



# Chapter 3

## **Simplifying the Tests for Bail**

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*The commission believes the current tests are complicated and confusing and there are many compelling reasons for their reform.*

### WHAT ARE THE TESTS FOR BAIL?

Section 4 of the Bail Act contains a general presumption in favour of bail—that is, the Act states that an accused person is generally entitled to bail. However, this presumption is subject to the ‘unacceptable risk test’.

Accused people who are charged with certain offences may also have to pass another test before receiving bail: the ‘exceptional circumstances’ test or the ‘show cause’ test.

### UNACCEPTABLE RISK TEST

Accused people are entitled to be released on bail unless the prosecution satisfies the court that there is an unacceptable risk the accused would:

- fail to appear in court in compliance with bail
- commit an offence while on bail
- endanger the safety or welfare of members of the public
- interfere with witnesses or otherwise obstruct the course of justice.<sup>1</sup>

In assessing whether there is an unacceptable risk, the decision maker must look at all relevant considerations, including the:

- nature and seriousness of the offence
- accused’s ‘character, antecedents [meaning any prior convictions], associations, home environment and background’
- accused’s compliance with any previous grants of bail
- strength of evidence against the accused
- attitude, if expressed to the court, of the alleged victim to the grant of bail.<sup>2</sup>

### REVERSE ONUS TESTS

The Bail Act lists offences which do not have a general entitlement to bail. If charged with those offences accused people have to satisfy the court that they should be granted bail, rather than the prosecution satisfying the court that they should not. Because the onus is on the accused rather

than the prosecution these are known as ‘reverse onus’ offences. There are two categories of reverse onus offences—those where the accused must show ‘exceptional circumstances’, and those where they must ‘show cause’. Exceptional circumstances is a higher, or more difficult, test than show cause—a ‘high hurdle’.<sup>3</sup> We explain reverse onus offences and the procedure for applying them in our Consultation Paper.<sup>4</sup>

Briefly, if the charge involves any of the offences listed in section 4(4), the decision maker must remand the accused unless the accused ‘shows cause’ why detention is not justified. The offences include committing a further offence while on bail, breach of an intervention order, aggravated burglary, and certain drug offences. There is no exhaustive list of criteria that accused people can rely on to show cause. Instead, each case must be assessed on its unique facts. A combination of factors can result in an accused showing cause.<sup>5</sup>

If accused people are charged with any of the offences listed in section 4(2)(a) or (aa), they must be remanded in custody unless the decision maker is satisfied there are exceptional circumstances to justify granting bail. These offences include murder, trafficking in a commercial quantity of drugs, and other serious drug offences. Like show cause, an individual factor or combination of factors, which by themselves are not exceptional, can constitute exceptional circumstances.<sup>6</sup>

### WHY DO THE TESTS NEED REFORM?

In the Consultation Paper we asked whether the presumptions against bail in the Bail Act should be reformed or removed altogether.<sup>7</sup> Most submissions addressed the Bail Act’s reverse onus provisions and advocated some sort of reform; no one believed the current provisions should remain as they are.

The commission believes the current tests are complicated and confusing and there are many compelling reasons for their reform.

## TWO-STEP PROCESS

If charged with a reverse onus offence, the Bail Act requires consideration of the show cause or exceptional circumstances test *and* the unacceptable risk test. Bail is not automatically granted if accused people successfully show cause or demonstrate exceptional circumstances—they may still be refused bail because they are an unacceptable risk. The procedure of applying a reverse onus test and then the unacceptable risk test is often referred to as a ‘two-step process’.

Following the publication of our Consultation Paper in late 2005, President Maxwell of the Court of Appeal questioned the necessity of the two-step process in *Re Fred Joseph Asmar*, which involved a show cause offence.

... the question is whether the applicant has satisfied the Court that his/her detention in custody is not justified. That question will be answered either in the affirmative or in the negative. If answered in the affirmative, bail should be granted. If answered in the negative, bail must be refused. There is no second step.<sup>8</sup>

In arguing that cause has been shown, an accused will canvas the four matters that must be considered when deciding unacceptable risk. These factors remain ‘at the heart’ of any bail decision.<sup>9</sup>

The decision in *Asmar* potentially means the two-step approach is no longer relevant when an accused seeking bail is charged with a show cause offence. However, the decision is a judgment of a single justice rather than the full Court of Appeal, and therefore is not binding on other decision makers. Other judgments of single Supreme Court judges are contrary to the position established in *Asmar*, such as the two-step process outlined by Justice Gillard in *DPP v Harika*.<sup>10</sup> In the recent case of *Re Application for Bail by Paterson*, Justice Gillard said the approach adopted by President Maxwell was wrong.<sup>11</sup> The commission has been told that some magistrates are now following *Asmar*, including those in the Children’s Court. We have also been told that bail justices are being trained in the new approach, although they are not being told they must apply *Asmar*.

Because the court in *Asmar’s* case was only looking at the show cause test, the decision does not apply to the exceptional circumstances test. The two-step process for an exceptional circumstances offence is demonstrated in *Beljajev v Director of Public Prosecutions*. Justice Kellam found that despite there being exceptional circumstances owing to delay, there was still an unacceptable risk the accused would fail to surrender himself into custody and would commit further offences while on bail.<sup>12</sup> In doing so, Justice Kellam was following a two-step process previously set out by the Court of Appeal.<sup>13</sup>

## ARTIFICIAL REASONING PROCESS

Throughout our review, decision makers highlighted the overlap between the two reverse onus tests and the unacceptable risk test. This was the problem President Maxwell identified in *Asmar’s* case. Factors that may show cause or demonstrate exceptional circumstances will also be relevant to unacceptable risk. This means that an attempt to follow two discrete tests can be somewhat artificial. Justice Kellam, before the decision in *Asmar*, said ‘the two inquiries overlap in the sense that the unacceptable risk factors have to be weighed when considering whether the applicant for bail has shown cause’.<sup>14</sup> This comment is equally applicable to exceptional circumstances offences.

We heard decision makers will often form a ‘global’ view about bail, and structure the decision accordingly.<sup>15</sup> In other words, all factors raised in a bail application will be considered and a decision then made that conforms to the reverse onus framework.

Compartmentalising a bail decision so there is a two-step process with individual factors being considered and addressed at different stages is illogical. As detailed in *Asmar*, satisfying one stage of the process will likely satisfy the other.<sup>16</sup> The current system also results in overlap and obscures the real issue. We have been told decision makers will consider all matters and then make a judgment based on the ultimate determinant—risk. The following view was expressed to us by one decision maker: ‘The fundamental exercise you conduct is risk assessment. You can clothe it and dress it up in various formulas and language. In the end, risk assessment is what you do’.<sup>17</sup>

- 1 *Bail Act 1977* s 4(2)(d)(i).
- 2 *Bail Act 1977* s 4(3).
- 3 *Re application for bail by Whiteside* [1999] VSC 413 (Unreported, Warren J, 6 October 1999) [9].
- 4 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 78–82.
- 5 See, eg, *Re Browne-Kerr* (Unreported, Supreme Court of Victoria, Coldrey J, 10 August 1993); *Michael Kanfouche* (Unreported, Supreme Court of Victoria, Smith J, 4 April 1991); *R v Nezif* [2005] VSC 17 (Unreported, Habersberger J, 21 January 2005).
- 6 See, eg, *R v Abbott* (1997) A Crim R 19, 27 (Gillard J); *R v Sanareeve* (Unreported, Supreme Court of Victoria, Vincent J, 3 July 1986).
- 7 Victorian Law Reform Commission (2005) above n 4, 83–91.
- 8 *Re application for bail by Fred Joseph Asmar* [2005] VSC 487 (Unreported, Supreme Court of Victoria, Maxwell P, 29 November 2005) [11].
- 9 *Re application for bail by Fred Joseph Asmar* [2005] VSC 487 (Unreported, Supreme Court of Victoria, Maxwell P, 29 November 2005) [12]. These factors are not exhaustive, however, President Maxwell pointed out that they would be at the ‘forefront’ of a bail decision.
- 10 [2001] VSC 237 (Unreported, Gillard J, 24 July 2001); Victorian Law Reform Commission (2005) above n 4, 82.
- 11 (2006) 166 A Crim R 122, 126.
- 12 *Beljajev v DPP* (1998) 101 A Crim R 362.
- 13 *Beljajev v DPP (Vic)* (Unreported, Supreme Court of Victoria, Appeal Division, Young CJ, Crockett and Ashley JJ, 8 August 1991) [36].
- 14 *Re application for bail by Mark Clifford Hayden* [2005] VSC 160 (Unreported, Kellam J, 6 May 2005) [10].
- 15 Roundtable 1.
- 16 Although we heard that sometimes a decision maker will find that cause has been shown but then find the accused is an unacceptable risk; this was criticised by judges in consultation 46.
- 17 Roundtable 1.

*It is difficult to see why certain offences attract a reverse onus and others do not.*

Similarly, the Magistrates' Court of Victoria's submission stated:

*... magistrates are concerned about the artificiality of the reasoning which must be applied when determining cases to which the tests apply when it is abundantly clear that the main issue whether or not to grant bail is the question of risk.*

Even if it was possible to develop a coherent framework for the inclusion of offences in reverse onus categories, this problem of an artificial reasoning process would not be addressed.

#### AD HOC INCLUSION OF OFFENCES

Several submissions pointed out that reverse onus offences are ad hoc and anomalous.<sup>18</sup> Some believed reverse onus offences were chosen largely for political reasons: 'These offences tend to be a hotchpotch of additions, many responding to the perceived climate of the time'.<sup>19</sup>

Fitzroy Legal Service noted:

*... it is apparent from Parliamentary debates surrounding the enactment of some of these provisions and other extrinsic material that offences are given reverse onus status in order to reflect politically expedient views about particular offences, rather than because accused charged with these offences pose an objectively greater risk of breaching bail.*

It is difficult to see why certain offences attract a reverse onus and others do not. Seriousness or prevalence alone are not the only criteria used. Serious offences such as attempted murder, manslaughter, rape, aggravated rape, and culpable driving causing death do not attract a reverse onus. However, accused people who fail to notify the Director of Public Prosecutions in writing of a change of address must 'show cause'. These anomalies have been present in the legislation since it was enacted in 1977.

