



REVIEW OF THE BAIL ACT

Final Report

Published by the Victorian Law Reform Commission

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REVIEW OF THE BAIL ACT

Final Report

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ACAS	Adult Court Advice and Support Service
ACJP	Aboriginal Community Justice Panel
ACT	Australian Capital Territory
AIC	Australian Institute of Criminology
AJA2	Aboriginal Justice Agreement Phase 2
ALO	Aboriginal Liaison Officer
CAHABPS	Central After-Hours Assessment and Bail Placement Service
CALD	Culturally and Linguistically Diverse
CBD	central business district
CISP	Court Integrated Services Program
CJEP	Criminal Justice Enhancement Program
CREDIT	Court Referral and Evaluation for Drug Treatment
CSOs	Client Service Officers
CYFA	Children, Youth and Families Act
DHS	Department of Human Services
DPP	Director of Public Prosecutions
ITP	Independent Third Person
LEAP	Law Enforcement Assistance Program
LRCV	Law Reform Commission of Victoria
LRCWA	Law Reform Commission of Western Australia
NARTT	Northern Arrest and Referral Treatment Team
NSW	New South Wales
OPP	Office of Public Prosecutions
PILCH	Public Interest Law Clearing House
RVAHJ	Royal Victorian Association of Honorary Justices
UK	United Kingdom
VALS	Victorian Aboriginal Legal Service
YJC	Youth Justice Centre

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Preface

The *Bail Act 1977* has not been comprehensively reviewed, still less comprehensively updated, since it came into operation on 1 September 1977. Yet the bail system in Victoria not only has an impact that reaches beyond the strict confines of the legislation, but is also a very important element in the delivery of justice. When, in November 2004, the Attorney-General gave the commission a reference to review the Act, it could justifiably be doubted whether the regime then in place was (to adopt a phrase included in the terms of the reference) 'consistent with the overall objectives of the criminal justice system'.

This is the Victorian Law Reform Commission's Final Report in its review of the bail system. We were asked to make recommendations for any procedural, administrative and legislative changes which may be necessary to ensure that the bail system functions simply, clearly and fairly. It was a wide brief, which required—if it was to be adequately discharged—the gathering of an extensive body of information. We accordingly conducted a large number of informal consultations to identify issues with the Bail Act or bail procedure and bail support programs. We published the results of that consultation and our other research in a Consultation Paper in November 2005.

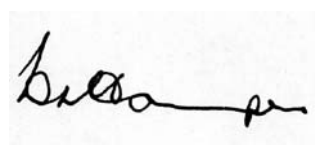
We also published an information booklet for victims, seeking their views on particular aspects of bail law or procedure relevant to them. The booklet was distributed by the Victims' Support Agency through their network of Victims Assistance and Counselling Programs. We nevertheless received very little response to the booklet.

On the other hand, 49 submissions to the consultation paper were forwarded to the commission, and we conducted a series of four roundtables in 2006 on specific topics to assist us to develop recommendations. These covered after-hours bail decisions, bail for children and young people, the presumptions against bail, and victims and bail. We also held an Indigenous Australians forum, which assisted in the important task of gaining a Koori perspective on all those topics.

Such extensive and thorough work deserves proper acknowledgment. I would like to thank the Bail Advisory Committee, the members of which provided the commission with their advice and expertise, and assisted in development of our recommendations. Even more particularly, I wish to thank the staff who worked on the report—Team Leader Angela Langan, Research Officers Daniel Evans, who conducted research and initial writing for the report, and Keren Murray, who took over that task when Daniel left the commission in June 2006. Each brought to all that they did not only inexhaustible energy and dedication, but an excellence in research and legal knowledge of which the commission is very proud. Angela and Keren were the principal authors of the report, but they and Daniel received invaluable assistance from their research assistant, Miriam Cullen.

I must also thank those of my fellow commissioners who with me made up the bail division of the commission for the purposes of this reference. It has been a pleasure and a privilege to share with Dr Iain Ross and Judges Jennifer Coate and Felicity Hampel their wisdom, balanced judgment, intellectual ability and companionship.

The report was edited by Alison Hetherington. Trish Luker worked on the design of the report. Kath Harper proofread and prepared the index. Julie Bransden prepared the bibliography and Nicole Gavrilidis arranged the report's distribution. To each I extend my gratitude for a job well done.



Justice David Harper

Commissioner
Victorian Law Reform Commission

Terms of Reference

To review the provisions of the *Bail Act 1977* and its practical operation in order to ensure that it is consistent with the overall objectives of the criminal justice system including:

- the presumption of innocence;
- the protection of the public, including the victims of crime;
- the speedy resolution of issues concerning a person's detention; and
- the presumption in section 4 of the Bail Act that a person accused of an offence should normally be granted bail, except in circumstances specified in the legislation.

To make recommendations for any procedural, administrative and legislative changes which may be necessary to ensure that the bail system functions simply, clearly and fairly.

In conducting the review the Victorian Law Reform Commission should have regard to:

- the themes and principles outlined in the Attorney-General's *Justice Statement* (May 2004);
- the over-representation of Indigenous Australians held on remand;
- the possibility of providing alternatives to incarceration for defendants who would not otherwise be granted bail;
- the intersection of the Bail Act and the *Children and Young Persons Act 1989*;
- Report No 50 of the Law Reform Commission of Victoria, *Review of the Bail Act 1977*, which was completed in October 1992; and
- the needs of marginalised and disadvantaged groups, including Indigenous Australians, and the impact of the bail system on people in those groups.

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Executive Summary

This report makes recommendations for procedural, administrative and legislative changes so the bail system functions simply, clearly and fairly.

ARREST AND SUMMONS

Police make the initial decision about whether to charge and bail accused people, or issue them with a summons to attend court. Not everyone accused of an offence is charged and bailed—about half of accused people receive a summons and about half are charged. This decision is entirely at the discretion of police—depending on the circumstances, police may decide to charge and bail an accused person with a minor offence like shoplifting, but issue a summons for a serious offence like rape. We recommend that Victoria Police develops and publishes clear criteria for the use of charge and summons.

BAIL AND REMAND

Bail is a long established practice in criminal law, allowing accused people to remain in the community until their charges can be heard by a court. It ensures that people accused of crimes, who may be not guilty of some or all of the charges, do not unnecessarily spend time on remand.

The commission found there is a strong presumption in Victoria that an accused person will receive bail. Remand is undesirable for many reasons, including:

- People accused of crimes are presumed innocent and may ultimately be found not guilty of some or all of their charges. It would be unfair if they serve time for charges they are found not guilty of.
- Although prisons work to keep the community safe while an offender is locked up, research shows that once someone goes to prison they are more likely to go back. Remand is therefore a last resort because it exposes people to negative influences and increases the likelihood they will offend again.
- Remand comes at significant financial cost to the community—approximately \$204 per day per prisoner.¹
- Remand involves significant social cost to the community—imprisonment can result in unemployment, homelessness, drug abuse, exacerbation of mental illness and the perpetuation of poverty cycles.

Remand should only be used when the court does not think bail conditions will ensure the accused person will return for trial and not offend in the meantime.

Despite decreasing crime rates in Victoria, remand is increasing. Research has shown that this increase is not linked to an increase in serious offending.

SIMPLIFYING BAIL LAW

The basic elements of Victorian bail law were included in legislation in 1977—the Bail Act. The Act has been amended many times since, but retains the same structure, language and drafting style. The Act has long been criticised as being overly complex in both its language and structure. In our Consultation Paper we asked whether the Act should be redrafted to improve its accessibility. A typical response received said: ‘While some people may feel satisfied that they have mastered the complexities of the current Act ... it does not assist in making the law accessible to the general community’.

We recommend the current Bail Act be repealed and a new Act drafted in plain English that incorporates the recommendations in this report.

Bail is not well understood in the community. Some people find it difficult to separate the concepts of bail and sentencing, specifically, that the presumption of innocence applies when bail decisions are made because the accused person is yet to be tried. Simplifying the Bail Act, including the tests that apply to bail decisions, will make it easier for the community to understand how and why bail decisions are made.

It is also not well understood that courts make only a small proportion of bail decisions. Most people are bailed by police, who make more than 90% of bail decisions. Bail applications are only heard by Magistrates’ Courts if police do not grant bail. An application may also be heard by a bail justice. Bail justices are volunteer laypeople who hear applications for bail when police have refused bail and a court is not open. As most bail decisions are made by laypeople (police and bail justices), it is very important the Bail Act is easy to understand and the tests for bail simple and straightforward to apply.

¹ Department of Justice [Victoria], *Corrections Statistics FAQs* (June 2007) <www.justice.vic.gov.au> at 27 June 2007.

SIMPLIFYING BAIL TESTS

The Bail Act contains a presumption in favour of bail. Accused people must be granted bail unless there is an unacceptable risk they will not return to court, will commit offences or interfere with witnesses. However, for certain offences there is a presumption against bail unless the accused person can 'show cause' or 'exceptional circumstances' why bail should be granted. This system of 'reverse onuses' adds to the complexity of the Bail Act because two tests have to be applied to the decision—the unacceptable risk test and the reverse onus test.

The reverse onus tests give the impression that bail will not be granted for the specified offences, but bail is often granted for reverse onus offences. This reflects the fact that offence type is only one factor taken into account by the decision maker.

Some people argue that reverse onus tests should remain because they make it clear the accused person has to argue why bail should be granted. This occurs whether a reverse onus applies or not—if the police oppose bail and the accused person does not argue for it, bail will be refused. Throughout our review we heard that the arguments put forward to overcome the unacceptable risk test are also used for the show cause and exceptional circumstances tests. In most cases satisfying one test will satisfy the other. The ultimate issue for a bail decision maker is whether the accused person poses an unacceptable risk.

We recommend the removal of reverse onus tests so all bail decisions are made on the basis of unacceptable risk. We do not believe this will alter the outcome of bail decisions because decision makers have told us unacceptable risk is always the ultimate test. Reverse onuses apply to a small number of offences, many of which do not commonly come before the court. They include: murder and treason; arson causing death; serious drug offences; a violent breach of a family violence or stalking order by a person with a history of violence; aggravated burglary; and indictable offences where a weapon is used.

The commission believes decision makers will continue to treat seriously bail applications for offences that currently attract a reverse onus. There is no suggestion that applications for offences not currently included in the reverse onus categories are treated lightly. Changes to police treatment of family violence, and other changes recommended in our 2006 Family Violence report, will ensure that family violence is treated seriously by police and courts in all respects, including bail.

A common criticism of the current Act is that the inclusion of offences in the reverse onus categories is ad hoc. Most serious violent offences are not included, such as attempted murder, rape or serious assault. The same arguments are canvassed in bail applications that do not involve a reverse onus, and the ultimate issue for the decision maker is whether the accused person poses an unacceptable risk. This simplified approach should apply to all offences.

We recommend stricter controls over police powers to re-bail accused people who are alleged to have committed an offence while on bail.

Commonwealth legislation stipulates a reverse onus for some offences and these will continue to apply.

BAIL CONDITIONS

The commission recommends changing the Act to make it clearer what conditions decision makers can impose on people who are bailed. The Act should also clarify that decision makers can consider the conditions that will be imposed when deciding whether bail should be granted.

Historically, people were released on bail on the condition that another person put up money or property to secure their attendance at court. If accused people did not attend court, the money or property was forfeited. This condition is still imposed in some cases. We recommend it be retained in the new Bail Act, with modernised provisions and approach to ensure people without means are not discriminated against. We also recommend changes to make the process clearer for those who are providing the money or property.

It is much more common for accused people to be released on conditions that direct their conduct, such as reporting regularly to police. 'Therapeutic' conditions are also an accepted feature of our bail system, with many accused people referred to support services or required to address personal problems. These can include drug and alcohol treatment, psychiatric treatment or counselling for issues such as anger management or gambling problems. We recommend the new Act continue to allow such conditions, because they are effective on many levels, including reducing recidivism.

CLARIFYING DECISION MAKERS' POWERS

One of the confusing things about the current Bail Act is that it uses the word 'court' to sometimes mean a court, and sometimes police and bail justices. The new Bail Act should refer to individual decision makers so their powers are clear.

We recommend bail justices and magistrates be able to hear bail applications for any offence. They currently cannot hear bail applications for murder or treason, though magistrates can hear bail applications for murder at the end of a committal. The commission believes this artificial distinction, which trusts magistrates to hear bail for murder at some times but not others, should be removed.

Bail justices should also be able to hear bail applications for murder—they will provide a review of the accused person's custody and are likely to authorise continued detention until the person can be taken before a court. We make

Executive Summary

recommendations about application of the ‘new facts and circumstances rule’ which will protect an accused person’s right to make further application to the court even if they were legally represented in a hearing before a bail justice. It will also allow accused people to be represented in an application before the court made shortly after arrest.

We recommend bail justices be empowered under the new Act to authorise continued detention of an accused person, rather than remand. We also recommend:

- a new administrative framework for bail justices
- professionalised training
- a central service for deployment of bail justices
- adherence to a code of conduct and requirement to act impartially.

The changes aim to make the bail justice system more efficient and accountable.

Police are the gatekeepers of the bail system—they make the decision about whether to charge or summons accused people. Bail is only in issue when a person is charged with an offence. We recommend Victoria Police develops and publishes a clear policy setting out the criteria used to determine whether to proceed by arrest and charge or summons. We recommend an extension to police powers to determine bail, but checks on their power to bail the same person multiple times and on bail conditions they can impose. Police also need to improve the way they give bail information to victims.

CONSIDERATION OF PARTICULAR GROUPS

Marginalised and disadvantaged people are over-represented in our criminal justice system. This includes Indigenous Australians, people with cognitive impairment, people with mental illness, and people with drug addictions. We look at the particular issues affecting these groups, and make what recommendations are possible given the limits of this review. Although we cannot make recommendations to address people’s disadvantage, we can strive to ensure that disadvantage is not compounded by the bail system. In particular, we recognise the disadvantage faced by Indigenous Australians in the criminal justice system.

We review the support programs that offer alternatives to custodial remand for accused people. We recommend culturally appropriate support for Indigenous Australians. Recommendations also address the lack of accommodation options for accused people on bail, which is a continuing problem. We also recommend decriminalisation of public drunkenness and the introduction of a civil response, including sobering-up centres. This offence has a disproportionate impact on Indigenous Australians and other disadvantaged people and its decriminalisation has been recommended in many reports.

We recommend children be given special consideration in the bail process, as they are in all other stages in the criminal justice system. The Children, Youth and Families Act creates a special regime for the treatment of children in the criminal justice system, and contains provisions about bail. However, in most respects the Bail Act applies to children as if they were adults. We recommend specific provisions in the new Bail Act about bail for children and suitable conditions. For young people (18–20), we recommend courts have the power to order remand to a Youth Justice Centre or Youth Unit in a prison.

Recommendations

1. *The Bail Act 1977* should be repealed. The Act and its Regulations should be rewritten and replaced by a new principal Act and new regulations which incorporate the recommendations in this report. All provisions dealing with bail should be in this Act.
2. The new Bail Act and Regulations should be written in plain English. The Act should be drafted with its audience in mind, especially the needs of lay decision makers.
3. The forms contained in the Bail Regulations 2003 should be redrafted in plain English, taking into account that a significant proportion of people who appear before the court have intellectual disabilities, poor literacy, or English is not their first language. The forms should contain the contact details of the registrar at the court to which the accused is bailed and support services within the surrounding area of the court to which the accused is bailed.
4. The new Bail Act should use the phrase 'remand in custody' when bail is refused, and 'bailed to appear' when bail is granted.
5. The new Bail Act should be drafted to refer to 'court', 'police', 'bail justice', and 'registrar' where appropriate to make the powers of each decision maker under the Act clear. Where different courts have different powers, individual courts should also be referred to.
6. The term 'warrant of commitment' should not be used in the new Bail Act.
7. The new Bail Act should refer to modern forms of communication in line with other Victorian legislation.
8. Section 4(2)(b) of the *Bail Act 1977* should not be re-enacted in the new Bail Act.
9. The Bail Act should contain a purposes provision. The purposes of the Bail Act should be to:
 - have within one Act all general provisions dealing with bail
 - establish processes to ensure the prompt resolution of bail after arrest
 - ensure bail hearings are conducted in a fair, open and accountable manner
 - ensure bail is not used to punish accused people
 - limit or prevent offending by accused people while on bail by providing for the imposition of conditions of bail commensurate with any such risk
 - promote transparency in decision making
 - ensure the safety of the community, including alleged victims and witnesses
 - ensure the bail system does not perpetuate the historical disadvantage faced by Indigenous Australians in their contact with the criminal justice system
 - promote public understanding of bail practices and procedures
 - reform the bail laws of Victoria.
10. The new Bail Act and regulations should comply with not only the provisions but the intention of the *Charter of Human Rights and Responsibilities Act 2006* and the *Victims' Charter Act 2006*.
11. The Department of Justice should establish an office of crime statistics and research.
12. Bail decisions should be made on the basis of unacceptable risk. There should be no presumption against bail for any offence in the new Bail Act.
13. The unacceptable risk provision in the new Bail Act should provide:

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

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

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

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

Recommendations

14. Victoria Police should develop and publish a clear policy setting out the criteria used to determine whether to proceed by arrest or summons.
15. The new Bail Act should require that on charging a person with an offence, police must check whether the person is already on bail. If so, the police may grant bail when it is impracticable to take the accused before a court.
16. Victoria Police training and procedures for bail should promote referral of accused people to support services such as the Court Integrated Services Program (CISP) where referral would be appropriate.
17. The new Bail Act should stipulate that police may grant bail to an accused charged with any offence.
18. Section 464A of the *Crimes Act 1958* should be amended by adding the following:

In a recorded interview, interviewing officers must inform suspects before any questioning commences that suspects should not expect that their exercise of a free choice to answer questions put to them during interview will favourably affect their prospects of obtaining bail in the event that they are charged.
19. The section in the new Bail Act providing for police power to grant bail should contain a note referring to the amended section 464A of the *Crimes Act 1958*.
20. Victoria Police bail guidelines should state that a bail decision by police can only be made by 'a member of the police force of or above the rank of sergeant or for the time being in charge of a police station'.
21. Victoria Police should develop a clear, concise plain English guide that sets out the powers police have under the new Bail Act and the appropriate procedures to be adopted in a bail application. This guide should be available to all officers who make bail decisions.
22. The importance of up-to-date bail information should be considered by Victoria Police in the current upgrade of the Law Enforcement Assistance Program (LEAP), and by the Department of Justice in the development of E*Justice. The design of these systems should ensure that bail information is current, and that bail status is flagged if an accused is already on bail when charged with another offence.
23. To assist the decision maker to determine the grant of bail, Victoria Police should ensure that the record of prior conviction history includes dates of the commission of offences.
24. Victoria Police should improve its procedures for the collection of criminal record data. The Department of Justice should consider commissioning an audit of the quality of current criminal record holdings.
25. The database that replaces LEAP should record:
 - the application for and execution of all warrants by police
 - the date and time of execution of a warrant
 - whether the subject of a warrant is an Indigenous Australian.
26. Victoria Police should develop a central warrants database accessible to individuals named in the warrants, or their legal representatives, with sufficient information to identify and locate warrants, including:
 - the type of warrant
 - the date of issue
 - the issuing officer
 - whether the subject of the warrant is an Indigenous Australian.
27. Victoria Police should ensure the information contained in the new LEAP database and any new warrants register is used only for the purpose for which it was collected.
28. Victoria Police and the Victorian Aboriginal Legal Service (VALS) should formally agree that Victoria Police will notify VALS of any outstanding arrest warrants for Indigenous Australians in cases where it is practicable and reasonable to do so.
29. Victoria Police should formally agree with Victoria Legal Aid that Victoria Police will notify the Grants Division of Victoria Legal Aid of any outstanding arrest warrants for Indigenous Australians, in cases where it is practicable and reasonable to do so.
30. Victoria Legal Aid should institute a procedure for the Grants Division to check for outstanding warrants when assessing an application for a grant of aid to an Indigenous Australian.
31. The agreements between Victoria Police, VALS and Victoria Legal Aid referred to in recommendations 28 and 29 should be subject to similar performance monitoring as the agreement between Victoria Police and VALS about notification of arrest.
32. The new Bail Act should allow the court to issue an arrest warrant upon revocation of bail if the accused has failed to attend without reasonable excuse, provided the proper notice has been served. This should apply even when the accused was previously bailed to a future date.
33. The new Bail Act should allow police to arrest an accused on bail who the police have reasonable grounds to believe is breaking or has broken bail conditions, or is preparing to abscond.

34. The new Bail Act should provide that on the issue of a warrant to arrest after failure to appear, the accused be brought back before the court that issued the warrant, unless it is not in the interests of justice to do so.
35. The *Magistrates' Court Act 1989* should be amended to clarify that if an accused is brought back before a bail justice or magistrate upon execution of an endorsed warrant, the bail justice or magistrate is not bound by that endorsement.
36. Police, bail justices and magistrates should receive training about the effect of endorsements on warrants to arrest.
37. On-the-spot bail should not be introduced in Victoria.
38. Section 10(2) of the *Victims' Charter Act 2006* should be amended to replace the reference to 'family members of the victim' with 'any other person affected by the grant of bail' and to remove the reference to 'the attitude of the victim towards the granting of bail'.
39. Section 10(2) of the *Victims' Charter Act 2006* should be amended to provide that where reasonably practicable, police are obliged to inform the victim of a crime against the person that the bail decision maker will take into account the victim's safety and welfare, where relevant, when determining the grant of bail.
40. The *Victims' Charter Act 2006* should be amended to provide that as soon as reasonably practicable, victims of crimes against the person should be informed of the outcome of bail hearings and any bail conditions designed to protect them or their families. For all other offences, victims should be informed they may request this information.
41. Prosecuting agencies are responsible under section 10(1) of the *Victims' Charter Act 2006* for informing victims of bail outcomes. The mechanics of how this is to occur should be resolved by prosecuting agencies and the Victims Support Agency as soon as possible and a system put in place to ensure victims are informed without delay.
42. The bail justice system should be retained and reformed in accordance with the recommendations in this report. The Department of Justice should commission an independent review of the bail justice program in three years to determine whether it is working well, or whether another system should be instituted. In the long term, an after-hours bail court should be considered.
43. The bail justice provisions in the *Magistrates' Court Act 1989* (sections 120–124) should be repealed and re-enacted in the new Bail Act in an amended form in accordance with the recommendations in this report.
44. The Secretary of the Department of Justice should have responsibility for the administration of the bail justice system.
45. Bail justices should be deployed to bail hearings and interim accommodation hearings through a centralised call-out system, developed in consultation with bail justices, Victoria Police and the Department of Human Services (DHS). The system must be designed to be adaptable to the different needs of different locations and should be administered by the Secretary, Department of Justice.
46. The Department of Justice should institute a reimbursement system for bail justices based on the model used by the Office of the Public Advocate to reimburse Independent Third Persons. Reimbursement should only be made to bail justices who conduct one or more hearings throughout the year.
47. The new Bail Act should limit bail justices' decision-making role to 'granting bail' and 'authorising continued detention' of the accused by the police.
48. The new Bail Act should stipulate that bail justices may only authorise the continued detention of the accused to the next business day. If the local court is not sitting that day, the accused must be taken to a court in that region that is sitting.
49. The new Bail Act should provide that bail justices can grant bail to or authorise continued detention of an accused charged with any offence.
50. The Department of Justice should continue to encourage diversity of bail justices by promoting the bail justice program among women, younger adults, and people of diverse cultural backgrounds.
51. Sections 120 and 121 of the *Magistrates' Court Act* should be repealed and re-enacted in the new Bail Act with the following additions:
 - Section 120 should be amended so that people are not eligible for appointment as a bail justice unless they have satisfactorily completed a course of accreditation prescribed by the Secretary, Department of Justice.
 - Section 121(3) should be amended so that people who are a bail justice by virtue of being a prescribed office holder may not act as a bail justice unless they have satisfactorily completed a course of accreditation prescribed by the Secretary, Department of Justice.

Recommendations

52. The bail justice accreditation course should be designed to ensure bail justices are adequately trained in the legal, procedural, ethical and social context issues involved in bail applications. This must include Indigenous awareness training.
53. The course should be provided at no cost to bail justices.
54. The Department of Justice should provide regular information to bail justices. Material should be available electronically and remain available on a website accessible by bail justices so new appointees can access past material.
55. The new Bail Act should provide that:
 - Bail justice appointments be limited to a fixed tenure of three years, with the potential for re-appointment.
 - To be eligible for re-appointment, bail justices must have:
 - satisfactorily completed a re-accreditation course
 - not unreasonably been unavailable to perform their duties when rostered, or unreasonably been unavailable for the roster.

Beyond these two eligibility criteria, re-appointment should be at the discretion of the Attorney-General.
56. Re-accreditation courses should be provided by the Department of Justice at no cost to bail justices.
57. The new Bail Act should require bail justices to attend training as directed by the Secretary, Department of Justice when reasonably required to do so.
58. The new Bail Act should retain the current age limits for appointment and retirement of bail justices: appointment up to the age of 65 years and retirement at 70 years of age.
59. The new Bail Act should stipulate that a person who was a bail justice immediately before the new legislation comes into force should continue to be a bail justice under the new legislation as if the person had been appointed under the new legislation and subject to the new terms and conditions of that legislation.
60. A detailed code of conduct should be introduced for bail justices—to be included as either a schedule to the new Bail Act or as regulations. The Bail Act must state that bail justices must adhere to the code of conduct.
61. The code of conduct should be based on the 2004 draft code produced by the Department of Justice and the recommendations in this report, and should include the following:
 - bail justices are required to act impartially, with independence and integrity in the performance of their role, and appear to be doing so
 - bail justices must conduct themselves appropriately in private and publicly
 - bail justices must not be unreasonably unavailable at the times for which they are rostered
 - bail justices must limit contact with the media about their bail justice duties to the provision of their decisions and reasons
 - bail justices must not arrange or accept transport by police to the police station
 - bail justices must not discuss the application with police before the hearing.
62. The provisions in the *Magistrates' Court Act 1989* regarding the removal of bail justices should be repealed.
63. The removal provisions should be enacted in the new Bail Act as follows:
 - 1) If the Secretary of the Department of Justice is satisfied that a bail justice has breached the code of conduct the Secretary may suspend the bail justice from office.
 - 2) As soon as practicable after the Secretary suspends a bail justice, the Secretary may, depending on the nature of the seriousness of the breach, either:
 - a) direct the bail justice to engage in counselling, training or re-accreditation; or
 - b) nominate a person whom the Attorney-General must appoint to undertake an independent investigation into the bail justice's conduct.
 - 3) If the Secretary makes a direction under 2(a), the Secretary must lift the suspension once the bail justice has satisfactorily completed the counselling, training or re-accreditation.
 - 4) If the Secretary makes a direction under 2(a) and the bail justice without valid excuse does not comply either by not attending or not engaging in counselling, training or re-accreditation, this constitutes grounds for removal.
 - 5) A person appointed under 2(b) must:
 - a) investigate the bail justice's conduct; and
 - b) report to the Attorney-General on the investigation; and
 - c) give a copy of the report to the bail justice and the Secretary.
 - 6) The report under (5)(b) may include a recommendation that the bail justice be removed from office.
 - 7) After receiving a report under (5)(b) recommending removal, the Attorney-General, after consulting the Secretary, may recommend to the Governor-in-Council that the bail justice be removed from office.

- 8) The person who conducted the investigation and the Attorney-General may only recommend that a bail justice be removed on the ground that the bail justice is not a fit and proper person to remain in the office because of dereliction of duty or proved misbehaviour or incapacity which includes, but is not limited to:
 - a) the bail justice is guilty of an indictable offence or of an offence which, if committed in Victoria, would be an indictable offence; or
 - b) the bail justice is mentally or physically incapable of carrying out satisfactorily the duties of his or her office; or
 - c) the bail justice is incompetent or is in neglect of duty; or
 - d) the bail justice has engaged in unlawful or improper conduct in the performance of the duties of his or her office; or
 - e) the bail justice has committed a serious, wilful or sustained breach of the code of conduct.
- 9) The Attorney-General must not make a recommendation under (7) unless the bail justice has been given a reasonable opportunity to make written and oral submissions to the person who conducted the investigation and the Secretary.
- 10) In making a recommendation under (7), the Attorney-General is entitled to rely on any findings contained in the report under (5)(b).
- 11) If the Attorney-General decides not to make a recommendation under (7):
 - a) the Attorney-General must inform the Secretary as soon as practicable after receiving the report under (5)(b); and
 - b) the Secretary must lift the suspension.
64. Detailed guidelines about how to conduct a bail hearing should be created and issued to all bail justices. They should be based on the Royal Victorian Association of Honorary Justices Record of Hearing form.
65. The guidelines should state that on authorising continued detention of an accused the bail justice must enquire about the accused's health and wellbeing, note any custody management issues on the remand warrant and notify the custody sergeant.
66. The Code of Conduct should state that guidelines for bail justice hearings should generally be followed.
67. The Department of Justice should develop and implement a policy for secure storage and disposal of notes and records of hearing produced by bail justices as a matter of priority.
68. Bail justice hearings should be conducted in a space which is as separate from the ordinary operation of the police station as possible. All new and renovated police stations should include a room that can be accessed from both the public and secure areas which can be used for bail justice hearings.
69. The Victoria Police policy on the presence of the public or media at bail hearings should be amended. As a general rule interested members of the public and the media should have access to bail justice hearings. Wherever possible hearings should take place in a part of the station easily accessible to the public and arrangements should be made by police to facilitate attendance if requested. Public and media access to the hearing should only be refused if their safety will be endangered or they pose a security risk. As hearings occur in police stations, the decision about whether to admit members of the public or media must remain with the officer-in-charge.
70. The Department of Justice and Victoria Police should institute a policy of no time limit on when the police may call a bail justice to attend a bail hearing outside of court hours. This should be monitored to ensure it is being adhered to by police and bail justices. The Victoria Police Manual should be amended to include consideration of the needs of the accused person in the decision about whether to call a bail justice.
71. The new Bail Act should contain a note to the unacceptable risk provisions advising that some Commonwealth offence provisions stipulate a reverse onus for bail and that they continue to apply.
72. The new Bail Act should empower magistrates to grant bail to an accused charged with any offence.
73. The new Bail Act should contain a provision about the admissibility of confessions or admissions volunteered during a bail application that are not elicited through examination or cross-examination. The general rule should be against admissibility.
74. Bail decision makers should record written reasons for the grant or refusal of bail in all cases and a copy should be provided to the accused and the prosecution. In the Magistrates' Court this requirement should be satisfied by the use of a 'tick-a-box' form, designed with space for any other reasons to be briefly noted in writing.
75. The new Bail Act should provide that failure by a decision maker to record reasons when required to do so does not invalidate the bail decision.
76. The chiefs of each court should consider issuing a practice direction stipulating that an accused is not to be bailed or remanded to a date to be fixed. If the matter cannot proceed on the date stipulated, there should be a bail extension hearing, with the accused not required to attend unless the prosecution opposes extension or the accused is seeking a bail variation.

Recommendations

77. Generally the new facts or circumstances rule should continue to apply. However, the new Bail Act should stipulate that an accused may be represented at a bail application made within two court-sitting days after arrest without having to show new facts or circumstances on a subsequent application.
78. The new Bail Act should continue to allow unrepresented accused people to apply for bail without restriction.
79. The new Bail Act should specifically refer to the right of accused people to make further application for bail to the Supreme Court.
80. The new Bail Act should provide that an accused and the Director of Public Prosecutions (DPP) each have the right to appeal the decision of a single judge of the Supreme Court on a director's appeal to the Court of Appeal.
81. The new Bail Act should clarify that to lodge a director's appeal, the DPP must be satisfied that it is in the public interest and the:
 - amount of any surety is inadequate;
 - conditions of bail are insufficient; or
 - bail decision contravenes or fails to comply with the Bail Act.
82. Sections 18 and 18A of the Bail Act should be redrafted in the new Bail Act to clearly set out the basis for an application under each section and the role of the court. The headings of these sections should clearly express their contents.
83. Section 18 currently covers further applications for bail, variation of bail, revocation of bail, appeals by the DPP from refusals to revoke bail, and notification to sureties. These matters should be separated into different sections in the new Bail Act and given clear headings.
84. The sections in the new Bail Act covering the matters in section 18 of the Bail Act (except for appeals by the DPP in section 18(6A)) should express in plain English that applications made pursuant to those sections are hearings *de novo*.
85. The new Bail Act should make it clear that once a director's appeal is heard and an order is made quashing the original order, the court's consideration of bail is a hearing *de novo*.
86. The processes for bail pending appeal and bail pending retrial should be clarified and included in the new Bail Act. The relevant sections of the *Crimes Act 1958* should be repealed accordingly.
87. An application for bail pending appeal should be heard by a single judge of the Court of Appeal. Rule 2.29(3) of the *Supreme Court (Criminal Procedure) Rules 1998* should be amended accordingly and a practice note issued to this effect. The right to appeal to the full court (three judges) should be retained.
88. When the Court of Appeal allows an appeal and orders a new trial, the court should proceed to determine bail provided that the material before the court is sufficient to make that decision. The application should be heard by a single judge of the bench which allowed the appeal immediately or as soon as practicable after the appeal is determined. If the material is not sufficient to make a decision, the matter should be remitted to the court where the applicant is to be retried.
89. The new Bail Act should allow defence-initiated variations of minor bail conditions to be made by consent with each party (applicant and respondent) filing a statement with the court. If there are any sureties, the police informant should be responsible for contacting them to obtain their consent to the variation. In the informant's statement filed with the court, the informant should state that he or she has contacted any sureties and that they consent to the variation. The court can make the variation on the papers in chambers. The variation will come into effect at the time the accused (and any surety) attends at the registry and signs the new undertaking. If the magistrate does not think the variation is appropriate, it will be listed for hearing in court.
90. The new Bail Act should provide that bail may be extended when the accused is not present in court for 'sufficient cause'.
91. The new Bail Act should state that an accused is not guilty of the offence of failure to answer bail if the accused appeared at another court, so long as that appearance was by prior arrangement with the court to which the accused was bailed.
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
 - with a deposit or bail guarantee condition.
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.
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.
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.
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.
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.
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.
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.
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.
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.
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.

Recommendations

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.
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.
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.
118. The new Bail Act should stipulate that the right of a bail guarantor to apprehend the accused is abolished.
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.
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.
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.
123. Section 346 of the *Children, Youth and Families Act 2005* (CYFA) should be amended so that the requirements of subsections 7 and 8 also apply to hearings before bail justices.
124. Section 345 of the CYFA should be amended. The heading should be amended to read 'Children to be proceeded against by summons'. The section should be amended to provide for a presumption in favour of proceeding against children by summons rather than arrest and charge, regardless of whether the proceedings are commenced by police directly charging the accused, or by filing a charge with the court as currently provided for in the section.
125. The following addition should be made to section 345 of the CYFA: If it appears to a magistrate that the informant has used the arrest and charge procedure inappropriately against a child, the magistrate should question the informant on oath as to why the child was not summonsed.
126. Victoria Police should develop a clear, published policy detailing the criteria used to determine whether to proceed against children by caution, arrest or summons. The policy should contain a preference for the use of caution where possible, and summons except where arrest is justified. The policy should take into account the recommendations of the Royal Commission into Aboriginal Deaths in Custody relating to arrest of children, particularly Recommendation 239.
127. The provisions of the CYFA that apply to bail should be moved to the Bail Act, and the CYFA should contain a note referring to the provisions in the Bail Act.

128. The Bail Act should contain a provision based on section 362 of the CYFA that requires a decision maker to consider child-specific factors when making a bail decision for a child. In addition to the factors that must be weighed up by a decision maker under the unacceptable risk test, a decision maker should have regard to:
- the need to consider all other options before remanding the child in custody;
 - the need to strengthen and preserve the relationship between the child and the child's family;
 - the desirability of allowing the child to live at home;
 - the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;
 - the need to minimise the stigma to the child resulting from a court determination; and
 - the likely sentence should the child be found guilty.
129. The legislative provisions about bail conditions recommended in Chapter 7 should apply to children as well as adults. However, the Bail Act should contain a specific provision for the imposition of conditions on children. When considering the bail conditions to be imposed on a child, a decision maker must consider:
- the need to strengthen and preserve the relationship between the child and the child's family;
 - the desirability of allowing the child to live at home;
 - the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
 - the need to minimise the stigma to the child resulting from a court determination.
130. A child-specific bail support program should be established in the Children's Court. It should be developed and administered by CISP, but funded by DHS. Protocols for information sharing should be put in place between DHS and CISP to ensure an integrated service for children. As with the service in the Magistrates' Court, culturally appropriate support should be provided for Indigenous children.
131. There should be no change to the current legislation regarding undertakings by parents or another person.
132. The new Bail Act should provide magistrates and judges with the power to remand a young person (18–20) to either a Youth Justice Centre (YJC) or a Youth Unit within an adult correctional facility following an assessment by Youth Justice or Corrections Victoria. The placement decision should reside with the decision maker, taking into account the assessment. If a young person is assessed as suitable for placement in either facility and the decision maker remands the young person elsewhere, the decision maker should be required to provide reasons for that decision.
133. Youth Justice and Corrections Victoria should develop and distribute clear criteria for the assessment of a young person's suitability to be remanded to a YJC or Youth Unit.
134. The Bail Act should include an administrative power allowing for the transfer of young people to an adult facility if they are subsequently found to be unsuitable for placement in a YJC, similar to that in section 469 of the CYFA.
135. To ensure the Aboriginal Community Justice Panel (ACJP) program is able to provide an effective service to Indigenous Australian accused people Victoria Police and the Department of Justice should:
- establish additional ACJPs
 - ensure each ACJP has at least four active members
 - provide further training to ACJP members
 - provide additional funding to the ACJP program.
136. The Victorian Aboriginal Legal Service should receive further funding to operate the Client Service Officer (CSO) program and to provide further training to CSOs, particularly on the operation of the bail system.
137. The Department of Justice should ensure that there is an Aboriginal Liaison Officer (ALO) or a Koori Court Officer in all court regions.
138. Koori Court Officers should also fulfil the role of an ALO in relation to bail. This addition should be monitored by the Department of Justice to ensure the workload is sustainable and the roles do not conflict. If the workload is not sustainable or the roles conflict, separate ALOs should be employed.
139. The Indigenous Issues Unit of the Department of Justice and DHS should work together to provide more accommodation options for Indigenous Australians on bail throughout Victoria. The accommodation should be culturally appropriate.
140. The Indigenous Issues Unit of the Department of Justice and DHS should work together to develop more drug and alcohol programs for Indigenous Australians on bail. The programs should be culturally appropriate.
141. The Indigenous Issues Unit of the Department of Justice should establish a mentoring program for Indigenous Australians on bail based on the Djarmbi–Tiddas Mentoring Program model.
142. Training for magistrates, police and bail justices on Indigenous issues should cover specific issues facing Indigenous women and their specific support needs.
143. The new Bail Act should provide that when making a decision involving an Indigenous Australian, bail decision makers must take into account the needs of the accused as a member of the Indigenous community.

Recommendations

144. The new Bail Act should contain a note to the Indigenous-specific provisions referring to the Commonwealth legislation which deals with the relevance of customary law and cultural practice to the determination of bail for accused people charged with Commonwealth offences.
145. The police should be obliged to investigate whether a person who they arrest is a primary carer for children or other dependants. To ensure that police fulfil this obligation, Victoria Police should develop a primary carer checklist similar to the reception assessment form used at the Dame Phyllis Frost Centre.
146. If a detained person is a primary carer for children, the police should be obliged to ensure that appropriate care arrangements are in place for the children. If appropriate care arrangements are not in place, the police should be obliged to contact DHS to ensure such arrangements are made. Victoria Police should develop a protocol with DHS to this effect.
147. Public drunkenness should be decriminalised as an offence in line with the recommendation of the 2001 Parliamentary Inquiry into Public Drunkenness.
148. The Department of Justice and the DHS should consider allocating more crisis and longer term accommodation for accused people on bail.
149. DHS should provide more supported accommodation for accused people on bail who have multiple needs.
150. DHS should review the number of places available in residential drug rehabilitation services to ensure that it is meeting demand.
151. Police, criminal lawyers, bail justices, magistrates and judges should all receive ongoing training about working with cognitively impaired accused people, victims and witnesses.
152. If an Independent Third Person (ITP) or other person attends to assist an accused at the record of police interview, the informant should immediately flag this on LEAP to ensure that an ITP or other person is present whenever the accused is interviewed by police in future.
153. The Office of the Public Advocate should provide ITPs for accused people with cognitive impairment at bail justice hearings to assist them to understand the bail hearing process and the conditions of bail, or the reasons for remand.
154. There should be clear protocols between the Office of the Public Advocate, Victoria Police and the Department of Justice as to the role of ITPs at bail justice hearings. Training for ITPs, police and bail justices should ensure they are aware of the protocols.
155. DHS should develop and fund a service like the Central After Hours Assessment and Bail Placement Service for people with a cognitive impairment who are arrested by police after hours.
156. Victoria Police and DHS should review why section 16(3) of the *Mental Health Act 1986* is not being applied to transfer accused people to a mental health facility.
157. The Attorney-General should consider establishing a review which identifies the issues confronted by people with cognitive impairment in the criminal justice system and makes recommendations for legal and procedural changes.

Chapter 1

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Chapter 1

Introduction

SCOPE OF REPORT

This is the commission's Final Report on the review of the *Bail Act 1977* and its operation. The Attorney-General, the Honourable Rob Hulls, gave the commission its terms of reference in November 2004 and the review began in March 2005.

This report contains the commission's recommendations to government for procedural, administrative and legislative changes to ensure the bail system functions simply, clearly and fairly. In keeping with our terms of reference, this review has not been confined to the Bail Act but has also looked at the wider bail system in Victoria, including the bail decision makers, bail support programs, and issues for particular groups. The full terms of reference are on p5.

In June 2006 the Attorney-General requested the commission consider two additional matters. On 6 June he requested we consider how possible preparatory offences would be treated under any new Bail Act. On 13 June he asked us to consider the adequacy of the penalty for failing to meet a surety. The terms of reference do not ask us to consider particular offences or penalties, we have therefore not done so apart from these two requests.

PREVIOUS REVIEWS

The Bail Act came into effect in September 1977. It has been amended many times to remedy particular problems or implement new policies. However, it has not been comprehensively updated or modernised and the drafting style and structure are much as they were in 1977.

The Bail Act was reviewed by the former Law Reform Commission of Victoria (LRCV) in 1992. The review was partly completed, with one report produced, when the LRCV was abolished. The recommendations from the first report, a review of the Bail Act, were never implemented. The second part of the review, to look at the operation of the Act within the criminal justice system, was not undertaken. Many of the issues raised in the LRCV report are still relevant today and are considered in this report.

One of the commission's functions is to undertake minor law reform projects suggested by the community. In 2002 we produced a community law reform report on bail. The Victorian Aboriginal Legal Service (VALS) suggested the commission review section 4(2)(c) of the Bail Act, which required decision makers to refuse bail for accused people who were in custody for failing to answer bail, unless satisfied that the failure was due to causes beyond their control. This provision was having a disproportionate impact on Indigenous Australians and other people from disadvantaged groups. Our report recommended the Victorian Government repeal section 4(2)(c). The provision was repealed on 18 May 2004. This is discussed in chapter 10.

VICTORIAN CONTEXT

There has been significant adoption of *therapeutic jurisprudence* in criminal justice in Victoria over the past decade, initially driven by the Magistrates' Court. This has resulted in the establishment of diversionary programs within the Magistrates' Court and, more recently, specialist courts such as the Koori Court and Drug Court. Some diversionary programs are instituted as part of an accused's bail, such as the Court Referral and Evaluation for Drug Treatment (CREDIT) Bail Support program. Whether utilising the CREDIT program or not, decision makers tend to impose bail conditions that encourage accused people to obtain support and treatment for drug and alcohol use, mental illness and behavioural problems.

In 2006 the government committed to a human rights charter with which all new legislation must comply, including any new Bail Act. *The Charter of Human Rights and Responsibilities Act 2006* enshrines the presumption of innocence and the right to liberty. It states that accused people must not be 'automatically detained in custody', but may be released subject to a guarantee they will appear for trial.¹ The charter is discussed throughout this report.

Also in 2006, the government introduced a charter of rights for victims. *The Victims' Charter Act 2006* aims to direct the criminal justice system's response to victims. It recommends prosecuting agencies provide information to victims about bail on request, including the outcome of any bail application and special conditions to protect the victim. The charter is discussed in Chapter 4. These measures aim to support and assist vulnerable people, who may be victims or defendants or both, as well as outlining basic rights for the entire community.

A number of high profile criminal cases have drawn attention to bail. Between 1998 and 2006, nine 'underworld' figures were murdered while on bail. Several underworld figures suspected of involvement in those murders were on bail at the time the murders occurred. Further attention was drawn to bail when gangland identity Tony Mokbel absconded at the conclusion of his trial over importation of a traffickable quantity of cocaine in March 2006. This has led to calls by Victoria Police for a more prescriptive approach to the consideration of bail.

OUR APPROACH

Under the current Bail Act and Human Rights Charter, accused people have a general entitlement to bail and the presumption of innocence. In keeping with these entitlements, the commission believes focusing on 'risk' when considering bail is the best way to determine whether release of a particular offender is appropriate or not.

Good policy should be informed by the broad range of cases that come before our justice system, not one particular case or type of case. An effective Bail Act must be able to respond to the diverse circumstances of accused people so decision makers can determine whether they present an unacceptable risk if released. It should therefore provide an effective response to everyone from the intellectually disabled young person to high profile organised crime figures.

Some people who participated in this review suggested a prescriptive approach to bail. This would focus on the alleged offence and rely on complex formulas to determine risk. The commission believes a prescriptive approach would not achieve the breadth of response needed for the Bail Act to work effectively and that it is inappropriate when an accused is yet to be convicted. Prescriptive legislation is inevitably complex, which is undesirable for legislation that is predominantly applied by people without legal training. Instead, we have focused on simplifying the Act to make it more accessible for the lay decision makers who are its main users, police and bail justices, and easier to understand for those affected by it. These issues are discussed further in Chapter 3.

It is impossible to talk about bail without also considering the related issues of the decision to arrest or summons, and remand. Bail is only an issue for about half of cases before the court. This is because police have the discretion about whether to arrest, charge and bail accused people, or issue them with a summons to attend court.² This decision is not guided by formal police policy nor is it dependent on the offence. The commission thinks there should be greater transparency in this decision, including guidelines about when charge and bail or summons should be used. This is discussed in Chapter 4.

This review does not comprehensively consider remand issues. In our Consultation Paper we provided an overview that included data on bail and remand patterns. In this report we provide updated information on remand trends and briefly discuss other issues if they are relevant to bail decisions. The characteristics of accused people who are remanded do not appear to support its increasing use.³ The Victorian Ombudsman released a report in July 2006, *Conditions for Persons in Custody*, which looks at overcrowding and other problems caused by the increased incarceration rate in Victoria.

We also look at the impact of the bail system on particular groups—Indigenous Australians, young people, women, people experiencing homelessness and people with cognitive impairments. Although we believe there should be one simple test for bail, consideration for particularly disadvantaged groups can form part of that test.

1 *Charter of Human Rights and Responsibilities Act 2006* s 21(6).

2. For more detail see Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 19–22.

3 A Criminology Research Council study, *Factors that Influence Remand in Custody*, was considered in detail in Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 11–13.

Chapter 1

Introduction

OUR PROCESS

CONSULTATION PAPER

Between April and July 2005, the commission consulted widely with people who come into contact with the bail system to assess the need for reform. Forty-nine meetings were held with individuals and organisations, including police, bail justices, courts, defence and prosecution lawyers, bail service providers, and victims' agencies. As is generally the case with law reform, it is important to examine the processes that surround legislation as well as the legislation itself.

In November 2005 the commission released a Consultation Paper that drew on initial consultations and other extensive research. The paper asked 86 questions and invited submissions—48 were received.

VICTIMS BOOKLET

When the Consultation Paper was released, we also released a booklet seeking the views of victims of crime about bail law. It provided information about bail law generally, and on particular aspects that affect victims of crime. The booklet contained a few questions about issues such as: how victims' views are represented at bail hearings; provision of information about bail to victims; whether bail should be harder to get for some crimes; and what victims thought of the Victims' Charter, which was in draft at that time.

The booklet was distributed by the Victims Support Agency through its network of agencies that provide Victims Assistance and Counselling Programs (VACPs). The agencies were requested to distribute the booklets to victims. Three submissions were received from VACP agencies, but none from victims themselves.

ADDITIONAL TERMS OF REFERENCE

We received the additional terms of reference after our Consultation Paper was released. We wrote to everyone who had made a submission to the paper to seek their views on the penalty for failing to meet surety. We sent information about the current law, Justice Gillard's remarks in *R v Mokbel and Mokbel* [2006], other cases of failing to meet surety, and legislation in other states.⁴ We received 18 further submissions on this issue.

We did not seek submissions on whether there should be a presumption against bail for the proposed preparatory offence for armed robbery. Our approach to the presumptions against bail and the factors we considered in making recommendations in this area are discussed in Chapter 3.

CONSULTATIVE COMMITTEE

The commission established a consultative committee early on to provide advice about our approach and the direction of the review. The committee comprises individuals with relevant expertise and/or experience, including police, court workers, prosecutors, defence lawyers, bail support workers, a victim of crime, and an Indigenous bail worker. The committee met four times throughout the reference.

FURTHER CONSULTATION AND ROUNDTABLES

Between March and May 2006, the commission held roundtable discussions on some of the big issues considered by this reference: reform of the reverse onus provisions in the Bail Act; consideration of children in the Bail Act; reform to the bail justice system; Indigenous bail issues; and victims and bail. Criminal justice participants with expertise in these areas were invited to the roundtables. The discussions at the roundtables helped the commission develop the recommendations in this report but not all of those who participated in the roundtables agree with the commission's recommendations.

Throughout 2006 and in early 2007 we conducted 18 more consultations with individuals, agencies and government departments to gather information and refine recommendations.

4 The material is contained in Appendix 1.

Chapter 2

New Bail Act



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Chapter 2

New Bail Act

Legislation should be drafted so that people who are affected by it can understand it.

The most consistent theme to emerge during the course of our review was the need to redraft the Bail Act to simplify its language, improve its presentation and structure, and make it more accessible. Every submission the commission received to its Consultation Paper supported a Bail Act rewrite. In this chapter we consider the problems with these aspects of the Act and other reasons for rewriting it.

ACCESSIBILITY

The Bail Act is largely applied by decision makers who do not have formal legal qualifications: bail justices, police and to a lesser extent, sureties. Bail has a profound impact on the tens of thousands of people who are arrested every year and the many victims of crime affected by their actions. Despite this, it appears little regard was given to the needs of the Act's audience when it was drafted. The Act is littered with obstacles which make it difficult for the average reader to gain a clear overview of the bail system. In 1991 the LRCV reported on the 'great difficulty' that people have in understanding the Bail Act.¹

Legislation should be drafted so that people who are affected by it can understand it. This is especially so in the case of bail because the legislation includes many important legal rights and responsibilities. However, the current language and structure of the Bail Act does not have the layperson in mind. Laypeople reading the Act for the first time would be confronted with terms and concepts they would find largely unintelligible. They would be equally confused with the structure of the Act and how the various sections 'fit together'.

The current Bail Act is written in legalese yet those who use it the most will never have had any legal training. It would seem that it is high time for it to be re-written with it being kept in mind that its target audience will not be lawyers.²

Youthlaw, a specialist young people's legal centre, submitted that the Bail Act is 'complicated, overly legalistic and difficult to interpret'. The Commonwealth Director of Public Prosecutions argued: 'While some people may feel satisfied that they have mastered the complexities of the current Act, the current Act does not assist in making the law accessible to the general community'.

When legislation is difficult to comprehend, decision makers may develop customs and shortcuts that undermine the intention of the legislature. There is even a risk that provisions will be ignored. Many decision makers, especially police, do not regularly look at the Act. Instead, they rely on their existing knowledge of the system and collective knowledge of their peers. We are unable to say whether this is because of the nature of the Act or other reasons.

There are social and economic benefits to be obtained from an accessible Bail Act. Less time spent dealing with bail applications will free valuable court and police resources. Less time will also be spent finding provisions, cross-referencing, interpreting sections and consulting with peers. More importantly, an Act that is easier to use will also help accused people, victims and sureties exercise their rights.

Most drafters recognise the need to tailor laws to their audience, including the federal Office of Parliamentary Counsel:

If laws are hard to understand, they lead to administrative and legal costs, contempt of the law and criticism of our Office. Users of our laws are becoming increasingly impatient with their complexity. Further, if we put unnecessary difficulties in the way of our readers, we do them a great discourtesy.³

A new Bail Act will still assume its audience has existing knowledge of the area. It is not always possible to reduce words or phrases to their most basic level. However, it is possible to draft a Bail Act that is intelligible to a much wider audience and easier for lay decision makers, lawyers and judicial officers to use.

