



Chapter 6

Bail Decisions by Courts

CONTENTS

- 100 Unacceptable Risk and Delay
- 102 Commonwealth Provisions
- 103 Murder and Treason
- 104 Confessions and Admissions
- 105 Provision of Reasons
- 107 Bail to a Date to be Fixed
- 108 Bail Applications
- 110 Appeals
- 113 Court of Appeal Bail
- 114 By-consent Variations of Bail Conditions
- 116 Extension in Accused's Absence
- 116 Appearance at a Different Court
- 117 Revocation Post-committal

Chapter 6

Bail Decisions by Courts



Given the key role courts play in bail decision making, it is essential their jurisdiction, powers and procedures are clearly defined and operate efficiently.

Courts only determine 5% of bail applications in Victoria.¹ However, their decisions shape all bail decisions because other bail decision makers must follow precedents set by the courts. They are also likely to be influenced by what a court may decide in a particular case because their own decision may ultimately be subject to court review.

Given the key role courts play in bail decision making, it is essential their jurisdiction, powers and procedures are clearly defined and operate efficiently.²

UNACCEPTABLE RISK AND DELAY

The increasing length of time it takes for some criminal matters to be determined by the courts is a concern.³ There are many reasons behind this, such as the delays: in preparing prosecution briefs; by the accused in obtaining legal aid or securing counsel; in matters being listed for trial; and in obtaining forensic test results.⁴

Accused people may spend a long time on remand as a result of such delays. An accused ultimately found not guilty or sentenced to a non-custodial or short custodial sentence is likely to feel aggrieved by a lengthy period spent on remand. The prospect of remand may also inappropriately influence an accused to plead guilty so the case is dealt with quickly.⁵

The Department of Justice is seeking to reduce delays. Its review of criminal procedure and criminal jurisdictional thresholds led to enactment of the *Courts Legislation (Jurisdiction) Act 2006*. The Act amends Victoria's criminal laws to improve committal procedures and enable the Magistrates' Court to deal with more indictable offences. The reforms aim to modernise the justice system, improve case management, facilitate early identification of guilty pleas, and reduce delay.⁶ The department is continuing to review criminal procedures to further reduce delay as part of its ongoing review of the Crimes Act. Other efforts to reduce delay include recent reforms to sexual offence laws and the reference to the Sentencing Advisory Council on sentencing indications and discounts.

In Chapter 3 we discussed the unacceptable risk test. Decision makers use this test to determine whether an accused should be released on bail.⁷ In assessing unacceptable risk the court must consider all relevant matters, including those specified in the Bail Act.⁸ The length of time spent or likely to be spent on remand is not listed as one of the relevant considerations,

though the list is not exhaustive. Courts have cited delays as relevant in a number of cases.⁹ For example, in the high profile case of Tony Mokbel unacceptable delay in getting to trial was the initial reason for bail being granted.¹⁰ Similarly, in *Hildebrandt v DPP* Justice King ordered the accused to be released on bail:

*The factors that make him an unacceptable risk have to be weighed against the fact that he is a man presumed to be innocent, who has currently spent two years on remand and will spend a minimum of at least two years eight months on remand prior to his case being heard.*¹¹

The Supreme Court has not provided decision makers with clear rules on how delay should be taken into account in a bail hearing.¹² It was suggested in consultations that delay should be specifically addressed in the new Bail Act. This would reinforce the principle that it is undesirable to remand accused people, who are presumed innocent, for lengthy periods. It may also lead to more consistency in bail decision making.

The concept of delay is subjective. If delay is to be taken into account in bail decision making, what period of time constitutes a relevant delay? Some jurisdictions have addressed this issue by imposing a specific time limit. Under the Irish Bail Act, when accused people are remanded and the trial has not commenced within four months of the bail refusal, they may renew the bail application on the ground of delay and the court shall bail them if satisfied the interests of justice require it.¹³ Custody time limits also apply in the UK.¹⁴ If prosecutors want the accused remanded for longer than the set limit, they must apply to the court for an extension. The court may only grant an extension if satisfied that it is needed because of a specified cause and 'the prosecution has acted with all due diligence and expedition'.¹⁵

Other jurisdictions take a more flexible, case-based approach. The NSW Bail Act lists criteria bail decision makers must consider. The criteria include 'the period that the person may be obliged to spend in custody if bail is refused'.¹⁶ Similarly, the New Zealand Bail Act lists considerations, including 'the likely length of time before the matter comes to hearing or trial'.¹⁷

In our Consultation Paper we asked whether the Bail Act should specifically refer to delay as a factor to be considered in determining unacceptable risk.¹⁸ In particular, we asked

whether the Act should refer to specific time periods or whether decisions about unacceptable delays should be left to judges or magistrates.

The majority of relevant submissions supported delay being a factor in the bail decision but were divided on its inclusion in the Bail Act. Most thought that a specific reference to delay should be included in the Bail Act.¹⁹ Some emphasised the gravity of depriving people who are presumed innocent of their liberty.²⁰ Others against the inclusion of a specific reference to delay in the Bail Act,²¹ such as the Magistrates' Court, preferred that the 'status quo remain'.²² Some submissions said relevance of delay should be determined by a judge or magistrate.²³ Others did not say whether a specific reference to delay should be included, but thought the relevance of delay should be left to the discretion of the judge or magistrate.²⁴

None of the submissions that favoured a specific reference in the Bail Act favoured set time limits. Dr Chris Corns said: 'I think there would be great difficulties in formulating statutory limits for what is and is not acceptable time frames'. Two submissions thought the decision to remand the accused should be periodically reviewed.²⁵ Some submissions thought that the longer a person remains in custody the more the balance should tip in favour of granting bail, and that the decision maker should be required to provide written reasons if bail is refused after review.²⁶

Two submissions favoured the NSW model, which requires the decision maker to consider 'the period the person may be obliged to spend in custody if bail is refused'.²⁷ The Commonwealth DPP preferred this model because: 'The word "delay" presumes there is a general accepted timeline for what is not delayed ... Whilst a brief may take some time to put together it may not necessarily be appropriately described as delayed ...'

Mokbel's disappearance while on bail prompted criticism of the decision to release him. However, police acknowledged that bail laws were not the problem in the Mokbel case, but rather the time it takes for complex cases to move through the criminal justice system.²⁸ Delay in the Mokbel case was further caused by the investigation of corruption allegations against members of the former Victorian Drug Squad who were to be witnesses at Mokbel's trial.²⁹ Changes to the Bail Act could not solve such problems.

- 1 See data in Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 8.
- 2 For an overview of the criminal jurisdiction of the four courts that make bail decisions in Victoria and how frequently each of these courts hears bail applications see: *Ibid* 57–58.
- 3 *Ibid* 58–60.
- 4 See, eg, Judge Paul Rice, 'Getting Serious About the Causes of Delay and Expense in the Criminal Justice System' (Paper presented at the 24th AIJA Annual Conference, Adelaide, 15–17 September 2006); Chief Judge Michael Rozenes, 'Delay in the Criminal Jurisdiction—and What Can Be Done About It' (Paper presented at the Attorney-General's Justice Statement: Agenda for Change Conference, Aitken Hill, 29–30 October 2003); Standing Committee of Attorneys General Working Group on Criminal Trial Procedure, *Report (Martin Report)* (1999) Australian Government Attorney-General's Department <www.ag.gov.au> at 23 May 2007; Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (2007) Australian Institute of Criminology <www.aic.gov.au> at 23 May 2007.
- 5 For detailed discussion see Victorian Law Reform Commission (2005) above n 1, 59.
- 6 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006, 1774–1777 (Attorney-General Robert Hulls).
- 7 *Bail Act 1977* s 4(2)(d). Some accused may also have to establish 'exceptional circumstances' or 'show cause' why detention is not justified: see Chapter 3.
- 8 *Bail Act 1977* s 4(3).
- 9 See discussion of delay in George Hampel and Daniel Gurvich, *Bail Law in Victoria: A Practical Guide to the Law, Procedure and Advocacy in Bail Applications* (2003) 10–13.
- 10 *Mokbel v DPP (No 2)* (2002) 132 A Crim R 290; *Mokbel v DPP (No 3)* (2002) 133 A Crim R 141. The Mokbel case is discussed in greater detail in Chapter 8. See also *DPP v Cozzi* [2005] VSC 195 (Unreported, Coldrey J, 8 June 2005).
- 11 [2006] VSC 198 (Unreported, King J, 31 May 2006) [11].
- 12 See, eg, the contrasting decisions in *DPP v Tang* (1995) 83 A Crim R 593 (Beach J) and *R v Kantzidis* (Unreported, Supreme Court of Victoria, Smith J, 9 August 1996) and the analysis of Kellam J in *Beljajev v DPP* (1998) 101 A Crim R 362. See also Lillian Lieder, *Criminal Law 2001: Bail Update and Review* (2001) 14.
- 13 *Bail Act 1997* (Ireland) s 3.
- 14 *Prosecution of Offences Act 1985* (UK) ss 22, 22A. The custody time limits range from 56 to 182 days: *Prosecution of Offences (Custody Time Limits) Regulations 1987* (UK) regs 4, 5.
- 15 *Prosecution of Offences Act 1985* (UK) s 22(3).
- 16 *Bail Act 1978* (NSW) s 32(1)(b)(i).
- 17 *Bail Act 2000* (NZ) s 8(2)(f).
- 18 Victorian Law Reform Commission (2005) above n 1, 60.
- 19 Submissions 13, 17, 24, 30, 32, 33, 38, 41.
- 20 Submissions 24, 29, 32, 38.
- 21 Submissions 11, 18, 22, 39, 45. Submission 39 endorsed the Magistrates' Court of Victoria's submission.
- 22 This view was supported by the majority of magistrates: submission 22.
- 23 Submissions 11, 22, 39, 45.
- 24 Submissions 8, 23, 46.
- 25 Submissions 24, 32.
- 26 Submissions 24, 32, 38. See the Provision of Reasons section in this chapter.
- 27 Submissions 17, 33.
- 28 *Lawyers Hit Back at Crime Claims* (2006) *The Age* <www.theage.com.au> at 30 March 2006.
- 29 *Mokbel v DPP (No 3)* (2002) 133 A Crim R 141 [2].



