

Chapter 4

Police and Bail



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The impact of the decision to arrest or summons is significant.

What appears to be missing from the literature ... is investigation and analysis of processes outside of judicial determinations. There is little analysis of police decisions to arrest, and whilst limited attention has been given to the importance of police decisions on police bail in the bail process, little is known about that process. Police decision-making is also recognised as important at the judicial stage of the process, particularly in terms of recommendations to prosecutors, but that is not a well understood process.¹

Police are effectively gatekeepers for the bail system. Between 2000 and 2005, police considered approximately 93% of bail applications in Victoria.² In contrast, over the same period the courts dealt with 5% of applications, and bail justices with 2%.³ Police make the decision to proceed by arrest or summons. If by arrest, they usually make the initial decision to bail or remand the accused. Therefore, police policies and procedures about bail are critical to the overall working of the system and fairness of its outcomes. Yet, as King, Bamford and Sarre point out above, little is known about the police process of bail decision making. It is imperative that police decision making is transparent, consistent and accountable.

NATURE OF POLICING

The mission of Victoria Police is to 'provide a safe, secure and orderly society by serving the community and the law'.⁴ The police form part of the executive arm of government. As part of the executive, police do not exercise judicial or legislative power. This means police are not empowered to determine the guilt or innocence of an accused, or to punish those who breach the law.⁵

Police discretion to arrest or summons an accused and then to remand or bail must be exercised within these limits. Arrest, remand and bail conditions must not be used to punish or prejudice the accused, as stated by Chief Justice Gleeson:

Where there is no reasonable apprehension that an accused person will fail to turn up at court to answer charges, and where the issue of a summons is an available procedure, it would be quite wrong to use the procedure of arrest or warrant where the purpose of doing so is to display the law operating with its full severity.⁶

This statement equally applies to the bail decision and any conditions the police may impose. As recommended in Chapter 7, any bail conditions must relate to the purposes of bail and should be no more onerous than necessary. Accused people should only be remanded if they pose an unacceptable risk.

RECOMMENDATIONS

14. Victoria Police should develop and publish a clear policy setting out the criteria used to determine whether to proceed by arrest or summons.

INITIAL DECISION: ARREST OR SUMMONS

When police decide to charge accused people with criminal offences, they may proceed by arrest or summons. A summons is a direction to attend court on a particular date to answer the charge. If arrested, accused people are taken into custody, and then remanded or released on bail (with or without conditions) to appear in court on a particular date. The procedures that apply to arrest and summons are set out in our Consultation Paper.⁷

The impact of the decision to arrest or summons is significant. Only arrest results in restrictions on accused people's liberty, either by remand or the imposition of bail conditions. In consultations, concerns were raised about the decisions made by police.⁸ In particular, there was concern that:

- police may be using their power to arrest when it is unwarranted
- there are no Victoria Police guidelines on whether to proceed by arrest or summons
- arrest may be used in preference to summons because of administrative expediency and convenience
- Indigenous Australians are more likely to be arrested than non-Indigenous accused.⁹

In our Consultation Paper we asked whether police are using arrest and summons appropriately.¹⁰ The majority of submissions that answered this question were worried about police decisions.¹¹ Some were particularly concerned that people charged with minor offences who had no criminal history were being arrested,¹² yet in other cases people charged with serious indictable offences were summonsed.¹³ Magistrates were concerned that police may be choosing to use summons rather than charge for indictable matters 'in order to evade or circumvent the Committal Procedure'. Other submissions thought police followed appropriate criteria and procedures when deciding to arrest or summons.¹⁴ The police said the decision of whether to arrest or summons was not relevant to the question of bail.

We also asked whether the processes for arrest and bail or issuing a summons disproportionately affect the decision about which course is adopted.¹⁵ Some submissions thought administrative considerations might influence police to proceed by arrest.¹⁶ Fitzroy Legal Service thought that the administrative convenience of using summons could be improved. For example, one difficulty faced by police is serving a summons by post on an accused with no fixed address. The service suggested that alternative methods could be authorised, such as service on agencies or third parties the accused has regular contact with.

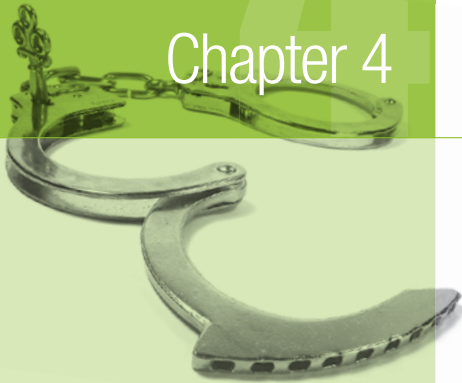
Some submissions favoured a presumption in favour of proceeding by summons.¹⁷ There was also support for clear, principled guidelines for police to determine whether to proceed by summons or arrest.¹⁸

The commission acknowledges that the decision to arrest or summons is broader than the issue of bail. However, it is the decision that determines whether the question of bail—and its impact on the accused's liberty—will arise. The commission is concerned that the current decision-making process lacks transparency. There are no published criteria to guide decisions. Some police stations have their own criteria, but this is not universal.¹⁹ The commission believes Victoria Police should develop and publish the criteria used to determine whether to proceed by arrest or summons. This should ensure police decision making is more transparent, consistent and accountable, and operates within the limits that apply to police authority as part of the executive arm of government.

- 1 Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 27.
- 2 Full details of this Victoria Police data are contained in Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 8.
- 3 *Ibid* 8.
- 4 Victoria Police, *About Victoria Police* (2006) <www.police.vic.gov.au/content.asp?Document_ID=3> at 5 December 2006.
- 5 AM Gleeson, 'Police Accountability and Oversight: An Overview' in David Moore and Roger Wettenhall (eds) *Keeping the Peace: Police Accountability and Oversight* (1994) 23, 24.
- 6 *Ibid* 23, 25.
- 7 Victorian Law Reform Commission (2005) above n 2, 20. As early as 1975, the Australian Law Reform Commission recommended that arrest should only be preferred to summons in limited circumstances: Law Reform Commission [Australia], *Criminal Investigation, An Interim Report*, Report No 2 (1975) [312].
- 8 Victorian Law Reform Commission (2005) above n 2, 20–22.
- 9 Consultations 6, 8, 12.
- 10 Victorian Law Reform Commission (2005) above n 2, 22.
- 11 Submissions 22, 24, 29, 30, 32, 34, 38, 39, 41, 45. Submission 39 endorsed the Magistrates' Court of Victoria's submission.
- 12 Submissions 22, 24, 39.
- 13 Submissions 22, 45, 39.
- 14 Submissions 6, 18, 23, 33.
- 15 Victorian Law Reform Commission (2005) above n 2, 22.
- 16 Submissions 22, 24, 32, 38, 39, 45; Indigenous Forum, 4 May 2006.
- 17 Submissions 24, 30, 34.
- 18 Submissions 22, 32, 39.
- 19 Victorian Law Reform Commission (2005) above n 2, 21.

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It might seem anomalous that the police are entrusted to decide bail for some accused but not others, largely dependent on whether or not a court is open.

INDIGENOUS AUSTRALIANS

Use of arrest for adult Indigenous Australians is higher than that for adults generally, although the difference is marginal.²⁰ This is likely to be the result of a complex mix of factors, ranging from cultural issues to particular policies that have a disproportionate impact on Indigenous Australians, such as targeting recidivists.²¹ A recent NSW report concluded that Indigenous Australians' risk of being charged or imprisoned was greater if they:

- abused drugs or alcohol
- did not complete year 12
- were unemployed
- were experiencing financial stress
- were living in a crowded household
- were a member of the Stolen Generations.²²

The study did not consider the issue of arrest, though it is likely that these factors also have an impact on the arrest rate. The findings accord with those in the Victorian Aboriginal Justice Agreement Phase 2, which identifies social, economic and cultural disadvantage as the overwhelming reasons for over-representation of Indigenous Australians in the criminal justice system.²³ The agreement also identifies unstable communities, victimisation and systemic discrimination as contributing factors. These issues cannot be addressed by changes to the criteria for arrest and summons alone. Many of the initiatives in the agreement focus on social, cultural and economic disadvantage. One of its strategies aims to reduce the number of Indigenous Australians who have serious contact with Victoria Police. This includes increasing the proportion who are cautioned when processed by police, which should lead to fewer arrests.²⁴

The Royal Commission into Aboriginal Deaths in Custody recommended that, 'All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders'.²⁵ Victoria Police informed the Victorian Implementation Review of the Royal Commission that this recommendation has been fully implemented in Victoria.²⁶ However, this view was not fully supported in community consultations conducted by the review team.²⁷ There was particular concern about regional variation in arrest rates²⁸ and it was also suggested that:

*police are too ready to arrest and prosecute for minor offences and that this creates a vicious circle that progressively precludes offenders, particularly juveniles, from the utilisation of alternatives to arrest and prosecution.*²⁹

The review noted that although the gap in arrest rates between Indigenous and non-Indigenous accused had narrowed and the use of summons had increased, 'the rate of cautioning appears to have remained static with Aboriginal people being half as likely to be cautioned as their non-Aboriginal counterparts'.³⁰

Our consultations and submissions to our Consultation Paper do not support the view that arrest is being used as a last resort. In 2003–04, 57% of Indigenous alleged offenders were arrested rather than summonsed, compared to 51% of alleged offenders generally.³¹ We believe our recommendation that Victoria Police develops and publishes clear criteria for arrest and summons will improve transparency and accountability of decision making regarding the arrest of Indigenous Australians. The rate of arrest appears to be more disproportionate for Indigenous young people than for the Indigenous Australian population as a whole. We discuss this in Chapter 9.

POLICE DECISIONS DURING COURT HOURS

Police may only make bail decisions when it is 'not practicable' to bring a person before a court.³² If the appropriate court is open and there are no impediments to taking the accused there, police should not make the bail decision.

We reported in our Consultation Paper that police often make bail decisions in the above circumstances.³³ We suggested several reasons for this, including the strain on resources in taking an accused to court and a belief that a court would grant bail anyway. A good example is that of a first-time accused charged with shop theft. If the accused was arrested it is unlikely police would oppose bail. Without police opposition, a court would most likely grant bail.³⁴

It might seem anomalous that the police are entrusted to decide bail for some accused but not others, largely dependent on whether or not a court is open. As discussed above, police are entrusted to make the decision that dictates the course of a matter—whether to arrest or summons.

In our Consultation Paper we asked whether the Bail Act should be amended to allow police to grant bail when it is 'practicable' to take an accused before a court.³⁵ There was general support in submissions for this amendment.³⁶ It was considered to be consistent with the right of the accused to be bailed as soon as possible and would save resources.³⁷ However, there was also concern that police may impose inappropriate and unnecessarily onerous bail conditions.³⁸ The Magistrates' Court thought the amendment should not be made for this reason. Some submissions emphasised retention of the right to a court hearing if bail is refused or to dispute the bail conditions imposed.³⁹ Dr Chris Corns raised the issue of accused people failing to appear when bailed by police. However, he concluded, '[t]he balance to this concern is that this scenario routinely arises for court based decisions anyway, plus the existence of available mechanisms to re-apprehend the accused'.

The commission believes police should be able to grant bail, even when it is practicable to take an accused to court, subject to the limitation discussed below. However, the bail hearing should proceed before a court if:

- the police oppose the grant of bail
- the accused objects to a bail condition the police impose⁴⁰
- an accused so requests.

These provisos recognise the importance of decisions to remand people in custody or curtail their liberty through bail conditions.

The suggested change reflects what appears to already occur in practice. This practice is generally appropriate and should be recognised by the law. It is important that police resources are not tied up taking accused people to court when it is not necessary, particularly in regional areas where resources are more limited and the nearest court some distance away.