LANGUAGE

Simple language is essential for accessibility. The current Bail Act was drafted in 1977 when Victorian legislation was not drafted in a plain English style.⁴ As the LRCV noted, it was often the case that laws drafted in the 1970s were unnecessarily convoluted, ‘complexity and longwindedness reached their height in the 1970s ...’.⁵ Today’s Bail Act remains testament to the drafting style characteristic of the 1970s and 1980s.⁶ Much of the content of our Bail Act remains largely the same as it was when first enacted.⁷

The language used in legislation is important. The Bail Act conveys rights and responsibilities which have the potential to affect many people in our community. The use of ‘legalese’ and concepts that are difficult to understand allows only those with ‘inside knowledge’ to understand the law. Those whom the Act directly affects—accused people and victims—are given secondary status. If readers struggle to understand what a section of the Bail Act means, they are likely to lose the message behind a provision. This leads to frustration for the reader and eventual defeat.⁸

In our Consultation Paper we asked about concepts and words in the Bail Act.⁹ Several submissions addressed the words, phrases or concepts that required greater clarification, redrafting, amendment or deletion.¹⁰ Those that came up most often were ‘court’, ‘remand’, and ‘surety’. Problems with the term ‘surety’ are discussed in Chapter 8; ‘court’ and ‘remand’ are discussed in this chapter.

PRESENTATION AND STRUCTURE

Presentation and structure are equally important to the plain English style. Material should be presented in sequential manner that is logical to the reader and assists in absorbing information. Even if written simply, an Act may still be difficult to comprehend if its structure is not intuitive and orderly.

The organisation of the Bail Act has been the subject of particular criticism:¹¹

- Provisions that are conceptually related to one another are spread throughout the Act rather than grouped together.¹²
- Provisions are difficult to find due to a lack of headings and index and inaccurate headings.¹³
- Sections are too lengthy, requiring readers to revise material they have already read to understand it.¹⁴
- There is constant referencing to other legislation, particularly in section 4.
- Provisions do not follow the sequence of events that occur during a bail hearing.
- There is insufficient use of aids to assist the reader, such as headings, subheadings, examples, tables, the placement of information in *schedules* and cross-referencing to other sections or definitions.

Dr Chris Corns, a senior criminal law lecturer, raised the difficulties in teaching students in his submission. Part of his concern is the structure of the Act:

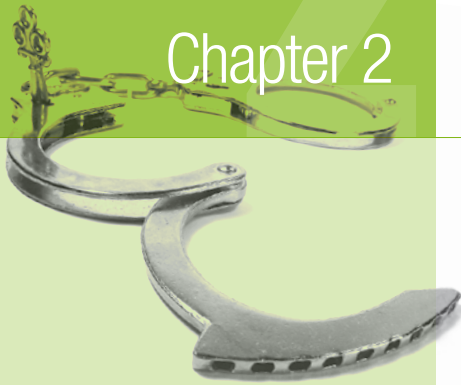
It has been my experience that the Victorian statutory law relating to bail is a difficult aspect of criminal procedure to teach, and for students to understand. This is because of the structure of the Bail Act and the way in which provisions have been interpreted. This is not simply an academic issue. It is important that law students have a clear and comprehensive grasp of the law relating to bail and remand, particularly those who go on to practice in the criminal jurisdiction.

This criticism is particularly important because the Act is taught widely, not only to law students, but to bail justices and police.

- 1 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Discussion Paper No 25 (1991) 27. In 1990 the Legal Aid Commission of Victoria drafted a report about what it considered to be a badly drafted and confusing Bail Act that lacked clearly defined procedures and definitions: Legal Aid Commission of Victoria, *Bail Report* (1990).
- 2 Submission 9.
- 3 Office of Parliamentary Counsel, *Plain English Manual* (undated) <www.opc.gov.au/about/html_docs/pem/chap_1.htm> at 2 February 2007.
- 4 The Victorian Office of the Chief Parliamentary Counsel now drafts legislation consistent with plain English principles: Office of the Chief Parliamentary Counsel, *The Legislative Process* (January 2007) <www.opc.vic.gov.au> at 28 February 2007.
- 5 Law Reform Commission of Victoria, *Access to the Law: The Structure and Format of Legislation*, Report No 33 (1990) 55.
- 6 The movement towards plain English drafting gained currency in Australia in the mid 1980s, following developments in the United States and England. In 1985 the LRCV was given a reference on plain English covering both legislation and other government documents: see *ibid*; Law Reform Commission of Victoria, *Legislation, Legal Rights and Plain English*, Discussion Paper No 1 (1986); Law Reform Commission of Victoria, *Plain English and the Law*, Report No 9 (1987).
- 7 Between November 1977 and February 2007 there were 35 Acts of Parliament that made amendments to the *Bail Act 1977*. None have made extensive changes to the Act’s contents. Section 4 has been subject to the majority of changes. The layout of the Act has also been changed with the inclusion of section headings (as opposed to marginal notes), a table of provisions and endnotes.
- 8 Robert Eagleson, *Writing in Plain English* (1994) 3–4.
- 9 Chapter 11.
- 10 Submissions 11, 14, 18, 23, 24, 29, 30, 32, 33, 38, 41, 45, 46.
- 11 Submissions 9, 11, 13, 17, 18, 21, 22, 23, 24, 29, 30, 32, 33, 38, 39, 41, 45, 46.
- 12 See, eg, *Bail Act 1977* ss 9(3A), 9(3B), 15(2), 27 all concern where and how to execute documents for bail.
- 13 See, eg, *Bail Act 1977* s 18 headed ‘Appeal against refusal of bail or conditions of bail’ which also concerns variation and revocation of bail.
- 14 See, eg, *Bail Act 1977* s 4(4) which is long and badly drafted so it is hard to determine which parts of the section apply to each other. Section 12 is also a good example.

Chapter 2

New Bail Act



We believe terms that are fundamental to the bail decision should be clear to all parties.

The structure of the Act's individual provisions is also problematic, as is the use of the passive rather than active voice, the expression of directions in negatives rather than positives, the use of unnecessary qualifications and sentence length. Sentences longer than 100 words in the Bail Act are the norm rather than the exception. Long sentences impose a strain on the reader's short-term memory, as the LRCV commented:

If we write long, meandering sentences, running on for clause after clause and embedding clauses within clauses, we force the reader into intricate syntactic analysis. The longer the sentence rambles, the greater the danger that a detail will be overlooked or a connection missed ... There is never any justification for a long sentence in a functional document.¹⁵

An example of the LRCV's concerns can be found in section 15(2) of the Bail Act. It is directed towards bail justices and sureties and deals with the witnessing of a surety's and accused's signature when the latter is being held on remand:

Where a certificate of bail is endorsed on a warrant and it is inconvenient for sureties to attend at the prison to sign the undertaking of bail any bail justice may make a duplicate of the certificate on the warrant and upon the certificate being produced to some other bail justice that bail justice may witness the signature of the surety or the signatures of the sureties on the undertaking in conformity with the certificate, and upon the undertaking being transmitted to the officer in charge of the prison and produced together with the certificates on the warrant to any bail justice attending or being at the prison the bail justice may thereupon witness the signature of the accused person on the undertaking and may order him to be discharged out of custody.

The section is written as one sentence, contains no punctuation and comprises 133 words. Aside from the vocabulary problems, the section could be redrafted into more sentences to break the material into manageable pieces. Many other sections of the Bail Act are similar to this section.

The 'show cause' test is a prime example of the difficulty caused by the structure of the Bail Act's sections. Section 4(4) starts on page eight of the Bail Act and concludes on page 11. It includes subsections (a), (b), (ba), (c), (caa), (ca), (cab), (cb), (cc) and (d). Within these subsections there are more subsections numbered (i) and (ii). After subsection (d), the section reverts to the first subsection level of 4(4). It then divides into subsections (i) and (ii) which apply to all the lettered subsections (a) to (d). This structure is extremely confusing. At first glance, the final subsections (i) and (ii) appear to apply only to section 4(4)(d), yet in fact apply to all the lettered subsections. The potential to mislead someone not familiar with the operation of the Bail Act is high.

DRAFTING

A recently released Australian Institute of Criminology (AIC) report on bail quotes an unnamed court: 'It's a shocking piece of legislation, probably one of the worst pieces of legislation you come across, in Victoria anyway. Get them to rewrite it in a user friendly form ...'.¹⁶

The commission has not included draft legislation in this report because drafting is a specialised area and drafting an entire Act is beyond our expertise. The Office of the Chief Parliamentary Counsel employs experienced drafters and is responsible for the drafting of Bills within Victoria. Any new plain English version of the Act would be drafted by the office.

RECOMMENDATIONS

1. The *Bail Act 1977* should be repealed. The Act and its Regulations should be rewritten and replaced by a new principal Act and new regulations which incorporate the recommendations in this report. All provisions dealing with bail should be in this Act.
2. The new Bail Act and Regulations should be written in plain English. The Act should be drafted with its audience in mind, especially the needs of lay decision makers.

We recommend adopting a very simple drafting style, similar to the example provided by the LRCV in its 1991 report. Our recommendations should help create a simpler Act.

The needs of accused people must also be considered when drafting the new Act. The Bail Regulations contain forms used in bail hearings, including those that must be signed by accused people, such as the Undertaking of Bail. The current drafting of these forms is archaic and would be difficult for many accused people to understand. The Undertaking of Bail for Appearance at Trial form does not include the many pre-trial hearings that accused people will be required to attend in answer to their bail.

In our Consultation Paper we asked whether the forms contained in the Bail Regulations should be rewritten in plain English and what they should contain. Submissions that addressed these questions favoured redrafting the forms in plain English with headings that describe the next hearing accused people are required to attend.¹⁷ For example, mentions or contest mentions in the Magistrates' Court and case conferences or trials in the higher courts.

The Police Association and the Public Interest Law Clearing House (PILCH) thought the Undertaking of Bail form should also contain details of appropriate legal and other support services. PILCH suggested it contain the contact details of any bail supervisor, any organisation or individual with whom accused people have reporting obligations, and a contact at the court. The Police Association noted that new forms should take into account the needs of intellectually impaired people. The Criminal Bar suggested that the forms be available in different languages to ensure accused people and sureties are adequately informed of their rights and obligations.

The commission agrees that the forms need to be redrafted and should take into account language and literacy barriers and provide contact information.

RECOMMENDATIONS

3. The forms contained in the Bail Regulations 2003 should be redrafted in plain English, taking into account that a significant proportion of people who appear before the court have intellectual disabilities, poor literacy, or English is not their first language. The forms should contain the contact details of the registrar at the court to which the accused is bailed and support services within the surrounding area of the court to which the accused is bailed.
4. The new Bail Act should use the phrase 'remand in custody' when bail is refused, and 'bailed to appear' when bail is granted.

CLARIFYING IMPORTANT TERMS

The Bail Act uses the word 'remand' to refer to both remand in custody and remand while on bail. The modern use of remand means remand in custody. In the Consultation Paper we asked whether the legislation should only use the term remand to mean remand in custody.¹⁸ All submissions that answered this question, apart from the Office of Public Prosecutions (OPP), supported this proposal.¹⁹

We believe terms that are fundamental to the bail decision should be clear to all parties. The Criminal Bar Association submitted: 'The experience of our members is that the use of the expression "remand" is confusing and often troubling to accused who have been granted bail'.

In the new Bail Act the term 'remand' should only be used when bail is refused.

In our Consultation Paper we discussed the possible confusion caused by the different meanings of the word 'court' in the Bail Act and asked whether the definition should be retained.²⁰ The Bail Act sometimes defines court to mean only the court and at other times to include the court, police and bail justices. Most submissions thought this was confusing and that the Act should refer to individual decision makers where appropriate.²¹

We believe the current definition is confusing and should not be replicated in the new Act. The powers of each decision maker will also be considerably clearer if the Act refers specifically to police, registrars,²² bail justices and courts rather than 'court'. Where appropriate, individual courts should also be referred to, such as Magistrates', Children's, and Supreme Courts.

15 Law Reform Commission of Victoria (1986) above n 6, 19.

16 Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 78.

17 Submissions 6, 11, 15, 18, 23, 24, 29, 30, 32, 33, 38, 41, 45, 46.

18 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 161.

19 Submissions 6, 11, 18, 23, 24, 29, 30, 32, 33, 38 all supported. The OPP did not explain why it did not support this proposal.

19 Submissions 23, 24, 29, 30, 32, 33, 38, 41, 45. The only submissions that supported retention of the current definition were from bail justices: 11, 18, 46.

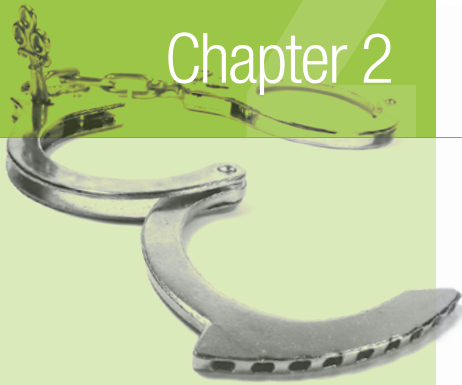
20 Victorian Law Reform Commission (2005) above n 18, 159–160.

21 Submissions 23, 24, 29, 30, 32, 33, 38, 41, 45. The only submissions that supported retention of the current definition were from bail justices: 11, 18, 46.

22 Registrars do not make bail decisions but are responsible for other decisions relevant to bail, such as the suitability of sureties.

Chapter 2

New Bail Act



Police, prosecution and defence agencies favoured the inclusion of a purposes or objects provision.

DELETING REDUNDANT TERMS OR PROVISIONS

The Bail Act refers to both warrants of commitment—a warrant to commit a person to prison—and warrants of remand. A warrant is a document, usually issued by a court, that directs or authorises someone to do something, in this case to remand an accused person in custody. In the context of the Bail Act, the two warrants direct the same thing, and warrants of commitment are no longer used.²³ Continued reference to both warrants in the Act causes confusion.

In our Consultation Paper we asked whether the Bail Act should continue to make reference to a warrant of commitment, and whether removing the reference to it would cause any problems.²⁴ All but two relevant submissions said the reference should be deleted.²⁵ Only the OPP and Magistrates' Court favoured retention. The OPP did not give any reason for retention. The Magistrates' Court thought it should be retained because it relates specifically to the document generated to hold a person in custody. However, the warrant is no longer used and the *Magistrates' Court Act 1989* makes it clear that the term warrant of commitment is obsolete.²⁶ We therefore recommend against continued reference to warrants of commitment in the Bail Act.

The Bail Act refers to telegrams and cablegrams.²⁷ These forms of communication are no longer used. In our Consultation Paper we asked whether the Bail Act should continue to refer to telegrams and cablegrams.²⁸ All submissions that answered this question favoured removal of these terms.²⁹ We recommend the new Bail Act refer to modern forms of communication in line with other Victorian legislation.

In our Consultation Paper we discussed section 4(2)(b) of the Bail Act, which requires a complete denial of bail for someone already in custody serving a sentence.³⁰ It was superseded by the inclusion of section 4(2A) in the Bail Act in 1989, which provides that a court is not required to refuse bail in that situation but accused people cannot be released on bail until they finish their prison sentence. The two provisions conflict and section 4(2)(b) is no longer required. In our Consultation Paper we asked whether section 4(2)(b) should be repealed. Most submissions agreed³¹ though two bail justices submitted that the section should not be repealed, but did not provide any reason.³² We also asked whether there were any other sections of the Bail Act that are no longer relevant but received no response.

RECOMMENDATION

5. The new Bail Act should be drafted to refer to 'court', 'police', 'bail justice', and 'registrar' where appropriate to make the powers of each decision maker under the Act clear. Where different courts have different powers, individual courts should also be referred to.
6. The term 'warrant of commitment' should not be used in the new Bail Act.
7. The new Bail Act should refer to modern forms of communication in line with other Victorian legislation.
8. Section 4(2)(b) of the *Bail Act 1977* should not be re-enacted in the new Bail Act.

INCLUSION OF A STATEMENT OF PURPOSES

In our Consultation Paper we asked whether the Bail Act needs a statement of purposes or an objects provision to broadly detail its main purposes.³³ We also asked what purposes people believed should be served by the Bail Act.³⁴

Police, prosecution and defence agencies favoured the inclusion of a purposes or objects provision.³⁵ The OPP submitted: ‘Yes. The purpose should seek to balance the rights of defendants with the legitimate expectations of the community’.

A recent AIC study detailed what constitutes good practice in bail decision making. One of the issues it identified was the need for bail legislation to include ‘a statement of principles, objectives and criteria guiding decision making’.³⁶ It also suggested distinguishing the criteria for assessing eligibility for bail (risk) from the objectives of bail.

The study found that the rights of accused people underpin bail practice but are little discussed. It supports a statement of principles affirming:

- the seriousness of the decision to deprive a person of liberty
- the presumption of innocence
- the use of custodial remand as a last resort, only to be used when no appropriate alternative is available ...³⁷

WHY HAVE A PURPOSES STATEMENT?

The commission believes it is important that the purposes of the Bail Act, and in turn the purposes of bail, be articulated. Purposes statements are commonly included in new legislation. The need for them was recognised 20 years ago in a ministerial statement by the Victorian Attorney-General.³⁸ The statement announced changes to the format of new Acts, including the requirements to insert a statement of purposes or objects.

The purposes and objectives of bail have never been addressed in Victorian legislation. The commission believes many people do not understand what purposes bail serves and tend to believe that some purposes are more important than others. There also seems to be limited understanding in the community of the different purposes of bail and sentencing.

A decision maker has to balance two competing interests when making a bail decision:

- ensuring the accused will attend court and not interfere with witnesses or commit other offences
- ensuring the accused, who has not yet been found guilty of the offence and is entitled to the presumption of innocence, is not deprived of liberty unnecessarily.

It is important that these interests are balanced and one objective does not take precedence over another. Dr Corns addressed this issue in his submission:

A clear statement of the purposes of the act should help decision makers (judicial and non-judicial) not only in interpreting the act but in apportioning the weight that ought to be given to the various competing considerations.

Detailing the objectives of bail will help decision makers appreciate that bail serves several purposes, and the rights of the accused need to be balanced with the protection of the community.

23 Discussed further in Victorian Law Reform Commission (2005) above n 18, 160–161.

24 Ibid.

25 Submissions 11, 18, 23, 29, 30, 32, 33, 38, 45.

26 *Magistrates’ Court Act 1989* sch 8, cl 11.

27 *Bail Act 1977* s 30(3); Form 2 in the Bail Regulations.

28 Victorian Law Reform Commission (2005) above n 18, 161.

29 Submissions 11, 18, 23, 24, 29, 30, 32, 33, 38, 46.

30 Victorian Law Reform Commission (2005) above n 18, 163.

31 Submissions 22, 23, 24, 29, 30, 32, 33, 39, 41, 45.

32 Submissions 11, 18.

33 An example of a purposes provision can be found in the *Sentencing Act 1991* s 1. A purposes/objects provision appears at the start of an Act. A purposes/objects provision is different from a short title to an Act or a preamble. In some Acts, individual parts or sections contain a purposes provision, detailing what the intended purpose of the specific part or section is.

34 Victorian Law Reform Commission (2005) above n 18, 16–17.

35 Submissions 8, 9, 11, 12, 13, 15, 23, 24, 29, 30, 32, 33, 34, 38, 41.

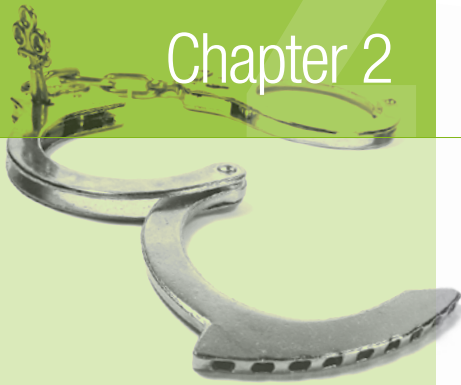
36 King, Bamford and Sarre (2005) above n 16, 108.

37 Ibid.

38 Victoria, *Parliamentary Debates*, Legislative Council, 7 May 1985, Vol 377, 432 (Jim Kennan).

Chapter 2

New Bail Act



There are dangers if decision makers craft initiatives too far removed from the traditional objectives of bail.

POLICY CONSIDERATIONS

The original purpose of bail or remand was to ensure accused people's attendance in court to answer the charges against them. However, bail legislation has increasingly been used to effect broader policy considerations, particularly the prevention of offending through imposition of bail conditions and bail support programs. Increased emphasis has been placed on the use of bail and remand in protecting the community from crime. The AIC study into factors affecting remand points out:

The last forty years has seen a move away from making the integrity and credibility of the justice system (for example, ensuring the defendant will attend court) the predominant outcome. Both legislative and operational policy changes have elevated the importance [of protecting the community] ... above the others.³⁹

In the past 10 years the number of services supporting people on bail has increased. Pre-sentence initiatives in Victoria were discussed in our Consultation Paper and are also addressed in this report.⁴⁰ The most well known initiative in Victoria is the CREDIT Bail Support program but there are other public and private services used by decision makers when setting bail conditions.

Initiatives that aim to address behaviour, such as drug rehabilitation, accommodation, and anger management, are now an accepted feature of our system. They provide more options for decision makers and help accused people to avoid further contact with the criminal justice system, appear in court as required, and stop offending.

While acknowledging the importance of current support services, the commission recognises concerns about bail becoming a vehicle for the imposition of myriad pre-sentence initiatives.⁴¹ Sentencing experts Arie Freiberg and Neil Morgan have discussed the traditional purposes of bail and the differences between bail and sentence:

Although bail based schemes have the benefit of flexibility and do provide an opportunity for innovation on a pilot basis, the primary purpose of bail should not be lost. Bail should be seen as essentially process orientated rather than performance based. Its main role is to ensure that the [alleged] offender appears in court, either to face charges or to be sentenced.⁴²

RECOMMENDATIONS

9. The Bail Act should contain a purposes provision. The purposes of the Bail Act should be to:
 - have within one Act all general provisions dealing with bail
 - establish processes to ensure the prompt resolution of bail after arrest
 - ensure bail hearings are conducted in a fair, open and accountable manner
 - ensure bail is not used to punish accused people
 - limit or prevent offending by accused people while on bail by providing for the imposition of conditions of bail commensurate with any such risk
 - promote transparency in decision making
 - ensure the safety of the community, including alleged victims and witnesses
 - ensure the bail system does not perpetuate the historical disadvantage faced by Indigenous Australians in their contact with the criminal justice system
 - promote public understanding of bail practices and procedures
 - reform the bail laws of Victoria.

The commission agrees that the distinction between the purposes of bail and sentencing must be maintained. There are dangers if decision makers craft initiatives too far removed from the traditional objectives of bail. There is a risk that accused people—who are presumed to be innocent—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.⁴³ In Chapter 7 we make recommendations about the imposition of bail conditions which aim to maintain this distinction.

WHAT SHOULD A PURPOSES STATEMENT SAY?

Many suggestions for objects or purposes were put forward in submissions, including:⁴⁴

- to provide a fair, efficient and consistent set of principles and procedures to ensure the appearance of all accused people in criminal proceedings⁴⁵
- the presumption that all accused people are entitled to bail unless the circumstances justify its denial⁴⁶
- the timely processing of bail applications⁴⁷
- the presumption of innocence⁴⁸
- the use of remand as a last resort⁴⁹
- bail powers not to be used punitively and bail conditions to be used sparingly⁵⁰
- the safety of the community, including victims, witnesses and the accused⁵¹
- bail decisions to be made free from discrimination of any kind⁵²
- transparency of decision making, including provision of reasons.⁵³

These suggestions informed the commission's consideration of what the purposes of the Act should be. Some suggestions fit more appropriately within the substantive provisions of the Act and will be discussed elsewhere. These include the presumption that bail be granted, sparing use of conditions, and provision of reasons. We do not consider it necessary to include a provision about decisions being made free from discrimination because this is part of the oath sworn by decision makers.

It is important to distinguish between the purposes of the Bail Act, and the purposes or principles of bail itself. We believe the principles of bail should be discerned from the substantive provisions of the Act, rather than drawn out in a separate provision. For example, the Act will contain a substantive provision establishing a general presumption in favour of bail. It is unnecessary and possibly confusing to repeat this in a 'principles' provision.

The commission believes the purposes provision in the *Sentencing Act 1991* provides a good model for the new Bail Act. The provision that 'all relevant law be in one Act' should be replicated in the new Bail Act, as should the purpose of 'promoting public understanding of practices and procedures'. These two purposes support our recommendations, which aim to simplify bail law and ensure it is accessible to those using it and affected by it. There is a poor understanding in the community of the different purposes of bail and sentencing. Having clear purposes provisions in both Acts may improve understanding of the different purposes.

Two of the purposes we recommend address particular groups: victims and Indigenous Australians. The reference to victims and witnesses reflects recommended changes to the unacceptable risk test made in Chapter 3. The safety and welfare of victims generally is discussed in Chapter 4. The inclusion of a specific provision about Indigenous Australians is discussed in Chapter 10.

39 King, Bamford and Sarre (2005) above n 16, 8.

40 See Chapter 7.

41 Arie Freiberg and Neil Morgan, 'Between Bail and Sentence: The Conflation of Dispositional Options' (2004) 15(3) *Current Issues in Criminal Justice* 220. The views of Freiberg and Morgan were reinforced in a meeting with Professor Freiberg, Chairperson of the Sentencing Advisory Council, 5 January 2006.

42 Ibid 234. The PILCH submission also raised issues relevant to the potential 'conflict' between bail and sentence.

43 Ibid. In the course of their discussion, Freiberg and Morgan discuss the 'blurring' between pre-sentence initiatives and sentence that has occurred in other jurisdictions within Australia. The example of the Drug Court of Western Australia is presented. Unlike most Drug Courts in Australia, which follow the traditional model of a finding of guilt and then sentence, Western Australia uses a mechanism known as the Pre-Sentence Order. Under this scheme the court adjourns sentence for up to two years and imposes a range of conditions that accused people must comply with. The order is not based on the bail system, although it shares many features in common with bail. The authors contend that the order is problematic for a number of reasons: it has onerous conditions more appropriate to sentence, it distorts sentencing data, its place in the sentencing hierarchy is confused, it may not provide an additional benefit over the existing sentencing options, and the right to appeal against the imposition of an order is problematic. The same arguments could be applied to a similar use of onerous bail conditions.

44 Some of the submissions listed below did not directly suggest inclusion of these points in an objects and purposes clause, but the submission had a focus on the importance of the point in consideration of bail.

45 Submission 13.

46 Submissions 9, 13, 24, 29, 30, 32, 38.

47 Submissions 11, 13, 30, 38.

48 Submissions 13, 17, 21, 24, 29, 30, 31, 32, 33, 38, 40, 45, 47.

49 Submissions 9, 12, 24, 30, 32, 34, 38, 42.

50 Submissions 13, 15, 17, 24, 29, 30, 31, 32, 34, 40, 45.

51 Submission 34.

52 Submissions 15, 31, 32, 34.

53 Submission 34.

Chapter 2

New Bail Act

BAIL AND HUMAN RIGHTS

The commission believes a new Bail Act should approach bail from a human rights perspective. The fundamental legal rights that are common to all people include: protection from arbitrary detention, a fair trial, legal representation and the presumption of innocence.

International law recognises that as a general rule pre-trial detention is to be avoided. One of the main international documents outlining basic human rights is the International Covenant on Civil and Political Rights.⁵⁵ Australia has ratified the covenant; however, this does not mean it is legally binding.⁵⁶

Several submissions discussed the link between human rights and bail.⁵⁷ Youthlaw submitted that any reforms to the Bail Act 'must be consistent with the Victorian Government's human rights obligations'. Promotion and protection of human rights is one of the government's primary strategic aims.⁵⁸ It is important to recognise, however, that human rights are rarely absolute.⁵⁹ This is particularly true for bail. The rights of an accused must be balanced against competing interests—those of the State and the wider community.

HUMAN RIGHTS FOR ACCUSED PEOPLE IN VICTORIA

On 1 January 2007 most provisions in the Victorian Charter of Human Rights and Responsibilities Act came into force. The charter focuses on rights that are applicable to all members of the community rather than the rights of individual groups and mainly deals with civil and political rights, many of which emanate from the international covenant. The charter includes the following provisions relevant to bail:

- Accused people have the right to the presumption of innocence.⁶⁰
- People must not be subjected to 'arbitrary' arrest or detention.⁶¹
- People who are arrested or detained on criminal charges must be promptly brought before a court and tried without 'unreasonable delay'.⁶² Accused children must be brought to trial 'as quickly as possible'.⁶³
- If accused people are not tried within a 'reasonable time' after arrest or detention they must be released.⁶⁴
- Accused people must not be 'automatically detained in custody'. They may be released subject to a guarantee that they will appear for trial.⁶⁵
- Accused people who are detained in custody are entitled to apply to a court for a 'declaration or order' about the lawfulness of such detention, and the court must make a decision 'without delay'. If the detention is unlawful the court must order their release.⁶⁶
- Accused people must be segregated from convicted offenders, 'except where reasonably necessary'.⁶⁷ Accused children must be segregated from adults.⁶⁸
- Accused people must be treated in a manner 'appropriate' for those who have not been convicted.⁶⁹

The charter will ensure policy makers give prominence to human rights in the preparation of new legislation.⁷⁰ Courts will also consider the charter when they interpret laws, as will public officials when they develop new policies.⁷¹ Any new Bail Act that results from this review will have to be compatible with the charter. The charter recognises that human rights will, in some circumstances, be limited by statute. This is only to occur where the limitation is 'reasonable' and can 'be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.⁷²

The Victorian charter is similar in many respects to the UK Human Rights Act. A report of the European Commissioner for Human Rights in 2004 noted that:

*The United Kingdom has not been immune, however, to a tendency increasingly discernable across Europe to consider human rights are excessively restricting the effective administration of justice and the protection of the public interest ... Against a background, by no means limited to the United Kingdom, in which human rights are frequently construed as, at best, formal commitments and, at worst, cumbersome obstructions, it is perhaps worth emphasising that human rights are not a pick and mix assortment of luxury entitlements, but the very foundation of democratic societies. As such, their violation affects not just the individual concerned, but society as a whole; we exclude one person from their enjoyment at the risk of excluding all of us.*⁷³

55 *International Covenant on Civil and Political Rights*, opened for signature on 19 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

56 Ratification does not create binding legal obligations. Instead, it means that a state party will take the necessary steps to give effect to the treaty at a domestic level. Many human rights recognised by international law are still not protected by Victorian law and will not be protected without the introduction of municipal law. The policy of the Australian Government is that '...ratification of a treaty does not give rise to a legitimate expectation than an administrative decision will be made in conformity with the treaty. Ratification does not impose upon the Government a legal obligation to comply with a treaty's provisions until the necessary implementing legislation has been passed, either by the Commonwealth or by State or Territory Governments': Treaties Secretariat, Department of Foreign Affairs and Trade, *Signed, Sealed and Delivered: Treaties and Treaty Making: An Official's Handbook* (2005) 9.

57 Submissions 15, 24, 30, 32, 38.

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

59 There is much written on whether there are any absolute rights, see Jeremy Waldron (ed) *Theories of Rights* (1984).

60 *Charter of Human Rights and Responsibilities Act 2006* s 25(1).

61 *Charter of Human Rights and Responsibilities Act 2006* s 21(2).

62 *Charter of Human Rights and Responsibilities Act 2006* ss 21(5)(a),(b).

63 *Charter of Human Rights and Responsibilities Act 2006* s 23(2).

64 *Charter of Human Rights and Responsibilities Act 2006* s 21(5)(c).

65 *Charter of Human Rights and Responsibilities Act 2006* s 21(6).

66 *Charter of Human Rights and Responsibilities Act 2006* s 21(7).

67 *Charter of Human Rights and Responsibilities Act 2006* s 22(2).

68 *Charter of Human Rights and Responsibilities Act 2006* s 23(1).

69 *Charter of Human Rights and Responsibilities Act 2006* s 22(3).

70 For legislative changes a 'Human Rights Impact Statement' must be drafted by the responsible minister for inclusion in Cabinet submissions. There is currently no formal requirement that this occur, though it may be included in the Cabinet handbook in future. New legislation introduced into parliament will be accompanied by a 'Statement of Compatibility', prepared by the Member of Parliament who introduces the Bill, which details whether or not the Bill complies with the Charter: s 28.

71 *Charter of Human Rights and Responsibilities Act 2006* part 3, divs 3, 4. These sections commence on 1 January 2008. Superior courts within Victoria have already demonstrated a willingness to take into account international human rights instruments in the context of bail, particularly the detention conditions of remandees or prisoners: see eg *In the matter of Little Joe Rigoli* (Unreported, Court of Appeal, Maxwell, P and Charles, JA, 16 December 2005) [5].

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

73 Council of Europe, *Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to the United Kingdom: 4th–12th November 2004: For the Attention of the Committee of Ministers and the Parliamentary Assembly* (2004) [3]–[4].

Chapter 2

New Bail Act

HUMAN RIGHTS FOR VICTIMS OF CRIME IN VICTORIA

Human rights are also relevant to the criminal justice system's response to victims of crime. The Charter of Human Rights and Responsibilities Act does not contain provisions relevant to victims of crime. They are addressed in the new Victims' Charter Act which contains comprehensive provisions relating to victims and the criminal justice system.⁷⁴ We discuss the provisions of the Victims' Charter Act as they apply to bail in Chapter 4.

The first international instrument to address the needs of victims was the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁷⁵ The declaration was adopted

by the United Nations in the mid 1980s and includes the need to inform victims of 'their role and the scope, timing and progress of the proceedings and the disposition of their cases'.⁷⁶ Victims should also be given the opportunity to have their views and concerns voiced at 'appropriate stages' of judicial proceedings 'without prejudice to the accused'.⁷⁷

The declaration is not a legally binding document. Various Australian states have incorporated provisions of the declaration in legislation or codes, charters or guidelines. Within Victoria, the Victims' Charter Act endeavours to incorporate principles of the UN declaration.⁷⁸ The Victims' Charter is discussed further in Chapter 4.

RECOMMENDATION

10. The new Bail Act and regulations should comply with the intention of the *Charter of Human Rights and Responsibilities Act 2006* and the *Victims' Charter Act 2006*.

⁷⁴ The *Victims' Charter Act 2006* commenced operation on 1 November 2006.

⁷⁵ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, GA Res 40/34, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/Res/40/34 (1985).

⁷⁶ *Ibid*, Article 6(a). Victim is defined in Article 2. A person may be considered a victim 'regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted ...'

⁷⁷ *Ibid*, Article 6(b).

⁷⁸ Victims Support Agency, Department of Justice, *Victims' Charter: Community Consultation Paper* (2005) 12.



Chapter 3

Simplifying the Tests for Bail

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Chapter 3

Simplifying the Tests for Bail

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

WHAT ARE THE TESTS FOR BAIL?

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

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

UNACCEPTABLE RISK TEST

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

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

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

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

REVERSE ONUS TESTS

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

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

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

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

WHY DO THE TESTS NEED REFORM?

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

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

TWO-STEP PROCESS

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

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

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

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

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

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

ARTIFICIAL REASONING PROCESS

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

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

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

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

Chapter 3

Simplifying the Tests for Bail



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

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

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

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

AD HOC INCLUSION OF OFFENCES

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

Fitzroy Legal Service noted:

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

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

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

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

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

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

'WORKING AROUND' THE ACT

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

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

And the police officer agreed:

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

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

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

FACTORS UNIQUE TO THE INDIVIDUAL

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

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

The Fitzroy Legal Service submitted:

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

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

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

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

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

COMPLEXITY

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

The Magistrates' Court of Victoria submitted:

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

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

18 Submissions 8, 9, 13, 17, 21, 22, 24, 32, 39, 45, 33.

19 Submission 17. Submission 21 said the Bail Act had become, 'in some senses a political football', submission 9 said 'they are offences that have a short period of notoriety', submission 38 argued that 'many offences that currently attract reverse onus, reflect media views ...' and submission 24.

20 *Bail Act 1977 s 4(4)(ba)*; submissions 22, 24, 38, 39.

21 *Re application for bail by Fred Joseph Asmar* [2005] VSC 487 (Unreported, Supreme Court of Victoria, Maxwell P 29 November 2005) [5].

22 This is because the accused person has committed an indictable offence while on bail: *Bail Act 1977 s 4(4)(a)*.

23 Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 79.

24 Ibid.

25 Submission 9.

26 Consultations 7, 22.

27 Submissions 17, 45.

28 Roundtable 5.

29 Roundtable 1.

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

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

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

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

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

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

FALSE PERCEPTIONS

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

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

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

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

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

JUDICIAL DISCRETION

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

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

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

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

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

HUMAN RIGHTS AND REVERSE ONUS

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

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

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

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

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

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

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

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

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UK HUMAN RIGHTS LEGISLATION

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

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

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

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

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

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

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

SUBMISSIONS

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

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

Similarly, Victoria Legal Aid stated:

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

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

VICTORIAN HUMAN RIGHTS CHARTER

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

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

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

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

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

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

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

52 *Ibid* 65.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

BAIL OFFENCES

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

FAILURE TO APPEAR DATA

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

The most recent published study was carried out in NSW in 2002.⁷² It found that in the Local Court (the NSW equivalent of our Magistrates' Court) those charged with theft were the most likely to fail to appear, followed by receiving/handling, burglary and then disorderly conduct. It also found that accused people with prior convictions were more likely to fail to appear than those without prior convictions, and accused people facing multiple offences were more likely to fail to appear than those charged with one offence.

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

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

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

Overall the number of people who fail to appear in Victoria is proportionally small. The Magistrates' Court of Victoria finalised 130 680 cases, involving several times that number of charges, in 2004–05.⁸¹ It issued 9445 warrants relating to 5761 defendants who failed to appear while on bail and found 8032 charges of failure to appear proven.⁸² This suggests that failure to appear is a problem in approximately 7% of cases before that court. While we do not have access to comprehensive data as NSW does, it seems that failure to appear has been a far greater problem in NSW than Victoria. The 2002 NSW study found that a warrant had been issued for failure to appear in 14.6% of cases finalised in the NSW Local Court. In the higher courts it was 5.3%. It also found that particular categories of offenders had much higher rates of failure to appear.

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

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

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

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

A 2006 *Herald Sun* article suggested that the numbers of 'absconders' had skyrocketed in Victoria.⁸⁷ This is not the case. Victoria Police changed the way it recorded failure to appear offences in July 2005, resulting in an increase of approximately 3000 recorded offences. The number of actual charges of failure to appear decreased between 2004–05 and 2005–06.⁸⁸ The detailed figures are contained in Appendix 3.

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

70 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 74.

71 Ibid 79.

72 NSW Bureau of Crime Statistics and Research, *Absconding on Bail*, Crime and Justice Bulletin No 68 (2002).

73 Data obtained from Court Services, Department of Justice, 15 May 2006 and 29 November 2006. The data refers to numbers of defendants who had at least one warrant of apprehension order made. See Appendix 2 for warrant data.

74 Although we obtained total numbers of warrants issued for failure to appear each year, we could only obtain information about the offence the accused failed to appear on if the matter was finalised. Once a warrant is issued, the accused may surrender to police and voluntarily attend court, or police may find and arrest the person and take him or her to court. The matter is finalised by the accused being convicted and sentenced or acquitted. The court then records the charge that received the highest sentence, ie the most serious charge. Each year large numbers of warrants for fail to appear on bail are not finalised. A 'clean up' of warrants was conducted by police in 2001. However, since that time the number of non-finalised warrants has increased markedly each year—1287 in 2001–02 to 3264 in 2005–06. In 2000–01 almost four-fifths were finalised, in 2005–06 only half.

75 That is, 28% of warrants for failure to appear in the Magistrates' Court over the six-year period where the offence was known. These figures are for adults in the Magistrates' Court. The number of warrants issued against defendants for theft over the six-year period was 6259, including theft (1980), theft from shop (3203) and theft of motor vehicle (1076) over the six-year period 2000–01 to 2005–06. The percentage calculation uses the known offences only. A large proportion of the offence types are unknown and were not included in the calculation. In 2005–06 the Magistrates' Court heard 26 459 proven charges of theft: Magistrates' Court of Victoria, *Annual Report 2005–06* (2006) 21. The number of warrants for failure to appear that year where the known charge was theft was 817. Data from the Children's Court is similar—thrift is the most common charge children fail to appear on, followed by burglary: Data obtained from Court Services, Department of Justice, 29 November 2006.

76 Of the warrants issued where the offence was known over the six-year period: 1333 warrants for failure to appear on a burglary charge; 794 for criminal damage, handling stolen goods, and possessing cannabis: Data obtained from Court Services, Department of Justice, 29 November 2006.

77 Magistrates' Court of Victoria (2006) above n 75, 21.

78 Data obtained from Court Services, Department of Justice, 29 November 2006.

79 Data obtained from Court Services, Department of Justice, 21 June 2007.

80 Based on the warrants where the offence was known in the data obtained, the top ten charges on which accused failed to appear in 2005–06 were: theft from shop (412), theft (256), burglary (155), criminal damage (146), drive while disqualified (111), possess cannabis (105), drive while suspended (102), recklessly cause injury (102), theft of a motor vehicle (94), breach intervention order (91). These figures are incomplete because a large proportion of the offences in the 2005–06 data were unknown because the matter had not been finalised.

81 Magistrates' Court of Victoria, *Annual Report 2004–05* (2005) 23.

82 Proven charges of failure to appear from ibid 25; Data on warrants issued and number of defendants obtained from Court Services, Department of Justice, 15 May 2006. Court Services advised that this data could not be directly compared to the data published in the Magistrates' Court *Annual Report* as a different program is used to extract the two data sets. The comparison is therefore a suggested approximation.

83 *Bail Amendment (Repeat Offenders) Act 2002* s 3 and schedule 1, now in *Bail Act 1978* (NSW) s 9B.

84 NSW Bureau of Crime Statistics and Research, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002*, Crime and Justice Bulletin No 83 (2004).

85 Ibid 6.

86 Ibid 5. It is suggested in the report that this may be due to the high proportion of Indigenous Australians who have a prior conviction: 1.

87 Geoff Wilkinson, 'The bail fugitives' *Herald Sun*, 16 November 2006, 1.

88 Data prepared by Corporate Statistics, Victoria Police, provided to the commission on 7 December 2006.

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

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

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

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

FAILURE TO APPEAR AND OFFENCE GRAVITY

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

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

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

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

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

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

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

OFFENDING ON BAIL

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

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

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

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

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

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

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

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

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

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

CONSEQUENCES OF REMOVAL

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

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

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

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

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

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

INFORMATION IN HEARINGS

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

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

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

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

RECOMMENDATIONS

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

PUBLIC CONFIDENCE IN BAIL

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

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

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

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

FAMILY VIOLENCE

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

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

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

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

108 Consultation 54.

109 Roundtable 1.

110 Roundtable 1.

111 Roundtable 1.

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

113 Ibid 18–19.

114 Ibid 98.

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

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

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

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

119 Submissions 22, 24, 38, 39.

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

COMMONWEALTH LEGISLATION

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

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

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

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

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

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

MODELS FOR REFORM

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

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

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

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

MINIMALIST APPROACH

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

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

There are various advantages to a minimalist model:

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

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

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

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

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

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

INTERMEDIATE APPROACH

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

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

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

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

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

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

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

121 See discussion in Chapter 5 under Commonwealth Provisions.

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

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

124 Submissions 23, 41, 33, 39.

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

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

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

128 Consultation 54.

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

130 Submission 46; consultation 46.

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

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

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

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

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

SIMPLIFIED APPROACH

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

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

lay decision makers make approximately 95% of bail decisions.¹³³ Most stakeholders are in favour of a simplified Bail Act, though some argued that reverse onus provisions should be retained.¹³⁴

Those in favour of retention said the current system should remain and decision makers could cope with the complexity. In our roundtable discussions two beliefs were expressed in favour of reverse onus provisions:

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

COMMISSION'S RECOMMENDATION

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

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

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

PREPARATORY OFFENCES

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

RECOMMENDATIONS

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

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

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

CHANGES TO THE UNACCEPTABLE RISK TEST

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

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

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

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

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

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

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

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

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

134 Submissions 23, 41, 33 argued for retention.

135 Roundtable 1.

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

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

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

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

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

Chapter 3

Simplifying the Tests for Bail



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

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

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

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

RECOMMENDATIONS

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

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

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

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

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

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

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

¹⁴³ Submissions 22, 23.

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

Chapter 4

Police and Bail

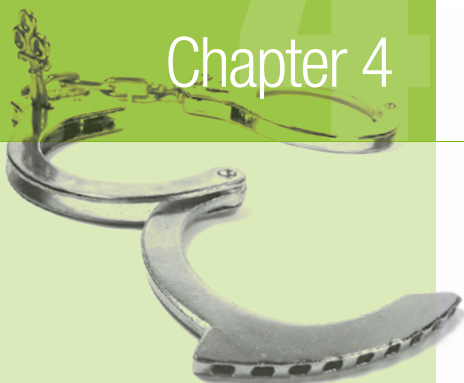


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Chapter 4

Police and Bail



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

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

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

NATURE OF POLICING

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

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

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

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

RECOMMENDATIONS

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

INITIAL DECISION: ARREST OR SUMMONS

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

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

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

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

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

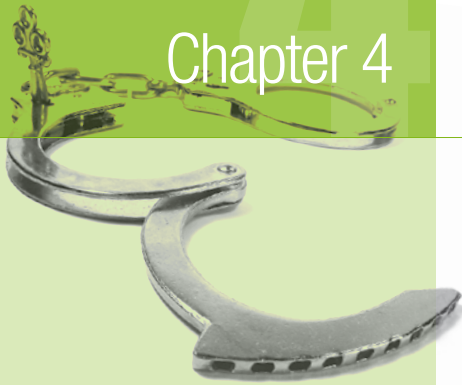
Some submissions favoured a presumption in favour of proceeding by summons.¹⁷ There was also support for clear, principled guidelines for police to determine whether to proceed by summons or arrest.¹⁸

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

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

Chapter 4

Police and Bail



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

INDIGENOUS AUSTRALIANS

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

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

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

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

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

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

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

POLICE DECISIONS DURING COURT HOURS

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

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

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

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

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

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

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

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

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

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

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

21 Submission 34.

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

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

24 Ibid 33.

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

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

27 Ibid 425–26, 435–36.

28 Ibid 425.

29 Ibid 436.

30 Ibid 425–26, 435.

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

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

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

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

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

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

37 Submissions 13, 30, 32.

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

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

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

41 See Chapter 7.



Chapter 4

Police and Bail

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

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

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

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

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

LIMITS ON POLICE BAIL

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

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

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

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

RECOMMENDATIONS

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

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

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

POTENTIAL MISUSE OF BAIL

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

There are protections against such a misuse of power:

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

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

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

45 This program is discussed in detail in Chapter 7.

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

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

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

49 This issue was raised by magistrates in consultation 18.

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

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

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

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

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

55 Submissions 17, 24, 30, 38.

56 Submissions 13, 22, 23, 39.

57 See Chapter 3.

58 See Chapters 5 and 6.

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

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

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

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

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

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

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

66 Submission 18.

67 Submissions 24, 38.

Chapter 4

Police and Bail

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

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

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

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

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

MISUNDERSTANDING THE BAIL ACT

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

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

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

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

POLICE AT COURT AFTER NIGHT SHIFT

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

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

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

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

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

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

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

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

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

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

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

68 *Ibid* 27.

69 *Ibid* 34–35.

70 *Ibid* 35.

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

72 Submissions 24, 32, 38.

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

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

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

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

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

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

79 Submissions 22, 30, 32, 39.

80 Submissions 24, 32.

81 Submissions 21, 24, 41.

82 Submissions 13, 24.



Chapter 4

Police and Bail

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

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

LEAP

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

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

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

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

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

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

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

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

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

CRIMINAL RECORDS

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

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

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

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

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

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

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

RECOMMENDATIONS

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

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

84 Submission 22.

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

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

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

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

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

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

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

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

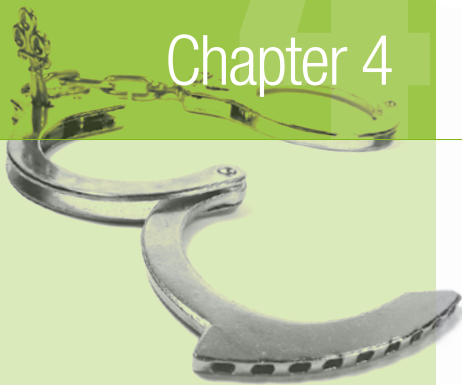
93 Information provided by Peter Donnelly, Assistant Director, Records Services Division, Victoria Police, 26 March 2007.

94 *Ibid.*

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

Chapter 4

Police and Bail



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

WARRANT PROBLEMS

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

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

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

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

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

In particular, the committee recommended that:

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

RECOMMENDATIONS

25. The database that replaces LEAP should record:

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

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

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

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

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

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

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

INDIGENOUS AUSTRALIANS

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

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

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

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

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

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

RECOMMENDATIONS

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

96 Consultation 6.

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

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

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

100 Ibid, recommendations 34, 35, 130.

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

102 Ibid 4.

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

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

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

106 Ibid 475.

107 Submission 34.

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

109 Ibid, recommendation 125.

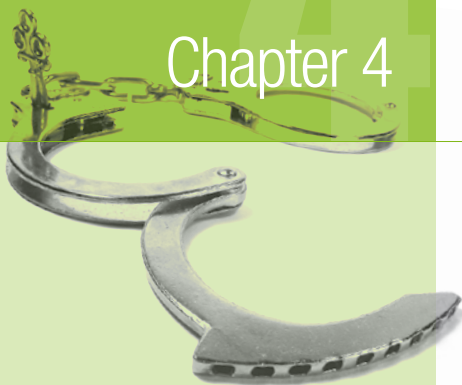
110 Ibid 476; Victoria Police, 'VPM Instruction 113-1: Taking a Person into Custody', *Victoria Police Manual* (2 October–5 November 2006) [4.3.5].

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

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

Chapter 4

Police and Bail



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

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

The committee also recommended that:

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

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

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

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

RECOMMENDATIONS

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

NO WARRANT FOR BREACH OF CONDITION

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

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

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

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

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

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

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

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

113 Victorian Parliament Law Reform Committee (2005) above n 99, recommendation 126. In September 2005, Victoria Police advised the committee that it was drafting a report with recommendations to address delays in notification of VALS: 474.

114 Information provided by Aboriginal Advisory Unit, Victoria Police, 27 February 2007.

115 Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody, *Review Report, Volume 1* (2005) 448.

116 Ibid. 449, recommendation 61.

117 Ibid.

118 Victorian Parliament Law Reform Committee (2005) above n 99, 474.

119 Information provided by Aboriginal Advisory Unit, Victoria Police, 11 April 2007.

120 Ibid.

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

122 *Bail Act 1977* s 24(1)(a).

123 The following sections of the Bail Act authorise courts to issue warrants of arrest: ss 9(6), 18A(7), 23(2), 26(1),(2).

124 Victorian Law Reform Commission (2005) above n 2, 72.

125 Ibid 72–73.

126 Consultation 9. See discussion in ibid 73.

127 Ibid 73.

128 Submissions 6, 8, 11, 13, 18, 22, 33, 39, 41 supported the proposal. Submissions 24, 29, 30, 32, 38 opposed the proposal. Victoria Police did not oppose this proposal operating in addition to existing powers of arrest without a warrant: submission 23.

129 Submission 13.

130 Submission 33.

131 Submission 41.

132 Submission 6.

133 Submissions 22, 39.

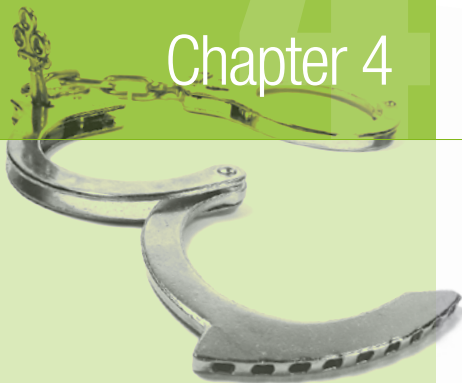
134 Submissions 24, 29, 30, 32, 38. The Law Institute of Victoria argued that the existing powers in the Bail Act were sufficient to allow a warrant to be issued upon revocation of bail.

135 The Commonwealth DPP's submission noted that having a warrant is significant for extradition proceedings.

136 The provision of notice to sureties and other parties is addressed in Chapter 8.

Chapter 4

Police and Bail



RELUCTANCE TO ARREST WITHOUT WARRANT

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

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

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

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

POWER TO ARREST WITHOUT WARRANT

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

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

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

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

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

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

WARRANT ENDORSEMENT

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

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

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

RECOMMENDATIONS

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

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

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

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

Those in support of the proposal argued:

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

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

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

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

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

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

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

137 Consultation 9.

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

139 Ibid 73.

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

141 Submissions 24, 30.

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

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

144 Ibid.

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

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

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

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

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

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

151 Consultation 46.

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

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

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

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

156 Submissions 24, 32.

157 Submissions 24, 38.

158 Submission 45.

159 Submission 22 (majority of magistrates).

160 Submission 41.

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

162 Submission 18.

163 Submissions 24, 30, 32, 38.

164 Consultation 47.

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

Chapter 4

Police and Bail

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

ON-THE-SPOT BAIL

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

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

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

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

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

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

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

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

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

VICTIMS' SAFETY AND WELFARE

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

RECOMMENDATIONS

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

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

Victims of crime are often concerned about their safety and welfare if an accused is released on bail.¹⁶⁸ The Bail Act provides that where relevant, decision makers should consider 'the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail' when determining whether the accused presents an unacceptable risk.¹⁶⁹ The Victims' Charter similarly requires that a court, in having regard to the safety and welfare of the public in accordance with the Bail Act, may take into account the safety and welfare of the victim or the victim's family, and the attitude of the victim towards the granting of bail.¹⁷⁰ The charter also says victims have a right to be given clear, timely and consistent information about their rights and entitlements.¹⁷¹

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

In our Consultation Paper we asked whether the views of victims are adequately taken into account during bail hearings.¹⁷² This question raises two issues:

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

The first issue is discussed in Safety and Welfare Evidence in this chapter. The second issue is about the relevance of the victim's attitude to the assessment of unacceptable risk.¹⁷³

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

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

Some submissions expressed concern about the relevance of the victim's attitude to the bail decision.¹⁷⁴ In particular, there was concern that victims' views should only be taken into account so far as they are relevant to the question of whether the accused poses an unacceptable risk. For example, Fitzroy Legal Service said:

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

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

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

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

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

168 Ibid.

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

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

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

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

173 Ibid 111.

174 Ibid 112.

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

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

177 Submissions 22, 24, 30, 38.

178 Submission 22.

179 Submissions 29, 34, 38.

180 Submission 22.

181 Submissions 29, 38.

182 Submissions 29, 34, 38.

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

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

185 *Victims' Charter Act 2006* s 18.