The presumption of innocence and the right to liberty make the length of time spent and likely to be spent on remand relevant to whether an accused poses an *unacceptable* risk. The commission believes the new Bail Act should require a decision maker to consider ‘the period the accused has already spent in custody and the period he or she is likely to spend in custody if bail is refused’. We recommended in Chapter 3 that this be included in the factors relevant to the determination of unacceptable risk. We avoid use of the term ‘delay’. Lengthy periods spent in custody may not only be caused by ‘delays’. For example, a trial may be held up because of the complexity of evidence gathering and analysis.

We do not favour the inclusion of set time limits. When deciding whether an accused poses an unacceptable risk the court must ‘have regard to all matters appearing to be relevant’—the time spent in custody will only be one matter to be weighed against other factors.³⁰ For example, if the time between arrest and trial is likely to exceed any custodial sentence the accused might receive it would clearly be relevant to the bail decision. However, other factors will also be relevant to the final decision.

The Bail Act should not state that the longer a person remains in remand the more the balance tips in favour of release. The weight given to the time spent by an accused in custody should ultimately be at the discretion of the decision maker.

We believe this approach is compatible with the right to liberty in the Victorian Charter of Human Rights. The charter says accused people must be brought promptly before a court and have the right to be brought to trial without unreasonable delay.³¹ If these requirements are not complied with they must be released. Whether a delay is ‘unreasonable’ will depend on the circumstances of the case. When interpreting a similar provision of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the European Court of Human Rights stated:

*the reasonableness of the length of detention must be assessed in each case according to its special features. Continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty.*³²

The New Zealand Court of Appeal also found that delay alone is not determinative of the bail decision:

*Another important consideration is the likely length of the detention before trial. Where it is unlikely to occur within a few months the delay will be a factor favouring the granting of bail but is not in itself determinative ... It is the task of the judge hearing a bail application to balance these various factors giving due weight of course to the Bill of Rights guarantees.*³³

COMMONWEALTH PROVISIONS

In Chapter 3 we noted that various Commonwealth offences attract a reverse onus. We recommend abolition of the reverse onus tests in Victoria; however, they will continue to apply to Commonwealth offences. It was suggested in one consultation that the Bail Act should refer to the Commonwealth provisions that relate to bail.³⁴

The links between the Bail Act and Commonwealth legislation may also be deficient.³⁵ This could cause problems when the Bail Act is applied to Commonwealth offences. For example, the grounds for an appeal by the Victorian or Commonwealth DPPs refer to any breach of the Bail Act, but not to a breach of the relevant Commonwealth provisions.³⁶

In our Consultation Paper we asked whether the Bail Act should refer to Commonwealth legislation that has a bearing on the bail decision.³⁷ The majority of relevant submissions agreed.³⁸ Youthlaw said ‘[r]eference to legislation that interacts with the Bail Act, backed up by adequate training, would facilitate the making of fairer decisions’. Some submissions thought the Bail Act should refer to specific sections in Commonwealth legislation.³⁹ In contrast, the Commonwealth DPP and the Magistrates’ Court thought any reference to the Commonwealth legislation should be more general.⁴⁰

Some submissions opposed the inclusion of a reference to the Commonwealth legislation in the Bail Act.⁴¹ The Criminal Bar Association thought ‘the Bail Act should not be complicated by the inclusion of references to Commonwealth legislation’. Victoria Police also opposed a reference, but thought Commonwealth legislation should be included in a list of matters that decision makers should consider when applying the reverse onus tests. It suggested

that any bail guidelines developed for police should refer to the Commonwealth provisions. The Magistrates' Court believed the status quo should remain, where Commonwealth prosecutors bring the relevant provisions to the court's attention. Dr Chris Corns thought the 'ideal solution' would be the creation of a 'stand alone federal Bail Act'.

The commission believes the new Bail Act should note that a reverse onus applies to some Commonwealth offences for bail. As a matter of statutory interpretation, Commonwealth legislation prevails over Victoria's when they conflict.⁴² Nevertheless, the commission believes it is worth referring to Commonwealth legislation in the Bail Act to ensure decision makers are aware of and give precedence to it. It is preferable to refer to the Commonwealth legislation generally rather than to specific provisions. Specific provisions will change over time and as pointed out in the Commonwealth DPP's submission, 'it has been very difficult to synchronise the Bail Act with the various pieces of Commonwealth legislation that have a bearing on the bail decision'.

MURDER AND TREASON

The Supreme Court is the only court able to determine bail for an accused charged with murder or treason, subject to one exception: when committing an accused charged with murder for trial a magistrate may also determine bail.⁴³

In its 1992 report on the Bail Act, the LRCV concluded that 'the seriousness of the crime of murder was not a sufficient reason for having bail decisions made in the Supreme Court'.⁴⁴ It recommended the limitation on bail decisions for murder and treason be abolished. It gave its reasons in an earlier report on homicide:

- no such restrictions apply in other very serious cases
- a significant number of people charged with murder are not tried for murder and only a small minority of those charged are convicted of murder. The charging decision is a 'very inexact measure of the final outcome'.⁴⁵

RECOMMENDATIONS

71. The new Bail Act should contain a note to the unacceptable risk provisions advising that some Commonwealth offence provisions stipulate a reverse onus for bail and that they continue to apply.
72. The new Bail Act should empower magistrates to grant bail to an accused charged with any offence.

In our Consultation Paper we asked whether the Bail Act should allow the Magistrates' Court to hear bail applications by people charged with murder and treason.⁴⁶

There was broad support in submissions for this proposal.⁴⁷ Some submissions pointed out that magistrates may determine bail for other serious offences that carry a maximum term of life imprisonment.⁴⁸ The Criminal Bar Association said that since the abolition of capital punishment, murder and treason can no longer be distinguished from other serious offences on the basis of punishment. Dr Chris Corns highlighted the discretionary aspect of charging, saying, 'it is a matter of police discretion and subjective judgment to initially charge murder rather than some other form of homicide'. The Magistrates' Court submission noted magistrates' current ability to determine bail following committal. The court was not aware of any appeals from such decisions, and said bail was only infrequently granted.⁴⁹

Two submissions opposed allowing magistrates to grant bail for murder or treason offences.⁵⁰ Court Network argued victims and their families 'feel their matter is being shown a higher degree of respect, according to the seriousness of the crime, when heard in the Supreme Court'. The commission acknowledges that a hearing in the Supreme Court may appear to accord greater gravity and respect to a case; however, a bail application is an *interlocutory* matter. An accused charged with murder or treason will be tried in the Supreme Court.

Victoria is unusual in limiting the power to grant bail for murder or treason to the Supreme Court. No other Australian state or territory, except for Queensland, imposes such a restriction.⁵¹ The restriction is anomalous and inefficient. Magistrates can grant bail for other serious offences carrying a maximum life sentence and for murder following a committal hearing. As noted by the LRCV, the initial charge of murder is an 'inexact measure of the final outcome'. Also, applications to the Magistrates' Court entail less expense than those in the Supreme Court. In the interests of consistency and efficiency, the commission believes magistrates should be able to grant bail for any offence.⁵²

- 30 *Bail Act 1977* s 4(3).
- 31 *Charter of Human Rights Act 2006* s 21(5).
- 32 *Punzelt v Czech Republic* (2001) 33 EHRR 49, [73]. The court said while reasonable suspicion that the person had committed an offence is a necessary condition for continued detention, after a certain lapse of time it no longer suffices. There must be other 'relevant' and 'sufficient' grounds that justify the deprivation of liberty. The national authorities must have displayed 'special diligence' in the conduct of the proceedings. See also, *Stögmüller v Austria* (1969) 1 EHRR 155; *Grisez v Belgium* (2003) 36 EHRR 854.
- 33 *B v Police (No 2)* [2000] 1 NZLR 31, 35.
- 34 Consultation 47.
- 35 Consultation 2.
- 36 This is discussed in detail in Victorian Law Reform Commission (2005) above n 1, 68.
- 37 *Ibid* 69. We also asked how this would best be achieved and where such a reference should be made.
- 38 Submissions 11, 24, 29, 30, 32, 33, 38.
- 39 Submissions 13, 24, 29.
- 40 The OPP deferred to the Commonwealth DPP's submission. Submission 39 adopted the Magistrates' Court submission.
- 41 Submissions 18, 23, 45.
- 42 *Australian Constitution* s 109.
- 43 *Bail Act 1977* s 13.
- 44 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 9.
- 45 Law Reform Commission of Victoria, *Homicide*, Report No 40 (1991) [102]–[110].
- 46 Victorian Law Reform Commission (2005) above n 1, 72.
- 47 Submissions 13, 17, 22, 24, 29, 32, 33, 38, 39, 45, 46. Magistrates supported this proposal in consultations 18, 48. A Supreme Court judge also expressed support: consultation 10.
- 48 Submissions 33, 45. The Criminal Bar Association referred to offences under the *Drugs, Poisons and Controlled Substances Act 1987*, and the offences of conspiracy to murder, incitement to murder and attempted murder, which all have a maximum penalty of life imprisonment.
- 49 See the Director's Appeals section in this chapter.
- 50 Submissions 41, 48.
- 51 *Bail Act 1980* (Qld) s 13. Removal of this provision has been recommended: 'The power of the Magistrates' Court to grant bail should be extended to all offences'. Queensland Law Reform Commission, *The Bail Act 1990*, Report No 43 (1993) 45.
- 52 We also recommend that bail justices and police should be able to grant bail for any offence: chapters 4 and 5.



