

Chapter 7

Bail Conditions

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Chapter 7

Bail Conditions

Though not provided for in the Bail Act, bail conditions that require accused people to access support services, treatment or rehabilitation are an established feature of the Victorian bail system.

The Bail Act allows decision makers to impose conditions on bail.¹ Aspects of bail conditions are discussed in other parts of this report. Chapter 6 deals with bail variations by consent, bail to date to be fixed, and appearing at a court different to that which granted bail. On-the-spot bail is considered in Chapter 4.

GENERAL AND 'SPECIAL' CONDITIONS

Accused people can be released with a surety or on their own undertaking, with or without conditions. Under section 5 in the Act, a decision maker must first decide whether to release accused people on bail on their own undertaking or with a surety. The decision maker must not make the conditions any more onerous than public interest requires, taking into account the nature of the offence and the circumstances of the accused person.²

The decision maker must then decide whether other 'special' conditions should be imposed³ to ensure an accused person will: come to court; not commit an offence on bail; endanger the safety of the public; interfere with witnesses; or obstruct the course of justice. The 'no more onerous' requirement that applies to the initial decision to grant bail does not apply to the imposition of special conditions.

The structure of section 5 does not reflect the way decision makers consider and impose bail conditions. Special conditions are far more commonly imposed than deposits or bail guarantee conditions. They include such things as living at a specific address, reporting to police stations, not having contact with victims and witnesses, and attending support programs. Police, bail justices and courts may all impose these conditions.

The commission believes that the distinction between general and special conditions in the Bail Act, and the different considerations that apply, creates confusion. Associate Professor John Willis noted:

The relationship between s 5(1) and s 5(2) is not very clear. For example, are special conditions under s 5(2) to be imposed for purposes different from those which apply under s 5(1)? As with most of the Bail Act, s 5 needs re-drafting.

The distinction is unnecessary and should not be maintained in the new Bail Act.

CONSIDERATION OF CONDITIONS

Section 5(1) requires the decision maker to consider the imposition of bail conditions in escalating order: own undertaking first, then a deposit, a surety, and finally a deposit and a surety. The decision maker:

shall not make the conditions for his entry into bail any more onerous for the accused person than the nature of the offence and the circumstances of the accused person appear to the court to be required in the public interest.

Section 5(1) appears to be largely ignored because, as discussed, conditions directing conduct are far more routinely used than sureties, and deposits are rarely used.

The commission believes this provision needs to be simplified and updated in the new Bail Act to more accurately reflect the way bail conditions are imposed. The Act should first require consideration of release on own undertaking to attend court on a particular date, with no other conditions. Rather than a deposit of money or surety, the next option should be release on own

RECOMMENDATIONS

92. There should be no distinction between general and special conditions of bail in the new Bail Act. The section of the new Act dealing with conditions of bail should:
 - list the order in which conditions should be considered
 - list the purposes for which conditions may be imposed
 - require that conditions imposed be no more onerous than necessary, and reasonable and realistic, taking into account the individual circumstances of the accused person.
93. The new Bail Act should require decision makers to consider imposition of bail conditions in the following order:
 - own undertaking without other conditions
 - own undertaking with conditions about conduct
 - a deposit or bail guarantee condition.¹

undertaking with conditions about conduct. This would allow the imposition of common conditions, such as requiring the accused to reside at a certain place or to attend drug treatment.

Imposition of a deposit or surety should be considered last, and should be listed as alternative options. The commission has not heard of a court imposing both a deposit and a surety, and cannot think of a situation where this would be necessary or appropriate. Sureties and deposits raise the prospect of discrimination against accused people with limited access to financial support. These issues are discussed further in Chapter 8.

PURPOSE OF CONDITIONS

Though not provided for in the Bail Act, bail conditions that require accused people to access support services, treatment or rehabilitation are an established feature of the Victorian bail system. This reflects an overall shift in the focus of the courts to consider the individual and underlying causes of alleged offending. This approach was first driven by the Magistrates' Court with the CREDIT Bail Support program and has received significant support in Victoria through initiatives such as Drug Courts, Koori Courts, the new Neighbourhood Justice Centre, CISP and the Aboriginal Justice Agreement. As support and funding for these initiatives has increased, so has courts' use and acceptance of the programs. The Victorian Government has indicated its support of this approach in the *Justice Statement*, committing to:

Adopt a multi-disciplinary approach to address the offending behaviours of people who may be mentally ill, have an intellectual disability, are dependant on drugs or who are homeless, and are caught up in a cycle of offending and punishment.⁴

BAIL SUPPORT

In our Consultation Paper we discussed bail support services in detail, including the CREDIT program⁵ and community-based drug initiatives.⁶ They are discussed further in Chapter 11. We asked whether the Bail Act should allow decision makers to impose conditions to ensure accused people seek rehabilitation, treatment or support on bail.⁷ This arose from concern about the legitimacy of imposing such conditions before any finding of guilt, and confusion about how suitability for support programs could be taken into account in the bail decision.

Many submissions were supportive of the use of bail support programs.⁸ However, concerns were expressed about aspects of our proposal to allow imposition of bail support conditions by decision makers. These included: concerns about involuntary obligations being placed on accused people who are presumed innocent; the possibility of onerous or inappropriate conditions being imposed; and ensuring the use of such conditions for purposes that legitimately relate to bail.

St Kilda Legal Service submitted:

As a general rule, the type of offender who is in need of rehabilitation services has committed an offence or offences to which they will plead guilty. However it cannot be assumed by the framers of the legislation that this is so in every case, and it needs to be questioned whether a court should have the right to place an involuntary obligation to attend rehabilitation services on a person who will plead not guilty to a charge and for whom mitigation in sentencing is not necessarily a prime issue.