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

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

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

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

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

191 *Victims' Charter Act 2006* s 7.

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

193 See discussion of unacceptable risk test in Chapter 3.

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



Chapter 4

Police and Bail

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

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

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

VICTIMS' VIEWS ON SAFETY AND WELFARE

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

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

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

RECOMMENDATIONS

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

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

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

SAFETY AND WELFARE EVIDENCE

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

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

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

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

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

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

195 Victorian Law Reform Commission (2005) above n 2, 76.

196 *Bail Act 1977* s 14.

197 Consultation 9.

198 Submissions 30, 32.

199 Victorian Law Reform Commission (2005) above n 2, 76.

200 Consultation 45.

201 Victorian Law Reform Commission (2005) above n 2, 28–29.

202 Victoria Police, 'VPM Instruction 119-1: Welfare of Victims and Witnesses', *Victoria Police Manual* (2 October–5 November 2006) [4.4] and 'VPM Instruction 108-3: Recording a Crime on LEAP', [7.1].

203 Victoria Police, 'VPM Instruction 108-3: Recording a Crime on LEAP', *Victoria Police Manual* (2 October–5 November 2006) [7.1]. 'Crime against the person' is defined in the VPM Instruction as 'attempted homicide, sexual offence, robbery, assault, aggravated burglary or stalking'.

204 Victoria Police, 'Notice to the Victim—Important Information' (VP Form L1).

205 Victoria Police, 'VPM Instruction 108-8: Sexual Offence Investigations', *Victoria Police Manual* (2 October–5 November 2006) [4.5.1]; Victoria Police, *Code of Practice for the Investigation of Sexual Assault* 2005 Edition (2005) 13.

206 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2004) 40.

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

208 Submissions 11, 13, 18, 20, 22, 24, 25, 30, 32, 39, 45; roundtable 5.

209 Submissions 30, 32.

210 Submissions 24, 29, 32, 38.

211 Victoria Police (2 October–5 November 2006) above n 203, [7.1] defines 'crime against the person' as 'attempted homicide, sexual offence, robbery, assault, aggravated burglary or stalking'.

212 Consultations 18, 27, 31, 36; roundtable 5. The magistrates thought they applied section 4(3)(e) appropriately when advised of victims' concerns.

213 Submissions 24, 30, 32.

214 Submissions 24, 32, 38.

215 Submissions 11, 25, 41, 46; roundtable 5.

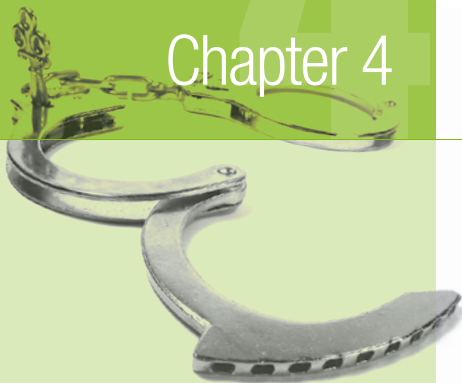
216 Roundtable 5.

217 Submission 25.

218 Submission 20.

Chapter 4

Police and Bail



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

KEEPING VICTIMS INFORMED

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

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

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

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

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

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

In our Consultation Paper we asked:

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

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

RECOMMENDATIONS

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

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

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

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

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

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

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

A dedicated centralised service could provide:

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

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

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

220 Submission 25.

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

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

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

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

225 Consultations 11, 27, 36.

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

227 Ibid 30–31.

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

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

230 Submissions 18, 45, 46.

231 Submissions 45, 46.

232 Submission 32.

233 Submission 17.

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

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

236 Consultation 55.

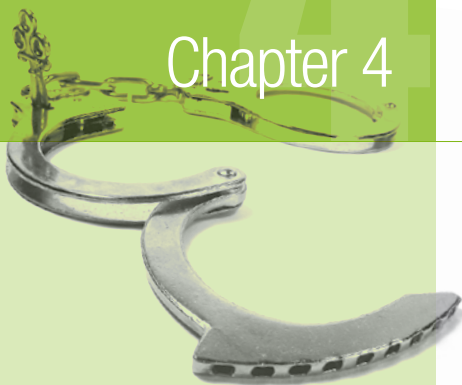
237 Roundtable 5; consultation 55.

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

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

Chapter 4

Police and Bail



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

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

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

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

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

²⁴⁰ Roundtable 5.

²⁴¹ Submission 20.

²⁴² Submission 25.

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

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

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

Chapter 5

After-hours Bail Decisions



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Chapter 5

After-hours Bail Decisions

Despite its shortcomings, the bail justice system provides a cost-effective service which allows for prompt bail hearings for accused people who would otherwise have to wait until the next court sitting date.

WHO ARE BAIL JUSTICES?

Bail justices are a unique feature of the Victorian bail system—no other state has them. Bail justices are community members who play an important role in the Victorian bail system. They are volunteers who are specially trained to hear bail applications at police stations when courts are closed. Detailed information about who bail justices are, when they are used, and what powers they exercise is in our Consultation Paper.¹

SHOULD BAIL JUSTICES BE RETAINED?

In our Consultation Paper we asked whether the bail justice system should be retained and, if not, what system would be preferable.² Aspects of the bail justice system received widespread criticism during our review. Bail justices are volunteer laypeople who tend not to grant bail. Many issues about bail justices' training, conduct, lack of diversity, and oversight of the bail justice program were discussed in the Consultation Paper.³

Despite its shortcomings, the bail justice system provides a cost-effective service which allows for prompt bail hearings for accused people who would otherwise have to wait until the next court sitting date. Bail justices make decisions in very different circumstances to those of a magistrate or judge sitting in court. Accused people are often 'at their worst' having recently been arrested, legal representation is rare, the information available is often limited, and the support services available to a court are not available after hours. Although bail justices grant bail in a relatively small percentage of cases, calling a bail justice adds to police workloads and provides a disincentive for them to seek remand of accused people unless it is really necessary.⁴

Bail justices also provide a review function. The arresting officer is required to give sworn evidence before the bail justice to support the grounds for remand. The supervising officer's remand decision is scrutinised almost immediately. This makes police much more accountable for their remand decisions.⁵ Bail justices also have a role in oversight of police treatment of accused people.

Some submissions supported the retention of bail justices, but many of these noted that criticisms were valid and improvements needed to be made.⁶ Others preferred a court-based model using either magistrates or judicial registrars—some only if substantial reform to the bail justice system was unsuccessful.⁷

Criticisms of the bail justice system are covered in detail in our Consultation Paper, and are addressed throughout this chapter. Arguments for retaining the bail justice system include:

- Structures and systems to support it are in place.
- It is relatively inexpensive.
- Increased involvement and administrative responsibility by the Department of Justice over the past two years has already resulted in improvements.
- Many of the issues raised in consultations and submissions are capable of being remedied by legislative, procedural, organisational and cultural change without necessarily abolishing the whole system.
- Bail justices also hear Interim Accommodation Orders for children.⁸
- Other recommendations made in this report may improve the performance of the bail justice system, such as the abolition of reverse onus tests, changes to the new facts or circumstances rule and inclusion of child and Indigenous specific provisions in the Bail Act.
- The current system has the support of the Children's Court, the Magistrates' Court, County Court, Victoria Police, bail justices and the OPP. At our roundtable discussion, defence lawyers indicated that if a court-based system was not practical they would support the retention of bail justices if criticisms were addressed.⁹

The commission carefully considered arguments for and against retention of bail justices. We are concerned by the many criticisms raised, and on the basis of those criticisms prefer a court-based system. However, we are recommending retention of the current system, in part because of the current impracticability of instituting a court-based system.

In the Consultation Paper we discussed the possibility of after-hours bail courts, such as exist in NSW.¹⁰ We also discussed the newly created position of judicial registrar, and whether in future they may be able to hear bail applications.¹¹ Judicial registrars are not currently empowered to hear bail applications—magistrates would be required for after-hours hearings. After-hours courts do not have the

support of the Magistrates' Court. The court advised that the current video-link system is inadequate to facilitate bail hearings from around the state by a centralised court, which is what we had envisaged. Concerns were also raised about the limitations of video-link, such as not knowing who else is in the room with the accused and what is occurring off camera.¹² If video-link facilities could not be used, police would have to transport accused people to court, which would require increased resources.

Also, unless all the services available to the court during the day were available at night, many applications would simply be adjourned to daytime court sittings when support services are available. Providing all support services overnight is impracticable. While it would be easier to do if applications are heard by video-link in one centralised location, it would still require significant resources. We believe the current system is worthy of more attention before a decision is made to institute an after-hours court.

NEW BAIL JUSTICE LEGISLATIVE FRAMEWORK

Legislative provisions that create and regulate bail justices are in the Magistrates' Court Act. The Magistrates' Court Act amended the Bail Act so that bail justices could hear and determine applications for bail in certain circumstances, replacing the previous role of justices of the peace.¹³ The expressed policy for creation of bail justices was 'the need for trained officers to make judicial decisions about a person's liberty'.¹⁴

The provisions about bail justices are in the Magistrates' Court Act for historical reasons. The commission can see no practical reason for them to remain there. To promote clarity about the role of bail justice, and public understanding of the role, the provisions should be moved to the Bail Act. Although bail justices also hear Interim Accommodation Orders, they are called bail justices and most people would assume that information about them would be found in the Bail Act.

RECOMMENDATIONS

42. The bail justice system should be retained and reformed in accordance with the recommendations in this report. The Department of Justice should commission an independent review of the bail justice program in three years to determine whether it is working well, or whether another system should be instituted. In the long term, an after-hours bail court should be considered.
43. The bail justice provisions in the *Magistrates' Court Act 1989* (sections 120–124) should be repealed and re-enacted in the new Bail Act in an amended form in accordance with the recommendations in this report.

NEW BAIL JUSTICE ADMINISTRATIVE FRAMEWORK

In the Consultation Paper we discussed an internal 2004 Department of Justice review of the bail justice system.¹⁵ When we started our review a Registrar of Honorary Justices administered the appointment of bail justices and kept a register of current bail justices. In the absence of support by the department, the voluntary RVAHJ and local bail justice associations supported bail justices. All bail justices are invited to join the RVAHJ, but not all do. After its review the department began to take a more active role—increasing the resources available to support the bail justice system and increasing departmental oversight of the role.

It was apparent from some submissions from bail justices that they did not believe we had adequately recognised their good work and commitment. The efforts of dedicated bail justices who have given their time to this role and to the RVAHJ or local bail justice organisations are to be commended. Actively fulfilling the role of bail justice requires considerable commitment and many bail justices go beyond this to be involved in associations.

The usefulness of associations as a means of local support and information sharing is beyond question. However, we believe it is important for the department to have responsibility for oversight of the bail justice system if the many criticisms raised in this review are to be overcome. The RVAHJ has made efforts to professionalise the role, however, it has no legal status to review, counsel, discipline or institute removal proceedings for bail justices who act inappropriately. Serious complaints about the conduct of individual bail justices have been raised with the department. These issues could not be addressed by the RVAHJ, even with increased powers, because membership is voluntary.

- 1 Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 37–39.
- 2 Ibid 53–55.
- 3 Ibid 39–46.
- 4 Sue King, David Bamford and Rick Sarre, *Factors that Influence Remand in Custody: Final Report to the Criminology Research Council* (2005) 80.
- 5 Ibid 83.
- 6 Submissions 8, 9, 11, 18, 19, 22, 23, 39, 41, 46, 48.
- 7 Submissions 13, 17, 24, 30, 32, 33, 38, 45.
- 8 Interim Accommodation Orders applications occur when DHS child protection workers apply to have a child removed from a family for safety reasons and placed in the care of the department: *Children and Young Persons Act 1989* s 69(5). In making recommendations, the commission has given consideration to this role. However, any scrutiny of this role by bail justices is outside our terms of reference.
- 9 Roundtable 2.
- 10 Victorian Law Reform Commission (2005) above n 1, 54.
- 11 In the Consultation Paper judicial registrars were incorrectly referred to as 'a new class of judicial officer'. They are in fact legally qualified registrars who have been delegated specific limited judicial powers. See *Magistrates' Court Act 1989* ss 16B–16K.
- 12 Roundtable 1.
- 13 The *Justices Act 1958* contained provisions about justices of the peace granting or refusing bail which are similar to the provisions which are now in the *Bail Act 1977*.
- 14 See the Second Reading Speech Victoria, *Parliamentary Debates*, Legislative Assembly, 23 March 1989, 488 (Mr McCutcheon, Attorney-General).
- 15 Victorian Law Reform Commission (2005) above n 1, 39.

Chapter 5

After-hours Bail Decisions

Bail justices who actively carry out their role incur not only a time but also a financial commitment.

Bail justices raised concerns with us, and an independent consultant employed by the department, about the RVAHJ seeking to control and direct them without authority to do so.¹⁶ Some said they only remain members because they have no other way to receive updates about legislative or other changes. There is significant disagreement between bail justices about administrative issues, to the extent that there are several metropolitan and regional bail justice associations that have broken away from the RVAHJ.

We believe the way forward for the bail justice system is for the department to take greater responsibility to ensure a professional and consistent service. The department can draw on the resources necessary to properly support bail justices in their role. This includes not only financial resources, but also the authority to develop binding practices with police and other agencies, and access to legal advice and support. It would be inefficient and inappropriate for the department to provide these resources to a voluntary body such as the RVAHJ. The department is accountable to the Attorney-General and subject to government and public scrutiny.

The department has already made important changes. An Honorary Justices Coordinator, a Project Manager and other staff have been employed in place of the Registrar of Honorary Justices. This team has implemented administrative improvements which are discussed throughout this chapter. By arrangement between the Chief Magistrate and the department, the department's Court Services unit rather than the court now has responsibility for administering bail justices.¹⁷ A circular was sent to all bail justices in December 2006 clarifying this. We believe the Attorney-General should formally delegate responsibility for bail justices to the department.

The Magistrates' Court will continue to be involved in training bail justices and engaging with them at a local level. Bail justice associations should also be encouraged—these provide a useful forum for the important functions of mentoring, problem-solving and information-sharing.

ROSTERS

When we began this review, one of the most frequent criticisms we heard was that police could choose which bail justice was called to the station. This allowed police to largely control the outcome of a bail application by not calling bail justices who had made decisions they didn't agree with. In areas where there was more than one bail justice available, either the RVAHJ or local association operated a roster. However, there was still nothing to stop police calling someone other than the rostered bail justice.

The department and the Magistrates' Court commissioned an electronic call-out system to combat this problem, delegating its development to the RVAHJ. Funding to develop the system was provided by the RVAHJ and the department. This arrangement seems to have occurred because the RVAHJ wanted to do it and the Honorary Justices Registry did not have the necessary administrative support. The RVAHJ had also developed its own database of bail justices using software superior to the registry's. A practice had developed of the registry providing new appointees' details to the RVAHJ to be added to the database. Victoria Police agreed to the implementation of the electronic system, and after trials with police it was implemented in much of the Melbourne metropolitan area in 2005. The RVAHJ then sought to implement the system throughout Victoria.

A number of problems have occurred as a result of the electronic roster's implementation. First, some bail justices have raised concerns about the RVAHJ having their personal details and control of the roster when not all bail justices are members.¹⁸ The RVAHJ's suggested solution to this is that membership should be made mandatory.¹⁹ Bail justices are volunteers and the RVAHJ is a voluntary body. It has no accountability except to its members. In its submission the RVAHJ proposed acting as an independent body for regulation and licensing of honorary justices, in a similar role to the Law Institute and Bar Council.

RECOMMENDATIONS

44. The Secretary of the Department of Justice should have responsibility for the administration of the bail justice system.
45. Bail justices should be deployed to bail hearings and interim accommodation hearings through a centralised call-out system, developed in consultation with bail justices, Victoria Police and the Department of Human Services (DHS). The system must be designed to be adaptable to the different needs of different locations and should be administered by the Secretary, Department of Justice.

Secondly, concerns were raised with the department about the way the RVAHJ communicated with bail justices about implementation of the roster, and responded to issues and concerns. The department was unable to resolve the problems with the RVAHJ and engaged an independent consultant to conduct a review of the roll-out of the computerised roster system. The consultant recommended that a bail justice reference group be established to agree on roster principles and remain as a forum to discuss other issues affecting bail justices.²⁰ The department has established a reference group that will deal with all issues that arise for bail justices, not just the roster. The reference group includes magistrates, police, the Department of Human Services (DHS) and bail justices from each association. They are in the process of developing sub-groups to consider particular issues and this will include a roster sub-group.²¹

The commission believes the role of the RVAHJ in administering the roster goes beyond what is appropriate for a voluntary organisation, but reiterate that this largely came about because the department was not fulfilling the role. There is no doubt that a centralised call-out system is to be preferred. It should ensure selection of bail justices independent of police, fair distribution of work, a standard and transparent procedure, and system monitoring. Monitoring of the system is extremely important. Feedback already suggests that some police may be trying to circumvent independent selection by recording that they have tried to contact the rostered bail justice, though the bail justice disputes receiving a call.²²

The department now has its own up-to-date database of bail justices. It would be unfortunate if it had to create a parallel roster system after providing funding to the RVAHJ to develop the current system. However, our view is that the roster system should be administered by the department in consultation with Victoria Police and DHS, and with bail justices themselves. As with the appointment of bail justices, deployment of bail justices and responsibility for ensuring the integrity of that deployment is a function that should remain with an organisation directly responsible to the Attorney-General and the general public.

The department is currently trialling a centralised call-out system with three police stations in Melbourne, with call centre staff employed to take calls from police or Child Protection and then contact the rostered bail justice in the relevant region. Bail justices in the region must

only accept a call-out to a hearing if it comes through the call centre. This effectively prevents police from having any control over the bail justice chosen for the hearing, and also prevents any discussion between police and bail justices before they attend the station. The roster used by the call centre is developed by the local bail justices.²³ The system provides collation of information about bail justice hearings, as the bail justice logs the result of the hearing with the call centre on completion.

The department advises that feedback from the trial has been positive. The department intends to offer the roster system to other police stations around the state.²⁴

Departmental oversight of the deployment of bail justices is also important to ensure bail justices are properly utilised. In the Consultation Paper we noted there were 491 bail justices throughout the state, though only about one-quarter were actively carrying out their role.²⁵ We are now advised there are 360 bail justices on rosters, though some are not responding when called. The implementation of the electronic roster has resulted in the resignation of some bail justices who were not willing to commit to a roster.²⁶ However, it appears there is still a large number of inactive bail justices. We believe that only those actively undertaking bail justice duties should be entitled to maintain their appointment. This is addressed in many of the recommendations in this chapter.

REIMBURSEMENT

Bail justices who actively carry out their role incur not only a time but also a financial commitment. A bail justice must have at least a home telephone and/or mobile phone, preferably access to the internet, and access to transport to and from police stations and association meetings. The lack of remuneration or reimbursement of bail justices for these expenses was raised at our Indigenous forum. It was noted that access to such resources impacted on the diversity of bail justices and caused problems for some people in fulfilling the role. The importance of maintaining the independence of bail justices from police was also emphasised. Maintaining impartiality, both in fact and in appearance, was also raised by some participants at the after-hours bail roundtable, and by Indigenous bail justices in a recent review of the Koori Bail Justice Program.²⁷ Accepting police transport to hearings creates a perception of partiality but it is likely that some bail justices accept, and feel justified in doing so, because it reduces their costs.

16 Report Prepared by Max Jackson & Associates for the Department of Justice, *The Computerised Rostered Call Out System for Bail Justices: A Review of Issues Perceptions and Operational Factors: Outcome Report* (2006) 20–21; submission 44.

17 Consultation 59.

18 Submission 44.

19 Submission 46.

20 Max Jackson & Associates (2006) above n 16, 89.

21 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

22 Information provided by Project Director, Honorary Justices Unit, 16 June 2006.

23 Information provided by Project Director, Honorary Justices Unit, 17 May 2007.

24 Ibid.

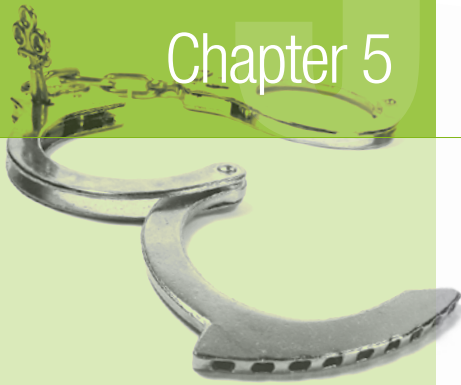
25 Victorian Law Reform Commission (2005) above n 1, 37.

26 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

27 Department of Justice [Victoria], *Review of the Indigenous Bail Justice Program: Final Draft Report* (2006) 44.

Chapter 5

After-hours Bail Decisions



An appropriate system of reimbursement will allow for stricter guidelines to be imposed on bail justices regarding assistance from police. It will also encourage diversity in appointments. It recognises that bail justices contribute more than time to the role. The Office of the Public Advocate has a system in place for reimbursing Independent Third Persons (ITPs) who, like bail justices, must travel to police stations. It provides a sliding scale depending on the number of call-outs attended and a base amount. Considering the large number of inactive bail justices, we do not believe payment should be made to bail justices unless they actually attend hearings.

DEFINING THE BAIL JUSTICE OFFICE

The RVAHJ incorrectly characterises bail justices as independent judicial officers. While justices of the peace originally had powers similar to magistrates, this is no longer the case and has not been since the Magistrates' Court Act was enacted.²⁸ The powers of justices of the peace were significantly limited by that Act. The role of bail justice was created, and its functions defined, in the Bail Act and in the *Children and Young Persons Act 1989*.

The office of bail justice does share similarities with judicial offices. Bail justices are required to take an oath²⁹ and are provided with the same protections and immunities as magistrates.³⁰ Once appointed, bail justices have the same tenure as judges and magistrates.³¹ However, they are appointed by the Attorney-General, rather than the Governor-in-Council and the removal provisions for bail justices are no longer the same as those for magistrates.³² The removal provisions for magistrates are now in the *Constitution Act 1975* along with other judicial officers.³³ 'Judicial office' is defined in that Act to mean judges, masters and magistrates, but does not include bail justices.³⁴ Bail justices also differ from judicial officers in that they are not lawyers and are volunteers, which means they are not subject to any oversight through the terms of their employment.

People who told us they preferred a court-based system over the current bail justice system generally thought a decision as important as removing a person's liberty should be made by a legally qualified decision maker.³⁵ The RVAHJ was angered by criticisms of the system based on bail justices not being legally qualified:

We assert that a properly trained volunteer is completely able and intellectually qualified to read and understand the bail act ... Suggestion to the contrary, that only lawyers are capable of understanding law, is a form of such breath taking arrogance it needs no comment ...

While we agree that laypeople can understand the law, there is no doubt that bail justices will not be aware of the interrelationship of bail, criminal and evidence law in the way that a magistrate or judge will. This is not intended as a disparagement of individual bail justices, but is a reflection of the limitations of the role. All judicial appointments, including magistrates, require legal qualifications. The Magistrates' Court was professionalised almost 20 years ago—a reflection of the complexity of matters that the court now deals with.

A bail justice has very specific powers which are not commensurate with a court's powers. The Bail Act's use of the word 'court' to in some cases include police and bail justice hearings seems to have caused some confusion in this regard. Bail justices are not appointed as judicial officers, but as justices of the peace with a specific role and limited powers. They do not have any role outside of bail and Interim Accommodation Order hearings, apart from some justice of the peace functions. This confusion will be partly overcome by our recommendation that the new Bail Act refer to specific decision makers so their powers are clearly defined.³⁶

DEFINING BAIL JUSTICE POWERS

In the Consultation Paper we asked about curtailing the statutory powers of bail justices in response to concerns raised with us in consultations.³⁷ There appears to be some

RECOMMENDATIONS

46. The Department of Justice should institute a reimbursement system for bail justices based on the model used by the Office of the Public Advocate to reimburse Independent Third Persons. Reimbursement should only be made to bail justices who conduct one or more hearings throughout the year.
47. The new Bail Act should limit bail justices' decision-making role to 'granting bail' and 'authorising continued detention' of the accused by the police.

confusion about the nature and functions of bail justices, which has arisen because the distinctions between justices of the peace and judicial officers have changed.

ADMINISTRATIVE OR JUDICIAL POWER?

Bail justices are a special class of justice of the peace, given the authority to make bail decisions. Apart from the fact that they are volunteers, they are not unusual in being delegated powers usually exercised by a court. For example, the Magistrates' Court Act provides for the appointment of judicial registrars who are delegated particular powers to hear prescribed matters. In the Supreme Court an example is a registrar of probates, who is a court employee but acts judicially in making a grant of probate.³⁸

The power to make bail decisions can be characterised as administrative or judicial, depending on who is exercising it. For example, police are not exercising judicial power when granting bail.³⁹ As bail justices are not judicial officers, and like police are making a decision that will be reviewed by a court, they arguably exercise administrative power also.

The nature of a power can be coloured by the person or body exercising it. Many cases have emphasised that the nature of the decision maker—judicial or non-judicial—can influence characterisation of the power as judicial or non-judicial.⁴⁰ This can be the case even if the power is characterised as a judicial power when exercised by a judicial officer. The courts have described 'chameleon like' powers that take their character from the decision maker.⁴¹

Delineation of the powers exercised by bail justices is important. We recommend that the power exercised by bail justices be clearly defined in the new legislation as administrative to remove any confusion. The commission considers that a bail justice hearing is an independent review of the police decision. We therefore recommend that it be characterised in this way. The new Bail Act should empower bail justices to grant bail and 'authorise the continued detention' of the accused by the police, rather than remand.

Bail justices hear applications for both state and federal criminal matters in Victoria. The laws of the state concerning arrest, custody and trial apply to a person charged with a federal criminal offence.⁴² The Victorian Bail Act therefore applies to people charged with federal offences, and state courts have jurisdiction to hear federal criminal offences. The Constitution only allows federal judicial power to be vested in state and federal courts; it cannot be vested in non-judicial bodies.⁴³ Bail justices do not fit this criterion.⁴⁴

28 The *Justices Act 1958* allowed a Court of Petty Sessions (now the Magistrates' Court) to be constituted by two justices of the peace, a stipendiary magistrate or a single justice of the peace if the parties consented.

29 *Magistrates' Court Act 1989* s 120(3).

30 *Magistrates' Court Act 1989* s 124.

31 The retirement age is 70: *Magistrates' Court Act 1989* s 123(a).

32 *Magistrates' Court Act 1989* s 120(1).

33 *Constitution Act 1975* s 87AAB. These provisions were included in the Act in April 2006.

34 *Constitution Act 1975* s 87AAA.

35 Consultations 7, 22, 25.

36 Chapter 2.

37 Victorian Law Reform Commission (2005) above n 1, 45–46, 49–51.

38 *In re the Will of Mary Lucy Rider* (1901) 27 VLR 238. At 242 Hood J said: 'The act of the Registrar in granting the probate is a judicial act, and s.29 [of the Administration and Probate Act 1890] says that "every such probate or administration shall be deemed to be granted by the court"'. This can be contrasted with a bail justice decision which is reconsidered by a court within a short time, usually the next court sitting day.

39 '... it is no part of the function of the police to exercise judicial power ... activities such as apprehension and questioning of suspects, fingerprinting, detention, and refusal of bail are all administrative activities that are intended to be aimed at furthering the course of justice ...': AM Gleeson, 'Police Accountability and Oversight: An Overview' in David Moore and Roger Wettenthal (eds) *Keeping the Peace: Police Accountability and Oversight* (1994) 24.

40 Examples are: *R v Spicer; Ex parte Australian Builders Labourers' Federation* (1957) 100 CLR 277, 305 (Kitto J); *R v Hegarty; Ex parte The Corporation of the City of Salisbury* (1981) 147 CLR 617, 628 (Mason J) (with whom Gibbs CJ, Stephen and Wilson JJ agreed); *Re Dingjan* (1995) 183 CLR 323, 360 (Gaudron J); *Yanner v Minister for Aboriginal & Torres Strait Islander Affairs* (2001) 108 FCR 543, 554 (Sackville J).

41 *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 18, (Aickin J); *Kioa v West* (1985) 159 CLR 550, 612 (Brennan J); *Luton v Lessels and Another* (2002) 210 CLR 333, 387–388 [188–189] (Callinan J).

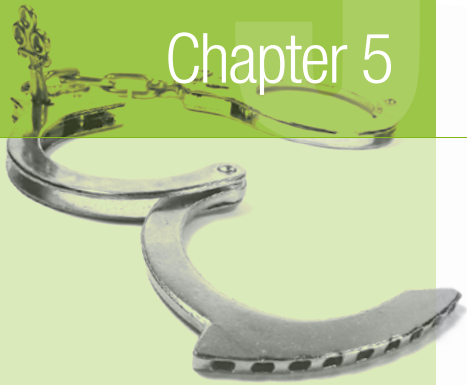
42 *Judiciary Act 1903* (Cth) s 68.

43 *Commonwealth Constitution* s 71.

44 Section 23C of the Crimes Act 1914 (Cth) provides that a person under arrest for a Commonwealth offence must be brought before a judicial officer within the prescribed investigation period. Judicial officer is defined to mean a magistrate, justice of the peace or person authorised to grant bail under the law of the state where the person was arrested. Federal judicial power may only be vested in state and federal courts. It cannot be vested in non-judicial bodies. Aspects of judicial power may be delegated by courts to non-judicial officers of the court provided that judges continue to bear the major responsibility for the exercise of judicial power, and provided that the decisions of non-judicial officers may be reviewed or appealed on questions of fact and law: *Harris v Caladine* (1990) 172 CLR 84. The federal jurisdiction of state courts may be exercised by a master, registrar or other officer of the court: *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49. Bail justices do not form part of a court, although their decisions are subject to *de novo* review by courts in most instances. If bail justices are exercising judicial power in determining bail applications, then to the extent that the *Judiciary Act 1903* vests federal judicial power in bail justices, it is invalid. If bail justices are exercising an administrative power, then this problem does not arise.

Chapter 5

After-hours Bail Decisions



We recommend bail justices be able to hear bail applications for any offence, including homicide.

This has not been considered a problem thus far, but is another reason why it is preferable for bail justice's power to be clearly defined as administrative.

DETENTION LENGTH

Bail justices have the power under section 12(1A) of the Bail Act to remand an accused for up to eight days. Despite this, current practice is to remand an accused to the next court sitting day unless this is not possible. In the Consultation Paper we asked if bail justices should only be able to remand accused people to the next sitting date of the court.⁴⁵ This change was supported by all submissions that responded to this issue.⁴⁶ Two submissions said they had no problem with the change but thought the current provision allowed for contingencies and perhaps should be retained.⁴⁷

We have not heard any compelling argument for retaining the power to remand for up to eight days. Accused people should be brought before a court, where they have access to legal representation and support services, as soon as possible. It might sometimes be the case, as Stephen Mayne's submission suggested, that a person might be due to appear in court in two days on another matter, so could be remanded until then. A person's liberty should not be subject to administrative convenience. In such cases it is quite common for the other matter to be brought forward and dealt with on the day the accused is brought before the court.

The commission is concerned that some accused people may be remanded for lengthy periods because their local court does not sit every business day. In some regional areas the local court does not sit five days per week. If the local court is not sitting on the next business day, the bail justice should authorise detention of the accused only until the next business day and the accused should be taken before the nearest court which is sitting that day.

HEARING APPLICATIONS FOR ANY OFFENCE

The Bail Act allows bail justices to make decisions for all offences except murder and treason. In the Consultation Paper we asked whether bail justices should retain the power to hear applications for serious indictable offences, particularly those that currently require exceptional circumstances to be shown.⁴⁸

Submissions were divided on this issue.⁴⁹ As discussed in Chapter 3, we recommend that all bail applications be decided on the basis of unacceptable risk, with no distinctions based on offence category. We can see no justification for making distinctions between offences for bail justices. This would unnecessarily complicate the new Bail Act, and may also lead to accused people spending more time in custody. In its response on this issue the RVAHJ said: 'This would introduce a double-system and increase complexity. There is no suggestion in the Consultation Paper that bail justices are releasing people inappropriately!'

Victoria Police submitted:

In the interests of ensuring accused persons are processed without unnecessary delays, it is suggested that rather than restricting the authority of bail justices to make bail decisions for persons accused of certain offences, appropriate training and support should be provided to bail justices to enable them to undertake this role effectively.

We agree with this view, and believe the recommendations in this chapter will help professionalise the bail justice system and ensure better training, information and support. This should lead to increased confidence in bail justice decisions.

We recommend bail justices be able to hear bail applications for any offence, including homicide. Based on past bail justice decisions, it is unlikely that bail justices would bail a person accused of murder. However, they will provide independent scrutiny of the police decision and explain bail rights to accused people, and the considerations involved in the bail decision. Our recommended change to the new facts and circumstances rule will mean that accused people will not be prevented from making further applications before the court even if they are legally represented at the bail justice hearing.⁵⁰

During the course of this review we have seen media reports about bail justices conducting hearings for accused people charged with homicide.⁵¹ It therefore appears that some police currently call a bail justice when they should not. We assume this occurs after the accused is held for some time and is done to provide validation of continued detention, even though bail justices do not have the power to do so.

DIVERSITY

In the Consultation Paper we discussed the lack of diversity among bail justices. The overwhelming majority of bail justices are male, aged over 50 and of Anglo-Saxon background. There was a perception among some people consulted that this contributed to a lower bail rate because of a more conservative viewpoint.

The need for greater diversity of age, gender and ethnicity was noted by the RVAHJ after conducting a survey of bail justices in 2000.⁵² Some submissions pointed out the difficulty in attracting younger applicants and women, particularly those with young children, because of the requirement to attend hearings during the night.⁵³ Others thought that maturity and expertise were more important considerations than diversity.⁵⁴

The Department of Justice is developing a new recruitment system to increase diversity and target locations where there are shortages of bail justices. This will include identifying suitable applicants through liaison with local governments, members of parliament, regional departmental officers and the Victorian Multicultural Commission. New bail justices will be recruited through this process after a new training process is put in place.⁵⁵

Diversity of bail justices should be encouraged, as it has been in the public service and police for some time, and more recently in judicial appointments.

INDIGENOUS BAIL JUSTICE PROGRAM

The Aboriginal Bail Justice Program incorporates Indigenous Australians into the decision-making process and is an example of the need to target particular groups who may not otherwise consider this role. A number of issues about the program were raised in our Consultation Paper.⁵⁶ The program has recently been reviewed and a report commissioned by the Department of Justice was tabled at the Aboriginal Justice Forum in March 2007.⁵⁷ It was accepted by

the forum but the recommendations have not yet been considered. The report recommends expansion of the program; however, it also noted that its objectives are unclear and recommends the objectives be clearly defined and promoted.

The report covers many of the general issues about bail justices the department is currently looking at, but considers them specifically for Indigenous bail justices. This includes consideration by the department of improved recruitment, training and mentoring for bail justices, and reimbursement of expenses involved in carrying out the role. Most of these concerns are addressed by the recommendations in this report.⁵⁸ We believe it is appropriate to leave specific consideration of the Aboriginal Bail Justice Program review report to the Aboriginal Justice Forum.

ACCREDITATION AND TRAINING

Until recently, the process for applying for appointment as a bail justice was simply to send a written application to the Justices of the Peace and Bail Justices Registry and provide three written references. After vetting by a selection panel, applicants completed a three-day accreditation course: two days with trainers and one day of home study. This process relied on individuals nominating themselves and did not take into account the needs of the system, such as supplying bail justices to areas with insufficient numbers. It also did not prepare applicants for the reality of fulfilling the role. Many applicants dropped out during the accreditation course, or did not remain on a roster after appointment.

The Department of Justice has undertaken considerable work to improve the recruitment criteria and process for bail justices.⁵⁹ The new process includes targeting applicants in areas of low bail justice numbers through the locally-based nomination process discussed. This process will not only assist diversity but also identify suitable people who may not otherwise have considered applying. The criteria also emphasises

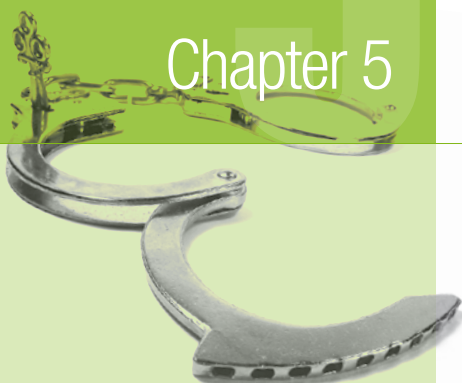
RECOMMENDATIONS

48. The new Bail Act should stipulate that bail justices may only authorise the continued detention of the accused to the next business day. If the local court is not sitting that day, the accused must be taken to a court in that region that is sitting.
49. The new Bail Act should provide that bail justices can grant bail to or authorise continued detention of an accused charged with any offence.
50. The Department of Justice should continue to encourage diversity of bail justices by promoting the bail justice program among women, younger adults, and people of diverse cultural backgrounds.

- 45 Victorian Law Reform Commission (2005) above n 1, 49–50.
- 46 Submissions 11, 23, 24, 30, 32, 33, 38.
- 47 Submissions 11, 46.
- 48 Victorian Law Reform Commission (2005) above n 1, 49.
- 49 Submissions 8, 11, 18, 19, 23, 24, 38, 46 thought bail justices' power to grant bail should remain as it is. Submissions 14, 17, 22, 30, 32, 39, 41 thought it should be restricted—of these, some thought bail justices should not be able to grant bail for any serious indictable offences, others just exceptional circumstances offences.
- 50 See discussion in Chapter 6. The recommendation will allow accused people to be represented at a bail application made within two court-sitting days of arrest without having to show new facts and circumstances in order to re-apply.
- 51 For example: Andrea Petrie, 'Black widow' lit fatal house fire: police (2005) *The Age* <www.theage.com.au> at 12 August 2005; John Silvester et al, 'I Give Up', *The Age* (Melbourne) 21 June 2007, 1.
- 52 Submission 46.
- 53 Submissions 13, 19.
- 54 Submissions 11, 17, 18, 36.
- 55 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.
- 56 The Aboriginal Bail Justice Program is discussed in more detail in Victorian Law Reform Commission (2005) above n 1, 42.
- 57 Department of Justice [Victoria] (2006) above n 27.
- 58 The report was received too late for detailed consideration in this review. We also did not consider it appropriate to consider and endorse recommendations before they are adopted by the Aboriginal Justice Forum.
- 59 This includes making information about the criteria for selection of bail justices available on the department's website: Department of Justice, *Bail Justice Appointments Information and Forms* (2007) <www.justice.vic.gov.au> at 16 February 2007.

Chapter 5

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that the applicant must be willing to carry out the duties of a bail justice at all reasonable times and at locations within a reasonable distance.

For people without legal training, a three-day course is inadequate to cover the legal, procedural, ethical and social context issues involved in bail applications. One bail justice who completed the course in 2004 told us the training ‘was plainly too short’.⁶⁰ The same bail justice noted the difficulty that he and others experienced in their initial interpretation of the Bail Act, such as knowing which offences were indictable. Training must not only cover the Bail Act but provide bail justices with sufficient knowledge of criminal and evidence law for them to properly undertake their role. Being able to ‘read and understand the Bail Act’ as the RVAHJ submitted is not an adequate qualification to make bail decisions.

Two submissions also raised the importance of bail justices receiving training about the specific disadvantage faced by some accused people in dealing with the criminal justice system. Issues raised in submissions included youth, mental health, drug dependence, homelessness and cultural background.⁶¹ At our Indigenous Forum, participants raised the need for cultural awareness training for bail justices, particularly about the risk of deaths in custody. They also thought bail justice training should include:

- awareness of the support mechanisms available for Indigenous Australians, such as VALS and Aboriginal Community Justice Panel (ACJP) workers
- the need to ensure police policy requirements have been adhered to, for example, that VALS and the ACJP have been notified an Indigenous Australian is in custody
- the need to ask about Indigenous status—police often assume someone is not Indigenous because of their appearance.

Indigenous awareness training for people in the criminal justice system was also a recommendation of the Royal Commission into Aboriginal Deaths in Custody.⁶²

The department is developing professionalised accreditation and ongoing training for bail justices which will be offered through Victoria University, which also provides registrar training courses.⁶³ We believe completion of a course of accreditation is a crucial requirement to becoming a bail justice and should be included in legislation. Qualifications as an eligibility requirement for appointment are routinely included in legislation, such as the requirement for judicial registrars to be legally qualified.⁶⁴ The course should cover the issues raised above.

Bail justices are volunteers and their socioeconomic circumstances may vary. To encourage diversity in bail justices, and recognise they are already volunteering their time and energy, the accreditation course should be free.

As discussed, we recommend that the legislative provisions governing bail justices should be contained in the Bail Act, not the Magistrates’ Court Act. Section 120 of the Magistrates’ Court Act provides for the appointment of bail justices and section 121 provides that a person who holds

RECOMMENDATIONS

51. Sections 120 and 121 of the Magistrates’ Court Act should be repealed and re-enacted in the new Bail Act with the following additions:
 - Section 120 should be amended so that people are not eligible for appointment as a bail justice unless they have satisfactorily completed a course of accreditation prescribed by the Secretary, Department of Justice.
 - Section 121(3) should be amended so that people who are a bail justice by virtue of being a prescribed office holder may not act as a bail justice unless they have satisfactorily completed a course of accreditation prescribed by the Secretary, Department of Justice.
52. The bail justice accreditation course should be designed to ensure bail justices are adequately trained in the legal, procedural, ethical and social context issues involved in bail applications. This must include Indigenous awareness training.
53. The course should be provided at no cost to bail justices.
54. The Department of Justice should provide regular information to bail justices. Material should be available electronically and remain available on a website accessible by bail justices so new appointees can access past material.

a 'prescribed office' in the public service is a bail justice by virtue of that position.⁶⁵ These provisions should be re-enacted in the new Bail Act in plain language, with an addition to reflect the importance of adequate training. The Act should require that people cannot act as bail justices unless they have satisfactorily completed training.

INFORMATION AND UPDATES

In the Consultation Paper we asked if there was a need for regular communication between the Department of Justice and bail justices.⁶⁶ Submissions from bail justices expressed concern that they may be unaware of important legislative and procedural changes because there is no formal system to provide them with updates.⁶⁷ Until recently the only communication bail justices received was the RVAHJ quarterly newsletter. Bail justices who are not members of the RVAHJ do not receive the newsletter. Some bail justices told us they only remain members of the RVAHJ to receive this type of information.⁶⁸

Most submissions emphasised the need for communication and training to be provided by the department.⁶⁹ Some emphatically saw this as the role of the department rather than the RVAHJ or local associations.⁷⁰ We agree that it is the department's responsibility to ensure all bail justices are properly informed and trained. Bail justices are already volunteering their time. They should not be forced to join and fund an association to obtain the information necessary to fulfil their role.

The department has begun communicating regularly with bail justices through circulars on topical issues. Information about our review, the compellability of bail justices as witnesses, and clarification of governance issues has been provided. This format should be used to provide updates to bail justices about any legislative or procedural changes to bail and important court decisions affecting the exercise of discretion under the Act. The department has advised that the circulars will be included in the online training materials so new bail justices are aware of them.⁷¹

The department should consider regular email updates that direct bail justices to a website containing the information. The website could contain links to the Bail Act and other relevant legislation, previous updates, non-identifying information on complaints about bail justices to highlight the standard of conduct expected, and any information or feedback from the Magistrates' Court. As some bail justices may not have access to the internet, updates should still be available through regular mail-outs.

RE-APPOINTMENT AND REFRESHER TRAINING

Regular updates from the department to bail justices are important but not enough. There is currently no requirement that bail justices undertake ongoing training after appointment. The need for ongoing training was raised in an internal departmental review of bail justices, and concerns were raised with us in consultations and submissions.⁷² In the Consultation Paper we asked whether bail justices should be:

- appointed for limited terms
- required to undertake mandatory refresher courses
- eligible for re-appointment only if they successfully complete refresher training.⁷³

Ongoing training to ensure bail justices are applying the current law and are aware of current practices is essential. Refresher training is currently offered by the RVAHJ, but the training is irregular, not always offered at locations convenient for regional bail justices and is paid for by bail justices themselves. However, the RVAHJ has undertaken considerable work to professionalise its training.

The RVAHJ advised us that refresher training is significantly different from the initial training.⁷⁴ The Chief Magistrate is normally available for one day and a County Court judge and Supreme Court justice attend. Presentations are also provided by:

- the Melbourne University Department of Criminology
- Aboriginal bail justices, who provide cultural awareness training
- the Central After-Hours Assessment and Bail Placement Service (CAHABPS), which attends bail hearings involving children.

In its submission the RVAHJ said it is moving to full recognition as a registered training organisation and noted the problem with attendance at refresher training not being mandatory.

All submissions from bail justices supported the need for some form of further training. Bail justice Stephen Mayne thought this should only occur when major changes to the Act take place but most submissions, including from bail justices, thought training should be regular and mandatory.⁷⁵ Many submissions emphasised the need for communication and training to be provided by the department.⁷⁶

60 Submission 8.

61 Submissions 30, 32.

62 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, recommendation 96.

63 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

64 *Magistrates' Court Act 1989* s 16C(4).

65 'Prescribed office' includes court registrars (above a certain classification), County and Supreme Court associates, and Supreme Court prothonotaries: *Magistrates' Court General Regulations 2000* r 202.

66 Victorian Law Reform Commission (2005) above n 1, 46.

67 Submissions 18, 36, 44.

68 Submission 44.

69 Submissions 17, 18, 32, 36, 44.

70 Submissions 36, 44.

71 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

72 Victorian Law Reform Commission (2005) above n 1, 43; submissions 18, 32, 36, 44.

73 Ibid 46.

74 Roundtable 2.

75 Submissions 19, 44, 46 from bail justices, and submissions 13, 22, 29, 30, 32, 39, 48.

76 Submissions 17, 18, 32, 36, 44.

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The best way to ensure bail justices are adequately trained is to link refresher training to re-appointment.

A 2004 internal Department of Justice review considered creating fixed-term appointments for bail justices, with re-appointment conditional on attendance at refresher training.⁷⁷ In the past justices of the peace had to apply every three years for renewal of registration.⁷⁸ Fixed-term appointments received support in consultations and submissions.⁷⁹ We believe fixed-term appointments could both ensure attendance at training and overcome the problem of large numbers of inactive bail justices.

The department's review considered fixed terms of three or five years. Submissions addressing this varied, with some suggesting three years and others five.⁸⁰ We believe five years without further training is too long and recommend three-year terms be adopted. Although bail legislation may not change frequently, other criminal and evidence legislation that may impact on bail decisions does, as does practice and procedure and support services.

The best way to ensure bail justices are adequately trained is to link refresher training to re-appointment. However, simply attending training is not sufficient. There must be some measurement of satisfactory completion of the training to ensure participants have understood the material. Satisfactory completion of the training will only result in eligibility for further

appointment—re-appointment will not be automatic. The provision we recommend leaves discretion with the Attorney-General. However, we foresee that re-accreditation will generally result in re-appointment in the absence of any conduct or availability issues.

The re-accreditation course should be provided free to bail justices. For this reason, and access to qualified legal educators, we believe the training should be provided by the Department of Justice. It is not sufficient for current bail justices to train new bail justices, even with the assistance of the Magistrates' Court as currently occurs. The expertise of the Magistrates' Court should continue to be drawn on and magistrates and current bail justices should be involved in the training. However, neither are likely to have the time to develop comprehensive training courses or expertise in the legal education of laypeople.

We also believe it is important for the department to have the authority to direct bail justices to attend training. This would cover situations where police or other participants in a hearing believe the bail justice is not aware of current law or procedures. If, after investigating such an allegation, the department is satisfied that further training is required, it should be able to direct a bail justice to attend.

RECOMMENDATIONS

55. The new Bail Act should provide that:

- Bail justice appointments be limited to a fixed tenure of three years, with the potential for re-appointment.
- To be eligible for re-appointment, bail justices must have:
 - satisfactorily completed a re-accreditation course
 - not unreasonably been unavailable to perform their duties when rostered, or unreasonably been unavailable for the roster.

Beyond these two eligibility criteria, re-appointment should be at the discretion of the Attorney-General.

56. Re-accreditation courses should be provided by the Department of Justice at no cost to bail justices.

57. The new Bail Act should require bail justices to attend training as directed by the Secretary, Department of Justice when reasonably required to do so.

58. The new Bail Act should retain the current age limits for appointment and retirement of bail justices: appointment up to the age of 65 years and retirement at 70 years of age.

59. The new Bail Act should stipulate that a person who was a bail justice immediately before the new legislation comes into force should continue to be a bail justice under the new legislation as if the person had been appointed under the new legislation and subject to the new terms and conditions of that legislation.

Existing bail justices should not be required to undertake re-accreditation when the new Bail Act comes into force. This would be unduly onerous and could result in insufficient numbers of bail justices while training occurred. A person who was a bail justice before the new Bail Act is enacted should continue in the role, subject to the new terms and conditions of the legislation.

The age limits for bail justice appointment and retirement are in the Magistrates' Court Act. The cut-off for appointment is 65 years of age, and a bail justice ceases to hold office at 70 years of age.⁸¹ Although we heard of one bail justice who was unhappy about retiring at 70 years, the retirement age was not raised by anyone else and we believe the current age is appropriate. The cut-off age for appointment was not raised with us at all and given the resources that go into training and appointment of bail justices we believe the cut-off age is also appropriate.

CODE OF CONDUCT

There are no legislative provisions about bail justice conduct apart from the removal provisions discussed later in this chapter. The RVAHJ has a code of conduct for its members that provides for misconduct to be considered by an ethics committee.⁸² The RVAHJ code provides a guide to an acceptable standard of conduct for bail justices; however, the only sanction that can be applied is expulsion from the RVAHJ.

The Department of Justice issued a Code of Conduct for Bail Justices in 1997. The 2004 departmental review of bail justices redrafted the code and distributed it for comment. The code is still in draft form because the department is

awaiting the outcome of our review to finalise its terms. Submissions from the RVAHJ and other bail justices noted the problem of 'lack of teeth' in the draft code.⁸³ The Knox bail justice association also noted that the code lacks procedures for reporting inappropriate behaviour.

Some very serious complaints about bail justices' conduct have been reviewed by the department. These include: allegations of impersonating other public officials in dealings with the public; public association with known criminals; overstating powers to members of the public, such as suggesting bail justices have 'investigative powers' similar to police; and forged credentials used for appointment as a bail justice. Two other complaints regarded personal problems that meant the bail justice was no longer suitable to carry out the role.

We have also been told of inappropriate behaviour by bail justices during hearings. This included bringing family members or pets to hearings, appearing intoxicated at hearings, refusing to provide reasons for a decision when asked, and conducting hearings after having acted as an Independent Third Person for the accused.⁸⁴ These are probably isolated incidents but bring the bail justice system into disrepute.

At our roundtable on after-hours hearings, some participants talked about the perceived lack of impartiality of bail justices. This was said to result from social relationships between bail justices and police, bail justices speaking to police before hearings and accepting transport from police to hearings.⁸⁵ It is likely that most bail justices are aware that the appearance of impartiality is as important as actually being impartial.⁸⁶

RECOMMENDATIONS

60. A detailed code of conduct should be introduced for bail justices—to be included as either a schedule to the new Bail Act or as regulations. The Bail Act must state that bail justices must adhere to the code of conduct.
61. The code of conduct should be based on the 2004 draft code produced by the Department of Justice and the recommendations in this report, and should include the following:
 - bail justices are required to act impartially, with independence and integrity in the performance of their role, and appear to be doing so
 - bail justices must conduct themselves appropriately in private and publicly
 - bail justices must not be unreasonably unavailable at the times for which they are rostered
 - bail justices must limit contact with the media about their bail justice duties to the provision of their decisions and reasons
 - bail justices must not arrange or accept transport by police to the police station
 - bail justices must not discuss the application with police before the hearing.

77 Information provided by Court Services, Department of Justice, 27 July 2005.

78 *Magistrates' Courts Act 1971* s 13.

79 Consultations 7, 15, 23, 25, 44; submissions 13, 19, 22, 29, 30, 32, 39, 44, 46.

80 Submission 22 suggested three years, submission 13 suggested three or five years, submissions 19, 44, five years.

81 *Magistrates' Court Act 1989* s 120(2) provides for appointment and s 123(a) retirement of bail justices.

82 Royal Victorian Association of Honorary Justices, *Code of Conduct* (2000) <www.rvahj.org.au> at 14 March 2007.

83 Submissions 18, 44, 46.

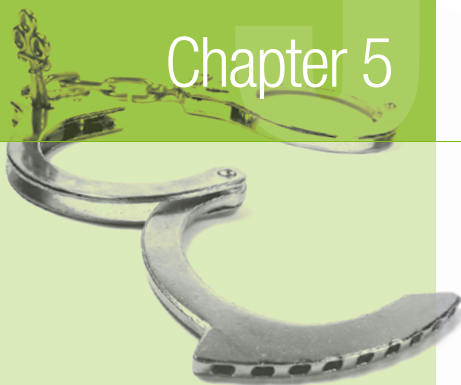
84 Consultation 25; roundtables 1, 2.