The amendment should also benefit accused people. There is little doubt that accused people would prefer to be bailed without delay from a police station rather than being held in custody to be taken before a court.

The concerns about police imposing inappropriate conditions are addressed by other recommendations in this report. This includes that the Magistrates' Court should review the conditions set by police or bail justices at the first *mention date* to ensure they are appropriate, and are no more onerous than necessary to secure the purposes of bail.⁴¹

20 Ibid 21. Figure 9 in our Consultation Paper shows that between 1999–2004 the difference in the rate of arrest of Indigenous Australians and other Australians in Victoria ranged between 1% and 6%. There was no trend discernable. Data prepared by Corporate Statistics, Victoria Police, extracted from the LEAP database, 24 June 2005.

21 Submission 34.

22 NSW Bureau of Crime Statistics and Research, *The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 NATSISS Survey*, Crime and Justice Bulletin No 104 (2006).

23 Department of Justice [Victoria], *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A Partnership Between the Victorian Government and the Koori Community* (2006) 13, referring to the findings of the Royal Commission into Aboriginal Deaths in Custody (1991).

24 Ibid 33.

25 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, recommendation 87.

26 Department of Justice [Victoria], *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report: Volume 1* (2005) 355.

27 Ibid 425–26, 435–36.

28 Ibid 425.

29 Ibid 436.

30 Ibid 425–26, 435.

31 Victorian Law Reform Commission (2005) above n 2, 21. Data prepared by Corporate Statistics, Victoria Police, extracted from the LEAP database, 24 June 2005.

32 *Bail Act 1977* s 10(1).

33 Victorian Law Reform Commission (2005) above n 2, 23.

34 There is no Victorian data about how often a decision maker grants bail in non-opposed bail applications. However, a recent study of bail decision making in Western Australia found that in cases where the prosecutor did not oppose bail, 90.1% of defendants were granted bail: Alfred Allan et al, 'An Observational Study of Bail Decision-Making' (2005) 12(2) *Psychiatry Psychology and Law* 319, 325.

35 Victorian Law Reform Commission (2005) above n 2, 24.

36 Submissions 13, 17, 23, 24, 29, 30, 32, 33, 38, 45, 46. These submissions disagreed: 11, 18, 22, 39, 41.

37 Submissions 13, 30, 32.

38 Submissions 13, 22, 30, 32, 39.

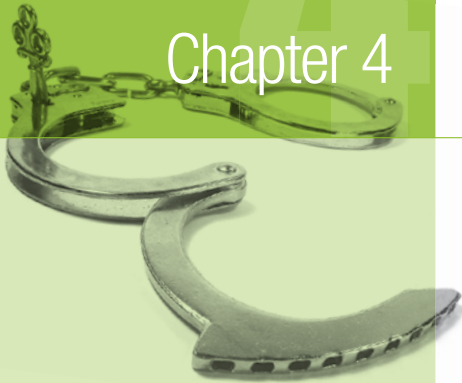
39 Submissions 13, 23, 24, 29, 32.

40 Police are empowered to impose bail conditions pursuant to *Bail Act 1977* s 5.

41 See Chapter 7.

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The commission believes police power to grant bail should be limited if the accused is already on bail, and police should be required to check whether accused people are already on bail.⁴² There is a risk that accused people may be bailed numerous times by police, particularly if police are unaware they are already on bail.⁴³ Accused people may continue to offend until police eventually refuse bail and seek remand.⁴⁴ A court may then refuse bail because of the risk of re-offending. If the accused had been linked with support services the pattern of re-offending may have been avoided and the accused may not ultimately have been remanded. When an accused is already on bail the commission believes the police should only have the power to grant bail when it is impracticable to take the accused before a court.

It is important that police retain the power to grant bail in cases when it is impracticable to take accused people already on bail before a court to avoid keeping them in custody unnecessarily. If police grant bail in these circumstances, they should consider imposing appropriate bail conditions, including referral to support services such as the Court Integrated Services Program (CISP).⁴⁵

Victoria Police policy already requires that police refer accused people with demonstrable drug problems to the CREDIT Bail Support program when appropriate.⁴⁶ It appears this policy has not always been followed. However, this is improving according to the program manager of CISP and CREDIT Bail Support.⁴⁷ Victoria Police has allocated a liaison person who works closely with the program to improve police referrals. The program manager advised that a considerable number of referrals to the program now come from police. CREDIT and CISP workers provide direct feedback to police informants who make referrals so they can see what the program achieves. The program manager regularly promotes the programs to police, magistrates and lawyers in regional areas. DHS has also

employed a diversion coordinator who educates those involved in the criminal justice system about court support services and treatment programs available for accused people on bail, as well as the program outcomes for accused people.

The commission welcomes these initiatives and believes police training and procedures for bail should continue to focus on referral to support services where appropriate.

LIMITS ON POLICE BAIL

Police cannot grant bail to an accused charged with murder or treason.⁴⁸ The police can decide bail for any other alleged offence when it is not practicable to take an accused before a court. If police decide to remand an accused, and the court is not open, the accused has a right to apply for bail before a bail justice.⁴⁹

In consultations, concern was expressed about police power to grant bail for serious indictable offences. In our Consultation Paper we asked whether police should be prevented from making bail decisions when the accused is charged with a serious indictable offence.⁵⁰ We also asked whether this limitation should be restricted to offences categorised as 'exceptional circumstances' offences.

Submissions on this issue were almost evenly split.⁵¹ Some argued that the bail decision should be based on the circumstances of each case, not on the category of the offence.⁵² Others thought the category of 'serious indictable offences' was too broad, and so favoured restricting the limitation to either 'exceptional circumstances' or a specific list of offences.⁵³

The commission believes there should be no limit on police power to grant bail based on offence type. We recommend the 'exceptional circumstances' and 'show cause' categories be abolished, so these could not be used as the basis for a restriction.⁵⁴ As argued in some

RECOMMENDATIONS

15. The new Bail Act should require that on charging a person with an offence, police must check whether the person is already on bail. If so, the police may grant bail when it is impracticable to take the accused before a court.
16. Victoria Police training and procedures for bail should promote referral of accused people to support services such as the Court Integrated Services Program (CISP) where referral would be appropriate.
17. The new Bail Act should stipulate that police may grant bail to an accused charged with any offence.

submissions, the commission believes the bail decision should be based on the circumstances of each case, not on the category of the offence. It would therefore be anomalous to suggest police should not be empowered to grant bail for certain offences, including murder and treason. This recommendation is consistent with the commission's recommendations that both bail justices and magistrates should also be able to grant bail to an accused charged with any offence.⁵⁵

We do not believe this recommendation will change current practice. It is exceedingly unlikely that police would grant bail to a person charged with murder or other serious violent offences—police culture dictates against such a decision. It is therefore unnecessary for the Act to contain this limitation. Removing it accords with our recommendations to keep the new Act simple.

POTENTIAL MISUSE OF BAIL

It appears that police mostly exercise their bail powers in an appropriate and responsible manner.⁵⁶ However, in some instances this may not be the case.⁵⁷ In particular, there is a risk police may promise to grant bail, or threaten to withhold or oppose it, to obtain admissions or other information from the accused.⁵⁸

There are protections against such a misuse of power:

- a court will review the bail decision if the accused is remanded
- the bail or remand decision is made by a senior police officer⁵⁹
- admissions or other information will be inadmissible as evidence if obtained by illegitimate means.⁶⁰

However, it may be difficult for an accused to establish that a threat or implied threat was made. Accused people might also assume that by cooperating with the police, they will be treated more favourably, even if the police do not intend to create this impression.

The majority of submissions we received about this issue said in some cases police have misused their power to grant bail,⁶¹ particularly as a means of eliciting admissions from the accused.⁶² One bail justice reported: 'I have had defendants say "I told the cops everything because they said I'd get bail". However the police are applying for a remand'.⁶³ Two submissions believed that the requirement for police informants to attend for cross-examination at a bail hearing was an important safeguard.⁶⁴

45 This program is discussed in detail in Chapter 7.

46 Victoria Police, 'VPM Instruction 113-6: Bail and Remand', *Victoria Police Manual* (2 October–5 November 2006) [1], [7]. CREDIT is discussed in Chapter 7. It is being incorporated into CISP.

47 Information provided by Ms Jo Beckett, Program Manager, CISP and CREDIT Bail Support program on 2 May 2007.

48 In the section on LEAP below, the commission recommends that the upgrade of LEAP and development of E*Justice must ensure that bail information is current and an accused's bail status is flagged.

49 This issue was raised by magistrates in consultation 18.

50 Victoria Police Legal and Corporate Policy section organised collection of data about bail by prosecutors in Melbourne, Ringwood, Frankston, Dandenong, Broadmeadows and Heidelberg Magistrates' Courts in August 2006. Data was not collected for all applications, and complete data for each matter was not collected. Because of these limitations little can be drawn from the data. In the overwhelming majority of matters bail had originally been granted by police rather than the court.

51 *Bail Act 1977* s 13. Only the Supreme Court may grant bail to an accused charged with murder or treason. A magistrate who commits an accused charged with murder may also grant bail following the committal hearing. See Victorian Law Reform Commission (2005) above n 2, 22–24.

52 *Bail Act 1977* s 10(2). See Chapter 5.

53 Victorian Law Reform Commission (2005) above n 2, 24.

54 Submissions against the suggested limitation: 17, 18, 24, 29, 30, 38, 46. Submissions in favour of some restriction (either all serious indictable offences or a list of offences) were: 8, 11, 13, 22, 23, 32, 33, 39, 41, 45.

55 Submissions 17, 24, 30, 38.

56 Submissions 13, 22, 23, 39.

57 See Chapter 3.

58 See Chapters 5 and 6.

59 Victorian Law Reform Commission (2005) above n 2, 26.

60 Consultations 6, 8, 10, 13, 17, 22.

61 Victorian Law Reform Commission (2005) above n 2, 24. Concerns about police misusing their bail power to induce guilty pleas or obtain admissions are longstanding. A 1977 report on unconvicted prisoners and bail recommended that: 'The practice of bail bargaining should be declared illegal and breaches dealt with under police disciplinary procedures': Susan Armstrong, MJ Mossman and Ronald Sackville, *Essays on Law and Poverty: Bail and Social Security* (1977) 4, 52.

62 *Bail Act 1977* s 10(1).

63 The *Crimes Act 1958* and the *Evidence Act 1958* contain provisions concerning the voluntariness of confessions.

64 Submissions 11, 22, 39, 45. Submissions 30 and 32 suggested that this was a particularly important issue for accused who are primary carers. Primary carers are discussed in detail in Chapter 11.

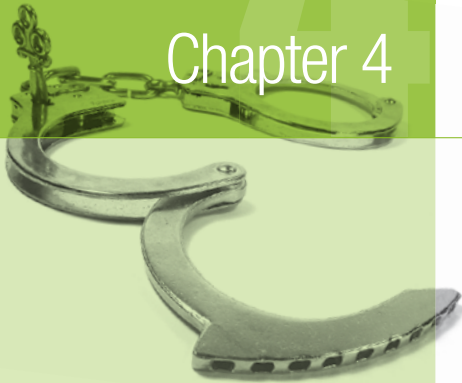
65 Submissions 13, 18, 24, 29, 30, 32, 34, 38.

66 Submission 18.

67 Submissions 24, 38.

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The requirement that police informants attend court the day after night shift can be a considerable burden, particularly if they are rostered to work the following night.

Victoria Police said it was not aware of problems with police promises to grant bail and did not think this issue was relevant to the review of the Bail Act.