Fitzroy Legal Service said:

... the existence of such programs can create an expectation that all eligible accused seeking bail will engage with such programs and the services they offer and a corresponding perception that not engaging will be detrimental to the accused from the court's perspective ... the requirement to comply with special conditions may put an accused at additional and unnecessary risk of breaching bail. This is of particular concern in relation to accused with special needs and circumstances who may face greater difficulties complying with such conditions than other accused ... They should only operate therapeutically and in circumstances where their imposition is necessary in relation to risk.

Other submissions also supported making it clear in the Bail Act that bail conditions should only be imposed to reduce any unacceptable risk of breaching bail.⁹ The Law Institute of Victoria said:

The LIV considers that the proper focus of bail must remain securing the attendance at Court, preventing interference with evidence and witnesses, and preventing offending (see s.5(2) of the Act). If specific programmes can be clearly demonstrated as appropriate for one of these purposes then the LIV supports the court being able to use a special condition.

1 Bail Act 1977 s 4(5). The conditions are imposed in accordance with s 5. The Act refers to the 'court' in s 4(5) and s 5, which in this context includes police and bail justices, though this is not clear from the Act.

2 Bail Act 1977 s 5(1).

3 Bail Act 1977 s 5(2).

4 Department of Justice [Victoria], *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 15.

5 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 104–5, 142–145.

6 Ibid 145–147. Programs discussed are the Northern Arrest Referral Team and the Arrest Referral Program in St Kilda.

7 Ibid 105.

8 Submissions 13, 15, 17, 18, 22 (majority of magistrates supported), 23, 24, 29, 30, 32, 33, 35, 38, 41, 45, 46.

9 Submissions 17, 22, 24, 29, 30, 32.

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Bail Conditions

Bail support programs offer obvious benefits to accused people and to the community by helping accused people comply with bail and reduce offending.

Accused people who intend to plead guilty to some or all of their charges have a very strong incentive to comply with bail support programs. Addressing issues that have led to offending through treatment or support will be viewed by the court as evidence of remorse, and of taking responsibility for past behaviour and future changes in their life. This can have a significant impact on the sentence received, sometimes the difference between a custodial and non-custodial penalty. The period on bail is therefore an ideal time to offer services to accused people because they are likely to take them up.

INTEGRITY OF BAIL

Bail support programs offer obvious benefits to accused people and to the community by helping accused people comply with bail and reduce offending. However, we note the concerns raised in submissions and by Freiberg and Morgan about maintaining the integrity of bail.¹⁰ The commission agrees the distinction between bail and sentence must be maintained. Accused people on bail are presumed innocent and should not be subject to a legislative power to direct them to attend programs to address the alleged offending behaviour.

There are dangers if decision makers craft initiatives too far removed from the 'traditional' objectives of bail. There is a risk that accused people may find themselves subjected to lengthy and complicated orders that are more onerous than any potential sentence, and for which the possibility and consequences of breach are great. The sentencing process is a more appropriate mechanism for imposing such conditions. They may also be appropriate for accused people on bail after deferral of sentence, when a guilty plea has been entered.¹¹

Freiberg and Morgan argue that '[b]ail should be seen as essentially process oriented rather than performance based'. They note that the 'main role of bail is to ensure that the offender appears in court'.¹² While this is the primary purpose of bail, it is well established that bail is also a mechanism for ensuring:

- community safety by prevention of offending
- the integrity of the justice process by ensuring accused people do not interfere with witnesses.

These aims appear in the Bail Act in both the unacceptable risk test, where the bail decision is made, and as a threshold test for the imposition

of conditions in section 5(2). It is therefore clear that these purposes may justify either remand of accused people or the imposition of bail conditions. It is important to ensure that conditions imposed do not go beyond these purposes. However, we heard throughout this review that bail conditions, as long as they support accused people to comply with bail, are preferable to remand and also more effective. Bail support programs have been found to be effective in various ways, including reducing breaches: 'Sixty seven percent used to breach bail conditions prior to the Bail Support Program commencing. This figure has been reduced to fewer than 20 percent for the last two years'.¹³

The commission thinks the considerations in section 5(2) are appropriate, allowing support conditions to be imposed as long as they clearly relate to the purposes listed in the section. Section 5(2) should be simplified but essentially reproduced in the new Bail Act. This will allow bail support programs to be ordered by the court as long as the:

- requirements of the program imposed clearly relate to the purposes listed in the section
- accused is assessed as eligible for the program
- accused consents to undertake the program.

We do not believe it necessary or desirable for the Bail Act to refer to specific conditions that may be ordered. A flexible approach within defined parameters allows innovation, which is exactly what has occurred in Victoria through the Magistrates' Court.

Many of the concerns raised in submissions are overcome by the court practice of making a general order for the accused to comply with the conditions of the program when it is court-based, such as CISP. CISP brings together all the court support services to offer an integrated service for accused people with multiple needs. It aims to address over-representation of vulnerable offenders and reduce the rate of re-offending.¹⁴ A CISP worker assesses accused people to determine what support they need, and provides that assessment to the court. If the magistrate is satisfied that the support offered by the program sufficiently addresses unacceptable risk factors, and the accused consents, he or she is released on bail on the condition of complying 'with all requirements of CISP'.

Magistrates do not assess the accused's needs or specify the exact terms of assistance, though they will make clear their expectations about the purpose of such assistance. CISP then works with the accused on the basis of individual needs, rather than to a rigid set of bail conditions. Its stated aim is 'matching the level of intervention to the level of risk of offending and need'.¹⁵ This allows flexibility, which is appropriate when dealing with people with complex needs and problems. Assistance can be provided by CISP for:

- drug and alcohol dependency
- homelessness
- mental health problems
- disability
- young offenders
- Koori-specific needs.

CISP aims to improve access and coordination of services and can obtain priority access to treatment and support services for accused people in urgent need.