85 Roundtable 2.

86 Submissions 11, 46.

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The appearance of impartiality is particularly important because of the environment in which decision making occurs—a police station. Removing hearings from police stations was one of the reasons commonly raised for preferring a court-based model to the current bail justice system.⁸⁷ It is imperative that bail justices remain aware of the high standard that must be maintained to overcome the difficulties of the environment.

Bail justices are given the authority to make a decision affecting a person's liberty. Given the responsibility of this role and the criticisms we have heard, we believe a comprehensive code of conduct should be developed and included in the new Bail Act as a schedule or regulations. We recommend that a serious breach of the code of conduct should result in removal. This will allow removal for inappropriate behaviour or misconduct, whether it occurs in the course of a bail justice's duties or outside those duties. It will also allow removal for neglect of duty, that is, being unreasonably unavailable for a roster.

The code should be based on the current Department of Justice draft but take into account the recommendations in this report.⁸⁸ On the basis of criticisms we have heard, the code should emphasise:

- acting impartially and with integrity
- maintaining the appearance of impartiality and independence
- maintaining independence from the parties
- behaving appropriately both in hearings and in the community
- actively undertaking duties
- limiting contact with the media.

MISCONDUCT AND REMOVAL

The procedure for removal of a bail justice in the Magistrates' Court Act is complex, time consuming and expensive and, until recently, was identical to the process for removing a magistrate.⁸⁹ This is anomalous because bail justices are volunteers, there are many more of them than magistrates and they do not exercise judicial powers comparable with those of magistrates. The removal process is so difficult that it has never been used. This is despite the fact that bail justices can be removed for 'dereliction of duty' and more than 100 are currently not on a roster.⁹⁰ The onerous requirements have significant implications for

dealing with misconduct or neglect of duty by bail justices. In our Consultation Paper we asked if the removal provisions should be replaced with a simpler model.⁹¹

The submissions that addressed this issue all thought the current removal process was unduly onerous and inappropriate.⁹² Dr Chris Corns submitted that the current provisions are inappropriate because a bail justice is not a member of the judiciary and the 'complex and stringent' removal provisions for members of the judiciary should not apply to removal of a layperson. As the legislation stipulates that the Attorney-General appoints bail justices, and bail justices tender their resignation to the Attorney-General, Dr Corns thought the Attorney-General would be the appropriate person to remove a bail justice from office, rather than the Governor-in-Council.⁹³ The Magistrates' Court submission suggested the Attorney-General, upon recommendation by the Chief Magistrate.

Aside from the onerous procedural aspects, the current removal process is also problematic because bail justices can only be removed for misconduct if it occurs 'in the performance of the duties of their office'.⁹⁴ If, for example, a bail justice used the position improperly to gain advantage, or misrepresented the role's powers, it would not be grounds for removal if it occurred outside a bail hearing.

In the absence of a legislative ability to deal with many instances of misconduct, the RVAHJ developed its own procedure for dealing with complaints. It has instituted regular meetings with stakeholders to address problems or complaints as they arise, and more serious matters are dealt with through 'retraining, written advice or mediation'. However, the number and nature of complaints the Department of Justice has recently reviewed indicate the need for an investigating body with greater authority, including the ability to effect removal. The RVAHJ does not believe the current legislative sanctions are sufficient, as it says in its submission: 'The RVAHJ has long held that the removal process is cumbersome, inefficient and is the only real sanction that is open to address bail justice behaviour'.

The RVAHJ has also advocated to the department for a review panel, similar to the current appointment panel. The review panel would deal with all complaints and be able to impose a range of actions, from investigation to retraining, suspension and removal by the Governor-in-Council.

RECOMMENDATIONS

62. The provisions in the *Magistrates' Court Act 1989* regarding the removal of bail justices should be repealed.
63. The removal provisions should be enacted in the new Bail Act as follows:
- (1) If the Secretary of the Department of Justice is satisfied that a bail justice has breached the code of conduct the Secretary may suspend the bail justice from office.
 - (2) As soon as practicable after the Secretary suspends a bail justice, the Secretary may, depending on the nature of the seriousness of the breach, either:
 - a) direct the bail justice to engage in counselling, training or re-accreditation; or
 - b) nominate a person whom the Attorney-General must appoint to undertake an independent investigation into the bail justice's conduct.
 - (3) If the Secretary makes a direction under 2(a), the Secretary must lift the suspension once the bail justice has satisfactorily completed the counselling, training or re-accreditation.
 - (4) If the Secretary makes a direction under 2(a) and the bail justice without valid excuse does not comply either by not attending or not engaging in counselling, training or re-accreditation, this constitutes grounds for removal.
 - (5) A person appointed under 2(b) must:
 - a) investigate the bail justice's conduct; and
 - b) report to the Attorney-General on the investigation; and
 - c) give a copy of the report to the bail justice and the Secretary.
 - (6) The report under (5)(b) may include a recommendation that the bail justice be removed from office.
 - (7) After receiving a report under (5)(b) recommending removal, the Attorney-General, after consulting the Secretary, may recommend to the Governor-in-Council that the bail justice be removed from office.
 - (8) The person who conducted the investigation and the Attorney-General may only recommend that a bail justice be removed on the ground that the bail justice is not a fit and proper person to remain in the office because of dereliction of duty or proved misbehaviour or incapacity which includes, but is not limited to:
 - a) the bail justice is guilty of an indictable offence or of an offence which, if committed in Victoria, would be an indictable offence; or
 - b) the bail justice is mentally or physically incapable of carrying out satisfactorily the duties of his or her office; or
 - c) the bail justice is incompetent or is in neglect of duty; or
 - d) the bail justice has engaged in unlawful or improper conduct in the performance of the duties of his or her office; or
 - e) the bail justice has committed a serious, wilful or sustained breach of the code of conduct.
 - 9) The Attorney-General must not make a recommendation under (7) unless the bail justice has been given a reasonable opportunity to make written and oral submissions to the person who conducted the investigation and the Secretary.
 - (10) In making a recommendation under (7), the Attorney-General is entitled to rely on any findings contained in the report under (5)(b).
 - (11) If the Attorney-General decides not to make a recommendation under (7):
 - a) the Attorney-General must inform the Secretary as soon as practicable after receiving the report under (5)(b); and
 - b) the Secretary must lift the suspension.

87 Roundtable 2.

88 Guidance could also be obtained from the Guide to Judicial Conduct which applies to judicial officers throughout Australia, though many aspects will not apply to bail justices: Australian Institute of Judicial Administration, *Guide to Judicial Conduct* (2002).

89 The provision for removal of a bail justice is reproduced in Victorian Law Reform Commission (2005) above n 1, Appendix 2. The procedure for magistrates was the same up until 2006 when the removal provisions for magistrates became the same as those for other judicial officers: *Constitution Act 1975* ss 87AAA–87AAB.

90 *Magistrates' Court Act 1989* s 122(2)(c) provides for removal of bail justices for neglect of duty.

91 Victorian Law Reform Commission (2005) above n 1, 45–46.

92 Submissions 13, 22, 39, 41, 46.

93 *Magistrates' Court Act 1989* s 120.

94 *Magistrates' Court Act 1989* s 122(2)(d).

Chapter 5

After-hours Bail Decisions

As accused people are almost never legally represented before bail justices, training and guidelines should emphasise the maintenance of procedural fairness.

The commission does not consider it appropriate for a panel that includes current bail justices to review complaints and decide on action to remedy them. A perception of bias could arise if the subject of the complaint was a close associate of a panel member, and it is possible that a complaint could arise against a bail justice on the panel.

The department has developed a policy for addressing complaints and allegations. Its process is to review all complaints against bail justices internally and discuss them with the complainant and the bail justice to determine appropriate action. It advises that many complaints are resolved this way.⁹⁵ If the complaint is more serious or cannot be resolved informally it may be referred to an independent external person for review. Complaints about the conduct of people in their role as a bail justice and conduct that has the potential to bring the office of bail justice into disrepute are reviewed.⁹⁶

The department advises that procedural fairness underpins all aspects of a review. Bail justices are formally invited to participate in the review, but if they refuse the review still proceeds. A report is completed detailing the process undertaken, who was interviewed and what they said, an analysis of the evidence, consideration of options, and recommendations. It is envisaged that the recently established Bail Justice Reference Group will be consulted about complaint handling policies but will not have any role in dealing with individual complaints.⁹⁷

The process used by the Department of Justice is appropriate and should be formalised and included in legislation as part of the suspension and removal process. Although some submissions favoured the Attorney-General to make the removal decision, the commission believes retaining the Governor-in-Council will ensure there can be no criticism of the process on political grounds.

There is no justification for a removal process equivalent to that used for judicial officers. Suspension and removal should not require an application to the Supreme Court by the Attorney-General, as the Magistrates' Court Act currently stipulates. In keeping with our recommendations about departmental administrative oversight, we believe the appropriate person to suspend bail justices is the Secretary of the Department of Justice. The secretary should also have power to direct a bail justice who has breached the code of conduct to engage in counselling, training or re-accreditation. If a breach is more serious, the

secretary should have the power to nominate an independent investigator to be appointed by the Attorney-General.

The power to remove should remain with the Governor-in-Council on the recommendation of the Attorney-General following investigation and a report by an appointed investigator that there are grounds for removal. The provisions in the *Victorian Civil and Administrative Tribunal Act 1998* that provide for suspension and removal of a non-judicial member, and those in the Magistrates' Court Act regarding judicial registrars, provide a useful model.⁹⁸ Our recommendation for the suspension and removal procedure is based on these provisions.

Not every breach of the code of conduct should automatically justify removal. A decision about whether a breach is serious enough to warrant removal should be made in each case. Counselling, training or re-accreditation should be directed for less serious breaches of the code. Examples of less serious breaches could include a bail justice having inadequate knowledge of the law or procedure, or being unavailable for the roster without a valid excuse for a short period. Some less serious breaches may warrant counselling rather than training, such as inappropriate behaviour in a bail hearing or in the community. If the breach is more serious or wilful and sustained, investigation by an independent person would be warranted. Serious breaches would include: ongoing neglect of duty; impropriety in a bail hearing or in dealings with the police; impropriety in the community; overstating or misusing powers in a hearing or in the community; and criminal charges.

The independent reviewer's report should be provided to the bail justice and the department Secretary. The bail justice should be invited to submit a response to the Secretary that will be considered by the Attorney-General along with the report. If the Attorney-General recommends removal to the Governor-in-Council, the report and response should be provided with that recommendation. After considering all the material the Governor-in-Council may decide to remove the bail justice from office.

As the suggested provision does not preclude review, the Supreme Court's inherent jurisdiction to review the removal decision will be retained.⁹⁹ The recommended process emphasises procedural fairness for the bail justice and provides guidance about conduct, but makes the procedure less difficult to use by removing the cumbersome requirement to apply initially to the Supreme Court.

BAIL JUSTICE HEARING GUIDELINES

The way bail justices conduct hearings varies widely. The conduct of a hearing is covered in training but the Department of Justice only began issuing procedural guidelines to trainees in the late 1990s. The current guidelines were updated in 2005. The guidelines include a running order for the hearing, a suggested script for matters that should be explained to the accused, suggested wording that may be used when advising the accused that bail is granted or refused, and the wording of the formal order in each case. It does not appear that the guidelines have been issued to all bail justices. The Geelong Association of Honorary Justices' submission questioned why this had not occurred.

In the Consultation Paper we asked if detailed guidelines should be issued to bail justices about how a bail hearing is to be conducted and, if so, what they should contain and what status they should have.¹⁰⁰ All submissions that addressed this thought guidelines would be useful and most thought they should not have any statutory authority.¹⁰¹ The Magistrates' Court thought the guidelines should provide 'the norm'. Bail justice Stephen Mayne thought the guidelines should be 'in the form of a code of practice', while John Fox thought 'a bail justice should be free to adapt the process to the specific situation within general guidelines' because a hearing in a small country police station may be different to one in a large city station.

The RVAHJ has created what it calls 'aides memoirs' for its members to use in hearings. These include Record of Hearing forms for bail and Interim Accommodation Order hearings, and a guide to the forms required by the Act or Regulations for these hearings. The Record of Hearing form for bail provides a guide to the

order of proceedings and the kinds of issues that should be considered. It provides more guidance than the department's guidelines, which lack prompts about the types of issues that could be raised by accused people to support their application, reasons for refusal of bail, and welfare or medical concerns of the accused. These are all contained in the RVAHJ document.

We believe bail justice hearings should be less formal than a court but certain standards must be maintained, such as ensuring the accused is given a fair hearing, has the process explained, and is given the reasons for a decision. This should be the case no matter what type of police station the hearing is conducted in, or where in the station it occurs. Guidelines are important to ensure all relevant issues are covered in hearings. As accused people are almost never legally represented before bail justices, training and guidelines should emphasise the maintenance of procedural fairness. Many accused people will require questioning and prompting to raise issues relevant to the bail decision. The RVAHJ form prompts bail justices to question accused people about their personal details. Guidelines should also cover issues that may be raised by accused people to support a bail application, such as any treatment, counselling or other support being undertaken or available.

If an accused is to remain in custody, questions about welfare are imperative. Court, police and corrections practices recognise the increased risk of suicide in the first 24 hours of incarceration, particularly for Indigenous Australians. Mental or physical health problems are common among the prison population. Some of the issues that should be checked by bail justices are noted on the RVAHJ form. When an accused is remanded by a magistrate, custody management issues are noted on the remand warrant. This should also

RECOMMENDATIONS

64. Detailed guidelines about how to conduct a bail hearing should be created and issued to all bail justices. They should be based on the Royal Victorian Association of Honorary Justices Record of Hearing form.
65. The guidelines should state that on authorising continued detention of an accused the bail justice must enquire about the accused's health and wellbeing, note any custody management issues on the remand warrant and notify the custody sergeant.
66. The Code of Conduct should state that guidelines for bail justice hearings should generally be followed.
67. The Department of Justice should develop and implement a policy for secure storage and disposal of notes and records of hearing produced by bail justices as a matter of priority.

95 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

96 Information provided by the Department of Justice, 22 September 2006.

97 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

98 *Victorian Civil and Administrative Tribunal Act 1998* ss 22, 23; *Magistrates' Court Act 1989* ss 16G, 16H.

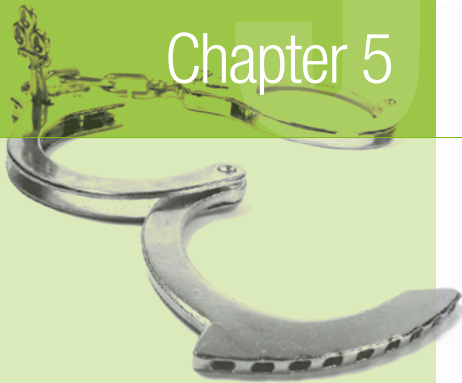
99 *Constitution Act 1975* s 85(1).

100 Victorian Law Reform Commission (2005) above n 1, 46.

101 Submissions 8, 11, 18, 19, 22, 24, 30, 36, 39, 41, 46.

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be done by bail justices after making inquiries with the accused. The Courtlink system used by the Magistrates' Court contains a checklist of custody management issues:

- Aboriginal descent
- withdrawing from a drug of addiction
- risk of self harm
- psychiatric illness
- intellectual disability
- vulnerable due to age and/or appearance
- physical injury
- undiagnosed disability/illness.

Guidelines should advise bail justices to inquire about these issues and record them on the remand warrant, as well as advising the custody sergeant. They should not attempt to resolve issues or engage in counselling or advising the accused. Guidelines should also cover what to do if a bail justice has concerns about police treatment of the accused. The department's Honorary Justices Coordinator can provide information about police complaint processes and will also keep a record of the complaint.¹⁰²

Information about bail justice hearings assists in policy making in this area. The records bail justices make of hearings may also be useful to them if for some reason they are called as a witness in a trial to give evidence about what they have heard or observed. Some bail justices already keep such records, which also raises issues about privacy of information. The department should develop a policy about secure storage and disposal of this information.

Hearing guidelines should be separate from the Code of Conduct, but the code should stipulate that guidelines exist to ensure coverage of all relevant issues and a fair hearing for the accused, and should generally be followed. Though bail justice hearings should not be conducted like a court, they should be conducted in a manner that makes it clear to accused people that a hearing is occurring and they are facing an independent and impartial decision maker.

WHERE HEARINGS ARE CONDUCTED

As we have noted, the environment in which bail justice hearings occur is not ideal. In its submission Fitzroy Legal Service noted

... this decision making occurs in an environment (usually a police station) where impartiality (or the appearance of impartiality) is unlikely to be achieved or perceived by an accused. This severely undermines its effectiveness and appropriateness.

Hearings in police stations may occur over the charge counter in the watchhouse, in an office surrounded by the paraphernalia of police business, or in a separate room. Bail justice hearings may also take place in the Melbourne Custody Centre under the Magistrates' Court.

The Department of Justice advises that the choice of hearing environment differs according to local practice. It is also driven by the demeanour of the accused person and any associated security risks for all the hearing participants. Some of the newer police stations have rooms that can be accessed from both the public and secure areas.¹⁰³ The RVAHJ recommends to its members that hearings be conducted in a room or office. Bail justice Stephen Mayne also submitted that where possible hearings should be conducted in a purpose-built room, not at counters.

The commission is concerned that in some locations hearings are routinely conducted over the charge counter in the watchhouse. This does not assist with an appearance of impartiality. Hearings should be conducted in a space which is as separate from the ordinary operation of the police station as possible. We understand that facilities differ from station to station but this should not be an excuse for the hearing to be conducted in a way that is most convenient for the police. The hearing must have the appearance of a process independent of police. Hearings should not be conducted over charge counters unless an honest assessment is made that the accused poses a physical threat to the bail justice which cannot be overcome through the presence of police. All new and renovated police stations should include a room that can be accessed from both the public and secure areas which can be used for bail justice hearings.

OPEN AND CLOSED HEARINGS

The media's role in bail justice hearings arose in our initial consultations and we noted it when discussing guidelines for hearings in the Consultation Paper.¹⁰⁴ The Herald and Weekly Times' submission argued that as the Bail Act does not distinguish between hearings before courts or bail justices, the provisions in the Magistrates' Court Act about conducting proceedings in open court apply to bail justice hearings.¹⁰⁵ The lack of clarity about this issue is another example of the problems caused by the Bail Act not distinguishing between decision makers. It also highlights the problems caused by hearings occurring in police stations.

We do not believe the Magistrates' Court Act provisions apply to bail justice hearings. Bail justices are not magistrates and do not preside over a Magistrates' Court or have the broad powers of magistrates. The Bail Act does not stipulate that bail justice hearings should be public hearings, or give bail justices power to make orders outside of bail orders.

Bail justice hearings occur in a police station. The many problems associated with bail justice hearings occurring in police stations are acknowledged in this report. Because it is an operational environment where offenders are being processed and police business is occurring, it cannot be compared to the court setting. Although the bail justice controls the bail proceeding, police control the physical environment. It would be impractical for bail justices to make orders about who could be at the hearing because they will not know what else is occurring in the station, or what police resources are available to ensure everyone's safety.

The commission fully endorses the principles of open justice. We believe that as a general rule interested members of the public and the media should have access to bail justice hearings. If hearings occur in operational areas of the station it may be more difficult to accommodate the media and public. Hearings should take place in a dedicated space or away from the other business of the police station. When this principle is adhered to there should be fewer practical problems with media or public attendance.

Victoria Police policy states that members of the public or media may attend bail hearings on police premises provided they do not pose a security risk, or it is otherwise impractical.¹⁰⁶ We believe there should be a general rule in favour of open hearings and police policy should be changed to place greater emphasis on facilitating access. However, we also acknowledge that security issues may arise and the final decision about allowing the public into the station must remain with the officer-in-charge. As bail justices remand accused people to the next sitting day, the media have access to the court bail hearing within a relatively short time.

RECOMMENDATIONS

68. Bail justice hearings should be conducted in a space which is as separate from the ordinary operation of the police station as possible. All new and renovated police stations should include a room that can be accessed from both the public and secure areas which can be used for bail justice hearings.
69. The Victoria Police policy on the presence of the public or media at bail hearings should be amended. As a general rule interested members of the public and the media should have access to bail justice hearings. Wherever possible hearings should take place in a part of the station easily accessible to the public and arrangements should be made by police to facilitate attendance if requested. Public and media access to the hearing should only be refused if their safety will be endangered or they pose a security risk. As hearings occur in police stations, the decision about whether to admit members of the public or media must remain with the officer-in-charge.

102 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

103 Information provided by Project Director, Honorary Justices Unit, 28 February 2007.

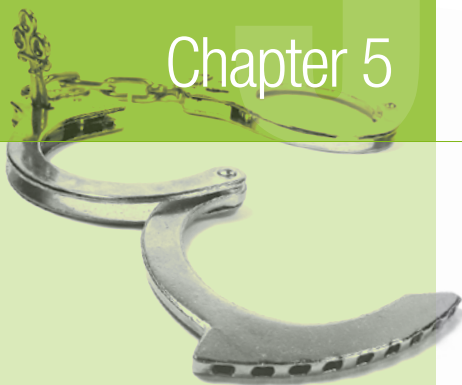
104 Victorian Law Reform Commission (2005) above n 1, 46.

105 *Magistrates' Court Act 1989* ss 125, 126.

106 Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) Instruction 113-6, Bail and Remand 5.9.

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NO TIME LIMIT ON CALL-OUT

In some police regions a practice has developed of not calling a bail justice after a certain time of night.¹⁰⁷ There is no legislation or policy covering this issue and practice appears to vary from station to station. We asked for submissions on whether there should be a time limit for calling bail justices to a police station, and if so, what cut-off time was appropriate.¹⁰⁸

The majority of submissions addressing this thought there should be no time limit on when a bail justice is called out.¹⁰⁹ Most thought that a cut-off time should not be stipulated, but a practical approach should be adopted. Bail justices should be available when needed but if the court is due to open within a few hours it may not be necessary to call a bail justice. Some submissions thought there should be a time limit. The Police Association and one bail justice supported a midnight time limit.¹¹⁰ Others supported the practical approach discussed, that is, cut-offs of two to four hours before court sittings.¹¹¹

If the bail justice system is to be retained, we believe it is important for bail justices to be available as needed outside of court hours. We agree with Victoria Legal Aid's submission that: 'Imposing a limitation defeats the purpose of providing bail justices as an after-hours alternative ...'.

If it is early morning and the court will be open within a few hours, a pragmatic decision should be made by police in each case about the benefit of calling a bail justice. This should take into account the personal circumstances of the accused, particularly children, who should be released from custody as soon as practicable. The Victoria Police Manual currently states that the decision should be made based only on the length of time before court opens and the availability of a bail justice or difficulties in obtaining a bail justice.¹¹² This should be amended to take into account the needs of the accused.

RECOMMENDATIONS

70. The Department of Justice and Victoria Police should institute a policy of no time limit on when the police may call a bail justice to attend a bail hearing outside of court hours. This should be monitored to ensure it is being adhered to by police and bail justices. The Victoria Police Manual should be amended to include consideration of the needs of the accused person in the decision about whether to call a bail justice.

107 Victorian Law Reform Commission (2005) above n 1, 50.

108 Ibid 51.

109 Submissions 11, 13, 22, 24, 29, 30, 38, 39.

110 Submissions 6, 8.

111 Submissions 19, 46, 48.

112 Victoria Police (2 October–5 November 2006) above n 106, 4.1.2.



Chapter 6

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Chapter 6

Bail Decisions by Courts



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

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

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

UNACCEPTABLE RISK AND DELAY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- 1 See data in Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 8.
- 2 For an overview of the criminal jurisdiction of the four courts that make bail decisions in Victoria and how frequently each of these courts hears bail applications see: *Ibid* 57–58.
- 3 *Ibid* 58–60.
- 4 See, eg, Judge Paul Rice, 'Getting Serious About the Causes of Delay and Expense in the Criminal Justice System' (Paper presented at the 24th ALJA Annual Conference, Adelaide, 15–17 September 2006); Chief Judge Michael Rozenes, 'Delay in the Criminal Jurisdiction—and What Can Be Done About It' (Paper presented at the Attorney-General's Justice Statement: Agenda for Change Conference, Aitken Hill, 29–30 October 2003); Standing Committee of Attorneys General Working Group on Criminal Trial Procedure, *Report (Martin Report)* (1999) Australian Government Attorney-General's Department <www.ag.gov.au> at 23 May 2007; Jason Payne, *Criminal Trial Delays in Australia: Trial Listing Outcomes* (2007) Australian Institute of Criminology <www.aic.gov.au> at 23 May 2007.
- 5 For detailed discussion see Victorian Law Reform Commission (2005) above n 1, 59.
- 6 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2006, 1774–1777 (Attorney-General Robert Hulls).
- 7 *Bail Act 1977* s 4(2)(d). Some accused may also have to establish 'exceptional circumstances' or 'show cause' why detention is not justified: see Chapter 3.
- 8 *Bail Act 1977* s 4(3).
- 9 See discussion of delay in George Hampel and Daniel Gurvich, *Bail Law in Victoria: A Practical Guide to the Law, Procedure and Advocacy in Bail Applications* (2003) 10–13.

- 10 *Mokbel v DPP (No 2)* (2002) 132 A Crim R 290; *Mokbel v DPP (No 3)* (2002) 133 A Crim R 141. The Mokbel case is discussed in greater detail in Chapter 8. See also *DPP v Cozzi* [2005] VSC 195 (Unreported, Coldrey J, 8 June 2005).
- 11 [2006] VSC 198 (Unreported, King J, 31 May 2006) [11].
- 12 See, eg, the contrasting decisions in *DPP v Tang* (1995) 83 A Crim R 593 (Beach J) and *R v Kantzidis* (Unreported, Supreme Court of Victoria, Smith J, 9 August 1996) and the analysis of Kellam J in *Beljajev v DPP* (1998) 101 A Crim R 362. See also Lillian Lieder, *Criminal Law 2001: Bail Update and Review* (2001) 14.
- 13 *Bail Act 1997* (Ireland) s 3.
- 14 *Prosecution of Offences Act 1985* (UK) ss 22, 22A. The custody time limits range from 56 to 182 days: *Prosecution of Offences (Custody Time Limits) Regulations 1987* (UK) regs 4, 5.
- 15 *Prosecution of Offences Act 1985* (UK) s 22(3).
- 16 *Bail Act 1978* (NSW) s 32(1)(b)(i).
- 17 *Bail Act 2000* (NZ) s 8(2)(f).
- 18 Victorian Law Reform Commission (2005) above n 1, 60.
- 19 Submissions 13, 17, 24, 30, 32, 33, 38, 41.
- 20 Submissions 24, 29, 32, 38.
- 21 Submissions 11, 18, 22, 39, 45. Submission 39 endorsed the Magistrates' Court of Victoria's submission.
- 22 This view was supported by the majority of magistrates: submission 22.
- 23 Submissions 11, 22, 39, 45.
- 24 Submissions 8, 23, 46.
- 25 Submissions 24, 32.
- 26 Submissions 24, 32, 38. See the Provision of Reasons section in this chapter.
- 27 Submissions 17, 33.
- 28 *Lawyers Hit Back at Crime Claims* (2006) *The Age* <www.theage.com.au> at 30 March 2006.
- 29 *Mokbel v DPP (No 3)* (2002) 133 A Crim R 141 [2].

Chapter 6

Bail Decisions by Courts



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

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

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

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

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

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

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

COMMONWEALTH PROVISIONS

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

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

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

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

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

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

MURDER AND TREASON

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

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

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

RECOMMENDATIONS

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

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

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

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

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

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

Chapter 6

Bail Decisions by Courts



CONFESSIONS AND ADMISSIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

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

PROVISION OF REASONS

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

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

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

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

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

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

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

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

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

57 Consultation 47.

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

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

60 *Ibid* 64.

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

62 Submissions 13, 45.

63 Submissions 24, 29, 32, 38.

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

65 Submissions 24, 30, 32, 38.

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

67 Submissions 13, 23.

68 Submissions 22, 33, 39.

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

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

71 Submissions 13, 33.

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

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

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

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

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

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

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

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

Chapter 6

Bail Decisions by Courts

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

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

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

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

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

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

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

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

In contrast, the OPP said:

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

BAIL TO A DATE TO BE FIXED

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

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

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

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

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

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

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

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

83 *Administrative Law Act 1978* s 10.

84 Consultations 7, 8.

85 Consultations 18, 63.

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

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

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

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

90 Submissions 24, 29, 38.

91 Submissions 8, 18.

92 Submission 8.

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

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

95 See also consultations 18, 63.

96 Consultation 63.

97 And see submission 12.

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

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

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

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

102 Submissions 22, 24, 30, 39.

103 Submissions 23, 29.

104 Submissions 30, 45 made similar suggestions.

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Bail Decisions by Courts



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

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

BAIL APPLICATIONS

NEW FACTS OR CIRCUMSTANCES

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

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

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

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

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

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

IN-PERSON BAIL APPLICATIONS

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

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

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

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

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

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

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

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

111 See the Confessions and Admissions section in this chapter.

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

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

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

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

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

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

118 Submissions 24, 32.

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

120 Submissions 17, 24, 29; roundtable 1.

121 Submissions 24, 29, 38.

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

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

124 See Chapter 10.

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

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

Chapter 6

Bail Decisions by Courts



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

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

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

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

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

FURTHER SUPREME COURT APPLICATIONS

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

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

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

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

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

APPEALS

DIRECTOR'S APPEALS

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

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

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

RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

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

Chapter 6

Bail Decisions by Courts



FURTHER APPLICATIONS AND APPEALS

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

COURT OF APPEAL BAIL

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

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

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

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

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

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

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

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

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

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

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

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

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

RECOMMENDATIONS

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

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

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

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

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

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

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

160 *Crimes Act 1958* s 582.

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

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

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

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

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

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

167 Ibid.

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

Chapter 6

Bail Decisions by Courts

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

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

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

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

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

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

BY-CONSENT VARIATIONS OF BAIL CONDITIONS

Applications to vary bail conditions can be made by accused people and the prosecution.¹⁷⁴

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

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

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

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

RECOMMENDATIONS

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

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

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

A few submissions suggested types of 'minor' conditions the proposed procedure should apply to, such as reporting and residency conditions.¹⁸¹ In contrast, the Law Institute of Victoria submitted there should be no limit on the type of conditions that could be varied by consent.

The commission believes there should be a procedure for changing bail conditions by consent without the requirement of a court hearing. Each party should be required to file a statement of consent with the court. A similar procedure already operates in the Supreme Court for dealing with by-consent bail applications.¹⁸² In many cases, this would be a more efficient use of courts' and parties' time and resources. Most bail matters before the court are on conditions that were originally set by police. If the police agree to the variation, it is likely the court will.

The reform may also assist vulnerable accused people to abide by their bail conditions. Their often unstable lives may necessitate more frequent variations of minor conditions. A process which enables them to vary without attending court may help ensure conditions are varied rather than broken.

The commission believes the by-consent procedure should be limited to defence-initiated applications. If it was extended to the prosecution there is a risk the power may be misused. For example, the prosecution may give an accused the option of consenting to more onerous conditions or face an application for revocation of bail. Even if undue pressure is not applied, an accused may still feel compelled to consent to a proposed variation. The prosecution may still apply to vary conditions, but this will always be heard in court.

The by-consent procedure should not be limited to certain types of conditions. A condition which appears to be minor may in fact have been crucial to the decision to grant bail. For example, a magistrate may have only granted bail to an accused on the condition he resided with his parents so they could supervise him. Initially the parties should decide whether a variation is minor. The papers given to the magistrate by the parties should explain why a variation is considered to be minor. The magistrate should then have discretion to list the matter for hearing if he or she does not think the variation is minor or appropriate.

It is important for sureties to be informed of the proposed variation and give their consent.¹⁸³ To ensure sureties are contacted, the police informant should be responsible for obtaining their consent to the variation and confirm it in the prosecution's statement to the court.¹⁸⁴ If accused people were responsible for contacting any sureties, there is a risk they would falsely claim to have done so.

This procedure differs from the surety notification procedure recommended in Chapter 8 for variation applications heard in court. For the latter, we recommend that whichever party applies to vary the order should be responsible for notifying the surety. The surety may either attend the hearing or provide an affidavit evidencing his or her consent to the proposed variation. We do not believe this process is necessary for minor by-consent variations. The requirement that the informant contacts the surety and obtains his or her consent is sufficient and is consistent with the more streamlined approach we have recommended.

If this procedure for minor by-consent variations was adopted, it would still be necessary for an accused and surety to sign a revised Undertaking of Bail form, but this would not need an additional hearing. Instead, the accused and surety would be required to attend the registry to sign the revised undertaking once the order for variation had been made. The variation would take effect from the date the revised undertaking was signed.

169 Willis (2005) above n 158, 314; submission 13.

170 [2006] VSCA 298 (Unreported, Maxwell P, Buchanan, Nettle, Neave and Redlich JJA, 19 December 2006) [2]. The court referred to *Re Clarkson* [1986] VR 583; *Re Crawley* (Unreported, Victorian Supreme Court, Court of Appeal, Phillips CJ, Callaway and Batt JJA, 5 August 1998). See also *Re Jackson* [1997] 2 VR 1; *Re Pennant* [1997] 2 VR 85. These cases refer to 'very exceptional circumstances'. In paras 27 and 28, the court said: "'exceptional circumstances' means circumstances which are truly exceptional'.

171 *United Mexican States v Cabal* (2002) 209 CLR 165, 181 (Gleeson CJ, McHugh and Gummow JJ).

172 *United Mexican States v Cabal* (2002) 209 CLR 165, 181 (Gleeson CJ, McHugh and Gummow JJ) referring to *Ex parte Maher* [1986] 1 Qd R 303, 310 (Thomas J). Quoted with approval in *Re Zoudi* [2006] VSCA 298 (Unreported, Maxwell P, Buchanan, Nettle, Neave and Redlich JJA, 19 December 2006) [28]. See critique of these reasons in Willis (2005) above n158, 304–08.

173 The commission consulted the Court of Appeal about this issue: consultation 62.

174 *Bail Act 1977* s 18(6).

175 See discussion in Victorian Law Reform Commission (2005) above n 1, 113.

176 *Ibid*. Discussed in consultations 6, 7, 9, 10, 14, 18, 34, 41, 46.

177 Submissions 11, 15, 22 (minority of magistrates), 23, 24, 29, 30, 32, 33, 35, 38, 41, 46.

178 Submissions 15, 30, 32, 35.

179 Submissions 11, 15, 33, 46. The Law Institute of Victoria referred to 'the relevant Court Official'. PILCH submitted that in New Zealand registrars can vary or revoke bail conditions and substitute or impose another bail condition for summary offences. They can also vary reporting conditions for indictable offences.

180 Submissions 24, 30, 32.

181 Submissions 15, 24, 30, 32, 35.

182 Supreme Court of Victoria, Practice Note No 5 of 2004, [5(a)] provides: 'If the prosecution has consented to the application and on the material before the PCD judge [the Principal Judge in the Criminal Division], which may include draft agreed bail conditions, the PCD judge considers it proper to do so, the PCD judge may then make an order admitting the applicant to bail without requiring the parties to attend before a judge'.

183 Provision of notice to sureties is discussed in Chapter 8. See also *Bail Act 1977* s 18(7) and Magistrates' Court of Victoria, Practice Direction No 4 of 2005.

184 A member of Victoria Police on our Advisory Committee approved of this suggestion. Sureties are relatively rare in the Magistrate's Court, so this obligation is unlikely to be onerous.

Chapter 6

Bail Decisions by Courts



EXTENSION IN ACCUSED'S ABSENCE

In certain circumstances a court may extend bail to a further hearing date without an accused being in court.¹⁸⁵ In 2004, the Bail Act was amended at the courts' request to broaden the basis on which courts can extend bail in the accused's absence.¹⁸⁶ Bail may now be extended when the accused is not present for 'sufficient cause'.¹⁸⁷ Sufficient cause is not defined—it is for the court to determine in each case.

Judges and magistrates may extend bail in accused people's absence but require them to attend the court registry to sign the bail extension by a particular date. This may be completed at a different registry to the court which extended the bail. The extension does not take effect until the accused has signed it. If the accused does not sign by the required date, an arrest warrant can be issued for failure to appear.

In our Consultation Paper we asked about the effect of the 2004 amendment and if there are any problems with the 'sufficient cause' test.¹⁸⁸ Most relevant submissions thought the amendment was working well.¹⁸⁹ Many said the amendment had resulted in bail being extended more often.¹⁹⁰ Some thought the police were less likely to object to extending bail in the accused's absence since the amendment.¹⁹¹

Only the OPP responded negatively to the amendment. In contrast, the Commonwealth DPP said, 'We have not [had] any problems with the "sufficient cause" test'.

It appears the 2004 amendment is working well in practice. The commission believes it should be included in the new Bail Act—no further change is necessary.

APPEARANCE AT A DIFFERENT COURT

One submission expressed concern about the validity of the growing practice of accused people arranging to appear and have bail extended at a different court to the one they had been bailed to.¹⁹² For example, an accused who has been bailed to appear at the Melbourne Magistrates' Court may want to appear and have bail extended in the Broadmeadows court. According to the submission, accused people generally ring the Melbourne Magistrates' Court for permission from the registry coordinator. Once they have appeared in the Broadmeadows Magistrates' Court, the coordinator there rings the Melbourne court to confirm the appearance. The coordinator at Melbourne then 'extends' bail.

The submission was concerned that this practice is not provided for in the Bail Act and could potentially contravene it. In particular, section 30 makes it an offence to fail to appear in accordance with the bail undertaking and section 6 requires the accused to appear. The submission notes that section 16(3) of the Act allows the court to extend bail in the accused's absence if there is sufficient cause and section 21(1)(c) of the Magistrates' Court Act allows a registrar to extend bail. However, the definition of 'court' in the Bail Act does not include a registrar.

The commission agrees that the validity of the bail extension in these circumstances is questionable. Accused people should be able to appear at another court to have their bail extended, provided they have made prior arrangements with the court they were bailed to appear in. In many cases this will be a more efficient use of resources and will help accused people who may not have the means to travel to the appointed venue. To ensure accused people who appear at another court are not charged with breaching the Bail Act, the new Bail Act should explicitly state this is not an offence.

RECOMMENDATIONS

90. The new Bail Act should provide that bail may be extended when the accused is not present in court for 'sufficient cause'.
91. The new Bail Act should state that an accused is not guilty of the offence of failure to answer bail if the accused appeared at another court, so long as that appearance was by prior arrangement with the court to which the accused was bailed.

REVOCATION POST-COMMITTAL

Following committal proceedings in the Magistrates' Court, an accused's bail order technically expires and a fresh application must be made. However, in practice the decision is treated as one of whether to extend, vary or revoke the existing order rather than a new application being made.¹⁹³

Concern was expressed in consultations about some magistrates revoking bail at the conclusion of a committal hearing without the prosecution making an application for revocation, or any evidence that the accused had breached bail conditions.¹⁹⁴ As the existing bail order expires at the conclusion of a committal hearing, there is no need for the prosecution to apply for revocation. Magistrates are entitled to remand the accused without an application for revocation, or without giving notice. However, this action goes against established practice and may raise issues of natural justice if accused people are remanded after being 'surprised' by a hearing and consequently unprepared.

In our Consultation Paper we asked whether the Bail Act should prevent a court from revoking bail without the prosecution making an application for revocation and providing notice to the accused.¹⁹⁵

There was strong support in submissions for this proposal.¹⁹⁶ Some also thought revocation should only occur if the prosecution can establish certain matters.¹⁹⁷ Victoria Legal Aid suggested bail should only be revoked if the prosecution shows there has been a serious or ongoing breach of bail, there is likely to be a serious breach of bail, or there is an unacceptable risk the accused will not appear at the trial. Some submissions pointed out that the committal hearing is a review only of the prosecution's evidence and therefore does not provide a reasonable basis for revoking bail.¹⁹⁸

Other submissions opposed the proposal to limit the court's power to revoke bail.¹⁹⁹ The Magistrates' Court thought magistrates should retain the power to revoke bail following committal, but thought the court should give adequate notice to the parties to allow lawyers to take instructions and make submissions.

The commission does not believe the court's power to consider bail at the conclusion of a committal should be curtailed. It appears from our consultations that the practice of denying bail following committal without warning to the defence is limited to a small number of magistrates—it does not warrant a change in the law. We do not believe that creating a presumption in favour of the continuation of bail would be appropriate. Therefore, it would be good practice for the defence to be prepared to apply for bail following committal regardless of whether the court has indicated it may refuse bail or the prosecution has expressed opposition to bail continuing.

When deciding whether to grant bail, the 'history of any previous grants of bail to the accused person' is a relevant consideration.²⁰⁰ We recommended in Chapter 3 that this explicitly include 'any grant of bail in the matter currently before the court'. The fact that the accused has abided by the conditions of the original grant of bail should therefore be taken into account by the court when determining bail following committal.

185 *Bail Act 1977* s 16(3).

186 *Justice Legislation (Sexual Offences and Bail) Act 2004*, Explanatory Memorandum, 2004, 6.

187 *Bail Act 1977* s 16(3)(b). See *Justice Legislation (Sexual Offences and Bail) Act 2004* s 11.

188 Victorian Law Reform Commission (2005) above n 1, 75.

189 Submissions 22, 29, 32, 39, 45.

190 Submissions 24, 30, 32, 38, 45.

191 Submissions 24, 32, 38.

192 Submission 14.

193 In our Consultation Paper we discussed this issue on the basis of current practice, rather than treating the matter as a fresh application for bail.

194 Consultations 2, 7, 10, 22, 39; submission 2.

195 Victorian Law Reform Commission (2005) above n 1, 71.

196 Submissions 13, 19, 24, 30, 32, 38.

197 Submissions 24, 30, 32, 38.

198 Submissions 24, 32, 38.

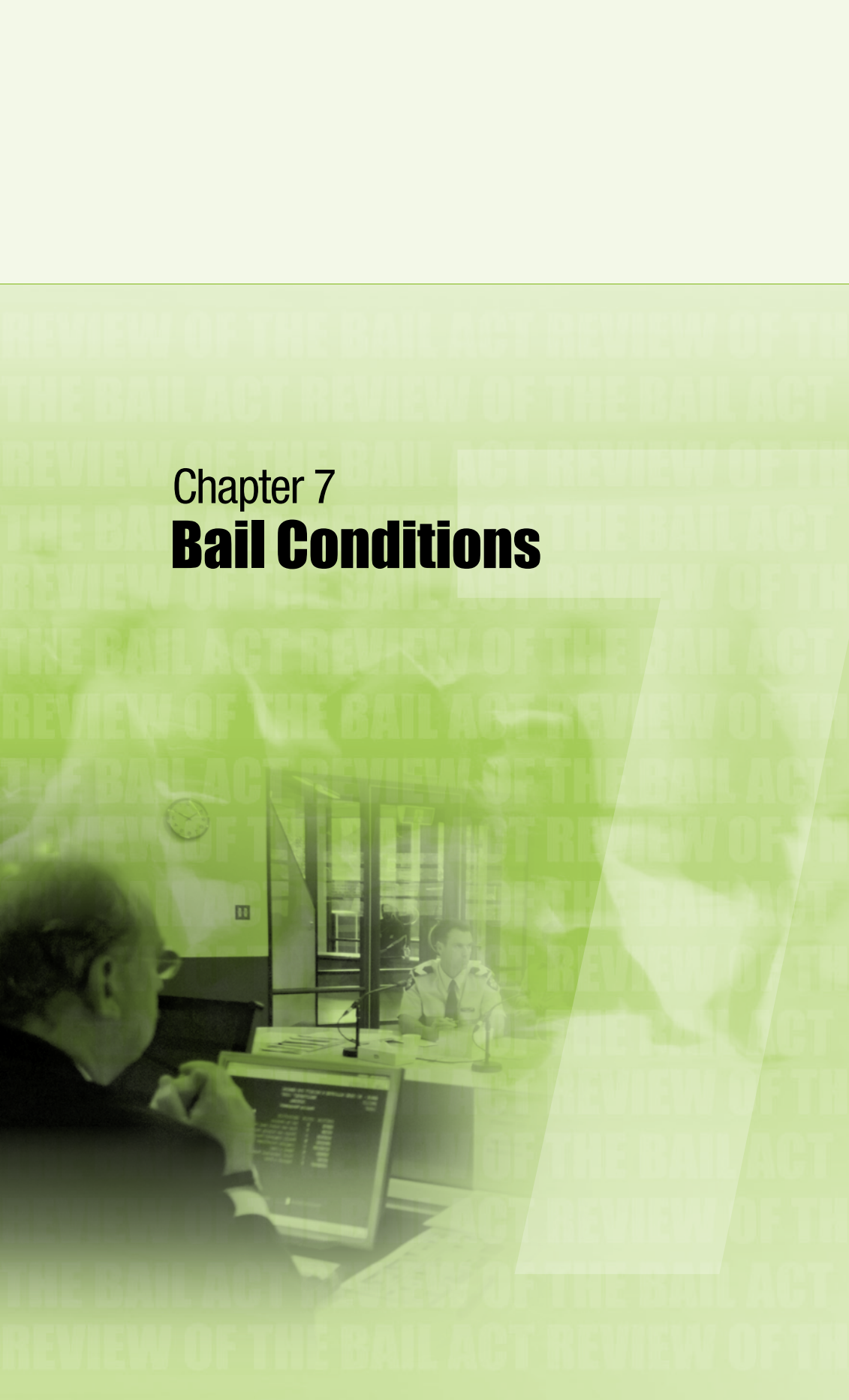
199 Submissions 22, 23, 39, 41.

200 *Bail Act 1977* s 4(d)(3)(c).

Chapter 6

Bail Decisions by Courts





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.

Chapter 7

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.

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

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.

- 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.

Chapter 7

Bail Conditions



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.

Chapter 7

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.

Chapter 7

Bail Conditions



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.

Chapter 7

Bail Conditions



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.

Chapter 7

Bail Conditions



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.



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.¹

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.² 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.³ Of those that selected an alternative, all favoured ‘guarantor’.⁴ A small number of submissions favoured the retention of the term ‘surety’.⁵

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’.⁶ 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.⁷

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.⁸ 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.*⁹

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'.¹⁰ 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.*¹¹

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.¹² 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,¹³ 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.¹⁴

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.¹⁵

Unfortunately, we have not been able to obtain data on how often bail guarantors are used or their effectiveness.¹⁶ 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.¹⁷ 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.¹⁸

- 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 22) 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 Southamptton 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.

Chapter 8

Surety for Bail



In 1992, the LRCV considered abolishing deposits.¹⁹ 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.²⁰ Submissions widely supported their retention.²¹ However, some submissions expressed concern about the potentially discriminatory use of deposits.²² 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.²³

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.²⁴ 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.²⁵

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.²⁶ 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.²⁷

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.²⁸

In the Consultation Paper we asked whether magistrates and judges should play a greater role in assessing the suitability of a proposed bail guarantor.²⁹ Some submissions said they should;³⁰ 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.³¹ One submission suggested that matters should be referred back to the magistrate who granted bail if the registrar rejects the proposed bail guarantor.³²

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.³³ 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.³⁴ It is an offence for an accused person to indemnify a bail guarantor for the guaranteed amount.³⁵ 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.³⁶ There was broad support in submissions for this proposal but there are some problems with it:³⁷

- 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.³⁸ 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.³⁹ 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.⁴⁰ 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'.⁴¹

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.⁴² Courts have in the past reduced the amount a bail guarantor had to pay because of inability to pay.⁴³ 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.*⁴⁴

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.⁴⁵ As with deposits, some submissions were concerned about the potentially discriminatory impact of bail guarantee conditions.⁴⁶ 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.⁴⁷ Some submissions argued that registrars should be responsible for assessing proposed bail guarantors' resources, and referring the matter back to courts if not satisfied.⁴⁸ Others thought the court (or other decision maker) should consider bail guarantors' financial positions when setting the amount.⁴⁹ 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.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³

OUTDATED PROCEDURES

To ensure bail guarantors have sufficient means, the court or court official may require them to lodge the guaranteed amount in cash.⁵⁴ 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.⁵⁵ Submissions agreed unanimously that this requirement is outdated, redundant and should be repealed.⁵⁶ Many people said this provision is no longer used.⁵⁷ 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.

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Surety for Bail



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.⁵⁸ 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.⁵⁹ 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.⁶⁰

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*.⁶¹

In our Consultation Paper we asked whether bail guarantors are given sufficient information about their obligations.⁶² Some respondents believed they were not.⁶³ 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.⁶⁴ 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.⁶⁵ Some said an interpreter should be available to ensure the information is accurately communicated to people from culturally and linguistically diverse backgrounds.⁶⁶

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.⁶⁷ 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.⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹ 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.⁷²

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'.⁷³ 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].

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Surety for Bail



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.⁷⁴ 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.⁷⁵ The South Australian *Bail Act 1985* does not refer to it. The right has been retained in Tasmania, Western Australia and Queensland.⁷⁶ However, the Queensland Law Reform Commission recommended in 1991 that the right be abolished.⁷⁷ In Western Australia, the bail guarantor must only apprehend the accused where 'it is not expedient' to obtain police assistance because of likely delays.⁷⁸ The bail guarantor must also deliver the accused to police 'as soon as practicable' after arrest.⁷⁹

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.⁸⁰ Alternatively, bail guarantors may apply to the court to be discharged from their bail undertaking.⁸¹ 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.⁸² The responses supported both abolishing⁸³ and retaining⁸⁴ 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.⁸⁵ 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.⁸⁶

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.⁸⁷

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.⁸⁸ 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.⁸⁹ 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'.⁹⁰ 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.⁹¹

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.⁹² 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.⁹³ It does not mention notice of an application for variation made by the police, even though the Act provides for such an application.⁹⁴ 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).

Chapter 8

Surety for Bail

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*.⁹⁵ This Act is referred to in the Bail Act, but only in the context of deposits, and is not commonly used in Victoria.⁹⁶ Our consultations show that most people are unfamiliar with the forfeiture process. All other Australian jurisdictions incorporate forfeiture provisions into their Bail Acts.⁹⁷

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.⁹⁸

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.⁹⁹ 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.¹⁰⁰

In our Consultation Paper we referred to an anomaly identified by Hampel and Gurvich.¹⁰¹ 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.¹⁰² 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*:¹⁰³

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.¹⁰⁴ Most submissions on this issue supported amendment.¹⁰⁵ 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.¹⁰⁶ A few submissions were against any amendment.¹⁰⁷

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.¹⁰⁸ All other jurisdictions use the word ‘may’,¹⁰⁹ although some also place the onus on the bail guarantor to satisfy the court why such an order should not be made.¹¹⁰ The majority of jurisdictions also restrict forfeiture to failure to appear rather than breach of any bail condition.¹¹¹

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.¹¹² 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.¹¹³ 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.*¹¹⁴

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.¹¹⁵

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:¹¹⁶

- 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.

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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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ In Tasmania and Western Australia the term of imprisonment is not limited, but is calculated by reference to the forfeited amount.¹²⁰

Submissions were evenly split on whether or not the current penalty should be increased.¹²¹ Most who believed it should be increased suggested a five year maximum penalty.¹²² They argued that the current maximum of two years was an insufficient deterrent, particularly in cases like *Mokbel*,¹²³ 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.*¹²⁴

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',¹²⁵ and therefore called for more robust penalties.

Of the submissions against increasing the penalty, most favoured a civil enforcement system.¹²⁶ 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.¹²⁷ Forfeiture proceedings are by nature civil proceedings¹²⁸ or perhaps contempt of court, rather than criminal proceedings.¹²⁹

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.¹³⁰ Some referred to the dearth of cases about penalties for failure to meet a bail guarantee condition as evidence.¹³¹ 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.¹³² Increasing the penalty may also make it more difficult for disadvantaged accused to find a bail guarantor, potentially leading to a denial of bail.¹³³ 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.¹³⁴

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.¹³⁵ A maximum two year penalty applies to serious summary offences, such as obscene exposure and escaping from lawful custody.¹³⁶ There are a wide range of offences carrying a lesser penalty, including common assault (three months)¹³⁷ and aggravated assault (six months).¹³⁸

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.¹³⁹

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 affidavits of 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.¹⁴⁰

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



Chapter 9

Children and Young People

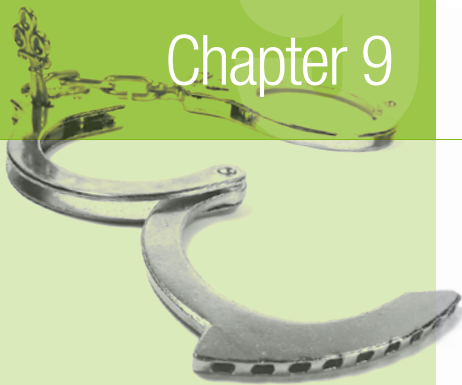


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Data from 2003–04 showed that Indigenous children were almost twice as likely as non-Indigenous children to be proceeded against by arrest rather than summons.