We heard criticisms about several offences that attract a reverse onus as well as offences that are excluded. Several submissions said the presumption against bail in the family violence and stalking provisions was problematic because of the untested nature of behaviour that may be alleged.<sup>20</sup>

The lack of framework for deciding reverse onus offences has been noted by the current President of the Court of Appeal:

*Section 4 of the Act is headed 'Accused person held in custody entitled to bail'. The attractive simplicity of this statement is, however, not borne out by the complicated provisions of s 4. The entitlement to bail contained in the opening words of s 4(1) is so hedged about with qualifications, with different tests and different onuses according to the class of offence involved, that the 'scheme' of the provisions is difficult to discern.<sup>21</sup>*

Maintaining a system where offences that attract a reverse onus are chosen on political grounds during 'law and order' debates results in inconsistencies and unfairness. Piecemeal reform hinders the development of an Act based on a consistent philosophy. The current provisions may also contribute to a perception that serious offences that do not fall within the exceptions are not treated with the same degree of gravity as the offences that do.

#### 'WORKING AROUND' THE ACT

We heard that the reverse onus provisions are sometimes more onerous than the situation demands. Because of this, decision makers will often find ways to 'work around' the requirements of the Bail Act.

The example most often cited was that of a first-time offender on bail for a minor offence who is then charged with shop theft. In this situation the accused falls within a show cause category.<sup>22</sup> However, it appears the test is often ignored by decision makers. This was discussed in a recent AIC report, which quoted an unnamed bail justice and unnamed police officer. The bail justice criticised the current provisions and explained how they operate in practice: '... the police actually close a blind eye to the fact that it's show cause anyway in a lot of those cases, and in my experience they don't actually fill in their reasons for granting bail in a show cause situation'.<sup>23</sup>

And the police officer agreed:

*You tend to go, dare I say, around the Bail Act a little, for practicality purposes. An example for that would be if you had a shoplifter who does a \$10 shop theft, gets caught and [for] some reason gets bailed. If he gets caught that day, the next day,*

*whenever, prior to the court case, and he gets caught shoplifting again, we're talking indictable offences, so he's on bail for an indictable, he's committed an indictable offence whilst on bail. He automatically falls into show cause. Realistically, a bail justice or a court won't remand somebody on that ... So it then falls back on us to not so much breach the Bail Act, but to take a practical view of it which in turn may open us up to criticism later on.*<sup>24</sup>

Similar sentiments were expressed in submissions. A defence lawyer said there was not the 'slightest chance that a shoplifter with no priors would receive a penalty more serious than fines'.<sup>25</sup> In ignoring the reverse onus provisions, decision makers are considering matters other than the alleged offence: the relatively trivial nature of the alleged offending, the unlikelihood of a custodial sentence and factors personal to the accused.

### **FACTORS UNIQUE TO THE INDIVIDUAL**

Several submissions said reverse onus provisions place undue attention on the offence charged, as opposed to factors personal to the accused and the circumstances of the alleged offending. A concern was expressed in some consultations that the Bail Act had become 'offence specific' as opposed to 'person specific'.<sup>26</sup> Dr Chris Corns, arguing in favour of greater consideration of factors personal to the individual, put it this way in his submission:

*In my view the fundamental distinction is between decision-making based on facts and considerations relating to the individual, on the one hand, and decision making based on the description of the particular crime alleged.*

The Fitzroy Legal Service submitted:

*Views about the particular offences, whatever their source, will always be an inappropriate basis for being given reverse onus status in the Act. Ultimately, it is difficult to see how, as a matter of logic, the fact of an accused being charged with a particular offence bears on the risk of them breaching bail.*

Submissions pointed out that categorisation based on the nature of the offence fails to consider there will be degrees of and variations in offending.<sup>27</sup>

Reverse onus provisions create particular difficulty for vulnerable accused people, such as those with a cognitive impairment, Indigenous Australians and children. Some accused people may have difficulty understanding spoken and written language and communicating verbally. They may also be unable to read or write and may tend to understand things they are told in a very literal way.

Reverse onus provisions require that bail be refused unless accused people successfully argue their case for bail. Many bail applications are made by accused people representing themselves. Vulnerable people often lack the skills or confidence to argue their case skilfully and therefore to exercise their rights.

Removing the reverse onus provisions would mean that vulnerable people do not have to wrestle with the meaning of show cause or exceptional circumstances. For many accused people these terms mean very little and the concept of risk is much simpler.

### **COMPLEXITY**

People outside the criminal justice system tend to have little understanding of bail law and the reverse onus provisions. The Victims Support Agency told us victims had minimal understanding of bail law and any reforms to make it more comprehensible would be welcomed.<sup>28</sup> Defence practitioners stressed the trouble they have in explaining the reverse onus provisions to clients. We also experienced first-hand the difficulty involved in explaining the provisions to laypeople during our consultations.

The Magistrates' Court of Victoria submitted:

*The primary benefit of abolishing reverse onus is that the Bail Act would be substantially simplified and the reasons for either granting or refusing bail would be much more readily understood by the community, particularly those to whom the decisions have a direct bearing.*

The court's view was shared by most of the participants who attended our roundtable discussion on this issue.<sup>29</sup>

- 18 Submissions 8, 9, 13, 17, 21, 22, 24, 32, 39, 45, 33.
- 19 Submission 17. Submission 21 said the Bail Act had become, 'in some senses a political football', submission 9 said 'they are offences that have a short period of notoriety', submission 38 argued that 'many offences that currently attract reverse onus, reflect media views ...' and submission 24.
- 20 *Bail Act 1977 s 4(4)(ba)*; submissions 22, 24, 38, 39.
- 21 *Re application for bail by Fred Joseph Asmar* [2005] VSC 487 (Unreported, Supreme Court of Victoria, Maxwell P 29 November 2005) [5].
- 22 This is because the accused person has committed an indictable offence while on bail: *Bail Act 1977 s 4(4)(a)*.
- 23 Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 79.
- 24 *Ibid.*
- 25 Submission 9.
- 26 Consultations 7, 22.
- 27 Submissions 17, 45.
- 28 Roundtable 5.
- 29 Roundtable 1.

## Chapter 3

# Simplifying the Tests for Bail

*The inclusion of particular offences in reverse onus categories gives the appearance of being 'tough' on those crimes.*

A commonly expressed concern was the ambiguity of the term 'show cause'. We were told the phrase lacks meaning. Defence practitioners in particular said it is difficult to explain to clients and, given its subjectivity, becomes a 'hit-and-miss' process—some decision makers will find cause has been shown while others, in an almost identical factual scenario, will not. Victoria Legal Aid submitted:

*If presumptions against bail are retained, then the distinction between 'show cause' and 'exceptional circumstances' should be clarified in the legislation. Currently, both tests lack precision and decisions are frequently inconsistent.*

Complexity is also caused by the need to 'synchronise' the reverse onus provisions in the Victorian Bail Act with the reverse onus provisions in Commonwealth legislation.<sup>30</sup> Changes to Commonwealth legislation have required complex amendments to the reverse onus provisions in the Victorian Bail Act, making this provision even more difficult to understand.<sup>31</sup> The complexity caused by the interaction of the Bail Act with Commonwealth legislation is discussed later in this chapter.

It was suggested to the commission that just because something is complex is not a reason to change it.<sup>32</sup> The commission does not accept this argument. Simplicity is an essential consideration for bail legislation. The Bail Act is used and applied by laypeople every day: police, bail justices and court registrars. And it has a direct bearing on an even wider group of people—victims, accused people and sureties.

A simplified Bail Act will allow the basis for decisions to be more readily understood. This will assist all decision makers, but particularly lay decision makers. It should also improve public understanding of bail law and therefore engender greater confidence in the bail process.

### FALSE PERCEPTIONS

The commission is concerned that the structure of the current tests creates an expectation that bail is less likely to be granted for reverse onus offences. This is a false perception that is likely to be particularly frustrating for victims of crime, who may expect an accused will be refused bail. Police share this frustration; during our consultations some officers criticised the way magistrates apply the Act in this area.<sup>33</sup>

The inclusion of particular offences in reverse onus categories gives the appearance of being 'tough' on those crimes, but it also obscures the complexity of the bail decision. A recent example of this followed civil disturbances in New South Wales (NSW). Legislation was enacted that created a presumption against bail for the offences of riot and affray.<sup>34</sup> Politicians called on decision makers to apply the new laws when considering bail.<sup>35</sup> When bail was granted to accused people, concern was then expressed about 'extraordinary leniency'.<sup>36</sup> Reverse onus provisions do not mean a blanket ban on bail; discretion will always remain with the decision maker.

We also heard police often use reverse onus provisions as a 'flag'. If an accused has been charged with a reverse onus offence police will not consider granting bail, automatically leaving the decision to a bail justice or court:

*The existence of the reverse onus situation is one that also can create problems in perception in the police force. That is some informants often the more junior feel that if there is a reverse onus situation then the court should make a decision about bail. Thus a number of low level offenders can be remanded for [a] short period overnight or [over] the weekend which result eventually in consent bail applications when a prosecutor has been able to explain how courts interpret such provisions as show cause to the informant.<sup>37</sup>*

Misunderstanding the way the legislation applies places additional stresses on the bail justice system and the courts.

## JUDICIAL DISCRETION

Judicial discretion can be circumscribed or guided by legislation. The Bail Act directs that certain matters be considered when determining unacceptable risk.<sup>38</sup> Reverse onus provisions are another example of the legislature endeavouring to direct the manner in which discretion is exercised. The High Court of Australia has addressed the issue of exceptional circumstance provisions in bail law, with the current Chief Justice noting:

*A law conferring a discretion on a court can determine the factors to which the court must have regard in exercising the discretion ... it can provide that there is a presumption that the discretion should be exercised in a particular way, save in exceptional circumstances.*<sup>39</sup>

An argument was put to us that the Bail Act should be more prescriptive for decision makers.<sup>40</sup> The commission believes this would further complicate an already confusing Act. The unacceptable risk test places appropriate parameters around the bail decision and keeps things simple.