Not all programs are available at all courts. CISP is a pilot operating for three years, 2006–09, in the Melbourne, Sunshine and Latrobe Valley Magistrates' Courts. It will be evaluated over that time and if successful will be implemented statewide. All Magistrates' Courts have access to the Adult Court Advice and Support Service (ACAS). Some courts have the CREDIT program, or services such as the Salvation Army or community-based organisations like Mildura's Mallee Accommodation and Support Program. Regional courts that do not have access to the CREDIT program are serviced by Rural Outreach Diversion Workers. We heard regional services struggle to obtain adequate funding; accommodation and treatment for drug and alcohol dependency can be limited and therefore difficult to access on bail. This can be problematic for accused people who may be remanded until such services are available, or breach that bail condition because they cannot access the service.

RECOMMENDATIONS

94. The new Bail Act should stipulate that bail conditions may only be imposed to reduce the likelihood that an accused person will:

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

The varying availability of support services is another reason for not supporting a legislative mandate for the court to order treatment. In Chapter 11 we recommend that the number of places available in residential drug rehabilitation services should be reviewed to ensure demand can be met. As pointed out in Jesuit Social Services' submission, funding support services for people on bail is far more cost-effective than remand.

APPROPRIATE CONDITIONS

In our Consultation Paper we asked whether some bail conditions were being used for punishment rather than assistance. In particular, we looked at police reporting conditions, abstinence conditions, public transport bans, geographical exclusion zones and curfews.¹⁶

Our previous recommendation requires that conditions imposed be related to the unacceptable risk factors. Youthlaw pointed out that banning accused people from doing certain things, such as taking drugs, goes beyond the purpose of bail because it does not address an unacceptable risk factor. Banning addicts from taking substances without imposing a support condition to assist them to address their addiction sets them up to fail. Imposition of the condition is therefore not going to make the accused less likely to offend or fail to appear. It is a simplistic approach to what are often complex and entrenched behaviours.¹⁷ St Kilda Legal Service submitted: 'If the consequence of breaching such a condition is likely to be more prohibitive conditions or to be remanded, then it is simply inappropriate to impose such conditions'.

The commission believes these types of conditions are punitive. In the case of conditions banning use of illegal substances they are simply unnecessary because this is an offence and committing an offence automatically breaches bail.¹⁸

- 10 Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: The Conflation of Dispositional Options' (2004) 15 (3) *Current Issues in Criminal Justice* 220.
- 11 Ibid 23–4. Freiberg and Morgan also have concerns about this extension of the sentencing process, which may be addressed through a formal sentencing indication scheme being considered by the Sentencing Advisory Council Victoria.
- 12 Ibid 24.
- 13 Victorian State Reference Group, National Illicit Drug Strategy Division Initiative, *A Better Way Forward: Drug Diversion: Facts and Case Histories* (2006) 26.
- 14 Submission 27.
- 15 Ibid.
- 16 Victorian Law Reform Commission (2005) above n 5, 106–108 regarding adults, 128–129 regarding children.
- 17 Consultations 25, 34, 39.
- 18 Submission 22.



The Law Institute of Victoria submitted:

Generally the LIV considers that there should be some direction that special conditions are only imposed with the aims of improving the accused's ability to comply with purposes in the Act (s5(2)). Before imposing a special condition the decision maker must be satisfied that the special condition is necessary for the purpose and reasonable for the accused. The LIV considers that this is a case by case consideration for decision makers.

The commission agrees that each case must be considered individually, but believes some guidance should be provided to decision makers in the exercise of their discretion. The following recommendations set some parameters.

NO MORE ONEROUS THAN NECESSARY

Section 5(1) of the Bail Act already states that ordinary conditions of bail should be no more onerous than required in the public interest, taking into account the nature of the offence and the circumstances of the accused. However, this does not apply to the special conditions in section 5(2). We heard special conditions imposed were often onerous, both in nature and in the number imposed, setting accused people up to fail.¹⁹

We recommend that the new Bail Act retain a requirement that conditions be no more onerous than necessary. This will apply to any condition imposed because there will no longer be a distinction between ordinary and special conditions of bail. It will therefore apply to sureties and deposits as well as conditions about conduct. In Chapter 8 we also recommend that decision makers take into account the means of accused people when imposing deposits, and the means of sureties when imposing a surety.

We recommend that the new Bail Act require conditions to be no more onerous than necessary to secure the purposes listed in recommendation 94. That is, the conditions must relate to the purposes of bail and be no more onerous than is required to achieve those purposes. This better reflects the task of the decision maker than simply referring to the alleged offence.

We also recommend that the new Bail Act require bail conditions to be reasonable and realistic, taking into account the individual circumstances of the accused. This is essentially the same as the current requirement in section 5(1). It is important to legislatively require decision makers to consider each case on its facts and craft conditions accordingly. The Act must require decision makers to consider the individuals before them and take into account their needs, including those arising because they belong to a particular group. This is the best way to reduce recidivism at this stage—by addressing the behaviours that lead to offending. This formulation retains flexibility for decision makers but is intended to ensure they consider both individual and systemic issues. Issues for particular groups are considered in Chapters 9, 10 and 11 including children, Indigenous Australians, women, people with mental illness or disability and people from emerging communities.

REPORTING CONDITIONS

A commonly imposed condition is a requirement to report regularly to a police station. Problems with reporting conditions are discussed in detail in our Consultation Paper.²⁰ Victoria Police policy discourages reporting conditions because it believes they are ineffective in many cases. The condition should only be used for serious offences where there is a risk the accused would fail to appear without it.²¹ This policy began in 2004 but in 2004–05 reporting conditions were still by far the most frequently imposed bail condition.²² Anecdotally it would appear that courts still favour reporting conditions.

