

## Chapter 8

# Surety for Bail

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## Chapter 8

# Surety for Bail



*The Mokbel case prompted concerns that surety conditions are ineffective and the penalties for failing to meet them are an insufficient deterrent for serious offences.*

The high profile disappearance of ‘gangland’ identity, Tony Mokbel, while on bail in March 2006 drew public attention to the role of sureties for bail. In response to Mokbel’s failure to appear at his drug-trafficking trial, the court ordered his sister-in-law to forfeit a \$1 million surety or face two years in jail.<sup>1</sup>

The *Mokbel* case prompted concerns that surety conditions are ineffective and the penalties for failing to meet them are an insufficient deterrent for serious offences. Following the decision in *Mokbel*, the government asked the commission to consider the maximum sentence for failing to meet a surety.

Apart from penalties, *Mokbel* highlights other issues with the use of sureties. What or who is the source of a surety’s funds? Is a proposed surety suitable? What is the surety’s financial position? What rights do sureties have to protect their assets? Should surety conditions be used at all? This chapter recommends changes to the way these matters are dealt with. It also recommends reform of the administration of sureties, the role of bail justices and surety forfeiture provisions.

### TERMINOLOGY

The term ‘surety’ can be confusing.<sup>2</sup> It is used variously to refer to:

- a person who undertakes to pay a specified amount if the accused fails to abide by the bail conditions
- the amount that the person making the undertaking has undertaken to pay if the accused breaches the bail conditions
- the bail condition requiring a person to enter into such an undertaking before the accused is released on bail.

In our Consultation Paper we asked whether the term ‘surety’ should be replaced with another term in the Bail Act, for example ‘guarantor’ or ‘acceptable person’. The majority of submissions on this issue thought that ‘surety’ should be replaced with another term.<sup>3</sup> Of those that selected an alternative, all favoured ‘guarantor’.<sup>4</sup> A small number of submissions favoured the retention of the term ‘surety’.<sup>5</sup>

The commission agrees that the term ‘surety’ is confusing and little understood beyond the criminal justice system. The commission prefers the term ‘bail guarantor’. ‘Guarantor’ more clearly describes the role undertaken by sureties. In effect, the surety undertakes to ensure the accused will abide by the bail conditions. If the accused does not do so, the surety guarantees to pay a set amount. However, it is important to distinguish ‘bail guarantor’ from the commercial use of ‘guarantor’. As stated by Justice Gillard in *Mokbel v DPP (Vic) and DPP (Cth)*: ‘In one sense, it [the undertaking] is a guarantee, but the legal principles relating to guarantees in commercial law do not apply to the surety’s obligations’.<sup>6</sup> Therefore, the term ‘bail guarantor’ should be used rather than just ‘guarantor’.

The amount the bail guarantor undertakes to pay should be referred to as the ‘guaranteed amount’ and a bail condition that requires a bail guarantor should be called ‘bail guarantee condition’. Throughout this chapter, we will refer to these terms rather than ‘surety’.

### DO BAIL GUARANTEE CONDITIONS WORK?

A bail guarantor is a person (or people) who undertake to ensure the accused will abide by bail conditions—most importantly, to appear in court. If the accused breaches any bail condition, the bail guarantor undertakes to pay a set amount of money. The bail guarantor’s undertaking is backed by a security, usually money or a house, which is forfeited if the accused breaches bail.

Bail guarantors have long formed part of the bail system. In 1768, *Blackstone’s Commentaries on the Laws of England* described bail as:

*a delivery, or bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance: he being supposed to continue in their friendly custody, instead of going to gaol.<sup>7</sup>*

### RECOMMENDATIONS

103. The terms ‘bail guarantor’, ‘guaranteed amount’ and ‘bail guarantee condition’ should replace the term ‘surety’ in the new Bail Act.

104. Bail guarantees as a condition of bail should be retained in the new Bail Act.

The grant of bail did not set accused people free, but rather released them from the custody of the law into the custody of bail guarantors.<sup>8</sup> In the absence of a formal police force, bail guarantors performed a supervisory role to ensure accused people attended court to answer the charges against them.

The historical role of bail guarantors persists today. When outlining the role of bail guarantors in *Mokbel*, Justice Gillard said:

*The importance of the undertaking by the surety cannot be overstated. The Court, once it grants bail, is not in a position to supervise obedience to the order and conditions. It relies upon a surety or sureties to perform that task. In that sense, the surety acts as both the eyes and ears of the Court. The surety undertakes the duty to ensure that the principal, that is, the accused, honours his undertaking to the Court to appear at trial and to attend each day at trial.*<sup>9</sup>

According to Hampel and Gurvich, a bail guarantor is used 'to ensure that someone other than the accused has a direct interest in seeing the accused ... answers bail'.<sup>10</sup> The theory is that accused people will feel compelled by their relationship with the bail guarantor to honour the bail undertaking. As stated by Justice Gillard in *Mokbel*:

*The real pull of bail, the real effective force that it exerts, is that it may cause the offender to attend his trial rather than subject his nearest and dearest who have gone surety for him to undue pain and discomfort.*<sup>11</sup>

Although bail guarantee conditions appear to be sound in theory, the commission has concerns about their use in practice, their effectiveness and their relevance. The commission is worried about:

- the quality of bail guarantors' consent to enter undertakings. The 'nearest and dearest' of an accused may feel at the least compelled, or at the worst coerced, to stand as bail guarantor for the accused.<sup>12</sup> A bail guarantor stands to lose a significant sum of money or property, or face a jail term, if the accused breaches bail

- bail guarantors having little or no authority over the accused,<sup>13</sup> which would minimise their ability to 'supervise obedience to the order and conditions'
- whether it is appropriate to ask families to act as jailers. Family members are in effect asked to act as representatives of the State and may find their obligations to the court are compromised by their loyalty to the accused
- the use of conditions that assume the bail guarantor has a respect for the law that the accused lacks. This is not necessarily the case
- the risk that an accused who is unable to find a person with sufficient resources to stand bail guarantor may be refused bail. This raises the prospect of discrimination against accused people with limited access to financial support.<sup>14</sup>

Given the development of the modern police force and the use of other bail conditions to supervise the accused, the role of bail guarantors is arguably less relevant today than it was in the past.<sup>15</sup>

Unfortunately, we have not been able to obtain data on how often bail guarantors are used or their effectiveness.<sup>16</sup> There is a risk that without bail guarantors, accused people may be bailed less often. Given this risk and the lack of data, combined with the longevity of the bail guarantee system, the commission believes bail guarantee conditions should be retained.

## DEPOSITS

An alternative monetary condition to a bail guarantee is a deposit. The Bail Act provides that courts should consider the release of an accused 'on his own undertaking with a deposit of money or other security', before considering a bail guarantee condition.<sup>17</sup> The Act does not impose conditions on the deposit's source, so the accused may provide it directly.