Children are particularly vulnerable in their dealings with the criminal justice system. This is recognised in various ways in Victoria: through legislation—the *Children, Youth and Families Act 2005* (CYFA); the use of the Children’s Court for matters involving children; and specific custodial facilities for children known as detention centres. In Victoria a ‘child’ is defined as a person aged over 10 years and under 18 at the time of the alleged commission of an offence.¹

As with adults, police are the principal bail decision makers for children. In 2004–05 approximately 87% of bail applications for children were granted by police, 1% by bail justices and 12% by the Children’s Court.²

ARREST

In Chapter 4 we looked at the police decision to arrest or summons. Section 345(1) of the CYFA provides that children should be proceeded against by summons except in exceptional circumstances. Although it appears from the section heading that this is a general rule, it actually only applies when police seek to have a charge and warrant issued by a registrar. Only a very small number of warrants of this type are issued in the Children’s Court.³ In most cases involving children police arrest the accused, issue the charge and then file it with the court.

In our Consultation Paper we discussed police practice regarding arrest of children. We also discussed a 2001 study which found an increasing tendency by Victoria Police to use arrest rather than summons or caution against Indigenous children.⁴ We asked whether police were using their powers to arrest children, particularly Indigenous children, appropriately. Concerns were raised in some consultations that arrest is sometimes used inappropriately.

PREFERENCE FOR SUMMONS

Should section 345(1) of the CYFA be amended to provide a general requirement that children be proceeded against by summons? This was not addressed in submissions to our Consultation Paper. From discussions at our Children and Young People roundtable it appears this was because many people assumed from the heading—‘Children to be proceeded against by summons except in exceptional circumstances’—that this section had general application.

There was discussion at the roundtable about how the section should be amended. Some participants thought it would be difficult for police to apply an exceptional circumstances test to the charge and bail of children. There was concern that police in different locations and with differing levels of experience would interpret the test differently. There was also concern about what the consequences would be of not complying with the exceptional circumstances test.

Roundtable participants thought it was important for police to receive direction in the exercise of their discretion to charge and bail children. Concern was raised about inappropriate use of charge and bail for children accused of minor offences such as shoplifting. This was also raised in submissions from defence lawyers and DHS.⁵ Victoria Legal Aid submitted: ‘... children charged with minor offences such as shoplifting are regularly proceeded against by way of charge and bail—with excessive exclusion conditions and a curfew’. Submissions from other defence lawyers voiced similar concerns about excessive conditions.⁶ DHS thought that police generally use their power to arrest appropriately but there are instances where summons or caution would be more appropriate.

In our Consultation Paper we noted the views of Melbourne Children’s Court magistrates who thought police used their arrest powers appropriately.⁷ Youthlaw’s submission responded to this perception:

With respect to those magistrates, they rarely need to consider the issue of how the matter is brought before their court unless they are dealing with a charge of failing to appear, or the matter is being adjourned and some issue concerning bail is raised.

Many roundtable participants noted that there seemed to be ‘no rhyme or reason’ to police decisions in some instances to charge and in others to summons. Participants generally agreed that it did not seem logical for the CYFA to impose an obligation on the registrar when making a decision about charge but not police. The same considerations should apply in each case.

The commission strongly supports a legislative preference for children to be proceeded against by summons rather than arrest and charge, especially children accused of committing minor offences. We agree with our roundtable participants that it is illogical for the CYFA to impose an obligation on a registrar to proceed by summons and not police.

We note the concerns raised at the roundtable about police applying an exceptional circumstances test to the decision to charge or summons. We recommend simplification of this provision to ensure more consistent application. The heading of section 345 should be amended to read ‘children to be proceeded against by summons’, and the section amended to contain a presumption in favour of summons. This should sufficiently direct police that summons is to be used unless arrest and charge can be justified. We believe arrest is only justified to prevent the child from continuing to offend at that time or there is good reason to believe it will be difficult to serve a summons.⁸

We also recommend legislation to direct magistrates to consider the appropriateness of charge and bail when the accused is a child. If it appears charge and bail was used inappropriately, the magistrate should question the informant on oath about why a summons was not issued. This provision will provide a further disincentive for police to use charge and bail unless it can be justified.

INDEPENDENT PERSON

The CYFA requires police to ensure a ‘parent or guardian ... or an independent person’ is present when deciding whether to grant bail to a child.⁹ The same requirement applies when a person under 18 years is being formally questioned.¹⁰ At our Children and Young People roundtable it was noted that the CYFA does not impose the same requirement on hearings by bail justices. This was considered anomalous and required amendment.

A roundtable participant asked whether the CYFA considers bail justices to fulfil the role of an ‘independent person’. Bail justices are decision makers—it would be inappropriate for them to fulfil the role of an independent person. Independent persons attend hearings to assist

the child. Roundtable participants thought it was important to clarify that the two roles are separate, particularly to avoid situations where a person who is both a trained ‘independent person’ and a bail justice tries to fulfil both roles in a hearing.

The CYFA states that an independent person ‘may take steps to facilitate the granting of bail, for example, by arranging accommodation’.¹¹ There was some discussion at the roundtable about whether CAHABPS fulfilled the role of an independent person at bail justice hearings, or whether a separate independent person was required.¹² This arose from a suggestion that the police may not view CAHABPS as independent, but as an advocate for the child. The CYFA clearly envisages the independent person taking ‘steps to facilitate the granting of bail’. The commission considers the involvement of CAHABPS to be sufficient to fulfil the requirement for an independent person.

ARREST OF INDIGENOUS CHILDREN

In our Consultation Paper we noted the higher arrest rate of Indigenous children compared with non-Indigenous children. Data from 2003–04 showed that Indigenous children were almost twice as likely as non-Indigenous children to be proceeded against by arrest rather than summons.¹³ By 2005–06 the arrest rate of Indigenous children had increased to more than double that of non-Indigenous children: 8% of non-Indigenous children arrested compared with 21% of Indigenous children.¹⁴ Detailed data for 2004–05 and 2005–06 is included in Appendix 5.

VALS submitted the available data is ‘evidence that recommendation 87(a) of the Royal Commission into Aboriginal Deaths in Custody that Indigenous Australians be arrested as a last resort is not being implemented’. It suggests that police policy should reflect the Royal Commission’s recommendation that arrest should only be used if the alleged offence is serious and it appears the child is likely to repeat the offence or commit other offences at that time.¹⁵

The Magistrates’ Court submission noted the views of an experienced Children’s Court magistrate:

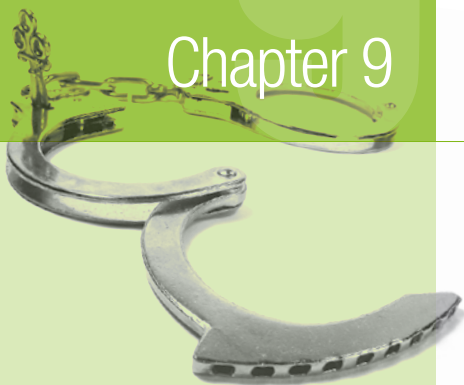
- 1 *Children, Youth and Families Act 2005* s 3. This Act replaces the *Children and Young Persons Act 1989*. The majority of provisions in the new Act commenced on 23 April 2007.
- 2 For comprehensive data see Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 118.
- 3 Information provided by Principal Registrar, Children’s Court of Victoria, 13 March 2007.
- 4 Victorian Law Reform Commission (2005) above n 2, 119–120.
- 5 Submissions 24, 30, 32, 38, 34, 42.
- 6 Submissions 30, 32, 38.
- 7 Victorian Law Reform Commission (2005) above n 2, 119.
- 8 This is based on Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3, recommendation 239.
- 9 *Children, Youth and Families Act 2005* s 346(7).
- 10 *Crimes Act 1958* s 464E(1)(a).
- 11 *Children, Youth and Families Act 2005* s 346(8).
- 12 Police have access to trained ‘independent persons’ who are coordinated by the Youth Referral and Independent Person Program.
- 13 Victorian Law Reform Commission (2005) above n 2, 120.
- 14 Victoria Police data, provided by the Department of Justice Indigenous Unit, 29 March 2007.
- 15 Commonwealth (1991) above n 8, recommendation 239.

RECOMMENDATIONS

123. Section 346 of the *Children, Youth and Families Act 2005* (CYFA) should be amended so that the requirements of subsections 7 and 8 also apply to hearings before bail justices.

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In my view the question is being asked in the wrong place in the system. Even though the statistics show a significant over-representation of indigenous children in the arrest statistics, I have no evidence that it has any other cause than a significant over-representation of indigenous children committing serious offences and a significant over-representation of indigenous children in the child protection system. To reduce the arrest rate of indigenous children one needs to start at the other end of the process and reduce the recidivism rate and the rate of child protection notifications. Initiatives like the Children's Court (Koori Division) are a good starting point.

We do not have sufficient information to make a definitive statement about why the arrest rate of Indigenous children is so much higher than that of non-Indigenous children, and the cautioning rate so much lower.¹⁶ This is another example of the need for improved data collection (as recommended in Chapter 3) to accurately identify where the problem lies and allow informed and targeted policy. There is no doubt that systemic disadvantage is the overwhelming reason for the over-representation of Indigenous Australians in the criminal justice system.¹⁷ However, this is not to say that other factors, including procedural decisions such as arrest or summons, do not also play a part. The Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody noted:

Some Aboriginal respondents also indicated to the Review that the self-fulfilling prophecy whereby, in their view, unnecessary arrests and convictions for minor offences lead cumulatively to a serious record is still at work.¹⁸

The review goes on to cite the example of a very minor offence—a \$1.50 shop theft—where the accused was charged and convicted. Previous convictions make it less likely the person will receive the benefit of a caution or diversion for further offences, however minor.¹⁹

Chris Corns discussed the issue of appropriate use of arrest and police culture in his submission:

The topic of police culture is problematic. Whilst there is considerable literature confirming the existence of a police 'culture' in most western societies, the focus of these studies have been on aspects such as corruption, code of silence, alienation, racism, and so on ... there is considerable literature relating to police culture and police practices which suggest that practical and administrative considerations do influence police practices and I would not at all be surprised if this was found in Victoria in relation to bail decisions ... Whilst there are some studies indicating that the police disproportionately use arrest more than summons for aboriginal youth, it does not necessarily follow that these patterns are a manifestation of a police culture.

Research over the past decade shows that throughout Australia police tend to use arrest, 'move on' and search powers more often with Indigenous young people than they do for the general population.²⁰ In most Australian states Indigenous youth are more likely to be arrested than non-Indigenous youth.²¹ A study by Cunneen and White in NSW found:

This pattern of differential treatment was maintained when the offence type was held constant. For example, 91.2 per cent of Aboriginal first offenders apprehended for break-and-enter offences were charged rather than cautioned, while only 83 per cent of non-Aboriginal first offenders apprehended for the same offence were charged.²²

Police decision making has therefore been demonstrated to impact on the disparate treatment of Indigenous young people. Cunneen and White note: 'all the available evidence demonstrates that the discretionary decisions that are made [by police] work against the interests of Indigenous young people'.²³

Some of these issues will be addressed by the Police Cautioning and Youth Diversion Pilot Project run by VALS and Victoria Police, which began in March 2007.²⁴ The pilot arises from the Aboriginal Justice Agreement, with funding from the Department of Justice. It aims to decrease children's contact with the criminal justice system, increase cautioning and improve cautioning outcomes, and improve local relationships between Indigenous youth and police.

The pilot project includes a criminal justice component—local level police protocols for cautioning—and a community-based follow-up component. Police are linked with local diversionary services that will work with children to encourage their participation in activities, emphasise the seriousness of contact with the criminal justice system, and demonstrate community support. This will include workers employed at Aboriginal co-ops who are funded by DHS through its Youth Justice Indigenous Australian Program. The workers are employed by the co-ops to provide support for children in the youth justice system and those at risk of entering the system. Police, support services and community members are involved in follow-up meetings and programs based on the recommendations made at the caution.

The program encourages cautioning for up to a third offence, where appropriate. A Victoria Police Youth Resource Officer will be nominated in each region to organise the cautions with VALS. One or two officers in each region, of senior sergeant rank or above, will issue cautions. If a first-time offender is not issued with a caution, the informant must fill out a 'failure to caution' form listing the reasons. This is reviewed by the youth resource officer and officer in charge to determine whether a caution is appropriate.

The pilot aims to increase cautioning rates and community support for Indigenous youth to increase diversion from the criminal justice system. The pilot is operating in Mildura, which has the lowest cautioning rate of Indigenous children, and the Latrobe Valley, which has the highest cautioning rate but also a high recidivism rate after caution. The pilot looks at both the rate and effectiveness of cautioning and will monitor outcomes through local reference groups and data collected by youth resource officers, which will be entered into a VALS database.

The commission endorses the pilot program and its roll-out across Victoria if the pilot is successful. Use of cautioning rather than charge has been found to have an impact on juvenile recidivism. A recent Australian Institute of Criminology study of all people born in Queensland in 1984 found that child offenders who are cautioned for their first offence are less likely to re-offend by the age of 17 than those who are charged and dealt with by the court.²⁵ Of those who initially received a caution, 31% re-offended by the age of 17. Of those who went to court, 42% re-offended. The

study also found that Indigenous children who went to court were more likely to re-offend than non-Indigenous children who went to court. This suggests that being charged and going to court may have a greater negative impact on Indigenous children than non-Indigenous children. Not surprisingly, the study also found that children who have had contact with the child protection system because of maltreatment are also more likely to re-offend. The authors noted that this indicates the importance of targeted crime prevention programs for children with multiple risk factors.

The Aboriginal Justice Agreement Phase 2 (AJA2) outlines other initiatives aimed at crime prevention and early intervention with young Indigenous Australians at risk of coming into contact with the criminal justice system. The agreement's stated intention is to 'give the highest implementation priority to initiatives that have the potential to make the largest impact on over-representation and to those targeting young Koories'.²⁶ Except where otherwise stated, these initiatives are the responsibility of DHS:

- services to help families support youth so they are less likely to offend
- reducing the progression of Indigenous youth from the child protection system into the youth justice system
- the Preventative Youth Early School Leaver and Youth Employment Program—intensive outreach support to assist Koori youth to remain in school or connect with other educational and training programs
- community grant programs—provide Indigenous youth with activities that protect them from risks in their environment
- Youth at Risk Program—Victoria Police
- drug and alcohol service—work more effectively with the regional and local Aboriginal Justice Advisory Committees to reduce substance abuse by Indigenous youth
- increasing Indigenous youth's access to mainstream opportunities, particularly sport and recreation, youth programs, services and performing arts—Department of Justice Indigenous Unit and Aboriginal Affairs Victoria
- continuation and possible expansion of the Koori Night Patrol Program—Department of Justice Indigenous Unit

16 Victorian Law Reform Commission (2005) above n 2, 119–120.

17 Department of Justice [Victoria], *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A Partnership between the Victorian Government and the Koori Community* (2006) 13. This issue is discussed further in Chapter 9.

18 Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody, *Review Report, Volume 1* (2005) 425.

19 Ibid 426.

20 Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (2007) 155–7.

21 Ibid 156–7.

22 Ibid 155.

23 Ibid 153.

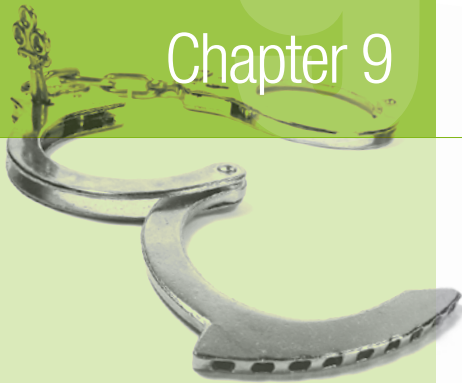
24 Information about the pilot obtained from Victorian Aboriginal Legal Service Co-operative Limited, *Police Cautioning and Youth Diversion Pilot Project: Final Progress Report* (2007).

25 Susan Dennison et al, *Police Cautioning in Queensland: The Impact on Juvenile Offending Pathways* (2006). 'Re-offend' means re-offending detected by police, bringing the child into contact with the criminal justice system.

26 Department of Justice [Victoria] (2006) above n 17, 31.

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- strategies to reduce alcohol-related incidents leading to arrest or negative contact with police, with an emphasis on custody as a last resort for intoxicated people—Victoria Police
- expansion of the Aboriginal Community Liaison Officer Program and continuation of the Police Aboriginal Liaison Officer Program to develop positive relationships between the Indigenous community and Victoria Police and implement jointly planned local initiatives—Victoria Police.

As already discussed, use of arrest for minor offences is a continuing problem. While endorsing the cautioning program, we remain concerned about the disproportionate use of arrest rather than summons for Indigenous children. In Chapter 4 we recommend that Victoria Police develops and publishes a clear policy detailing the criteria to be used to determine whether to arrest or summons accused people. This policy should specifically address what factors should be taken into account when deciding whether to arrest rather than summons a child. While changes in police policy cannot overcome other systemic issues, police should be aware of the impact of the decision to caution, summons or charge on a child's future progress through the system. The arrest policy should direct police to consider:

- the recommendation of the Royal Commission about limitations on when arrest should be used
- the disadvantage faced by Indigenous children in the criminal justice system

- the importance of utilising support services for Indigenous children to increase caution and summons rates.

Other recommendations in this chapter may help reduce arrest rates by reducing re-offending, particularly the recommendations about imposition of appropriate conditions and improved bail support for children.

The commission has only been able to consider arrest as a peripheral issue to bail. An independent reviewer who could look at this issue more broadly may also improve policy in this area. We note the submission of the Law Institute of Victoria:

The LIV has been advocating the establishment of a Victorian Children and Young People's Commission for some time. The LIV considers that such a commission would be able to identify policy issues that might lead to the ... disproportionate arrest rates for indigenous children. Importantly the LIV sees the commission as being able to recommend appropriate ways of dealing with and overcoming such issues.

The Child Safety Commissioner, established by the Victorian Government in 2005, sits within the Office of Children. The commissioner is not independent, but provides advice to DHS and the Minister for Children and is answerable to the minister. We believe there is a need for an independent children and young person's commission that could monitor and investigate issues such as the use of caution, arrest and summons for Indigenous and other children, and systemic discrimination against Indigenous children in the criminal justice system.

RECOMMENDATIONS

124. Section 345 of the CYFA should be amended. The heading should be amended to read 'Children to be proceeded against by summons'. The section should be amended to provide for a presumption in favour of proceeding against children by summons rather than arrest and charge, regardless of whether the proceedings are commenced by police directly charging the accused, or by filing a charge with the court as currently provided for in the section.
125. The following addition should be made to section 345 of the CYFA: If it appears to a magistrate that the informant has used the arrest and charge procedure inappropriately against a child, the magistrate should question the informant on oath as to why the child was not summonsed.
126. Victoria Police should develop a clear, published policy detailing the criteria used to determine whether to proceed against children by caution, arrest or summons. The policy should contain a preference for the use of caution where possible, and summons except where arrest is justified. The policy should take into account the recommendations of the Royal Commission into Aboriginal Deaths in Custody relating to arrest of children, particularly Recommendation 239.

CHILD SPECIFIC FACTORS IN BAIL ACT

The potentially harmful effect of sentencing a child to detention is acknowledged in the CYFA, which states that all other sentencing options must be considered before detention.²⁷ However, there is no similar legislative provision about remand of children—the Bail Act applies to children in the same way as adults.

The CYFA imposes some special protections for children, and where there is inconsistency with the Bail Act it takes precedence.²⁸ The Bail Act contains no reference to these provisions, which are:

- a child cannot be remanded for more than 21 days without being brought back before the court²⁹
- a bail justice cannot remand a child for more than one day, or in some areas of the state two³⁰
- a parent, guardian or independent person must be present when a police officer is considering bail for a child³¹
- children must not be refused bail solely on the basis that they do not have adequate accommodation³²
- if children do not have the capacity or understanding to enter into an undertaking of bail they can be released on bail by a parent or guardian entering an undertaking to bring them to court³³
- police do not have power under the CYFA or the Bail Act to remand a child in custody.³⁴

In our consultation with CAHABPS, we heard that bail justices do not always read the Bail Act and CYFA together. CAHABPS thought that some bail justices do not always consider the specific provisions that apply to children, tend to deal with them as adults, and take a punitive approach to bail. This can result in remand of children who are then released by the court the following day. This is inappropriate when CAHABPS is available to put support in place for children after hours.

In addition, bail justices are not bound by police policy that requires CAHABPS to be contacted when considering remand of a child. We were told bail justices do not always wait for CAHABPS to arrive to perform an assessment. This is also

inappropriate, particularly if the child is then remanded. This problem would be remedied through adoption of the new bail justice roster system currently being trialled by the Department of Justice. Under that system the call centre will only arrange a bail justice to attend after CAHABPS has been contacted, has commenced an assessment, and has advised a bail justice may be called. The new roster system is discussed in Chapter 5.

In our Consultation Paper we asked whether the Bail Act should contain a provision similar to section 362 of the CYFA, so that child-specific factors must be considered when making a bail decision.³⁵ We also asked what matters a decision maker should be required to consider. Section 362 requires a court to consider particular matters when deciding what sentence to impose on a child. These include the need to preserve and strengthen the family relationship, the desirability of allowing a child to live at home and that detention should be a last resort.³⁶

In consultations some people noted that it was odd to treat children like adults at the start of the criminal justice process but then legislate special considerations for sentencing at the end of it.³⁷ A similar set of provisions in the Bail Act would ensure that all decision makers consider child-specific issues when deciding bail.

Submissions largely supported inclusion of child-specific factors in the Bail Act.³⁸ A senior Children's Court magistrate said:

Because the sentencing objectives and sentencing provision for adults and children are so different, there is an underlying tension involved in having essentially the same bail provisions applying to each ... Assuming that a single Bail Act, in whatever form emerges from these consultations, is likely to apply both to children and adults, I would strongly support the inclusion of child-specific factors. It would be logical that s. 139 of the CYPA [now s 362 CYFA], which sets out matters to be taken into account in sentencing a child, should also be relevant to the determination of whether or not a child should be granted bail.

All participants at our Children and Young People roundtable supported the inclusion of child-specific considerations in the Bail Act.

27 *Children, Youth and Families Act 2005* s 361.

28 *Children, Youth and Families Act 2005* s 346(6).

29 *Children, Youth and Families Act 2005* s 346(3).

30 *Children, Youth and Families Act 2005* s 346(4)(b).

31 *Children, Youth and Families Act 2005* s 346(7).

32 *Children, Youth and Families Act 2005* s 346(9).

33 *Children, Youth and Families Act 2005* s 346(10).

34 *Children, Youth and Families Act 2005* s 346(2): a child who is not bailed from police custody must be brought before a court or bail justice 'within a reasonable time' but 'not later than 24 hours after being taken into custody'.

35 Victorian Law Reform Commission (2005) above n 2, 137. The Consultation Paper question referred to s 139 of the *Children and Young Persons Act 1989* which was then in force. Section 362 is the equivalent provision in the CYFA.

36 *Children, Youth and Families Act 2005* s 361.

37 Consultations 7, 14, 25; submission 2.

38 Submissions 9, 22, 23, 24, 29, 30, 32, 38, 39, 41, 42, 46 supported; submissions 18, 45 opposed.

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Concern was raised in consultations and submissions that inappropriate and punitive conditions are being imposed on children.

Most supportive submissions thought the types of matters listed in section 362 of the CYFA were appropriate. The OPP suggested: 'All relevant matters pertaining to the alleged offences and the child's age and personal circumstances'. Some submissions thought the Act should require remand to be used only in limited circumstances and as a last resort.³⁹ The Law Institute of Victoria also thought the decision maker should consider the likely sentence that would be imposed if the child was found guilty.

Two submissions did not support inclusion of child-specific factors in the Bail Act. One from bail justice Steve Kirby did not provide any reason. The other, from the Criminal Bar Association, said: 'A Magistrate will inevitably take matters of this type into account when dealing with a young accused'. However, the vast majority of bail decisions for children are not made by magistrates.

We also asked in the Consultation Paper whether the CYFA provisions that apply to bail should be moved to the Bail Act. Submissions generally supported the move, including Victoria Legal Aid, the OPP, the RVAHJ, and the Magistrates' Court, which had 'no objection'.⁴⁰ We did not receive any opposing submissions to this proposal.

The commission believes the special considerations that apply to children in other legislation such as the CYFA and the Charter of Human Rights and Responsibilities Act should also apply to bail decisions. Inclusion of these considerations in the Bail Act will make it clear that children should be treated differently to

adults. The majority of bail decisions for children are made by lay decision makers who are not as familiar with the principles contained in the CYFA as Children's Court magistrates. It is important for the Bail Act to direct their attention to the specific considerations that apply to children. We also believe that it is important for all legislation about bail to be in one Act. This will simplify application of the law for lay decision makers.

We recommend that the provisions relating to bail in the CYFA be moved to the Bail Act. A note should be inserted into the CYFA at the beginning of Chapter 5, indicating that provisions about bail of children are in the Bail Act.

We also recommend the inclusion of child-specific considerations in the Bail Act. This should include the first four provisions of section 362(1) of the CYFA, as well as a requirement for decision makers to consider the likely sentence that will be imposed if the child is found guilty. Although police and bail justices will not be as familiar with likely penalties as magistrates, this will at least require them to consider the likelihood of the child receiving a sentence of detention. This may prevent some children from being unnecessarily remanded. We also recommend a provision that makes it clear remand of children should be a last resort. Police policy requires remand be considered 'as a last alternative'.⁴¹ Detention as a last resort in sentencing is already provided for in the CYFA. It is logical and consistent to have a similar legislative provision for remand.

RECOMMENDATIONS

127. The provisions of the CYFA that apply to bail should be moved to the Bail Act, and the CYFA should contain a note referring to the provisions in the Bail Act.

128. The Bail Act should contain a provision based on section 362 of the CYFA that requires a decision maker to consider child-specific factors when making a bail decision for a child. In addition to the factors that must be weighed up by a decision maker under the unacceptable risk test, a decision maker should have regard to:

- the need to consider all other options before remanding the child in custody;
- the need to strengthen and preserve the relationship between the child and the child's family;
- the desirability of allowing the child to live at home;
- the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance;
- the need to minimise the stigma to the child resulting from a court determination; and
- the likely sentence should the child be found guilty.

We do not recommend inclusion of the last two provisions of section 362(1). They relate to children being aware they must bear responsibility for any illegal action, and the need to protect the community from the violent or other wrongful acts of children. These considerations are not appropriate at the bail stage when the child is presumed innocent. Protection of the community is a consideration under the unacceptable risk test. The child-specific provisions work with the unacceptable risk test and are intended to provide guidance to decision makers in its application.

In Chapter 9 we recommend the inclusion of Indigenous-specific provisions into the Bail Act. These will apply to all bail applications by Indigenous Australians, including children.

BAIL CONDITIONS FOR CHILDREN

In Chapter 7 we recommended that bail conditions must relate to the purposes of bail and be no more onerous than necessary. These recommendations apply to adults and children. However, as discussed in our Consultation Paper, particular issues arise with bail conditions imposed on children.⁴² We asked whether decision makers are imposing appropriate special conditions on children and young people.

Concern was raised in consultations and submissions that inappropriate and punitive conditions are being imposed on children. Those generally considered problematic were geographical exclusions, curfews, residential conditions, bans on public transport, and bans on drugs, alcohol or chroming.⁴³

Fitzroy Legal Service raised particular concerns about geographical exclusions and curfews:

For example 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.

Curfews have been similarly criticised ... Curfew conditions are said to be preventative measures, 'keeping children off the streets' and away from negative influences. They are said to promote the re-establishment of family relationships. We believe these objectives are largely unrealistic and ineffective for their stated purposes. Instead, unfairly and unjustly and contrary to the purposes of bail law, they impose a form of pre-sentence punishment on unconvicted or sentenced accused.

Youthlaw submitted:

We would concur with the concerns raised in the Consultation Paper regarding the imposition of excessive geographical conditions, curfews and residential conditions, and the problems these conditions can create for our clients. Given the difficulties and lack of support faced by many of our young clients, we would argue for a provision in the Bail Act which provided that in the case of young offenders, the number of conditions imposed should be kept to a minimum, and should only be directed to what is necessary to achieve the object of bail (namely the attendance of the defendant at court and the minimization of the risk of re-offending).

DHS's submission raised issues about inappropriate conditions and lack of structured support:

The special conditions imposed on bail are generally appropriate, however the monitoring and lack of consequences of these special conditions does not support the structure of supervised bail. Bail conditions should be achievable and able to be monitored and enforced so as not to undermine the credibility of the decision makers.

At times special conditions can be onerous or less than appropriate. For example if a child has addictive behaviours in relation to chroming it may be more appropriate to require assessment and treatment for the addiction than to impose a blanket ban on chroming.

39 Submissions 9, 38, 42.

40 Submissions 22, 24, 29, 30, 38, 39, 41, 46.

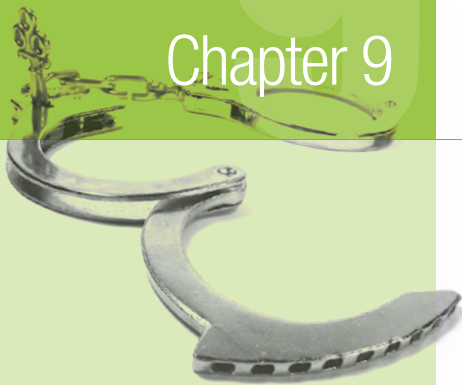
41 Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) Instruction 113-6: Bail and Remand [1].

42 Victorian Law Reform Commission (2005) above n 2, 128–130.

43 Ibid. Similar issues have been raised in NSW, see Roslyn Cook and Joe McNamara, 'Bandaidd Bail: Current Bail Practices in NSW Come Under Fire' (2006) 6 (17) *Indigenous Law Bulletin* 6. The *Bail Act 1978* (NSW) specifically provides for 'place restriction': s 36B.

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In one consultation, CAHABPS noted that punitive and unrealistic conditions were imposed on young people, such as not going to the Melbourne CBD and drug use bans.

Another concern frequently raised was that too many conditions are imposed on children. Legal Aid submitted:

The more numerous or onerous conditions that are placed on bail, the more likely it is that the accused will breach the conditions. This is particularly so with children or young people—who may not have the maturity to comply with some conditions for extended periods or at all. A breach of bail may have serious and long term consequences for the child. Special bail conditions should only be imposed if they are necessary to ensure that the accused appears to answer the charges, does not interfere with witnesses or commit another offence while on bail. As special conditions are a restriction on the right to liberty, they should only be used as a last resort. They should never be imposed as a punitive measure—prior to a finding of guilt and the fixing of the appropriate sentence.

The commission is concerned that bail conditions more onerous than sentencing orders are sometimes imposed on children. Exclusion conditions, bans on substance abuse and curfews are onerous, and are often made without organising support for the child. These conditions, while well meant, may not take into account the child's age and maturity and ability to comply with them.⁴⁴ It is also inappropriate to impose punitive conditions before a finding of guilt. As discussed in Chapter 7, curfews and

geographical exclusion conditions may also be inconsistent with the provisions of the Charter of Human Rights.

We recommend the decision maker take into account factors similar to those contained in section 362(1) of the CYFA when deciding on appropriate conditions. As discussed, the parts of section 362(1) about accepting responsibility are not appropriate at the bail stage, when the child is still presumed innocent. We also do not consider it appropriate to include the provision about protecting the community from the child because it will be taken into account under the unacceptable risk test. The ACT Bail Act contains child-specific provisions for the bail decision and for the imposition of conditions.⁴⁵ We have, to some extent, used that Act as a model.

BAIL SUPPORT FOR CHILDREN

Support for children at an early stage in the criminal justice process may help reduce or prevent re-offending. However, the Children's Court has no bail support program. A recent NSW study suggests that a high proportion of children who appear in the Children's Court will continue to offend into adulthood, especially if their first court appearance occurred when they were young.⁴⁶ While analysis of developmental prevention programs is beyond the scope of this reference, early intervention to reduce the likelihood of future offending is now well recognised as an effective strategy: 'There is now a strong evidence base that problem behaviour by young children is one of the strongest predictors of both adolescent delinquency and later adult offending'.⁴⁷

RECOMMENDATIONS

129. The legislative provisions about bail conditions recommended in Chapter 7 should apply to children as well as adults. However, the Bail Act should contain a specific provision for the imposition of conditions on children. When considering the bail conditions to be imposed on a child, a decision maker must consider:

- the need to strengthen and preserve the relationship between the child and the child's family;
- the desirability of allowing the child to live at home;
- the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
- the need to minimise the stigma to the child resulting from a court determination.

130. A child-specific bail support program should be established in the Children's Court. It should be developed and administered by CISP, but funded by DHS. Protocols for information sharing should be put in place between DHS and CISP to ensure an integrated service for children. As with the service in the Magistrates' Court, culturally appropriate support should be provided for Indigenous children.

Bail support services—CREDIT and ACAS for young people and CAHABPS for children—are discussed in detail in our Consultation Paper.⁴⁸ During our review we found that these programs are well regarded across the criminal justice system. The CAHABPS and ACAS programs have been evaluated positively by DHS, which has led to their continuation and expansion. Evaluation of the CREDIT program and other Magistrates' Court support services has led to their expansion and integration into CISP, which is discussed in Chapter 7.

In our Consultation Paper we asked what could be done to encourage police and bail justices to use supervised bail support programs for children and young people.⁴⁹ Responses focused on the lack of supervised bail support for children, such as this from Victoria Legal Aid:

This question presupposes that supervised bail support programs for children are readily available. However, in VLA's experience, this is not the case. We have found that publicly funded programs are few and far between. Juvenile [now Youth] Justice workers will sometimes provide bail support on an unofficial basis to previous clients. However, they have no mandate to provide such assistance unless and until the child ... (is) bailed on a deferral of sentence.

Other community and defence lawyers and DHS also commented on the lack of bail support for children.⁵⁰

Most responses wanted bail support services established for children but did not specify how this should be done.⁵¹ In its submission, the Law Institute advocated for a legislative mandate for DHS to supervise young people on bail. The Mental Health Legal Centre submitted there should be a specialised bail support program for children separate from DHS because it may have removed children on bail from their families under its protective mandate. The centre also noted the problem of DHS not being able to confirm accommodation until after a person has been bailed. The centre preferred a court-annexed bail support program with funding to ensure the availability of accommodation, like CREDIT. DHS's submission supported the establishment or expansion of bail support programs such as CREDIT in the Children's Court.

Although CAHABPS exists to provide bail support to children after hours, there is no bail support service at Children's Courts. There is a further anomaly in service provision because young people dealt with in the Magistrates' Court have the benefit of the CISP or CREDIT programs, as well as ACAS, but children have no court-based bail support. The commission believes bail support is crucial for children—every effort should be made to divert children from further offending at the earliest possible stage. Supervised support would be more effective than the imposition of onerous or punitive behavioural conditions.

We recommend that a child-specific bail support program be established in the Children's Court. It should be operated by CISP because it has infrastructure in place in Magistrates' Courts and expertise in bail support.⁵² However, it should be funded by DHS, which should share information with CISP about mutual clients to ensure children receive an integrated service. In courts where CISP does not yet operate, bail support for children should be provided by CREDIT or Rural Outreach Diversion workers, who should be sufficiently resourced and trained to do so.⁵³

Given the proportion of Indigenous children who are arrested, and therefore on bail, culturally appropriate support is essential. Youth Justice (in DHS) recently commenced the Koori Youth Intensive Bail Support Program—one of the initiatives from AJA2. This program supports Indigenous children on bail during deferral of sentence in the Children's Court, and Indigenous young people on any bail order in the Magistrates' Court. Children or young people are only eligible for the program if they are assessed as being at high risk of breaching bail or re-offending, and considered likely to be remanded in custody. Workers provide support to children or young people and their families, and assist them to engage with appropriate services, as well as providing reports and advice to the courts. The program covers the northern and western metropolitan regions of Melbourne as well as Shepparton and the Latrobe Valley.⁵⁴

The Koori Youth Intensive Bail Support Program will work with a small number of high needs clients. Culturally appropriate bail support should be available for all Indigenous children on bail. The Melbourne Children's Court operates a Koori Court, and a second Children's Koori Court will

44 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) Recommendation 228 says: 'Children should not be subject to inappropriate bail conditions, such as 24 hour curfews, that disrupt their education and have the effect of forcing constant contact with their families or that impose policing roles on carers'.

45 *Bail Act 1992* (ACT) s 23 contains the criteria for granting bail to children, s 26 the conditions on which bail may be granted to children.

46 NSW Bureau of Crime Statistics and Research, *The Transition from Juvenile to Adult Criminal Careers*, Crime and Justice Bulletin No 86 (2005).

47 Ross Homel et al, *The Pathways to Prevention Project: Doing Developmental Prevention in a Disadvantaged Community* (2006) 1.

48 Victorian Law Reform Commission (2005) above n 2, 122–126.

49 Ibid 126.

50 Submissions 29, 30, 32, 38, 42.

51 Submissions 24, 30, 32.

52 Children's Courts are generally located in Magistrates' Courts—the only stand-alone Children's Court is in the Melbourne CBD.

53 Rural Outreach Diversion workers are funded by DHS to provide a service to court regions that do not have a CREDIT worker. They provide a similar service and liaise with the closest CREDIT worker to put in place appropriate support services for accused people on bail: Information provided by Ms Jo Beckett, Program Manager CISP and CREDIT Bail Support Program, 2 May 2007.

54 Information provided by the Manager, Program Development Unit, Juvenile Justice, DHS, 13 March 2007.

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The police policy should be enforced to ensure diversionary support is put in place for children at the earliest opportunity.

be established in Mildura by the end of 2007. In those courts the Children's Koori Court Officers should fulfil the role of an ALO in the bail support program where their workload allows. As noted in Chapter 10, the workload of Koori Court officers should be monitored to determine whether they are able to fulfil this role, and if not, an Aboriginal Liaison Officer should also be employed. In Chapter 10 we also recommend that in courts that do not incorporate a Koori Court, an ALO should be employed to provide assistance.

It appears that the services provided to young people in the Magistrates' Court by CISP and CREDIT and ACAS are sufficient, as no criticisms were raised in submissions. These programs are viewed positively and have broad support in the criminal justice system. The CISP and CREDIT programs are discussed in more detail in Chapter 7, including better referral by police.

INCREASING REFERRALS

In addition to the need for more services for children, better utilisation of current services was also raised in submissions. Victoria Police policy requires: that CAHABPS be contacted to attend hearings before bail justices when a child is not legally represented; that CAHABPS must be given access to the child before the hearing; and that the hearing be organised to accommodate bail justices and CAHABPS.⁵⁵ In our Consultation Paper we noted CAHABPS feedback that police do not always make contact.⁵⁶ This was substantiated by the Victorian Ombudsman in 2002.⁵⁷ The Ombudsman indicated that he would review the situation in the following year, however, that does not seem to have occurred. The police policy should be enforced to ensure diversionary support is put in place for children at the earliest opportunity.

Bail justices' utilisation of support services is also an issue according to CAHABPS. Bail justice Steve Kirby's submission seems to confirm this:

At the moment with a remand application various entities offer alternatives to remand placement, but as they cannot guarantee ... (secure welfare and transport to the court) generally their services are inadequate for the application.

On the other hand, bail justice Michael Wilson submitted that he relies on the services provided by DHS 'who seem to have adequate services in place'.

CAHABPS was established because many children were being remanded by bail justices only to be released by a court the following day. It is still the case that a significant number of children are bailed by the court after refusal by a bail justice.⁵⁸ In the Consultation Paper we provided information from DHS about reasons given by bail justices for refusing bail. This indicated that bail justices most often refuse bail to children because they have not 'shown cause', rather than because they pose an unacceptable risk.⁵⁹ Our recommendations to simplify the tests for bail, discussed in Chapter 3, may reduce unwarranted remand of children by bail justices.

CAHABPS provides an assurance to bail justices that support will be provided for children who are released on bail. This should ensure bail is granted except where a realistic concern remains about unacceptable risk. The risk must be of such seriousness that it warrants placing a child in custody. As discussed in Chapter 5, bail justices may also make release of children conditional on release to a particular person, such as a parent.

Victoria Police suggested one way of ensuring consideration of bail support programs by police and bail justices in its submission: 'One option may be to require police and bail justices to report by exception and detail individually why the child/young person was not deemed suitable for specific supervised bail support programs'. The CISP and CREDIT programs allow referral of accused people by anyone, including police. When a similar program is established in the Children's Court, police will be able to refer children to it. Police policy should ensure this occurs. Police referral of adults has been very low in the past but has recently increased considerably.⁶⁰ The new Department of Justice training for bail justices should emphasise that remand of children is a last resort and should only occur when CAHABPS and other bail supports do not sufficiently reduce unacceptable risk. The department should also consider the reporting requirement suggested by Victoria Police in its submission. In Chapter 7 we recommend that magistrates review conditions of bail set by police and bail justices at the first mention of a matter. Many matters in the Children's Court are finalised on the first mention date but for those that are not, the magistrate could refer children to the bail support program if appropriate.

REMAND TO SECURE WELFARE

The need for intensive support for some children on bail was raised in our roundtable. One participant noted that on rare occasions there can be a need to bail a child to the secure welfare facilities operated by DHS as part of its protective, rather than criminal, mandate. It was suggested this should be provided for in the Bail Act.

In certain circumstances magistrates can make orders confining children to secure welfare for their own protection, on application by DHS. This is done when there is a 'substantial and immediate risk of harm' to children.⁶¹ It was noted at our roundtable that sometimes magistrates are concerned that there is a risk of harm to children appearing before them on criminal charges—such as a need for immediate medical care due to mental health or substance abuse issues.

These orders are currently made by bailing children to reside at secure welfare facilities on the condition they are not to be released on bail unless a DHS representative transports them to the facility. The order is only made after a DHS court advice worker contacts the secure welfare facility and an over-the-phone assessment determines a child's suitability for placement. Children are often already known to the staff. If they are found suitable the order can be made. If not, the court must find other support for them.

The commission is concerned that making this process more easily accessible may lead to inappropriate use of secure welfare facilities. The admission of children to secure welfare should not occur unless staff assess a child as suitable. Although the current process required to bail a child to secure welfare is somewhat involved, we believe it is appropriate.

BAIL UNDERTAKINGS BY PARENTS

Children who do not have the capacity to enter an undertaking may still be released on bail if their parent or 'some other person' enters the undertaking on their behalf.⁶² In our Consultation Paper we asked whether the Bail Act should be amended to allow the court to require a child's parents, or some other person, to enter an undertaking when the child *does* have the capacity to enter into a bail undertaking.⁶³ This was suggested on the basis that some children may forget about or disregard their obligation to the court, especially young children.⁶⁴ We also asked whether the Act should refer to specific matters that a decision maker must consider when deciding whether an undertaking should be entered by a parent or other person.

Relevant submissions were divided on this issue. In the Magistrates' Court submission an experienced Children's Court magistrate says:

*There is often a world of difference between a child's capacity to **enter into** a bail undertaking and the child's subsequent capacity to **comply with** the undertaking. It is highly desirable to have the ability to require an adult, whether a parent or other adult, to enter into a bail undertaking on behalf of a child so that they will be under some obligation to ensure that the child complies with conditions, notably the requirement to attend court on the specified date. In my view this is an essential and urgent amendment.*

Victoria Police, the OPP and some bail justices also supported the amendment, although the OPP noted there may be 'legitimate concerns against imposing such obligations'.⁶⁵

Other submissions opposed the amendment.⁶⁶ The Law Institute of Victoria said:

The LIV does not support the imposition of bail undertakings on 3rd parties where the direct party has the capacity to enter into the condition. The LIV submits that this could add an unnecessary burden to the relationship between the bailed person and the 3rd party. The LIV is particularly concerned that in the case of children and young people this may lead to added tension from the only supportive adult the child identifies with.

55 Victoria Police (2 October–5 November 2006) above n 41, Instruction 113-6 Bail and Remand [4.4.5].

56 Victorian Law Reform Commission (2005) above n 2, 137.

57 The Ombudsman Victoria, *Twenty-Ninth Report of The Ombudsman: 30 June 2002* (2002) 30–2.

58 Victorian Law Reform Commission (2005) above n 2, 48. The data does not enable us to establish whether bail was granted by the court on the following day or a later date.

59 Ibid 122.

60 Information provided by Ms Jo Beckett, Program Manager CISP and CREDIT Bail Support Program, 2 May 2007.

61 Eg, *Children Youth and Families Act 2005* ss 263(1)(e), (3), (5) allow for placement of a child at substantial and immediate risk of harm in secure welfare as part of an Interim Accommodation Order.

62 *Children Youth and Families Act 2005* s 346(10). This is discussed in detail in Victorian Law Reform Commission (2005) above n 2, 130–131.

63 Victorian Law Reform Commission (2005) above n 2, 131.

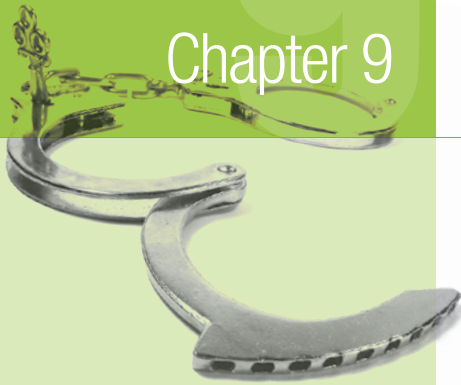
64 Consultation 14.

65 Submissions 11, 18, 23, 41, 46.

66 Submissions 8, 24, 29, 30, 32, 38, 42.

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The Mental Health Legal Service also expressed concern that it ‘interferes with relationships and may sever the crucial family supports’. Three submissions agreed with the concerns raised in our Consultation Paper about possible criminal liability faced by parents if children breach bail conditions.⁶⁷ DHS noted:

The philosophy of the Juvenile Justice program is focussed on rehabilitation of young offenders. Onus is placed on young people taking responsibility for their behaviour. Holding parents or some other person responsible for the young person’s behaviour is inconsistent with this, but may be appropriate with younger children and in relation to parental responsibilities such as ensuring that a child goes to school.

The commission is concerned that the amendment would encourage decision makers to impose obligations on parents whenever they were concerned that a child may not comply. The criminal part of the CYFA emphasises the need for children to take responsibility for their behaviour.⁶⁸ Guidelines could be put in place detailing when the obligation may be imposed on a parent, but these would necessarily have to be broad.

Many children who appear before the court may be immature and need support to comply with their obligations. This should be provided through bail support programs, which could involve parents where appropriate, rather than imposing obligations on parents. Imposition of obligations on parents is more congruent with the family division of the Children’s Court. The suggested amendment raises issues about parental responsibility—it assumes they are able to exercise control over their child. The commission does not support imposition of obligations on others in the criminal context when breach of conditions raises criminal sanctions. Parents who are unable to control their child may face prosecution for breach of the undertaking if the child fails to appear—failure to appear is a criminal offence.⁶⁹

REMAND OF YOUNG PEOPLE

There is an anomaly in the options available to a decision maker for remanding and sentencing young people. Young people aged 18–20 can be sentenced to a Youth Justice Centre (YJC), but not remanded to one.⁷⁰ The sentencing option is provided for in the *Sentencing Act 1991*, but there is no corresponding provision about remand in the Bail Act. The CYFA only applies to children aged up to 18—therefore only children aged up to 18 can be remanded to YJCs.⁷¹ Young people are remanded to adult correctional facilities, but when sentenced may be moved to a YJC. This anomaly has been the subject of debate for some time, and strong views on this issue were expressed in consultations and submissions.

There is an exception to the general rule that a young person will be remanded with adults. The Port Phillip Prison at Laverton has a youth unit, established in 1999, to reduce the risk of suicide and self-harm among young men who enter adult jail.⁷² A youth unit has also been established in the new Metropolitan Remand Centre, which opened in May 2006. The unit accommodates prisoners aged 18–24 who are immature, vulnerable, naïve, have poor coping skills, and/or high anxiety levels. It is geographically separate from the mainstream prisoner area. During the day young people in the unit can mix with other prisoners within that part of the prison—which houses people who are vulnerable, at risk or detoxing and low risk—if they wish. However, there are also separate areas for young people who do not wish to mix with older prisoners.⁷³ The two youth units can house approximately 100 young people.

There is no such facility for young women in Victoria.⁷⁴ Women on remand are held in the Dame Phyllis Frost Centre in Melbourne. Women on remand can be segregated from women serving sentences.⁷⁵ This is up to the prisoner—they are given the option to be segregated in the reception and remand area. Alternatively, they are also able to reside in the mainstream accommodation units with sentenced prisoners.⁷⁶ Although remand of women has increased considerably in the past 10 years, the numbers of women on remand are still small, making it impractical to segregate young women from older women.

RECOMMENDATIONS

131. There should be no change to the current legislation regarding undertakings by parents or another person.

Magistrates and judges have no power to direct that young people be assessed for or placed in a youth unit. Once remanded, young people are held in police cells until a place becomes available at the Metropolitan Assessment Prison. All prisoners are processed through that prison and then may be sent to another facility.⁷⁷ They may therefore spend several days in police custody and then further time in a remand facility with adult mainstream prisoners. Decision makers can note risk factors on the remand warrant and these will be taken into account on reception to prison. However, there is no 'fast-tracking' of young people to a youth unit. They may experience harm while associating with older and hardened prisoners, and they may be at greater risk of self harm.

In our Consultation Paper we asked whether it should be possible for decision makers, in appropriate circumstances, to remand young people aged 18–20 to YJCs.⁷⁸ Submissions supported this suggestion, except that from DHS:

Young people are only sentenced ... to a Youth Training Centre [now Youth Justice Centre] if the court is satisfied they have reasonable prospects for rehabilitation or are particularly impressionable, immature, or likely to be subject to undesirable influences in adult prison. Before reaching this conclusion the court considers a suitability assessment by Juvenile Justice, the nature of the offence, and the age, character and past history of the offender.

This is a complex assessment process that would be hampered by the lack of time and information available at the point of remand, where there has been no finding of guilt. There would be risk of unsuitable young adults being remanded to a Youth Training Centre. This would be an issue for Juvenile Justice centres given that they are not high security and have an emphasis on rehabilitation.

A more suitable option would be to expand the facilities available in Youth Units as discussed in the VLRC Paper. Juvenile Justice and Department of Justice are working together to meet the needs of young people held in adult facilities and there is value in developing distinct facilities for young people who do not fall within the jurisdiction of the Children's Court.

This ignores the reality that many young people are already being remanded to YJCs through the section 49 procedure. Section 49 of the Magistrates' Court Act allows a magistrate to 'return' young people to a YJC rather than remanding them in an adult prison if they are undergoing a sentence of detention in a YJC.⁷⁹ There are several situations in which this procedure may be used. It exists to ensure appropriate treatment of young people who offend before and after turning 18, who therefore may be dealt with by the Children's and Magistrates' Courts.⁸⁰

A practice has developed whereby young people facing multiple charges in the Magistrates' Court plead guilty to one or more charges for which a YJC sentence is likely. They are then held in a YJC on sentence, and section 49 is used to allow them to be 'returned' to a YJC on the remaining charges.

The commission is concerned that young people may be pleading guilty inappropriately to avoid being held in an adult prison. There are also other problems with this procedure. A YJC sentence may finish before the remaining charges have been finalised. In that situation the accused would be transferred directly from the YJC to remand in an adult prison. The procedure may also result in young people spending additional time in custody because the time served at a YJC cannot be taken into account when the remaining charges are dealt with. This is because they were serving a sentence in the YJC, not being held on remand. DHS noted this in its submission:

Furthermore, young people with numerous outstanding matters who receive a section 49 order have been known to serve additional sentence time. Although this is not common practice, it is becoming an issue when serious matters take a number of months to be addressed in court resulting in the young person receiving an additional sentence.

All other submissions that addressed this issue supported the ability to remand to YJCs. For example, the Magistrates' Court said: 'The Magistrates' strong view is that there should be a presumption that all young persons be remanded to YJC'. Magistrates told us the decision to remand vulnerable and immature young people to an adult prison was always very difficult.⁸¹ They also advised that they consider the custodial setting to which a young person will be remanded when deciding bail.

67 Submissions 24, 30, 32.

68 Eg, *Children Youth and Families Act 2005* s 362(1)(f).

69 *Bail Act 1977* s 30.

70 *Sentencing Act 1991* s 32(1). Youth Justice Centres were known as Youth Training Centres under the *Children and Young Persons Act 1989* and were referred to in that way in our Consultation Paper.

71 Remand of children is discussed in Victorian Law Reform Commission (2005) above n 2, 120–122.

72 The Port Phillip Youth Unit is discussed in detail in *ibid* 132–133.

73 Information provided by Executive Officer, Metropolitan Remand Centre, 18 July 2006.

74 Information provided by Jessamy Nicholas, Project Coordinator, Better Pathways Implementation, Corrections Victoria, 23 April 2007.

75 This is required by the *Charter of Human Rights and Responsibilities Act 2006* s 22(2).

76 Information provided by Jessamy Nicholas, Project Coordinator, Better Pathways Implementation, Corrections Victoria, 23 April 2007.

77 Young people are generally transferred out of the Metropolitan Assessment Prison unless they have higher risk needs that cannot be provided for at the Melbourne Remand Centre: Information provided by Executive Officer, Metropolitan Remand Centre, 17 April 2007.

78 Victorian Law Reform Commission (2005) above n 2, 133–135.

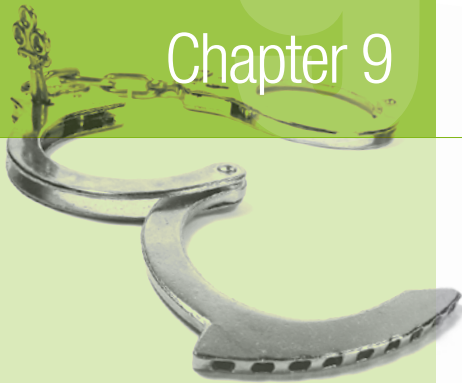
79 The *Magistrates' Court Act 1989* and the *Bail Act 1977* do not refer to this process as being 'remanded' in a YJC but as a 'return' to a YJC. The young person is not 'remanded' because they are serving a sentence of detention on another charge.