Without empirical research it is difficult to know the extent to which inappropriate conduct occurs. However, it appears from submissions and consultations that such conduct is a problem. The ability to cross-examine the informant is an important safeguard, but this will generally only provide protection when the accused is remanded or when the police actually make a threat, direct or implied, rather than in cases where the accused wrongly assumes cooperation will influence the police bail decision.

The Criminal Bar Association suggested in its submission that police should be obliged to tell accused people in a recorded interview that they should not expect that answering questions will favourably affect the bail decision. The commission believes this would be a sensible safeguard and could be incorporated in the Preamble to Interview Card that police are obliged to read to a suspect before questioning commences.⁶⁵ Section 464A of the *Crimes Act 1958* sets out the procedures for dealing with a person detained in custody. This section should be amended in accordance with the Criminal Bar Association's suggestion. To ensure police and bail decision makers are aware of this requirement, a note should be included in the new Bail Act referring to the amended section 464A.

Under the Bail Act, police bail decisions may only be made by 'a member of the police force of or above the rank of sergeant or for the time being in charge of a police station'.⁶⁶

The commission believes this is an important safeguard for promoting consistency and accountability in police bail decision making. The Victoria Police Manual, which guides police bail decision making, does not refer to this requirement. The commission believes Victoria Police bail guidelines, discussed later under 'Misunderstanding the Bail Act', should reiterate the Bail Act's requirement.

The commission is particularly concerned by reports of police imposing inappropriate and unnecessarily onerous bail conditions. Such conditions include blanket restrictions on travel by public transport, broad geographic exclusion zones, and abstinence conditions without referral to any support services. Anecdotally, it appears that many of the most inappropriate bail conditions are imposed by police. Accused people may feel pressured to accept overly onerous conditions to be released, putting them at increased risk of breach. Breach may ultimately lead to remand, which might have been avoided if more appropriate conditions were initially imposed, together with referral to support services. Inappropriate bail conditions are discussed in detail in Chapter 7.

Another issue discussed in the Consultation Paper was the impact accused people's attitude towards police may have on the bail decision.⁶⁷ We were told that police are more inclined to oppose bail or impose tougher conditions if accused people are belligerent towards them. Accused people's attitude to police is irrelevant to the bail decision.

The Consultation Paper discussed inappropriate use of the bail justice system by police.⁶⁸ This matter is discussed in detail in Chapter 5.

RECOMMENDATIONS

18. Section 464A of the *Crimes Act 1958* should be amended by adding the following:

In a recorded interview, interviewing officers must inform suspects before any questioning commences that suspects should not expect that their exercise of a free choice to answer questions put to them during interview will favourably affect their prospects of obtaining bail in the event that they are charged.

19. The section in the new Bail Act providing for police power to grant bail should contain a note referring to the amended section 464A of the *Crimes Act 1958*.

20. Victoria Police bail guidelines should state that a bail decision by police can only be made by 'a member of the police force of or above the rank of sergeant or for the time being in charge of a police station'.

21. Victoria Police should develop a clear, concise plain English guide that sets out the powers police have under the new Bail Act and the appropriate procedures to be adopted in a bail application. This guide should be available to all officers who make bail decisions.

MISUNDERSTANDING THE BAIL ACT

Misunderstanding by police of aspects of the Bail Act is common.⁶⁹ At best, this can result in wasted resources, such as calling bail justices when they have no power to act. At worst, it can be detrimental to the accused by causing delays or the imposition of inappropriate bail conditions.

Given the complexity and almost impenetrable language and structure of the current Bail Act, it is unsurprising that police have trouble understanding and applying it. In our Consultation Paper we asked whether it would be beneficial to provide further guidance to police officers about making bail decisions.⁷⁰ We suggested a plain English guide detailing police powers and procedures for bail and matters relevant to the bail decision.

There was universal support in submissions for the introduction of guidelines to assist police to understand their bail powers and the procedures to follow.⁷¹ Both Victoria Police and the Police Association supported this suggestion and other submissions said the principles underpinning bail, such as the presumption of innocence and the right to liberty, should be emphasised.⁷²

Although other recommendations in this report should result in a more user-friendly Bail Act, simple guidelines for everyday use will assist police decision making and practices. Such guidelines could improve the transparency and consistency of police decision making and police accountability.

POLICE AT COURT AFTER NIGHT SHIFT

If police oppose a bail application or an application to vary bail conditions, the police informant or corroborator must attend court for the hearing. Accused people who are remanded at night or early in the morning will usually have a court hearing the next day. Bail hearings can frequently be delayed while legal representation, assessment by support services and the attendance of family is organised. Contested bail hearings may not be heard until later in the day.

The requirement that police informants attend court the day after night shift can be a considerable burden, particularly if they are rostered to work the following night. It raises occupational health and safety concerns, not only for the individual officer but also those around them. It may interfere with other police operations by diverting resources.⁷³ There is

also a risk that police may bail an accused they might otherwise have remanded, possibly with overly onerous bail conditions.⁷⁴ Without further research it is difficult to determine whether the requirement to attend court influences police bail decisions.

In our Consultation Paper we asked whether the requirement for police informants to attend bail hearings the morning after working a night shift causes undue hardship.⁷⁵ We also asked what measures could be introduced to improve the situation. Many submissions acknowledged the burden on police, but nevertheless thought it was outweighed by the accused's right to a fair and prompt bail hearing.⁷⁶ As stated by Youthlaw: 'We recognise the hardship faced by police in this situation. However, the informant has a duty to attend court as the liberty of the accused is at stake. The evidence of the informant must be tested'.

One alternative would be to use affidavit evidence from informants and corroborators, similar to the South Australian system.⁷⁷ However, there are two disadvantages to this approach. First, the opportunity to cross-examine police witnesses is an important safeguard for the accused and would be lost if the evidence was provided on paper.⁷⁸ The presence of the officer also allows magistrates to ask questions to gain a broader understanding of the circumstances of the case. Secondly, the production of affidavits or statements before a court hearing would also impose a burden on police and divert resources.

Victoria Police and the Police Association supported the alternative of a hearing 'on the papers', though the association thought it would only be appropriate in less serious bail applications.

Several submissions against a hearing 'on the papers' supported prioritising these matters on the court list⁷⁹ or allocating more resources to the court and police;⁸⁰ others thought it was an operational matter for Victoria Police;⁸¹ and some suggested greater flexibility in police rostering.⁸²

The Melbourne Magistrates' Court has a protocol that magistrates will try to list bail hearings early and deal with them quickly when the informant or corroborator has worked a night shift. The commission endorses this protocol. However, there are still necessary delays while the accused organises the application.

65 Victoria Police Form 252A referred to in 'VPM Instruction 112-3: Suspects and Offenders: Interviews and Statements', *Victoria Police Manual* (2 October–5 November 2006) [4.2.1]. The Police Commissioners Policy Advisory Group is considering creating a national standard for police recording which would automatically record interviews and would use tamper proof tapes: Information provided in Bail Reference Advisory Committee Meeting, 22 November 2006.

66 *Bail Act 1977* s 10(1).

67 Victorian Law Reform Commission (2005) above n 2, 27.

68 *Ibid* 27.

69 *Ibid* 34–35.

70 *Ibid* 35.

71 Submissions 6, 11, 13, 22, 23, 24, 29, 30, 32, 38, 39, 41, 45, 46.

72 Submissions 24, 32, 38.

73 King, Bamford and Sarre (2005) above n 1, 84.

74 David Bamford, Sue King and Rick Sarre, *Factors Affecting Remand in Custody: A Study of Bail Practices in Victoria, South Australia and Western Australia* (1999) 51–2.

75 Victorian Law Reform Commission (2005) above n 2, 27.

76 Submissions 13, 22, 24, 29, 30, 32, 33, 38, 39, 45.

77 Bamford, King and Sarre (1999) above n 74, 84–86. Bail applications in the Supreme Court of Victoria can also be heard 'on the papers': Supreme Court of Victoria, Practice Note No 5 of 2004, para 5(a).

78 Bamford, King and Sarre (1999) above n 74, 85.

79 Submissions 22, 30, 32, 39.

80 Submissions 24, 32.

81 Submissions 21, 24, 41.

82 Submissions 13, 24.



Chapter 4

Police and Bail

In June 2006, the Chief Magistrate issued a practice note expressing concern about the practice of counsel accepting multiple cases for one day.⁸³ Delays to bail hearings can occur simply because the lawyer is in another court representing another person. The practice note requires bail applications to be ready for hearing by 10am, with an exception for overnight remands. Counsel who have more than one brief for the day should contact the court coordinator to determine whether they will be able to deal with all the matters without inconveniencing the court. Although an exception is made for overnight remands, this new practice may help reduce delays in bail applications. The Magistrates' Court is willing to impose a protocol to formalise the existing practice so the matters are mentioned in court and given priority.⁸⁴ Ultimately, some delays in bail applications following overnight remand are inevitable but they should be reduced as far as possible.

The commission recognises the burden attendance at bail hearings places on police. However, it is important that an accused's bail application is heard without undue delay and the evidence is tested through cross-examination. The presence of the informant or corroborator ensures their evidence can be questioned and allows the court to gain a fuller picture of the circumstances of the case. The commission believes the informant or corroborator must continue to appear at the bail application hearing.

LEAP

The Bail Act requires decision makers to consider previous grants of bail when determining whether an accused poses an unacceptable risk.⁸⁵ If an accused was on bail at the time of the alleged offence, the accused may also have to 'show cause' why remand is not justified.⁸⁶ Therefore, it is important that a decision maker knows whether an accused is already on bail.

The Law Enforcement Assistance Program (LEAP) is the primary information system used by Victoria Police. It stores a range of information, including data on particular crimes and personal information on accused people and convicted offenders. LEAP is used to support operational policing and as a data management system; police rely on it to inform them of an accused's

bail status.⁸⁷ The Victoria Police Manual directs officers to check an accused's bail status on LEAP and bring it to the attention of the bail decision maker.⁸⁸

Although LEAP is capable of keeping information about whether an accused is on bail, two problems commonly arise. The first is that LEAP is not always updated promptly, and information relevant to the bail decision may therefore not be available to police. This could be because police fail to forward the appropriate forms to the Central Data Entry Bureau, which is responsible for data entry in LEAP, or the bureau may be behind schedule in its data entry. Failure to identify alleged repeat offending means people are not referred to support services that may assist them to stop such behaviour.⁸⁹

The second problem is the failure to update the database following an accused's first court appearance. A case may be adjourned and bail extended but LEAP is not updated unless the police informant is at the hearing and enters the new details. There is no procedure for the prosecutor to provide the details to the Central Data Entry Bureau. Nor is the information automatically transferred from the court's computer system to LEAP. As a result, the accused's bail status may be unclear to an officer accessing LEAP after the first court appearance date.

Police could obtain details of the accused's next hearing date from a Magistrates' Court website.⁹⁰ However, the website does not indicate if the accused is on bail or summons, so the matter would need to be crosschecked on LEAP. Accessing the Magistrates' Court website is an inefficient solution to the LEAP deficiencies.

The Victorian Government is in the process of replacing LEAP with a new database, which it anticipates will take three years.⁹¹ The Department of Justice has also embarked on the Criminal Justice Enhancement Program, which includes the implementation of a computer-based application called E*Justice. In part, E*Justice aims to assist justice agencies to manage information about accused people, including the automatic transfer of information between LEAP and Courtlink, the Magistrates' Court database. This should ensure that an accused's bail status and future court dates are automatically updated in LEAP. This process was being tested in early 2007.