Reporting could be considered punitive unless it clearly relates to one of the purposes of bail. It would be difficult to argue that a reporting condition could have any effect on offending. The commission does not think reporting conditions are justified unless there is a risk an accused person will abscond. That is, there is a risk of flight as opposed to a risk of failure to appear because of other problems. If accused people have problems such as homelessness or mental illness which increase the likelihood they will forget or disregard their court date, these problems should be addressed. Regular reporting to a police station

RECOMMENDATIONS

95. The new Bail Act should require that bail conditions imposed be no more onerous in nature and number than necessary to secure the purposes listed in Recommendation 94.
96. The new Bail Act should stipulate that bail conditions imposed must be reasonable and realistic taking into account the individual circumstances of the accused.

may be a reminder that they have an upcoming court date, but it also increases the likelihood of breach of bail if they forget to report. It also increases the potential for conflict between accused people and police. This was raised as a particular issue by VALS in its submission:

This is a culturally inappropriate condition given the historical relationship between Indigenous Australians and the police ... Indigenous Australians distrust and are intimidated by police and do not find entering a police station easy.

Under our 'no more onerous' recommendation, in cases where reporting is not justified it will be possible to argue against it, or against the frequency of reporting proposed. CISP may decrease the use of reporting conditions by courts because CISP workers will report to the court if their client does not attend appointments or comply with directions. CISP is only operating at three courts, but the same argument could apply to any accused subject to CREDIT or ACAS.

SUBSTANCE ABUSE CONDITIONS

In our Consultation Paper we discussed conditions that require accused people to refrain from behaviours linked to their alleged offending, and asked whether it was appropriate to impose them without establishing accompanying support structures.²³ Examples include refraining from drinking alcohol, visiting licensed premises, using illegal drugs, and not to chrome or be affected by inhalants.

The majority of relevant submissions thought these conditions were either unnecessary, in the case of banning illegal behaviour, or inappropriate.²⁴ The PILCH Homeless Persons Legal Clinic submitted that 'any special conditions that are attached to a grant of bail should seek to address, rather than prohibit the underlying causes of behaviour'.

Victoria Legal Aid submitted:

The real issue here is the 'unacceptable risk' test. If it is alleged that the accused is committing offences due to inappropriate drug use and will continue to do so while on bail, then the court needs to consider whether the risk of breach can be reduced

to an acceptable level—by imposing a special condition about the use of drugs.

St Kilda Legal Service submitted that imposing conditions which direct accused people not to take certain substances:

... sets the accused up for failure. It does not take into account the difficulties of detoxification and rehabilitation, and the fact that it often takes a number of attempts for a user to begin to succeed to detoxify and rehabilitate.

The commission believes these conditions could be viewed as punitive—banning certain behaviour will not prevent the behaviour from continuing unless support is provided. These conditions could be argued against on the basis of the 'no more onerous' provision, especially if the accused is addicted to the banned substance. Breach may lead to remand of the accused, even if no criminal offending has occurred.

In one region we heard that conditions banning chroming by young people imposed by bail justices led to remand of young people because of breaches.²⁵ Abstinence is unrealistic for many of the people for whom it is ordered. The commission believes the imposition of a condition to comply with a nominated support service, such as CISP, is both more realistic and effective.

In Chapter 11 we discuss the success of the Northern Arrest and Referral Treatment Team (NARTT)²⁶—non-coercive police referrals to community support agencies. This type of arrangement between police and local providers, as well as court-based support services, benefits accused people and the community far more than abstinence bail conditions. The use of abstinence conditions should be discouraged in training provided to magistrates, judges, police and bail justices.

EXCLUSION CONDITIONS

Another problematic condition raised in our Consultation Paper is a ban on accused people travelling on public transport.²⁷ The condition is more likely to be imposed when an accused person is alleged to have committed an offence on public transport, for example repetitive

RECOMMENDATIONS

97. Training for magistrates, judges, police and bail justices should discourage the use of abstinence conditions. Information should be provided in training about the efficacy of support programs in achieving the purposes of bail, such as the results achieved by CISP and community-based programs such as the Northern Assessment and Referral Treatment Team.

- 19 Consultations 10, 12, 25, 37, 39; submissions 24, 30.
- 20 Victorian Law Reform Commission (2005) above n 5, 106–107.
- 21 Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) Instruction 113-6 Bail and Remand [5.3.3].
- 22 See data in Victorian Law Reform Commission (2005) above n 5, 106.
- 23 *Ibid* 107–108.
- 24 Submissions 15, 22, 24, 29, 30, 32, 35, 38, 41, 45, 46.
- 25 Consultation 39.
- 26 This program has had a name change from the Consultation Paper, when it was called the Northern Arrest and Referral Team.
- 27 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) above n 5, 108.

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Bail Conditions

Accused people may accept onerous or inappropriate conditions when arrested because of their anxiety to get out of custody.

vandalism or assault.²⁸ We asked whether this condition was being imposed appropriately.

Submissions expressed concern about imposition of the condition but did not indicate experience of it, suggesting it is not commonly imposed.²⁹ Victoria Police said it had 'no comment', Victoria Legal Aid was not aware of the condition being imposed and the OPP said it was 'generally' not being imposed 'as it is considered to be too difficult to comply with and too restrictive'. Only Youthlaw and the Magistrates' Court indicated experience of the condition. Youthlaw submitted: 'conditions that restrict a young person's access to transport can also restrict their access to crucial support services and rehabilitation programs'. The Magistrates' Court was concerned about the imposition by police of this condition and geographical exclusion conditions, such as not going into the central business district (CBD). It submitted: 'these conditions can make the day to day lives of defendants very difficult. They should be used sparingly if at all'.

Fitzroy Legal Service said:

... geographical exclusion zones are often unnecessarily broadly defined or impractical. Such broad exclusion conditions are more likely to be imposed by police or bail justices than courts however. In our experience, young people tend to agree to overly punitive conditions by way of bail undertakings, as their overriding and immediate concern is to be released from police custody.

Urban Seed, a support agency that works with people on the street in Melbourne, provided the commission with a paper it prepared in 2003 expressing concern about the imposition of bail conditions excluding accused people from the CBD. It submitted:

The issue is still of concern in the CBD [in 2006]. We would like to recommend that police take into account the health and welfare needs of a person before imposing bail conditions that exclude people from places that address those needs.