According to our consultations, deposit conditions are rarely used. The Criminal Bar Association suggested that in the past (more than 20 years ago) deposits were far more common in Victoria. Apparently deposits are used frequently in NSW.<sup>18</sup>

- 1 *R v Mokbel and Mokbel* [2006] VSC 158 ('*Mokbel*'). Gillard J rejected the surety's application for relief against forfeiture in *Mokbel v DPP (Vic) and DPP (Cth)* [2006] VSC 487. On 15 March 2007 Renate Mokbel was arrested and remanded in custody for failing to pay the \$1 million.
- 2 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 161–62.
- 3 Submissions 11, 18, 22, 24, 29, 30, 32, 33, 38, 39, 46. Submission 39 endorsed the Magistrates' Court of Victoria's submission.
- 4 Submissions 18, 22, 24, 30, 39.
- 5 Submissions 23, 41, 45.
- 6 *R v Mokbel and Mokbel* [2006] above n 1, [42].
- 7 (Vol IV, Chapt 2) 293, quoted in George Hampel and Daniel Gurvich, *Bail Law in Victoria: A Practical Guide to the Law, Procedure and Advocacy in Bail Applications* (2003) 32.
- 8 *2 Hawkins Pleas of the Crown* c 15, s 3, referred to in *R v Mokbel and Mokbel* [2006], above n 1, [45].
- 9 *Ibid* [53].
- 10 Hampel and Gurvich (2003) above n 7, 32.
- 11 *R v Southampton Justices; Ex parte Corker* (1976) 120 SJ 214 (Lord Widgery CJ) quoted in *R v Mokbel and Mokbel* [2006] above n 1, [56].
- 12 Submission 17.
- 13 *Ibid*.
- 14 Submissions 32, 34.
- 15 Submission 17.
- 16 In 1992, based on a study of bail guarantees in metropolitan Victoria, Gwenda Langford concluded, 'there is no precise method or system for calculating the numbers of defendants who appear to answer their charge, nor any means of evaluating the relevance of the use of sureties in achieving appearance': Gwenda Langford, *A Pilot Study of Sureties and Bail in Metropolitan Victoria* (Unpublished Master of Policy and Law thesis, La Trobe University, 1992). Unfortunately, Langford's conclusion continues to apply today.
- 17 *Bail Act 1977* s 5(1)(b).
- 18 Consultation 11.



In 1992, the LRCV considered abolishing deposits.<sup>19</sup> However, it ultimately decided not to recommend their abolition, instead finding:

*it may be that decision-makers should be more prepared to use deposits than sureties. For example, there is some evidence that many of the persons who provide sureties are mothers, wives or girlfriends of accused persons. These people are required to act as private police on pain of losing their money. In such cases a deposit may well be a preferable option.*

In our Consultation Paper we asked whether deposit conditions should be retained.<sup>20</sup> Submissions widely supported their retention.<sup>21</sup> However, some submissions expressed concern about the potentially discriminatory use of deposits.<sup>22</sup> An accused may be unable to raise the funds or other security for a deposit and so be refused bail. It was suggested that decision makers should take into account the accused's means when setting the deposit amount.<sup>23</sup>

The commission believes deposit conditions should be retained. It gives decision makers an option that may encourage the grant of bail, even if it is rarely used. A wider range of options also enhances the decision maker's ability to tailor bail conditions to the circumstances of the case and ensure conditions are not unnecessarily onerous. It may also avoid the strain placed on personal relationships when one person stands bail guarantor for another.

It is important that deposits are not used in a discriminatory manner.<sup>24</sup> The *Bail Act 1992* (ACT) provides a good model. Section 25(7) ensures that the decision maker takes the accused's means into account when determining whether to impose a deposit condition and the deposit amount. If an accused has insufficient means, the decision maker may refuse bail. However, section 25(8) also directs decision makers to consider alternative conditions that will secure

the purposes of bail. The 'purposes of bail' referred to in the section 25(8) are equivalent to the factors listed in our recommendation 13.

As we recommend in Chapter 7, it is important that deposit conditions are only considered after decision makers have considered releasing accused people on bail:

- on their own undertaking to attend court on a particular date without further conditions; or
- on their own undertaking with conditions about conduct.

A deposit condition or bail guarantee condition should be considered last, and they should be stated as alternative options.<sup>25</sup>

## ASSESSMENT AND ADMINISTRATION

Two keys areas for potential reform of the bail guarantee system raised in our Consultation Paper were:

- the process for assessing bail guarantors' suitability
- the administrative procedures surrounding bail guarantee conditions.

### SUITABILITY

To qualify as a bail guarantor, a person must be aged 18 or above, must not be under any 'disability in law' and must have the money or assets to make the necessary payment.<sup>26</sup> When considering the suitability of a proposed bail guarantor, the following matters may be taken into account:

- financial resources
- character and any previous convictions
- proximity to the accused (whether by kinship, residence or otherwise)
- any other relevant matters.<sup>27</sup>

## RECOMMENDATIONS

105. Deposits as a condition of bail should be retained in the new Bail Act.

106. The new Bail Act should require bail decision makers to consider:

- the accused's means when determining a) whether to impose a deposit condition and b) the deposit amount
- alternative conditions that will secure the factors listed in recommendation 13 if satisfied the accused will not be able to comply with a deposit condition.

107. The new Bail Act should require that to qualify as a bail guarantor, a person must be aged 18 or above, not under any disability in law and must have the money or assets to make the necessary payment if required.

The commission believes the existing qualifications for bail guarantors and the matters considered in assessing their suitability are adequate and should be retained. However, as recommended in Chapter 2, section 9 should be redrafted in plain English to make it more comprehensible and ensure it is consistently applied.

## ASSESSMENT

Although judicial officers are responsible for imposing bail guarantee conditions and setting the guaranteed amount, registrars or other court officials usually assess suitability and means of proposed bail guarantors. In two consultations, reservations about the current procedure for assessing prospective bail guarantors were raised.<sup>28</sup>

In the Consultation Paper we asked whether magistrates and judges should play a greater role in assessing the suitability of a proposed bail guarantor.<sup>29</sup> Some submissions said they should;<sup>30</sup> however, most thought the current system was adequate. Some acknowledged that in cases where the police, prosecution, decision maker or registrar had concerns about a proposed bail guarantor, the court should play a role in assessing suitability.<sup>31</sup> One submission suggested that matters should be referred back to the magistrate who granted bail if the registrar rejects the proposed bail guarantor.<sup>32</sup>

There does not appear to be a strong need for judicial officers to review all bail guarantors' suitability. The commission believes it is only necessary for a judicial officer to review a proposed bail guarantor's suitability if the prosecution or police request it. Otherwise, the current system of assessment by registrars should continue.

There are also concerns about registrars' ability to adequately assess the suitability of proposed bail guarantors because relevant information is sometimes missing. In our consultation with registrars at the Melbourne Magistrates' Court, they said their ability to check criminal records

is limited, so they usually only discover criminal histories if police tell them.<sup>33</sup> Registrars also suspected that the accused may sometimes put up the guaranteed amount, and so undermine the bail guarantor's interest in ensuring the accused abides by bail conditions.<sup>34</sup> It is an offence for an accused person to indemnify a bail guarantor for the guaranteed amount.<sup>35</sup> Yet it is difficult for a registrar to determine the source of cash or a bank cheque.

Section 25 of the Bail Act enables courts to issue arrest warrants for accused people if they become aware of the unsuitability of a bail guarantor. However, this option involves considerable time and resources. It also risks a breach of bail in the interim. The alternative suggested in our Consultation Paper was for accused people to provide the prosecution with the details of prospective bail guarantors so their criminal history could be checked before the bail application is made.<sup>36</sup> There was broad support in submissions for this proposal but there are some problems with it:<sup>37</sup>

- It could delay bail determinations because of the process required to conduct checks.
- It will often not be known before the hearing whether a bail guarantor will be required.
- It would be difficult to apply this procedure to bail applications made immediately after arrest.

Together, these problems make this alternative unwieldy.

A more efficient solution would be to require the bail guarantor to provide proof of identity to the registrar and attest to the matters listed in the Suitability section of this chapter, including any previous convictions.<sup>38</sup> These matters could be included in the Affidavit of Justification (discussed later), which should also include a statement that the bail guarantor is not being indemnified by anyone else.

## RECOMMENDATIONS

108. The new Bail Act should provide that the following matters may be taken into account when considering the suitability of a proposed bail guarantor:

- financial resources
- character and any previous convictions
- proximity to the accused (whether by kinship, residence or otherwise)
- any other relevant matters.