CONFESSIONS AND ADMISSIONS

The rules of evidence generally do not apply to bail hearings.⁵³ The Bail Act does not allow examination or cross-examination of accused people by police about the alleged offence at a bail hearing.⁵⁴ Any adverse evidence obtained through such questioning is unlikely to be admissible at the bail hearing or trial. However, accused people might independently volunteer confessions or admissions. Because such information is not obtained through direct questioning it raises questions about its admissibility as evidence.⁵⁵

If an admission or confession is made at a bail application, the trial judge or magistrate determines its voluntariness at a pre-trial hearing. If admissible, the jury or magistrate (depending on the court the matter is heard in) decides what weight to attach to it.⁵⁶

Bail justices told us that accused people had volunteered confessions or admissions in their presence.⁵⁷ This is most likely to occur when accused people do not have legal representation. Self-represented accused people are vulnerable—they are unlikely to have received legal advice and are generally keen to be released from custody.⁵⁸ Any alleged confession or admission in these circumstances should be treated with caution.⁵⁹

In our Consultation Paper we asked whether the Bail Act should specify how to use confessions or admissions volunteered during a bail application and whether there should be a general rule in favour of or against admissibility.⁶⁰

The majority of relevant submissions favoured a general rule against admissibility of such confessions or admissions.⁶¹ The submissions emphasised that bail is not about the determination of guilt or innocence.⁶² The accused is often unrepresented, may be distressed and may have substance abuse or disability issues.⁶³ The admissions are generally not made on oath, nor are they likely to have been made after appropriate judicial warnings.⁶⁴ As a result, such admissions tend to be unreliable and should not be considered voluntary.⁶⁵

Some submissions thought there should be a blanket rule against admissibility.⁶⁶ Others thought such confessions or admissions

should generally be inadmissible but it should ultimately be left to the discretion of the judge or magistrate.⁶⁷ For example, Victoria Police said:

these types of confessions/admissions should remain inadmissible. However, in relevant circumstances, this may be an issue that should be left to the Magistrate or Judge at any subsequent hearing to assess the voluntariness of the confession.

Three submissions preferred the status quo remain, where a magistrate or judge assesses the voluntariness of any confession or admission and the weight to attach to it.⁶⁸ Two submissions preferred a general rule in favour of admissibility.⁶⁹ The OPP said: 'Although there may be policy reasons to the contrary, we are of the view that there should be a prima facie rule of admissibility'.

Some submissions thought rules about admissibility should be included in the Bail Act.⁷⁰ Others thought there was no need for a specific provision.⁷¹ There was no suggestion that a provision should be included in the uniform Evidence Act rather than the Bail Act. The uniform Evidence Act could be introduced into Victoria before a new Bail Act.⁷²

The Bail Act's existing prohibition protects accused people from providing incriminating evidence during a bail hearing. It recognises that the hearing should not be used as an opportunity to gather evidence against the accused. This prohibition should be retained.

The commission believes a new Bail Act should contain a general rule against the admissibility of confessions or admissions volunteered during a bail application. The circumstances in which they are made bring their voluntariness and reliability into question. Magistrates and judges should retain the discretion to admit such confessions or admissions into evidence, but only if they are made voluntarily and their admission would not be unfair to the accused.

The rule against admissibility should be included in the new Bail Act rather than the uniform Evidence Act. This accords with our recommendation that all legislation relating to bail be contained in the Bail Act. It also ensures lay decision makers will be aware of the provision. A specific provision in the Bail Act

RECOMMENDATIONS

73. The new Bail Act should contain a provision about the admissibility of confessions or admissions volunteered during a bail application that are not elicited through examination or cross-examination. The general rule should be against admissibility.

would not conflict with the uniform Evidence Act but operate in addition to it.⁷³ Guidance in the Bail Act should help ensure consistent decision making about the admissibility of voluntary confessions or admissions. It should also provide greater protection for the accused against the inappropriate use of such confessions or admissions.

PROVISION OF REASONS

The Bail Act only requires decision makers to record their reasons for granting or refusing bail in the following circumstances:

- When granting bail: if judges or magistrates grant bail because an accused has ‘shown cause’, they must include a statement of reasons in the order.⁷⁴ Police and bail justices must also ‘record’ and ‘transmit’ a statement of reasons when granting bail to an accused who has ‘shown cause’.⁷⁵
- When refusing bail: if a court refuses bail to an accused when the prosecution has sought remand, it must record reasons on the relevant warrant.⁷⁶ If magistrates refuse bail when committing an accused charged with an indictable offence to a superior court for trial, they must give reasons.⁷⁷

Judges and magistrates usually give oral reasons for granting or refusing bail, even if the Bail Act does not require it. Decision makers generally should give reasons to accord with the requirements of procedural fairness. If a decision maker fails to record reasons for granting or refusing bail when required to do so by the Bail Act, the bail order is legally invalid.⁷⁸

It is unclear why the Bail Act requires recorded reasons for some matters but not others. Decision makers must record reasons if they grant bail to accused people charged with ‘show cause’ offences but not if they refuse bail for the same offences. There is also no requirement to give reasons when granting or refusing bail to accused people charged with ‘exceptional circumstances’ offences.⁷⁹

The provision of reasons, particularly written reasons, makes it clearer whether a decision maker has taken into account relevant or irrelevant considerations in reaching a bail decision, and therefore whether their discretion has miscarried.

53 *Bail Act 1977* s 8(a).

54 *Bail Act 1977* s 8(b).

55 See, eg, *The Queen v Kathleen Therese MacBain* (Unreported, Supreme Court of Victoria, Winneke P, Buchanan JA and O’Byrne AJA, 17 July 2002) discussed in Victorian Law Reform Commission (2005) above n 1, 63.

56 Dr Chris Corns submitted that at a bail hearing an accused is ‘in custody’ under the *Crimes Act 1958* s 464. Therefore, any confessions or admissions made to an ‘investigating officer’ must be tape-recorded to be admissible, unless exceptional circumstances justify the reception of the evidence. ‘Investigating officer’ would include police, but is unlikely to include a bail justice.

57 Consultation 47.

58 The misuse of bail powers by police to elicit admissions from such accused is discussed in Chapter 4.

59 Discussed further in Victorian Law Reform Commission (2005) above n 1, 64.

60 *Ibid* 64.

61 Submissions 8, 13, 23, 24, 29, 30, 38, 45.

62 Submissions 13, 45.

63 Submissions 24, 29, 32, 38.

64 Submissions 24, 38. The Magistrates’ Court said magistrates would generally stop or warn accused people before they made incriminating admissions or confessions. Accused people are generally not sworn. If they want to be sworn, magistrates generally caution against it: submission 22. However, bail justices and police may not provide such warnings or cautions.

65 Submissions 24, 30, 32, 38.

66 Submissions 24, 29, 30, 32, 38, 45.

67 Submissions 13, 23.

68 Submissions 22, 33, 39.

69 Submissions 11, 41. The RVAHJ seemed to favour admissibility but only for out-of-sessions hearings.

70 Submissions 8, 11, 30, 32, 41, Consultation 9.

71 Submissions 13, 33.

72 Victorian Law Reform Commission, *Implementing the Uniform Evidence Act: Report* (2006).

73 See Uniform Evidence Act ss 85, 86, 90, 135, 137, 138.

74 *Bail Act 1977* s 4(4)(a)–(d)(i). Subsection (i) applies to all the preceding subsections (a) to (d) in section 4(4).

75 *Bail Act 1977* s 4(4)(a)–(d)(ii). Subsection (ii) applies to all the preceding subsections (a) to (d) in section 4(4). It appears ‘transmit’ means police must provide the reasons to the court the accused will appear before. Police and bail justices must use form 3 of the *Bail Regulations 2003* to record their reasons.

76 *Bail Act 1977* s 12(1)(b).

77 *Bail Act 1977* s 12(2)(b). Reasons for refusal need not be given when no application for bail is made: *The Queen v The Director-General of Corrections; ex parte Peter John Allen* (Unreported, Supreme Court of Victoria, Tadgell J, 11 November 1986).

78 See, eg, *DPP v Parker* (Unreported, Supreme Court of Victoria, Practice Court, Mandie J, 19 August 1994); *DPP (Cth) v Schevella* (Unreported, Supreme Court of Victoria, Beach J, 12 January 1987); *DPP (Cth) v Abbott* 97 A Crim R 19, 23–25; *DPP v Harika* [2001] VSC 237 (Unreported, Gillard J, 24 July 2001) [26]–[38].

79 See, eg, *DPP v Spiridon* [1989] VR 352 (Hampel J).

Chapter 6

Bail Decisions by Courts

The commission believes decision makers should record written reasons for the grant or refusal of bail in all cases.

In our Consultation Paper we discussed what sufficient ‘reasons’ are for the purpose of the Bail Act.⁸⁰ While reasons ‘must be comprehensible’, written reasons may be brief.⁸¹ Reasons may be considered in conjunction with the transcript of proceedings and documentary evidence presented.⁸² For example, magistrates usually note reasons in a ‘tick-a-box’ format with space for extra comments in Courtlink, the Magistrates’ Court information system. Some magistrates record ‘as per oral reasons’. Oral reasons form part of the decision and are incorporated into the court record.⁸³

In consultations concerns were expressed about the nature and extent of reasons bail decision makers provide.⁸⁴ The Melbourne Magistrates’ Court pointed out that the workload of magistrates makes the provision of lengthy written reasons impracticable. Magistrates generally expand upon their reasons orally.⁸⁵ There were also concerns that police and bail justices do not always provide reasons when required to do so.⁸⁶

In our Consultation Paper we asked about the adequacy of reasons provided by decision makers when required under the Bail Act.⁸⁷ We asked whether the Bail Act should require reasons to be given in all cases, what the appropriate method for recording reasons should be and whether written reasons should be required in all cases.

There was general support in submissions for reasons to be given by bail decision makers, particularly when bail is refused.⁸⁸ Most relevant submissions thought the combination of written and oral reasons given by the Magistrates’ Court was satisfactory.⁸⁹ There were concerns about the reasons given by police and bail justices, and several submissions thought they should be required to provide written reasons, at least if bail is refused.⁹⁰ Both Victoria Police and the RVAHJ thought the reasons currently given were adequate. Two individual bail justices said they routinely provide reasons to the accused.⁹¹ One said: ‘I think it is only fair to tell an accused why he/she is remanded in custody’.⁹² The RVAHJ suggested that bail justices could be required to provide reasons on their hearing form.