80 The section 49 procedure is discussed in detail in Victorian Law Reform Commission (2005) above n 2, 135–136.

81 Consultation 18.

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Many submissions did not distinguish between YJCs and youth units in adult prisons. Victoria Legal Aid said:

Adult remand facilities are totally inappropriate for young people—due to the dangers posed by older or more hardened offenders and the risk of suicide or self-harm. VLA supports giving decision-makers the power to remand young people to a ... YTC or specialised youth unit instead of an adult facility. In fact, VLA suggests that the Act should go further and require decision-makers to do so, unless the young person is assessed as unsuitable ... The Act should also impose a duty on the decision-maker to provide reasons if the decision is made to remand a young person elsewhere. There should be clear criteria about suitability for YTC and there should be an ability to cross-examine the assessor about their reasons for assessing the young person as unsuitable. Adequate resourcing will be required to ensure that sufficient YTC or youth unit places are available to cater for young remandees.

Youthlaw, Fitzroy Legal Service, the Law Institute of Victoria and Mental Health Legal Centre all raised the issue of provision of reasons by the court if an order is not made for placement in a youth-specific remand facility.

The ability to remand to YJCs was recommended by the LRCV.⁸² It recognised this would not automatically mean that every 17–20 year old would be remanded to YJCs. As with sentencing to YJCs, a suitability assessment would be conducted by Youth Justice. The ability for all courts to remand to YJCs was also recommended by Professor Arie Freiberg in a 2002 sentencing review.⁸³ He noted:

Implementation of these proposals would significantly increase the accommodation pressures upon youth training centre facilities, which are currently at their limits. However, if it is considered appropriate to segregate sentenced young offenders by creating such facilities, it would seem even more appropriate to provide separate facilities for unsentenced young offenders who have not yet been found guilty of any offence ... sentencing practices are being distorted by the nature of the correctional facilities available.

In July 2005 a 26-bed unit opened at the Melbourne Youth Justice Centre for young men on remand. This considerably increased the capacity of the centre—from 60 to 86—and was in response to an expected increase in demand following the increase of the age jurisdiction of the Children's Court criminal division from 17 to 18 years. This means additional capacity need only be found for 18–20 year olds. As noted, not all 18–20 year olds will be considered by the court to require remand to a YJC.

The commission recommends that the Bail Act allow magistrates and judges to remand young people aged 18–20 to either a YJC or a prison youth unit, following an assessment by Youth Justice or Corrections Victoria. This is consistent with the current power in the Sentencing Act to sentence young people aged 18–20 to a YJC. It is also consistent with the service currently provided by ACAS in the Magistrates' Court for people aged 18–20. The final decision about placement should reside with the decision maker, taking into account the assessment. The ability to remand to either facility should alleviate concerns about placement of inappropriate young people in YJCs.

Young people facing remand will often be in that situation because of ongoing offending, and will therefore be known to Youth Justice or Corrections Victoria, or both. This will assist with assessment for appropriate placement. In cases where young people are not already known, we believe the issues noted by DHS in its submission can be covered by an assessment by Youth Justice or Corrections Victoria at the court. This is already occurring through use of the section 49 procedure. Although young people must be sentenced on at least one matter to use section 49, the majority of their charges usually remain outstanding. We cannot see that this results in a substantially different situation to assessing a young person who has all charges outstanding. Assessments of this type for YJCs are done by ACAS workers. ACAS workers are now available at all Magistrates' Courts in Victoria, and the ACAS unit at Melbourne Magistrates' Court also provides a service to the higher courts.

Assessment will be assisted by the development of clear suitability criteria by Youth Justice and Corrections Victoria. This criteria must be available to all those involved in the young person's matter, including lawyers and decision makers. Lawyers need to know when it is appropriate to ask the magistrate or judge to order assessment of clients for remand to YJCs if bail is refused. The court needs to know when it is appropriate to make such an order, particularly as it will have the power to make the order in opposition to assessment by Youth Justice. Although we do not recommend a presumption that all young people be remanded to YJCs, we think the court should be required to provide reasons for not remanding young people to a youth-specific facility if they are assessed as suitable. As submitted by Youthlaw, this would assist with any appeal. We do not make any recommendation about the ability to cross-examine the assessor, as suggested by Victoria Legal Aid, because this can already be done and does not need a specific provision. Such cross-examination would be unlikely because it would generally result in the court hearing information that may not support the accused's application.

Adequate resources must be provided to ensure there are sufficient YJC and youth unit places for young people on remand, and sufficient staff and programs to meet their needs. Much of this may be met by the increase in places in YJCs which has already occurred and the Melbourne Remand Centre's new unit. However, we agree with Professor Freiberg that the need for resources to establish this scheme does not outweigh the clear need for young people to be treated appropriately on remand.

The increase in accommodation options discussed is only for young men. As noted, women held on remand are not segregated by age, and segregation of remand and sentenced prisoners is not enforced but offered to prisoners as an option. Young women who are sentenced to a YJC are held in the Parkville Youth Residential Centre. This is the sole facility in Victoria for female children and young women. It is a 30-bed unit, which also houses sentenced and remanded boys aged 10–14. They are segregated from the girls and women. As there is no youth unit for young women, our recommendation will really only provide decision makers with one option for vulnerable young women—remand to the YJC. As there is only one small unit to accommodate young women, more accommodation options may be required. However, the numbers of female children held in custody on remand or sentence are likely to be small.⁸⁴

The commission accepts that inappropriate behaviour by young people once in a YJC or youth unit would need to be acted on. We therefore recommend creation of an administrative power allowing for the transfer of young people to an adult facility if they are subsequently found to be unsuitable for placement in a YJC. This is currently provided for in section 469 of the CYFA for young people sentenced to YJCs. A similar provision should be created to cover transfer of young people on remand. The transfer decision should be made by an independent body similar to the Youth Parole Board.

No such provision is required for transfer from a Youth Unit because young people would simply be moved from one part of an adult prison to another.

RECOMMENDATIONS

132. The new Bail Act should provide magistrates and judges with the power to remand a young person (18–20) to either a Youth Justice Centre (YJC) or a Youth Unit within an adult correctional facility following an assessment by Youth Justice or Corrections Victoria. The placement decision should reside with the decision maker, taking into account the assessment. If a young person is assessed as suitable for placement in either facility and the decision maker remands the young person elsewhere, the decision maker should be required to provide reasons for that decision.
133. Youth Justice and Corrections Victoria should develop and distribute clear criteria for the assessment of a young person's suitability to be remanded to a YJC or Youth Unit.
134. The Bail Act should include an administrative power allowing for the transfer of young people to an adult facility if they are subsequently found to be unsuitable for placement in a YJC, similar to that in section 469 of the CYFA.

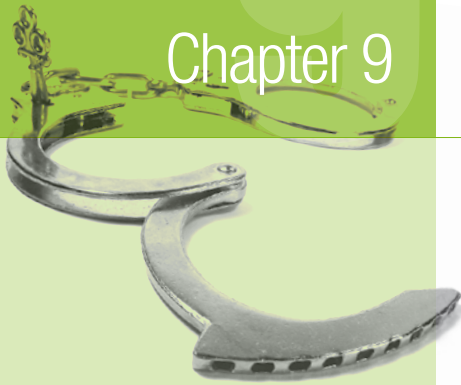
82 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 15.

83 Arie Freiberg, *Pathways to Justice: Sentencing Review 2002* (2002) 161–162.

84 A solicitor from the Youth Unit at Victoria Legal Aid advised on 27 April 2007 that he was not aware of any problems with capacity of the unit, and that there are often no young women there.

Chapter 9

Children and Young People



In both cases there is no need to create a right to appeal the transfer decision because transfer will trigger a new facts or circumstances bail application. Continued remand of the young person will then be reconsidered by the court in light of the young person's incarceration in an adult facility. For young people transferred from YJCs, the court should decide whether to order assessment for the Youth Unit if that has not already been done administratively. For young people transferred from the Youth Unit to mainstream adult prison, the court will decide whether this is sufficient reason to release them on bail. The commission recognises that this is currently the only option open to the court, and young people are often released on bail because the decision maker does not want to incarcerate them with mainstream adult prisoners.



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Indigenous Australians

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Chapter 10

Indigenous Australians

Historically, the relationship between Indigenous Australians and criminal justice agencies, particularly police, has been poor.

Throughout this report, we have discussed bail system issues that are of particular concern to Indigenous Australians:

- In Chapter 3 we noted the disproportionate impact restrictions on bail can have on Indigenous Australians.
- In Chapter 4 we looked at the impact of arrest practices and warrant procedures, and explored on-the-spot bail.
- In Chapter 5 we discussed the Aboriginal Bail Justice Program and Indigenous awareness training for bail justices.
- In Chapter 7 we considered Koori Courts and the impact of bail conditions on Indigenous Australians.
- In Chapter 8 we noted the potentially discriminatory impact of financial bail conditions on Indigenous Australians.
- In Chapter 9 we discussed the higher arrest rates of Indigenous children and young people and their interaction with the bail system.

In this chapter we review and make recommendations about the support services available to Indigenous Australians at arrest and bail, including those for Indigenous women. We also recommend the inclusion of an Indigenous-specific provision in the new Bail Act.

OVER-REPRESENTATION

Indigenous Australians continue to be over-represented in the criminal justice system.¹ They are 12 times more likely to be held in Victorian prisons than other Australians.² Between 1999–00 and 2002–03 the proportion of Indigenous prisoners on remand in Victoria increased from 50% to 61%.³ Between 2002–03 and 2004–5, Indigenous Australians were 23% more likely to be on remand when in prison in Victoria compared to other Australians.⁴ The number of Indigenous Australians apprehended by police in Victoria increased by 65% between 1993–4 and 2002–03, compared to an increase of 27% for other Australians over the same period.⁵ These figures provide an impression of the extent of Indigenous Australians' over-representation in the criminal justice system.

The Victorian Aboriginal Justice Agreement Phase 2 (AJA2) identified the causes of Indigenous over-representation as:

- social, economic and cultural disadvantage
- unstable communities
- victimisation
- systemic discrimination.⁶

According to AJA2, social, economic and cultural disadvantage is the overwhelming reason for the over-representation, therefore 'any attempt to reduce over-representation must also address the disadvantage that underlies it'.⁷ Addressing disadvantage involves broad issues such as health, education, housing and employment.⁸ These are beyond the scope of a review of the Bail Act. However, disadvantage can also be addressed through:

- focused criminal justice initiatives such as culturally appropriate support services
- measures to alleviate the disproportionate impact apparently non-discriminatory laws and practices may have on Indigenous Australians.⁹

These clearly fall within the ambit of the bail review.

CRIMINAL JUSTICE AGENCIES, RELATIONS

Historically, the relationship between Indigenous Australians and criminal justice agencies, particularly police, has been poor. In 1991 the Royal Commission into Aboriginal Deaths in Custody reported that relations between Indigenous Australians and the police 'have on the whole been bad ... Both Aboriginals and police bring a great deal of historical baggage to their contemporary relations'.¹⁰ In 2005 the Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody reported:

the positive accounts put forward by police and some Aboriginal individuals or groups [of improvements in police-Aboriginal relations] pale into virtual insignificance when set against what can only be described as the avalanche of complaints about police attitudes and behaviour received by the Review Team from the Aboriginal community.¹¹

Improved relations between police and Indigenous Australians are crucial to redressing the disadvantage experienced by Indigenous Australians in their contact with the criminal justice system. This is particularly the case for bail. As noted in Chapter 4, police are effectively gatekeepers for the bail system.

Relations between Indigenous Australians and criminal justice agencies have not been limited to the enforcement of the criminal law, but extend to the administration of government policies about protection, assimilation and the removal of children. According to the AJA2, these policies 'have contributed significantly to the breakdown of Koori social structures and continue to cause disadvantage and dysfunction to this very day'.¹²

It is important to assess the operation of support services and the need for further services and other targeted bail initiatives in the context of the long history of poor relations between Indigenous Australians and criminal justice agencies. This is a history unique to Indigenous Australians that calls for targeted responses.

PREVIOUS REFORM

In 2004 the Victorian Government repealed section 4(2)(c) of the Bail Act in response to our recommendation from a community law reform project.¹³ Section 4(2)(c) required decision makers to refuse bail for accused people who were in custody for failing to answer bail, unless satisfied that the failure was due to causes beyond their control. While on its face the provision appears to be non-discriminatory, it was having an unfair effect on Indigenous Australians and other vulnerable accused. This issue was originally brought to our attention by VALS. When introducing the amendment in parliament, the Attorney-General noted the over-representation of Indigenous Australians in custody and said the amendment would 'ensure that the bail system operates in a fairer way for Indigenous people, people from newly arrived communities and people with a physical or intellectual disability'.¹⁴

Because of the many variables inherent in bail applications we are unable to assess the impact of the repeal of section 4(2)(c). However, its removal was broadly supported by defence lawyers and support agencies.

- 1 Department of Justice [Victoria], *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A Partnership Between the Victorian Government and the Koori Community* (2006) 7–8. The overrepresentation of Indigenous people on pre-trial detention is a global problem: 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), preamble and [1.III.2].
- 2 Department of Justice [Victoria], *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Statistical Information: Volume 2* (2005) 100.
- 3 Over the same period the proportion of non-Indigenous prisoners on remand increased from 46% to 53%: Ibid 100.
- 4 Department of Justice [Victoria] (2006), above n 1, 7.
- 5 The proportion of Indigenous Australians apprehended by police, remained relatively stable over the 10 year period at about 3%: Above n 2, 67.
- 6 Ibid 13–14. See also, NSW Bureau of Crime Statistics and Research, *The Economic and Social Factors Underpinning Indigenous Contact with the Justice System: Results from the 2002 NATSISS Survey*, Crime and Justice Bulletin No 104 (2006). This is also discussed in Chapter 4 of this report.
- 7 Department of Justice [Victoria] (2006) above n 1, 13.
- 8 There is a 'need for social, economical, cultural and associated issues to be adequately addressed to decrease the number of those incarcerated and returning to incarceration': Department of Justice [Victoria], *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report, Volume 1* (2005) vii. See also, Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (2005). Family wellbeing programs aim to address these broader issues: Apunipima Cape York Health Council, *Family Well Being: Evaluation Report 2006* (2006); Mary Whiteside et al, 'Empowerment as a Framework for Indigenous Workforce Development and Organisational Change' (2006) 59 (4) *Australian Social Work* 422. The impact of 'strong communities' on Indigenous Australians' contact with the justice system is considered in: Ruth Lawrence, *Research on Strong Indigenous Communities* (2007).
- 9 VALS submitted: 'Arguments that the law is applied equally and fairly overlook difference and the impact of a supposedly neutral system on disadvantaged people'.
- 10 Commissioner JH Wooten, *New South Wales, Victoria and Tasmania—the Importance of Aboriginal/Police Relations* (1991) Austlii <www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/regional/nsw-vic-tas/222.html> at 26 March 2007, 153.
- 11 Department of Justice [Victoria] (2005) above n 8, 408. Recommendations 59 to 63 of the review address racist attitudes and abusive behaviour by police and aim to improve police–Aboriginal relations. The issue of poor relations between Indigenous Australians and police was raised in: consultations 8, 13, 28; submission 34.
- 12 Department of Justice [Victoria] (2006) above n 1, 13.
- 13 *Justice Legislation (Sexual Offences and Bail) Act 2004* s 10; Victorian Law Reform Commission, *Failure to Appear in Court in Response to Bail: Report* (2002) 33.
- 14 Victoria, *Parliamentary Debates*, Legislative Assembly, 21 April 2004, 718 (Rob Hulls, Attorney-General).



SUPPORT SERVICES

A range of support services exist for Indigenous Australians who come into contact with the criminal justice system in Victoria.¹⁵ The following sections outline and make recommendations about services relevant to Indigenous Australians involved in the bail system. Services available for Indigenous children and young people are discussed in Chapter 9.

CLIENT SERVICE OFFICERS

When police take an Indigenous Australian into custody, they are obliged to notify VALS.¹⁶ VALS employs Client Service Officers (CSOs) who can assist the accused either by telephone or by going to the police station. CSOs can:

- provide general information about the accused's rights
- arrange for a solicitor to provide legal advice and act as a liaison between the accused and the solicitor
- take basic instructions and adjourn matters until a solicitor is available
- act as an Independent Person for accused people aged under 18
- lodge court documents
- visit the accused in prison
- arrange transport for court appearances.¹⁷

There are 11 CSOs in Victoria: seven in regional areas and four in the metropolitan area.¹⁸ All are Indigenous Australians. VALS operates an after-hours service that is staffed by the metropolitan CSOs.

In our Consultation Paper we asked questions about the service provided by CSOs.¹⁹ The responses are discussed in the following section.

ABORIGINAL COMMUNITY JUSTICE PANELS

As well as notifying VALS when an Indigenous Australian is taken into custody, the police are also required to notify the local ACJP.²⁰ ACJPs perform the following roles:

- 'call outs' to assist Indigenous Australians taken into police custody
- community welfare and social support to individuals and families in crisis
- third party present at police interviews
- assistance with court attendance—providing advice to the court on cultural issues and support to the accused
- preventative and diversionary programs.²¹

The ACJP program was established in 1988 as a joint initiative of Victoria Police and VALS. It is administered by and funded through Victoria Police, but is independently incorporated and each panel operates autonomously.²² Members are volunteers. They are available 24 hours a day, seven days a week. There are 13 ACJPs operating in regional Victoria.²³

A 2005 independent review of the ACJP program made recommendations on ACJPs' role, location, resourcing, recruitment, training and effectiveness.²⁴ The review found that all communities identified the 'call out' function as the primary role of the ACJP.²⁵ This role is similar to that of CSOs. In their 'call out' role ACJP members are to provide support and ensure the safety of Indigenous Australians held in police custody. The AJA2 identifies this role as a priority: 'The ACJP Program will be strengthened so that it provides a wider and more effective practical advocacy service to Koories detained by police'.²⁶ Victoria Police is responsible for strengthening the program and it has told the commission it plans to establish three more ACJPs.²⁷

RECOMMENDATIONS

135. To ensure the Aboriginal Community Justice Panel (ACJP) program is able to provide an effective service to Indigenous Australian accused people Victoria Police and the Department of Justice should:

- establish additional ACJPs
- ensure each ACJP has at least four active members
- provide further training to ACJP members
- provide additional funding to the ACJP program.

136. The Victorian Aboriginal Legal Service should receive further funding to operate the Client Service Officer (CSO) program and to provide further training to CSOs, particularly on the operation of the bail system.

In our early consultations it appeared that the effectiveness of ACJPs—and Indigenous services in general—varied from location to location.²⁸ Local factors seem to have an impact on ACJP effectiveness, including the commitment and skills of members, the attitude of local police, and the working relationship between the panel members, police and bail justices.

In our Consultation Paper we asked whether CSOs and ACJPs provide an effective service to people in police custody facing a bail hearing. Submissions were generally supportive of the roles.²⁹ VALS thought they were effective in providing moral support to accused people and advocating on their behalf at bail justice hearings.³⁰ In particular, VALS said they are able to provide ‘personal background and information about Indigenous Australians seeking bail’. Victoria Police thought ACJPs provide an effective service and there is a good working relationship between most ACJPs and police.

Some submissions raised concerns about the programs. The Magistrates’ Court and VALS agreed that the effectiveness of ACJPs varies between regions. The Magistrates’ Court thought this was due to factors such as the working relationship between panel members and police. VALS said CSOs and ACJP members’ effectiveness was limited by under-funding and overwork. VALS also identified training problems with ACJP members because they are volunteers with a high turnover rate. VALS suggested the programs would be more effective with more funding and more training on the Bail Act and the law. It also noted that the quality of service depends on the personalities involved and suggested the ACJP program should not be administered by Victoria Police.³¹

The commission supports the continued operation of the CSO and ACJP programs. In particular, we support the call-out service provided to Indigenous Australians taken into police custody. In this capacity, CSOs and ACJPs provide moral support to Indigenous Australians, as well as cultural and personal information about the accused to police and bail justices. They can also inform bail decision makers about available support services such as accommodation and family support.

- 15 Some of these services were discussed in our Consultation Paper: Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 154–56. Support programs specifically for Indigenous prisoners in Victoria, some of which may be available to prisoners on remand, include Aboriginal Well-being Officers, Indigenous Service Officers, Aboriginal Family Visits Program, Aboriginal Cultural Immersion Program, Marumali Program, Koori Cognitive Skills program and the Koori Prisoner Booklet: information provided by Marie Murfet, Manager, Indigenous Policy and Services Unit, Corrections Victoria, 24 April 2007.
- 16 Notification occurs when the police officer completes the Attendance Register: Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) ‘VPM Instruction 113-1: Taking a Person into Custody’ [4.3.5]. Concerns about delays in notifying VALS were raised in the Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody (2005) above n 8, 448–49 and in Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures*, No 170 of Session 2003–2005 (2005) 473–75. This issue is discussed further in Chapter 4.
- 17 Victorian Aboriginal Legal Service, *Legal Services* <www.vals.org.au> at 15 March 2007.
- 18 The regional CSOs are located in Swan Hill, Bairnsdale, Heywood, Shepparton, Ballarat, Morwell and Mildura. One of the metropolitan positions was vacant in March 2007: Information provided by Greta Clarke, VALS, 27 March 2007.
- 19 Victorian Law Reform Commission (2005) above n 15, 156.
- 20 Victoria Police (2 October–5 November 2006) above n 16, ‘VPM Instruction 113-1: Taking a Person into Custody’ [4.3.5].
- 21 Ingenuity SED Consulting, *Aboriginal Community Justice Panel Program: Review*, Final Report (2005) 14–22.
- 22 Ibid 33.
- 23 Victoria Police, *Aboriginal Community Justice Panels* <www.police.vic.gov.au> at 15 March 2007.

- 24 Ingenuity SED Consulting (2005) above n 21. ACJPs were also reviewed in 2001: Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel*, Final Report (2001). The 2001 review is discussed in: Victorian Law Reform Commission (2005) above n 15, 155–56.
- 25 Ingenuity SED Consulting (2005) above n 21, 15.
- 26 Department of Justice [Victoria] (2006) above n 1, 41.
- 27 As at March 2007, the location of the new ACJPs was being negotiated with relevant Indigenous organisations: information provided by the Aboriginal Advisory Unit, Victoria Police, 6 March 2007.
- 28 This was also noted by the Parliament of Victoria Law Reform Committee, *Review of Legal Services in Rural & Regional Victoria: Report* (2001) 151. Similar concerns were noted in the community responses to the Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody (2005) above n 8, 431–33.
- 29 The 2005 review of the ACJP program reported that in all consultations there was overwhelming support for the program and a large number of requests that it be extended to other regions: Ingenuity SED Consulting (2005) above n 21, 33.
- 30 Submissions 29, 30 supported VALS’s submission.
- 31 This issue was raised in the 2005 review of the ACJP program. In one consultation conducted by the 2005 review it was suggested the program should be operated independently of Victoria Police. However, in other consultations, there was little concern about this issue; some thought the placement of the ACJP program within Victoria Police was beneficial. The review did not recommend that the program should be administered by a body other than Victoria Police. However, it did recommend that a statewide coordinator be established with a direct reporting role to the ACJP executive and consideration of relocation of the ACJP state office to a more ‘Koori friendly environment’: Ingenuity SED Consulting (2005) above n 21, 33, 36, 42.

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Chapter 10

Indigenous Australians



To improve relations between police and Indigenous Australians, Victoria Police has established the Aboriginal Community Liaison Officer program and the Police Aboriginal Liaison Officer program.

The commission is, however, concerned by reports of limitations on the effectiveness of the programs due to high workloads, limited training and funding, and partial geographical coverage. The commission notes that the 2005 review of the ACJP program recommended:

- additional ACJPs be established
- each ACJP have at least four active members
- further training be provided to ACJP members
- additional funding be provided to the ACJP program.³²

The commission endorses these recommendations. We support Victoria Police's plans to establish three more ACJPs. It is important that the program provides a statewide service. Sufficient members should be recruited to help 'alleviate the risk of individual burn-out' and ensure ACJPs are more representative of their community. Members should also receive training on the bail system.³³ It is not appropriate for ACJP members to provide legal advice; however, a working knowledge of the bail system will help them to provide appropriate support to Indigenous Australians, particularly as part of the call-out service. At the time of the 2005 review the program was funded at 1988 levels.³⁴ This funding is inadequate. The 2005 review said: 'For the Program to be effective statewide an increase in resources would need to be provided'.³⁵

The CSO program should also receive more funding. We have been told CSOs are paid very little for a large amount of work.³⁶ VALS receives its funding for the CSO program from the Commonwealth Government. The Victorian Government should request an increase in this funding. CSOs would also benefit from further training, particularly on the operation of the bail system.³⁷

A 2001 review of the ACJP program found that ACJP members had also acted as bail justices.³⁸ The review suggested there was a potential conflict between the two roles. In our Consultation Paper we asked if there was any such conflict.³⁹

VALS's submission said the roles should be kept separate and noted one case in which an ACJP member had also acted as a bail justice: 'everyone left the police station (except the Defendant) confused on what their role was'. Victoria Police was not aware of any current conflict, but recommended that if an Indigenous bail Justice comes to a station to complete ACJP duties, that person could not act as a bail justice. Similarly, the Magistrates' Court said:

a conflict would only arise in the unlikely scenario of a panel member, who was also a Bail Justice, attending a police station to assist an offender and subsequently being asked by the police to act as the Bail Justice in that case.

An ACJP member who provides support to an accused should not act as bail justice in the same case. There is a conflict of interest between the two roles. However, it appears there is now a better understanding of this among police and ACJP members and these conflicts no longer seem to be occurring.

POLICE LIAISON OFFICERS

To improve relations between police and Indigenous Australians, Victoria Police has established the Aboriginal Community Liaison Officer program and the Police Aboriginal Liaison Officer program. These programs 'aim to reduce the frequency of negative contact that Koories have with police and increase the likelihood that contact is less punitive than is currently the case'.⁴⁰

The community liaison program employs Indigenous Australians to build local relationships between the Indigenous community and police.⁴¹ Community liaison officers are unsworn officers.⁴² The program was piloted in 2005 in Morwell and Mildura.⁴³ Four officers were jointly funded by Victoria Police and the Department of Justice's Indigenous Issues Unit.⁴⁴ Under AJA2, the program has received funding for six more community liaison officers and a state coordinator. The program will be rolled out over four years and is due for completion in 2010.⁴⁵ New officers have been employed in Shepparton, Bairnsdale and the City of Yarra, and a state coordinator has been employed.

There are 80 police liaison officers employed across Victoria and the program was expanded in 2006.⁴⁶ Police Aboriginal liaison officers are commissioned police officers. Their liaison functions are in addition to their general duties. They are not necessarily Indigenous Australians. Community feedback on the program to the Victorian Implementation Review was generally positive.⁴⁷

COURT ABORIGINAL LIAISON PROGRAM AND KOORI COURT OFFICERS

The Magistrates' Court Aboriginal Liaison program was established in 2002.⁴⁸ Its overall objective is to reduce the over-representation of Indigenous Australians in the criminal justice system.⁴⁹

The program operates out of the Melbourne Magistrates' Court. The majority of work is done in Melbourne, but it does provide a statewide service, usually by telephone.⁵⁰ The program has a coordinator and one ALO. There are plans to employ an ALO in the Dandenong Magistrates' Court.⁵¹ The program is linked to CISP (discussed in Chapter 7).

The ALOs' role is to:

- assist and advise the court about cultural issues
- provide advice and services to Indigenous offenders and their families
- raise awareness of cross-cultural issues in the criminal justice system
- advise and report to magistrates and court staff on appropriate actions for Indigenous offenders
- inform local Indigenous communities about court processes
- liaise with government and non-government agencies to coordinate service delivery and improve knowledge about issues affecting Indigenous Australians.⁵²

The ALO may provide support and advice to Indigenous Australians before bail hearings. At the hearing, the ALO may advise the court about cultural issues and available support services. An Indigenous accused can be bailed to follow the instructions of the ALO. In this supervisory capacity, the ALO may organise services for the accused, such as counselling, accommodation and health care.

Koori Court Officers may also help Indigenous accused with bail, although this is not formally part of their role.⁵³ The officers' role is to:

- advise and report to the Magistrates' Court and staff, including Community Corrections, about services and programs available to Indigenous Australians
- assist Indigenous Australians before the Koori Court with court outcomes and obligations
- identify and maintain a register of local services with an emphasis on Indigenous Australians
- liaise with Community Corrections Officers to assist in the development of case management plans for Indigenous Australians where appropriate
- educate the Indigenous community about the operation of the court and the criminal justice system
- build and maintain links between the Magistrates' Court and the Indigenous community by raising cross-cultural awareness with users of the Koori Court system.⁵⁴

The primary role of a Koori Court Officer is to assist Indigenous Australians before the Koori Court and to build relationships between the court and the community.⁵⁵ From time to time, officers do assist accused people on bail.⁵⁶ For example, in Broadmeadows the court has made it a condition of bail that the accused follow all lawful directions of the Koori Court officer. However, these cases are rare. The officer may also assist in linking an accused with support services, particularly if asked to do so by an accused's solicitor.

In our Consultation Paper, we asked whether there were sufficient support services for Indigenous Australians who come into contact with the bail system, especially in regional Victoria.⁵⁷ In response, we received submissions from the Magistrates' Court and VALS.⁵⁸

The Magistrates' Court thought the ALO was a very important position, and said the program should be extended to rural areas not served by existing or planned Koori Courts. The court noted concerns that there were 'insufficient adequate resources available to meet the needs of the Koori Court'.⁵⁹ VALS said 'there are not sufficient support services for Indigenous accused who come into contact with the bail system, especially in regional Victoria'. VALS thought

32 Ingenuity SED Consulting (2005) above n 21, 36–44.

33 Ibid 39.

34 Ibid 23.

35 Ibid 41.

36 Submission 34; consultation 65.

37 Ibid.

38 Aboriginal Community Justice Panel Review Team (2001) above n 24, 155–56. The Aboriginal Bail Justice Program is discussed in Chapter 5.

39 Victorian Law Reform Commission (2005) above n 15, 156.

40 Department of Justice [Victoria] (2006) above n 1, 33.

41 Ibid 9.

42 Consultation 60.

43 Information provided by the Aboriginal Advisory Unit, Victoria Police, 6 March 2007; Department of Justice [Victoria] (2006) above n 1, 33.

44 Consultation 60.

45 Information provided by the Aboriginal Advisory Unit, Victoria Police, 6 March 2007.

46 Ibid. The Victorian Implementation Review reported there were 40 police Aboriginal liaison officers: Department of Justice [Victoria] (2005) above n 8, 429.

47 Ibid 429–431.

48 The program is discussed in Victorian Law Reform Commission (2005) above n 15, 156.

49 Magistrates' Court of Victoria, *Aboriginal Liaison Program* (2007) <www.magistratescourt.vic.gov.au> at 29 March 2007.

50 Consultation 12.

51 Consultation 68.

52 Magistrates' Court of Victoria, *Aboriginal Liaison Program* (2007) <www.magistratescourt.vic.gov.au> at 29 March 2007.

53 Consultations 68, 69. Koori Courts are discussed in Chapter 7.

54 Department of Justice [Victoria], 'A Sentencing Conversation': *Evaluation of the Koori Courts Pilot Program: October 2002–October 2004* (2006) 40.

55 According to the Koori Court Project Manager, officers are a lynchpin between the court and the community: consultation 68.

56 Consultation 69.

57 Victorian Law Reform Commission (2005) above n 15, 157.

58 The Law Institute of Victoria said it would be guided by VALS's response. Youthlaw referred to VALS's response and supported its concerns.

59 This is a quote from an evaluation of the Koori Courts: Department of Justice [Victoria] (2006) above n 54, 64.

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Chapter 10

Indigenous Australians



there should be an ALO in all courts. It also noted the concerns about inadequate resourcing of Koori Courts highlighted in the Magistrates' Court submission.

The commission agrees that the ALO program provides very important services to Indigenous Australians and the courts. ALOs provide support and explain the bail process. They advise courts on the culturally specific needs of Indigenous Australians, which helps courts to assess the risks posed by an accused when making a bail decision and to set culturally appropriate bail conditions. In particular, the ability to bail accused people on the condition they follow the instructions of the ALO helps to ensure they are linked with culturally appropriate services and monitored in a culturally sensitive way.

Koori Court Officers also provide important services to Indigenous Australians. However, assistance with bail appears to be relatively ad hoc because it is not part of their core role. Their ability to assist an accused on bail depends on their workload and whether their assistance is requested.

The commission is concerned that ALO services are limited in regional Victoria. Although the program provides a statewide service, one ALO said it is impossible to cover regional Victoria.⁶⁰ The ALO can provide telephone advice to magistrates and solicitors, provide reports to the court, and set up appointments with regional services, but is unable to supervise people on bail in regional areas.

Koori Courts are primarily based in regional Victoria: Bairnsdale, Broadmeadows, Latrobe Valley, Mildura, Shepparton and Warrnambool.⁶¹ Koori Court Officers have established links with local support services and the Indigenous community. These links are an important resource which the commission believes could be used to assist more Indigenous Australians with bail, similar to the assistance provided by ALOs.

To ensure a full ALO service is available in regional areas, the commission believes there should be an ALO or a Koori Court Officer in all court regions. This is subject to monitoring officers' workload, as discussed below.

Although Koori Court Officers assist some Indigenous Australians with bail, the commission is concerned about the impact on their workloads of undertaking the ALO role. The Broadmeadows Koori Court Officer said she would be able to take on the ALO role, but emphasised that the workload of officers differs between courts.⁶² The Koori Court project manager thought it would be unwise to require officers to undertake the ALO role because of potential 'burnout' and subsequent high turnover of officers.⁶³ A high turnover could undermine the service because the personal relationships officers build with the local community and service providers are integral to the success of the service they provide.

There is also the risk of a potential conflict between the two roles.⁶⁴ If an accused fails to abide by the instructions of an ALO as required by the conditions of bail, the ALO is obliged to report this to the court. This obligation could undermine the trust which the Koori Court Officers build with Indigenous Australians.

It is important that Koori Court Officers are not overworked. It could lead to a high turnover, and also limit the level of service they can provide. However, the officers already have established links within their communities on which an ALO service could be built. To ensure Koori Court Officers are not overworked by requiring them to provide an ALO bail service, their workload should be monitored. If the officers are unable to fulfil the function of an ALO, a separate ALO should be employed.

RECOMMENDATIONS

137. The Department of Justice should ensure that there is an Aboriginal Liaison Officer (ALO) or a Koori Court Officer in all court regions.
138. Koori Court Officers should also fulfil the role of an ALO in relation to bail. This addition should be monitored by the Department of Justice to ensure the workload is sustainable and the roles do not conflict. If the workload is not sustainable or the roles conflict, separate ALOs should be employed.
139. The Indigenous Issues Unit of the Department of Justice and the DHS should work together to provide more accommodation options for Indigenous Australians on bail throughout Victoria. The accommodation should be culturally appropriate.

ACCOMMODATION

Concern about a lack of accommodation services for Indigenous Australians was a consistent theme in consultations and submissions.⁶⁵ VALS said arranging appropriate accommodation is the centre pin of bail applications: if clients do not have anywhere to go, they will not get bail.⁶⁶ This was echoed by Indigenous representatives in Geelong, who said accommodation is often the difference between getting bail and being remanded.⁶⁷

For Indigenous Australians, the problem of accommodation is twofold:

- a lack of a fixed address at arrest means bail decision makers may be reluctant to bail the accused without a fixed residential bail condition⁶⁸
- inadequate supported housing options for Indigenous Australians on bail mean they may be remanded until appropriate accommodation can be secured or may be bailed to inappropriate accommodation, which increases the risk they will breach their bail conditions.

VALS submitted that:

... if a person does not have accommodation they are disadvantaged in the bail process. Indigenous Australians are socio and economically disadvantaged and demand for housing assistance means that there are long waiting lists.

VALS quoted a CSO: 'there is never enough accommodation for Indigenous people on bail. Many of our clients are "in transition", which is a polite term for being homeless'. VALS called for the establishment of Indigenous-specific bail hostels and said bail should not be refused on the sole ground that an accused does not have any, or adequate, accommodation.⁶⁹

ALOs, CSOs, Koori Court Officers and ACJP members play an important role in connecting accused people with accommodation services. The ALO at Melbourne Magistrates' Court prefers to use Indigenous-specific accommodation rather than mainstream services because it is more comfortable for Indigenous Australians.⁷⁰ Finding accommodation in regional areas can be difficult.⁷¹ This is a particular problem for accused people who are not from an area because they will have difficulty establishing they have access to accommodation or family support.⁷²

In our Consultation Paper we discussed Warrakoo Station—a NSW farm run by Indigenous Victorians which caters to young Indigenous men on bail who have been convicted but their sentence has been deferred.⁷³ Participants are bailed to comply with the rules of the Warrakoo program and directions of the program manager. The program has received positive feedback and was praised by the Victorian Parliament Law Reform Committee, which recommended that similar initiatives be developed.⁷⁴ The Wulgunggo Ngalu Learning Place in Gippsland is being developed for Indigenous men on community-based orders following conviction.⁷⁵ It is a residential program for up to 20 Indigenous men that aims to teach them life skills to improve health and job prospects, and to reduce substance abuse and the likelihood of re-offending. It is expected to open in late 2007.

The commission is concerned by the discriminatory effect lack of accommodation has on Indigenous Australians applying for bail. Existing disadvantage is reinforced by the bail system. To help overcome this, the commission believes adequate accommodation options should be provided to Indigenous Australians on bail. To reduce the risk of breaching bail conditions, this accommodation should be tailored to the cultural needs of Indigenous Australians. Warrakoo Station and the Wulgunggo Ngalu Learning Place provide good examples of the types of innovative initiatives that can be developed to house and support Indigenous Australians on bail.⁷⁶ Supported accommodation options within the community are also required.⁷⁷ It is particularly important that accommodation options are improved in regional areas.

60 Consultation 12.

61 There is also a Koori Court at the Children's Court of Victoria. A second Children's Koori Court is to be opened in Mildura by the end of 2007, and another adult Koori Court is to be opened in Swan Hill by June 2008: Department of Justice [Victoria], *Victoria's Seventh Koori Court Opens* (2007) <www.justice.vic.gov.au> at 4 April 2007.

62 Consultation 69.

63 Consultation 68.

64 Consultation 69.

65 Consultations 8, 12, 28, 40, 68; submissions 22, 34; Indigenous Forum. Submissions 29 and 30 supported VALS's response. Particular accommodation problems for Indigenous women are discussed in the Indigenous Women section. Bail accommodation for all accused people is discussed in Chapter 11.

66 Consultation 8.

67 Consultation 40.

68 Submission 34.

69 This requirement already applies to children: *Children, Youth and Families Act 2005* s 346(9).

70 Consultation 12.

71 Consultations 12, 40.

72 Indigenous Forum; consultation 40.

73 Victorian Law Reform Commission (2005) above n 15, 156–57.

74 Parliament of Victoria Law Reform Committee (2001) above n 28, recommendation 30. See comments in Victorian Law Reform Commission (2005) above n 15, 157.

75 Department of Justice [Victoria], *Wulgunggo Ngalu Learning Place* <www.justice.vic.gov.au> at 30 March 2007.

76 The Wulgunggo Ngalu Learning Place is not for people on bail, but is a good model of culturally appropriate accommodation and support.

77 See, eg, the discussion of supported transitional housing in Chapter 11.

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Female offenders, whether Indigenous or not, tend to be more socio-economically disadvantaged than male offenders.

DRUG AND ALCOHOL PROGRAMS

Drug and alcohol misuse is prevalent among Indigenous accused people.⁷⁸ According to the Royal Commission Report into Aboriginal Deaths in Custody, the Indigenous Australians whose deaths were the subject of the report 'misused alcohol to a grave extent'.⁷⁹ Of the 99 deaths reviewed:

*forty-three had been taken into last custody directly for reasons related to alcohol and it can safely be said that overwhelmingly in the remaining cases the reasons for last custody was directly alcohol related.*⁸⁰

The Royal Commission linked alcohol abuse to the historical disempowerment of Indigenous Australians.⁸¹

The Victorian Implementation Review confirmed that alcohol and drug misuse is a continuing problem for Indigenous Australians.⁸² It noted the Victorian Government had introduced many initiatives to counter the problem, but 'it is clear that problems remain'.⁸³

Indigenous Australians may be linked to drug and alcohol programs while on bail through existing services such as the CREDIT program, CISP, the ALO program, CSOs and ACJPs. For example, the integrated services pilot discussed in Chapter 7 includes assistance tailored to Koori-specific needs. This is provided through the ALO program at Melbourne Magistrates' Court and through the Koori Court workers in the Latrobe Valley Magistrates' Court.⁸⁴

VALS submitted that existing services were culturally inappropriate: 'Indigenous Australians criticize the CREDIT program as culturally insensitive. If the services are culturally inappropriate, then the accused is not likely to meet bail conditions'. We understand that VALS's primary concern was the lack of Indigenous workers involved in the program, which we believe has since been addressed by the ALOs' closer involvement in the program, including provision for the ALO to supervise Indigenous clients on bail.

In its response to our question about the adequacy of support services for Indigenous Australians, the Magistrates' Court said drug and alcohol rehabilitation programs were 'an obvious area where resources need to be invested'. The court urged consultation with the Indigenous community on this issue.

Addressing the problem of alcohol and drug misuse in the Indigenous community requires a multifaceted response.⁸⁵ Part of this response should include drug and alcohol programs run by Indigenous workers for Indigenous Australians on bail. Indigenous Australians are more likely to comply with their bail conditions if they are given appropriate support to address the underlying causes of their offending. Initiatives like the ALO program help link Indigenous Australians on bail with culturally appropriate programs, however, ALOs rely on others to develop these programs. There are already some programs available but the commission believes more should be developed.⁸⁶

MENTORING

In 2002 a pilot mentoring program was established to assist young Indigenous women complete Community-Based Orders and Intensive Corrections Orders.⁸⁷ This program, known as the Djarmbi-Tiddas Mentoring Program, is being expanded to assist Indigenous men and women to complete community-based dispositions.⁸⁸ Culturally appropriate local support is provided to Indigenous offenders by elders and other respected people.⁸⁹

Mentoring also forms part of a 'Make It Work' support program provided to adults on bail by WISE Employment, a not-for-profit employment service for disadvantaged job seekers. It receives referrals from the Magistrates' Court CREDIT Bail Support Program.⁹⁰ A 2006 evaluation of the program found statistically significant relationships 'between having a program mentor and obtaining employment, achieving a positive criminal justice outcome, and somewhat lower recidivism'.⁹¹

RECOMMENDATIONS

140. The Indigenous Issues Unit of the Department of Justice and DHS should work together to develop more drug and alcohol programs for Indigenous Australians on bail. The programs should be culturally appropriate.
141. The Indigenous Issues Unit of the Department of Justice should establish a mentoring program for Indigenous Australians on bail based on the Djarmbi-Tiddas Mentoring Program model.
142. Training for magistrates, police and bail justices on Indigenous issues should cover specific issues facing Indigenous women and their specific support needs.

The Djarmbi–Tiddas Mentoring Program is not available to people on bail; however, the commission believes it is a good model.⁹² Based on consultations and submissions it appears that Indigenous accused people often respond better to programs which are run by Indigenous Australians. If accused people are linked with a mentor from the local community, the commission believes they are more likely to comply with bail conditions, and therefore less likely to be remanded for breach of bail. The mentoring program could be linked with existing services, such as the ALO program.

INDIGENOUS WOMEN

Indigenous Australian women are over-represented in the prisoner population at a similar rate to Indigenous men.⁹³ In particular, Indigenous women are over-represented on remand:

*In Victoria, Indigenous women are more likely than non-Indigenous women to enter prison custody on remand. They are also more likely to be released from remand to bail without spending any part of that imprisonment under sentence.*⁹⁴

Indigenous women are disadvantaged in their contact with the criminal justice system on the basis of both race and gender.⁹⁵ Female offenders, whether Indigenous or not, tend to be more socio-economically disadvantaged than male offenders.⁹⁶ This disadvantage is particularly pronounced for Indigenous women:

*As a result, Koori women in contact with the criminal justice system have more needs than most other groups and require more intensive and multi-dimensional services if there is to be an impact on their over-representation.*⁹⁷

- 78 Issues of general concern for accused people who misuse alcohol and drugs are discussed in Chapter 11.
- 79 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [1.2.17].
- 80 Ibid.
- 81 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, [15.1.1].
- 82 Department of Justice [Victoria] (2005) above n 2, 265.
- 83 Ibid 269.
- 84 The Koori Court is not part of CISP, but CISP will work closely with the Koori Court workers in the Latrobe Valley Magistrates' Court: consultation 64.
- 85 See, eg, the broad range of recommendations made by the Royal Commission and the Victorian Implementation Review targeting drug and alcohol misuse: Department of Justice [Victoria] (2005) above n 8, 245–48, 273–74. Substance use and misuse is a strategic area for action identified in: Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (2005) ch 8.
- 86 Eg, the Ngwala Willumbong Cooperative provides alcohol and drug rehabilitation services and outreach support programs for Indigenous Australians: Ngwala Willumbong Cooperative, *About Us* (2007) <www.ngwala.org/organisation/organisation.htm> at 2 April 2007.
- 87 Department of Justice [Victoria], *Victorian Aboriginal Justice Agreement* (2000) 35. The Aboriginal Women's Mentoring Program was run by the Rumbalara Aboriginal Cooperative in Shepparton.
- 88 Community-based dispositions are set out in the *Sentencing Act 1991*.

- 89 In AJA2 the program is referred to as the Koori Offender Support and Mentoring Program: Department of Justice [Victoria] (2006) above n 1, 35. The program will run for a year until June 2007. It is expected to be extended for a further three years, subject to an evaluation: information provided by Guy Hatfield, Indigenous Issues Unit, Department of Justice 3 April 2007. The Better Pathways strategy also refers to expanding the Aboriginal Women's Mentoring Program: Department of Justice [Victoria], *Better Pathways: An Integrated Response to Women's Offending and Re-Offending* (2005) 26.
- 90 Submission 28.
- 91 Deakin University Employment and Social Exclusion Research Group, *Make It Work: An Employment Assistance and Mentoring Program for Offenders: A Comprehensive Evaluation* (2006) iii–iv.
- 92 For a review of literature on mentoring programs, see Ibid 14–24.
- 93 The actual number of women is smaller: Department of Justice [Victoria] (2006) above n 1, 19.
- 94 This means that Indigenous women on remand are less likely than other women on remand to go on to receive a custodial sentence: Department of Justice [Victoria] (2005) above n 89, 19.
- 95 Women from minority groups are likely to face multiple discrimination in their contact with the justice system: (17 August 2005) above n 1, preamble.
- 96 'Female offenders generally have poorer physical and mental health, lower levels of education, employment and income, and a lower standard of housing': Department of Justice [Victoria] (2006) above n 1, 19. The socioeconomic disadvantages experienced by female offenders are reflected globally: Laurel Townhead, *Pre-Trial Detention of Women and Its Impact on Their Children* (2007) 16.
- 97 Department of Justice [Victoria] (2006) above n 1, 19.

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TRAINING

It is important that bail decision makers are aware of the particular needs and concerns of Indigenous women. A member of our Advisory Committee reported that there is a tendency among decision makers to assume that services for Indigenous men will be appropriate for Indigenous women. Indigenous women's needs and concerns are distinct. For example, Indigenous women 'tend to have the primary parenting role'. Indigenous women are victims of crime more frequently than Indigenous men and other Victorians, which is often linked to the reasons they come into contact with the criminal justice system.

Bail decision makers should not assume that Indigenous women's needs are the same as those of Indigenous men, or that the same services are appropriate. To ensure magistrates, police and bail justices are aware of the specific concerns and needs of Indigenous women, they should receive specific training. This will help them fulfil their obligations under the new Bail Act, for example, when assessing unacceptable risk and setting conditions that are no more onerous than necessary and are reasonable and realistic for the individual accused.⁹⁸

SUPPORT SERVICES

Given that Indigenous women face unique disadvantages in their contact with the criminal justice system, it is important that support services are tailored to their particular needs. As stated in a report by the Anti-Discrimination Commission Queensland:

Equality of outcomes for Indigenous women will not occur if they are simply expected to fit into and to benefit from existing correctional services and programs that mostly have been developed for non-Indigenous male prisoners.⁹⁹

Without appropriate services, Indigenous women may be less likely to be released on bail, or more likely to breach bail conditions if released.

The Magistrates' Court expressed concern about the lack of accommodation and other supports available to Indigenous women when bail is decided.¹⁰⁰ A member of our Advisory Committee reported that some services available to Indigenous men are not available to Indigenous women: for example, a residential drug rehabilitation centre for Indigenous women does not cater for women on methadone, yet the equivalent male facility does.

The commission is particularly concerned about the lack of appropriate accommodation for Indigenous women on bail. This potentially acts as a bar to their release, and may lead to higher rates of remand. In February 2006, the Federation of Community Legal Centres and the Victorian Council of Social Service made a submission to the Equal Opportunity Commission of Victoria alleging systemic discrimination against women in Victorian prisons.¹⁰¹ In particular, it alleged that Indigenous women prisoners 'are more likely to be held on remand and not granted bail due to homelessness'.¹⁰²

Lack of housing as a potential barrier to Indigenous women being released on bail is acknowledged by the government's Better Pathways strategy.¹⁰³ The strategy has funded two dedicated supported transitional housing properties to be established for Indigenous women and their children.¹⁰⁴ The Aboriginal Justice Forum has approved the establishment of these properties in Shepparton and Mildura.¹⁰⁵ To be eligible for a house, an Indigenous woman must have been granted bail by a court and be homeless, or at risk of long-term homelessness. The woman will be able to stay in the house with her family until permanent accommodation is secured. Local Indigenous community organisations will provide support services to the transitional properties. Indigenous women will also have priority access to ten metropolitan transitional housing properties through the Better Pathways strategy.¹⁰⁶

The establishment of dedicated transitional housing for Indigenous women is a good example of the specialised support services that need to be provided to help overcome the disadvantage they face, and address their over-representation on remand. The provision of accommodation for accused women and their families recognises they are often primary carers. It reduces not only the disruptive effects of remand on Indigenous women, but also on their children. The commission endorses this initiative.

INDIGENOUS-SPECIFIC PROVISION

Indigenous Australians are over-represented on remand and face unique disadvantages in their contact with the criminal justice system.¹⁰⁷ It was suggested to us that this situation should be recognised in an Indigenous-specific provision in the new Bail Act. This was not raised in our Consultation Paper; however, there was general support for its inclusion at our Indigenous Forum and in some consultations.¹⁰⁸

Specific provisions, procedures and services already exist for Indigenous Australians in the criminal justice system. For example, as discussed, special notification obligations apply to police when they take an Indigenous Australian into custody, Koori Courts are involved in sentencing Indigenous offenders, and specialised Indigenous support services are provided in courts and the community.

The CYFA includes Indigenous-specific decision making principles that apply to child protection matters.¹⁰⁹ The new provisions aim to ‘reduce the very high overrepresentation’ of Indigenous children and young people in the child protection system.¹¹⁰ When children are held in criminal custody they are entitled to have reasonable efforts made to meet their medical, religious and cultural needs, including their needs as members of the Indigenous community.¹¹¹ This requirement is a well-established principle, having been included in the *Children and Young Persons Act 1989* in 1992.¹¹²

Although the Bail Act does not refer to Indigenous Australians, bail decision makers may take their needs as members of the Indigenous community into account; for instance, when:

- assessing unacceptable risk¹¹³
- setting bail conditions¹¹⁴
- extending bail in the accused’s absence¹¹⁵
- determining whether an accused is guilty of the offence of failure to answer bail.¹¹⁶

For example, to render any risk posed by an accused ‘acceptable’, a decision maker may direct an accused to follow the directions of an ALO as a condition of bail. Similarly, when setting bail conditions, a bail decision maker could bail an accused to multiple addresses recognising that Indigenous Australians may not have one fixed address, but instead reside at a number of addresses with extended family. When deciding to extend bail in accused people’s absence or determining whether their failure to appear

98 See discussion on unacceptable risk test in Chapter 3 and recommendations on bail conditions in Chapter 7.

99 Anti-Discrimination Commission Queensland, *Women in Prison: A Report by the Anti-Discrimination Commission* (2006) 111.

100 Submission 22. See also consultation 12.

101 Equal Opportunity Commission Victoria, *Women Prisoners in Victoria* (2006) 3.

102 Ibid 11.

103 Department of Justice [Victoria] (2005) above n 89, 19.

104 Ibid 19.

105 In March 2007, two properties were in the final stages of being leased by the Office of Housing, funded by Corrections Victoria: information provided by Lorraine Beeton, Corrections Victoria, 19 March 2007.

106 Ibid. These properties are discussed in Chapter 11.

107 A submission to the Scrutiny of Acts and Regulations Committee inquiry into discrimination in the law argued that the broad discretion given to bail decision makers under the unacceptable risk test was likely to disadvantage people without legal representation. It was submitted that a lack of legal representation combined with over-representation of Indigenous Australians charged with lower order offences may lead to discrimination against Indigenous Australians. The committee recommended that the unacceptable risk test be retained pending our review of the Bail Act: Scrutiny of Acts and Regulations Committee, *Discrimination in the Law: Inquiry under Section 207 of the Equal Opportunity Act 1995: Final Report* (2005) recommendation 23. We believe our recommendations on Indigenous Australians should address this concern.