109. The new Bail Act should provide that if the prosecution or police object to a proposed bail guarantor, the matter should go back before a judicial officer to determine the bail guarantor's suitability.

19 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 13–14.

20 Victorian Law Reform Commission (2005) above n 2, 95.

21 Submissions 11, 13, 18, 22, 23, 24, 29, 33, 39, 43, 45, 46.

22 Submissions 24, 30, 32.

23 Submission 32.

24 This issue is discussed in the Financial Position section in this chapter.

25 The Bail Act requires the court to consider the imposition of bail conditions in escalating order, beginning with own undertaking, a deposit, a surety, and finally a deposit and a surety: *Bail Act 1977* s 5(1).

26 *Bail Act 1977* s 9(1). The phrase 'disability in law' is not defined in the *Bail Act 1977*. It includes those who are bankrupt or lack legal capacity.

27 *Bail Act 1977* s 9(2).

28 Consultations 2, 19.

29 Victorian Law Reform Commission (2005) above n 2, 94.

30 Submissions 23, 33, 46.

31 Submissions 24, 29, 30, 32, 38.

32 Submission 45.

33 Consultation 24.

34 This issue was also raised in consultation 22. A number of cases have emphasised the importance of the bail guarantor being independent and undertaking a real obligation. Bail guarantors must put their own money at risk: *Mokbel v DPP (Vic) and DPP (Cth)* [2006] above n 1, [38], [45–47]; *Re Wilkinson* [1983] 2 VR 250, 254–55.

35 *Bail Act 1977* s 31. The bail guarantor could be charged with the common law offence of perverting (or attempting to pervert) the course of justice: *R v Freeman* (1985) 17A Crim R 272.

36 Victorian Law Reform Commission (2005) above n 2, 95.

37 Submissions 11, 13, 18, 22, 23, 33, 39, 41.

38 A similar suggestion was put forward in submission 45.

## Chapter 8

# Surety for Bail



*If a decision maker sets an amount which is beyond the means of anyone willing to act as bail guarantor, the accused is effectively denied bail.*

There is always the risk of false declarations. However, this would be covered by section 9(6) of the Bail Act, which provides that if the bail guarantor knew the information in the Affidavit of Justification was false, then the court may declare the guaranteed amount forfeited and issue a warrant to arrest the accused.<sup>39</sup> The commission considers this option to be more practical than issuing a warrant to arrest an unsuitable bail guarantor or requiring a criminal record check before the bail application hearing. A bail guarantor who knowingly made a false affidavit may also be charged with perjury or attempting to pervert the course of justice, as Renate Mokbel was in February 2007. This is discussed in the Appropriate Penalties.

The commission believes that our recommendations, combined with existing protections in the Bail Act and criminal offences, will provide sufficient protection against the acceptance of unsuitable bail guarantors.

### FINANCIAL POSITION

If accused people breach their bail conditions, the consequences for bail guarantors can be very serious. Bail guarantors may be required to forfeit large amounts of money, or possibly their homes. If bail guarantors cannot provide the guaranteed amount, they may be imprisoned for up to two years.<sup>40</sup> The repercussions of these sanctions may affect not only bail guarantors, but also their families.

As noted, the registrar or court official must consider the proposed bail guarantor's financial resources when assessing suitability. Section 9(3) also requires the court or court official to be satisfied that the bail guarantor has sufficient means. The Queensland *Bail Act 1980* provides a further limitation: 'A person shall not be accepted as a surety if it appears to the justice ... that it would be particularly ruinous or injurious to the person or the person's family if the undertaking were forfeited'.<sup>41</sup>

This provision goes beyond a simple assessment of bail guarantors' financial resources and whether they have sufficient means to cover the guaranteed amount.

If a court orders the guaranteed amount to be forfeited, bail guarantors can apply to vary or rescind the order on the basis it would be unjust to require them to pay the guaranteed amount.<sup>42</sup> Courts have in the past reduced the amount a bail guarantor had to pay because of inability to pay.<sup>43</sup> However, severe financial consequences alone may not be sufficient reason to reduce the amount forfeited. In the recent case of *Mokbel v DPP (Vic) and DPP (Cth)*, Gillard J stated:

*In my opinion, absent any changed circumstances relating to the financial affairs of the surety after the undertaking has been executed, the impact upon the surety's financial position of enforcing the undertaking is not a matter that should be taken into account.*<sup>44</sup>

In our Consultation Paper we asked whether the Bail Act should contain a provision like Queensland's Act, and whether the guaranteed amount should be proportionate to the bail guarantor's overall financial situation.<sup>45</sup> As with deposits, some submissions were concerned about the potentially discriminatory impact of bail guarantee conditions.<sup>46</sup> Accused people who are unable to find bail guarantors with sufficient means may be denied bail, yet accused people with access to bail guarantors with adequate resources may be released. Arguably, a smaller amount for a bail guarantor of limited resources provides the same incentive as a larger amount for a bail guarantor of greater resources.

VALS raised this as a particular problem for Indigenous Australians:

*Given the low socio-economic background of Indigenous Australians a figure may be excessive for them, but not for others. It is VALS's experience that generally financial*

### RECOMMENDATIONS

110. The new Bail Act should require that before undertaking to be bail guarantor for an accused, a proposed bail guarantor should be required to:

- provide proof of identity
- attest to certain matters (those currently in section 9(2) of the *Bail Act 1977*) in the Affidavit or Declaration of Justification.

The Affidavit or Declaration of Justification should also include a statement that the bail guarantor is not being indemnified by anyone else.

*conditions are not imposed on Indigenous Australians. Disadvantaged people are likely to be subjected to other bail conditions that are arguably more disruptive of every day life and one's liberty than the bail condition of a surety imposed on a rich person.*

There was general support for the suggestion that proposed bail guarantors' resources should be taken into account in setting the guaranteed amount.<sup>47</sup> Some submissions argued that registrars should be responsible for assessing proposed bail guarantors' resources, and referring the matter back to courts if not satisfied.<sup>48</sup> Others thought the court (or other decision maker) should consider bail guarantors' financial positions when setting the amount.<sup>49</sup> Victoria Police thought the proposal had merit, but submitted 'it is important to ensure that the potentially bureaucratic requirements of such a proposal do not override the prompt granting of bail where justified'.

The commission believes decision makers should consider bail guarantors' financial circumstances when determining whether to impose a bail guarantee condition and when setting the guaranteed amount. Bail guarantee conditions should be applied equitably. If a decision maker sets an amount which is beyond the means of anyone willing to act as bail guarantor, the accused is effectively denied bail. The accused will remain in custody until a bail guarantor with sufficient means is found, which may not be possible.<sup>50</sup> As for deposits, sections 25(7) and 25(8) of the ACT's Bail Act provide a good model for ensuring the decision maker considers the bail guarantor's resources, and alternative conditions if a bail guarantor has insufficient means to provide adequate security.

It is appropriate that decision makers consider these issues, rather than just registrars or other court officials, because they can consider alternative conditions to secure the purposes of bail without imposing unnecessary hardship on bail guarantors. The Bail Act obliges decision makers to only impose a bail guarantee condition if an accused's own undertaking or undertaking with a deposit are insufficient.<sup>51</sup> The Act also requires that these conditions be no more onerous than is required in the public interest. This takes into account the nature of the offence and the circumstances of the accused.<sup>52</sup> The requirement that registrars or other court officials must be satisfied bail guarantors have sufficient means before accepting them is a further safeguard against inequitable bail guarantee conditions.<sup>53</sup>

### OUTDATED PROCEDURES

To ensure bail guarantors have sufficient means, the court or court official may require them to lodge the guaranteed amount in cash.<sup>54</sup> Alternatively, they may require them to lodge a 'savings passbook, deposit stock-card or other document for operating an account' which shows a credit balance equal to or more than the guaranteed amount. This document is lodged with a signed authority for withdrawal of the guaranteed amount from the account to the applicable registrar.