Some submissions emphasised the importance of providing reasons ‘to ensure procedural fairness and to ensure proper decision making’.⁹³ Fitzroy Legal Service said:

Where bail is refused, such reasons should be properly explained rather than constituted by mere repetition of the relevant provisions ... For example,

‘unacceptable risk’ or ‘failed to show cause’ would not be adequate. Reasons should enable those preparing future applications to understand properly the basis for refusal to grant bail.

In contrast, the OPP said:

The minimum requirements should be that there is a note on the records of the court recording the relevant provisions that were applied and the decision expressed in reference to the relevant provisions.

Most submissions thought reasons should be recorded, but were mixed about whether written reasons were necessary.⁹⁴ For example, the Magistrates’ Court said:

Oral reasons should be provided by all decision makers where a decision has been made to refuse bail ... The Magistrates are concerned that if written reasons were required in all cases, there would be enormous resource implications and cause substantial delay.⁹⁵

Victoria Legal Aid thought the mixture of written and oral reasons provided by the Magistrates’ Court was adequate. The Criminal Bar Association thought a court should not be required to record all reasons, but should record in point form the essential reasons for granting or refusing bail. Similarly, the Commonwealth DPP said ‘reasons, albeit brief and not touching on every matter taken into account, should be stated and recorded in Courtlink’.

The commission believes decision makers should record written reasons for the grant or refusal of bail in all cases. Procedural fairness must be evident in the decision to remand accused people—clear reasons must be given for this decision. In fairness to the police or prosecution who may oppose bail, reasons should also be provided for the grant of bail.

Reasons should be recorded in writing and a copy given to the accused and prosecution. This will increase the transparency, consistency and accountability of bail decision making. It is important that the key reasons are recorded in writing. These reasons can be expanded upon orally, as occurs in the Magistrates’ Court.

The commission acknowledges that requiring written reasons will have resource implications. In the Magistrates’ Court this requirement should be satisfied by the use of a tick-a-box form, with space for any other reasons to be briefly noted. This should minimise delays and the need for further resources. Magistrates could use the

tick-a-box form in Courtlink to generate a copy of written reasons to give to the accused and prosecution.⁹⁶ A similar form could be used by police and bail justices.

The provision of reasons may lead to greater efficiency and fairness in the justice system. If accused people know why bail has been refused, they will be in a better position to address particular issues of concern, making a future grant of bail more likely. As discussed in Chapter 3, it is more cost-efficient for an accused to be released on bail than kept on remand.⁹⁷ This may also reduce numbers of bail applications, further reducing costs.

It is important when providing reasons that the decision maker does not merely recite the Bail Act. It is not enough to say an accused is an unacceptable risk. It is important to say why. For example, a decision maker may consider that an accused poses an unacceptable risk of failing to appear because she does not live in the jurisdiction. Or an accused does not present an unacceptable risk because of family support and lack of prior convictions. This must be clear to the accused.

As already noted, failure by a decision maker to provide reasons when required to do so by the Bail Act invalidates the bail decision. In his submission, Professor John Willis was concerned about the impact of this on an accused: 'What is the status of D who is at large on a legally void grant of bail? D has not been responsible for this and furthermore D's bail status in such a case will be unknown to police and D'.

Professor Willis suggested that the grant of bail should not be invalidated if a decision maker fails to provide reasons when required to do so. The commission agrees that an accused should not be adversely affected by a decision maker's failure to provide reasons. As pointed out by Professor Willis, examples of such provisions are already found in the Crimes Act.⁹⁸

RECOMMENDATIONS

74. Bail decision makers should record written reasons for the grant or refusal of bail in all cases and a copy should be provided to the accused and the prosecution. In the Magistrates' Court this requirement should be satisfied by the use of a 'tick-a-box' form, designed with space for any other reasons to be briefly noted in writing.
75. The new Bail Act should provide that failure by a decision maker to record reasons when required to do so does not invalidate the bail decision.
76. The chiefs of each court should consider issuing a practice direction stipulating that an accused is not to be bailed or remanded to a date to be fixed. If the matter cannot proceed on the date stipulated, there should be a bail extension hearing, with the accused not required to attend unless the prosecution opposes extension or the accused is seeking a bail variation.

BAIL TO A DATE TO BE FIXED

Occasionally a higher court will bail or remand accused people 'to a date to be fixed'. Accused people are later advised when they are next required to appear in court. Possible reasons for not setting a date include uncertainty over the availability of forensic test results or a judge's availability.

Bailing to a date to be fixed is problematic. It places the accused in a position of uncertainty and there is a risk that a case may be inadvertently overlooked.⁹⁹ However, setting an arbitrary return date may also be problematic because all the parties are required to return to court even though a matter may not be ready to proceed.

In our Consultation Paper we asked whether the practice of a court bailing or remanding an accused to a date to be fixed is a problem and what problems could arise if judges were not able to do this.¹⁰⁰

Almost all relevant submissions agreed that an accused should not be bailed or remanded to a date to be fixed.¹⁰¹ Submissions said accused people should be given certainty¹⁰² and expressed concern about matters being 'lost in the system'.¹⁰³ The OPP noted that if an accused does not appear when required, the prosecution 'invariably has difficulties in obtaining an arrest warrant'.

Submissions proposed a variety of alternatives. Victoria Legal Aid suggested if the matter cannot proceed on the date fixed, there should be a bail extension hearing on that date.¹⁰⁴ The accused should not be required to attend unless the prosecution intends to oppose the extension or the accused wants to apply to vary bail conditions. The Law Institute of Victoria suggested that an accused could be bailed 'to a date to be fixed but not later than (a specified date)'.

80 Victorian Law Reform Commission (2005) above n 1, 65.

81 *DPP v Harika* [2001] VSC 237 (Unreported, Gillard J, 24 July 2001) [26].

82 *DPP v Harika* [2001] VSC 237 (Unreported, Gillard J, 24 July 2001) [33]. In *Bellajev v DPP* (Unreported, Supreme Court of Victoria, Appeal Division, Young CJ, Crockett and Ashley JJ, 8 August 1991) the court said that in a bail application, 'the judge is not obliged to state in his reasons every matter which he has taken into account or the weight he has attributed to any particular matter'.

83 *Administrative Law Act 1978* s 10.

84 Consultations 7, 8.

85 Consultations 18, 63.

86 Advisory Committee Meeting, 10 May 2005; consultation 14.

87 Victorian Law Reform Commission (2005) above n 1, 66.

88 Submissions 8, 13, 17, 22, 24, 29, 30, 32, 33, 39, 45, 46.

89 Submissions 22, 23, 24, 29, 38, 39, 46. One submission thought the current system for recording reasons appeared to be unsatisfactory: submission 13.

90 Submissions 24, 29, 38.

91 Submissions 8, 18.

92 Submission 8.

93 Submission 32. See also, submissions 29, 30, 33.

94 Professor John Willis thought reasons should be put in writing. Submissions 13, 30, 32, 38 thought reasons should be recorded but did not state whether this should be in writing.

95 See also consultations 18, 63.

96 Consultation 63.

97 And see submission 12.

98 *Crimes Act 1958* ss 464SB(7), 464T(8).

99 Consultation 46. Early in 2005, the County Court 'cleaned up' its registry and discovered some matters had become lost this way.

100 Victorian Law Reform Commission (2005) above n 1, 114.

101 Submissions 22, 23, 24, 29, 30, 38, 39, 41, 45; consultation 46. Bail Justice Stephen Mayne did not think this practice was a problem.

102 Submissions 22, 24, 30, 39.

103 Submissions 23, 29.

104 Submissions 30, 45 made similar suggestions.



The new facts or circumstances rule aims to prevent repeat applications for bail when the initial application has been found to lack merit.

The commission agrees that it is inappropriate for an accused to be bailed or remanded to a date to be fixed. All parties, in particular the accused, should have the certainty of a return date. This would also ensure that cases are not lost in the system. Courts should always set a return date.

BAIL APPLICATIONS

NEW FACTS OR CIRCUMSTANCES

Once accused people have applied for bail, they must show ‘new facts or circumstances’ have arisen before a court will hear any further application for bail.¹⁰⁵ However, this does not apply if they were not legally represented at previous bail hearings. This exception recognises the disadvantage self-represented applicants often face because of a lack of legal or other skills.¹⁰⁶

The new facts or circumstances rule aims to prevent repeat applications for bail when the initial application has been found to lack merit. It also helps to prevent ‘magistrate shopping’ where an accused makes repeat applications in the hope a different magistrate or judge will rule differently.¹⁰⁷ We were told the rule also prompts lawyers to advise clients against legal representation for bail applications made soon after arrest because they may not be in a position to present a well prepared and supported application.¹⁰⁸ If accused people are represented and the application is ill-prepared, they face the new facts or circumstances hurdle for any subsequent application. Many accused people understandably insist on a bail application as soon as possible and often opt to represent themselves.¹⁰⁹

Legal representation for bail applicants is preferable because the process is generally more efficient and the hearing is more likely to focus on the issues relevant to the bail decision. South Australian research also shows that accused people who are legally represented are more likely to be granted bail.¹¹⁰ This results in savings to the justice system through a reduction in the number of further applications and the costs of remand. Legal representation also reduces the risk of accused people inadvertently prejudicing their defence.¹¹¹ However, removing the new facts

or circumstances rule altogether may encourage repeat applications which lack merit.¹¹²

In our Consultation Paper we asked whether accused people should be allowed representation at a bail application made shortly after arrest without having to show new facts or circumstances on their subsequent application.¹¹³ Victoria Legal Aid had previously suggested it should be allowed within two business days of arrest.¹¹⁴ There was strong support in submissions for this suggestion.¹¹⁵ The majority view of the Magistrates’ Court was that ‘the current situation is artificial and can lead to unjust situations ... Representation should always be encouraged, as it assists both the applicant and the court’. Some submissions, however, thought the rule should be retained without change.¹¹⁶

Some submissions acknowledged that providing legal representation at a hearing shortly after arrest may increase costs, but thought this should be balanced against potential savings to the justice system.¹¹⁷ The Law Institute of Victoria argued the proposed change ‘will result in fewer applications in person and be a more useful application of court time’. Some also emphasised the importance of protecting accused people’s right to liberty.¹¹⁸ Victoria Legal Aid said:

... it is currently rare for an unrepresented accused to be granted bail. Representation may increase the success rate for initial applications and therefore reduce the cost to the justice system of subsequent applications. In any event, resource implications must be balanced against the accused’s fundamental right to liberty.