108 Consultations 6, 7, 8, 13, 65, 68. Other jurisdictions have Indigenous-specific provisions in their Bail Acts. These are discussed in the Other Jurisdictions section.

109 *Children, Youth and Families Act 2005* ss 347(2)(c), 12.

110 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1375 (Sherryl Garbutt, Minister for Children).

111 *Children, Youth and Families Act 2005* ss 347(2)(d), 482(2)(c).

112 *Children and Young Persons Act 1989* ss 130(2)(d), 252(2)(c), inserted by *Children and Young Persons (Amendment) Act 1992* ss 26(1)(b), (2)(b).

113 *Bail Act 1977* s 4(3). The unacceptable risk test is discussed in Chapter 3.

114 *Bail Act 1977* s 5. Setting appropriate bail conditions for Indigenous Australians is discussed in Chapter 7.

115 *Bail Act 1977* s 16(3).

116 *Bail Act 1977* s 30(1).

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Concern was expressed at our Indigenous Forum that decision makers lacked knowledge about Indigenous issues.

is reasonable, a decision maker may take into account an obligation to attend a community funeral. Indigenous Australians are often obliged to attend funerals of members of their extended family or community in the same way that other cultures are obliged to attend funerals of members of their immediate family. Indigenous Australians' funerals can extend over several days.¹¹⁷

It is important that these cultural factors and community expectations are taken into account when making bail decisions. Otherwise Indigenous Australians may be bailed on inappropriate bail conditions, which they are more likely to breach, or remanded unnecessarily, contributing to their over-representation in custody.

Without a specific direction to decision makers in the Bail Act, there is a risk that consideration of these matters will be inconsistent and will compound the historical and continuing disadvantage faced by Indigenous Australians in their contact with the criminal justice system.¹¹⁸ VALS believes magistrates generally do not take Indigenous issues into account in bail applications and approaches vary enormously between magistrates.¹¹⁹ Concern was expressed at our Indigenous Forum that decision makers lacked knowledge about Indigenous issues. It was suggested that a specific provision in the Bail Act would enable lawyers to 'pull up' decision makers who did not consider Indigenous issues when relevant.¹²⁰

While there are strong reasons for including an Indigenous-specific provision in the new Bail Act, there are also arguments that can be made against it:

- A specific provision may be unnecessary. The Bail Act already allows decision makers to take into account special needs and cultural issues. Any inconsistency or deficiency in decision making can be addressed through training.
- Why single out one group for special treatment? Other groups are also disadvantaged in their interaction with the criminal justice system, such as people with cognitive impairment, racial minorities, and recently arrived immigrants.

- There is a risk the accused's needs may be privileged at the expense of the victim's. The victim may also be Indigenous or have particular cultural needs or concerns which should be taken into account.
- Who has authority to speak on behalf of a culture? There is a risk that Indigenous representatives will not represent the views or needs of the whole community.
- On a practical level, cultural or personal information may not be available to bail decision makers or may cause delays in decision making.

Each of these points will be considered in turn.

A specific provision may be unnecessary.

While bail decision makers can take into account the needs of Indigenous Australians, our consultations indicate they do not uniformly do so. This may result in inconsistent decision making and contribute to the over-representation of Indigenous Australians on remand. On its face, the provisions of the Bail Act apply equally to all. However, if relevant considerations are not taken into account, such as the needs of an accused as an Indigenous Australian, this can result in indirect discrimination. Positive legal measures are arguably necessary to ensure Indigenous cultural issues are taken into account in bail decision making.

Why single out one group for special treatment?

Indigenous Australians have a unique history of disadvantage in their interaction with the criminal justice system. Remedying this disadvantage calls for a unique response. Recognising the needs and circumstances of Indigenous Australians by including an Indigenous-specific provision in the new Bail Act does not mean the claims of other disadvantaged groups will be ignored by bail decision makers. We also make recommendations to assist other disadvantaged groups in the bail system.¹²¹

There is a risk the accused's needs may be privileged at the expense of the victim's.

Consideration of the accused's needs as an Indigenous Australian is just one element of the bail decision. It is not determinative of the decision. Taking the accused's background into account does not result in disregard for the welfare of victims. The commission has recommended that the safety and welfare of victims, and any other person affected by the grant of bail, should be taken into account by bail decision makers when assessing whether an accused poses an unacceptable risk.¹²² If the victim is also an Indigenous Australian, this can be taken into account by the bail decision maker.

Who has authority to speak on behalf of a culture? The issue of representativeness needs to be addressed at a community and institutional level. For example, the 2005 review of the ACJP program highlighted the need to increase the number of ACJP members to 'allow for communities to be more inclusive in the involvement of further community members and reduce the one family representation highlighted in the consultation'.¹²³ The issue of representativeness already confronts the ALO program, CSOs, ACJPs and Koori Courts. It is not a sufficient reason for abandoning representatives altogether.

Cultural or personal information may not be available or may cause delays. There are already services in place, such as ALOs and CSOs, to provide information to bail decision makers. We have made recommendations to strengthen and expand these programs. If these services are not available, a specific provision would at least alert decision makers and legal representatives to consider these issues and make inquiries of the accused. Waiting for the information and establishing links with culturally appropriate support services may result in Indigenous Australians spending more time on remand. While this is a concern, there is also a risk that without the information and services Indigenous Australians released on bail will be set up to fail due to culturally inappropriate conditions and a lack of support.¹²⁴

On balance, the commission believes that an Indigenous-specific provision should be included in the new Bail Act. The question is: what form should such a provision take?

OTHER JURISDICTIONS

The inclusion of an Indigenous-specific provision in a Bail Act is not novel. Both the NSW and Queensland Bail Acts include such provisions. In NSW, an accused's Indigenous status is relevant to the application of the unacceptable risk test. Specifically, when considering the probability of whether an accused will appear in court, the bail decision maker may have regard to:

*the person's background and community ties, as indicated (in the case of an Aboriginal person or Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known).*¹²⁵

In assessing the 'interests of the person', the bail decision maker may consider: 'if the person is under the age of 18 years, or is an Aboriginal or Torres Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact'.¹²⁶

In a bail proceeding in Queensland:

if the defendant is an Aboriginal or Torres Strait Islander person—the court may receive and take into account any submissions made by a representative of the community justice group of the defendant's community, including, for example, about—

- (i) *the defendant's relationship to the defendant's community; or*
- (ii) *any cultural considerations; or*
- (iii) *any considerations relating to programs and services established for offenders in which the community justice group participates.*¹²⁷

The Law Reform Commission of Western Australia (LRCWA) recently recommended that the Western Australian equivalent of the unacceptable risk test should direct bail decision makers to consider the 'cultural background' of the accused.¹²⁸ The commission preferred the term 'cultural background' to a specific reference to Indigenous culture because, '[c]ultural factors for other groups in the community may well be relevant to bail'.¹²⁹ However, the LRCWA thought it was also necessary to recommend that Aboriginal customary law be taken into account

117 Submission 34.

118 Bail 'criteria (many of which focus on western concepts) have the potential to disadvantage Indigenous people applying for bail': Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture: Final Report*, Project 94 (2006) 165.

119 Consultation 8. Similar concerns were raised about bail justice decision making: consultation 65.

120 In one consultation we were told of a case before a bail justice involving an Indigenous woman. The lawyer said that the recommendations of the Royal Commission into Aboriginal Deaths in Custody should be considered. The bail justice responded that he did not care if she was black or white: consultation 65.

121 See Chapter 11.

122 See Chapters 3 and 4.

123 Ingenuity SED Consulting (2005) above n 21, 39.

124 This concern was raised by a member of our Advisory Committee.

125 *Bail Act 1978* (NSW) s 32(1)(a)(ia). This provision mirrors s 32(1)(a)(i), which applies to non-Indigenous Australians except that s 32(1)(a)(i) refers to 'the history and details of the person's residence, employment and family situations and the person's prior criminal record (if known)'.

126 *Bail Act 1978* (NSW) s 32(1)(b)(v).

127 *Bail Act 1980* (Qld) s 15(1)(f).

128 Law Reform Commission of Western Australia (2006) above n 118, 167, recommendation 33.

129 Ibid 167.

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to ensure that relevant customary law issues are not overlooked. It recommended that when applying the equivalent of the unacceptable risk test, the bail decision maker 'shall have regard, where the accused is an Aboriginal person, to any known Aboriginal customary law or other cultural issues that are relevant to bail'.¹³⁰ To address concerns about the safety and welfare of Indigenous victims, the LRCWA also recommended that bail decision makers should consider submissions from a community justice group representative in the victim's community.¹³¹

In contrast to the states, the Commonwealth recently amended the *Crimes Act 1914* to expressly prohibit bail decision makers considering 'any form of customary law or cultural practice' as a reason for excusing, justifying, authorising, requiring, lessening or aggravating the seriousness of the alleged criminal behaviour when determining whether to grant bail or in setting bail conditions.¹³² This applies to any decision maker considering bail for people accused of Commonwealth offences. To provide protection to victims and witnesses, the amendments require decision makers to consider the potential impact of granting bail on a victim or witness who lives in a remote community.¹³³ According to the government, victims and witnesses 'in such communities face higher risks than others when alleged offenders are released into their communities on bail'.¹³⁴

The Commonwealth Government expressed particular concern about 'the high levels of family violence and child abuse in Indigenous communities'.¹³⁵ As discussed, the commission agrees that the safety and welfare of victims and witnesses, including their particular needs or concerns as Indigenous Australians, is a relevant factor in the bail decision. We do not believe that the inclusion of an Indigenous-specific provision will lessen the protection available to victims. Rather, our recommendations about victims, combined with the improved services and protections arising from the Victims' Charter, should increase that protection.

Nor does the commission intend that an Indigenous-specific provision in the new Bail Act be used to excuse, justify, authorise, require or lessen the seriousness of any criminal behaviour. These considerations are more relevant to sentencing than bail. The seriousness of an alleged offence is only relevant to the bail decision when assessing unacceptable risk.¹³⁶ The inclusion of an Indigenous-specific provision should not be perceived as a licence for Indigenous Australians to raise 'cultural defences' when seeking bail. Rather, it is intended to ensure bail decision makers are aware of and consider the needs of an accused as an Indigenous Australian. For example, in setting the conditions of bail a decision maker may allow an accused to reside at multiple addresses with extended family, to attend community events such as funerals, and engage with culturally appropriate support services.¹³⁷

MODELS FOR REFORM

An Indigenous-specific provision could be included in:

- the new Bail Act's statement of purposes¹³⁸
- a list of considerations relevant to the assessment of unacceptable risk
- a list of considerations relevant to setting bail conditions
- an evidential provision.

A reference to Indigenous Australians in the purposes statement would guide interpretation of the new Bail Act as a whole, and therefore inform all bail decisions involving Indigenous Australians. However, there is a risk the purposes statement could be ignored because it would not impose any specific obligations on bail decision makers.

The NSW Bail Act and the LRCWA recommendations provide examples of Indigenous-specific considerations relevant to the assessment of unacceptable risk. Such a provision could, for example, direct bail decision makers to consider the support structures available to Indigenous Australians through extended family and the community.

In Chapter 7 we recommended that bail conditions be reasonable and realistic and no more onerous than necessary. However, a specific reference to Indigenous Australians' needs and cultural considerations may help ensure that bail conditions are appropriate and do not set up Indigenous Australians to fail. For example, decision makers could bail accused people on the condition that they reside at a number of addresses, therefore recognising that Indigenous Australians may not have a single fixed address.¹³⁹

The Queensland Bail Act and LRCWA recommendations provide examples of evidentiary provisions which allow bail decision makers to receive submissions on Indigenous-specific issues, such as connection to community, cultural concerns and available support services. Provision of such information already occurs in Victoria through CSOs, ACJPs, ALOs, VALS solicitors and other legal representatives. However, as noted, the reception of this information varies. If the Bail Act specifically provided for such submissions to be made, it could increase consistency in bail decision making and result in more appropriate bail outcomes for Indigenous Australians.

RECOMMENDATIONS

The commission believes the best model for reform is to combine an Indigenous-specific reference in the statement of purposes in the new Bail Act with a special evidentiary provision.

To address the over-representation of Indigenous Australians on remand and the unique disadvantages they confront, one of the purposes of the new Bail Act should be to 'ensure the bail system does not perpetuate the historical disadvantage faced by Indigenous Australians in their contact with the criminal justice system'. We make this recommendation in Chapter 2.

To prevent this being overlooked by bail decision makers, the new Bail Act should contain a special evidentiary provision. When making a decision involving an Indigenous Australian, bail decision makers must take into account the needs of an accused as a member of the Indigenous community.¹⁴⁰ While this provision obliges decision makers to consider these matters, they would still retain discretion about the appropriate weight to give them. A person's Indigenous status is just one factor in the bail decision, it is not determinative.

In contrast to the Queensland provision, the special evidentiary provision we have proposed does not specifically state that a bail decision maker 'may receive and take into account' submissions on this issue. This is implied in our provision; decision makers must take into account any submissions made to them, even if they ultimately give them little or no weight in their determination. If relevant submissions are not made, decision makers are still obliged to consider the more general issues of Indigenous over-representation and disadvantage highlighted in the purposes statement.

Imposing this obligation on decision makers may lead to delays while they seek relevant submissions.¹⁴¹ In some cases it will be appropriate to adjourn a matter to avoid imposing inappropriate conditions or remanding an accused who could be released with appropriate support services. Rather than adjourning, a decision maker may choose to take into account the more general concerns about Indigenous Australians in the purposes statement.

RECOMMENDATIONS

143. The new Bail Act should provide that when making a decision involving an Indigenous Australian, bail decision makers must take into account the needs of the accused as a member of the Indigenous community.
144. The new Bail Act should contain a note to the Indigenous-specific provisions referring to the Commonwealth legislation which deals with the relevance of customary law and cultural practice to the determination of bail for accused people charged with Commonwealth offences.

130 Ibid 168, recommendation 34(1).

131 Ibid 168, recommendation 34(2). This recommendation also applies to submissions received from representatives of the accused person's community. A community justice group is defined as a community justice group established under the *Aboriginal Communities Act 1979* (WA).

132 *Crimes Act 1914* (Cth) s 15AB(1)(b) inserted by *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) sch 1. The government made similar amendments to the general sentencing principles: *Crimes Act 1914* (Cth) s 16A amended by *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) sch 1.

133 *Crimes Act 1914* (Cth) s 15AB(2) inserted by *Crimes Amendment (Bail and Sentencing) Act 2006* (Cth) sch 1.

134 Explanatory Memorandum, *Crimes Amendment (Bail and Sentencing) Bill 2006* (Cth) 2–3.

135 Explanatory Memorandum, *Crimes Amendment (Bail and Sentencing) Bill 2006* (Cth) 1. In July 2006, the Council of Australian Governments (COAG) asked the Standing Committee of Attorneys-General 'to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required': Council of Australian Governments, *Communiqué of Meeting, 14 July 2006* (2006) <www.coag.gov.au> at 23 March 2007. In April 2007, COAG noted the progress made in tackling violence and child abuse in Indigenous communities (including the amendments to the Commonwealth *Crimes Act 1914*) and requested a further progress report in December 2007: Council of Australian Governments, *Communiqué of Meeting, 13 April 2007* (2007) <www.coag.gov.au> at 26 April 2007.

136 *Bail Act 1977* s 4(3)(a). See discussion in Chapter 3.

137 The issue of releasing an accused on bail to face traditional punishment under customary law was discussed in: Law Reform Commission of Western Australia (2006) above n 118, 170. This concern was not raised in consultations or submissions to our review of the Bail Act.

138 In Chapter 2 we recommend the inclusion of a statement of purposes in the new Bail Act.

139 We were told by our Advisory Committee that some magistrates already do this.

140 This wording is similar to that used in the *Children, Youth and Families Act 2005* about the treatment of Indigenous children in custody.

141 See, eg, Law Reform Commission of Western Australia, *Aboriginal Customary Laws: Discussion Paper Overview*, Project No 94 (2006) 167.

Chapter 10

Indigenous Australians



The basic infrastructure for the provision of evidence on these issues is largely in place through CSOs, ACJPs and ALOs. These services will be enhanced by our recommendations. A special evidentiary provision, combined with the new purposes statement, will ensure consideration of Indigenous issues will not be limited to one aspect of bail decision making, such as the assessment of unacceptable risk. Submissions may be considered on the issues of unacceptable risk, appropriate bail conditions, extending bail in the accused's absence, or determining whether an accused has reasonable cause for failing to appear. The accused's needs as a member of the Indigenous community are a relevant consideration across the spectrum of bail decision making.

We note that our recommendations potentially conflict with the Commonwealth Government's recent amendments to the Crimes Act. As noted in Chapter 6, as a matter of statutory interpretation, Commonwealth legislation prevails over Victorian legislation. Therefore, to the extent of any conflict, the Commonwealth legislation will apply to the determination of bail for an accused charged with a Commonwealth offence. To ensure bail decision makers are aware of the Commonwealth legislation, there should be a note about it in the new Bail Act linked to the Indigenous-specific provisions.

Chapter 11

Marginalised Groups



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Chapter 11

Marginalised Groups



People from marginalised groups are overrepresented in the criminal justice system and tend to be disadvantaged in their interaction with the bail system. This disadvantage is reflected in the bail decision-making process itself and a lack of appropriate support services. This combination often entrenches existing disadvantage. For example, homeless people may be refused bail because decision makers think they pose too great a risk of failing to appear. If appropriate transitional accommodation was available, decision makers may come to different conclusions. Addressing the disadvantage faced by marginalised groups requires not only reform of the Bail Act, but also the provision of appropriate support services to ensure the Act is applied in a non-discriminatory manner.

Throughout this report, we have discussed the interaction of marginalised groups with the bail system when relevant. In this chapter we consider substance abuse, homelessness and cognitive impairment, and issues particular to women.¹ We consider each of these groups in the following sections; however, the issues experienced by people within these groups often overlap. For example, a person with cognitive impairment may also be homeless; and a female accused may also have a substance abuse problem. Therefore, a holistic approach is required when applying the Bail Act to marginalised groups.

WOMEN

Between 1996 and 2006, Victoria's female prison population almost doubled.² The percentage of female prisoners compared to male prisoners also increased, though they remained a small minority.³ In 2005, Corrections Victoria introduced the Better Pathways strategy to address the increase in women's imprisonment. It said the following trends have driven the increase:

- more women imprisoned for violent offences and drug-related offending, leading to more women serving longer sentences
- increased use of remand, particularly for women with inadequate accommodation and complex treatment and support needs
- less use of prison as a 'last resort' sentencing option
- more women sentenced to a short term of imprisonment.⁴

There are important differences between women who come into contact with the criminal justice system compared to men:

- they commit fewer and less serious crimes
- their offending is more closely linked to substance abuse
- they experience higher rates of mental illness, substance abuse and trauma
- they are more often victims of crime
- they are more likely to have primary carer responsibilities.⁵

These differences mean that female prisoners' needs, including those on remand, are different to those of men and so require specialised policies, programs and services in response.

The unique profile and needs of female offenders should be reflected in the operation of the bail system. For example, a women's primary carer status will often be relevant to the assessment of unacceptable risk in determining whether to grant bail.⁶ Similarly, the kinds of support services available to women released on bail or on remand should be tailored to their needs.

PRIMARY CARERS

Primary carer responsibilities do not fall solely on women. However, the issue of primary carer status is particularly acute for female prisoners.⁷ In 2005, about 75% of female prisoners in Victoria had primary carer responsibilities for children or other family members before going to prison.⁸ According to the Better Pathways strategy, 'women offenders are heavily influenced by their responsibilities and concerns for their dependent children'.⁹

Incarceration is not only a cause of anxiety and distress for primary carers, but also disruptive for their dependants and can impact on their emotional and behavioural development.¹⁰ The period a primary carer may spend on remand is uncertain and often lengthy.¹¹ This uncertainty can be difficult for dependants and their interim carers.¹²

Bail Decisions

Bail decision makers can take into account an accused's responsibilities as a primary carer when deciding whether to grant bail. However, nothing in the Bail Act obliges them to do so. In our Consultation Paper we asked whether the new Bail Act should include such a requirement.¹³

There was general consensus in relevant submissions that care of children or other dependants was an appropriate consideration in a bail application. The majority thought the new Bail Act should specifically require decision makers to take into account an accused's primary carer status when deciding whether to grant bail.¹⁴ The OPP suggested it could be included in a non-exhaustive list of factors for the bail decision maker to consider.

Two submissions thought bail decision makers should consider the impact of the grant or refusal of bail on any dependants.¹⁵ For example, Fitzroy Legal Service said bail decision makers should give 'foremost consideration to the best interests of the child' and that refusal to grant bail 'should require justification'.

Victoria Police, the Magistrates' Court and one bail justice did not support a specific reference to primary carer status in the Bail Act.¹⁶ Victoria Police thought this issue should be left to the decision maker's discretion. The Magistrates' Court said magistrates take into account all relevant factors, including the need to care for dependent children, and thought that a specific reference in the Act was unnecessary. It was against a specific reference in the new Bail Act unless it was part of a non-exhaustive list of factors. The court said: 'Carer status is an important consideration in relation to reducing the risk of failing to appear'.

The commission believes bail decision makers should consider accused people's primary carer status when relevant to the assessment of unacceptable risk, particularly the risk of failing to appear. An accused's care-giving responsibilities can already be taken into account when making a bail decision. However, the commission believes a specific provision in the new Bail Act, as part of a non-exhaustive list of relevant considerations, is warranted. If primary carer status is not presented by accused people or their representatives, a legislative provision will prompt decision makers to make inquiries about any responsibilities that are relevant to the bail decision, particularly when the accused is unrepresented. This should improve consistency in bail decision making and result in more appropriate outcomes for primary carers and their dependants.

In Chapter 3 we recommended factors that bail decision makers should take into account when assessing unacceptable risk, including the

1 Issues of concern for Indigenous Australians are addressed in Chapter 10. Bail support services are discussed in Chapter 7.

2 The total number as at 30 June 1996 was 127; in 2006, the total was 246. There was a slight drop between 2005 and 2006 (258 in 2005 to 246 in 2006). This drop may be partly attributable to the change in the definition of child from a person under 17 years of age to a person under 18 years of age: *Children and Young Persons (Age Jurisdiction) Act 2004* s 3. This change came into force on 1 July 2005. Therefore, the data before 2006 includes 17 year olds: Australian Bureau of Statistics, *Prisoners in Australia*, Catalogue No 4517.0 (2006) 29.

3 In 1996, female prisoners represented 5.2% of the Victorian prisoner population. This figure increased to 6.3% in 2006: *Ibid* 29. The increase in the proportion of female prisoners in Victoria reflects a national trend. Between 1995 and 2005 the imprisonment rate of women in Australia increased at a faster rate (82.5%) than for men (25%): Office for Women [Australia], *07 Women in Australia* (2007) 109. Globally, there has been an increase in the pre-trial detention of women and the number is increasing at a higher rate than for male prisoners: Laurel Townhead, *Pre-Trial Detention of Women and its Impact on their Children* (2007) 6.

4 Department of Justice [Victoria], *Better Pathways: An Integrated Response to Women's Offending and Re-offending* (2005) 7.

5 *Ibid* 9.

6 The unacceptable risk test is discussed in Chapter 3.

7 For a recent discussion of the remand of women and its impact on children around the world, see: Townhead (2007) above n 3.

8 Department of Justice [Victoria] (2005) above n 4, 27.

9 *Ibid* 9.

10 See discussion in: Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (2005) 140–41. See also, Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders, *Children: Unintended Victims of Legal Process—A Review of Policies and Legislation Affecting Children with Incarcerated Parents*, Discussion Paper (2006); Rosemary Woodward, *Families of Prisoners: Literature Review on Issues and Difficulties* (2003) ch 4; Justice Cabinet Committee [SA], *Children of Prisoners Project: Steering Committee's Report to the Justice Cabinet Committee* (2005) 7, 16–18, 24; Victorian Association for the Care and Resettlement of Offenders, *Doing It Hard: A Study of the Needs of Children and Families of Prisoners in Victoria* (2000) 6–8. The Better Pathways strategy notes there is a lack of Victorian research on the impact of a mother's incarceration on children: *Ibid* 16.

11 In a survey of 10 mothers who were refused bail, in four cases the children waited between 15 months and four years while their mothers were on remand. In the remaining cases, the mother was on remand for an average of six months: Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders (2006) above n 10, 37.

12 *Ibid* 39.

13 Victorian Law Reform Commission (2005) above n 10, 141.

14 Submissions 11, 24, 29, 30, 32, 38, 41. RVAHJ thought primary carer status should be considered along with other relevant matters.

15 Submissions 29, 32.

16 Bail justice: submission 18.

Chapter 11

Marginalised Groups

Care of dependants is a common cause of anxiety for primary carers who are arrested.

'responsibilities of the accused, including primary carer responsibilities'. This recommendation is not limited to women, it applies to all accused people who may have primary care responsibilities. Nor is it limited to accused people with dependent children—some people may be responsible for elderly parents or a disabled partner.

The commission notes that this provision has the potential for abuse by accused people who may falsely claim to be primary carers. Decision makers and police should keep this in mind when assessing the credibility of evidence presented by an accused.

Primary carer responsibilities can affect an accused's ability to comply with certain bail conditions.¹⁷ For example, it may be difficult for a primary carer to comply with a bail support program or regular reporting requirements. The commission believes it is important that decision makers take primary carer responsibilities into account when setting bail conditions. In particular, as recommended in Chapter 7, bail conditions should be no more onerous than necessary and should be reasonable and realistic taking into account the circumstances of the accused.

Accommodation

Lack of appropriate accommodation¹⁸ for an accused's dependants can adversely affect bail outcomes and the accused's relationship with dependants.¹⁹ For example, a primary carer may be refused bail if appropriate supported accommodation that can cater for dependants is unavailable. Primary carers of young children who are remanded may be separated from them if appropriate accommodation is not provided for children to live with them.

In our Consultation Paper we asked whether accommodation for women should also be equipped to accommodate children.²⁰ The Magistrates' Court submitted that it was aware of a 'lack of accommodation for women of all ages and in all family circumstances'. Two submissions thought facilities should be available to accommodate dependent children when a primary carer is remanded, and these facilities must be properly designed to meet the children's needs.²¹ Both also thought that the court must carefully assess whether accommodating the children in custody is appropriate. DHS was also concerned about the appropriateness of

accommodating children on remand, saying: 'Such accommodation should not automatically be provided and careful consideration and planning would need to occur to ensure that this would be in the best interests of the child/children'.

Two submissions noted that lack of appropriate accommodation should not be a factor in refusing bail.²² Fitzroy Legal Service said:

where the grant of bail relies on accommodation or rehabilitation facilities to accommodate women who are also primary carers, such facilities must also be resourced to house children. Any failure to provide for such is highly discriminatory and involves an unacceptable failure to protect the welfare of children.

Only the OPP opposed the suggestion that accommodation for women on remand be equipped to accommodate children. However, it supported the provision of such accommodation for women on bail.

The Better Pathways strategy acknowledges that lack of appropriate accommodation has acted as a 'barrier to diverting women from being remanded in prison custody'. To address this, funding has been allocated to establish 10 dedicated transitional housing properties for women who are participating in the CREDIT Bail Support program and their children.²³ The properties will have two to three bedrooms to cater for women who have dependent children.²⁴ By March 2007, two of these properties had been established, with a third expected to become available in April 2007. The Better Pathways strategy estimates this additional housing could divert up to 30 women each year from prison custody.²⁵

Existing initiatives which allow children to reside with mothers in custody²⁶ are available to both sentenced and remand prisoners.²⁷ For example, the Mothers and Children Program allows children up to school age to reside with their mothers in custody when it is considered to be in their best interests.²⁸ Children can also visit their mother in custody overnight and reside with her during the school holidays.²⁹

The commission endorses these initiatives to support accused women and their children. The provision of supported housing for women on remand that accommodates their children is an important step, which it is hoped will reduce the remand rate of primary carers and therefore the disruptive effects of separation on both carers

and their children. Supported accommodation should also help women with children to comply with bail conditions, such as engaging with the CREDIT program.

These initiatives are consistent with the principle in the Charter of Human Rights and Responsibilities Act that: 'Families are the fundamental group unit of society and are entitled to be protected by society and the State'.³⁰ This right does not mean accused women are automatically entitled to reside with their children either in custody or in supported bail accommodation—the right may be subject to reasonable limits.³¹ In particular, the best interests of the child must also be considered under the charter.³² Children of accused women should only reside with their mother if it is considered to be in their best interests.³³ This principle is already reflected in Corrections Victoria policy in the Mothers and Children Program.³⁴

Police Responsibilities

Victoria Police policy states: 'Police have a responsibility to protect children from physical, sexual or emotional abuse and to provide appropriate assistance to children in need of care'.³⁵ Although Victoria Police policy acknowledges this obligation, there are no clear guidelines about what police should do to assist dependants of a primary carer they have arrested and detained.³⁶ As a result, police practice varies in the way children are dealt with.³⁷

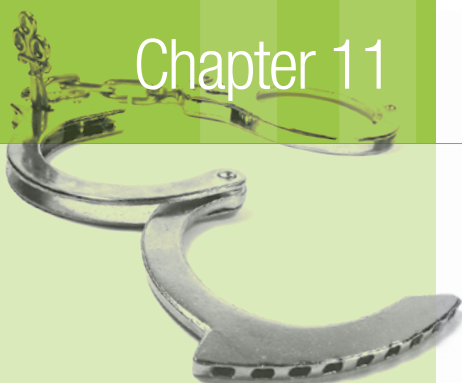
Care of dependants is a common cause of anxiety for primary carers who are arrested. If dependants are present at the time of arrest, they may try to find someone to look after them or take the dependants with them. In some cases dependants are left with neighbours. If dependants are not present at the time of arrest, accused people may not be given the opportunity to arrange appropriate care.³⁸ Primary carers may not know where their dependants are at the time of arrest.³⁹ Until appropriate arrangements are in place, primary carers are often unable to focus on the legal issues confronting them.

In our Consultation Paper we asked whether police officers should be required to look into whether a person they are arresting has dependent children and make arrangements for them.⁴⁰ We also asked what processes should be in place to protect dependent children of people who are arrested.

- 17 Victorian Law Reform Commission (2005) above n 10, 140.
- 18 Accommodation is discussed in the Homeless People section in this chapter and for Indigenous women in Chapter 10.
- 19 Victorian Law Reform Commission (2005) above n 10, 140.
- 20 Ibid 141.
- 21 Submissions 24, 30.
- 22 Submissions 32, 38.
- 23 These properties are in addition to those provided by the Transitional Housing Management Bail Support Program Housing Pathways Initiative established under Victoria's homelessness strategy: Department of Justice [Victoria] (2005) above n 4, 18–19. The CREDIT Bail Support program is discussed in Chapter 7.
- 24 Information provided by Lorraine Beeton, Corrections Victoria, 19 March 2007.
- 25 Department of Justice [Victoria] (2005) above n 4, 19.
- 26 Corrections Victoria aims to maintain relationships between female prisoners and their children with a contact visit program and family visit days for special occasions like Christmas: Information provided by Lorraine Beeton, Corrections Victoria, 19 March 2007. The Better Pathways strategy intends to provide extra indoor and outdoor space in a friendlier environment for women to meet with their families and provide further support for children of women in prison: Ibid 27, 33.
- 27 Information provided by Lorraine Beeton, Corrections Victoria, 19 March 2007.
- 28 Purpose-built accommodation for this program is being investigated as part of the Better Pathways strategy: Department of Justice [Victoria] (2005) above n 4, 31.
- 29 Information provided by Lorraine Beeton, Corrections Victoria, 19 March 2007.
- 30 *Charter of Human Rights and Responsibilities Act 2006* s 17(1).
- 31 *Charter of Human Rights and Responsibilities Act 2006* s 17(2). This principle is discussed in Chapters 2 and 3.
- 32 *Charter of Human Rights and Responsibilities Act 2006* s 17(2). This issue has been considered in UK cases in the context of children residing with their mothers in custody: *R(P) v Secretary of State for the Home Department*; *R(Q) v Secretary of State for the Home Department* [2001] 2 FLR 383; *CF v Secretary of State for the Home Department* [2004] 2 FLR 517.
- 33 This is consistent with the *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990), art 9(3). For a discussion of the application of international human rights standards to contact between women on remand and their children, see: Townhead (2007) above n 3, 25–27.
- 34 Department of Justice [Victoria] (2005) above n 4, 31.
- 35 Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) 'VPM Instruction 109-8: Children', [1].
- 36 There are protocols between Victoria Police and DHS about child protection for children at risk of physical or sexual abuse and child offenders, but not about arrangements for dependent children of an accused who is arrested.
- 37 Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders (2006) above n 10, 26–30.
- 38 Woodward (2003) above n 10, 14.
- 39 Ibid 26–30; Victorian Law Reform Commission (2005) above n 10, 141.
- 40 Victorian Law Reform Commission (2005) above n 10, 141.

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All relevant submissions except Victoria Police and one bail justice supported imposing an obligation on police to find out if a person has dependent children, and if so, to help make proper arrangements for their care.⁴¹ Two submissions thought police should refer the children to DHS.⁴² Others, including DHS, thought police should endeavour to make appropriate arrangements for the children before contacting DHS.⁴³ Youthlaw expressed concern about the added anxiety for accused people and their children caused by referrals to DHS.⁴⁴ Two submissions were concerned about potential abuse of the system by police to induce confessions or admissions—Victoria Legal Aid was aware of instances in which police had threatened to ‘remove the children’ if the accused did not make admissions.⁴⁵

Victoria Police opposed a legislative requirement, but said that once informed that an accused is a primary carer, police have a ‘duty of care to ensure that any dependent children are placed in appropriate care or accommodation’.

The commission believes police should be obliged to investigate whether a person they are arresting is a primary carer for children or other dependants. Victoria Police’s policy states that police have an obligation to provide assistance to children in need of care. Whether they act on this obligation should not depend on whether the accused tells them at the time of arrest. The police should proactively seek out this information to ensure appropriate care arrangements can be made. This information will also be relevant to the bail decision, as recommended earlier.

This recommendation is not limited to dependent children, but to all dependants, including elderly parents. They are equally in need of care—separation without appropriate care arrangements in place can cause anxiety and distress to accused people and their dependants.

To ensure police consistently follow this obligation, Victoria Police should produce a checklist to determine an accused’s primary carer status. The Dame Phyllis Frost Centre, the remand prison for women in Victoria, has a ‘reception assessment’ for all new inmates. It includes a section on children with questions on:

- whether the accused was a primary carer for any children prior to entering custody and who has care of the children now
- who has legal custody of the children
- the ages of the children
- any outstanding intervention orders.⁴⁶

A similar checklist should be used by police.

The obligation on police to investigate whether an accused is a primary carer does not necessarily need to be enacted in legislation. It could form part of police guidelines and procedures.

If police determine that a detained person is a primary carer for children, the commission believes they should be obliged to ensure appropriate care arrangements are put in place. This could include placing the children with a close relative or friend. Alternatively, voluntary childcare agreements can be entered into between the accused and a community service provider.⁴⁷ These agreements are usually short term (eg three weeks),⁴⁸ but can last up to six months and may be extended.⁴⁹ If primary carers on remand enter into a voluntary care agreement, DHS generally considers them to be taking reasonable steps to protect the child and therefore does not treat it as a child protection matter.⁵⁰

The commission does not think police should notify DHS whenever a primary carer is arrested. The fact that a carer is arrested is not in itself a protective ground requiring DHS intervention.⁵¹ Unnecessary intervention by DHS can cause further anxiety for primary carers and their children. However, if an appropriate person

RECOMMENDATIONS

145. The police should be obliged to investigate whether a person who they arrest is a primary carer for children or other dependants. To ensure that police fulfil this obligation, Victoria Police should develop a primary carer checklist similar to the reception assessment form used at the Dame Phyllis Frost Centre.

146. If a detained person is a primary carer for children, the police should be obliged to ensure that appropriate care arrangements are in place for the children. If appropriate care arrangements are not in place, the police should be obliged to contact DHS to ensure such arrangements are made. Victoria Police should develop a protocol with DHS to this effect.

is not available to care for children, police should contact DHS to ensure appropriate care is arranged. Victoria Police and DHS should develop a protocol to this effect. This will help to ensure that Victoria Police policy for dealing with children of detained carers is applied consistently, is open and accountable, and provides greater protection for children and certainty for their carers.

These recommendations are consistent with the right of every child 'to such protection as is in his or her best interest and is needed by him or her by reason of being a child'.⁵²

CALD WOMEN

In Victoria, there has been a significant increase in the number of female prisoners from culturally and linguistically diverse (CALD) communities.⁵³ This increase has been particularly pronounced for Vietnamese-born women, whose numbers increased from five in 1998 to 25 in 2005.⁵⁴ As a proportion of the female prisoner population this represents an almost threefold increase.⁵⁵ According to the Better Pathways strategy, the increase in female Vietnamese prisoners 'has been driven by serious drug offences that are anecdotally believed to be linked to settling debts incurred as a result of problem gambling'.⁵⁶

In our Consultation Paper we asked if there were any particular measures that would assist women from CALD backgrounds to comply with bail.⁵⁷ Relevant submissions were generally supportive of introducing such measures.⁵⁸ Only one submission, from a bail justice, opposed introducing particular measures for CALD women, asking: 'Are there any particular measures which could be put in place to assist Anglo/Irish, South African, etc. etc. I do not believe in the segregation of society based on cultural or linguistic diversity'.⁵⁹

Submissions suggested the following measures could help CALD women comply with bail:

- provision of more accommodation⁶⁰
- culturally and linguistically specific bail support programs and practitioners⁶¹
- promotion of existing relevant support agencies and the referral process.⁶²

The commission agrees that particular measures to assist women from CALD backgrounds to comply with bail should be provided. Women from CALD backgrounds have unique support needs which are not adequately catered for by mainstream support services.⁶³ Relying on the

41 Submissions 11, 22, 24, 29, 30, 32, 39, 41, 42, 48. The County Court generally endorsed the Magistrates' Court submission. Bail justice against the suggestion: submission 18.

42 Submissions 13, 41.

43 Submissions 22, 39, 42.

44 See also Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders (2006) above n 10, 27.

45 Submissions 24, 32.

46 Information provided by Jessamy Nicholas, Dame Phyllis Frost Centre, Corrections Victoria, 14 August 2006.

47 *Community Services Act 1970* ss 13A–13F. Some agencies operate on a 24 hour basis, but there may be no vacancies at short notice: Information provided by DHS representative at VACRO consultation on: Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders (2006) above n 10, 26 September 2006.

48 Information provided by DHS representative at consultation on: *ibid*, 26 September 2006.

49 *Community Services Act 1970* ss 13A(4), (5).

50 Information provided by DHS representative at consultation on: Flat Out Inc and the Victorian Association for the Care and Resettlement of Offenders (2006) above n 10, 26 September 2006.

51 *The Children, Youth and Families Act 2005* s 162 lists general child protection grounds which include parents abandoning the child or who are dead or incapacitated and there is no other suitable person to care for the child. Section 184(1) provides that police must notify DHS if they believe on reasonable grounds that a child has suffered or is likely to suffer significant harm as a result of physical or sexual abuse and the parents have not or are unlikely to protect the child from that type of harm. See also Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) 'VPM Instruction 109-8: Children' [4.1].

52 *Victorian Charter of Human Rights and Responsibilities Act 2006* s 17(2).

53 Department of Justice [Victoria] (2005) above n 4, 8.

54 These figures are given for 30 June each year: *ibid* 8.

55 The proportion of Vietnamese-born women increased from 3.3% to 9.7% over this period: *ibid* 8.

56 *Ibid* 8, 16. The Better Pathways strategy identified a gap in research on the relationship between women's problem gambling and offending, including Vietnamese women's particular vulnerability, and said it required closer examination to assist future policy development.

57 Victorian Law Reform Commission (2005) above n 10, 140. We also asked whether any measures could be put in place to assist Indigenous women. This issue is discussed in Chapter 10.

58 Submissions 11, 22, 23, 30, 32, 39, 41, 45. Some submissions recommended consulting with stakeholders with particular knowledge of this area: submissions 24, 29, 30.

59 Submission 18.

60 The Magistrates' Court noted the lack of accommodation for women of all ages and family circumstances.

61 Submission 32.

62 Submission 23.

63 The unique needs of female prisoners from CALD backgrounds are considered in: Anti-Discrimination Commission Queensland, *Women in Prison: A Report by the Anti-Discrimination Commission Queensland* (2006) 117–119.

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People with substance abuse problems should be released on bail if sufficient support is available to mitigate risk to an acceptable level.

latter can lead to discriminatory outcomes. A lack of appropriate services may result in women from CALD backgrounds either being refused bail or breaching bail conditions.

Initiatives designed to assist CALD women who come into contact with the bail system already exist. For example, the Better Pathways strategy includes the employment of a full-time Vietnamese Liaison Officer in the women's prison system.⁶⁴ The strategy recognises that cultural factors can be a barrier to Vietnamese women engaging with programs and services in prison.⁶⁵ An officer has been employed since October 2005.⁶⁶ The officer's role is to:

- interview Vietnamese women within 48 hours of arriving at the Dame Phyllis Frost Centre
- provide case management for Vietnamese women and liaise with unit case managers
- help maintain family ties
- link Vietnamese women with community services
- advise on, and raise awareness of, cultural issues among prison staff
- help Vietnamese women access programs and services
- deliver or arrange interpreting and translation services.⁶⁷

The officer provides services to Vietnamese women on remand and sentenced prisoners.

The commission endorses the Better Pathways initiatives. The increasing number of Vietnamese women in prison is a significant problem and is contributing to the rapid increase in the number of female prisoners in Victoria. The provision of dedicated transitional housing properties for women who are participating in the CREDIT program should also assist women from CALD backgrounds, particularly if the support services provided are culturally appropriate.

SUBSTANCE ABUSE

Many bail applicants have substance abuse problems. Substance abuse is relevant to decision makers' assessment of risk when determining whether to grant bail and what conditions to impose to reduce that risk to an acceptable level.

In Chapter 7 we listed principles that decision makers should apply when imposing bail conditions. In particular, we recommended that bail conditions should be no more onerous than necessary, and reasonable and realistic, taking into account the individual circumstances of the accused person. These principles are particularly pertinent to decisions about accused people with substance abuse problems. For example, imposing an abstinence condition is unlikely to be effective if appropriate treatment and support services are not put in place.

Bail support programs can reduce the risk posed by accused people to an acceptable level, enabling their release on bail rather than remaining on remand. People with substance abuse problems should be released on bail if sufficient support is available to mitigate risk to an acceptable level.

COURT-BASED SUPPORT PROGRAMS

In our Consultation Paper we discussed the correlation between crime and substance abuse and highlighted the need for innovative approaches to address drug- and alcohol-related offending. One such approach is the CREDIT Bail Support program.⁶⁸ This is a court-based program which employs a case-management model. A drug clinician assesses accused people and devises an individual program to assist them to access services such as drug and alcohol treatment, accommodation and welfare support. The accused is monitored and supported by court officers. If appropriate, an accused who consents can be diverted to a recommended drug treatment program as a condition of bail.

In areas where the CREDIT program is not available, Rural Diversion Outreach Workers assist accused people to access drug and alcohol services.⁶⁹ They provide case coordination and develop individual treatment plans for accused people.

In our Consultation Paper we asked whether there are any problems with the procedures or policies of the CREDIT program that we had not identified. Most relevant submissions expressed support for the CREDIT program.⁷⁰ The Magistrates' Court said its 'decision making is greatly enhanced by this service'. Jesuit Social Services' submission provided a detailed assessment of the cost-effectiveness of the program compared to remand, finding that the immediate cost per participant was considerably less than remand. It also argued that the less quantifiable benefits of the program, such as improvements in health, relationships, employment and education prospects, were likely to be substantial.

Submissions made the following criticisms of the CREDIT program:

- demand exceeds supply, so accused people who may be eligible for the program cannot be accommodated⁷¹
- lack of staff can cause delays and prolong an accused's time on remand⁷²
- it can be difficult to replace staff, particularly in rural areas, resulting in suspension of the program⁷³
- some magistrates and police officers are reluctant to use the program⁷⁴
- the program is culturally inappropriate for Indigenous Australians.⁷⁵

Some submissions called for further funding of the program and its expansion statewide to ensure that accused people who are eligible can participate in it.⁷⁶ It was also suggested that accused people's eligibility for the program should be assessed before the bail hearing to minimise delays.⁷⁷

In Chapter 7 we discussed CISP, a pilot program operating from 2006 to 2009. It combines and builds upon existing court support services, including the CREDIT program, to provide an integrated service to accused people.⁷⁸ Accused people can be assessed before bail hearings to determine their eligibility and if granted bail may be bailed on the condition that they comply with all the requirements of CISP.

Provided CISP is sufficiently resourced, it should address many of the concerns raised in submissions about the CREDIT program.⁷⁹ It provides an integrated service for accused people with multiple needs, such as substance abuse,

homelessness and mental health problems. CISP integrates the service providers for each of these needs and provides an individually-tailored support program.

CISP has funding to purchase priority access to treatment and community support services. For example, CISP will build on the existing Community Offender Advice Treatment Service.⁸⁰ This drug and alcohol treatment service currently assesses the needs of parolees or offenders on community-based orders. The service devises an individual alcohol and drug treatment plan and purchases treatment from community-based alcohol and drug treatment agencies.⁸¹ CISP intends to provide a similar service for people on bail.

CISP also aims to cater for accused people with culturally-specific needs.⁸² CISP works closely with ALOs at Melbourne Magistrates' Court and the Koori Court Officer at Latrobe Valley to ensure the services provided to Indigenous Australians are culturally appropriate.

Subject to a positive evaluation of the CISP pilot, it will be implemented statewide. This should address concerns about limited access to the CREDIT program, particularly in regional areas.

COMMUNITY-BASED DRUG INITIATIVES

Non-government organisations also provide drug related support services to accused people. These programs are generally local, often run by community health services in collaboration with other agencies such as the police, and receive some state government funding. Participants are not subject to court oversight like those referred to court-based services. In our Consultation Paper we discussed two of these services in detail: NARTT and the Arrest Referral Program.⁸³

NARTT is a partnership between Victoria Police and Plenty Valley Community Health operating in Whittlesea and Darebin. It aims to reduce accused people's future contact with the criminal justice system. NARTT receives referrals from police and then acts in a 'supported triage capacity' to refer participants to appropriate services, such as drug and alcohol, mental health and housing. The aim is to streamline referrals through a single team to 'minimise gaps and inconsistencies in who is referred'.⁸⁴ NARTT provides crisis support to accused people soon after arrest. It also provides referrals and support to victims and others in need of help.

- 64 Department of Justice [Victoria] (2005) above n 4, 25.
- 65 Ibid 25, 31. The Better Pathways strategy says that the employment of the Vietnamese Liaison Officer will help to gain great insight into the needs of Vietnamese women prisoners, which will inform future program development.
- 66 Information provided by Lorraine Beeton, Corrections Victoria, 19 March 2007.
- 67 Ibid; Department of Justice [Victoria] (2005) above n 4, 25.
- 68 Victorian Law Reform Commission (2005) above n 10, 142–145.
- 69 Victorian State Reference Group, National Illicit Drug Strategy Division Initiative, *A Better Way Forward: Drug Diversion: Facts and Case Histories* (2006) 29. The Community Offender Advice Treatment Service can also link people living in areas without access to a CREDIT drug assessor to a community based drug treatment service, 12.
- 70 Submissions 12, 22, 24, 29, 30, 32, 35. One bail justice thought the program made reoffending easier: submission 18. The OPP was not aware of any problems with the service.
- 71 Submissions 22, 35, 39.
- 72 Submissions 22, 39.
- 73 Submissions 22, 39.
- 74 Submissions 24, 29, 30, 32. The Law Institute of Victoria noted suggestions that the program lacks proper legislative backing and so should not be supported. The appropriateness of making bail support programs a condition of bail is addressed in Chapter 7.
- 75 Submission 34.
- 76 Submissions 24, 29, 30, 32, 35.
- 77 Submissions 22, 24, 30. Victoria Legal Aid also suggested there should be a presumption in favour of granting bail if the accused is assessed as suitable to participate in the program.
- 78 Submission 27. Accused people may be referred to CISP at any stage during the court process by any of the following people: police, Office of the Public Advocate, OPP, lawyers, judiciary, court staff, support services, family and friends, themselves.
- 79 From our consultations it appears that the CISP pilot is reasonably well resourced. Thirteen to 14 new staff will be employed at the Melbourne, Sunshine and Latrobe Valley Magistrates' Courts. These are in addition to the support workers already employed at these courts: consultation 64.
- 80 Consultation 64.
- 81 Victorian Government Health Information, *Community Offenders Advice and Treatment Service (COATS)* (2007) <www.health.vic.gov.au> at 15 May 2007.
- 82 Submission 27.
- 83 Victorian Law Reform Commission (2005) above n 10, 145–47. NARTT was originally called the Northern Arrest Referral Team (NART).
- 84 Information provided by Inspector John Thexton, Community Development Officer, Victoria Police, 26 April 2007.

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Victoria is now the only state that has not decriminalised or moved toward decriminalisation of public drunkenness.

In our Consultation Paper we noted the positive findings of a 2004 evaluation of NARTT. The evaluation recommended the program ‘be mainstreamed and receive continued and long-term funding’.⁸⁵ A more recent evaluation showed that accused people who engaged with treatment-action plans were much less likely to have future contact with the police than those who were referred to NARTT but did not engage with the program.⁸⁶

The NARTT model has recently been implemented in Echuca (Border Integrated Referral Team) and Shepparton (Shepparton Moyra Referral Team). Community health services have applied for funding of similar schemes in other regions.⁸⁷

In our Consultation Paper we asked whether community-based programs for people on bail with drug-dependency problems assist rehabilitation and minimise future contact with the criminal justice system.⁸⁸ We also asked if there were any problems with the services; how their success could be measured; and what features were likely to make them successful.

Most relevant submissions were supportive of community-based programs.⁸⁹ PILCH said:

Community based programs are an effective way of assisting people experiencing drug dependency as well as homelessness, mental health and associated issues. In particular, where community programs establish positive working relationships with other agencies and organisations, particularly Victoria Police and other law enforcement bodies, they can greatly assist people both to address the causes of offending behaviour and to divert people from the criminal justice system.

Only the OPP responded negatively about these programs—in its experience community-based program workers do not report breaches of bail conditions.

The main concerns in submissions about community-based programs focused on insufficient resources and a lack of awareness about the programs.⁹⁰ In particular, two submissions were concerned that a lack of resources prevented these services assessing accused people held on remand.⁹¹ Youthlaw was also concerned that existing services were unable to provide the intensive ongoing support needed to work effectively with young people.

Submissions varied in how they thought the programs’ success should be measured. The OPP and PILCH suggested recidivism rates as a measure. PILCH also suggested success could be measured by how effective the programs are in addressing the underlying causes of offending. Other submissions suggested the following factors contribute to the programs’ success:

- strong inter-agency partnerships, particularly with the police⁹²
- a holistic approach to assisting accused people with multiple needs⁹³
- voluntary rather than coerced participation⁹⁴
- sufficient resources to meet demand for services.⁹⁵

The commission believes that community-based programs are an important component of the support services provided to accused people, particularly those with substance abuse problems. Community-based programs may be more effective and appropriate than court-based programs for some accused people. These programs can also be accessed through CISP, which has funding to place clients in community-based programs.

Programs like NARTT demonstrate that with strong interagency cooperation, effective support can be provided to accused people to help them comply with bail conditions and reduce future contact with the criminal justice system. The commission believes that community-based programs make an important contribution to the success of the bail system—they should receive adequate funding to meet demand and successful models like NARTT should be expanded statewide.

The commission notes the OPP’s experience of breaches of bail conditions not being reported by community-based programs. This experience was not reflected in other submissions or consultations. The more commonly raised issue was that police do not always act on breaches that are reported to them, which is discussed in chapter 4. When accused people are referred to CISP or the CREDIT program, their case managers are obliged to monitor their progress and report non-compliance with the program to the court. When CISP clients are referred to community agencies, the agencies are required to provide the CISP case manager with regular written progress updates.⁹⁶ If an accused is referred by a court directly to a community agency rather than CISP or the CREDIT program, the agency can provide a written report on the accused’s progress to the accused’s solicitor, who will provide it to the court.

PUBLIC DRUNKENNESS

In our Consultation Paper we presented data about bail applications from 2000–01 to 2004–05. The data showed that of first applications for bail in Victoria, 26% were police bail for the offence of drunk in a public place. Public drunkenness was decriminalised in NSW, South Australia, Western Australia, the ACT and the Northern Territory in the 1970s and 1980s. It was decriminalised in Tasmania in 2000, and in 2005 Queensland introduced legislation allowing police to release a person arrested for public drunkenness without bail to ‘a place of safety’ including a hospital or sobering-up centre.⁹⁷ Victoria is now the only state that has not decriminalised or moved toward decriminalisation of public drunkenness.