In the Consultation Paper we asked whether the provision for the use of passbooks and withdrawal authorities should be repealed.<sup>55</sup> Submissions agreed unanimously that this requirement is outdated, redundant and should be repealed.<sup>56</sup> Many people said this provision is no longer used.<sup>57</sup> Further, the provision of a withdrawal authority is no guarantee the funds will be in the account if the court orders forfeiture of the guaranteed amount. The only way of guaranteeing this would be to freeze the account, which would entail administrative costs and time.

## RECOMMENDATIONS

111. The new Bail Act should require the bail decision maker to consider:

- the bail guarantor's means when determining a) whether to impose a bail guarantee condition and b) the guaranteed amount
- alternative conditions that will secure the factors listed in recommendation 13 if satisfied the accused cannot provide a bail guarantor with sufficient means to comply with the undertaking.

112. The new Bail Act should not provide for the lodging of savings passbooks, deposit stock-cards or other documents for operating an account, together with a withdrawal authority, to secure a bail guarantee condition.

- 39 It is also an offence (of perjury) under section 314(3) of the *Crimes Act 1958* to knowingly make a false affidavit or declaration.
- 40 *Crown Proceedings Act 1958* s 6(1).
- 41 *Bail Act 1980* (Qld) s 21(8). A similar provision is found in the *Bail Act 1982* (WA) s 39(c).
- 42 *Crown Proceedings Act 1958* s 6(4).
- 43 See the discussion of Crockett J in *Re Condon* [1973] VR 427. See also the comments of Butler-Sloss LJ in *R v Maidstone Crown Court; Ex parte Lever* [1995] 1 WLR 928, 40; McCullough J in *R v Uxbridge Justices; Ex parte Heward-Mills* [1983] 1 WLR 56, 62 and Kirby P in *Cucu v District Court of New South Wales* (1994) 73 A Crim R 240, 242.
- 44 *Mokbel v DPP (Vic) and DPP (Cth)* [2006] above n 1, [60].
- 45 Victorian Law Reform Commission (2005) above n 2, 96.
- 46 Submissions 1, 32, 34. In 2005, the United Nations Committee on the Elimination of Racial Discrimination noted the potential for discrimination and called on states to ensure: 'that the requirement to deposit a guarantee or financial security in order to obtain release pending trial is applied in a manner appropriate to the situation of persons belonging to such groups, who are often in straitened economic circumstances, so as to prevent this requirement from leading to discrimination against such persons': General Comment 31 on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, UN DOC A/60/18 (17 August 2005).
- 47 Submissions 1, 11, 18, 23, 24, 30, 32, 41, 45.
- 48 Submissions 22, 24, 30, 39, 45.
- 49 Submissions 32, 33.
- 50 The 'new facts or circumstances' rule applies to an application to vary the guaranteed amount if the accused applying is detained in custody: *Bail Act 1977* ss 18(1), (4). The new facts or circumstances rule is discussed in Chapter 6.
- 51 *Bail Act 1977* s 5(1). We also recommend that bail decision makers must consider imposing an undertaking with conditions about conduct before imposing a deposit or bail guarantee condition: see Chapter 7.
- 52 *Bail Act 1977* s 5(1). We recommend that all conditions must be no more onerous than necessary, and reasonable and realistic, taking into account the individual circumstances of the accused: see Chapter 7.
- 53 *Bail Act 1977* ss 9(2), (3).
- 54 *Bail Act 1977* s 9(3)(a)(i).
- 55 Victorian Law Reform Commission (2005) above n 2, 97.
- 56 Submissions 11, 18, 22, 23, 24, 29, 30, 32, 33, 39, 41, 45, 46.
- 57 Consultations 24, 29, 38, 44.



The commission believes this provision is outdated and should not be included in the new Bail Act. The remainder of section 9(3) should be retained and redrafted in plain English.

### EXPLANATION OF OBLIGATIONS

Court officials, usually Magistrates' Court registrars, are responsible for processing bail guarantee conditions. They ensure the bail guarantor signs the Undertaking of Bail form and the Affidavit of Justification for Bail form.<sup>58</sup> The latter requires bail guarantors to affirm they have sufficient assets to meet the guaranteed amount.

Before bail guarantors sign the undertaking, the registrar explains their obligations and gives them a Notice of Undertaking of Bail.<sup>59</sup> This notice sets out the accused's bail conditions and the consequences for the bail guarantor if the accused breaches those conditions.

By signing the undertaking, bail guarantors acknowledge they have received the notice. Registrars are also required to sign the undertaking to acknowledge they are satisfied the bail guarantor understands the nature and extent of the accused's obligations and the consequences if the accused fails to comply with them. It appears registrars also routinely explain bail guarantors' rights, although they are not statutorily required to do so.<sup>60</sup>

There are no guidelines for registrars or court officials about the information to give to bail guarantors. The consequences of misunderstanding those rights and obligations can be very serious, as demonstrated by the recent case of *Melincianu*.<sup>61</sup>

In our Consultation Paper we asked whether bail guarantors are given sufficient information about their obligations.<sup>62</sup> Some respondents believed they were not.<sup>63</sup> We also asked whether there should be guidelines for the information that should be provided. Some submissions proposed an information sheet or pamphlet be given to bail guarantors, others believed guidelines should be developed.<sup>64</sup> The Criminal Bar Association argued that bail guarantors should be given a checklist of their rights and obligations to sign to confirm their understanding.

A number of submissions suggested that written material for bail guarantors be provided in a range of languages.<sup>65</sup> Some said an interpreter should be available to ensure the information is accurately communicated to people from culturally and linguistically diverse backgrounds.<sup>66</sup>

Given the potentially severe consequences for bail guarantors if bail is breached, it is imperative that proposed bail guarantors understand their rights and obligations before entering into bail undertakings.<sup>67</sup> Written information, available in different languages, should be given to all prospective bail guarantors. These materials should include a checklist of bail guarantors' rights and obligations, which bail guarantors should be required to sign to confirm their understanding. To ensure bail guarantors' rights and obligations are explained fully and consistently, guidelines should be developed for registrars and other officials who are required to administer bail guarantee conditions.

### RECOMMENDATIONS

113. All courts should provide written materials to prospective bail guarantors to inform them about their rights and obligations. The materials should contain a checklist which bail guarantors are required to sign to confirm their understanding of their rights and obligations. The materials should be available in different languages.
114. The courts should establish guidelines for registrars and other relevant officials requiring the provision of sufficient information to bail guarantors so that they:
  - understand their rights and obligations
  - understand the accused's bail conditions.
115. The new Bail Act should contain a clear procedure for bail guarantors to sign the Undertaking for Bail form and the Affidavit or Declaration of Justification for Bail form at a venue other than the one where the accused signs the Undertaking for Bail form.

## VENUE FOR COMPLETION OF FORMS

The bail guarantor and accused generally complete the bail forms at the same venue, whether it is a registrar's office, police station or other venue. One submission asked whether the bail guarantor and accused must always be in the same place when they enter into an undertaking.<sup>68</sup> If a defendant is in custody in Melbourne and the bail guarantor is in Wodonga, can the bail guarantor attend the Wodonga court to sign the undertaking and Affidavit of Justification?

The issue already arises in the Bail Act. Sections 9(3A) and 9(3B) allow a bail guarantor to make the affidavit and enter the undertaking at a separate court to the accused. However, it seems the bail guarantor is required to 'appear before a court' rather than a registrar or other authorised person.<sup>69</sup> Section 15(2) allows the bail guarantor and accused to enter into the undertaking at separate venues after hours. It does not, however, refer to where the bail guarantor may make the Affidavit of Justification, which is required before an accused is bailed with a bail guarantee condition.<sup>70</sup> Section 27(1) allows the accused and bail guarantor to enter into the undertaking at a venue other than the court which granted the bail. However, it does not specify whether they must do so at the same venue.