Bail decisions are difficult. From time to time concerns are expressed about a particular decision to grant bail. Sometimes, the criticisms will be valid. However, often criticisms will be based on insufficient information, unrealistic expectations, and the benefit of hindsight or confusion about the competing objectives of bail. Dr Chris Corns' submission noted:

*... all that can be asked for is that the decision-maker has reached a decision which could be variously described as 'just', or 'justifiable' or 'rational' or 'appropriate'. Similar to sentencing decisions, it is usually problematic to describe the bail decision as 'right' or 'wrong'. Even where an accused who was granted bail fails to appear or otherwise breaches bail, the decision to grant bail was not necessarily wrong and can be clearly defensible.*

## HUMAN RIGHTS AND REVERSE ONUS

On 1 January 2007, most of the provisions of the *Charter of Human Rights and Responsibilities Act 2006* came into effect. Two of the charter's rights are particularly relevant to bail and the reverse onus provisions.

First, section 21 provides the right to liberty and security of the person. In particular, that a person who is arrested or detained on a criminal charge must be promptly brought before a court and brought to trial without unreasonable delay.<sup>41</sup> The person must be released if these requirements are not complied with. A person awaiting trial must not automatically be detained in custody. However, the person's release may be subject to guarantees to appear for trial and any other stage of the proceeding, including execution of judgment.<sup>42</sup>

Secondly, section 25(1) provides for the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law. This right applies from the point of charge, not just during the trial.<sup>43</sup>

The reverse onus provisions in the Bail Act potentially conflict with the right to liberty and the presumption of innocence. The charter requires that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights'.<sup>44</sup> If it is not possible to do so in a particular proceeding, the charter empowers the Supreme Court to make a 'declaration of inconsistent interpretation'.<sup>45</sup> Both these provisions come into force on 1 January 2008.

The rights in the charter are not absolute. The charter provides:

*A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors ...*<sup>46</sup>

Therefore, the right to liberty and the presumption of innocence can be limited in accordance with this provision. The compatibility of the reverse onus provisions with these rights has not yet been considered in the Victorian courts.<sup>47</sup>

- 30 Submission 33.
- 31 Bail Act 1977 ss 4(2)(ii)–(iii), (4)(cb)–(cc).
- 32 Roundtable 5; consultation 54.
- 33 Consultations 33, 54, 61.
- 34 *Law Enforcement Legislation Amendment (Public Safety) Act 2006* (NSW).
- 35 Australian Associated Press, 'Riot accused released on appeal', *Herald Sun* (Melbourne), <www.heraldsun.news.com.au> at 24 May 2006.
- 36 Australian Broadcasting Corporation, 'Minister Angry over Bail for Sydney Riot Accused', *ABC News Online*, 11 February 2006, <www.abc.net.au/news/newsitems/200602/s1567548.htm> at 24 May 2006.
- 37 Submission 9.
- 38 *Bail Act 1977* s 4(3).
- 39 *Ngoc Tri Chau v Director of Public Prosecutions (Cth)* (1995) 132 ALR 430, 438. Kirby P stated, 'There are many instances of statutory guidance for the making of judicial discretions ... which is clearly acceptable so long as it does not amount to a purported usurpation of the judicial function'.
- 40 Consultation 54.
- 41 *Charter of Human Rights and Responsibilities Act 2006* s 21(5).
- 42 *Charter of Human Rights and Responsibilities Act 2006* s 21(6).
- 43 In consultation 54 and roundtable 5 it was suggested in one consultation that the presumption of innocence is irrelevant at the pre-trial stage. This view does not accord with section 25(1) of the charter, nor with statements made by the Supreme Court of Victoria: eg, *Re application for bail by Peter Alan Heenan* [2005] VSC 49 (Unreported, Supreme Court of Victoria, Wheelan J, 3 March 2005) [3], where it was said, 'the Court starts with the presumption of innocence ...'; *DPP v Gregg James Hildebrandt* (Unreported, Supreme Court of Victoria, Bongiorno J, 18 November 2004), in an application for bail, 'This society does not pay lip service to the presumption of innocence, it is a real presumption ...'; *DPP v Cozzi* [2005] VSC 195 (Unreported, Supreme Court of Victoria, Coldrey J, 8 June 2005) [33]; *Re Gregg James Hildebrandt* [2006] VSC 198 (Unreported, Supreme Court of Victoria, King J, 31 May 2006) [11]; and *Re application for bail by Fred Joseph Asmar* [2005] VSC 487 (Unreported, Supreme Court of Victoria, Maxwell P, 29 November 2005) [25].
- 44 *Charter of Human Rights and Responsibilities Act 2006* s 32(1).
- 45 *Charter of Human Rights and Responsibilities Act 2006* s 36.
- 46 *Charter of Human Rights and Responsibilities Act 2006* s 7(2).
- 47 Section 21 of the charter was raised in *R v Alty* (Unreported, County Court, Judge Hannan, 24 January 2007). Judge Hannan ruled that section 32 (the interpretation provision) was not yet in force.



### UK HUMAN RIGHTS LEGISLATION

According to the charter, international law and judgments of domestic, foreign and international courts and tribunals relevant to human rights may be considered in interpreting a statutory provision.<sup>48</sup> The relationship between human rights and reverse onus provisions in bail has recently been considered in the United Kingdom (UK).<sup>49</sup>

In the UK, an accused charged with certain offences must show exceptional circumstances to be granted bail.<sup>50</sup> In 2001, the Law Commission of England and Wales considered the compatibility of this requirement with the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.<sup>51</sup> The Law Commission concluded that the reverse onus provision could be interpreted compatibly with the convention provided it was 'construed as meaning that where the defendant would not, if released on bail, pose a real risk of committing a serious offence, this constitutes an "exceptional circumstance" so that bail may be granted'.<sup>52</sup> According to this interpretation, the key issue is risk.

In 2006, the House of Lords also considered the compatibility of the UK's reverse onus provision with the convention in the case of *R(O) v Crown Court at Harrow*.<sup>53</sup> When we refer to the 'House of Lords' we mean the UK's final court of appeal rather than the entire Upper House of parliament. The court focused on the right to liberty.<sup>54</sup> The court adopted two alternative approaches to the issue:

- the reverse onus provision does not impose a burden of proof on the accused. Rather, it establishes a norm that an accused to whom it applies 'if granted bail [is] so likely to fail to surrender to custody, or offend, or interfere with witnesses, or otherwise obstruct the course of justice that bail should not be granted'. If the accused does not pose such an unacceptable risk, then the accused is an 'exception' to the norm and therefore should be granted bail.<sup>55</sup>

- the reverse onus provision imposes a legal burden on accused people to show exceptional circumstances. If they fail to discharge this burden, they will be denied bail. This burden breaches the right to liberty. Therefore, to comply with the charter, the provision should be 'read down to impose an evidential burden on the defendant to point to or produce material which supports the existence of exceptional circumstances'.<sup>56</sup> Therefore, 'the burden remains on the prosecution to satisfy the court that bail should not be granted'.<sup>57</sup>

According to the majority judgment in the House of Lords, regardless of which approach is adopted, the reverse onus provision has little effect on the way bail applications would be determined under the Bail Act.<sup>58</sup> The provision 'serves merely to "remind" the courts of the risks normally posed by those to whom [the provision] applies'.<sup>59</sup> The House of Lords had a 'mild preference' for the second approach.<sup>60</sup> Therefore, if a court is unsure whether an accused should be released on bail ('the only situation in which the burden of proof assumes any relevance'), bail would have to be granted.<sup>61</sup>

This decision effectively removes any substantive distinction between the reverse onus test and the unacceptable risk test for bail in the UK. The former is merely a reminder of the risks posed by an accused. Ultimately, the test is whether the accused poses an unacceptable risk if released.

### SUBMISSIONS

Some submissions raised concerns about the compatibility of the reverse onus provisions with human rights.<sup>62</sup> Fitzroy Legal Service stated:

*these [reverse onus] provisions are fundamentally inconsistent with the presumption of innocence. It is profoundly unjust that a person should effectively lose their liberty merely by being charged with a particular offence.*

Similarly, Victoria Legal Aid stated:

*Effectively, the person [to whom a reverse onus provision applies] faces the highest level of punishment (without a finding of guilt or sentence) merely because they have been charged with a relevant offence. This flies in the face of fundamental human rights, including the presumption of innocence and the right to liberty.*

The majority of submissions which expressed concern about human rights favoured a risk-based test for all offences.<sup>63</sup> They argued that the onus should always be on the prosecution to show that bail should not be granted.<sup>64</sup>

## VICTORIAN HUMAN RIGHTS CHARTER

If reverse onus provisions are included in a new Victorian Bail Act it is likely they will be subject to challenge under the Victorian charter. The Supreme Court may decide to follow the reasoning of the House of Lords in *R(O)*.<sup>65</sup> Both the interpretations outlined by the House of Lords effectively collapse the reverse onus test into the unacceptable risk test.<sup>66</sup> This brings the continuing relevance of the reverse onus test into question.

Under the charter, the Supreme Court could apply one of the House of Lords' interpretations if it considered it 'possible to do so consistently with [the] purpose' of the reverse onus provisions.<sup>67</sup> If not, it may make a 'declaration of inconsistent interpretation'.<sup>68</sup>

Alternatively, the court could find that the reverse onus test is a 'reasonable limit' on the right to liberty under the charter. However, the court must first consider whether there is 'any less restrictive means available to achieve the purpose' of the limitation.<sup>69</sup> It is arguable that the unacceptable risk test is such a means.

48 *Charter of Human Rights and Responsibilities Act 2006* s 32(2).