Urban Seed points out that exclusion conditions are contrary to other police policy that focuses on harm minimisation. It says police argue the condition is effective in preventing offending. Urban Seed maintains that for offences involving illegal drugs, it simply moves the drug purchase to a suburban market so users are less visible. The paper notes that police have said exclusion zones are an effective part of the police management strategy for the city:

Therefore this general police practice has nothing to do with an accused person's individual situation when applying for bail. It is completely inappropriate for police to use an individual's bail conditions to implement a management strategy.

Another example of a problematic exclusion condition was raised in a consultation with Legal Aid. It advised that some clients have effectively been put on home detention by a magistrate through a bail condition not to leave their house without a support worker. This is clearly a punitive order.

Apart from the Urban Seed submission, concerns about exclusion conditions were mostly raised in relation to children and young people. These are discussed in Chapter 9 where we recommend that the Bail Act contain specific factors that decision makers must consider when imposing conditions on children.

The commission strongly believes that exclusion bail conditions are inappropriate and should not be imposed. Although they are ostensibly imposed to prevent offending, we agree with the Criminal Bar Association's submission that these conditions are more likely to promote breaches than prevent them.

It is likely exclusion conditions will be challenged under the new Charter of Human Rights and Responsibilities Act when it comes into force on 1 January 2008. Section 12 of the charter enshrines freedom of movement. Section 7(2) details how human rights may be limited, providing that the rights enshrined are only to be subject to

such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including ... any less restrictive means available to achieve the purpose.

It may be argued that bail support conditions are more effective and less restrictive than exclusion conditions.

We recommend a note be added to the conditions section in the new Bail Act referring to these two charter provisions. This will ensure decision makers keep the charter provisions in mind when deciding on bail conditions and provide guidance on what may be considered 'no more onerous than necessary'. It will also ensure the charter rights are kept in mind by magistrates hearing applications to vary conditions, and when reviewing conditions.³⁰

UNACCEPTABLE RISK TEST AND CONDITIONS

A 2004 review of the CREDIT program revealed that some magistrates think it is inconsistent with the Bail Act.³¹ The review found disagreement between magistrates about whether suitability for the CREDIT program could be taken into account when deciding whether to grant bail under the unacceptable risk test. Some thought accused people could be granted bail because they had been found suitable for the CREDIT program, which reduced unacceptable risk factors to an acceptable level. Others thought that an accused had to first be granted bail and then referred to the CREDIT program for an assessment of suitability. In one consultation, Melbourne magistrates expressed concern that imposing a condition to comply with the CREDIT program may be ‘stretching’ the reasons for which a bail condition may be imposed under the Act.

Rather than referring to specific conditions, such as treatment and counselling, the commission believes the Bail Act should direct decision makers to consider conditions that may be imposed when deciding whether an accused person poses an unacceptable risk. This should be an adjunct to the unacceptable risk test rather than in the conditions section of the Act. It reflects how most decision makers approach bail now—the conditions an accused person will be subject to on bail are clearly relevant to an assessment of unacceptable risk. This includes sureties, reporting conditions and bail support conditions. This will clarify the process for decision makers, as well as lawyers and court support workers.

Combined with the presumption in favour of bail in the Act, this provision should ensure accused people are only remanded in custody as a last resort—that is, when it is not possible to impose conditions to reduce risk to an acceptable level.

REVIEW OF CONDITIONS

The overwhelming majority of bail decisions are made by laypeople—most by police and a small number by bail justices.³² The commission is concerned that inappropriate conditions are more likely to be imposed by these decision makers than courts. Police are not impartial decision makers. As discussed, conditions may be imposed by police to further the aims of policing rather than for the purposes of the Bail Act. Police and bail justices are also less likely to refer accused people to bail support programs, although they are able to do so. This may be because they cannot get an immediate assessment of the accused, as a court can. Accused people may accept onerous or inappropriate conditions when arrested because of their anxiety to get out of custody.

Our recommendations should help ensure that conditions imposed at arrest are not overly onerous, and are only imposed if they reduce unacceptable risk factors. However, we believe this needs to be monitored by the court. Court monitoring will also ensure that accused people who may be assisted by bail support can be referred by the court at the first mention date if it has not already been arranged. Monitoring should be a legislative requirement to ensure it occurs and to allay any court concerns about changing conditions previously imposed.

When accused people are released on bail by police or a bail justice, they are bailed to attend court on the next available mention date. This is generally four weeks after arrest. The court will therefore not have the opportunity to review the conditions for four weeks. The Bail Act gives accused people the right to seek to vary their conditions of bail at any time. It is important that accused people are made aware of this right.

We recommend Victoria Police develop a plain English document advising accused people of this right and it should be given to them along with their undertaking of bail form.

RECOMMENDATIONS

98. There should be a Note to the conditions section in the new Bail Act referring to section 12 of the *Charter of Human Rights and Responsibilities Act 2006* regarding freedom of movement, and section 7(2) which sets out how human rights may be limited, particularly the reference to ‘any less restrictive means available to achieve the purpose’.
99. The following provision should be included at the end of the unacceptable risk test in the new Bail Act: A decision maker can consider the conditions that may be imposed to reduce risk factors when making a bail decision.
100. The new Bail Act should require the court to review the conditions set by police or bail justices at the first mention date to ensure they are appropriate, and are no more onerous than necessary to secure one or more of the purposes of bail.

28 Consultations 18, 47.

29 Submissions 15, 29, 38, 45, 46.

30 Applications to vary bail conditions are considered in Chapter 6.

31 Silvia Alberti et al, *Court Diversion Program Evaluation: Process Evaluation and Policy & Legislation Review: Final Report: Vol 2* (2004) 79.