In our Consultation Paper we asked whether E*Justice would eliminate the problem of LEAP not containing up-to-date information on the accused's bail status.⁹² The OPP thought it would and Victoria Police and the Criminal Bar Association believed it would assist in the process. The Magistrates' Court was unfamiliar with E*Justice but viewed the current system as 'totally inadequate'. The Criminal Bar Association and the Law Institute of Victoria noted that no system would be completely accurate, with the Law Institute stressing the importance of maintaining the right to challenge the accuracy of recorded information.

If E*Justice successfully transfers bail information from Courtlink to LEAP, the commission believes it will be a significant improvement. The current system fails to ensure police and decision makers are aware of an accused's bail status, even though this information is crucial to the bail decision. Development of LEAP and E*Justice must ensure that timely bail information is available to police and other bail decision makers.

CRIMINAL RECORDS

The Magistrates' Court expressed concern in its submission about the information available about an accused's criminal history, specifically:

- 'the lack of information relating to sets of charges other than those directly before the court'
- the number of sets of charges some applicants for bail are already on without police informants being aware of them
- the dates of the commission of offences not being included in the record of the accused's prior conviction history.

RECOMMENDATIONS

22. The importance of up-to-date bail information should be considered by Victoria Police in the current upgrade of the Law Enforcement Assistance Program (LEAP), and by the Department of Justice in the development of E*Justice. The design of these systems should ensure that bail information is current, and that bail status is flagged if an accused is already on bail when charged with another offence.
23. To assist the decision maker to determine the grant of bail, Victoria Police should ensure that the record of prior conviction history includes dates of the commission of offences.
24. Victoria Police should improve its procedures for the collection of criminal record data. The Department of Justice should consider commissioning an audit of the quality of current criminal record holdings.

The court receives a criminal record listing, which includes the court the matter was heard in, the date it was heard, and the offences heard. Many matters are dealt with as 'consolidations' in the Magistrates' Court—a number of offences are dealt with on one day even though the accused person might have been charged with them at different times. From the criminal record it can appear to a decision maker that the accused had recently committed a large number of offences, even though some of the offences may actually have been committed a long time before the others.

Victoria Police is responsible for providing criminal records to the courts. The criminal records division expressed concern that providing dates of the commission of offences as part of the criminal record could involve considerable research and reprogramming of the record-keeping system.⁹³ It was suggested there should be further research into what information is required, how often courts want the information, the accuracy of the information that could be provided, and the cost of providing it.⁹⁴

The time between offences is clearly relevant to the decision maker's assessment of risk in a bail hearing. The commission believes the record of prior conviction history should include the dates of commission of offences to assist a decision maker to assess risk.

A 2006 report by the Privacy Commissioner contained recommendations to improve the quality of criminal record data. The commissioner recommended that consideration should be given to an audit of the data quality of current criminal record holdings.⁹⁵

The commission believes the inclusion of dates of offending on criminal records will improve the quality of criminal record data but also supports the audit recommended by the Privacy Commissioner and any subsequent improvements to the quality of the data held.

83 Chief Magistrate Ian Gray, 'Multiple Briefs in Criminal Matters' (16 June 2006) in 'Practice Notes' (2006) 80(08) *Law Institute Journal* 69.

84 Submission 22.

85 *Bail Act 1977* s 4(3)(c).

86 *Bail Act 1977* s 4(4)(a). In Chapter 3, the commission recommends the show cause test be abolished.

87 The LEAP database is discussed in Victorian Law Reform Commission (2005) above n 2, 32–33.

88 Victoria Police (2 October–5 November 2006) above n 47, [1].

89 Support services are discussed further in chapters 7 and 11.

90 The Magistrates' Court website has court lists under 'Quick Links': Magistrates' Court of Victoria <www.magistratescourt.vic.gov.au> at 20 March 2007.

91 Victorian Government, 'Premier Announces Statutory Body to Manage LEAP' (Media Release, 22 August 2005).

92 Victorian Law Reform Commission (2005) above n 2, 34. We also asked whether other mechanisms are required.

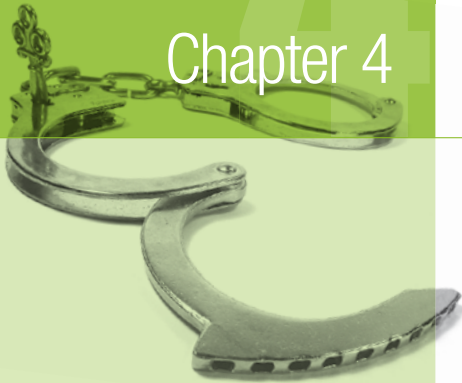
93 Information provided by Peter Donnelly, Assistant Director, Records Services Division, Victoria Police, 26 March 2007.

94 *Ibid.*

95 Office of the Victorian Privacy Commissioner, *Controlled Disclosure of Criminal Record Data: Report to the Attorney-General Pursuant to Section 63 (3) of the Information Privacy Act 2000*, Report 02.06 (2006) [78].

Chapter 4

Police and Bail



The commission believes it is important that record keeping and data collection about warrants is accurate, comprehensive and accessible.

WARRANT PROBLEMS

Poor data recording has also impacted on the effectiveness of warrants issued for failing to appear on bail. If an accused fails to attend court as required by the bail order, the court generally issues a warrant to arrest which is held by the police informant. If the accused tries to surrender and the informant is absent, it can be difficult to access the warrant.⁹⁶ In such cases, the accused is often told to wait until the informant returns.

There is no centralised police record of all warrants. While an informant holds a warrant, only he or she will have knowledge of it—there is no record on LEAP. If the informant has tried but been unable to execute the warrant it is sent to the Victoria Police Warrants Unit. The unit creates a Warrant Management Record in LEAP.⁹⁷ If the informant executes the warrant, it is never sent to the Warrants Unit and again there is no record of it on LEAP.

Apart from the administrative inefficiencies of this system, it can have serious implications for an accused on bail. If an accused voluntarily surrenders into custody, the decision maker is likely to consider the accused to be less of a risk if bailed again than someone who has to be found by police. However, the ability of the accused to surrender depends on the availability of the informant. It can also be difficult to access information on outstanding warrants to find out whether they ought to surrender.⁹⁸

The warrants system was extensively reviewed by the Victorian Parliament Law Reform Committee in its 2005 report *Warrant Powers and Procedures*. The report contains recommendations for improved data collection with three main aims:

- to provide for better gathering of statistics
- to promote greater scrutiny of warrants
- to provide greater access to information for individuals and legal representatives, including whether there are any outstanding warrants.

In particular, the committee recommended that:

- the replacement for the LEAP database record data about the application and execution of all warrants by police and that it include details of the date and time of execution and whether the subject of the warrant is an Indigenous Australian⁹⁹
- there should be a central warrants database accessible to individuals named in the warrants, or their legal representatives, with sufficient information to identify and locate warrants—information about their type, date of issue, issuing officer and whether the subject of the warrant is an Indigenous Australian.¹⁰⁰

RECOMMENDATIONS

25. The database that replaces LEAP should record:

- the application for and execution of all warrants by police
- the date and time of execution of a warrant
- whether the subject of a warrant is an Indigenous Australian.

26. Victoria Police should develop a central warrants database accessible to individuals named in the warrants, or their legal representatives, with sufficient information to identify and locate warrants, including:

- the type of warrant
- the date of issue
- the issuing officer
- whether the subject of the warrant is an Indigenous Australian.

27. Victoria Police should ensure the information contained in the new LEAP database and any new warrants register is used only for the purpose for which it was collected.

In its response to the committee's report, the Victorian Government noted that a warrant register could overcome the current inconsistency in record keeping; has the potential to increase transparency, efficiency and accountability; and create further efficiencies through the integration of the different agencies' systems.¹⁰¹ The government said it 'will further consider whether the benefits from such record keeping justify the costs of establishing these registers'.¹⁰²

The commission believes it is important that record keeping and data collection about warrants is accurate, comprehensive and accessible. In particular, there should be a centralised and accessible warrants register. This would promote greater accountability, consistency and administrative efficiency. It would also improve efficiency and result in savings for courts, police and legal aid. The commission endorses the recommendations made by the Victorian Parliament Law Reform Committee about record keeping.

The commission notes concerns raised about the use of information in LEAP for unauthorised and inappropriate purposes.¹⁰³ It is important that data collected and recorded as part of the improved record-keeping procedures is only used for the purpose it is collected for.

INDIGENOUS AUSTRALIANS

In the Consultation Paper we discussed problems with the execution of warrants to arrest Indigenous Australians.¹⁰⁴ An informal practice exists in country areas where Victoria Police notify VALS of outstanding warrants for the arrest of Indigenous Australians.¹⁰⁵ In a submission to the Victorian Parliament Law Reform Committee, VALS expressed concern that this was not done consistently.¹⁰⁶ The VALS submission to our Consultation Paper noted that if it is aware of an outstanding warrant, a

Client Service Officer can find the accused and accompany him or her to the police station: 'It is VALS' experience that bail is more likely to be granted in this situation than if the arrest warrant is executed in another context (ie: on the street when the accused does not expect it)'.¹⁰⁷

This issue was considered by the Law Reform Committee in its *Warrant Powers and Procedures* report.¹⁰⁸ The committee recommended that Victoria Police and VALS formalise an agreement for the police to notify VALS of outstanding arrest warrants for Indigenous Australians, where it is practicable and reasonable to do so.¹⁰⁹ The committee noted this would be similar to the existing agreement that police notify VALS whenever an Indigenous Australian is arrested.¹¹⁰ Victoria Police said it 'would be pleased to work towards developing such an agreement' with VALS.¹¹¹

In its response to the report, the Victorian Government supported the committee's recommendation, saying such notification:

*will allow VALS to assist its clients to attend a police station of their own accord to answer the warrant (a fact that can be used to support a bail application) and lessen the risk of unexpected and potentially confrontational arrests after being stopped in public as part of a routine matter, which may result in additional charges such as assault or resisting arrest.*¹¹²

It also said the police were prepared to discuss the matter with VALS. However, Victoria Police was concerned that notifying VALS may increase the risk of accused people absconding or destroying evidence, and additional funding would be needed to implement the new system. The government concluded that these matters would be considered during discussions with Victoria Police and VALS. As of late 2006, Victoria Police and VALS had not formalised an agreement.

RECOMMENDATIONS

28. Victoria Police and the Victorian Aboriginal Legal Service (VALS) should formally agree that Victoria Police will notify VALS of any outstanding arrest warrants for Indigenous Australians in cases where it is practicable and reasonable to do so.
29. Victoria Police should formally agree with Victoria Legal Aid that Victoria Police will notify the Grants Division of Victoria Legal Aid of any outstanding arrest warrants for Indigenous Australians, in cases where it is practicable and reasonable to do so.
30. Victoria Legal Aid should institute a procedure for the Grants Division to check for outstanding warrants when assessing an application for a grant of aid to an Indigenous Australian.

96 Consultation 6.

97 Victoria Police, 'VPM Instruction 113-7: Warrant to Arrest', *Victoria Police Manual* (2 October–5 November 2006) [6.4].

98 An accused may assume if he or she fails to appear in court that a warrant will be issued. However, many accused people have disabilities or substance abuse problems so will not have remembered or understood that they should have appeared in court, or they may not have a record of the date on which they are required to appear.

99 Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures*, No 170 of Session 2003–2005 (2005), recommendations 33, 127.

100 *Ibid*, recommendations 34, 35, 130.

101 Victorian Government, *Government Response to the Victorian Parliament Law Reform Committee's Warrant Powers and Procedures Final Report* (2006) 4.

102 *Ibid* 4.

103 Office of Police Integrity Victoria, *Investigation into Victoria Police's Management of the Law Enforcement Assistance Program (LEAP)* (2005).