49 *R(O) v Crown Court at Harrow* [2006] 3 WLR 195 ('*R(O)*'). The issue has also arisen in other jurisdictions. Eg, in the ACT, Gray J recently questioned whether a special or exceptional circumstances presumption transgressed the right to liberty in the *Human Rights Act 2004* (ACT). Ultimately, it was unnecessary for Gray J to determine this question: transcript of proceedings, *R v Rao* (Supreme Court of the ACT, Gray J, 11 August 2006). Introduction of the *Canadian Charter of Rights and Freedoms* in 1982 also saw challenges to bail laws prescribing reverse onuses: *R v Oakes* [1986] 1 SCR 103; *R v Pearson* [1992] 3 SCR 665.

50 *Criminal Justice and Public Order Act 1994* (UK) s 25.

51 The Law Commission [England and Wales], *Bail and the Human Rights Act 1998*, Report No 269 (2001) 52–65. In *Caballer v UK* (2000) 20 EHHR 643 and *SBC v UK* (2001) 34 EHHR 619, the UK government conceded that an absolute ban on the grant of bail based on particular offences, as provided for by section 25 when first enacted, violated the right to liberty in article 5(3) of the Convention. Following *Caballero* the Scottish executive decided against introducing an 'exceptional circumstances' test because it 'would add nothing to a clear common law position: Policy Memorandum, Bail, Judicial Appointments, etc (Scotland) Bill 2000 (SP Bill 17-PM) [18].

52 *Ibid* 65.

53 *R(O)* [2006] 3 WLR 195. See also *Ilijkov v Bulgaria* (Unreported, European Court of Human Rights, 26 July 2001).

54 UK courts have considered the compatibility of the presumption of innocence with reverse onus provisions in other contexts. Generally the courts have found that reverse onuses do interfere with the presumption of innocence. However, whether interference is justified depends on whether it pursues a legitimate aim and the means are proportionate to that aim. This, in turn, depends 'on examination of all the facts and circumstances of the particular provision as applied in the particular case': *Keogh v R* [2007] EWCA Crim 528; *A-G's Reference No 4 of 2002*, *Sheldrake v DPP* [2005] 1 AC 264, [21]. See also: *Salabiaku v France* (1991) 13 EHHR 379; *R v DPP, ex parte Kebilene* [2000] 2 AC 326; *R v Lambert* [2002] 2 AC 545; *R v Johnstone* [2003] 1 WLR 1736; Ian Dennis, 'Reverse Onuses and the Presumption of Innocence: In Search of Principle' (2005) *Criminal Law Review* 901.

55 *R(O) v Crown Court at Harrow* [2003] 1 WLR 2756, [32] (Kennedy LJ).

56 *R(O) v Crown Court at Harrow* [2003] 1 WLR 2756, [99] (Hooper LJ).

57 *R(O) v Crown Court at Harrow* [2003] 1 WLR 2756, [99] (Hooper LJ).

58 *R(O)* [2006] 3 WLR 195, [34] (Lord Brown). Lord Nicholls, Lord Hutton and Baroness Hale all agreed with Lord Brown. Lord Carswell also favoured this approach.

59 *R(O)* [2006] 3 WLR 195, [34] (Lord Brown).

60 *R(O)* [2006] 3 WLR 195, [35]. Case commentary in the Criminal Law Review questioned why an accused should even have to satisfy an evidentiary burden, stating 'it is not clear why the defendant ought to bear any burden'. It pointed to 'ample Strasbourg jurisprudence to the effect that the decision to take away a person's liberty pending trial must be a judicial one, taking account of all the circumstances including the presumption of innocence and "the rule of respect for the accused's liberty" (see, eg *CC v United Kingdom* [1999] *Crim. L.R.* 228; *SBC v United Kingdom* (2001) 34 E.H.R.R. 619 at [22]).': *R (on the application of O) v Crown Court at Harrow* [2001] *Crim LR* 63, 65.

61 *R(O)* [2006] 3 WLR 195, [35].

62 Submissions 17, 24, 30, 32, 38, 45, 47; roundtable 1. The importance of compliance with human rights generally was raised in submissions 13, 15, 31, 40.

63 Submissions 24, 30, 32, 38, 45, 47.

64 Submissions 24, 30, 32, 38, 45, 47.

65 [2006] 3 WLR 195. The reverse onus provision and convention right considered were very similar to the Victorian reverse onus provisions and the right to liberty in the charter. See also Justice Terry Connolly, 'Golden Thread or Tattered Fabric: Bail and the Presumption of Innocence' (Paper presented at the Law Council of Australia National Access to Justice and Pro Bono Conference 2006, Melbourne, 11–12 August 2006).

66 This reaches a similar result to that of President Maxwell in *Asmar* who adopted a one-step test based on risk.

67 *Charter of Human Rights and Responsibilities Act 2006* s 32(1). Section 30(1) of the *Human Rights Act 2004* (ACT) contains a similar interpretative principle. In *Kingsley's Chicken Pty Ltd v Queensland Investments Corporation and Canberra Centre Investments Pty Ltd* [2006] ACTCA 9 (Unreported, Higgins CJ, Connolly and Spender JJ, 2 June 2006) [52], the ACT Court of Appeal endorsed the approach of Lord Nicholls of Birkenhead to the application of the UK's interpretative principle in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571 who said: 'the interpretative obligation decreed by section 3 is of an unusual and far reaching character and may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question'. See also: *Capital Property Projects (ACT) Pty Ltd v Planning and Land Authority* [2006] ACTSC 122 (Unreported, Gray J, 15 December 2006) [22].

68 *Charter of Human Rights and Responsibilities Act 2006* s 36.

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

*The ultimate issue to be considered by a decision maker is risk.*

### BAIL OFFENCES

As discussed in the Artificial Reasoning Process section, the reverse onus provisions obscure the real issue in a bail decision. The ultimate issue to be considered by a decision maker is risk. The primary risks considered are failing to appear and re-offending on bail. Throughout the review we have been asked how much of a problem these issues are in Victoria.

#### FAILURE TO APPEAR DATA

Very few studies have been undertaken of failure to appear in court in compliance with bail. The LRCV obtained data for its 1992 report which found that in 1991 8.5% of people bailed did not appear in court at the required time.<sup>70</sup> It is unclear from the report whether this refers to instances of non-attendance or accused charged with the offence of failure to appear. It also looked at the most serious charge the accused had faced.<sup>71</sup> The largest group fell into the generic group 'other' (38%), followed by burglary (22%), theft (16%) and bail offence (10%).

The most recent published study was carried out in NSW in 2002.<sup>72</sup> It found that in the Local Court (the NSW equivalent of our Magistrates' Court) those charged with theft were the most likely to fail to appear, followed by receiving/handling, burglary and then disorderly conduct. It also found that accused people with prior convictions were more likely to fail to appear than those without prior convictions, and accused people facing multiple offences were more likely to fail to appear than those charged with one offence.

We obtained Magistrates' Court data on warrants for failure to appear for the years 2000–01 to 2005–06 to see if Victoria is similar to NSW.<sup>73</sup> The data relates to the number of warrants issued against defendants and offence type, and in relation to offence type only provides an indication rather than the complete picture.<sup>74</sup> The data about offence type is similar to NSW and confirms the anecdotal view that people accused of property and lower level offences are more likely to fail to attend court than those charged with serious or violent offending. The most common offence accused people fail to appear for in the Victorian Magistrates' Court is theft—28% of the warrants issued over the six-year period.<sup>75</sup> The second most common offence

was burglary, then criminal damage, possessing cannabis and driving while disqualified.<sup>76</sup> Apart from possessing cannabis, all of these offences are in the top 20 most common charges heard in the Magistrates' Court. In 2005–06 theft was the most common offence dealt with by the Magistrates' Court.<sup>77</sup>

Few people are charged with failure to appear for serious or violent offences in the Magistrates' Court. In the six-year period viewed there were fewer than 10 warrants issued for failing to appear for armed robbery in each year, apart from 2000–01 when there were 13; in 2005–06 there were seven. There were fewer than five warrants for intentionally causing serious injury issued each year apart from 2002–03 when there were seven. In 2005–06 there was only one.<sup>78</sup> Between 2001–02 and 2005–06 the court dealt with an average of 396 charges of armed robbery and 300 charges of intentionally causing serious injury per year.<sup>79</sup> The overwhelming number of warrants for failure to appear are for drug-related or street and traffic offences.<sup>80</sup>

Overall the number of people who fail to appear in Victoria is proportionally small. The Magistrates' Court of Victoria finalised 130 680 cases, involving several times that number of charges, in 2004–05.<sup>81</sup> It issued 9445 warrants relating to 5761 defendants who failed to appear while on bail and found 8032 charges of failure to appear proven.<sup>82</sup> This suggests that failure to appear is a problem in approximately 7% of cases before that court. While we do not have access to comprehensive data as NSW does, it seems that failure to appear has been a far greater problem in NSW than Victoria. The 2002 NSW study found that a warrant had been issued for failure to appear in 14.6% of cases finalised in the NSW Local Court. In the higher courts it was 5.3%. It also found that particular categories of offenders had much higher rates of failure to appear.

In response to the findings, the NSW Government enacted legislation restricting the availability of bail for the following categories of offenders:

- people accused of committing an offence on bail or parole, or currently serving a sentence for another offence
- people with a previous conviction for absconding on bail
- people charged with an indictable offence who have an earlier conviction for an indictable offence.<sup>83</sup>

In 2004 the NSW Bureau of Crime Statistics and Research conducted a study of the impact of these amendments.<sup>84</sup> It found that bail refusal rates rose by more than 10% for the first category of defendants, more than 7% for the second and more than 15% for the third. This had a significant effect on the state's remand population, which jumped from a monthly average of 1654 prisoners before the tougher bail laws, to a monthly average of 1756 prisoners after the new laws.<sup>85</sup> The higher rate of bail refusal did result in a drop in the number of warrants issued for failure to appear—the rate of failure to appear dropped from 11.6% to 9.4% in the Local Court and 3.6% to 1.9% in higher courts.