These provisions are extremely confusing. They are scattered throughout the Act and their headings are unhelpful. There should be clear provision for bail guarantors to sign the bail documents at a different venue to where the accused signs the Undertaking of Bail form. Provided bail guarantors' rights and obligations are explained to them, there is no reason why bail guarantors should not be able to sign the bail documents elsewhere. To require otherwise could cause considerable inconvenience and expense to a bail guarantor who may live in another part of the state. The time it takes for the bail guarantor to travel to where the accused is may also result in the accused remaining in custody for longer than necessary.

## RECOMMENDATIONS

116. The new Bail Act should not provide bail justices with the power to impose a bail guarantee condition.

117. Bail justices' training should include information on their existing power to impose a condition that a responsible person collects the accused from the police station.

## BAIL JUSTICES AND BAIL GUARANTEE CONDITIONS

Some bail justices told us they often grant bail with a small bail guarantee condition.<sup>71</sup> Bail justices have difficulty accessing support services for accused people after hours. Apparently, some bail justices impose bail guarantee conditions to ensure someone takes an interest in the accused's welfare. In particular, we were told bail justices tend to use bail guarantee conditions to:

- ensure someone comes to the police station and takes responsibility for the accused
- verify the accused's story
- release the accused to make arrangements with employers and others while giving the bail justice some 'security' that the person will appear
- provide extra security when an accused is already on bail for other offences.<sup>72</sup>

Very occasionally bail justices require a deposit, but this is rare because the accused generally does not have cash available. In contrast, a bail guarantee condition generally only requires an undertaking that the bail guarantor is able to provide the guaranteed amount if required.

The use of bail guarantee conditions by bail justices is problematic. The purpose of bail guarantee conditions is not to ensure that someone collects the accused from the station, nor to provide verification of the accused's story. As stated by Justice Gillard in *Mokbel*, the role of a bail guarantor is to 'to supervise obedience to the order and conditions'.<sup>73</sup> There is also the risk that after the bail justice has left, the police may decide a proposed bail guarantor is unsuitable and so deny bail.

It is not necessary for bail justices to use a bail guarantee condition to ensure someone collects the accused from the station and verifies the accused's story. Bail justices can order that accused people only be released on bail if a responsible person collects them from the station. The person does not need to be a bail guarantor. If a secured sum is required for an accused to be released on bail, it would be more appropriate to process the guarantee condition through a court rather than a police station.

58 Bail guarantors can make a Declaration of Justification instead of an Affidavit of Justification: *Bail Act 1977* s 9(4).

59 This document is not an official form contained in the *Bail Regulations 2003*.

60 The Bail Act confers two rights on bail guarantors: the right to apply to be discharged from their responsibilities and the right to apprehend the accused, which we recommend be abolished.

61 *Re an Application by Melincianu* [2005] VSC 89 (Unreported, Kaye J, 31 March 2005). See discussion in Victorian Law Reform Commission (2005) above n 2, 98.

62 *Ibid* 98.

63 Submissions 24, 30, 32, 41. See also consultation 9.

64 Submissions 23, 24, 29, 30, 32, 33, 45.

65 Submissions 24, 29, 30, 32, 33.

66 Submissions 24, 30.

67 Gillard J emphasised this point in *Mokbel v DPP (Vic) and DPP (Cth)* [2006] above n 1, [45].

68 Submission 14.

69 Section 3 of the Bail Act defines 'court' as 'a court or judge and, in any circumstances where a member of the police force or other person is empowered under the provisions of this Act to grant bail, includes that member or person'.

70 *Bail Act 1977* s 9(3)(b).

71 Consultation 47.

72 Correspondence with the OPP, 5 September 2005.

73 *R v Mokbel and Mokbel* [2006] above n 1, [53].



For these reasons, the commission believes bail justices' power to impose a bail guarantee condition should be abolished. As a bail justice still has the power to require a responsible person to collect the accused from the station, the commission thinks that this recommendation is unlikely to impact on the granting of bail. Bail justices' training should include information on their existing power to impose a condition requiring a responsible person to collect the accused from the station.

### BAIL GUARANTORS' RIGHT TO APPREHEND ACCUSED

The right of a bail guarantor to apprehend the accused is an old common law right that is explicitly retained in the Bail Act. The Act provides that the police must help bail guarantors apprehend accused people if required by the bail guarantor.<sup>74</sup> The bail guarantor has the right to bring the accused before a bail justice or court, who may discharge the bail guarantor's obligations and require the accused to find another bail guarantor for the same amount. If the accused fails to do so, the court or bail justice may jail the accused.

The right to apprehend the accused has been explicitly abolished in NSW, the Northern Territory and the ACT.<sup>75</sup> The South Australian *Bail Act 1985* does not refer to it. The right has been retained in Tasmania, Western Australia and Queensland.<sup>76</sup> However, the Queensland Law Reform Commission recommended in 1991 that the right be abolished.<sup>77</sup> In Western Australia, the bail guarantor must only apprehend the accused where 'it is not expedient' to obtain police assistance because of likely delays.<sup>78</sup> The bail guarantor must also deliver the accused to police 'as soon as practicable' after arrest.<sup>79</sup>

The right of the bail guarantor to apprehend the accused provides a safeguard against forfeiture. However, it is questionable how a bail guarantor would use this right. How would a bail guarantor physically restrain the accused, especially if the accused is a friend or relative? How long could bail guarantors detain accused people before bringing them before a court or bail justice? We could not find any instances where a bail guarantor had apprehended the accused.

The Victorian Bail Act provides other safeguards for bail guarantors against forfeiture. Bail guarantors may notify the police in writing if they believe the accused may fail to appear. The police can then arrest the accused without a warrant.<sup>80</sup> Alternatively, bail guarantors may apply to the court to be discharged from their bail undertaking.<sup>81</sup> The court must then issue a warrant of arrest to bring the accused before the court and may discharge the bail guarantor once the accused appears. If the court agrees to the discharge, the accused must find another bail guarantor and may be remanded in the interim.

In the Consultation Paper we asked whether the bail guarantor's right to apprehend the accused should be abolished and whether there was support for the Western Australian model.<sup>82</sup> The responses supported both abolishing<sup>83</sup> and retaining<sup>84</sup> the right. Some submissions argued it should be abolished because it is seldom used and it is more appropriate to confine arrest powers to police because of their training and accountability. Two of those submissions were concerned about the system of bail bondsmen in the United States and the potential for mistreatment of the accused.<sup>85</sup> Bail bondsmen in the United States are private citizens who have the power to apprehend accused who have failed to appear. Of the submissions that supported retention, two wanted the additional safeguards that apply in Western Australia.<sup>86</sup>

The commission believes the right of bail guarantors to apprehend accused people should be abolished. It is more appropriate for police, who are trained and accountable, to arrest people. Based on our consultations and submissions it appears the right is seldom, if ever, used. The options of notifying the police or applying to be discharged provide sufficient protection for bail guarantors—both trigger the arrest of the accused. The new Bail Act should explicitly state that the right is abolished to ensure the law is clear.

### RECOMMENDATIONS

**118.** The new Bail Act should stipulate that the right of a bail guarantor to apprehend the accused is abolished.

## BAIL VARIATION AND BAIL GUARANTOR ATTENDANCE

The accused, police or prosecution may apply to the court to:

- vary the guaranteed amount or conditions of bail
- revoke bail
- impose conditions if bail was granted unconditionally.<sup>87</sup>

If accused people apply for a variation of the guaranteed amount or conditions of bail, they must give bail guarantors written notice within a 'reasonable time' before the hearing.<sup>88</sup> The bail guarantor may appear in court to give evidence, and the hearing may be adjourned to allow this.