104 Victorian Law Reform Commission (2005) above n 2, 74.

105 Victorian Parliament Law Reform Committee (2005) above n 99, 476.

106 *Ibid* 475.

107 Submission 34.

108 Victorian Parliament Law Reform Committee (2005) above n 99.

109 *Ibid*, recommendation 125.

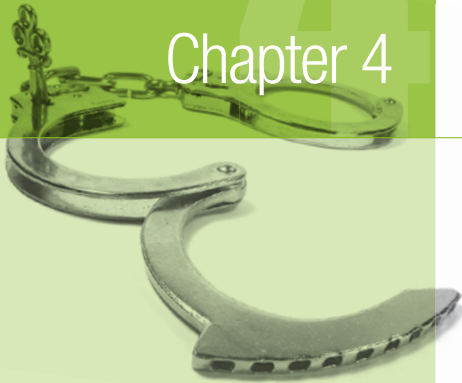
110 *Ibid* 476; Victoria Police, 'VPM Instruction 113-1: Taking a Person into Custody', *Victoria Police Manual* (2 October–5 November 2006) [4.3.5].

111 Victorian Parliament Law Reform Committee (2005) above n 99, 476.

112 Victorian Government (2006) above n 101, 8.

Chapter 4

Police and Bail



The commission supports the committee's recommendation for a formal agreement. As argued by VALS and noted in the government's response, accused people are more likely to be granted bail if they surrender than if they are unexpectedly arrested during a routine check. It is also likely to promote better relations between Indigenous Australians and police. Further, accused people are more likely to be linked with appropriate support services at an early stage, which may assist them to abide by their bail conditions.

VALS represents and assists many Indigenous Australians but it does not, and cannot, represent all of them. To ensure Indigenous Australians who are not represented by VALS are not disadvantaged, we believe Victoria Police and Victoria Legal Aid should reach a similar agreement. Victoria Legal Aid should check for outstanding warrants when assessing an aid application from an Indigenous Australian.

The committee also recommended that:

- the agreement between Victoria Police and VALS should be subject to performance monitoring by Victoria Police similar to the existing agreement about arrest notification
- the new agreement should incorporate relevant recommendations from a forthcoming Victoria Police report into the timeliness of arrest notification.¹¹³

The commission agrees that the agreement between Victoria Police and VALS should be subject to this performance monitoring, as should the recommended agreement between Victoria Police and Victoria Legal Aid.

The commission is concerned that the police report referred to as 'forthcoming' in the committee's 2005 report does not appear to have been produced. We were advised by the Aboriginal Advisory Unit of Victoria Police that it has no record of the report having been commissioned.¹¹⁴ The Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody also noted that Victoria Police was 'awaiting an evidence-based report from the Aboriginal Advisory Unit on issues such as delays in notification'.¹¹⁵ The Victorian Implementation Review referred to the report in one of its recommendations.¹¹⁶ The Victoria Police Aboriginal Advisory Unit informed us that a review of E*Justice found the average time between arrest of an Indigenous Australian and notification of VALS was 61 minutes. Victoria Police is currently considering implementing a one hour notification timeframe.¹¹⁷ According to the committee's report, the agreement between VALS and Victoria Police already required police to notify VALS within one hour of an Indigenous Australian's arrest.¹¹⁸ Victoria Police informed us that it has worked closely with VALS to address delays in notification.¹¹⁹ It also conducted an internal review of the Victorian Implementation Review and presented a report on this review to the Aboriginal Justice Forum in October 2006.¹²⁰

The commission is concerned by the inconsistent information provided by Victoria Police to the committee, the commission and the Victorian Implementation Review. The commission is also concerned that the E*Justice review of notification times does not appear to be publicly available.

RECOMMENDATIONS

31. The agreements between Victoria Police, VALS and Victoria Legal Aid referred to in recommendations 28 and 29 should be subject to similar performance monitoring as the agreement between Victoria Police and VALS about notification of arrest.
32. The new Bail Act should allow the court to issue an arrest warrant upon revocation of bail if the accused has failed to attend without reasonable excuse, provided the proper notice has been served. This should apply even when the accused was previously bailed to a future date.

NO WARRANT FOR BREACH OF CONDITION

If an accused breaches a bail condition, police have two options:

- apply to the court to vary or revoke the bail¹²¹
- arrest the accused without a warrant.¹²²

A court has no power to issue a warrant to arrest an accused for breach of bail conditions, except for the condition to appear in court on a particular date.¹²³ This was discussed in our Consultation Paper.¹²⁴ One concern raised in consultations was that without a warrant, there was no record in LEAP of bail being revoked following breach of bail conditions, and therefore no direction to police to arrest the accused.¹²⁵ We were told courts sometimes issue a warrant under other provisions of the Bail Act to 'get around' this problem.¹²⁶ In any event, warrants are not recorded in LEAP unless informants are unable to execute them. This issue is addressed by our recommendations on warrant record keeping.

We asked in the Consultation Paper whether the Bail Act should allow courts to issue a warrant when an accused's bail is revoked.¹²⁷ We received a mixed response.¹²⁸ Those in favour of the proposal gave the following reasons:

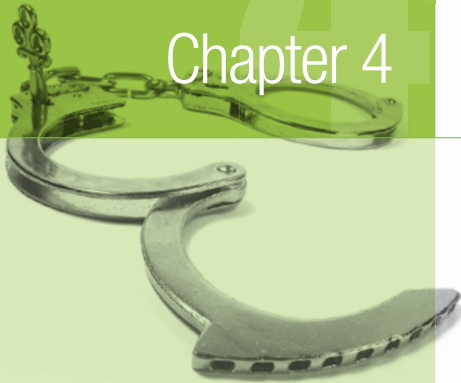
- courts should not have to rely on artificial devices to issue an arrest warrant upon revocation of bail¹²⁹
- a warrant is significant in the context of extradition¹³⁰
- police are reluctant to arrest in these circumstances without a warrant¹³¹
- the issue of a warrant would minimise the impact of LEAP's inadequacies¹³²
- the area of revocation of bail requires a complete overhaul.¹³³

Most of the submissions against the proposal did not provide reasons.¹³⁴

The commission considers the police ability to apply for revocation of bail, and their power to arrest without a warrant is sufficient to deal with an accused who has breached a bail condition. However, there are circumstances in which the issue of a warrant upon revocation of bail may be appropriate, such as facilitating extradition proceedings.¹³⁵ To ensure procedural fairness, the accused, and any surety, should be served with proper notice of an application to vary or revoke bail.¹³⁶

Providing courts with power to issue a warrant to arrest upon revocation of bail will not remedy problems associated with LEAP. The upgrade of LEAP and development of E*Justice should ensure police have up-to-date information on an accused's bail status, including any revocation or variation of bail.

- 113 Victorian Parliament Law Reform Committee (2005) above n 99, recommendation 126. In September 2005, Victoria Police advised the committee that it was drafting a report with recommendations to address delays in notification of VALS: 474.
- 114 Information provided by Aboriginal Advisory Unit, Victoria Police, 27 February 2007.
- 115 Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody, *Review Report, Volume 1* (2005) 448.
- 116 *Ibid* 449, recommendation 61.
- 117 *Ibid*.
- 118 Victorian Parliament Law Reform Committee (2005) above n 99, 474.
- 119 Information provided by Aboriginal Advisory Unit, Victoria Police, 11 April 2007.
- 120 *Ibid*.
- 121 *Bail Act 1977* s 18(6).
- 122 *Bail Act 1977* s 24(1)(a).
- 123 The following sections of the Bail Act authorise courts to issue warrants of arrest: ss 9(6), 18A(7), 23(2), 26(1),(2).
- 124 Victorian Law Reform Commission (2005) above n 2, 72.
- 125 *Ibid* 72–73.
- 126 Consultation 9. See discussion in *ibid* 73.
- 127 *Ibid* 73.
- 128 Submissions 6, 8, 11, 13, 18, 22, 33, 39, 41 supported the proposal. Submissions 24, 29, 30, 32, 38 opposed the proposal. Victoria Police did not oppose this proposal operating in addition to existing powers of arrest without a warrant: submission 23.
- 129 Submission 13.
- 130 Submission 33.
- 131 Submission 41.
- 132 Submission 6.
- 133 Submissions 22, 39.
- 134 Submissions 24, 29, 30, 32, 38. The Law Institute of Victoria argued that the existing powers in the Bail Act were sufficient to allow a warrant to be issued upon revocation of bail.
- 135 The Commonwealth DPP's submission noted that having a warrant is significant for extradition proceedings.
- 136 The provision of notice to sureties and other parties is addressed in Chapter 8.



RELUCTANCE TO ARREST WITHOUT WARRANT

We were told that police are sometimes reluctant to arrest an accused without a warrant.¹³⁷

Section 24 of the Bail Act allows police to arrest without a warrant when they reasonably believe the accused is likely to break, is breaking or has broken a bail condition.¹³⁸ In our Consultation Paper we asked whether there was any reluctance by police to arrest an accused without a warrant and whether section 24 should be amended to allow police to obtain a warrant from a court.¹³⁹

Most submissions, including Victoria Police, did not believe police are reluctant to arrest without a warrant.¹⁴⁰ Some suggested any reluctance was best addressed through police training rather than amendment to the Act.¹⁴¹ The OPP and the Magistrates' Court did think there was some reluctance among police and supported amending section 24.¹⁴² The Police Association did not think police were reluctant to arrest without a warrant, but thought police 'would perform their function with more certainty if the court issued an arrest warrant'.

It appears police are generally not reluctant to arrest an accused without a warrant under the Bail Act, so the commission does not think section 24 needs amendment.

POWER TO ARREST WITHOUT WARRANT

The commission is concerned that the police power to arrest an accused without a warrant is too broad. The Criminal Bar Association argued:

a person should not be subject to potential arrest merely because a police officer believes that the person is likely to breach a condition of bail. This provides too much power to police which can easily be abused.

The commission agrees that the power to arrest based on the belief that an accused is likely to breach a bail condition is a very wide power

which is open to abuse. The police should not have the power to arrest an accused on this ground.¹⁴³ They should, however, continue to be able to arrest an accused who they have reasonable grounds to believe is breaking or has broken bail conditions.

Police should also have the power to arrest an accused who they believe is preparing to abscond.¹⁴⁴

The commission notes that without a warrant other police officers may be unaware that an investigating officer considers there are grounds to arrest an accused on bail under section 24 of the Bail Act.¹⁴⁵ If this is considered to be a problem by police, it should be addressed by improvements to police record keeping systems as part of the upgrade of LEAP and development of E*Justice.

WARRANT ENDORSEMENT

A court may issue a warrant to arrest an accused for failing to appear in answer to bail.¹⁴⁶ If a court issues a warrant to arrest, it may 'endorse' the warrant with instructions.¹⁴⁷ This can include a direction that upon arrest, the accused must be released on bail as specified.¹⁴⁸ For example, the warrant may direct that the accused be released on bail on condition that a surety of a particular value is found.¹⁴⁹

Magistrates do not have power to direct that an accused must be brought back before them or another magistrate. In contrast, County and Supreme Court judges are able to direct that an accused be brought back before them, another judge or the Magistrates' Court.¹⁵⁰ However, according to one consultation, the direction is not always followed and it was thought that the issue of where an accused is taken following execution of the warrant should be clarified.¹⁵¹

In our Consultation Paper we asked whether greater clarity was needed about where an

RECOMMENDATIONS

33. The new Bail Act should allow police to arrest an accused on bail who the police have reasonable grounds to believe is breaking or has broken bail conditions, or is preparing to abscond.
34. The new Bail Act should provide that on the issue of a warrant to arrest after failure to appear, the accused be brought back before the court that issued the warrant, unless it is not in the interests of justice to do so.
35. The *Magistrates' Court Act 1989* should be amended to clarify that if an accused is brought back before a bail justice or magistrate upon execution of an endorsed warrant, the bail justice or magistrate is not bound by that endorsement.
36. Police, bail justices and magistrates should receive training about the effect of endorsements on warrants to arrest.

accused is taken following arrest for failing to appear.¹⁵² We asked whether the Bail Act or Magistrates' Court Act should allow magistrates to endorse a warrant to require the accused be brought back before them, or another magistrate.