32 For data on bail decisions see Victorian Law Reform Commission (2005) above n 5, 8.



NO OFFENCE OF BREACH OF CONDITIONS

In most cases it is not an offence for accused people to breach bail conditions. The consequence of breach is arrest, and a hearing before a court or bail justice to determine whether bail should be revoked, or the accused person released on the same or a new undertaking.³³ If there is a surety, the court also decides whether the surety should be forfeited. Only breaching bail by failing to appear in court is an offence under the Bail Act, if it occurs 'without reasonable cause'.³⁴

In our Consultation Paper we asked whether breaching a bail condition should be a criminal offence.³⁵ Submissions were divided on this issue. Two bail justices supported a new offence—one because 'there are not consequences for not abiding by bail conditions', and the other to provide a further penalty for people who breach bail conditions which replicate the conditions of an intervention order.³⁶ Victoria Police submitted that it may be appropriate for the breach of some conditions to be criminalised. They provided the example of breach of a geographical condition 'particularly where that condition is imposed to protect a victim'. The OPP supported creation of a new offence but provided no reasons. The RVAHJ did not indicate either way, but submitted that any new offence should only apply to certain conditions.

The Magistrates' Court advised that magistrates were divided on this issue, though the majority thought that only failing to appear should be a criminal offence. All other submissions about this issue opposed creation of a new offence.³⁷ The following concerns were raised:

- The offence would disproportionately affect disadvantaged and marginalised people—PILCH.
- The risk of revocation provides a sufficient incentive for people not to breach bail—PILCH.
- Bail support is a more effective way of ensuring accused people comply with bail conditions—PILCH.

- It would be onerous for the accused where there were numerous conditions, including therapeutic conditions—Magistrates' Court.
- It is not appropriate to revoke bail as a response to all breaches—bail may be varied or no action taken on the breach. Imposing a criminal sanction does not take account of the individual circumstances of accused people and the nature and seriousness of the breach—Law Institute Victoria.
- It would have the effect of embedding accused people deeper into the criminal justice system. A person accused of a minor charge who was unable to comply with conditions may end up facing more charges for breach of bail than for the original offence—St Kilda Legal Service.
- Charging for breaches of bail conditions would further stretch police resources—St Kilda Legal Service.
- The threat of being charged with breaching a bail condition could be used by police to threaten or coerce accused people—St Kilda Legal Service.
- The breach may not be clear-cut and charging may cause dispute. For example, an accused person required to notify the informant of a change of address may have notified the station but it was not passed on to the informant. It would be difficult for the accused to prove the notification, and inappropriate for him or her to face criminal sanction in those circumstances—RVAHJ.

The commission agrees that the addition of this offence would have a disproportionate impact on accused people with drug addiction, mental illness, homelessness, and disabilities such as acquired brain injury, whose lives are chaotic. It could also have a disproportionate impact on children and young people who may not at first appreciate the seriousness of adhering to conditions. This charge would result in conviction for a breach offence, making it harder to get bail in the future.

RECOMMENDATIONS

101. Victoria Police should develop a plain English document that informs accused people that they may seek to have any conditions varied by the court as soon as is reasonably practicable. This should be provided to accused people by police and bail justices along with their undertaking of bail form.
102. A new offence of breaching a bail condition should not be created.

We believe this offence would cause a significant increase in work for police and the Magistrates' Court, without significant benefit to the community. It could also lead to arbitrary charging decisions by police, with some breaches punished and others overlooked. We were told that police responses to breaches reported by support services are already extremely varied.³⁸ It is likely that police make a decision about the probable outcome if the matter is taken to court and decide that it is not worth the work required to go through the breach process.³⁹

The commission does not support introduction of this offence.

A related issue raised in our Consultation Paper was notification of support services such as ACAS and CISP when their clients breach bail by further offending and are either remanded or re-bailed.⁴⁰ This was not raised in submissions. Court support workers, including ACAS, all now have full access to the Magistrates' Court database, allowing them to check their client's status. If clients do not attend an appointment, the worker can easily find out if they have been remanded.

Notification is still an issue for non-court support workers, such as Youth Justice and community-based organisations providing bail support. However, Youth Justice workers can contact ACAS to obtain the information and community-based organisations should be able to contact CISP when it becomes a statewide service.

INDIGENOUS AUSTRALIANS

In our Consultation Paper we discussed particular issues that arise for Indigenous Australians in adhering to bail conditions. We asked whether excessive financial conditions were imposed on Indigenous accused people.⁴¹ The Magistrates' Court submitted it was not aware of any instances of excessive financial conditions being imposed on Indigenous Australians. VALS advised in its submission that financial conditions are generally not imposed on Indigenous Australians. This is discussed further in Chapter 8, where we recommend decision makers consider an accused's means when setting financial conditions.

We also asked whether bail conditions imposed on Indigenous Australians adequately take into account socioeconomic and cultural differences. VALS submitted that they do not, and 'in general [conditions imposed] are too onerous, unreasonable or unrealistic ... and setting people up to fail'. Problematic conditions raised by VALS included:

- Residing at one fixed address. VALS advised that Indigenous Australians often do not reside at one address, and it would be more culturally appropriate to bail to multiple addresses. This could already occur, and depends on appropriate submissions being made.⁴² However, it may also be useful for decision makers to be more aware of Indigenous issues when setting this condition.
- Not residing at an address because a resident has a criminal record. VALS submitted this is inappropriate as it has a disproportionate impact on Indigenous people, disrupts community/family life and denies the accused access to home, family or community.
- Reporting conditions. VALS advised that this is culturally inappropriate 'given the historical relationship between Indigenous Australians and the police'. It suggests a condition to report to a local Indigenous organisation, such as an Aboriginal co-op. This would require an agreement by the co-op to take on that responsibility and to report breaches. VALS further notes that reporting conditions are particularly onerous for accused people living in regional areas due to lack of public transport. As we noted earlier, despite contrary police policy, reporting conditions are still commonly imposed. VALS also advised reporting conditions limit ability to perform cultural responsibilities such as taking care of relatives, and attending funerals and family and community functions.
- Curfews. VALS noted these also limit ability to perform cultural responsibilities. It also removes Indigenous people from public space, which they consider cultural space, and criminalises non-offending behaviour.
- Abstinence conditions. VALS submitted these conditions set people up to fail and are inappropriate and ineffective without appropriate support services in place. Culturally appropriate support is discussed in Chapter 10.
- Not to associate with co-accused. VALS submitted this prevents accused people from attending community or family events, and sometimes from continuing to reside in their home. The condition 'has a disproportionate impact on Indigenous Australians given that Indigenous Australian homes often house immediate and extended family members (ie: kinship network)'.