Submissions were divided about whether the new facts or circumstances rule operates as a substantial barrier to further bail applications. Some magistrates thought the new facts or circumstances rule was relatively easy to satisfy, so it was rare for subsequent bail applications to be denied on this basis.¹¹⁹ The Commonwealth DPP agreed but others thought the rule presented a real hurdle.¹²⁰ Some were particularly concerned about cases in which the facts may not have changed, and therefore were not ‘new’, but stronger evidence of those facts had become available.¹²¹

RECOMMENDATIONS

77. Generally the new facts or circumstances rule should continue to apply. However, the new Bail Act should stipulate that an accused may be represented at a bail application made within two court-sitting days after arrest without having to show new facts or circumstances on a subsequent application.

Some submissions thought there should be a limitation to prevent repeat unmeritorious applications. There was support for limiting the exemption to applications made shortly after arrest, such as within the two business days suggested by Victoria Legal Aid.¹²²

The commission believes the new facts or circumstances rule should generally continue to apply to promote efficiency in the justice system and reduce unnecessary stress on victims and other services. However, the rule also promotes the perverse outcome of accused people being advised against legal representation for bail applications made shortly after arrest. It is desirable that accused people are represented at all bail applications. The commission recommends the Act allow accused people to be represented at bail applications made within two court-sitting days after arrest without having to show 'new facts or circumstances' on a subsequent application.

At our Indigenous Forum, concern was expressed that this period may be too short for Indigenous Australians.¹²³ We believe two days is sufficient, particularly as we are recommending strengthening of support services for Indigenous accused and an Indigenous-specific provision in the new Bail Act.¹²⁴

Although this recommendation may result in more bail applications by accused people increased efficiency and the greater likelihood of bail being granted on first application resulting from legal representation should offset increased costs that may result from the change.

The presumption in favour of bail that underpins the Bail Act should be supported by institutional mechanisms, including the encouragement of legal representation at all bail applications. The current situation, which in practice promotes self-representation, arguably undermines accused people's right to liberty.

IN-PERSON BAIL APPLICATIONS

As noted, there is no limit on the number of new bail applications unrepresented accused people can make. These are referred to as 'in-person' bail applications.

It was suggested to us that this allowance can be abused by accused people making repeat applications without merit.¹²⁵ A 2004 Magistrates' Court practice direction requires further bail applications by accused people who have been refused bail to be heard by the same magistrate.¹²⁶ This helps magistrates to minimise abuse of the bail process by repeat applicants.

105 *Bail Act 1977 s 18(4)*. This applies whether the initial application was refused, was granted but bail has been revoked, or the accused objects to any bail condition. The new facts or circumstances rule only applies to an application to vary a bail condition if the accused objects to the condition and therefore remains in custody: s 18(1). It does not apply to an accused who applies to vary a condition once released on bail: s 18(6).

106 'Prisoners are less likely to have completed high school than the general population, and they have poor cognitive functioning, limited literacy skills and poor numeracy': Ross Homel, *Open Doors or Prison Walls* (2006) Griffith Review <www.griffith.edu.au/griffithreview/campaign/apo/apo_ed11/homel_ed11.pdf> at 28 March 2007.

107 This is also prevented by the Magistrates' Court practice direction that future bail applications will be heard by the same magistrate if possible: Magistrates' Court of Victoria, Practice Direction No 1 of 2004.

108 Consultation 7. See also Victoria Legal Aid, *Towards a Better Bail Act: A Review of the Bail Act 1977 by Victoria Legal Aid* (2004) 28–29; Correspondence from the Victorian Aboriginal Legal Service to the Department of Justice, 29 October 2004.

109 It is not possible to obtain reliable figures on the number of self-represented bail applications made in the Magistrates' Court: meeting with Court Services, Department of Justice, 20 May 2005.

110 Alfred Allan et al, 'An Observational Study of Bail Decision-Making' (2005) 12 (2) *Psychiatry Psychology and Law* 319, 322, 327–328.

111 See the Confessions and Admissions section in this chapter.

112 The new facts or circumstances rule is not a universal feature of bail systems. For example, South Australia does not have it. However, '[w]ithout new circumstances the likelihood of a successful application would seem quite limited': Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 34.

113 Victorian Law Reform Commission (2005) above n 1, 62.

114 Victoria Legal Aid (2004) above n 108, 28.

115 Submissions 11, 13, 17, 22 (a minority of magistrates supported the status quo), 24, 29, 30, 32, 38, 45, 46; roundtable 1.

116 Submissions 8, 18, 23, 33, 41.

117 Submissions 13, 17, 24, 32. It may increase the short term costs for the accused and/or Legal Aid.

118 Submissions 24, 32.

119 Victorian Law Reform Commission (2005) above n 1, 62; consultations 18, 29.

120 Submissions 17, 24, 29; roundtable 1.

121 Submissions 24, 29, 38.

122 Submissions 17, 22, 24, 29, 30, 32, 39, 45; roundtable 1. Part-heard applications were also suggested as a way to allow accused people to address issues of concern before the conclusion of a bail hearing: roundtable 1.

123 It was thought that two days would place an undue burden on support agencies, particularly in rural areas.

124 See Chapter 10.

125 Victorian Law Reform Commission (2005) above n 1, 62; consultations 9, 24.

126 Magistrates' Court of Victoria, Practice Direction No 1 of 2004.



In our Consultation Paper we asked whether there are problems with in-person bail applicants not being subject to the new facts or circumstances rule.¹²⁷ We also asked whether accused people abused the process by making repeat in-person bail applications.

Most relevant submissions did not think accused people abused the in-person application process.¹²⁸ Several thought there were already sufficient practical disincentives to making repeat applications, such as the practice direction and logistical difficulties in preparing and serving applications from prison.¹²⁹ Most submissions did not think there should be any restriction placed on the number of in-person bail applications an accused can make.¹³⁰

In contrast, the OPP and Victoria Police thought the in-person bail application process does cause problems and should be restricted.¹³¹ Victoria Police said:

in-person applications often fail. This results in wasted use of police and court resources. In order to ensure an effective use of resources, it is suggested that accused persons should be required to demonstrate new facts or circumstances prior to making repeat in-person bail applications.

The commission believes the new Bail Act should continue to allow unrepresented accused people to apply for bail without restrictions. The commission believes the practice of the same magistrate hearing repeat applications and the practical disincentives to making repeat applications are sufficient to minimise abuse of the process. Restricting the process further would limit accused people's right to liberty.

FURTHER SUPREME COURT APPLICATIONS

Accused people can apply to the Supreme Court for bail without having to show new facts or circumstances or having been previously unrepresented.¹³² Although this right is well established, there is no reference to it in the Bail Act.

In our Consultation Paper we asked whether the Bail Act should refer to the right to apply for bail to the Supreme Court.¹³³ We also asked whether the present power of the Supreme Court was sufficient.

Relevant submissions were almost evenly split on this issue. Some believed the new Bail Act should refer to applications to the Supreme Court.¹³⁴ Others thought it unnecessary.¹³⁵

Some submissions thought a specific reference would promote greater transparency in the bail system, particularly for unrepresented accused.¹³⁶ The Criminal Bar Association thought it was unlikely that laypeople would be aware of the right: 'The purpose of the Act is to inform all Victorians of matters that are relevant to the issue of bail'.

The commission agrees that the new Bail Act should specifically refer to accused people's right to make further applications for bail to the Supreme Court. It will promote greater transparency and accessibility in the bail system.

APPEALS

DIRECTOR'S APPEALS

The Bail Act gives both the state and Commonwealth DPP the power to appeal bail decisions to the Supreme Court.¹³⁷ These appeals are commonly referred to as 'director's appeals' or 'section 18A appeals'.

Director's appeals are heard by a single judge of the Supreme Court. The judge has the power to quash the original decision and substitute another.¹³⁸ Director's appeals are uncommon—there are usually less than five brought by either the state or Commonwealth DPP each year.¹³⁹

In 2002, the Court of Appeal held in *Fernandez v DPP* that an accused had a right of appeal from a single judge's decision under section 18A.¹⁴⁰ The established position before *Fernandez* was that there was no right of appeal.¹⁴¹ While it is now clear that accused people can appeal a decision made under section 18A, it is not certain whether the DPP can also do so. In *Fernandez* President Winneke thought that 'either party would be entitled to challenge the single judge's decision on appeal'.¹⁴² However,

RECOMMENDATIONS

78. The new Bail Act should continue to allow unrepresented accused people to apply for bail without restriction.
79. The new Bail Act should specifically refer to the right of accused people to make further application for bail to the Supreme Court.

unlike the accused, the DPP would require leave to appeal in accordance with section 17A(4)(b) of the *Supreme Court Act 1986* because an appeal by the DPP would not concern 'the liberty of the subject' but would be from an interlocutory order in a matter of practice and procedure.¹⁴³

In our Consultation Paper we asked whether the right of an accused to appeal a decision of a single judge made under section 18A should be retained and incorporated into the Bail Act.¹⁴⁴ We also asked whether the Bail Act should include a corresponding right for the DPP or whether the appeal right should be removed altogether.