Most submissions supported clarification of the power to direct where an accused is taken following execution of a warrant for failing to appear.¹⁵³ Submissions were mixed about whether magistrates should be able to require that an accused to be brought back before them or another specified magistrate.¹⁵⁴ Submissions that were against or concerned about the proposal noted:

- it may result in unnecessary delay during which the accused would remain on remand¹⁵⁵
- it may lead to detention of an accused who had lawful reason for failing to appear¹⁵⁶
- a magistrate's recollection of a particular matter may wane¹⁵⁷
- bail is a matter for the court not a particular magistrate¹⁵⁸
- it would interfere with current flexibility which is a 'critical consideration' for the management of the Magistrates' Court.¹⁵⁹

Those in support of the proposal argued:

- it already occurs in practice¹⁶⁰
- it would allow magistrates to respond better to cases in which an accused had continually failed to appear after being re-bailed¹⁶¹
- remand applications heard by a different magistrate following failure to appear generally result in re-bailing the accused and no conviction. Failure to appear is a major burden on the police and magistracy.¹⁶²

The commission agrees that greater clarity is needed about where an accused is taken following execution of a warrant for failing to appear. We do not think it is appropriate for a magistrate to specify that an accused must be brought back before them, or another specified magistrate. This can result in delay while an accused remains on remand. An accused may have a lawful reason for failing to appear. It would also interfere with case management in the Magistrates' Court. A considerable period of time may also elapse between the issue of a warrant and the apprehension of the accused. In which case the original magistrate may have little memory of the matter and be no better equipped than another magistrate to hear it.

However, the new Bail Act should provide that an accused arrested on warrant for failure to appear be brought back before the court that issued the warrant, unless it is not in the interests of justice to do so. If the magistrate who issues the warrant is concerned about particular issues, such as the number of times an accused has failed to appear or psychiatric history, these can be noted on the court file for the attention of the magistrate who hears the subsequent bail application.

It is important that this requirement is subject to the exception: 'unless it is not in the interests of justice to do so'. For example, if an accused is brought before another court, that court should be able to determine the matter to avoid unnecessary delay, or if an accused is arrested after hours a bail justice should be able to decide bail. The commission does not intend the requirement to result in remanding accused people any longer than necessary.

Some submissions expressed concern about the ability of magistrates to direct that a person be re-bailed subject to specified conditions. They noted that magistrates who issue such warrants will not have all the relevant information about why the accused failed to appear.¹⁶³ Bail justices were concerned about excessive conditions and some thought they should determine the conditions, rather than the magistrate or judge who endorses the warrant.¹⁶⁴

The Magistrates' Court Act provides that after arrest the police, or whoever is effecting the warrant, must take the accused before a bail justice or the Magistrates' Court within a reasonable time or release him or her on bail in accordance with the endorsement of the warrant.¹⁶⁵ It therefore appears that bail justices or the Magistrates' Court are not bound by the endorsement on the warrant. The endorsement only applies as a direction to police if they release the accused on bail. The commission believes this matter should be clarified in the Magistrates' Court Act and any confusion about the application of endorsements among police, bail justices and magistrates should be remedied through training.

Police should retain the option of bringing the accused before a bail justice or the Magistrates' Court rather than acting on the endorsement. Many months may have elapsed since the warrant was issued, in which time circumstances may have altered or further information may have become available. Alternatively, the accused may be arrested on a more serious charge, making release on bail subject to the endorsement no longer appropriate.

137 Consultation 9.

138 Police may also arrest an accused without a warrant if a surety notifies the police in writing that the accused is likely to fail to appear and wishes to be relieved of his or her obligations as surety: s 24(1)(b). The police may also arrest the accused without a warrant if the police believe the surety is dead or that the security is no longer sufficient: s 24(1)(c). The general powers of police to arrest without a warrant are discussed in Victorian Law Reform Commission (2005) above n 2, 20.

139 Ibid 73.

140 Submissions 6, 8, 18, 23, 24, 29, 32, 38.

141 Submissions 24, 30.

142 Also submissions 11, 39. The OPP noted that the right of arrest without a warrant in these circumstances should be retained. The Commonwealth DPP also thought it was important that the police retain this right. In contrast, the Criminal Bar Association thought that police should be required to obtain a warrant.

143 This amendment was supported in consultation with magistrates: consultation 63.

144 Ibid.

145 Even with a warrant, there may be no record of it on LEAP: see discussion in the section on Warrant Problems.

146 *Bail Act 1977* s 26(2).

147 *Magistrates' Court Act 1989* s 62. This is not limited to warrants to arrest for failing to appear.

148 *Magistrates' Court Act 1989* s 62(1).

149 *Magistrates' Court Act 1989* s 62(2).

150 *Magistrates' Court Act 1989* s 66(2). This is in situations when an indictment or presentment has been filed in the County or Supreme Court and the accused has not appeared and pleaded.

151 Consultation 46.

152 Victorian Law Reform Commission (2005) above n 2, 75.

153 Submissions 13, 18, 22, 23, 24, 29, 30, 32, 39, 41.

154 Submissions in favour of the proposal: 18, 22 (minority of magistrates), 41. Submissions against the proposal: 22 (majority of magistrates), 24, 32, 38, 45, 46.

155 Submissions 17, 22 (majority of magistrates), 23, 30, 32, 46.

156 Submissions 24, 32.

157 Submissions 24, 38.

158 Submission 45.

159 Submission 22 (majority of magistrates).

160 Submission 41.

161 Submission 22 (minority of magistrates). The Magistrates' Court noted that if this amendment was made, the court would publish a protocol setting out the procedure to bring matters before the magistrate who made the order.

162 Submission 18.

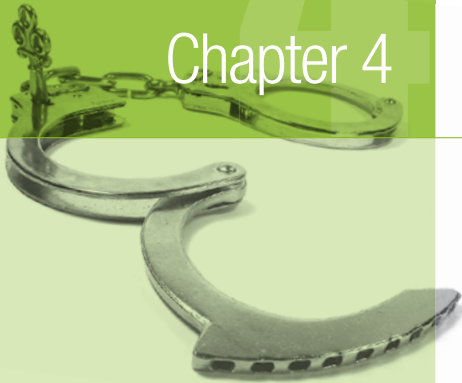
163 Submissions 24, 30, 32, 38.

164 Consultation 47.

165 *Magistrates' Court Act 1989* s 64(2).

Chapter 4

Police and Bail



Victims of crime are often concerned about their safety and welfare if an accused is released on bail

ON-THE-SPOT BAIL

When people are arrested in Victoria they are taken to a police station. Our legislation does not allow for someone to be released on bail at the place of arrest. The Royal Commission into Aboriginal Deaths in Custody recommended that governments consider amending bail legislation ‘to enable police officers to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station’.¹⁶⁶ The Royal Commission noted that the requirement to take an accused to a police station can be oppressive for both police and offenders, particularly in remote areas.¹⁶⁷ There is also no obligation on police to return the accused to the place of arrest.¹⁶⁸

In the UK police can bail accused people at the place of arrest—on-the-spot bail.¹⁶⁹ Accused people are given a notice which directs them to attend a police station on a subsequent date.¹⁷⁰ Police are not allowed to impose bail conditions when they impose on-the-spot bail.¹⁷¹

In our Consultation Paper we raised some concerns about on-the-spot bail, including the risk that police may impose overly onerous conditions and accused people failing to attend police stations would need to be tracked down.¹⁷²

We also noted that the issue of remoteness was less of a concern in Victoria than in other larger states and territories.¹⁷³

We asked whether on-the-spot bail should be instituted in Victoria, and whether there were any problems with this procedure.¹⁷⁴ Although many submissions appreciated the benefits of on-the-spot bail, the majority were against its introduction.¹⁷⁵ Only two submissions gave the proposal unqualified support.¹⁷⁶ Of those against it, many raised similar concerns to those expressed in our Consultation Paper, in particular:

- on-the-spot bail may encourage use of arrest and bail rather than summons¹⁷⁷
- the deterrent effect of the arrest process may be reduced¹⁷⁸
- certain safeguards in the current system would not necessarily apply, such as scrutiny by other officers¹⁷⁹

- accused people’s privacy would be at risk and they may be subject to humiliation¹⁸⁰
- accused people would be less likely to be properly assessed for any disabilities and given appropriate support¹⁸¹
- accused people may be less likely to comply with bail requirements—including the requirement to appear in court—because they may not understand them.¹⁸²

VALS was cautious about the introduction of on-the-spot bail. It would only support it subject to strict limitations and safeguards, including use only in remote areas and the requirement that VALS be notified when an Indigenous Australian was given on-the-spot bail.¹⁸³ Victoria Police expressed interest in exploring the option further ‘on the basis that it would reduce the time spent in custody by accused persons’. However, it was concerned by the ‘risks and consequences of non-compliance, inappropriate use and lack of safeguards for the accused’.

Given the concerns expressed in submissions, and the fact that remoteness is less of an issue in Victoria than in other states and territories, the commission does not think on-the-spot bail should be introduced in Victoria.

VICTIMS’ SAFETY AND WELFARE

The Victims’ Charter Act came into force on 1 November 2006. The charter establishes principles which govern how criminal justice and victims’ services agencies respond to victims of crime.¹⁸⁴ These agencies must consider the charter principles when dealing with victims of crime,¹⁸⁵ as do policy makers and administrators in criminal justice and victims’ services. Victims may make a complaint if they do not. However, the charter does not create legally enforceable rights or causes of action or affect the interpretation of any law.¹⁸⁶ Nor does it affect the validity, or provide grounds for review, of any judicial or administrative act or omission.¹⁸⁷ Some of the principles refer directly to bail and are discussed later.

RECOMMENDATIONS

37. On-the-spot bail should not be introduced in Victoria.

We sought victims' views by producing a booklet about bail issues for victims. This booklet was distributed by the Victims Support Agency through its network of agencies which provide Victims Assistance and Counselling Programs. The agencies were asked to distribute the booklets to victims. Some submissions were received from agencies, but none from victims themselves. Submissions from the agencies were primarily concerned with ensuring victims are given information about the bail process; kept informed of the progress and outcomes of bail hearings; given the opportunity to present their views and concerns; and their safety and welfare is considered in bail decision making.

Victims of crime are often concerned about their safety and welfare if an accused is released on bail.¹⁸⁸ The Bail Act provides that where relevant, decision makers should consider 'the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail' when determining whether the accused presents an unacceptable risk.¹⁸⁹ The Victims' Charter similarly requires that a court, in having regard to the safety and welfare of the public in accordance with the Bail Act, may take into account the safety and welfare of the victim or the victim's family, and the attitude of the victim towards the granting of bail.¹⁹⁰ The charter also says victims have a right to be given clear, timely and consistent information about their rights and entitlements.¹⁹¹

In Chapter 2, we recommend that the new Bail Act incorporate a purposes statement. The purposes include ensuring the safety of the community generally and the safety of the victim and witnesses to the alleged crime.

In our Consultation Paper we asked whether the views of victims are adequately taken into account during bail hearings.¹⁹² This question raises two issues:

- how are victims' views presented to the bail decision maker?
- to what extent are the views of victims relevant to the bail decision?