33 The police power to arrest without a warrant under s 24 of the Bail Act is considered in Chapter 4.

34 *Bail Act 1977* s 30(1).

35 Victorian Law Reform Commission (2005) above n 5, 116.

36 Submissions 11, 18 respectively.

37 Submissions 15, 17, 24, 29, 30, 32, 35, 38, 42, 47.

38 Consultation 5.

39 This issue is discussed further in Victorian Law Reform Commission (2005) above n 5, 126–127.

40 *Ibid* 126.

41 *Ibid* 109–110.

42 We were told by our Advisory Committee that some magistrates already do this.



A member of our Advisory Committee said inappropriate conditions for Indigenous Australians are also a result of lawyers not understanding and not raising the issues with the court. There was a view that lawyers are often after a ‘quick-fix’ solution and prefer to get the person out on bail immediately, even if the conditions are inappropriate, rather than waiting to sort out support mechanisms. This was seen as setting the accused up to fail, and missing the point of what could be achieved for the person during the bail period.⁴³

The commission believes these issues will generally be overcome through the recommendations in this chapter. We also recommend in Chapter 10 that decision makers must consider the needs of an accused as a member of the Indigenous community. In each case it will be important for legal representatives and support workers to put all the relevant information before the decision maker to ensure the needs of accused people are considered.

Specific issues for Indigenous Australians and how these should be taken into account in bail decisions are discussed in detail in Chapter 10, where we recommend Indigenous-specific provisions for the Bail Act.

KOORI COURTS

Two suggested bail initiatives for Indigenous Australians were discussed in our Consultation Paper.⁴⁴ One of these was ‘on-the-spot bail’, which is discussed in Chapter 4 of this report. The second was whether a specialist forum based on circle sentencing should be convened in Victorian courts to impose bail conditions on Indigenous Australians. This was recommended by the Aboriginal Justice Advisory Council of NSW and discussed in our Consultation Paper. It does not appear to have been introduced in NSW. We asked what difficulties such a forum may raise, and whether there were other ways to involve accused people’s family and community to ensure compliance with bail conditions.

Most submissions that addressed this suggestion said they were unable to comment or were not aware of issues,⁴⁵ or referred to VALS’s submission.⁴⁶ The OPP said it should not be introduced but did not provide further comment. The RVAHJ said that another way to involve family and community to ensure compliance with bail conditions was to require a surety from a respected community member or family member, ensuring a sense of responsibility for compliance by the accused and oversight by the surety. The commission believes that sureties will generally be inappropriate for Indigenous Australians; in

Chapter 8 we discuss problems with the use of sureties by bail justices.

Implementation of a circle-sentencing model for bail would require bail to be heard in the Koori Courts, which does not currently occur. It would not be appropriate to apply this model to bail hearings by police because it would delay the release of accused people. Delay may also be an issue for applying this model to court hearings. We discuss the advantages and possible disadvantages of this model in our Consultation Paper.⁴⁷

The Magistrates’ Court submitted:

Magistrates have had the benefit of the experience of the Koori court which demonstrates that their decision-making is better informed as a result of the contribution from Elders, the Koori Court Officer, other service providers and community members ... However, the Magistrates are uncertain about the practicality of devising and implementing a bail process along the lines of the Koori Court due to the necessity of the bail decision being made as soon as possible after arrest. Convening Koori Court is not a simple task ... We would not be endorsing any process which resulted in delay and which had the consequence of detaining Koori accused in custody for any longer than is currently the case.

The court suggests that elders be consulted about whether they want to participate in bail hearings. It also suggests that a simpler solution may be to involve the Koori Court Officer in bail applications in the normal sittings of the court:

Advice could be given to the court on cultural matters and support services available within the community. In addition, the Koori Court Officer would be able to explain the bail application procedure to friends and family of the accused. This suggestion is of course subject to the ability of the Koori Court Officer being able to undertake this role in addition to current work pressures.

The commission understands that Koori Court Officers are now involved in bail applications when available. This is discussed further in Chapter 10, where we recommend their workload be monitored and an Aboriginal Liaison Officer (ALO) also be employed if the workload is too much. The Magistrates’ Court also suggested an ALO be employed in regional courts which do not have a Koori Court or ALO. The commission agrees and this is also recommended in Chapter 10.

In its submission VALS outlined advantages of bail hearings in the Koori Court:

- bail conditions would be more culturally appropriate and realistic
- bail conditions would be more meaningful to the accused person
- it would empower the Indigenous community
- there would be greater incentive for accused people to comply with their conditions because they would have to face elders/respected people if they breach.

However, it went on to agree with the Magistrates' Court submission about the impracticability of conducting bail hearings in the Koori Court, and the employment of further ALOs. It suggests bail variation or revocation hearings could be heard in the Koori Court, and to overcome delay issues, the accused could be released on bail by police or the court with the standard conditions until the Koori Court sits again.