According to a Magistrates' Court Practice Direction, if a bail guarantor does not appear at the variation hearing the accused must provide oral or affidavit evidence of compliance with the notice requirements.<sup>89</sup> The County and Supreme Courts do not have equivalent practice directions.

Courts are wary about varying bail conditions without some indication from bail guarantors that they consent, but practice varies about how this consent is obtained. Doogue & O'Brien lawyers said the requirement for a bail guarantor to attend court can be an 'unfair burden on a working person who, by being a surety, is already under a substantial obligation to the court'.<sup>90</sup> It suggested the Bail Act be amended so a bail guarantor can lodge an affidavit of consent with the court before the variation hearing. In the Consultation Paper we asked whether this model should be adopted.<sup>91</sup>

Most submissions supported the suggestion and the commission agrees there should be a procedure consistent across all courts that enables bail guarantors to consent to bail variations without attending hearings.<sup>92</sup> Bail guarantors should have the option of providing an affidavit of consent. The court must be satisfied that the bail guarantor is aware of the application and the nature and likely consequences of the variation sought, and has been given a fair opportunity to respond to the court. If the bail guarantor does not attend the hearing or provide an affidavit, the court should have the power to allow the variation if it is satisfied the required notice has been given. To ensure the court is satisfied the bail guarantor is fully aware of and consents to the varied bail conditions, it should retain the power to require the bail guarantor's attendance.

This procedure will be used for variations of significant bail conditions. We recommend a different procedure in Chapter 6 for minor variations that all parties consent to. In those cases the police informant will contact the bail guarantors to notify them, and advise the court that they have done so.

The Bail Act requires that notice of an application for variation by the accused be given to the bail guarantor. However, it does not require notice of an application by the police or prosecution to be given to the bail guarantor or the accused. The Magistrates' Court Practice Direction says an application for variation of bail must be filed with the court and served upon the police and prosecuting agency within a reasonable time of the hearing.<sup>93</sup> It does not mention notice of an application for variation made by the police, even though the Act provides for such an application.<sup>94</sup> This should be rectified.

## RECOMMENDATIONS

119. The new Bail Act should provide that when a person on bail or the police or prosecuting agency make an application for variation of a bail condition, the other party and any bail guarantor must be given notice of the application. The notice to the bail guarantor must state:

- bail guarantors may attend the hearing or may provide affidavit evidence of their consent to the proposed variation before the hearing
- failure to attend or to provide an affidavit may result in the application being refused.

If the bail guarantor does not attend the hearing or provide an affidavit, the court may still allow the variation if it is satisfied that the required notice has been given. The court should retain the power to require the bail guarantor to attend if it considers it necessary to ensure the bail guarantor is fully aware of and consents to the varied bail conditions.

120. The new Bail Act should contain the bail guarantee forfeiture provisions. The relevant sections of the *Crown Proceedings Act 1958* should be repealed accordingly.

74 *Bail Act 1977* s 21.

75 *Bail Act 1978* (NSW) s 61; *Bail Act 1982* (NT) s 48; *Bail Act 1992* (ACT) s 56.

76 *Bail Act 1994* (Tas) s 26; *Bail Act 1982* (WA) s 46; *Bail Act 1980* (Qld) s 24.

77 Queensland Law Reform Commission, *To Bail or Not to Bail—A Review of Queensland's Bail Law*, Discussion Paper No 35 (1991) 54.

78 *Bail Act 1982* (WA) s 46(1)(b).

79 *Bail Act 1982* (WA) s 46(2).

80 *Bail Act 1977* s 39(1)(b).

81 *Bail Act 1977* s 23.

82 Victorian Law Reform Commission (2005) above n 2, 99.

83 Submissions 13, 17, 22, 24, 29, 30, 32, 39, 45.

84 Submissions 11, 18, 23, 33, 41, 46.

85 Submissions 13, 32.

86 Submissions 23, 33.

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

88 *Bail Act 1977* s 18(7). The notice is in *Bail Regulations 2003* Form 14.

89 Magistrates' Court of Victoria, Practice Direction No 4 of 2005.

90 Submission 1.

91 Victorian Law Reform Commission (2005) above n 2, 100.

92 Submissions 11, 13, 23, 24, 29, 30, 32, 33, 41, 45, 46.

93 Magistrates' Court of Victoria, Practice Direction No 4 of 2005.

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

*If satisfied that an accused has failed to abide by bail conditions, the court must order the guaranteed amount be paid to the State.*

### FORFEITURE AND PENALTIES

The procedure governing forfeiture of a guaranteed amount when an accused person breaches bail is set out in the *Crown Proceedings Act 1958*.<sup>95</sup> This Act is referred to in the Bail Act, but only in the context of deposits, and is not commonly used in Victoria.<sup>96</sup> Our consultations show that most people are unfamiliar with the forfeiture process. All other Australian jurisdictions incorporate forfeiture provisions into their Bail Acts.<sup>97</sup>

The commission believes forfeiture provisions should be included in the new Bail Act. Incorporation will promote consistency, clarity and transparency and will benefit people who frequently use the Act. It will also make the provisions more accessible and understandable to bail guarantors or prospective bail guarantors. We received unanimous support for this proposal in submissions.<sup>98</sup>

### CROWN PROCEEDINGS ACT ANOMALY

If satisfied that an accused has failed to abide by bail conditions, the court must order the guaranteed amount be paid to the State.<sup>99</sup> The court may set a time limit for payment and if this deadline passes, the amount may be obtained by seizing and selling the bail guarantor's property. If this fails, the bail guarantor may be imprisoned for up to two years.

Bail guarantors may apply to the court for variation or withdrawal of forfeiture orders on the ground it would be 'unjust' to require them to pay the guaranteed amount, having regard to all the circumstances of the case.<sup>100</sup>

In our Consultation Paper we referred to an anomaly identified by Hampel and Gurvich.<sup>101</sup> If an accused breaches a condition of bail a court has the discretion not to revoke bail if there is good cause or circumstances beyond the accused's control. Yet a court appears to have no such discretion with respect to bail guarantees. A literal interpretation of section 6 of the Crown Proceedings Act requires that even breach of a

minor bail condition would result in forfeiture of the guaranteed amount. Hampel and Gurvich argue that 'failure to observe a bail condition' in section 6 may only refer to failure to appear in court.<sup>102</sup> It is unlikely in practice that minor breaches would be brought before a court, but the guaranteed amount is liable to forfeiture nonetheless.