The first issue is discussed in Safety and Welfare Evidence in this chapter. The second issue is about the relevance of the victim's attitude to the assessment of unacceptable risk.¹⁹³

The Bail Act's reference to the victim's attitude is phrased broadly. However, it is only relevant to consideration of whether the accused poses an unacceptable risk if released—that is, the accused may:

- fail to appear;
- commit an offence while on bail;
- endanger the safety or welfare of a member of the public; or
- interfere with witnesses or otherwise obstruct the course of justice.

Some submissions expressed concern about the relevance of the victim's attitude to the bail decision.¹⁹⁴ In particular, there was concern that victims' views should only be taken into account so far as they are relevant to the question of whether the accused poses an unacceptable risk. For example, Fitzroy Legal Service said:

proper considerations relevant to the question of bail should remain the clear focus of any decision to grant or refuse bail. Care should be taken to ensure that any views of the victim are relevant to this question, rather than being matters more appropriately taken into account at other stages of the criminal process such as during sentencing.

Bail is not about the determination of guilt, nor is it concerned with punishment. The accused is presumed to be innocent. The commission believes the current provision is potentially misleading to victims and decision makers. The reference to the victim's attitude may falsely raise victims' expectations that they will have a say in whether or not the accused is released on bail. This is not the case, and the current provision may lead to disappointment and frustration with the system. The important and relevant issue is the safety of the victim. Focusing on the safety and welfare of victims, and any other person affected by the grant of bail, reflects current practice and accords with our proposed purposes statement.

In Chapter 3, we recommend that rather than having regard to the victim's attitude to the grant of bail, the Act should require regard to 'the safety and welfare of the alleged victim or any other person affected by the grant of bail' when assessing whether the accused poses an unacceptable risk. This reform should clarify how victims' concerns are relevant to the bail decision.

166 Commonwealth (1991) above n 26, recommendation 91(c). Victorian Law Reform Commission (2005) above n 2, 111.

167 Commonwealth (1991) above n 26, [21.4.14].

168 Ibid.

169 Victorian Law Reform Commission (2005) above n 2, 111–12.

170 *Police and Criminal Evidence Act 1984* (UK) s 30A(1).

171 *Police and Criminal Evidence Act 1984* (UK) s 30A(3).

172 Victorian Law Reform Commission (2005) above n 2, 112.

173 Ibid 111.

174 Ibid 112.

175 Submissions 22, 23, 24, 29, 30, 34, 38, 39, 45.

176 Submissions 11, 46. The OPP also supported the proposal but only in circumstances where it is impracticable to transport the accused to a police station: submission 41.

177 Submissions 22, 24, 30, 38.

178 Submission 22.

179 Submissions 29, 34, 38.

180 Submission 22.

181 Submissions 29, 38.

182 Submissions 29, 34, 38.

183 VALS is currently notified by police when an Indigenous Australian is arrested.

184 *Victims' Charter Act 2006* s 1(a). We use the term 'victim' throughout this report to include victims and alleged victims. In section 3, 'victim' includes a family member of a person who has died as a direct result of a criminal offence committed against that person. It is intended that family members of victims who have died would be covered by our recommendations.

185 *Victims' Charter Act 2006* s 18.

186 *Victims' Charter Act 2006* ss 22(1)(a), (1)(b).

187 *Victims' Charter Act 2006* s 22(1)(c).

188 Victorian Law Reform Commission (2005) above n 2, 27–28.

189 *Bail Act 1977* s 4(3)(e).

190 *Victims' Charter Act 2006* s 10(2).

191 *Victims' Charter Act 2006* s 7.

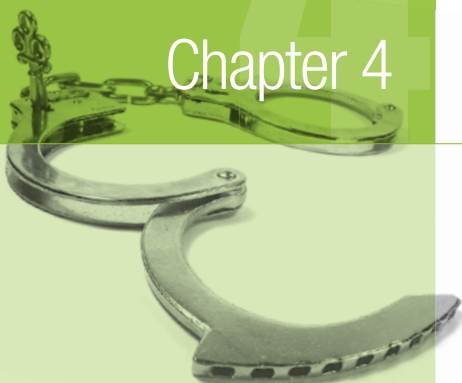
192 Victorian Law Reform Commission (2005) above n 2, 76. We also asked whether there should be a requirement that victims be informed of the fact that their views may be considered in making a bail decision.

193 See discussion of unacceptable risk test in Chapter 3.

194 Submissions 17, 24, 29, 32, 33, 38, 45.

Chapter 4

Police and Bail



As noted, section 10(2) of the Victims' Charter reflects the current Bail Act and directs bail decision makers to consider the victim's attitude towards the granting of bail. For the reasons given, and to accord with the new Bail Act, this reference should be removed from the Victims' Charter. Section 10(2) also directs decision makers to consider the safety and welfare of the victim or the victim's family. The reference to the safety and welfare of the victim is consistent with our recommendation. However, to accord with it, the reference to the 'family members of the victim' in section 10(2) should be replaced with 'any other person affected by the grant of bail'.

In our Consultation Paper we discussed the bail considerations relevant when it is unclear whether a victim will recover from a life-threatening injury caused by an offence.¹⁹⁵ The Bail Act provides that the court may refuse bail if there is doubt about the degree or quality of the offence because it is uncertain whether the victim will live or die.¹⁹⁶ One consultation suggested that bail should be automatically refused in such a case.¹⁹⁷ We did not ask a question on this issue but some submissions opposed such a requirement.¹⁹⁸ No submissions expressed support for the proposal.

As stated in our Consultation Paper, this requirement would be a radical departure from the presumption in favour of bail.¹⁹⁹ There is no other similar prohibition on bail in the Bail Act. If it were introduced, an anomaly could arise where an accused charged with murder is bailed, while another accused charged with a lesser offence is automatically refused bail while it remains unclear whether the victim will survive. The commission does not support adoption of this proposal.

VICTIMS' VIEWS ON SAFETY AND WELFARE

Although the Bail Act provides that victims' attitudes may be considered in the bail decision, victims are not routinely informed of this.²⁰⁰ In practice, police may not ask victims for their views directly, but will either take the concerns of victims into account when making a bail decision or will represent them to the bail justice or court. Victims do not usually give evidence themselves at a bail hearing.²⁰¹

A number of police procedures are relevant to the safety and welfare of the victim in bail decision making. Police are required to give victims a copy of the Notice to the Victim form.²⁰² If the offence is a crime against the person, the victim must acknowledge receipt of the notice.²⁰³ A new draft of the Notice to the Victim form states: 'You should let the police know if you have any concerns for your safety'.²⁰⁴ Police must inform victims of sexual offences if a suspect is interviewed, and obtain their views on bail.²⁰⁵ Finally, if the offence is one of family violence, police should set bail conditions that ensure the safety of victims.²⁰⁶ None of these procedures explicitly require the police to inform victims that their views may be taken into account in making the bail decision.

In our Consultation Paper we asked whether police should be required to inform victims about the provisions in the Bail Act which require their views—when expressed—to be taken into consideration.²⁰⁷ The majority of relevant submissions thought police should be required to do so.²⁰⁸ Some submissions limited this requirement to violent or sexual offences.²⁰⁹ Only the Commonwealth DPP thought victims should not automatically be informed of this provision because their views will rarely play a significant role in the bail decision. It thought there was a risk that if victims are invited to express their views, it may result in disappointment. Victoria Police considered the requirement to be a matter for

RECOMMENDATIONS

38. Section 10(2) of the *Victims' Charter Act 2006* should be amended to replace the reference to 'family members of the victim' with 'any other person affected by the grant of bail' and to remove the reference to 'the attitude of the victim towards the granting of bail'.
39. Section 10(2) of the *Victims' Charter Act 2006* should be amended to provide that where reasonably practicable, police are obliged to inform the victim of a crime against the person that the bail decision maker will take into account the victim's safety and welfare, where relevant, when determining the grant of bail.

internal policy. Some submissions emphasised that victims' views were only relevant to the unacceptable risk criteria in a bail decision and not to broader issues of punishment and sentencing.²¹⁰

Section 10(2) reflects the provisions of the Bail Act requiring the court to take into account the views of the victim, but does not put any obligation on police to inform the victim that this will occur. The commission believes police should inform victims of a crime against the person that the bail decision maker can take their safety and welfare into account when determining bail. This obligation should be limited to crimes against the person because the safety and welfare of victims will be most relevant in these cases.²¹¹ This does not prevent the police informing victims of other offences. We believe this obligation should only apply when it is reasonably practicable for police to inform the victim. For example, victims may be unknown or unavailable so it may not be possible for police to communicate with them. Finally, to avoid disappointment, it is important police make victims aware of the relevance of their views to the determination of unacceptable risk, as discussed.

SAFETY AND WELFARE EVIDENCE

We were told that although victims do not usually provide evidence at bail hearings, the police and prosecution present their views to the court where relevant and these views are seriously considered.²¹² A number of submissions supported this view.²¹³ For example, Victoria Legal Aid stated:

the court seriously considers any views of the victim that are presented. Usually the informant will give evidence as to the fears and views of the victim should the accused be granted bail—particularly in cases involving assaults or breach of intervention orders. Sometimes, the victim will be present and make their views known.

Some submissions thought that when concern for the victim's safety and welfare is raised, decision makers tended to 'err in favour of the victim'.²¹⁴ The Mental Health Legal Service was concerned that when an accused has a disability, the subjective views of the victim may be given too much weight, therefore compromising the accused's rights.

Some submissions thought victims' views were not being adequately taken into account, particularly at bail justice hearings.²¹⁵ The RVAHJ said the 'views of victims are rarely provided in a hearing before a bail justice'. At our roundtable on victims the possibility of presenting a Victim Impact Statement at the bail hearing was discussed, but did not receive much support.²¹⁶ A submission from a counselling coordinator also suggested the use of Victim Impact Statements.²¹⁷ A Centre Against Sexual Assault worker suggested that the views of professionals who have worked with the victim should also be sought as these may be relevant to the victim's safety and welfare.²¹⁸ Victoria Police submitted that the issue of victims' views was 'not a matter for the Act but should be the subject of internal policy instead'.

Although there was no consensus on the manner and extent to which victims' views are presented to bail decision makers, it appears that the police prosecutor and informant do raise the victims' safety and welfare at bail hearings if relevant. Our recommendation that police inform victims of crimes against the person that bail decision makers will take their safety and welfare into account, together with improved police and prosecution procedures for dealing with victims, should help to ensure police are made aware of victims' safety concerns.

The commission thinks it is more appropriate for concerns about victims' safety to be presented to the court by the police or prosecution, rather than victims giving evidence in person or through a Victim Impact Statement. Victim Impact Statements for bail hearings would impose an additional workload on police which we do not believe is warranted. Organising victims to attend hearings would also impose a significant burden on police resources and may delay bail hearings.