The method used in NSW to reduce failure to appear involved considerable financial and social costs associated with the significantly higher number of people on remand. It also had a disproportionate effect on Indigenous Australians. The remand rate for Indigenous Australians was already significantly higher than that of non-Indigenous adults—17.3% compared to 6.5%. After the Bail Act amendment, the rate of remand for Indigenous Australians increased by 14.4% and for non-Indigenous adults by only 7%.<sup>86</sup> This occurred despite amendments introduced at the same time that allowed the court to consider kinship and community ties when assessing the probability that Indigenous Australians would appear in court, and to consider their 'special needs'.

A 2006 *Herald Sun* article suggested that the numbers of 'absconders' had skyrocketed in Victoria.<sup>87</sup> This is not the case. Victoria Police changed the way it recorded failure to appear offences in July 2005, resulting in an increase of approximately 3000 recorded offences. The number of actual charges of failure to appear decreased between 2004–05 and 2005–06.<sup>88</sup> The detailed figures are contained in Appendix 3.

Data for the 1999–2006 period shows that charges of failure to appear have increased at a greater rate than the number of actual offenders charged. This suggests that some offenders are failing to appear more often. The number of people who have failed to appear has increased in the past seven years—from 4723 in 1999–2000, to 5620 in 2005–06. However, the number of charges of failure to appear has increased more than this—from 4979 to 6378.

- 70 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 74.
- 71 Ibid 79.
- 72 NSW Bureau of Crime Statistics and Research, *Absconding on Bail*, Crime and Justice Bulletin No 68 (2002).
- 73 Data obtained from Court Services, Department of Justice, 15 May 2006 and 29 November 2006. The data refers to numbers of defendants who had at least one warrant of apprehension order made. See Appendix 2 for warrant data.
- 74 Although we obtained total numbers of warrants issued for failure to appear each year, we could only obtain information about the offence the accused failed to appear on if the matter was finalised. Once a warrant is issued, the accused may surrender to police and voluntarily attend court, or police may find and arrest the person and take him or her to court. The matter is finalised by the accused being convicted and sentenced or acquitted. The court then records the charge that received the highest sentence, ie the most serious charge. Each year large numbers of warrants for fail to appear on bail are not finalised. A 'clean up' of warrants was conducted by police in 2001. However, since that time the number of non-finalised warrants has increased markedly each year—1287 in 2001–02 to 3264 in 2005–06. In 2000–01 almost four-fifths were finalised, in 2005–06 only half.
- 75 That is, 28% of warrants for failure to appear in the Magistrates' Court over the six-year period where the offence was known. These figures are for adults in the Magistrates' Court. The number of warrants issued against defendants for theft over the six-year period was 6259, including theft (1980), theft from shop (3203) and theft of motor vehicle (1076) over the six-year period 2000–01 to 2005–06. The percentage calculation uses the known offences only. A large proportion of the offence types are unknown and were not included in the calculation. In 2005–06 the Magistrates' Court heard 26 459 proven charges of theft: Magistrates' Court of Victoria, *Annual Report 2005–06* (2006) 21. The number of warrants for failure to appear that year where the known charge was theft was 817. Data from the Children's Court is similar—theft is the most common charge children fail to appear on, followed by burglary: Data obtained from Court Services, Department of Justice, 29 November 2006.
- 76 Of the warrants issued where the offence was known over the six-year period: 1333 warrants for failure to appear on a burglary charge; 794 for criminal damage, handling stolen goods, and possessing cannabis: Data obtained from Court Services, Department of Justice, 29 November 2006.
- 77 Magistrates' Court of Victoria (2006) above n 75, 21.
- 78 Data obtained from Court Services, Department of Justice, 29 November 2006.
- 79 Data obtained from Court Services, Department of Justice, 21 June 2007.
- 80 Based on the warrants where the offence was known in the data obtained, the top ten charges on which accused failed to appear in 2005–06 were: theft from shop (412), theft (256), burglary (155), criminal damage (146), drive while disqualified (111), possess cannabis (105), drive while suspended (102), recklessly cause injury (102), theft of a motor vehicle (94), breach intervention order (91). These figures are incomplete because a large proportion of the offences in the 2005–06 data were unknown because the matter had not been finalised.
- 81 Magistrates' Court of Victoria, Annual Report 2004–05 (2005) 23.
- 82 Proven charges of failure to appear from *ibid* 25; Data on warrants issued and number of defendants obtained from Court Services, Department of Justice, 15 May 2006. Court Services advised that this data could not be directly compared to the data published in the Magistrates' Court *Annual Report* as a different program is used to extract the two data sets. The comparison is therefore a suggested approximation.
- 83 *Bail Amendment (Repeat Offenders) Act 2002* s 3 and schedule 1, now in *Bail Act 1978* (NSW) s 9B.
- 84 NSW Bureau of Crime Statistics and Research, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (2004).
- 85 Ibid 6.
- 86 Ibid 5. It is suggested in the report that this may be due to the high proportion of Indigenous Australians who have a prior conviction: 1.
- 87 Geoff Wilkinson, 'The bail fugitives' *Herald Sun*, 16 November 2006, 1.
- 88 Data prepared by Corporate Statistics, Victoria Police, provided to the commission on 7 December 2006.

## Chapter 3

# Simplifying the Tests for Bail

*Accurate data would greatly assist policy making in this area, and would ensure that resources are directed to where they will be most effective.*

As we are unable to obtain detailed data similar to that in the NSW study, we cannot say whether it is particular categories of accused people who are failing to appear more, such as those with prior convictions or multiple charges. However, the proportion of accused people in our criminal justice system with problems such as drug addiction and mental illness is increasing.<sup>89</sup> We heard that these defendants are most likely to fail to appear due to chaotic lifestyles rather than an intention to abscond.<sup>90</sup> It is likely that many of these offenders would fall into similar categories as those addressed by the NSW Bail Act amendments. However, the commission believes these issues are more effectively addressed, with less financial and societal cost, by increasing support to reduce offending. Bail support programs are discussed in Chapter 7. According to Jesuit Social Services' submission, bail support services are also very cost effective compared to remand. It estimates Victoria pays an average of \$34 766.39 for each person placed on remand, compared to (in 2002) \$682.60 per person on the bail support program.

We heard that failing to appear is actually less common for people charged with serious offences and therefore less of a problem in the Supreme and County Courts than the Magistrates' Court.<sup>91</sup> This corresponds with the findings of the NSW study.<sup>92</sup> The Victorian OPP keeps records of warrants issued in the higher courts, and for cases that proceed by committal in the Magistrates' Court. All prosecutions in the County and Supreme Courts are conducted by the OPP or the Commonwealth Director of Public Prosecutions (DPP). The figures provided by the OPP are in Appendix 4 and confirm the anecdotal evidence. In the Supreme Court, no more than one person fails to appear each year, in some years none. In 2004–05 the Supreme Court dealt with 109 criminal trials and pleas of guilty.<sup>93</sup>

In the County Court the figures are higher, but have dropped over the past six years, and are still a small proportion of overall cases. The County Court Annual Report for 2005–06 shows the court finalised 4492 criminal cases.<sup>94</sup> The OPP data shows approximately 102 warrants issued for failing to appear in that period.<sup>95</sup> This is approximately 2.5% of cases, though it does not include warrants issued for Commonwealth criminal charges.<sup>96</sup>

### **FAILURE TO APPEAR AND OFFENCE GRAVITY**

The commission is concerned about seriousness of offence being used as an indicator of whether an accused will fail to appear on bail.

In discussing this issue we avoid general use of the term 'absconding' because it suggests deliberate action, such as leaving the jurisdiction, which is often not the case with failure to appear. In some situations absconding is a concern. It is argued that people who face serious drug offences may possess the means and ability to leave the jurisdiction.<sup>97</sup> Tony Mokbel has certainly shown that offenders with international connections and substantial means may abscond. All of these considerations can be considered under the unacceptable risk test.

A similar argument is mounted for other serious offences where accused people face potentially long sentences, such as murder. We have been unable to find any empirical evidence to support the contention that people facing serious criminal offences—including those offences that currently attract a reverse onus—are more likely to fail to appear than those facing less serious offences.

It seems that bail is often misunderstood as being a form of punishment, with seriousness of offence being the overriding concern. Punishment has never been an objective of our bail system, a point repeated by various courts.<sup>98</sup> Punishment is dealt with at the sentencing stage. In the bail decision, seriousness of offence is one of many factors that must be taken into account in determining risk.

We also heard from decision makers that accused people who fail to appear are not always deliberately avoiding their bail undertaking.<sup>99</sup> There may be many reasons why they do not appear in court, usually associated with chaotic lives which can result from drug addiction, cognitive impairment or mental illness.

The commission does not believe seriousness is a sufficient reason by itself to single out offences for special treatment. Decision makers can consider seriousness of offence under the unacceptable risk test. The current ad hoc system is unfair. Some serious offences attract a reverse onus but other equally serious offences attract the presumption in favour of bail. And, as discussed, at the bail stage the accused is presumed innocent of the offence.

Offenders who fail to appear on bail, particularly those who are subsequently found guilty, are a cost and concern to the community. However, when bail is considered the person has not been found guilty of the offences charged, and the decision maker is trying to predict future behaviour. In some cases this may be difficult and sometimes with hindsight it will be clear that the wrong decision was made.

## OFFENDING ON BAIL

Risk of re-offending is one of the considerations that must be taken into account by a decision maker when applying the unacceptable risk test. Throughout our review we were told that many accused people come to court on multiple charges and multiple bails. This could happen when different police arrest and bail accused people without knowing they are already on bail. This issue is discussed in Chapter 4. If accused people were brought before the court, rather than being bailed multiple times by police, this offending may have been stopped or reduced through remand, or engaging them with bail support. This is discussed in Chapter 7.