There was almost unanimous support in relevant submissions for retaining accused people's right to appeal.¹⁴⁵ Some submissions thought that to remove the right would infringe accused people's human rights, in particular the right to liberty.¹⁴⁶ Dr Chris Corns argued that the right is 'consistent with basic principles of natural justice'. Some submissions argued it was important for the Court of Appeal to be able to correct errors in law in a particular case, as well as clarify the principles relevant to bail law.¹⁴⁷ Others pointed out that any increased workload for the Court of Appeal would be minimal given the rarity of such appeals.¹⁴⁸

A few submissions thought the right should be extended to the DPP.¹⁴⁹ Dr Chris Corns said:

it would seem odd if the law recognises such an important right for the accused but not the DPP ... it is very difficult to see why, in bail matters, the DPP, representing the Crown and the general public interest, should be denied such a right.

Submissions which thought the right should be retained for the accused did not oppose extending it to the DPP.

The commission believes the new Bail Act should give the accused and DPP the right to appeal. This will clarify the parties' appeal rights and

make the law more accessible. As noted in submissions, the right to appeal to the Court of Appeal is consistent with the principles of natural justice and the accused's right to liberty. It will allow the Court of Appeal to clarify bail law, and is unlikely to have a significant impact on the Court of Appeal's workload.

The DPP should have this right of appeal because there is no reason why the right should be denied to one party. As submitted by Dr Chris Corns: 'Any member of the judiciary is capable of erring in law prejudicing either party'. The commission notes that the DPP's right to appeal will be restricted by the provisions of the Supreme Court Act and makes no recommendation on this issue.¹⁵⁰

On a director's appeal the decision maker need not find an error of law—though this will suffice—but may find that the discretion of the initial decision maker had 'miscarried'.¹⁵¹ Some submissions thought the DPP should be required to establish an error of law in director's appeals.¹⁵² Victoria Legal Aid submitted: 'This would confirm the principle that remand is a measure of last resort and a decision to grant bail should be rarely overturned'.

Section 18A allows the DPP to appeal a grant of bail if it is in the public interest.¹⁵³ This requirement acts as a threshold which the DPP must surpass to lodge an appeal. The DPP must also consider the amount of any surety to be inadequate, the conditions to be insufficient, or that the decision contravenes or fails to comply with the Bail Act. The latter requires an error of law. These conditions restrict the DPP's grounds to appeal a grant of bail. The commission believes the public interest threshold, combined with these conditions, is sufficient to address the concerns in some submissions that the DPP should be required to establish an error of law on a director's appeal. The requirements should be clarified in the new Bail Act.

RECOMMENDATIONS

80. The new Bail Act should provide that an accused and the Director of Public Prosecutions (DPP) each have the right to appeal the decision of a single judge of the Supreme Court on a director's appeal to the Court of Appeal.
81. The new Bail Act should clarify that to lodge a director's appeal, the DPP must be satisfied that it is in the public interest and the:
 - amount of any surety is inadequate;
 - conditions of bail are insufficient; or
 - bail decision contravenes or fails to comply with the Bail Act.

- 127 Victorian Law Reform Commission (2005) above n 1, 63.
- 128 Submissions 22, 24, 29, 33, 38, 39.
- 129 Submissions 24, 29, 30..
- 130 Submissions 24, 29, 30, 33, 38.
- 131 The OPP did not explain why the process was a problem, nor did it suggest any possible restrictions. Steve Kirby, a bail justice, thought the process was abused. Stephen Mayne, another bail justice, thought a limit on applications should be considered.
- 132 This is part of the Supreme Court's inherent jurisdiction: *Constitution Act 1975* s 85.
- 133 Victorian Law Reform Commission (2005) above n 1, 67.
- 134 Submissions 13, 18, 22, 32, 33, 39, 41, 45. Victoria Police did not oppose the introduction of a specific reference.
- 135 Submissions 11, 24, 29, 30, 38.
- 136 Submissions 13, 32, 45.
- 137 *Bail Act 1977* s 18A. For a summary of the bail decisions the DPP may appeal, see: Victorian Law Reform Commission, (2005) above n 1, 67.
- 138 *Bail Act 1977* s 18A(6).
- 139 Victorian Law Reform Commission (2005) above n 1, 67.
- 140 *Fernandez v DPP* (2002) 5 VR 374. See discussion in *ibid*.
- 141 *Beljajev v DPP (Vic)* (Unreported, Supreme Court of Victoria, Court of Appeal, Young CJ, Crockett and Ashley JJ, 8 August 1991).
- 142 *Fernandez v DPP* (2002) 5 VR 374, 388.
- 143 *Fernandez v DPP* (2002) 5 VR 374, 388. President Winneke suggested section 17A(3) may also restrict the DPP's right to appeal in certain circumstances.
- 144 Victorian Law Reform Commission (2005) above n 1, 68.
- 145 Submissions 13, 23, 24, 30, 32, 33, 38, 41, 45. Submissions 11, 29 were against retention of the right. The Law Institute of Victoria thought 'the right to appeal the decision in the absence of new facts and circumstances for either party should be removed'.
- 146 Submissions 24, 30, 32.
- 147 Submissions 13, 45.
- 148 Submissions 24, 45; consultation 48 pointed out that the Court of Appeal is already overburdened.
- 149 Submissions 13, 23, 33, 41.
- 150 *Fernandez v DPP* (2002) 5 VR 374, 388.
- 151 *Beljajev v DPP (Vic)* (Unreported, Supreme Court of Victoria, Court of Appeal, Young CJ, Crockett and Ashley JJ, 8 August 1991) 29 discussed in Victorian Law Reform Commission (2005) above n 1, 69.
- 152 Submissions 24, 30, 32, 38.
- 153 *Bail Act 1977* s 18A(1).



FURTHER APPLICATIONS AND APPEALS

As discussed in Chapter 2, headings in the Bail Act are often misleading. This is particularly the case in section 18 which is headed: ‘Appeal against refusal of bail or conditions of bail’. It actually deals with further applications for bail when the accused:

- is remanded by a bail justice or magistrate
- has been granted bail but objects to a condition imposed
- has had bail revoked.

Section 18 also deals with applications to vary or revoke bail, appeals by the DPP if a court refuses to revoke bail, and notice requirements for sureties.

Therefore, despite its heading, the majority of section 18 is not concerned with appeals at all. Most of the applications made under section 18 are actually hearings *de novo*. That is, the hearing is completely new, rather than a review of a decision.

In contrast, director’s appeals under section 18A appeals are not new hearings but reviews of previous decisions. If the court quashes the initial decision, it may substitute its own decision by way of a new hearing.

The mix of applications and appeals in sections 18 and 18A causes confusion.¹⁵⁴ In our Consultation Paper we asked whether the Bail Act should detail the nature of further applications for bail and director’s appeals.¹⁵⁵

There was strong support in submissions for clarification.¹⁵⁶ The Criminal Bar Association said:

An application under s. 18 is not in the nature of an appeal but a conditional right to make a new application. By contrast an appeal under s. 18A is an appeal strictly so called. This distinction should be reflected in the language of the two provisions.

The Magistrates’ Court suggested ‘a process flow chart and explanatory memorandum be prepared and provided’.

Sections 18 and 18A are typical of the confusion caused by the drafting and structure of the current Act. The commission believes sections 18 and 18A should be redrafted in the new Bail Act to clearly set out the basis for an application under each section and the role of the court. The headings of these sections should clearly express the contents. The matters covered by section 18 should be separated into different sections and given clear headings.¹⁵⁷

The reference to ‘appeal’ in the heading to section 18 causes confusion. Applications made under section 18—except for director’s appeals under section 18(6A)—are new hearings, not appeals. The sections in the new Bail Act covering the matters currently in section 18 should make this clear.

On a director’s appeal, the Supreme Court may quash the bail order if it thinks a different order should have been made, and then substitute its own order. The question of whether a different order should have been made is heard as an appeal. However, once the court decides to quash an order, the question of what order to substitute is heard as a new hearing. The current drafting of section 18A does not make this distinction clear. The commission believes this should be clarified in the new Bail Act.

RECOMMENDATIONS

82. Sections 18 and 18A of the Bail Act should be redrafted in the new Bail Act to clearly set out the basis for an application under each section and the role of the court. The headings of these sections should clearly express their contents.
83. Section 18 currently covers further applications for bail, variation of bail, revocation of bail, appeals by the DPP from refusals to revoke bail, and notification to sureties. These matters should be separated into different sections in the new Bail Act and given clear headings.
84. The sections in the new Bail Act covering the matters in section 18 of the Bail Act (except for appeals by the DPP in section 18(6A)) should express in plain English that applications made pursuant to those sections are hearings *de novo*.
85. The new Bail Act should make it clear that once a director’s appeal is heard and an order is made quashing the original order, the court’s consideration of bail is a hearing *de novo*.

COURT OF APPEAL BAIL

The Court of Appeal has the power to determine applications for bail by defendants:

- pending appeal against conviction or sentence from the County or Supreme Courts¹⁵⁸
- pending retrial following a successful appeal.¹⁵⁹

A single judge of the Court of Appeal may grant bail pending appeal or retrial.¹⁶⁰ If a single judge refuses bail, the defendant is entitled to have the Court of Appeal determine the application.¹⁶¹

However, the court's power to grant bail pending appeal is ordinarily exercised by two judges of appeal. Three judges may also exercise that power and, in exceptional circumstances, a single judge may exercise the power. When a defendant is granted a retrial, an application for bail 'should ordinarily' be made to a judge of the Trial Division of the Supreme Court rather than the Court of Appeal.¹⁶²

In our Consultation Paper we asked whether the bail application processes in the Court of Appeal are adequate and whether there are difficulties with sections 568(7), 579 and 582 of the Crimes Act or Practice Statement No 2 of 1997.¹⁶³

Submissions were divided, with two believing the bail application process in the Court of Appeal should be clarified,¹⁶⁴ and two others not perceiving any problems.¹⁶⁵

The Crimes Act, the *Supreme Court (Criminal Procedure) Rules 1998* and Court of Appeal Practice Statement No 2 of 1997 currently govern the processes for bail pending appeal and retrial. These need to be read in conjunction to understand how the system operates in practice. The commission believes the processes for bail

pending appeal and retrial should be included in the new Bail Act.¹⁶⁶ This will help clarify the system and make it more accessible.