- 195 Victorian Law Reform Commission (2005) above n 2, 76.
- 196 *Bail Act 1977* s 14.
- 197 Consultation 9.
- 198 Submissions 30, 32.
- 199 Victorian Law Reform Commission (2005) above n 2, 76.
- 200 Consultation 45.
- 201 Victorian Law Reform Commission (2005) above n 2, 28–29.
- 202 Victoria Police, 'VPM Instruction 119-1: Welfare of Victims and Witnesses', *Victoria Police Manual* (2 October–5 November 2006) [4.4] and 'VPM Instruction 108-3: Recording a Crime on LEAP', [7.1].
- 203 Victoria Police, 'VPM Instruction 108-3: Recording a Crime on LEAP', *Victoria Police Manual* (2 October–5 November 2006) [7.1]. 'Crime against the person' is defined in the VPM Instruction as 'attempted homicide, sexual offence, robbery, assault, aggravated burglary or stalking'.
- 204 Victoria Police, 'Notice to the Victim—Important Information' (VP Form L1).
- 205 Victoria Police, 'VPM Instruction 108-8: Sexual Offence Investigations', *Victoria Police Manual* (2 October–5 November 2006) [4.5.1]; Victoria Police, *Code of Practice for the Investigation of Sexual Assault* 2005 Edition (2005) 13.
- 206 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2004) 40.
- 207 Victorian Law Reform Commission (2005) above n 2, 29.
- 208 Submissions 11, 13, 18, 20, 22, 24, 25, 30, 32, 39, 45; roundtable 5.
- 209 Submissions 30, 32.
- 210 Submissions 24, 29, 32, 38.
- 211 Victoria Police (2 October–5 November 2006) above n 203, [7.1] defines 'crime against the person' as 'attempted homicide, sexual offence, robbery, assault, aggravated burglary or stalking'.
- 212 Consultations 18, 27, 31, 36; roundtable 5. The magistrates thought they applied section 4(3)(e) appropriately when advised of victims' concerns.
- 213 Submissions 24, 30, 32.
- 214 Submissions 24, 32, 38.
- 215 Submissions 11, 25, 41, 46; roundtable 5.
- 216 Roundtable 5.
- 217 Submission 25.
- 218 Submission 20.

Chapter 4

Police and Bail

Victims want to be given information about the operation of the criminal justice process and told about the progress of any investigation and trial of the accused.

KEEPING VICTIMS INFORMED

Victims want to be given information about the operation of the criminal justice process and told about the progress of any investigation and trial of the accused.²¹⁹ In particular, victims often want to be told of the outcome of bail applications and any conditions designed to protect them. According to one counselling agency:

Often the victim is not informed that the offender is released on bail or is fearful the offender may be released without being told. This places the victim in fear, and often the victim will not leave home in fear of the offender regardless of whether or not he has been granted bail. Victims must and should be kept informed. This only increases the distress and revictimisation of the victim.²²⁰

Keeping victims informed also ensures that they can report breaches of bail conditions, particularly conditions aimed at protecting themselves or their families.

There is no legislative requirement for victims to be automatically informed of bail outcomes and conditions. The Victims' Charter requires a prosecuting agency to tell victims—if they request it—of the outcome of the bail hearing and any conditions intended to protect them or their family.²²¹ It does not specify which prosecuting agency is responsible for informing victims. Victoria Police procedures require officers to inform victims if the accused is granted bail or is remanded in custody.²²² For sexual offences, police must advise victims of the outcome of any bail application and bail conditions designed for their protection.²²³ For family violence offences, police must inform victims if the accused is bailed or is remanded, summonsed or no further action is taken.²²⁴

The requirement for police to inform victims if a defendant is granted bail or remanded in custody is not uniformly followed.²²⁵ Victims often assume they will be kept informed and are not always told that under the Victims' Charter they need to request this information.

Other jurisdictions vary in the ways they provide bail information to victims.²²⁶ Some impose similar requirements to those in the Victims' Charter, requiring information to be provided on request. Others require information to be automatically provided to victims of sexual assault or other serious personal violence. Some require information to be provided on bail conditions and others require victims to be informed in all cases, with time limits applying to information provided to vulnerable victims.

In our Consultation Paper we asked:

- Should victims have to request information about the outcome of bail hearings?
- Should this information include details of bail conditions?
- Should police be required to automatically inform victims about outcomes of bail hearings? If so, should this be limited to serious and violent crimes?
- What other information or support regarding bail should be given to victims, if any, and who should be responsible for delivering it?²²⁷

The majority of submissions thought victims should be informed of the outcome of bail hearings and bail conditions without having to request it.²²⁸ Some submissions limited this to victims of serious or violent offences, believing that in other cases victims should be told they can request this information.²²⁹ A few submissions said victims should have to request information about the outcome of bail hearings and bail conditions.²³⁰ However, two of these thought that victims should be told they can request to be informed.²³¹

RECOMMENDATIONS

40. The *Victims' Charter Act 2006* should be amended to provide that as soon as reasonably practicable, victims of crimes against the person should be informed of the outcome of bail hearings and any bail conditions designed to protect them or their families. For all other offences, victims should be informed they may request this information.
41. Prosecuting agencies are responsible under section 10(1) of the *Victims' Charter Act 2006* for informing victims of bail outcomes. The mechanics of how this is to occur should be resolved by prosecuting agencies and the Victims Support Agency as soon as possible and a system put in place to ensure victims are informed without delay.

The commission believes that victims of crimes against the person should be informed of outcomes of bail hearings and any conditions designed to protect them or their family. For other offences, victims should be informed that they may request this information.

The commission does not believe all victims should be automatically informed of bail outcomes. Many victims will not want to know. For example, it is unlikely that a large department store will want to be given this information about accused people charged with shoplifting offences.²³² A requirement that all victims be automatically informed would impose an onerous administrative burden on the relevant prosecuting agency.²³³ It would also be a burden on repeat victims, such as large retail chains. However, all victims should be given the option to request the information. For victims of crimes against the person it is important that this information be given automatically. Their safety and welfare is likely to be the most acute and their need for the information to be greatest.

The commission notes that the Victims' Charter provision about giving bail information upon request is not legally enforceable. Despite this, we do not believe this requirement should be incorporated into the new Bail Act. The Bail Act should only contain provisions about bail, not the enforcement of victims' rights. Any provisions about victims' rights should be contained in the charter.

The charter does not specify which agency is responsible for informing victims of bail outcomes. In early 2007, prosecuting agencies and the Victims Support Agency identified that further work needs to be done to establish processes to inform victims of bail outcomes at different stages of the court process. We were told that strategies to address issues will be explored throughout 2007.²³⁴ The commission is concerned that the issue of who has responsibility for keeping victims informed of bail outcomes has not yet been resolved. The Victims' Charter Act received assent in August 2006 and came into force in November 2006. The Act requires that victims be informed, but this is not yet being routinely done. The commission believes the issue of who is responsible for keeping victims informed should be resolved as soon as possible.

It is important that victims of crimes against the person are informed about the outcome of bail decisions as soon as practicable.²³⁵ If the informant is at a bail hearing, we believe he or she should be responsible for keeping victims informed. However, problems arise if the informant is not in court.²³⁶ The prosecutor is often in court all day and does not have time to inform victims or informants of bail outcomes.²³⁷ Informants could be notified through the transfer of bail information between Courtlink and LEAP by E*Justice and they could then notify victims.²³⁸ A further difficulty is that informants are often unavailable because of rostering or leave. It can be difficult for the victim to obtain information from anyone apart from the informant.

It may be more practical to provide information to victims through a central telephone information service.²³⁹ This should be operated by Victoria Police in conjunction with other agencies, including the courts, the OPP and the Victims Support Agency. Police have initial and ongoing contact with victims and Victoria Police is the agency holding victims' contact details. It is therefore the most appropriate agency to administer this information.

A dedicated centralised service could provide:

- timely information to victims of crimes against the person
- a simple, accessible service for victims that does not rely on the availability of one person—the informant or the OPP solicitor, who will often be in court and unavailable
- a contact point for victims of other crimes, such as property crimes, who may want to obtain information about bail if they were traumatised by the alleged crime
- provision of information by staff with the training and time to discuss victims' concerns.

If the transfer of information by E*Justice cannot overcome the problem of information flow from the court to the police, consideration should be given to providing limited access to Courtlink for the Victoria Police staff responsible for informing victims. This will not be a complete answer because the higher courts do not use Courtlink. The OPP will need to provide timely information to Victoria Police so victims can be advised when a bail application is going to occur, the outcome and any relevant conditions.

219 Victorian Law Reform Commission (2005) above n 2, 27–29.

220 Submission 25.

221 *Victims' Charter Act 2006* s 10(1).

222 Victoria Police (2 October–5 November 2006) above n 202, [4.1].

223 Victoria Police (2 October–5 November 2006) above n 205, [4.5.1]; Victoria Police (2005) above n 212, 13.

224 Victoria Police, 'VPM Instruction 109-3: Family Violence Criminal Options', *Victoria Police Manual* (2 October–5 November 2006) [4.4]; Victoria Police (2004) above n 206, 29.

225 Consultations 11, 27, 36.

226 Victorian Law Reform Commission (2005) above n 2, 30–31.

227 *Ibid* 30–31.

228 Submissions 6, 13, 20, 23, 24, 25, 48; roundtable 5.

229 Submissions 11, 22, 30, 32, 39, 41; roundtable 5.

230 Submissions 18, 45, 46.

231 Submissions 45, 46.

232 Submission 32.

233 Submission 17.

234 Discussion with Rachael Salter, Victims Strategy, Victoria Police, 26 February 2007.

235 At the victims roundtable we heard that sometimes a victim is concerned about where the accused has been bailed to, particularly if they live nearby. This raises the question of what information would be provided to victims and how to ensure it is only provided to the victim or a person nominated by the victim. For example, if victims do not know the accused's address it would not be appropriate for it to be provided to them.

236 Consultation 55.

237 Roundtable 5; consultation 55.

238 Concerns were expressed in consultation 55 that E*Justice could not be relied upon because there were delays in the transfer of information. However, the system was not fully operational at that stage. Information transfer was being tested in early 2007. A participant at roundtable 5 suggested that courts should be responsible for informing victims.

239 An alternative suggested in consultation 57 was the Victim Information Notification Everyday (VINE) program—an automated victims' notification and information system used in the USA. The system contacts registered users to inform them of any change in an offender's custody status. Users can call the system for up-to-date information 24 hours a day: VINELink Website <www.vinelink.com> at 20 March 2007.

Chapter 4

Police and Bail

A system that relies on different agencies contacting victims as a matter progresses through the criminal justice system would not be suitable. Victims would have to contact different agencies as the matter progressed, leading to further confusion and frustration.

If a centralised service was established to provide bail information to victims this would not prevent them from contacting the informant or OPP to discuss bail or other aspects of the case. It would also not take away from the general responsibilities imposed on the police and OPP under the Victims' Charter Act to inform victims about the progress of the case. However, for victims of crimes against the person, information about bail should be provided without delay. Under current arrangements it does not appear feasible for this to be done by the informant.

The following suggestions for other information and support that could be given to victims were made in submissions:

- Victims should be told where the accused is being bailed to because some victims have become homeless because the accused is living next door²⁴⁰—the recommendations about provision of information to victims should cover this issue.
- Victims should be given the option of nominating another person to whom the information can be given²⁴¹—this is covered in section 5 of the Victims' Charter.
- Victims should be informed of the procedure that applies if an accused breaches bail²⁴²— the recommendations about provision of information to victims should cover this issue.
- Victims should be helped to understand the information they are given, particularly in the early stages because they can have trouble taking in information.²⁴³

Formal and informal support mechanisms already exist for victims, such as counselling, the Victims of Crime Assistance Tribunal and the Victims of Crime Helpline.²⁴⁴ The police's Notice to the Victim form refers victims to many of these services. The Victims Support Agency has also published *A Victim's Guide to Support Services and the Criminal Justice System* to coincide with the enactment of the Victims' Charter.²⁴⁵

240 Roundtable 5.

241 Submission 20.

242 Submission 25.

243 Roundtable 5. This suggestion is beyond the terms of reference of this review. The way information is presented to victims is a matter for the agencies which deal with victims directly, including victim support agencies.

244 Victorian Law Reform Commission (2005) above n 2, 29.

245 Victims Support Agency, *A Victim's Guide to Support Services and the Criminal Justice System* (2006).