 January 2007 most provisions in the Victorian Charter of Human Rights and Responsibilities Act came into force. The charter focuses on rights that are applicable to all members of the community rather than the rights of individual groups and mainly deals with civil and political rights, many of which emanate from the international covenant. The charter includes the following provisions relevant to bail:

- Accused people have the right to the presumption of innocence.⁶⁰
- People must not be subjected to 'arbitrary' arrest or detention.⁶¹
- People who are arrested or detained on criminal charges must be promptly brought before a court and tried without 'unreasonable delay'.⁶² Accused children must be brought to trial 'as quickly as possible'.⁶³
- If accused people are not tried within a 'reasonable time' after arrest or detention they must be released.⁶⁴
- Accused people must not be 'automatically detained in custody'. They may be released subject to a guarantee that they will appear for trial.⁶⁵
- Accused people who are detained in custody are entitled to apply to a court for a 'declaration or order' about the lawfulness of such detention, and the court must make a decision 'without delay'. If the detention is unlawful the court must order their release.⁶⁶
- Accused people must be segregated from convicted offenders, 'except where reasonably necessary'.⁶⁷ Accused children must be segregated from adults.⁶⁸
- Accused people must be treated in a manner 'appropriate' for those who have not been convicted.⁶⁹

The charter will ensure policy makers give prominence to human rights in the preparation of new legislation.⁷⁰ Courts will also consider the charter when they interpret laws, as will public officials when they develop new policies.⁷¹ Any new Bail Act that results from this review will have to be compatible with the charter. The charter recognises that human rights will, in some circumstances, be limited by statute. This is only to occur where the limitation is 'reasonable' and can 'be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.⁷²

The Victorian charter is similar in many respects to the UK Human Rights Act. A report of the European Commissioner for Human Rights in 2004 noted that:

*The United Kingdom has not been immune, however, to a tendency increasingly discernable across Europe to consider human rights are excessively restricting the effective administration of justice and the protection of the public interest ... Against a background, by no means limited to the United Kingdom, in which human rights are frequently construed as, at best, formal commitments and, at worst, cumbersome obstructions, it is perhaps worth emphasising that human rights are not a pick and mix assortment of luxury entitlements, but the very foundation of democratic societies. As such, their violation affects not just the individual concerned, but society as a whole; we exclude one person from their enjoyment at the risk of excluding all of us.*⁷³

55 *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

56 Ratification does not create binding legal obligations. Instead, it means that a state party will take the necessary steps to give effect to the treaty at a domestic level. Many human rights recognised by international law are still not protected by Victorian law and will not be protected without the introduction of municipal law. The policy of the Australian Government is that '...ratification of a treaty does not give rise to a legitimate expectation that an administrative decision will be made in conformity with the treaty. Ratification does not impose upon the Government a legal obligation to comply with a treaty's provisions until the necessary implementing legislation has been passed, either by the Commonwealth or by State or Territory Governments': Treaties Secretariat, Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered: Treaties and Treaty Making: An Official's Handbook* (2005) 9.

57 Submissions 15, 24, 30, 32, 38.

58 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004).

59 There is much written on whether there are any absolute rights, see Jeremy Waldron (ed) *Theories of Rights* (1984).

60 *Charter of Human Rights and Responsibilities Act 2006* s 25(1).

61 *Charter of Human Rights and Responsibilities Act 2006* s 21(2).

62 *Charter of Human Rights and Responsibilities Act 2006* ss 21(5)(a),(b).

63 *Charter of Human Rights and Responsibilities Act 2006* s 23(2).

64 *Charter of Human Rights and Responsibilities Act 2006* s 21(5)(c).

65 *Charter of Human Rights and Responsibilities Act 2006* s 21(6).

66 *Charter of Human Rights and Responsibilities Act 2006* s 21(7).

67 *Charter of Human Rights and Responsibilities Act 2006* s 22(2).

68 *Charter of Human Rights and Responsibilities Act 2006* s 23(1).

69 *Charter of Human Rights and Responsibilities Act 2006* s 22(3).

70 For legislative changes a 'Human Rights Impact Statement' must be drafted by the responsible minister for inclusion in Cabinet submissions. There is currently no formal requirement that this occur, though it may be included in the Cabinet handbook in future. New legislation introduced into parliament will be accompanied by a 'Statement of Compatibility', prepared by the Member of Parliament who introduces the Bill, which details whether or not the Bill complies with the Charter: s 28.

71 *Charter of Human Rights and Responsibilities Act 2006* part 3, divs 3, 4. These sections commence on 1 January 2008. Superior courts within Victoria have already demonstrated a willingness to take into account international human rights instruments in the context of bail, particularly the detention conditions of remandees or prisoners: see eg *In the matter of Little Joe Rigoli* (Unreported, Court of Appeal, Maxwell, P and Charles, JA, 16 December 2005) [5].

72 *Charter of Human Rights and Responsibilities Act 2006* s 7(2).

73 Council of Europe, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom: 4th–12th November 2004: For the Attention of the Committee of Ministers and the Parliamentary Assembly* (2004) [3]–[4].

HUMAN RIGHTS FOR VICTIMS OF CRIME IN VICTORIA

Human rights are also relevant to the criminal justice system's response to victims of crime. The Charter of Human Rights and Responsibilities Act does not contain provisions relevant to victims of crime. They are addressed in the new Victims' Charter Act which contains comprehensive provisions relating to victims and the criminal justice system.⁷⁴ We discuss the provisions of the Victims' Charter Act as they apply to bail in Chapter 4.

The first international instrument to address the needs of victims was the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁷⁵ The declaration was adopted

by the United Nations in the mid 1980s and includes the need to inform victims of 'their role and the scope, timing and progress of the proceedings and the disposition of their cases'.⁷⁶ Victims should also be given the opportunity to have their views and concerns voiced at 'appropriate stages' of judicial proceedings 'without prejudice to the accused'.⁷⁷

The declaration is not a legally binding document. Various Australian states have incorporated provisions of the declaration in legislation or codes, charters or guidelines. Within Victoria, the Victims' Charter Act endeavours to incorporate principles of the UN declaration.⁷⁸ The Victims' Charter is discussed further in Chapter 4.

RECOMMENDATION

10. The new Bail Act and regulations should comply with the intention of the *Charter of Human Rights and Responsibilities Act 2006* and the *Victims' Charter Act 2006*.

74 The *Victims' Charter Act 2006* commenced operation on 1 November 2006.

75 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/Res/40/34 (1985).

76 *Ibid*, Article 6(a). Victim is defined in Article 2. A person may be considered a victim 'regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted ...'

77 *Ibid*, Article 6(b).

78 Victims Support Agency, Department of Justice, *Victims' Charter: Community Consultation Paper* (2005) 12.