The current practice of two appeal judges hearing an application for bail pending appeal is unnecessary. There is no apparent reason for two judges to hear an application for bail pending appeal when a single judge of the trial division deals with bail pending retrial. The commission believes it would be sufficient for a single judge to hear the application and a more efficient use of the court's resources.

A practice note should be issued to this effect.¹⁶⁷ A practice note is more appropriate than inclusion in legislation because this is a management issue for the court. The right to appeal to the full court (three judges) should be retained.¹⁶⁸

As noted, an application for bail pending retrial is usually heard by a judge of the Trial Division rather than the Court of Appeal. The Criminal Bar Association submitted that this practice is 'very unsatisfactory'. The association argued that bail 'should be dealt with expeditiously' by the Court of Appeal 'unless there are cogent reasons why it is not in the interests of justice to do so'. The current practice results in a successful defendant incurring 'further expense and additional time in custody'.

The commission agrees the current practice is unsatisfactory. It causes delay and is inefficient given that the Court of Appeal bench that heard the appeal will generally have enough information to make the bail decision pending retrial. We recommend a change in practice.

When we published our Consultation Paper, the most recent cases on bail pending appeal required the defendant to show 'very exceptional circumstances' to be granted bail.

RECOMMENDATIONS

86. The processes for bail pending appeal and bail pending retrial should be clarified and included in the new Bail Act. The relevant sections of the *Crimes Act 1958* should be repealed accordingly.
87. An application for bail pending appeal should be heard by a single judge of the Court of Appeal. Rule 2.29(3) of the *Supreme Court (Criminal Procedure) Rules 1998* should be amended accordingly and a practice note issued to this effect. The right to appeal to the full court (three judges) should be retained.
88. When the Court of Appeal allows an appeal and orders a new trial, the court should proceed to determine bail provided that the material before the court is sufficient to make that decision. The application should be heard by a single judge of the bench which allowed the appeal immediately or as soon as practicable after the appeal is determined. If the material is not sufficient to make a decision, the matter should be remitted to the court where the applicant is to be retried.

154 Discussed in Victorian Law Reform Commission (2005) above n 1, 69.

155 Victorian Law Reform Commission (2005) above n 1, 70.

156 Submissions 8, 11, 13, 17, 18, 29, 30, 32, 33, 38, 41, 45. Victoria Legal Aid thought all headings in the Act should accurately reflect the sections' contents.

157 In Chapter 8 we discuss notification requirements for sureties. We discuss sureties' consent to minor bail variations in the section on By-consent Variations to Bail Conditions in this chapter.

158 *Crimes Act 1958* s 579(2). For a detailed discussion of bail pending appeal after conviction and sentence, see John Willis, 'Bail Pending Appeal After Conviction and Sentence on Indictment' (2005) 29 (5) *Criminal Law Journal* 296.

159 *Crimes Act 1958* ss 568(7), 592(2). The Court of Appeal may also hear director's appeals as discussed in the Director's Appeals section in this chapter.

160 *Crimes Act 1958* s 582.

161 *Crimes Act 1958* s 582. Two judges of appeal may exercise the court's jurisdiction to grant bail: *Supreme Court (Criminal Procedure) Rules 1998* r 2.29(3).

162 Court of Appeal Practice Statement No 2 of 1997 [1998] 2 VR 405. In practice, applications for bail pending appeal are heard quickly—usually within ten days: Consultation 62.

163 Victorian Law Reform Commission (2005) above n 1, 70.

164 Submissions 41, 45. The Criminal Bar Association said the procedure for bringing bail applications pending appeal was unclear and should be corrected.

165 Submissions 29, 33. The Law Institute of Victoria said 'bail interaction with the Court of Appeal generally works well'. However, it thought the Court of Appeal was not the proper domain for bail applications.

166 The commission consulted the Court of Appeal about this issue: consultation 62.

167 *Ibid.*

168 This is currently provided for in *Crimes Act 1958* s 582.

Holding a court hearing for a bail variation application may not be an appropriate use of time and resources when all parties consent to the change.

The Criminal Bar Association submitted that the 'exceptional circumstances' test was appropriate, but questioned whether the word 'very' added anything to it. In contrast, Dr Chris Corns agreed with the conclusions of an article by Professor John Willis, who said: 'The test for appeal bail of exceptional circumstances is too restrictive and unduly limits the discretion of the decision-maker'.¹⁶⁹

The Court of Appeal in the recent case of *Re Zoudi* preferred the phrase 'exceptional circumstances', saying the approach is the same whichever form of words is used.¹⁷⁰ The commission believes the 'exceptional circumstances' test is appropriate. The threshold required by the test is necessarily higher than that for pre-trial bail. As stated by the High Court in *United Mexican States v Cabal*: 'To stay an order of imprisonment before deciding the appeal is a serious interference with the due administration of criminal justice'.¹⁷¹ Further:

to allow bail pending the hearing of an appeal after a person has been convicted and imprisoned:

- makes the conviction appear contingent until confirmed;
- places the court in the invidious position of having to return a person whose circumstances may have changed dramatically during the period of liberty on bail;
- encourages unmeritorious appeals;
- undermines respect for the judicial system in having a 'recently sentenced man walking free';
- undermines the public interest in having convicted persons serve their sentences as soon as is practicable.¹⁷²

The commission supports the common law test of 'exceptional circumstances' applied in *Re Zoudi*. The word 'very' is superfluous and should no longer be used.¹⁷³

BY-CONSENT VARIATIONS OF BAIL CONDITIONS

Applications to vary bail conditions can be made by accused people and the prosecution.¹⁷⁴ Changes to bail conditions are often relatively minor. For example, accused people may want to change their residential address or the police station they report to. When the prosecution agrees with the proposed change, the court often also agrees. The subsequent court hearing is commonly referred to as a 'by-consent' bail variation.

Holding a court hearing for a bail variation application may not be an appropriate use of time and resources when all parties consent to the change.¹⁷⁵ In our Consultation Paper we discussed introducing a process to allow minor, by-consent, defence-initiated bail variations without a court hearing.¹⁷⁶

The majority of relevant submissions supported a process for by-consent bail variations without a court hearing.¹⁷⁷ However, the majority of magistrates and the Criminal Bar Association opposed the proposal. The association argued that the grant of bail and any conditions are orders of the court and should only be changed by the court with the parties in attendance.

Some submissions thought the proposal would help vulnerable accused people to comply with bail conditions.¹⁷⁸ PILCH said: 'People experiencing homelessness have transient, disrupted and changeable lives' and the requirement to attend court to vary bail can be onerous for them. Fitzroy Legal Service said its clients are often in unstable accommodation, which can lead to difficulties with residence and reporting conditions. It thought the proposal would 'alleviate unnecessary use of court resources and decrease breaches of bail conditions'.

RECOMMENDATIONS

89. The new Bail Act should allow defence-initiated variations of minor bail conditions to be made by consent with each party (applicant and respondent) filing a statement with the court. If there are any sureties, the police informant should be responsible for contacting them to obtain their consent to the variation. In the informant's statement filed with the court, the informant should state that he or she has contacted any sureties and that they consent to the variation. The court can make the variation on the papers in chambers. The variation will come into effect at the time the accused (and any surety) attends at the registry and signs the new undertaking. If the magistrate does not think the variation is appropriate, it will be listed for hearing in court.

Several submissions suggested minor bail variations could be dealt with by registrars or bail justices.¹⁷⁹ The minority of magistrates suggested that documentation be given to the magistrate in chambers, who could bring the application into open court if not satisfied that the proposed variation is appropriate.

Some submissions said the procedure should be for defence-initiated applications.¹⁸⁰ Only the Law Institute of Victoria explicitly said it should not be so limited and that the key requirement was consent.

A few submissions suggested types of 'minor' conditions the proposed procedure should apply to, such as reporting and residency conditions.¹⁸¹ In contrast, the Law Institute of Victoria submitted there should be no limit on the type of conditions that could be varied by consent.

The commission believes there should be a procedure for changing bail conditions by consent without the requirement of a court hearing. Each party should be required to file a statement of consent with the court. A similar procedure already operates in the Supreme Court for dealing with by-consent bail applications.¹⁸² In many cases, this would be a more efficient use of courts' and parties' time and resources. Most bail matters before the court are on conditions that were originally set by police. If the police agree to the variation, it is likely the court will.

The reform may also assist vulnerable accused people to abide by their bail conditions. Their often unstable lives may necessitate more frequent variations of minor conditions. A process which enables them to vary without attending court may help ensure conditions are varied rather than broken.

The commission believes the by-consent procedure should be limited to defence-initiated applications. If it was extended to the prosecution there is a risk the power may be misused. For example, the prosecution may give an accused the option of consenting to more onerous conditions or face an application for revocation of bail. Even if undue pressure is not applied, an accused may still feel compelled to consent to a proposed variation. The prosecution may still apply to vary conditions, but this will always be heard in court.

The by-consent procedure should not be limited to certain types of conditions. A condition which appears to be minor may in fact have been crucial to the decision to grant bail. For example, a magistrate may have only granted bail to an accused on the condition he resided with his parents so they could supervise him. Initially the parties should decide whether a variation is minor. The papers given to the magistrate by the parties should explain why a variation is considered to be minor. The magistrate should then have discretion to list the matter for hearing if he or she does not think the variation is minor or appropriate.

It is important for sureties to be informed of the proposed variation and give their consent.¹⁸³ To ensure sureties are contacted, the police informant should be responsible for obtaining their consent to the variation and confirm it in the prosecution's statement to the court.¹⁸⁴ If accused people were responsible for contacting any sureties, there is a risk they would falsely claim to have done so.