The Koori Court Pilot Project was reviewed and a report released in March 2006.⁴⁸ According to the report, bail conditions were considered by the Koori Courts during the pilot period. The CREDIT program is noted as one of the most important service providers in the Broadmeadows Koori Court:

The Magistrate of the Koori Court may refer a defendant to the treatment program as a condition of bail. The Broadmeadows Court CREDIT worker is often in attendance at the Koori Court and has worked closely with the Koori Court Officer. There have been 26 referrals to the CREDIT program since the Koori Court commenced operation.⁴⁹

Referral to ACAS for young offenders was also noted in the report.⁵⁰

The report recommends against holding bail hearings at Koori Courts. In considering whether exclusion of certain offences from the Koori Courts—sexual and family violence offences—should be reconsidered, the authors note:

The decision to exclude such matters from the jurisdiction of the Koori Court was initially made by the Statewide Working Group based upon the fact that the complexity of such matters might be an obstacle to the effective implementation of the pilot program ... The Shepparton Koori Court police prosecutor, Sgt Gordon Porter, also noted that the family violence matters

and sexual offences were excluded from the pilot program because, he observed they (along with bail hearings and contests) are 'inevitably involved in conflict and thus the collaborative approach used for the Koori Court would not be able to function'. This is probably an even stronger argument for the continuing exclusion of certain matters than the argument that they might be too complex for the pilot program. The success of the Koori Court depends upon the parties engaging in a dialogue that is fundamentally different from the usual adversarial nature of Magistrates' Court hearings. The tenor of the Koori Court and the relationship between the parties (such as the defendant and the Elders and the prosecutor) might be substantially altered if there is an element of conflict introduced.

In consultations with the Koori Court Unit and the Indigenous Issues Unit in the Department of Justice, concerns were raised about elders being involved in bail applications or setting bail conditions.⁵¹ It was thought that bail applications were too contentious and would pit 'community against community', and elders would not want to be involved in a decision to remand a person.

The general issue of contested matters being heard by the Koori Court is being explored by the Indigenous Issues Unit. The commission does not think it is appropriate to make a recommendation on this issue. The Indigenous Issues Unit has mechanisms in place to ensure appropriate consultation takes place with the community about this issue before a decision is made. It is possible that hearings for contested matters will not be introduced for various reasons. This could include the resources required. However, the main issue is that it would be a major departure from the current model for contested matters, including bail, to be dealt with by the Koori Court. A member of our Advisory Committee told us the Indigenous community would not want to be involved in such decisions because of the potential for conflict.⁵²

The Koori Court evaluation report makes it clear the court is considering the appropriateness of bail conditions for accused people who appear before it. This overcomes the problems raised in our Consultation Paper for those accused people. We think the best way to ensure appropriate conditions is to involve Indigenous support officers in the process, as recommended in Chapter 10.

43 Advisory Committee meeting, 22 November 2006.

44 Victorian Law Reform Commission (2005) above n 5, 110–112.

45 Submissions 23, 24, 45.

46 Submissions 29, 30.

47 Victorian Law Reform Commission (2005) above n 5, 110–111.

48 Department of Justice [Victoria], 'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program: October 2002–October 2004 (2006).

49 Ibid 67.

50 Ibid 68.

51 Consultations 52, 53.

52 Advisory Committee Meeting, 22 November 2006.



CONFLICT OF ORDERS

In our Consultation Paper we asked if there were any problems with bail conditions conflicting with other orders. This was raised mainly in the context of family violence intervention orders. For example, a bail condition may require an accused person to reside at a particular address, because it is the address given to the decision maker. However, an existing intervention order may stipulate that the accused not have contact with a person who lives at that address.

Submissions indicated that there is generally no problem with conflict of bail orders and other court orders.⁵³ If a person is charged with a family violence offence, an application for an intervention order will usually occur at the same time. Bail conditions sometimes mirror the intervention order requirements, or are at least made consistent with them. The OPP indicated that there have been conflicts between bail conditions and intervention orders, and this is remedied by amending the bail conditions.

Three other submissions indicated that conflicts sometimes arise. Bail justice Stephen Mayne submitted that issues can arise when DHS seeks to remove a parent from the family home due to allegations of child abuse, and the parent is currently on bail with a condition to reside at that address. Bail conditions do not provide the accused person with any 'right'. The accused person's bail conditions for example do not give a right to remain in the home. An Interim Accommodation Order removing the person from the home would prevail, and the person is obliged to apply to the court to vary the bail conditions to reside at another address. If the accused does not vary bail he or she risks being charged with breach, bail being revoked and remand in custody.

Stephen Mayne further submitted that bail justices should have the power to vary the bail conditions in these cases, notifying the informant of the new bail conditions. The commission does not think it would be appropriate for bail justices hearing accommodation orders to change to a bail hearing, or for the variation to occur without police first being notified. In Chapter 6 we recommend a procedure for 'minor' bail variations to be heard by magistrates in chambers, which would cover this situation.

The RVAHJ submitted that 'conflicts are possible, particularly with intervention orders'. It points out that knowledge of prior orders would assist when determining bail conditions, but this is not always provided because LEAP is unreliable. In Chapter 4 we discuss improvements to LEAP, which is soon to be replaced with a new database, and a new program called E*Justice that will allow information sharing between justice agencies such as courts and police. This should improve decision makers' access to information.

The Law Institute of Victoria submitted that it 'is aware of conflicts and duality between bail conditions and other court orders'. Its main concern seemed to be the use of bail conditions to achieve objectives which should be covered by other orders. For example, the use of intervention order type conditions on a bail order rather than applying for an intervention order. Victoria Police address this in its submission, noting:

The Code of Practice for the Investigation of Family Violence acknowledges that bail with conditions is appropriate to offer protection to family members and witnesses, however, it also requires that bail conditions and intervention orders are separate and conditions should be unique.

The Victims Assistance Program at Sunraysia Community Health Services said it had not had any problems with bail conditions conflicting with intervention orders. It thought it more likely that bail conditions might conflict with Family Court orders.

As there seems to be few problems with bail orders conflicting with other court orders the commission does not make any recommendation. The Magistrates' Court submitted 'often we are not told about the existence of pre-existing orders and circumstances do not always make it obvious to ask whether there are any pre-existing orders'. If the court believes that problems arise because of this, a question could be included on Courtlink to prompt magistrates to ask the accused and the prosecution if they are aware of any other orders that may conflict with bail conditions.

⁵³ Submissions 22, 23, 24, 25, 30, 38, 41, 45.