The mandatory nature of section 6 of the Crown Proceedings Act was confirmed by Justice Gillard in the recent case of *Mokbel*:<sup>103</sup>

*In my opinion, once the Court is satisfied that an accused person has failed to observe a condition of bail, the Court is bound to declare that the bail be forfeited, and order that the surety pay the amount undertaken, that in default payment can be exacted by seizing and selling the property of the surety, and that in default in whole or in part, the surety be imprisoned for a term not exceeding two years. In other words, the undertakings given by both the accused and the surety are self-executing and the Court is obliged to make the declaration and the orders.*

In our Consultation Paper we asked whether section 6 should be amended so a guaranteed amount is not automatically forfeited when bail conditions are breached.<sup>104</sup> Most submissions on this issue supported amendment.<sup>105</sup> Some favoured a model where the court inquires into the alleged breach and determines whether to exercise the forfeiture provisions; the bail guarantor would still be able to seek variation or withdrawal of the forfeiture order. There was also support for the suggestion that bail should only be forfeited when an accused has failed to appear in court, not for breach of any bail condition.<sup>106</sup> A few submissions were against any amendment.<sup>107</sup>

The mandatory nature of section 6 and its application to all bail conditions is unusual. Victoria is the only Australian jurisdiction that requires automatic forfeiture of the guaranteed

### RECOMMENDATIONS

121. The new Bail Act should stipulate that:

- the guaranteed amount should only be forfeited when the accused has failed to appear in court
- the court should only order forfeiture of the guarantee when it is satisfied there is no reasonable excuse for the accused's failure to appear
- the bail guarantor should retain the right to seek variation or withdrawal of the forfeiture order.

amount if the accused breaches any bail condition.<sup>108</sup> All other jurisdictions use the word ‘may’,<sup>109</sup> although some also place the onus on the bail guarantor to satisfy the court why such an order should not be made.<sup>110</sup> The majority of jurisdictions also restrict forfeiture to failure to appear rather than breach of any bail condition.<sup>111</sup>

The commission believes the mandatory nature of section 6 is unnecessarily harsh. It is anomalous that the court has discretion in dealing with accused people if they breach bail conditions, yet no discretion about forfeiture of guaranteed amounts. Although bail guarantors can apply to have forfeiture orders varied or withdrawn, it entails delay and added costs. It is inappropriate that the bail guarantor is at the mercy of prosecutorial discretion about whether a forfeiture application will be made if the accused breaches any bail condition. Forfeiture should be restricted to breach of the primary condition of bail: that the accused appear in court in answer to bail. The court should only order forfeiture of the guaranteed amount when it is satisfied there is no reasonable excuse for the accused’s failure to appear.<sup>112</sup> Bail guarantors should retain the right to seek variation or withdrawal of forfeiture orders on the ground that paying the amount would be unjust in all the circumstances.

## INTERSTATE PROPERTY

A Magistrates’ Court deputy registrar queried the practice of accepting interstate property as security for a bail guarantee condition.<sup>113</sup> The registrar suggested that property beyond the jurisdiction of the court is insufficient security because the court does not have the power to enforce forfeiture.

This issue was not raised in our Consultation Paper or consultations. The enforcement powers of the courts are beyond the terms of reference of this review. However, the government may want to consider this issue when it drafts the new Bail Act.

## PENALTY FOR FAILURE TO PAY FORFEITED AMOUNT

In determining the penalty for failure to pay a forfeited amount, Justice Gillard stated in *Mokbel*:

*The period of two years’ imprisonment has been the maximum since 1977 and, in my view, is an inadequate period when the undertaking to pay a sum is fixed as high as \$1 million. The Court invites Parliament to consider increasing the period, bearing in mind that the purpose of the default provision is to encourage both the accused and the surety to comply with their undertakings.*<sup>114</sup>

The commission does not look at penalties as part of its reviews. The adequacy of the penalty for this offence was therefore not discussed in our Consultation Paper and we did not seek submissions on it. However, following *Mokbel*, the Attorney-General asked the commission to consider the maximum sentence to be imposed on a bail guarantor for failing to pay after a court orders forfeiture of the guaranteed amount.<sup>115</sup>

The commission wrote to everyone who had responded to the Consultation Paper to request a further submission on penalties. We included a brief paper explaining the relevant law in Victoria and other Australian states and asked the following questions:<sup>116</sup>

- Is the current penalty of two years imprisonment for failing to meet a surety, provided for in section 6(1) of the Crown Proceedings Act, inadequate?
- For what reasons should the current penalty either remain as it is or be increased?
- Should the current provision remain, or is the civil forfeiture regime found in many other Australian states to be preferred?

In response we received 18 additional submissions.

- 95 *Crown Proceedings Act 1958* s 6. Prescribed forms relevant to the forfeiture process are contained in the *Crown Proceedings Regulations 2002*.
- 96 *Bail Act 1977* s 32.
- 97 *Bail Act 1982* (WA) s 49; *Bail Act 1980* (Qld) ss 31–32B; *Bail Act 1978* (NSW) ss 53A–53L; *Bail Act 1992* (ACT) s 37; *Bail Act 1995* (SA) s 19; *Bail Act 1982* (NT) s 40; *Bail Act 1994* (Tas) pt 4.
- 98 Submissions 11, 13, 18, 22, 23, 24, 29, 30, 32, 33, 39, 41, 45.
- 99 *Crown Proceedings Act 1958* s 6(1).
- 100 *Crown Proceedings Act 1958* s 6(4). Gillard J recently dismissed an application on this ground: *Mokbel v DPP (Vic) and DPP (Cth)* [2006] above n 1.
- 101 Victorian Law Reform Commission (2005) above n 2, 101.
- 102 Hampel and Gurvich (2003) above n 7, 39.
- 103 *R v Mokbel and Mokbel* [2006] above n 1.
- 104 Victorian Law Reform Commission (2005) above n 2, 102.
- 105 Submissions 11, 17, 22, 24, 29, 30, 32, 39, 45, 46.
- 106 Submissions 17, 22, 24, 30, 32, 39, 45.
- 107 Submissions 18, 23, 41.
- 108 The ACT has an automatic forfeiture provision for deposits, but not for securities undertaken by bail guarantors: *Bail Act 1992* (ACT) s 37(1)(c). NSW has an automatic forfeiture provision if an accused is convicted of failing to appear without a reasonable excuse: *Bail Act 1978* (NSW) s 53AA.
- 109 *Bail Act 1978* (NSW) s 53A; *Bail Act 1985* (SA) s 19; *Bail Act 1982* (NT) s 40; *Bail Act 1994* (Tas) s 20; *Bail Act 1980* (Qld) s 32; *Bail Act 1982* (WA) s 49; *Bail Act 1992* (ACT) s 37.
- 110 *Eg Bail Act 1982* (WA) s 49(1)(d).
- 111 *Bail Act 1978* (NSW) s 53A; *Bail Act 1992* (ACT) s 37; *Bail Act 1980* (Qld) s 32; *Bail Act 1982* (WA) s 49; *Bail Act 1994* (Tas) s 20.
- 112 In *R v Mokbel and Mokbel* [2006] above n 1, [26]–[39] Gillard J discusses the meaning and application of the words ‘has failed to observe a condition of bail’ in section 6. He sets out the arguments for and against a literal interpretation not involving proof of fault, compared to an interpretation that requires proof that the failure to observe the condition was deliberate. Ultimately, it was unnecessary for Gillard J to determine which interpretation applies. However, it demonstrates the ambiguity of the phrase.
- 113 Submission 14.
- 114 *R v Mokbel and Mokbel* [2006] above n 1, [59].
- 115 Letter from Attorney-General Rob Hulls, 13 June 2006.
- 116 Appendix 1.

## Chapter 8

# Surety for Bail



*Queensland and Victoria are the only jurisdictions that have an immediate default to a jail sentence.*

### Appropriate Penalties

In early English law, when an accused failed to appear, the bail guarantor faced the same punishment as the accused.<sup>117</sup> The penalties that apply to bail guarantors are no longer so draconian. The nature and severity of the penalty for failure to pay a guaranteed amount upon forfeiture varies throughout Australia. Queensland and Victoria are the only jurisdictions that have an immediate default to a jail sentence, which in both cases is a maximum of two years.<sup>118</sup>

In all other Australian jurisdictions, default of payment by the bail guarantor or of an order to seize and sell property is treated as a fine default. If the amount cannot be recovered through civil enforcement orders it is enforced as if it was a fine. That is, a community-based order is imposed and imprisonment is ordered only as a last resort on default of the community-based order. The maximum term of imprisonment which can then be imposed is limited to three months in NSW and the Northern Territory, and six months in the ACT and South Australia.<sup>119</sup> In Tasmania and Western Australia the term of imprisonment is not limited, but is calculated by reference to the forfeited amount.<sup>120</sup>

Submissions were evenly split on whether or not the current penalty should be increased.<sup>121</sup> Most who believed it should be increased suggested a five year maximum penalty.<sup>122</sup> They argued that the current maximum of two years was an insufficient deterrent, particularly in cases like *Mokbel*,<sup>123</sup> as stated in one submission:

*The circumstances of the case are unique and under normal circumstances the penalty for failing to meet surety would be adequate however, with high profile offenders amassing significant wealth and assets through criminal activity, recovery of property through civil enforcement orders and the application of default fines will hardly deter offenders of this nature complying with bail conditions. A custodial penalty may be the only deterrent and we therefore believe that the current penalty is inadequate.<sup>124</sup>*

Submissions in favour of an increase emphasised the important role performed by bail guarantors 'as a key accountability mechanism for ensuring the defendant's appearance',<sup>125</sup> and therefore called for more robust penalties.