We have been unable to find any recent Victorian studies about offending while on bail. The LRCV referred to a pilot research project undertaken by the AIC in Victoria in 1991 which found a very high rate of offending while on bail—31%—though this must be treated with caution as it looked at only a very small sample.<sup>100</sup> The Tasmanian Law Reform Institute looked at offending while on bail in 2004 using a larger sample. It found that 25.7% of people charged were already on bail. They were most likely to have been charged with a property offence, and to be already on bail for a property offence.<sup>101</sup> More comprehensive New Zealand studies using huge samples also found that the main offences committed while on bail were property offences, but found a lower rate of offending—about 20%.<sup>102</sup> Interestingly, research indicates that age, as opposed to offence type, may be a better determinant of whether an accused will offend on bail. King, Bamford and Sarre looked at studies in Australia, UK, Ireland and New Zealand and found that the rate of offending on bail increases as the age of the offender decreases. The highest offending occurred in the younger age groups.<sup>103</sup>

The commission considered undertaking an empirical study about offending on bail in Victoria but decided the cost and time involved were prohibitive, and conducting anything other than a rigorous study would be of no benefit. Obtaining a true picture of offending on bail requires tracking individual offenders through police and court records. This is because offending is not always detected immediately; people are often charged some time later with offences alleged to have been committed when they were on bail. It would also be necessary to track thousands of offenders to obtain a true picture.

Without data about offending on bail, we are unable to make any specific recommendations about it. However, we believe that many of our recommendations will assist to reduce offending on bail.<sup>104</sup>

The lack of Victorian data available on important outcomes in the criminal justice system such as failure to appear and offending on bail is problematic. Accurate data would greatly assist policy making in this area, and would ensure that resources are directed to where they will be most effective. In all of our previous criminal justice reports we have noted the difficulty in obtaining accurate and reliable data about the Victorian criminal justice system.

The Criminal Justice Enhancement Program (CJEP) aims to use information technology to improve information flow between agencies about accused people throughout their contact with the criminal justice system—from police to courts to corrections. As part of this program, the Justice Knowledge Exchange Project provides automatic data translation, aiming to exchange information securely and efficiently between government agencies and externally to authorised users.<sup>105</sup> These initiatives are still being developed, but provide the potential for better data collection across agencies in the future.

The lack of Victorian criminal justice data has resulted in considerable work for us to extract data from individual agencies—police, courts and corrections—for each criminal justice project we have undertaken. Extracting data from their systems is complex and difficult, and the data sets cannot be directly compared. We believe comprehensive, rigorous and systematic collection, analysis and publication of criminal justice system data is essential. It would greatly assist public debate about issues such as failing to appear and offending on bail if we knew

- 89 King, Bamford and Sarre (2005) above n 23, 95–96.
- 90 Bail Advisory Committee; consultations 3, 22; roundtable 1.
- 91 Consultation 10.
- 92 NSW Bureau of Crime Statistics and Research (2002) above n 72.
- 93 Supreme Court of Victoria *Annual Report 2004–05*, 3.
- 94 County Court of Victoria *Annual Report 2005–06*, 2. We were unable to obtain the number of warrants issued for failure to appear from the County Court.
- 95 The OPP data goes by calendar year. In 2005 there were 107 warrants for failure to appear, in 2006 there were 96.
- 96 The Commonwealth DPP was unable to provide a breakdown of warrants as the OPP did. Its data is also by accused rather than by warrant. It advised that over the 6.5 year period between July 2000 and January 2007 its records showed 686 accused had a warrant or warrants issued for failure to appear. These figures cover all Victorian courts—Magistrates', County and Supreme.
- 97 This was raised in submission 33 which discussed the difficulty of having an accused returned to Australia through the extradition process.
- 98 See *DPP v Cozzi* [2005] VSC 195 (Unreported, Supreme Court of Victoria, Coldrey J, 8 June 2005) [33]; *Director of Public Prosecutions v Seratorre* (1995) 132 ALR 461, 481 (Kirby P); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*, 110 ALR 97; *R v Greenham* [1940] VLR 236 (Mann CJ).
- 99 Roundtable 1.
- 100 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 65–66. The sample size was only 248 persons.
- 101 Tasmania Law Reform Institute, *Offending While on Bail*, Research Paper No 1 (2004) 14.
- 102 This is reported on by King, Bamford and Sarre (2005) above n 23, 25.
- 103 Ibid 26.
- 104 This includes recommendation 22—flagging accused people who are already on bail to ensure this is taken into account in any further bail decision. Our recommendations about support for accused people with complex needs in Chapter 11, and the supports currently available to accused people, will also help reduce re-offending.
- 105 Further information about these projects can be obtained from the Department of Justice website: <www.justice.vic.gov.au> at February 2007.

## Chapter 3

# Simplifying the Tests for Bail



*We do not anticipate that removing the reverse onus tests will result in different bail decisions being made.*

more about their occurrence. There are many models of criminal justice statistical agencies throughout Australia, such as the New South Wales Bureau of Crime Statistics and Research, the Office of Crime Statistics and Research in South Australia, and nationally the Australian Institute of Criminology.

### CONSEQUENCES OF REMOVAL

What will happen if reverse onus provisions are removed from the Bail Act? The Act would certainly be easier to read and understand. We have already detailed how section 4, which contains the reverse onus provisions, is a source of major frustration. Less time spent deciphering the provisions and structuring a decision to fit with them may also save decision makers' time.

*Asmar's* case demonstrates the complex interaction of the reverse onus provisions and unacceptable risk provision in the current Bail Act. Decision makers are split on how to apply the show cause test. Some are applying the one-step process detailed by President Maxwell in *Asmar's* case, while others continue to apply the two-step process of show cause and unacceptable risk. Removing the reverse onus provisions would simplify the tests and remove this problem.

Confusion may be caused by the Bail Act's requirement to record decision makers' reasons for some matters but not others.<sup>106</sup> For example, reasons must be given when an accused has shown cause and bail is then granted, but not if bail is refused.<sup>107</sup> Also, there is no legislative requirement to give reasons when granting bail for an 'exceptional circumstances' offence. The removal of reverse onus provisions, combined with our recommendations about the provision of reasons in Chapter 6, will make the Bail Act sections dealing with reasons straightforward and consistent. Decision makers will have a clear understanding of when reasons must be given and recorded.

The removal of the reverse onus provisions would mean it will be the police or prosecution's responsibility to demonstrate the accused is an unacceptable risk, rather than the accused having to argue for bail. A bail application would begin with the police or prosecution presenting

unacceptable risk arguments to a decision maker. This is what already occurs in an application that is not subject to a reverse onus. Victoria Police has expressed concern about removing the 'advantage' to the prosecution that the reverse onus provisions provide.<sup>108</sup>

The commission does not believe the police or prosecution will be disadvantaged by having to commence bail applications. It is what already occurs in the vast majority of bail applications. Accused people will still need to present their case for bail. If they remained silent it is very unlikely they would be granted bail.

### INFORMATION IN HEARINGS

Some people think reverse onus provisions elicit information from the applicant that would not otherwise be forthcoming.<sup>109</sup> The reversal of onus requires accused people to argue their case for bail first, and some people believe this requires them to present evidence that the prosecution might otherwise not obtain. The information could have a bearing on whether the accused is an unacceptable risk.

Some decision makers told us they are not concerned which party in a bail application presents the necessary information, as long as it is provided. Others said the prosecution should always carry the burden of proving unacceptable risk and appropriate information is currently provided.

The commission believes sufficient information would be presented by an accused in a bail application based solely on unacceptable risk. The vast majority of bail decisions are already made solely on this basis, including for serious offences such as rape and attempted murder. The accused still needs to convince a decision maker that a grant of bail is appropriate. Lawyers acting for accused people could not simply let the prosecution detail why there is an unacceptable risk without forcefully arguing in favour of bail. A failure by defence practitioners to present all relevant information means they risk their client being remanded in custody.

A decision maker will still be capable of adjourning a bail application so further information—from either the accused or the police—can be obtained.

### RECOMMENDATIONS

11. The Department of Justice should establish an office of crime statistics and research.

## PUBLIC CONFIDENCE IN BAIL

One of the main objections to removing the reverse onus provisions is that it may make it easier to obtain bail, or at least will give the appearance of it being easier. It was suggested to us that public confidence in the criminal justice system is strengthened by reverse onus provisions because people believe they make it more difficult for an accused to receive bail.<sup>110</sup>

Bail law is not widely understood within the community. Few people outside of the criminal justice system understand what reverse onus provisions are or how they operate. Without this understanding, some people may believe that removing reverse onus provisions would make it easier for an accused to receive bail. This is not the intention of the suggested reform, and we do not believe this would occur. The primary aim of the reform is to simplify the bail legislation. We do not anticipate that removing the reverse onus tests will result in different bail decisions being made. The commission believes public confidence will be enhanced by a system that is easily understood.

We are confident this change will not make it easier to obtain bail for two reasons. First, decision makers have told us they already make decisions on the basis of risk and they do not believe this change will affect their decisions.<sup>111</sup> Secondly, research shows that practices and procedures that influence the bail decision develop separately from the legislation.<sup>112</sup> Victoria's Bail Act contains reverse onus provisions and South Australia's has a general presumption in favour of bail with no qualifications. However, the remand rate in South Australia is considerably higher than in Victoria, approximately double in most years and sometimes triple.<sup>113</sup> Clearly factors other than the legislation have a considerable influence on the rate of bail and remand. The research notes: '... the legislation is interpreted (in each state) through a cultural lens which results in the emphasis of particular values and goals and thus shapes practice'.<sup>114</sup>

The broader context of criminal offending should also be considered. Victoria's recorded crime rate is one of the lowest in Australia.<sup>115</sup> Victoria has the lowest individual victimisation rate in Australia, and the second lowest household victimisation rate.<sup>116</sup> While recorded crime and victimisation rates have dropped in Victoria in recent years, the use of remand has increased. A new 600 bed remand centre was opened in April 2006 to cope with the boom.

## FAMILY VIOLENCE

We understand there may be some concern with removing the reverse onus tests for breaches of family violence orders. Bail did not arise as a major issue in our recent Family Violence review. Police response to family violence incidents, particularly in arresting and charging people with family violence offences and in prosecuting breaches, were the major concerns. These concerns have begun to be addressed by the Victoria Police Code of Practice for Family Violence. Concern about how breaches of orders are treated by the court related more to penalty than to bail.<sup>117</sup> The commission recommended training for magistrates about the effect of breaches on victims, including how what may seem to be a 'minor' breach can have a major impact because of the history of abuse.