This procedure differs from the surety notification procedure recommended in Chapter 8 for variation applications heard in court. For the latter, we recommend that whichever party applies to vary the order should be responsible for notifying the surety. The surety may either attend the hearing or provide an affidavit evidencing his or her consent to the proposed variation. We do not believe this process is necessary for minor by-consent variations. The requirement that the informant contacts the surety and obtains his or her consent is sufficient and is consistent with the more streamlined approach we have recommended.

If this procedure for minor by-consent variations was adopted, it would still be necessary for an accused and surety to sign a revised Undertaking of Bail form, but this would not need an additional hearing. Instead, the accused and surety would be required to attend the registry to sign the revised undertaking once the order for variation had been made. The variation would take effect from the date the revised undertaking was signed.

169 Willis (2005) above n 158, 314; submission 13.

170 [2006] VSCA 298 (Unreported, Maxwell P, Buchanan, Nettle, Neave and Redlich JJA, 19 December 2006) [2]. The court referred to *Re Clarkson* [1986] VR 583; *Re Crawley* (Unreported, Victorian Supreme Court, Court of Appeal, Phillips CJ, Callaway and Batt JJA, 5 August 1998). See also *Re Jackson* [1997] 2 VR 1; *Re Pennant* [1997] 2 VR 85. These cases refer to 'very exceptional circumstances'. In paras 27 and 28, the court said: "'exceptional circumstances' means circumstances which are truly exceptional'.

171 *United Mexican States v Cabal* (2002) 209 CLR 165, 181 (Gleeson CJ, McHugh and Gummow JJ).

172 *United Mexican States v Cabal* (2002) 209 CLR 165, 181 (Gleeson CJ, McHugh and Gummow JJ) referring to *Ex parte Maher* [1986] 1 Qd R 303, 310 (Thomas J). Quoted with approval in *Re Zoudi* [2006] VSCA 298 (Unreported, Maxwell P, Buchanan, Nettle, Neave and Redlich JJA, 19 December 2006) [28]. See critique of these reasons in Willis (2005) above n158, 304–08.

173 The commission consulted the Court of Appeal about this issue: consultation 62.

174 *Bail Act 1977* s 18(6).

175 See discussion in Victorian Law Reform Commission (2005) above n 1, 113.

176 *Ibid.* Discussed in consultations 6, 7, 9, 10, 14, 18, 34, 41, 46.

177 Submissions 11, 15, 22 (minority of magistrates), 23, 24, 29, 30, 32, 33, 35, 38, 41, 46.

178 Submissions 15, 30, 32, 35.

179 Submissions 11, 15, 33, 46. The Law Institute of Victoria referred to 'the relevant Court Official'. PILCH submitted that in New Zealand registrars can vary or revoke bail conditions and substitute or impose another bail condition for summary offences. They can also vary reporting conditions for indictable offences.

180 Submissions 24, 30, 32.

181 Submissions 15, 24, 30, 32, 35.

182 Supreme Court of Victoria, Practice Note No 5 of 2004, [5(a)] provides: 'If the prosecution has consented to the application and on the material before the PCD judge [the Principal Judge in the Criminal Division], which may include draft agreed bail conditions, the PCD judge considers it proper to do so, the PCD judge may then make an order admitting the applicant to bail without requiring the parties to attend before a judge'.

183 Provision of notice to sureties is discussed in Chapter 8. See also *Bail Act 1977* s 18(7) and Magistrates' Court of Victoria, Practice Direction No 4 of 2005.

184 A member of Victoria Police on our Advisory Committee approved of this suggestion. Sureties are relatively rare in the Magistrate's Court, so this obligation is unlikely to be onerous.



EXTENSION IN ACCUSED'S ABSENCE

In certain circumstances a court may extend bail to a further hearing date without an accused being in court.¹⁸⁵ In 2004, the Bail Act was amended at the courts' request to broaden the basis on which courts can extend bail in the accused's absence.¹⁸⁶ Bail may now be extended when the accused is not present for 'sufficient cause'.¹⁸⁷ Sufficient cause is not defined—it is for the court to determine in each case.

Judges and magistrates may extend bail in accused people's absence but require them to attend the court registry to sign the bail extension by a particular date. This may be completed at a different registry to the court which extended the bail. The extension does not take effect until the accused has signed it. If the accused does not sign by the required date, an arrest warrant can be issued for failure to appear.

In our Consultation Paper we asked about the effect of the 2004 amendment and if there are any problems with the 'sufficient cause' test.¹⁸⁸ Most relevant submissions thought the amendment was working well.¹⁸⁹ Many said the amendment had resulted in bail being extended more often.¹⁹⁰ Some thought the police were less likely to object to extending bail in the accused's absence since the amendment.¹⁹¹

Only the OPP responded negatively to the amendment. In contrast, the Commonwealth DPP said, 'We have not [had] any problems with the "sufficient cause" test'.

It appears the 2004 amendment is working well in practice. The commission believes it should be included in the new Bail Act—no further change is necessary.

APPEARANCE AT A DIFFERENT COURT

One submission expressed concern about the validity of the growing practice of accused people arranging to appear and have bail extended at a different court to the one they had been bailed to.¹⁹² For example, an accused who has been bailed to appear at the Melbourne Magistrates' Court may want to appear and have bail extended in the Broadmeadows court. According to the submission, accused people generally ring the Melbourne Magistrates' Court for permission from the registry coordinator. Once they have appeared in the Broadmeadows Magistrates' Court, the coordinator there rings the Melbourne court to confirm the appearance. The coordinator at Melbourne then 'extends' bail.

The submission was concerned that this practice is not provided for in the Bail Act and could potentially contravene it. In particular, section 30 makes it an offence to fail to appear in accordance with the bail undertaking and section 6 requires the accused to appear. The submission notes that section 16(3) of the Act allows the court to extend bail in the accused's absence if there is sufficient cause and section 21(1)(c) of the Magistrates' Court Act allows a registrar to extend bail. However, the definition of 'court' in the Bail Act does not include a registrar.

The commission agrees that the validity of the bail extension in these circumstances is questionable. Accused people should be able to appear at another court to have their bail extended, provided they have made prior arrangements with the court they were bailed to appear in. In many cases this will be a more efficient use of resources and will help accused people who may not have the means to travel to the appointed venue. To ensure accused people who appear at another court are not charged with breaching the Bail Act, the new Bail Act should explicitly state this is not an offence.

RECOMMENDATIONS

90. The new Bail Act should provide that bail may be extended when the accused is not present in court for 'sufficient cause'.
91. The new Bail Act should state that an accused is not guilty of the offence of failure to answer bail if the accused appeared at another court, so long as that appearance was by prior arrangement with the court to which the accused was bailed.

REVOCAION POST-COMMITTAL

Following committal proceedings in the Magistrates' Court, an accused's bail order technically expires and a fresh application must be made. However, in practice the decision is treated as one of whether to extend, vary or revoke the existing order rather than a new application being made.¹⁹³

Concern was expressed in consultations about some magistrates revoking bail at the conclusion of a committal hearing without the prosecution making an application for revocation, or any evidence that the accused had breached bail conditions.¹⁹⁴ As the existing bail order expires at the conclusion of a committal hearing, there is no need for the prosecution to apply for revocation. Magistrates are entitled to remand the accused without an application for revocation, or without giving notice. However, this action goes against established practice and may raise issues of natural justice if accused people are remanded after being 'surprised' by a hearing and consequently unprepared.

In our Consultation Paper we asked whether the Bail Act should prevent a court from revoking bail without the prosecution making an application for revocation and providing notice to the accused.¹⁹⁵

There was strong support in submissions for this proposal.¹⁹⁶ Some also thought revocation should only occur if the prosecution can establish certain matters.¹⁹⁷ Victoria Legal Aid suggested bail should only be revoked if the prosecution shows there has been a serious or ongoing breach of bail, there is likely to be a serious breach of bail, or there is an unacceptable risk the accused will not appear at the trial. Some submissions pointed out that the committal hearing is a review only of the prosecution's evidence and therefore does not provide a reasonable basis for revoking bail.¹⁹⁸

Other submissions opposed the proposal to limit the court's power to revoke bail.¹⁹⁹ The Magistrates' Court thought magistrates should retain the power to revoke bail following committal, but thought the court should give adequate notice to the parties to allow lawyers to take instructions and make submissions.

The commission does not believe the court's power to consider bail at the conclusion of a committal should be curtailed. It appears from our consultations that the practice of denying bail following committal without warning to the defence is limited to a small number of magistrates—it does not warrant a change in the law. We do not believe that creating a presumption in favour of the continuation of bail would be appropriate. Therefore, it would be good practice for the defence to be prepared to apply for bail following committal regardless of whether the court has indicated it may refuse bail or the prosecution has expressed opposition to bail continuing.

When deciding whether to grant bail, the 'history of any previous grants of bail to the accused person' is a relevant consideration.²⁰⁰ We recommended in Chapter 3 that this explicitly include 'any grant of bail in the matter currently before the court'. The fact that the accused has abided by the conditions of the original grant of bail should therefore be taken into account by the court when determining bail following committal.

185 *Bail Act 1977* s 16(3).

186 *Justice Legislation (Sexual Offences and Bail) Act 2004*, Explanatory Memorandum, 2004, 6.

187 *Bail Act 1977* s 16(3)(b). See *Justice Legislation (Sexual Offences and Bail) Act 2004* s 11.

188 Victorian Law Reform Commission (2005) above n 1, 75.

189 Submissions 22, 29, 32, 39, 45.

190 Submissions 24, 30, 32, 38, 45.

191 Submissions 24, 32, 38.

192 Submission 14.

193 In our Consultation Paper we discussed this issue on the basis of current practice, rather than treating the matter as a fresh application for bail.

194 Consultations 2, 7, 10, 22, 39; submission 2.

195 Victorian Law Reform Commission (2005) above n 1, 71.

196 Submissions 13, 19, 24, 30, 32, 38.

197 Submissions 24, 30, 32, 38.

198 Submissions 24, 32, 38.

199 Submissions 22, 23, 39, 41.

200 *Bail Act 1977* s 4(d)(3)(c).

Chapter 6

Bail Decisions by Courts