Of the submissions against increasing the penalty, most favoured a civil enforcement system.<sup>126</sup> This approach would be consistent with the majority of other Australian jurisdictions. Submissions said it would better reflect the fact that a bail guarantor who defaults may not have engaged in criminal or inappropriate behaviour.<sup>127</sup> Forfeiture proceedings are by nature civil proceedings<sup>128</sup> or perhaps contempt of court, rather than criminal proceedings.<sup>129</sup>

Failing the adoption of a civil enforcement system, these submissions favoured either leaving the penalty at two years or reducing it. Many submissions doubted the deterrence value of an increased penalty.<sup>130</sup> Some referred to the dearth of cases about penalties for failure to meet a bail guarantee condition as evidence.<sup>131</sup> It was also argued that given the personal relationship that usually exists between bail guarantors and accused people it was unlikely that an increased penalty would dramatically change bail guarantors' behaviour.<sup>132</sup> Increasing the penalty may also make it more difficult for disadvantaged accused to find a bail guarantor, potentially leading to a denial of bail.<sup>133</sup> Two submissions said it was inconsistent that the penalty for failure to appear is a one-year jail term, whereas a bail guarantor faces up to two years.<sup>134</sup>

A maximum penalty of five years imprisonment applies to serious indictable offences. They are often offences against the person, such as causing injury recklessly or negligently, or threats to inflict serious injury.<sup>135</sup> A maximum two year penalty applies to serious summary offences, such as obscene exposure and escaping from lawful custody.<sup>136</sup> There are a wide range of offences carrying a lesser penalty, including common assault (three months)<sup>137</sup> and aggravated assault (six months).<sup>138</sup>

There is a clear distinction between bail guarantors who help an accused to abscond compared to bail guarantors who unsuccessfully try to ensure the accused abides by the conditions of bail. To address this distinction,

### RECOMMENDATIONS

122. The current maximum penalty of two years imprisonment for failure by a bail guarantor to pay the guaranteed amount upon forfeiture should not be increased.

the commission considered recommending the creation of an offence of assisting an accused to abscond. However, the commission thinks this conduct is adequately covered by the existing common law offence of perverting the course of justice (or attempting to do so). The offence of 'accessory after the fact' may also apply, but this is more problematic because the principal offence must be proved first.<sup>139</sup>

The charge of attempting to pervert the course of justice has recently been brought against Renate Mokbel. She was also charged with five counts of perjury. The charges relate to affidavit evidence she gave as bail guarantor in the *Mokbel* case. The charges do not assert that she assisted Tony Mokbel to abscond. Rather, they assert that she knowingly gave false information about her assets when acting as bail guarantor. The charges demonstrate that if a court finds that a bail guarantor acted in bad faith further criminal sanctions may apply beyond the penalties for forfeiture.

The commission believes the current maximum penalty of two years imprisonment for bail guarantors who fail to pay the guaranteed amount upon forfeiture is adequate. In comparison to other Australian jurisdictions, Victoria already has one of the most severe penalties for failure to meet a forfeiture order. There is no evidence that a more severe penalty would be a greater deterrent. Nor does the commission believe there is evidence of cases in which a more severe punishment is warranted. Two years is a significant period of imprisonment. If bail guarantors assist accused people to abscond, they can be charged with perverting or attempting to pervert the course of justice, which carry a maximum penalty of 25 years imprisonment.<sup>140</sup>

The commission is not recommending a civil enforcement system be adopted. Bail guarantors' obligations are onerous and should not be entered into lightly. The existing penalties for failure to meet these obligations, although rarely imposed, emphasise the importance of the bail guarantor's role.

117 *R v Mokbel and Mokbel* [2006] above n 1, [50].

118 *Crown Proceedings Act 1958* (Vic) s 6; *Bail Act 1980* (Qld) s 32A.

119 *Fines Act 1996* (NSW) s 90; *Fines and Penalties (Recovery) Act 2001* (NT) s 88; *Magistrates' Court Act 1930* (ACT) s 154D; *Criminal Law (Sentencing) Act 1988* (SA) s 71.

120 The *Bail Act 1994* (Tas) s 21 provides that forfeiture orders are to be enforced under the *Justices Act 1959* (Tas) s 80. However, section 80 was repealed by the *Sentencing Act 1997* (Tas). As the *Sentencing Act* (ss 47, 50) re-enacts the repealed provisions, the reference in the *Bail Act 1994* is taken to be to the provisions of the *Sentencing Act (Acts Interpretation Act 1931* (Tas) s 17). Those provisions allow for a community-based order, civil recovery or imprisonment. Imprisonment is for the term of one day for every \$100: *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) s 57. The maximum term of imprisonment in WA is one day for every \$150 of the fine or the maximum term of imprisonment for the offence. Alternatively, the court may fix a period of imprisonment in default of payment: *Sentencing Act 1995* (WA) s 59.

121 Submissions in favour of an increased penalty: 6(a), 23(a), 37(a), 41(a), 44(a), 46(a). Submissions against: 13(a), 17(a), 24(a), 29(a), 32(a), 34(a).

122 Submissions 6(a), 37(a), 41(a), 44(a), 46(a).

123 *R v Mokbel and Mokbel* [2006] above n 1. Submissions 6(a), 37(a), 41(a).

124 Submission 6(a).

125 Submission 23(a).

126 Submissions 17(a), 24(a), 29(a), 32(a), 34(a).

127 Submissions 17(a), 29(a), 32(a).

128 Submission 24(a). The submission referred to Gillard J's comment in *Mokbel* that: '...the present proceeding is analogous to a civil proceeding and this is clear from the fact that part 1 of the Act is concerned with the recovery of debts and property by the Crown': *R v Mokbel and Mokbel* [2006] above n 1, [31].

129 Submission 13(a).

130 Submissions 13(a), 17(a), 24(a), 29(a), 32(a), 34(a).

131 Submissions 13(a), 24(a), 29(a), 32(a).

132 Submissions 13(a), 32(a).

133 Submission 32(a).

134 Submissions 17(a), 34(a).

135 *Crimes Act 1958* s 18, s 24, s 21 respectively.

136 *Summary Offences Act 1966* s 19, s 49E respectively.

137 *Summary Offences Act 1966* s 23. Alternatively, a fine of 15 penalty units applies. Since 1 July 2006, the value of one penalty unit has been \$107.43: *Victoria Government Gazette* G14 (6 April 2006) 680.

138 *Summary Offences Act 1966* s 24(1). Alternatively, a fine of 25 penalty units applies. If the assault is committed in the company of another person or by kicking, it carries a penalty of 12 months imprisonment: s 24(2). If it is committed with a weapon or instrument it carries a penalty of 2 years: s 24(2).

139 *Crimes Act 1958* s 325(1).

140 *Crimes Act 1958* s 320.

## Chapter 8

# Surety for Bail