In the Consultation Paper we asked whether there were concerns about particular reverse onus offences.<sup>118</sup> Some submissions raised concerns with the current reverse onus tests for stalking and family violence.<sup>119</sup> Many were concerned about the untested nature of the allegations that may be raised. Victoria Legal Aid submitted that even though use of the reverse onus tests is 'uncommon' they are problematic: 'Any relevant past behaviour may be raised during the assessment of unacceptable risk. Untested allegations do not justify reversing the onus'. The Mental Health Legal Centre raised concerns about the application of reverse onus tests to people with mental illness who may be assumed 'untrustworthy and dangerous'.

106 Victorian Law Reform Commission (2005) above n 4, 65.

107 *Bail Act 1977* ss 4(4)(d)(i)–(ii).

108 Consultation 54.

109 Roundtable 1.

110 Roundtable 1.

111 Roundtable 1.

112 King, Bamford and Sarre (2005) above n 23, 77.

113 *Ibid* 18–19.

114 *Ibid* 98.

115 Tim Holding, Minister for Police and Emergency Services, 'New Crime Figures Confirm Victoria is the Safe State' (Media Release, 1 May 2006) referring to ABS *Recorded Crime Victims* Catalogue No 4510.0 (2005).

116 Australian Bureau of Statistics, *Crime and Safety, Australia*, Catalogue No 4509.0 (2005). The state comparisons can be found under 'Summary of Findings'.

117 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) 373.

118 Victorian Law Reform Commission (2005) above n 4, 86–87.

119 Submissions 22, 24, 38, 39.



These provisions are another example of the inconsistency of the current Act—a charge of using or threatening to use violence in breaching an intervention order attracts a reverse onus, but offences of actual violence and sexual assault do not. It is also an example of raising victims' expectations about the likely outcome of a bail application. The commission believes changed police actions and attitudes to family violence through the application of the Code of Conduct, and training for magistrates about the effects of family violence, will have a far greater impact on victims' safety than removal of reverse onus tests. As noted, the 'cultural lens' through which decision makers view legislation has a significant impact on how it is applied. In addition, all of the issues raised in the current provisions can be considered by the decision maker under the unacceptable risk test.

#### COMMONWEALTH LEGISLATION

The exceptional circumstances test for federal offences contained in the *Crimes Act 1914* would continue to operate despite amendments to the Victorian Bail Act. We have considered this inconsistency between state and federal legislation but do not think it poses any problems:

- The federal offences which attract the exceptional circumstances test are not prevalent and do not often arise—most are serious drug offences or 'terrorism related' offences.
- There are already federal and state inconsistencies given that two Australian states have never had reverse onus provisions.
- The inconsistency is not of such a nature that it would undermine either the Victorian or federal bail regimes.

Associate Professor John Willis addressed the issue of federal and state differences in his submission:

*... Commonwealth approaches to bail should not determine the approach in Victoria. This would be an egregious example of the tail wagging the dog. However, the fact is that bail with respect to Commonwealth offences must at least for the present be dealt with by Victorian decision-makers.*

We detailed the interaction between federal drug offences and the Bail Act in our Consultation Paper.<sup>120</sup> Amendments to federal legislation were not reflected in the Bail Act for a considerable period of time. During this period certain offences that previously attracted a reverse onus under the Victorian Act no longer did.<sup>121</sup> At the time the Commonwealth DPP prepared its submission the Act had not been updated. The Deputy Director submitted that problems remained with offences of attempting to and conspiring to commit serious drug offences still not attracting a reverse onus: '[i]n the past it has been very difficult to synchronise the Bail Act with the various pieces of Commonwealth legislation that have a bearing on the bail decision'.

Removing reverse onus provisions from the Bail Act would avoid problems that have arisen owing to a mismatch between federal and state legislation. There would be no need to 'synchronise' the Bail Act with Commonwealth criminal legislation.<sup>122</sup>

#### MODELS FOR REFORM

As we have already mentioned, the LRCV recommended removing the reverse onus provisions in its 1992 report:

*The Commission believes that the rules requiring exceptional circumstances or the showing of cause in relation to certain types of offences should be abolished. Shifting the burden of proof in such cases imposes a strictly adversarial model on what should incorporate some aspects of an inquisitorial process. Bail should be available on the same basis and according to the same criteria in relation to all offences.<sup>123</sup>*

We presented three possible models for reform of the reverse onus provisions in our Consultation Paper:

- a minimalist approach—the retention of reverse onus provisions; the placement of the offences in a schedule; and the production of a conceptually coherent framework for deciding which offences should attract a reverse onus
- an intermediate approach—the abolition of one reverse onus category, either show cause or exceptional circumstances
- a simplified approach—removing the reverse onus provisions; making unacceptable risk the only test and modifying the criteria to be considered under unacceptable risk.

## MINIMALIST APPROACH

The minimalist approach received some support in submissions.<sup>124</sup> Under this approach, the show cause and exceptional circumstances provisions would remain. However, the way offences are allocated to either category would be reviewed so offences are included on the basis of a conceptually coherent framework rather than in the current ad hoc fashion. The following view was expressed by Victoria Police in its submission:

*Victoria Police is not aware of any need to review the current reverse onus offences, however, it supports the development of a model to determine what offences should attract the 'reverse onus' burden in the future ...*

There are various advantages to a minimalist model:

- A consistent approach to the inclusion of offences in the reverse onus categories would be inherently fairer for all accused people and could potentially ensure that any new offences are automatically added to the appropriate category.
- Putting the offences into a schedule would make the Bail Act simpler to read and navigate, and could also mean that subsequent legislative amendments to the schedule would be easier to draft.<sup>125</sup>

The main difficulty with this model is developing an appropriate framework. One suggestion involved allocating offences on the basis of maximum penalty.<sup>126</sup> In its submission the Criminal Bar Association made the following comments:

*A simple rule of thumb could be based on the maximum penalty applicable to the offence, such as life imprisonment or 25 years for exceptional circumstances and 15 or 20 years for show cause. Of course this question and our answer to it highlight the artificial nature of the reverse onus provisions of which we complain. Any attempt to devise a category of offence for the enlivening of a reverse onus is nothing more than an exercise in arbitrary decision making. This process [reverse onus] is flawed and should be abolished.*

The Northern Territory adopts this approach in its Bail Act, which contains a complicated scheme of presumptions against bail based on both offence type and level of penalty. The Northern Territory has the highest remand in custody rate

in Australia and Victoria the lowest.<sup>127</sup> Our terms of reference require us to look at alternatives to remand, suggesting that a low remand rate is valued in Victoria. We also believe the complex scheme in the Northern Territory Bail Act would be difficult for lay decision makers to apply.

None of the submissions received offered a satisfactory solution for the allocation of offences to the two reverse onus categories. The commission does not support models that would further complicate the Bail Act—for example, a model based on 'qualitative risk analyses', point scoring or the like.<sup>128</sup> We do not think such a model is feasible given that many bail decisions are made by lay decision makers and the necessity to consider individual circumstances in applications. A recent NSW Supreme Court bail judgment cautions against being overly prescriptive: '... it is rarely, if ever, that a simple, not to say a simplistic, one size fits all approach will be the best way of achieving a just individual result, and especially so in criminal cases'.<sup>129</sup>

## INTERMEDIATE APPROACH

The intermediate approach shares features with the minimalist model. However, instead of two reverse onus categories there is one, either show cause, exceptional circumstances or something else. Again, offences would be placed in a schedule to make the Act easier to use.

Victoria Police indicated some support for this model in its submission:

*Victoria Police is not opposed to the introduction of one reverse onus category on the understanding that the relevant test would be able to cater for a range of circumstances and offences currently captured under the existing tests of 'show cause' and 'exceptional circumstances'.*

Others indicated that removing the reverse onus provisions was preferable, but if retained the one-test model was better than the current two.<sup>130</sup>

The advantage of the intermediate model is that decision makers only need to become familiar with a single test and case law would develop around it to help guide them. Several other Australian jurisdictions use a single test.<sup>131</sup>

The problem with this approach is determining which test should be adopted. Should one of the existing reverse onus provisions be retained or should a new test be devised? If we maintain either 'show cause' or 'exceptional circumstances', what do we do with the offences that currently fall under the test to be abolished?

120 Victorian Law Reform Commission (2005) above n 4, 85–86.

121 See discussion in Chapter 5 under Commonwealth Provisions.

122 In Chapter 6 the commission recommends that a note be placed in the new Bail Act to advise that some Commonwealth offence provisions stipulate a reverse onus for bail and that they continue to apply.

123 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Discussion Paper No 25 (1991)14.

124 Submissions 23, 41, 33, 39.

125 The *Bail Act 1992* (ACT) sch 1 is a good example of the inclusion of reverse onus offences in a schedule.

126 See the questions posed in Victorian Law Reform Commission (2005) above n 4, 84.

127 Australian Bureau of Statistics, *Corrective Services 2006*, Catalogue No 4512.0, September Quarter 2006 (2006) Table 11, 19. The Northern Territory's remand rate per 100 000 of population was 115.2 in that quarter, compared with Victoria's rate of 18.8.

128 Consultation 54.

129 *R v Michael John Newby* (Unreported, Supreme Court of NSW, Sully J, 27 January 2006) 6–7.

130 Submission 46; consultation 46.

131 Queensland, the ACT, Western Australia and the Commonwealth. The Northern Territory Act is complex, but basically there is one test of 'satisfying' the decision maker that bail should not be refused.

## Chapter 3

# Simplifying the Tests for Bail

*The commission believes removing the reverse onus provisions so that bail decisions are made solely on the basis of unacceptable risk will result in simpler and more readily understood bail laws.*

As the Victoria Police submission illustrates, if this approach was adopted some groups would be reluctant to see any offences lose their reverse onus status.

Most Bail Acts that have reverse onus provisions employ either the 'show cause', or more commonly, the 'exceptional circumstances' category. Although a new test could be worded differently, it is unlikely to operate differently from the current categories. Commonwealth legislation uses the exceptional circumstances test. For the sake of consistency, if a single test was to be retained it may be the preferable option. However, exceptional circumstances is a higher test that is attached to more serious offences than the show cause requirement, so it would not seem logical to put all the offences under this category. In keeping a single test the problem remains—on what basis are offences allocated?

The commission does not believe having one test overcomes the inherent problems with reverse onus tests. It should also be remembered that in keeping a single test, the difficulty of the two-step process, where unacceptable risk factors are explored after the reverse onus test, would still remain.

### SIMPLIFIED APPROACH

The simplified approach was supported by the majority of submissions, including the Magistrates' Court of Victoria, the Royal Victorian Association of Honorary Justices (RVAHJ), the Criminal Bar Association, the Law Institute of Victoria and Jesuit Social Services.<sup>132</sup> The simplified approach removes the reverse onus provisions from the Bail Act and bail decisions are made solely on the basis of unacceptable risk. This is not a radical departure from what is already occurring. Risk is currently the final and key determinant in any bail application. If accused people pose an unacceptable risk they will not receive bail unless conditions can be imposed that will substantially reduce the risk.

One of the main advantages of this model is its simplicity. The concept of risk is easy for everyone involved in the bail decision to understand, including victims and accused people. It is also simpler for decision makers to apply. In Victoria

lay decision makers make approximately 95% of bail decisions.<sup>133</sup> Most stakeholders are in favour of a simplified Bail Act, though some argued that reverse onus provisions should be retained.<sup>134</sup> Those in favour of retention said the current system should remain and decision makers could cope with the complexity. In our roundtable discussions two beliefs were expressed in favour of reverse onus provisions:

- public confidence in the justice system is enhanced by the provisions
- they encourage the provision of information in a bail application that may not otherwise be forthcoming.<sup>135</sup>

### COMMISSION'S RECOMMENDATION

The commission notes the strong support for removing the presumption against bail and agrees with many of the criticisms of reverse onus tests: the inclusion of offences is ad hoc, the tests are complex, and the reasoning process behind them is artificial. We believe the reverse onus tests:

- create confusion
- obscure risk as the key issue of a bail application
- erode the presumption of innocence
- are unfair and unnecessary.

The commission has not heard any sufficiently compelling arguments in favour of their retention. There is no evidence to suggest the tests reduce absconding or offending on bail. It is imperative that the Bail Act be an accessible, simple and readily understood piece of legislation. The current Act fails on all counts. The commission believes removing the reverse onus provisions so that bail decisions are made solely on the basis of unacceptable risk will result in simpler and more readily understood bail laws.

### PREPARATORY OFFENCES

In a letter dated 6 June 2006 the Attorney-General requested the commission consider how possible preparatory offences would be treated under any new Bail Act. The Chief Commissioner of Police had requested the

## RECOMMENDATIONS

12. Bail decisions should be made on the basis of unacceptable risk. There should be no presumption against bail for any offence in the new Bail Act.

Victorian Government consider the introduction of offences for people preparing to commit an armed robbery.

The commission considered whether these offences should be treated any differently given our recommendation to remove the reverse onus provisions from the Bail Act. As discussed, we do not believe there is any justification for different treatment of offences. A bail application by an accused charged with preparatory offences should be decided on the basis of the unacceptable risk test.

## CHANGES TO THE UNACCEPTABLE RISK TEST

The commission believes the current unacceptable risk test in the Bail Act needs updating to reflect social concerns and our other recommendations. We do not recommend any change to the test itself, apart from redrafting to modernise language, and to make it clear that the court need only be satisfied on the *balance of probabilities*.

We have recommended several changes and additions to the section that details factors to be considered when assessing risk. The first part of the section would be simplified and refer to ‘weighing up’ factors because we think that is the most accurate description of what the decision maker is actually required to do. It would also make the provision much easier to read if the two parts of it were together in the new Act, rather than divided by a subsection as they currently are. The list of factors to be considered remains non-exhaustive.

We recommend that reference to the victim be changed from the ‘attitude’ of the alleged victim, to ‘the safety and welfare of the victim or any other person affected by the grant of bail’. The more important and relevant issue is the safety of the victim. This is currently considered by a decision maker both in considering unacceptable risk and setting bail conditions. Our recommendation is a more accurate and less misleading expression of the considerations relevant to unacceptable risk. This is discussed further in Chapter 4. The current provision gives the false impression that the court will give weight to victims’ opinions about whether the accused should be granted bail. If victims express an opinion the decision maker would include it as part of all the matters considered—it would not be a decisive factor. Victims are rarely present at bail applications in court or provide an opinion to the decision maker. Information about the victim is provided to the court by the police or OPP.

In our Consultation Paper we asked whether there should be a specific reference in the Bail Act to the delay in a matter getting to trial when weighing up factors under the unacceptable risk test.<sup>136</sup> The majority of submissions on this issue supported the inclusion of a reference to delay as a relevant factor.<sup>137</sup> We have decided not to use the word ‘delay’ because it is too subjective. We have recommended that the period people have already spent in custody and are likely to spend in custody if bail is refused should be one of the factors to be considered. We do not believe it appropriate to refer to any particular length of time in the Act. The length of time considered so unacceptable that it overcomes the risk of releasing the accused will differ from case to case. This issue is discussed further in Chapter 6.

We have added a provision about risk of harm to the accused on remand—whether self-harm or harm by another. Evidence of the conditions of confinement and their effect on the accused can already be used in a bail application in Victoria, and taken into account by the court. Common law decisions have established that harsh conditions of confinement are relevant as ‘this imprisonment (on remand) ... is only for safe custody, and not for punishment’.<sup>138</sup> This can include accused people’s risk of harm from other inmates, whether they will be kept in inhumane conditions or solitary confinement, and risk of them harming themselves.<sup>139</sup>

This recommendation makes it clear that the risk of harm to vulnerable accused on remand is an appropriate consideration for the court. It is also clear that it is one of many factors to be weighed up, and is not necessarily determinative. The public interest considerations involved in a fair trial include treating accused people appropriately. The level of risk of failing to appear or re-offending is weighed against the certainty that the accused will be in danger in custody. In *Hildebrandt* the court noted that it is an issue of ‘risk management’ and looked at whether sufficient conditions could be imposed to ensure attendance at court and prevent re-offending.<sup>140</sup> Imposition of appropriate conditions is discussed further in Chapter 7.

To promote clarity we recommend an addition to ‘history of previous grants of bail to the accused’ to make it clear this includes consideration of the accused’s compliance with bail in the matter currently before the court. Compliance with the current grant of bail may be an issue when bail is being considered for the next stage of a matter—for example, at the conclusion of a committal. The commission believes it should be

132 Submissions 9, 12, 13, 17, 18, 22, 24, 29, 30, 32, 38, 39, 45, 46. The majority of participants in our discussion of this issue also supported this model: roundtable 1.

133 Victorian Law Reform Commission (2005) above n 4, 8.

134 Submissions 23, 41, 33 argued for retention.

135 Roundtable 1.

136 Victorian Law Reform Commission (2005) above n 4, 58–60.

137 Submissions 13, 17, 24, 30, 32, 33, 38, 41.

138 William Blackstone, *Commentaries on the Laws of England* (1768) quoted in George Hampel and Daniel Gurvich, *Bail Law in Victoria: A Practical Guide to the Law, Procedure and Advocacy in Bail Applications* (2003) 25.

139 For example, *Luscombe, Application for Bail* (Unreported, Supreme Court, Harper J, 22 June 1993) 26; *Odezmir, Application for Bail* (Unreported, Supreme Court, Lush J, 28 August 1970) 26; *Hildebrandt v DPP* [2006] VSC 198 (Unreported, King J, 31 May 2006).

140 *Hildebrandt v DPP* [2006] VSC 198 (Unreported, King J, 31 May 2006) [12].

clearly stated in the Bail Act that adherence to the current grant of bail, as well as to previous grants of bail, is an appropriate factor to be taken into account.

In the Consultation Paper we asked if a person's status as a primary carer should be taken into account when deciding whether to grant bail. There was general consensus that care of dependent children or other family members was an appropriate consideration in a bail application.<sup>141</sup> Submissions largely supported the inclusion of primary carer status in the Act,

as long as it was part of a non-exhaustive list of factors to be taken into account.<sup>142</sup> Two submissions noted this is already considered by the court, and it is not necessary to include a particular reference to it in the Act.<sup>143</sup>

The commission believes this issue is of sufficient importance to be noted in the Act. The implications of remand for family members is an important consideration, and alternatives to custody should be found where possible. This issue is considered in more detail in Chapter 11.

## RECOMMENDATIONS

### 13. The unacceptable risk provision in the new Bail Act should provide:

Bail should be refused if the decision maker is satisfied on the balance of probabilities that there is an unacceptable risk the accused would:

- fail to attend court as required
- commit an offence while on bail
- endanger the safety or welfare of the public; or
- interfere with witnesses or otherwise obstruct the course of justice in any matter before a court.

The decision maker must weigh up all factors considered relevant in deciding whether the risk is unacceptable, including, but not limited to the:<sup>144</sup>

- nature and seriousness of the offence
- character, antecedents, background and social circumstances of the accused
- history of any previous grants of bail to the accused, including any grant of bail in the matter currently before the court
- strength of the evidence against the accused
- safety and welfare of the alleged victim or any other person affected by the grant of bail
- period the accused has already spent in custody and the period he or she is likely to spend in custody if bail is refused
- risk of harm—physical, psychological or otherwise—to the accused while on remand, including self-harm or harm by another
- responsibilities of the accused, including primary carer responsibilities.

141 Inclusion of consideration of primary carers in the Bail Act was also a recommendation in *Vacro, Action Paper, Children Unintended victims of legal process* (March 2007) 26.

142 Submissions 11, 24, 29, 30, 32, 38, 41, 42, 46 supported inclusion, submissions 18, 22, 23, 39 did not.

143 Submissions 22, 23.

144 In Chapter 7 we recommend a further addition to the unacceptable risk provision in the new Bail Act which will make it clear that decision makers can consider the conditions that may be imposed to reduce risk factors when making a bail decision.