Public drunkenness is largely a social and health problem rather than a legal problem. In 2006 the Victorian Parliamentary Drugs and Crime Prevention Committee noted ‘without doubt ... harmful alcohol consumption is a major public health issue in Australia and other parts of the world’.⁹⁸ The committee released a report making 165 recommendations for strategies to reduce harmful alcohol consumption, including decriminalisation of public drunkenness. When introducing the new legislation in Queensland, the Minister for Police and Corrective Services said that holding people found drunk in a public place in police cells had been an ‘inadequate, quick fix reaction to a social problem which has been fair neither to the incarcerated person nor the police officers who have been tasked with caring for these people’.⁹⁹

Decriminalisation has been recommended by numerous federal and state inquiries including the:

- Royal Commission into Aboriginal Deaths in Custody¹⁰⁰
- Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner¹⁰¹
- Drugs and Crime Prevention Committee, Parliament of Victoria in two reports, in 2001 and 2006¹⁰²
- Scrutiny of Acts and Regulations Committee, Parliament of Victoria¹⁰³
- Ombudsman Victoria and Office of Police Integrity.¹⁰⁴

85 Northern Arrest Referral Team (NART), City of Whittlesea, Victoria, *Arrest Referral Program Evaluations: Report 2* (2004) v.

86 Of offenders who engaged with the NARTT program from 1 July to 31 December 2005, 67% had no further involvement with the police. In contrast, of offenders who were referred to NARTT but did not engage in the program only 27% had no further involvement with police: information provided by Inspector John Thexton, Community Development Officer, Victoria Police, 26 April 2007.

87 Information provided by Inspector John Thexton, Community Development Officer, Victoria Police, 24 April 2007.

88 Victorian Law Reform Commission (2005) above n 10, 147.

89 Submissions 15, 22, 29, 32, 39.

90 Submissions 24, 29, 30, 32, 38.

91 Submissions 24, 32.

92 Submission 15.

93 Submissions 29, 32.

94 Submission 32.

95 Submissions 24, 30, 32.

96 Information provided by Jo Beckett, Program Manager CISP and CREDIT Bail Support program, Magistrates’ Court of Victoria, 22 December 2006.

97 Public drunkenness is still an offence in Queensland. The *Summary Offences Act 2005 (Qld)* s 10 states: ‘A person must not be drunk in a public place’. However, the *Police Powers and Responsibilities Act 2000 (QLD)* s 378 provides that when people are arrested for being drunk in a public place and a police officer is satisfied that it is more appropriate for them to be held in a place of safety, they will take them there. The *Bail Act 1980 (Qld)* was amended accordingly and s 14(1B) now allows a police officer to release arrested people without bail when they have been charged with being drunk in a public place and are released into the care of a person at a place of safety under the *Police Powers and Responsibilities Act 2000*.

98 Drugs and Crime Prevention Committee, *Inquiry into Strategies to Reduce Harmful Alcohol Consumption* (2006) Parliament of Victoria <www.parliament.vic.gov.au/dcp/Previous_Inquiries/alcoholharmreduction/default.html> at 15 May 2007 vi.

99 Queensland, *Parliamentary Debates*, Legislative Assembly, 17 May 2000, 1086 (Tom Barton, Minister for Police and Corrective Services).

100 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 3.

101 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1989–1996: A Report prepared by the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner for the Aboriginal and Torres Strait Islander Commission* (1996).

102 Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into Public Drunkenness*, Final Report (2001) and *Inquiry into Strategies to Reduce Harmful Alcohol Consumption* (2006) Parliament of Victoria <www.parliament.vic.gov.au/dcp/Previous_Inquiries/alcoholharmreduction/default.html> at 15 May 2007.

103 Scrutiny of Acts and Regulations Committee, *Review of Redundant and Unclear Legislation Inquiry into the Summary Offences Act 1966*, Final Report, November 2001 (2001) Parliament of Victoria <www.parliament.vic.gov.au/sarc/Summary_Offences/Final/Final_toc.htm> at 15 May 2007.

104 Ombudsman Victoria and Office of Police Integrity, *Conditions for Persons in Custody: Report of the Ombudsman Victoria and Office of Police Integrity* (2006).

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The Drugs and Crime Prevention Committee Inquiry into Public Drunkenness in 2001 recommended repeal of the offence of public drunkenness and related offences, and establishment of a new civil regime for dealing with intoxicated people. It recommended that sobering up centres be established to detain and treat people found intoxicated in public places, and that the centres should be put in place before the offences were repealed. Later reports agreed with this view, however, the matter has still not been addressed.

In his report on Conditions for Persons in Custody in 2006, the Victorian Ombudsman said:

I believe that it is in everyone's interest that this matter be given priority. Intoxicated persons are a danger to themselves and to others and accommodating them in unsuitable police cells, rather than taking them to health care facilities and sobering up centres with properly trained staff, puts them and their jailers at risk.

The commission agrees with this view. We believe that arrest and bail are inappropriate methods of dealing with public drunkenness. Decriminalising public drunkenness would achieve the following, in line with our terms of reference:

- Assist the bail system to function more efficiently and fairly. Decriminalisation will reduce administration for police and courts which results from the charge and bail process. It will also reduce the number of people in watchhouses, which will improve conditions for accused people who have been remanded and are awaiting bail applications or transfer to prison.
- Have a significant impact on the over-representation of Indigenous Australians held on remand in watchhouses. The Deaths in Custody Report found that a significant proportion of Indigenous Australians come into contact with police because of public drunkenness.¹⁰⁵
- Provide an alternative to incarceration for a significant number of people—more than 10 000 per year—who are 'lodged' in police cells for the offence of drunk in a public place and then released on bail.¹⁰⁶

- Significantly reduce the impact of the bail system on marginalised and disadvantaged groups, such as homeless people, who will no longer be dealt with by arrest and bail but through a civil apprehension and detention system.

In its investigation into strategies to reduce harmful alcohol consumption the Drugs and Crime Prevention Committee noted:

Another problem for elderly, middle-aged and young homeless people is that, similar to some Indigenous people, their drinking is often public drinking. This creates problems of its own; for example, homeless people may be more at risk of being arrested for public drunkenness offences.¹⁰⁷

AJA2 includes strategies to reduce alcohol related incidents leading to arrest or negative contact with police, with an emphasis on use of custody as a last resort for intoxicated people.¹⁰⁸ Police are to drive this initiative. Some sobering up centres have been established in Victoria for Indigenous Australians.

The centres and the AJA2 initiative are commendable, and important given the lack of broader action on this issue by the government. However, Indigenous Australians are only one group disproportionately affected by the continued criminalisation of public drunkenness. Public drunkenness should be decriminalised in line with the recommendation of the Drugs and Crime Prevention Committee Inquiry into Public Drunkenness, and sobering up centres established to meet expected need.

HOMELESSNESS

Homeless¹⁰⁹ people have a disproportionately high rate of contact with the criminal justice system.¹¹⁰ Much of this contact is directly linked to their homeless status. A 2004 report from the Homeless Persons' Court Project found that 75% of participants had received fines or charges for behaviour linked to homelessness, including begging, public drinking, shoplifting for food, and activities linked to underlying causes of homelessness, such as drug use.¹¹¹ The study also found that homeless people were more likely to be targeted by law enforcement officers for their behaviour in public places.¹¹² They recommended training and education programs for law

RECOMMENDATIONS

147. Public drunkenness should be decriminalised as an offence in line with the recommendation of the 2001 Parliamentary Inquiry into Public Drunkenness.

enforcement officers about 'the nature and extent of homelessness; causes of homelessness and pathways out of homelessness; and effective communication with people experiencing homelessness and with complex needs'.¹¹³

An accused's homeless status has ramifications for bail. Homelessness itself is not a reason to refuse bail. However, it may be taken into account when determining whether an accused poses an unacceptable risk of failing to appear or offending while on bail.¹¹⁴ The Bail Act directs decision makers to consider an accused's 'home environment' when assessing risk.¹¹⁵

In submissions and consultations many believed lack of accommodation increases the likelihood that bail will be refused.¹¹⁶ The Magistrates' Court said: 'Put simply, a person without accommodation is generally a person who is at risk of failing to appear on bail'. PILCH quoted a participant from the 2004 court project report: 'I've spent at least one year in the last twelve in holding cells because I had no address to be bailed to'.¹¹⁷

A SPECIFIC PROVISION?

Section 346 of the CYFA expressly prohibits decision makers from taking into account a child's lack of accommodation when making a bail decision. There is no equivalent provision for adults. In our Consultation Paper we asked whether the Bail Act should include such a provision for adults.¹¹⁸

Most relevant submissions agreed the new Bail Act should state that lack of accommodation should not be a factor in refusing bail.¹¹⁹ PILCH supported the amendment in principle, but said:

for the amendment to result in a change in practical outcomes, it must be matched with a commitment from the Victorian Government to provide safe and affordable accommodation to people experiencing homelessness.

The commission believes that lack of accommodation in itself should not be grounds for refusing bail. However, the commission does not believe the new Bail Act should contain an equivalent provision to section 346 of the CYFA. Section 346 is supported in practice by the child protection system. If an accused child lacks accommodation, the Children's Court is able to direct DHS to advise it on how and where the child could be accommodated. There is no equivalent support structure in place for adults.

105 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, [1.2.17].

106 Data provided by Court Services, Department of Justice, 6 September 2005, showed the number of defendants 'finalised' (sentenced) by the Magistrates' Court for the offence of 'drunk in a public place' in 2003–04 was 10 176 and in 2004–05 was 10 289. These figures are only for defendants who were charged with 'drunk' as the principal offence, ie the most serious offence. This suggests that it was the *only* offence with which the person was charged, as it is a minor summary offence.

107 Drugs and Crime Prevention Committee, *Inquiry into Strategies to Reduce Harmful Alcohol Consumption* (2006) Parliament of Victoria <www.parliament.vic.gov.au/dcp/Previous_Inquiries/alcoholharmreduction/default.html> at 15 May 2007, xxv.

108 Department of Justice [Victoria], *Victorian Aboriginal Justice Agreement: Phase 2 (AJA2): A Partnership Between the Victorian Government and the Koori Community* (2006) 32.

109 We discussed definitions of 'homelessness' and the rate of homelessness in Australia in Victorian Law Reform Commission (2005) above n 10, 147. A recent amendment to the *Magistrates' Court Act 1989* s 3(1) defines 'homeless person' as: '(a) a person living in—(i) crisis accommodation; or (ii) transitional accommodation; or (iii) any other accommodation provided under the *Supported Accommodation Assistance Act 1994* of the Commonwealth; or (b) a person who has inadequate access to safe and secure housing within the meaning of section 4 of the *Supported Accommodation Assistance Act 1994* of the Commonwealth': inserted by *Courts Legislation (Neighbourhood Justice Centre) Act 2006* s 3(1).

110 Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (2004), 4; Jelena Popovic, 'Homelessness and the Law: A View from the Bench' (2004) 17 (1) *Parity* 53.

111 Midgley (2004) above n 110, 16. The link between homelessness and crime is discussed further in: Victorian Law Reform Commission (2005) above n 10, 147.

112 Midgley (2004) above n 110, 17.

113 *Ibid*, recommendation 17, 8.

114 The unacceptable risk test is discussed in Chapter 3.

115 *Bail Act 1977* s 4(3)(b).

116 Submissions 12, 15, 22, 24, 30, 34, 39; consultations 18, 30, 34.

117 Midgley (2004) above n 110, 18.

118 Victorian Law Reform Commission (2005) above n 10, 148.

119 Submissions 15, 18, 30, 32, 34, 46. Submissions 24 and 29 said lack of accommodation should not be a ground for refusing bail, but did not say whether this should be provided for in the Bail Act. Only the OPP opposed including a specific provision in the Bail Act.

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In the commission's view, the key issue for homeless people applying for bail is the availability of appropriate accommodation.

While an equivalent provision for adults in the new Bail Act may be desirable in principle, in practice it is unlikely to affect the number of homeless people who are remanded if there is no accommodation support available. It may in fact have the unintended consequence of concealing homelessness as a basis for the refusal of bail—rather than referring to lack of accommodation, bail decision makers are likely to refer to other risk factors when ordering remand. It is preferable that the impact of homelessness on bail applications can be openly monitored so appropriate accommodation services can be established. This monitoring could be done by the CISP team.

ADEQUATE ACCOMMODATION

In the commission's view, the key issue for homeless people applying for bail is the availability of appropriate accommodation. In our Consultation Paper we asked whether the accommodation needs of homeless accused people were being adequately met, what kind of accommodation should be available and whether support should be provided with the accommodation.¹²⁰

No submissions thought that the accommodation needs of homeless people were being met adequately. Short term and crisis accommodation were identified as particular needs.¹²¹ Some submissions thought more accommodation was needed to ensure homeless people are not remanded unnecessarily and to reduce the risk of offending while on bail.¹²² VALS said solicitors sometimes hold off making a bail application until suitable accommodation can be secured—in one case a client remained on remand for 28 days until accommodation was found. According to the PILCH submission, bail applicants who lack accommodation have difficulty accessing crisis accommodation because they can only apply for a place if they can move in that day. As they have not yet been granted bail, they are not able to apply for a place.

Some submissions explicitly supported the provision of accommodation with appropriate support services.¹²³ PILCH remarked on the support expressed by participants in the 2004 Homeless Person's Court Project report for the CREDIT program, but that participants also noted the lack of availability of such support programs and services. Victoria Legal Aid and Youthlaw expressed concern that some accused

people were forced to accept unsuitable accommodation to avoid remand.

In our Consultation Paper we discussed existing government accommodation services available to people on bail: the CREDIT program and CAHABPS.¹²⁴ The CREDIT program has 20 transitional properties around Melbourne for people on bail.¹²⁵ Ten more properties are being established for the use of CREDIT's female clients and their children under the Better Pathways initiative. Twenty properties will be available for CISP's homeless clients¹²⁶ and five properties will be available for homeless clients of the Neighbourhood Justice Centre project.¹²⁷

The Department of Justice has engaged HomeGround Services, a non-government agency, to provide housing support services to people placed in these transitional properties. The aim is to help people address the issues that have contributed to their homelessness and alleged offending and to seek long-term accommodation. Housing Referral Information Officers will also be employed as part of CISP at the Melbourne and Sunshine Magistrates' Courts.¹²⁸ These officers will assist accused people to negotiate the housing system.

Non-government accommodation services also provide support for accused people with particular needs, such as residential drug rehabilitation programs¹²⁹ and Indigenous-specific accommodation. Placement with these services may be arranged through court programs, like CISP, or independently, for example by an accused's legal representative.

While the commission supports these initiatives, we are concerned that there is still a lack of appropriate short- and long-term accommodation available for homeless people seeking bail. In particular, there appears to be insufficient crisis accommodation. According to a 2007 report on homelessness in Melbourne, there is a lack of supported transitional accommodation, particularly in inner Melbourne.¹³⁰ As a result, boarding houses are commonly used as emergency accommodation. This is undesirable because boarding houses lack appropriate support services and it puts accused people at risk because it 'increases the possibility they will become entrenched in the homeless subculture'.¹³¹

The limited availability of appropriate accommodation for homeless people means they may remain on remand longer than necessary while waiting for accommodation to be found. This entrenches the disadvantages they face and discriminates against them on the basis of their homeless status. As stated in VALS's submission: 'In theory the laws of bail apply equally to everyone. However, they do not when the issue of beds crops up'.

To help overcome this disadvantage, the Department of Justice and DHS should consider providing more accommodation for accused people on bail. If appropriate accommodation is available, decision makers will be less likely to consider that a homeless person poses an unacceptable risk of failing to appear or reoffending while on bail.

Many homeless accused people have specific support needs. These needs may be related to the underlying causes of their homelessness or have arisen since they have become homeless, such as mental health issues, substance abuse, family violence, or a history of sexual abuse. The 2007 study of homelessness in Melbourne found that 43% of homeless people had problems with substance use, 66% of which developed after becoming homeless; and 30% of homeless people had mental health issues, 53% of which developed after becoming homeless.¹³²

In many cases, homeless people have multiple needs. According to the Mental Health Legal Centre's submission, some accused people with multiple needs can fall through the gap:

People with a mental illness (and their workers) may be unaware of the [community based] program[s] or unable to negotiate referral. They are possibly awaiting mental health assessment at the same time—there is reluctance by each service to offer support if they believe there is another more appropriate service—so they miss out.

It is important that the support needs of homeless people are approached holistically. Providing a bed short term without appropriate support is unlikely to address the underlying causes of homelessness or offending. The commission believes DHS should provide more supported accommodation to accused people on bail who have multiple needs.

The commission is concerned by reports that demand for residential drug rehabilitation services exceeds the places available. This can lead to accused people remaining on remand unnecessarily and without appropriate support. According to one participant in the 2004 Homeless Persons' Court Project study: 'If you're homeless, you've got no hope in hell of getting bail. It'll take you three weeks to three months to get rehab or housing'.¹³³ The commission believes DHS should review the number of places available in residential drug programs.

RECOMMENDATIONS

148. The Department of Justice and DHS should consider allocating more crisis and longer term accommodation for accused people on bail.
149. DHS should provide more supported accommodation for accused people on bail who have multiple needs.
150. DHS should review the number of places available in residential drug rehabilitation services to ensure that it is meeting demand.

- 120 Victorian Law Reform Commission (2005) above n 10, 148.
- 121 Submission 15; consultations 30, 34, 36.
- 122 Submissions 15, 22, 24, 30, 34, 39. Submission 29 supported all initiatives to provide adequate accommodation. A need for more accommodation options, particularly in regional areas and after hours, was raised in consultations 18, 30, 32, 34, 36, 37.
- 123 Submissions 15, 22, 30, 39.
- 124 Victorian Law Reform Commission (2005) above n 10, 148. In this report, the CREDIT Bail Support program is discussed in the Substance Abuse section in this chapter and in Chapter 7. The CAHABPS program is discussed in Chapter 9.
- 125 As part of the Transitional Housing Management Bail Support Program Housing Pathways Initiative. Evaluation of the bail support program, due for completion in June 2007, will focus on the effectiveness of the transitional housing components of the program.
- 126 Five had been established by May 2007: information provided by Ben Cukier, CISP and CREDIT Bail Support Program, Magistrates' Court of Victoria, 4 May 2007. CISP is discussed in the Substance Abuse section in this chapter and in Chapter 7.
- 127 Ibid. The Neighbourhood Justice Centre is a multi-jurisdictional court in the City of Yarra offering a range of services to victims, offenders, civil litigants and residents. It is a three-year pilot that began in February 2007.
- 128 Consultation 64.
- 129 For example, Odyssey House Victoria provides a residential drug treatment program. It has 20 two-bedroom shared houses in the metropolitan area and five two-bedroom houses in Shepparton for short to medium term stays. It also offers a short-term (three month) supported accommodation program in the Frankston–Mornington Peninsula area: Odyssey House Victoria, *Supported Accommodation* (2007) <www.odyssey.org.au> at 3 May 2007.
- 130 Chris Chamberlain, Guy Johnson and Jacqui Theobald, *Homelessness in Melbourne: Confronting the Challenge* (2007) 7.
- 131 Ibid.
- 132 Ibid 6.
- 133 Midgley (2004) above n 110, 18. People seeking referrals from housing agencies to a detoxification facility or mental health service face long waiting lists: Chamberlain (2007) above n 130, 7.

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Like homelessness, the offences that people with cognitive impairment are charged with may relate to behaviour arising from their impairment.

COGNITIVE IMPAIRMENT

People with cognitive impairment¹³⁴ are over-represented in the criminal justice system, particularly on remand.¹³⁵ Estimates of rates of cognitive impairment among offenders vary; however, they are consistently higher than for the general community.¹³⁶ For example, rates of major mental illnesses, like schizophrenia and depression, are three to five times higher among offenders compared to the general community.¹³⁷

People with cognitive impairment experience greater socioeconomic disadvantage than the general community. A 2006 report on the legal needs of people with mental illness in NSW reported that people with mental illness 'have been found to have lower levels of education and employment, less stable housing conditions and higher levels of poverty'.¹³⁸ People with cognitive impairment often have multiple needs. For example, they may also be homeless or have substance abuse problems.

Like homelessness, the offences that people with cognitive impairment are charged with may relate to behaviour arising from their impairment.¹³⁹ Therefore, their impairment can lead to their criminalisation.

People with cognitive impairment often face greater difficulties in dealing with the criminal justice system than other groups.¹⁴⁰ They experience individual and systemic barriers, including lack of awareness of legal rights, communication problems, lack of affordable legal services, and problems with identification of mental illness.¹⁴¹ These barriers can affect whether a person is granted bail, and if so, what bail conditions are imposed.¹⁴²

In our consultations and submissions three key areas of concern about cognitive impairment and the bail system emerged: identification of cognitive impairment; provision of support services; and the impact of cognitive impairment on bail decision making.

IDENTIFICATION

Identification of cognitive impairment in accused people is crucial to minimising disadvantage rather than entrenching it. Early identification by criminal justice professionals, including police, court officials and lawyers, will ensure accused people with cognitive impairment are linked to appropriate support services and their impairment is taken into account in decision making, when relevant.

Police are usually the first point of contact with the criminal justice system. Therefore, it is particularly important that police are equipped to identify people with cognitive impairment and to deal with them in an appropriate manner. The NSW Law Reform Commission has recommended that the police develop guidelines to assist officers to identify intellectual disability and to question a person with an intellectual disability in an appropriate way.¹⁴³ Similarly, we have previously recommended that Victoria Police should develop guidelines and implement training for the identification of cognitive impairment.¹⁴⁴

In our Consultation Paper we asked whether police should be given specific training and guidance to assist them to identify and interview a person with cognitive impairment.¹⁴⁵ All relevant submissions, bar one, thought police should receive such training.¹⁴⁶ Most also thought they should receive guidance on interviewing people with cognitive impairment.¹⁴⁷

Victoria Police nominated mental health as a priority issue for 2006–07 and has recently developed a Mental Health Strategy.¹⁴⁸ This reflects a national focus on mental health as a priority for policing.¹⁴⁹ Under the Mental Health Strategy, Victoria Police aims to improve police training on mental health to equip police to:

- Detect the symptoms and behaviours of a range of mental disorders that impact on a person's thoughts, perceptions and feelings.
- Communicate effectively with people with these mental disorders.
- Display empathy when interacting with people with mental disorders.
- Utilise legislation, policy, procedures and partnerships to respond appropriately and effectively to people with a mental disorder.¹⁵⁰

RECOMMENDATIONS

151. Police, criminal lawyers, bail justices, magistrates and judges should all receive ongoing training about working with cognitively impaired accused people, victims and witnesses.

To achieve these aims Victoria Police plans to update existing courses and promote joint training with other agencies, such as DHS.¹⁵¹

Victoria Police has also worked with the Office of the Public Advocate, the Victorian Equal Opportunity and Human Rights Commission and DHS to develop a 'ready reckoner' (checklist) to assist police to identify cognitive impairment.¹⁵² The ready reckoner:

- outlines police procedures for dealing with people with cognitive impairment
- assists police to recognise indicators of cognitive impairment
- assists police to communicate effectively with people with cognitive impairment
- advises police on how to contact agencies that may be of assistance.¹⁵³

The development of the ready reckoner will complement the Mental Health Strategy's proposals to improve the sources of information available to police, including revision of the Victoria Police Manual and the creation of a Mental Health Knowledge Bank.¹⁵⁴

The Mental Health Strategy also proposes the appointment of liaison officers to promote communication about mental health, to monitor and report on specific mental health issues and to provide targeted training.¹⁵⁵ Liaison officers will also update knowledge, systems and processes between operational areas and corporate support areas.

The commission welcomes Victoria Police's focus on improving the police response to people with cognitive impairment. Police should continue to receive ongoing training about working with cognitively impaired accused people, victims and witnesses. This should help to mitigate the disadvantage people with cognitive impairment face in their contact with the criminal justice system and may help to address their over-representation.

Such training should not be limited to police. It is important that all criminal justice professionals who deal with people with cognitive impairment receive appropriate training.

Police databases must be able to capture cognitive impairment identification to ensure that police are alerted in any future contact with that person. Victoria Police's Mental Health Strategy acknowledges the need to improve collection of information about police interaction with people with cognitive impairment. The strategy notes 'there is no single system by which interactions

134 'Cognitive impairment' includes, but is not limited to, impairment due to intellectual disability, mental illness, dementia and acquired brain injury. The commission has preferred the term 'cognitive impairment' over 'impaired mental functioning' and recommended its adoption in legislation, see Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk* (2003) 114; Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) recommendations 161, 162; Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Interim Report* (2003) 369–371.

135 James Ogloff et al, *The Identification of Mental Disorders in the Criminal Justice System* (2007) 1–2.

136 Paul White and Harvey Whiteford, 'Prisons: Mental Health Institutions of the 21st Century?' (2006) 185(6) *Medical Journal of Australia* 302, 302–3. See also, New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996) 23–26; Felicity Parton et al, 'An Empirical Study on the Relationship Between Intellectual Ability and an Understanding of the Legal Process in Male Remand Prisoners' (2004) 11(1) *Psychiatry, Psychology and Law* 96, 96–98.

137 Ogloff (2007) above n 135, 1.

138 Maria Karras et al, *On the Edge of Justice: The Legal Needs of People with a Mental Illness in NSW: Volume 4* (2006) xvi, 189–191.

139 Ibid 58–60.

140 Roundtable 2.

141 Karras (2006) above n 138, 94–119, which dealt with access to legal services generally by people with a mental illness, not just the criminal justice system. See also New South Wales Law Reform Commission (1996) above n 136, 82–83.

142 Roundtable 2.

143 New South Wales Law Reform Commission (1996) above n 136, recommendation 6.

144 Victorian Law Reform Commission (2004) above n 134, recommendations 150, 151.

145 Victorian Law Reform Commission (2005) above n 10, 154.

146 Submissions 6, 10, 11, 15, 22, 23, 24, 29, 30, 32, 39, 41, 43, 46; roundtable 2. One bail justice thought that 'police are very adept at determining whether a person has an intellectual disability': submission 18.

147 Submissions 6, 11, 15, 22, 24, 32, 39, 41, 43, 46. No submissions opposed this suggestion.

148 Victoria Police, *Peace of Mind: Providing Policing Services to People with, or Affected by, Mental Disorders: Strategic Directions Paper* (2007) 3. This strategy is based on an earlier Action Plan: Victoria Police, *Peace of Mind: Providing Policing Services to People with, or Affected by, Mental Disorders: Action Plan* (2006). Improving policing responses to people with mental disorder is one of Victoria Police's service delivery commitments: Victoria Police, *Business Plan 2006/07*, 6.

149 The Australasian Police Commissioners agreed at their 2006 conference to review the police response to people with mental illness: Victoria Police, 'Commissioners' Conference Concludes' (Media Release, 25 May 2006).

150 Victoria Police (2007) above n 148, 38; submission 23.

151 Information provided by Commander Ashley Dickinson, Manager, Operations Coordination Department (incorporating Mental Health Strategy Project), Victoria Police, 14 May 2007.

152 This will help police recognise when to call an ITP. ITPs are discussed in this chapter. In May 2007, the checklist had been finalised and was expected to be launched shortly: information provided by Julianne Fogarty, ITP Coordinator, Office of the Public Advocate, 15 May 2007.

153 Information provided by Commander Ashley Dickinson, Manager, Operations Coordination Department (incorporating Mental Health Strategy Project), Victoria Police, 14 May 2007.

154 Victoria Police (2007) above n 148, 44.

155 Ibid 10–11.

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with people with a mental disorder are recorded as the principal field and there is limited ability to link the organisation's different databases'.¹⁵⁶ The strategy proposes remedying this problem by integrating existing systems and improving the quality of and method by which data is recorded.

The commission welcomes Victoria Police's proposals for improving information capture and management, which should assist police to identify and deal with people with cognitive impairment appropriately.

Placing a flag on LEAP whenever an Independent Third Person (ITP) or other person is called to assist during a police interview would further help identify people with cognitive impairment.¹⁵⁷ The ITP program is run by the Office of the Public Advocate and operates during and after court hours using volunteers.¹⁵⁸ Victoria Police policy requires that an ITP, relative or close friend must be present when any intellectually or mentally impaired person is interviewed.¹⁵⁹ The ITP's role is to:

- Facilitate communication between police and the impaired person during the interview.
- Provide emotional support and ensure that the person understands their rights and the caution. They are not the person's legal counsel or advocate and should not make decisions on behalf of the person.¹⁶⁰

If an officer flags on LEAP that someone has been called to an interview, this should prompt police in any future dealing with the impaired person to arrange attendance of an ITP, relative or close friend. It will also trigger other relevant police protocols and procedures for dealing with cognitively impaired people.

SUPPORT SERVICES

Given the socioeconomic disadvantages faced by many people with cognitive impairment and the difficulties they experience in their contact with the criminal justice system, it is important that

appropriate support services are provided to them.

There are three main types of support which people with cognitive impairment may require for bail:

- legal advice and advocacy
- assistance to understand proceedings and the legal system
- support services such as accommodation, treatment and counselling.

In our Consultation Paper we discussed existing support services for accused people with cognitive impairment: the ITP program, court services, and Disability Services provided by DHS.¹⁶¹ The support available to accused people with cognitive impairment differs depending on whether they are arrested during or after court hours.

After Hours Support

There is currently no service which routinely provides legal advice and advocacy for accused people with cognitive impairment after hours or to help them to understand bail proceedings.

As discussed, the ITP program provides support to accused people with cognitive impairment during police interviews. ITPs do not act as advocates for an accused—their involvement is limited to assisting the person to understand communications with police. The Office of the Public Advocate's policy is that ITPs are not to assist accused people during bail justice hearings because they have not been trained to do this and they may lack impartiality after being involved in the police interview. If police grant bail, ITPs may use their discretion to assist an adult to understand the process, but must not assist a child. ITPs are not advocates and therefore the Office of the Public Advocate does not believe they can fulfil the requirements of an 'independent person' required by the CYFA. CAHABPS should be called instead.

RECOMMENDATIONS

152. If an Independent Third Person (ITP) or other person attends to assist an accused at the record of police interview, the informant should immediately flag this on LEAP to ensure that an ITP or other person is present whenever the accused is interviewed by police in future.
153. The Office of the Public Advocate should provide ITPs for accused people with cognitive impairment at bail justice hearings to assist them to understand the bail hearing process and the conditions of bail, or the reasons for remand.
154. There should be clear protocols between the Office of the Public Advocate, Victoria Police and the Department of Justice as to the role of ITPs at bail justice hearings. Training for ITPs, police and bail justices should ensure they are aware of the protocols.

In our Consultation Paper we asked whether specialised support should be available to accused people with cognitive impairment at bail hearings.¹⁶² We also asked whether ITPs could fulfil this role, whether training bail justices in disability issues would be an appropriate alternative, or whether there was a need for a new role to be created.

Most relevant submissions supported the provision of specialised support to accused people with cognitive impairment.¹⁶³ Some thought this support should extend to a specialist advocacy service.¹⁶⁴ The Mental Health Legal Service said: 'It is a person's right to have a legally trained advocate'.

Some submissions thought ITPs could perform a support role during bail hearings, provided they were given appropriate training.¹⁶⁵ Others were against this idea or had concerns about using ITPs to fulfil this role.¹⁶⁶ In particular, the Office of the Public Advocate said it was inappropriate for ITPs to advocate on behalf of an accused because it could lead to a conflict with their support role and would associate the ITP too closely with the accused. It also thought the skills required for advocacy were beyond what could be expected of an ITP. The Mental Health Legal Service expressed concern about ITPs acting as advocates:

in many situations the police select an independent third person who they believe will coerce the person into a confession or admission; if an ITP is present then the person may not have access to a legally trained advocate; police ITPs and the accused can be confused about the different roles of an ITP, advocate, carer and legal advocate.

One bail justice thought bail justices could fulfil a support role.¹⁶⁷ The Office of the Public Advocate suggested that the bail justices' role could be inquisitorial so they could ask for relevant information when accused people are unrepresented and unable to provide this information themselves. Other submissions did not believe specialist training for bail justices was an appropriate alternative to a specialised support service.¹⁶⁸ However, most relevant submissions did support training for bail justices and others involved in dealing with accused people with cognitive impairment.¹⁶⁹

Legal representation at bail hearings should only be provided by lawyers. However, there is no general 'right' to legal representation: most

people are unrepresented at bail justice hearings. To provide legal representation to all accused people with cognitive impairment at after-hours bail hearings would require a roster of lawyers available to every police station in Victoria. This is not feasible.

ITPs are able to provide legal information to accused people and already do so. Part of the ITP's role is to ensure accused people understand their legal rights. ITPs' training clearly delineates between the provision of legal information and legal advice.

The commission believes ITPs should provide support to accused people at after-hours bail hearings. We do not intend the ITP to assume the role of an advocate. Rather, the ITP's role would be to facilitate communication and assist accused people to understand the bail hearing process and their conditions of bail, or the reasons why they were remanded. The commission does not believe a specialist support role for after-hours bail hearings needs to be created. The ITP is already at the police station and has the skills to perform a support role during the hearing. The commission does not believe this would conflict with ITPs' current role, but rather is an extension of it.

To ensure there is no confusion about the role of an ITP at a bail justice hearing, there should be clear protocols between the Office of Public Advocate, Victoria Police and the Department of Justice. Training for police, ITPs and bail justices should ensure they are aware of these protocols.

There is currently no after-hours bail support service for adults. Therefore, it is difficult for accused people with cognitive impairment to access services like supported accommodation. This can have an impact upon bail decision making—without these services bail decision makers may consider accused people to pose an unacceptable risk under the terms of the Bail Act.

The Office of the Public Advocate submitted that ITPs could not be expected to act as a case management or referral service for accused people with cognitive impairment. The commission agrees this is beyond their role. The commission believes a specialist service should be established to help link accused people with cognitive impairment to appropriate accommodation services after hours. CAHABPS, a service which places children in accommodation after hours, provides a good model. This service should be used whenever an ITP is called. CAHABPS is discussed in Chapter 9.

¹⁵⁶ Ibid 33.

¹⁵⁷ LEAP is Victoria Police's primary information system. It is discussed in Chapter 4.

¹⁵⁸ This program is discussed in: Victorian Law Reform Commission (2005) above n 10, 150, 152.

¹⁵⁹ Victoria Police, *Victoria Police Manual* (2 October–5 November 2006) 'VPM Instruction 112-3: Suspects and Offenders: Interviews and Statements' [6.2.1].

¹⁶⁰ Ibid [6.2.4].

¹⁶¹ Victorian Law Reform Commission (2005) above n 10, 150–51.

¹⁶² Ibid 153.

¹⁶³ Submissions 10, 23, 24, 29, 30, 32, 38, 41, 43, 46.

¹⁶⁴ Submissions 30, 32, 38; roundtable 2. This was also implied by the Office of the Public Advocate's submission, though it did not think a new role needed to be created.

¹⁶⁵ Submissions 18, 24, 29, 41, 46, 48; roundtable 2. Victoria Legal Aid and the Law Institute of Victoria both wanted ITPs to receive appropriate training.

¹⁶⁶ Submissions 24, 30, 32, 38; roundtable 2.

¹⁶⁷ Submission 11.

¹⁶⁸ Submissions 22, 32, 38, 39, 41, 48.

¹⁶⁹ Submissions 10, 22, 24, 29, 30, 32, 38, 39.

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Our recommendation that police, bail justices, lawyers, magistrates and judges receive ongoing training about cognitive impairment should also promote better decision making.

Support During Court Hours

People with cognitive impairment have access to services during court hours, ranging from legal representation to court and community support services.

Legal representation is usually available, either privately or through Victoria Legal Aid. It is important that lawyers acting for people with cognitive impairment have appropriate training, as already recommended. A recent example of training in this area was the Law Institute of Victoria course on Working with Clients who have Cognitive Impairments. The commission supports such initiatives.

People with cognitive impairment may have a support worker, through either community agencies or DHS.¹⁷⁰ DHS Disability Services can help its registered clients with an intellectual disability prepare for court by:

- assisting them to find a solicitor
- providing a report to the solicitor on their history and circumstances
- finding a support person for court
- exploring available accommodation and support options before a bail application.¹⁷¹

Disability Services also funds a statewide emergency accommodation service consisting of two properties that accommodate up to ten clients.¹⁷² Placement is determined by need rather than location. The service was created for accused people with intellectual disabilities who require accommodation while on bail—accused people seeking bail are prioritised for placement in the houses.

The Magistrates' Court offers services, including a Disability Coordinator based at Melbourne who provides a statewide service to help the court deal with people with disabilities. The coordinator provides information to the court about a person's background, including treatment, and information about available services. The coordinator can also make recommendations to the court about bail and may supervise a person on bail if there are no other alternatives.¹⁷³

The Mental Health Court Liaison Service is a court-based psychiatric support service, provided

and funded by Forensicare.¹⁷⁴ It operates in metropolitan and regional Magistrates' Courts.¹⁷⁵ The service identifies and assesses people coming before the court who have or may have a mental illness and links them to appropriate facilities for treatment and support. The service also networks with mental health services and family members involved in the person's care and provides advice on mental health issues to the court.

Accused people with cognitive impairment can access services through the CREDIT program and CISP. The CISP team includes specialist staff skilled in dealing with people who have cognitive impairment.¹⁷⁶ CISP has also established links with specialised external support services for people with acquired brain injury.¹⁷⁷

While many submissions supported the provision of specialised support services for accused people with cognitive impairment, none raised any concerns about services currently available during court hours. The commission supports existing initiatives and the development of further services and training where appropriate.

BAIL DECISION MAKING

Cognitive impairment can have an impact upon the outcome of bail decisions. For example, an accused may appear agitated, confused or unable to understand the bail process due to cognitive impairment. As a result, a bail decision maker may think the accused poses too high a risk of re-offending or failing to appear if granted bail. Alternatively, a decision maker may grant bail on conditions which set an accused up to fail. This could occur if accused people are not provided with appropriate support to help them comply with the conditions or they do not understand the conditions.

Before releasing an accused on bail, the bail decision maker must be satisfied the accused understands 'the nature and extent of the conditions of his bail and the consequences of failure to comply with them'.¹⁷⁸ An accused with cognitive impairment may be unable to meet this requirement. This problem is addressed in different ways in other jurisdictions.

In Queensland, the police may release accused people without bail if they:

- have, or appear to have, an intellectual impairment

RECOMMENDATIONS

155. DHS should develop and fund a service like the Central After Hours Assessment and Bail Placement Service for people with a cognitive impairment who are arrested by police after hours.

- do not understand or appear not to understand the requirements of bail
- would be released on bail if they did understand the requirements of bail.¹⁷⁹

The accused may or may not be released into the care of another person. Release is conditional on the accused attending court on a particular date at a particular time, as set out in a 'release notice'.¹⁸⁰ If released into the care of another person, that person is also given a copy of the release notice.

In NSW, when deciding whether to grant bail, decision makers must take into account the interests of the accused, including any special needs arising from an intellectual disability or mental illness.¹⁸¹ Before imposing a bail condition on accused people with intellectual disability, decision makers must be satisfied that the condition is appropriate having regard to the capacity of the accused to understand the condition.¹⁸² All reasonable steps must be taken to ensure any person (including the accused) who enters into a bail undertaking is aware of their obligations and consequences of failing to comply.¹⁸³

In our Consultation Paper we asked whether the Bail Act should include a provision similar to NSW's. Many submissions supported this suggestion.¹⁸⁴ However, the Magistrates' Court said that magistrates routinely take capacity to understand into account. The court was concerned that 'mentally impaired persons might become ineligible for bail if appropriate conditions were not able to be imposed due to "capacity"'. The Law Institute was also concerned that the provision may be used as a means of refusing bail outright.

Some submissions supported incorporating a provision similar to Queensland's to enable police to release an accused with cognitive impairment who did not understand the requirements of bail.¹⁸⁵ This would overcome the concerns raised by the Magistrates' Court and the Law Institute. PILCH also suggested the Bail Act include a requirement similar to NSW's, that all reasonable steps be taken to ensure people entering into a bail undertaking are aware of their obligations and the consequences of failing to comply.

The commission believes decision makers should take into account an accused's capacity when setting bail conditions. However, we do not believe a special provision is necessary. Our recommendation in Chapter 7 that 'bail conditions be no more onerous than necessary, and reasonable and realistic, taking into

account the individual circumstances of the accused person', should help to ensure bail decision makers do not impose inappropriate conditions. Our recommendation that police, bail justices, lawyers, magistrates and judges receive ongoing training about cognitive impairment should also promote better decision making. Our recommendations about improvements to support services should also ensure accused people with cognitive impairment are more likely to be released on bail and assisted to abide by their bail conditions.

While there was some support in submissions for the release of an accused who did not understand the requirements of bail, it was not reported that accused people with cognitive impairment were routinely refused bail because they lacked the capacity to understand the bail conditions. Therefore, a provision like Queensland's does not appear to be necessary, particularly given our other recommendations. We were, however, informed of one case in which a mentally ill accused was refused bail because he was unable to understand the bail conditions or the consequences of failing to comply with them. The commission believes the problem of people who are mentally ill and in need of treatment could be addressed by an existing provision in the *Mental Health Act 1986*, discussed next.

MENTAL HEALTH ACT

During the course of our review, a magistrate informed us of a case in which she refused bail because she could not be satisfied the accused understood 'the nature and extent of the conditions of his bail and the consequences of failure to comply with them', as required by section 17 of the Bail Act.¹⁸⁶ A psychiatrist diagnosed the accused as catatonic, mute and psychotic, and certified that he should be admitted as an involuntary patient to a psychiatric hospital. The police did not oppose bail if it was on the condition he was admitted to hospital. However, the accused was unresponsive and unable to give instructions to Victoria Legal Aid. His condition meant he could not understand the bail conditions or the consequences of failing to comply with them, and therefore could not be released on bail.

The magistrate suggested the police could have used section 16(3) of the Mental Health Act to transfer the accused to a mental health service, however, the police told her they never use section 16. Section 16 empowers the Secretary of the Department of Justice or the Chief Commissioner of Police to transfer a mentally

170 Eg, DHS Disability Services can provide support and services to people with an intellectual disability. To access Disability Services, people with an intellectual disability (as specified in the *Disability Act 2006*) or their guardian must voluntarily agree to participate: submission 10. Disability services for people with intellectual, physical, psychiatric and sensory impairments are funded under the *Disability Act 2006* which commenced on 1 July 2007. Under the Act people with a physical, sensory or neurological impairment, an acquired brain injury, intellectual disability or developmental delay can access disability services: ss 3, 49.

171 Submission 10.

172 Ibid.

173 Consultation 16.

174 Forensicare is The Victorian Institute of Forensic Mental Health. It provides adult forensic mental health services in Victoria.

175 The regional service operates half time in Geelong, Shepparton, Bendigo, Ballarat and Latrobe Valley Magistrates' Courts: Magistrates' Court of Victoria, *Mental Health Court Liaison Service* (2007) <www.magistratescourt.vic.gov.au> at 11 May 2007.

176 Consultation 51.

177 Consultation 64.

178 *Bail Act 1977* s 17.

179 *Bail Act 1980* (Qld) s 11A.

180 *Bail Act 1980* (Qld) ss 11A, 11B.

181 *Bail Act 1978* (NSW) s 32(1)(b)(v).

182 *Bail Act 1978* (NSW) s 37(2A).

183 *Bail Act 1978* (NSW) s 39BG.

184 Submissions 10, 15, 24, 29, 30, 32, 41, 43, 46.

185 Submissions 15, 24, 30, 32.

186 Submission 49.

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ill person who is in prison or on remand to a mental health facility as an involuntary or security patient.¹⁸⁷ The transfer can only be ordered if a psychiatrist has certified that the person appears to be mentally ill, requires immediate treatment, and detention in a mental health facility is necessary for the person's health or safety or the protection of the public.¹⁸⁸ A psychiatrist from the mental health facility must also provide a report recommending transfer and stating that treatment services are available.¹⁸⁹

In appropriate cases this provision could be used to transfer mentally ill accused people to a mental health service. If accused people are unable to give instructions, police would need to make this decision before charging, as once people are charged they must be either bailed or remanded. This would not be the case if Victorian police had the power to 'discontinue arrest' as NSW police do.¹⁹⁰ This procedure can be used at any time, including where it becomes more appropriate to deal with the matter in some other way, for example, by summons.

It is wrong for people who need treatment to remain in custody simply because they lack the capacity to enter into a bail undertaking. It appears section 16(3) of the Mental Health Act is not being used in such cases. The commission believes Victoria Police and DHS should review why this is the case.

COGNITIVE IMPAIRMENT REVIEW

In our 2004 report *Sexual Offences: Law and Procedure* we stated that:

*The Commission believes provision of support for people who have a cognitive impairment who are involved in the criminal justice system requires broader and more systemic analysis than the scope of this reference allows.*¹⁹¹

This statement equally applies to this reference. As noted, people with cognitive impairment commonly encounter individual and systemic barriers in the criminal justice system. This occurs not only to accused people, but as discussed in our report on Sexual Offences, to victims and witnesses as well. Without a broader review of this issue, reform will necessarily be piecemeal.

In 2004 we recommended the Attorney-General consider establishing a review of the issues confronted by people with cognitive impairment in the criminal justice system.¹⁹² We reiterate this recommendation. The commission would be an appropriate body to conduct this review.

RECOMMENDATIONS

156. Victoria Police and DHS should review why section 16(3) of the *Mental Health Act 1986* is not being applied to transfer accused people to a mental health facility.
157. The Attorney-General should consider establishing a review which identifies the issues confronted by people with cognitive impairment in the criminal justice system and makes recommendations for legal and procedural changes.

187 *Mental Health Act 1986* ss 16(1), (3).

188 *Mental Health Act 1986* s 16(2)(a).

189 *Mental Health Act 1986* s 16(2)(b).

190 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 105.

191 Victorian Law Reform Commission (2004) above n 134, 331. The NSW Law Reform Commission undertook such a review in the 1990s: New South Wales Law Reform Commission (1996) above n 136.

192 Victorian Law Reform Commission (2004) above n 134, recommendation 157. The Victorian Ombudsman recently supported such a review: Ombudsman Victoria, *Improving Responses to Allegations Involving Sexual Assault* (2006) 36. The Mental Health Legal Service also thought a review was necessary.

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Appendix 1

Extra Surety Consultation

Failure to pay amount of surety ordered to be forfeited: section 6(1) *Crown Proceedings Act 1958*

The law in Victoria now

Section 6(1) of the *Crown Proceedings Act 1958* applies when bail has been breached and forfeited and the court orders payment of the amount of the surety. In default of payment of the surety the amount is to be obtained by seizing and selling the property of the surety. In default of seizure and sale, the surety may be imprisoned for a term not exceeding two years.

His Honour Justice Gillard's remarks in *Mokbel*

In considering an application under section 6 of the *Crown Proceedings Act 1958* for the forfeiture of bail and the payment of a surety, Justice Gillard made comments regarding the adequacy of the maximum term of imprisonment which may be imposed for failing to meet a surety:

'The Court invites Parliament to consider increasing the (current maximum two year) 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.'

Justice Gillard further noted that the two-year period of imprisonment had been the maximum since 1977, and was in his view inadequate when the undertaking is to pay a sum fixed as high as \$1 million.

Other cases on penalty for failing to meet surety

The only Victorian case, reported or unreported, that the commission has been able to find on this issue is *Re Condon* [1973] VR 427, which was referred to by His Honour Justice Gillard in *Mokbel*. In *Condon* the surety was ordered to pay the amount of the surety, which was \$5000, or in default to be imprisoned for 12 months. The amount of \$5000 was in those days substantial, and particularly so for Condon, as it amounted to half the value of her house. It was considered by the judge in that case to be 'substantial' but not 'unduly high' as the accused had been bailed on a charge of armed robbery which had netted \$280 000.

We have been unable to find any cases decided on section 32A of the *Queensland Bail Act 1980*, which contains a similar provision.

Legislation in other Australian states

In most other Australian jurisdictions, default of payment of the surety, or default of an order to seize and sell the property, is treated as defaulting on payment of a fine.

Queensland and Victoria are the only states which have an immediate default to a sentence of imprisonment, which in both cases is a maximum of two years. In other states if the amount cannot be recovered through civil enforcement orders the amount of the surety is enforced as if it was a fine. That is, a community based order is imposed in default of payment of the amount, 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. In Tasmania and Western Australia the term of imprisonment is not limited but is calculated by reference to the amount of the surety. (See table overleaf for further information.)

QUESTIONS

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 1958* 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?

Appendix 1

Extra Surety Consultation

Comparative table: Consequences of failure to pay amount of surety ordered to be forfeited

JURISDICTION	PROVISION	CONTENT	EFFECT
Australian Capital Territory	<i>Bail Act 1992</i> s 37	Recovery as a fine under division 3.9.2 of the <i>Magistrates Court Act 1930</i>	Section 154D <i>Magistrates Court Act 1930</i> A fine defaulter may be committed to prison for a maximum of six months.
New South Wales	<i>Bail Act 1978</i> s 53I	Unpaid bail money ordered to be forfeited to be recovered by the State Debt Recovery Office	<i>Fines Act 1996</i> provides for a civil forfeiture regime, then a community based order scheme, with imprisonment as the last resort where the fine has not been satisfied and community based order revoked: imprisonment for maximum of three months (s 90). NB: Separate offence in s 42A for fraudulent disposal of assets to prevent security being realised
Northern Territory	<i>Bail Act 1982</i> s 40	Payment to be enforced under Part 8 of the <i>Fines and Penalties (Recovery) Act 2001</i>	Section 109 of the <i>Fines and Penalties (Recovery) Act 2001</i> allows forfeited bail to be recovered as a fine. Fines recovered by a civil forfeiture regime, then a community based order scheme, with imprisonment as the last resort where the fine has not been satisfied and community based order revoked: imprisonment for maximum of three months (s 88).
Queensland	<i>Bail Act 1980</i> s 32A	Court ordering forfeiture of bail security to order that in default of payment the surety be imprisoned for a term of not more than two years	
South Australia	<i>Bail Act 1985</i> s 19	Pecuniary forfeiture may be recovered as a fine	<i>Criminal Law (Sentencing) Act 1988</i> provides for civil recovery mechanisms, community service orders. Failure to comply with community service order may result in imprisonment for a maximum of six months (s 71).
Tasmania	<i>Bail Act 1994</i> s 21	Amount may be recovered under s 80 of the <i>Justices Act 1959</i>	Section 80 of the <i>Justices Act 1959</i> was repealed in 1997 by the <i>Sentencing Act 1997</i> . As Sentencing Act re-enacts the repealed provisions the reference is taken to be to the provisions of the <i>Sentencing Act 1997</i> (s 17 <i>Acts Interpretation Act 1931</i>). Those provisions allow for community based order, civil recovery or imprisonment. Imprisonment is for the term of one day for every \$100.
Victoria	<i>Bail Act 1977</i> s 32 <i>Crown Proceedings Act 1958</i> s 6	In default of payment of amount or seizure and sale of property surety to be imprisoned for a term not exceeding two years	
Western Australia	<i>Bail Act 1982</i> s 49	Payment to be enforced under Part 5 of the <i>Fines Penalties and Infringement Notices Enforcement Act 1994</i> or order made under s 59 of the <i>Sentencing Act 1995</i>	Part 5 applies Part 4 (enforcement of fines) to unpaid sureties. Part 4 allows for civil recovery, work and development orders and in default imprisonment. Maximum period of imprisonment is calculated as one day for every \$150 of the fine or the maximum term of imprisonment for the offence. Court may also fix a period of imprisonment in default of payment under s 59 of the <i>Sentencing Act 1995</i> .

Appendix 2

Magistrates' Court of Victoria Data

Warrants of apprehension for failure to appear on bail

	2000–01	2001–02	2002–03	2003–04	2004–05	2005–06	TOTAL
Children's Court							
Case finalised— offence type known	197	229	242	209	229	301	1407
Case unfinalised— offence type unknown	38	42	53	39	104	151	427
Magistrates' Court							
Case finalised— offence type known	5109	5551	5831	5959	5761	6458	34 669
Case unfinalised— offence type unknown	1267	1287	1551	1910	3218	3264	12 497
Total finalised cases	5306	5780	6073	6168	5990	6759	36 076

Explanatory notes:

1. Data is based on number of warrants issued against defendants. Where a defendant fails to appear more than once, both warrants are counted. The data is a count of cases. Where a case has become part of a consolidation, the consolidation is counted and the cases making up the consolidation are not included.
2. Data excludes defendants whose first warrant of apprehension order was before the five years of data provided.
3. Cases that were finalised prior to 2000–01 but have come back for a breach hearing where the breach may have resulted in a warrant of apprehension order have been excluded.

Data prepared by Court Services, Department of Justice, 16 May 2006 and 29 November 2006.

Appendix 3

Victoria Police Data

Fail to answer bail

	DISTINCT ALLEGED OFFENDERS			ALLEGED OFFENDERS	CHARGES	RECORDED OFFENCES*
YEAR	MALE	FEMALE	TOTAL **			
1999-00	2621	744	3378	4723	4979	1762
2000-01	2880	823	3719	5381	5763	1934
2001-02	2819	820	3645	5299	5620	2103
2002-03	2895	844	3744	5298	5708	2381
2003-04	2905	837	3744	5342	5723	2537
2004-05	3461	982	4449	6299	6871	3318
2005-06	3348	857	4210	5620	6378	6318

* The procedure in which fail to answer bail offences are recorded on LEAP changed on 1 July 2005, which resulted in an increase of approximately 3000 recorded offences.

** Includes people where sex is unknown

Distinct Alleged Offender: Count of distinct offenders who had been processed with Fail to Answer Bail at least once in reference period

Alleged Offenders: Count of Offender Processings which have at least one Fail to Answer Bail charge

Charges: Number of Fail to Answer Bail charges recorded on LEAP

Recorded Offences: Count of Fail to Answer Bail offences recorded on LEAP

Note: Because Fail to Answer Bail offences were recorded differently to other offences before 2005-06, these statistics have not been extracted in accordance with official Victoria Police statistical processes; as such, extreme care is advised in the use of these figures.

Produced by Corporate Statistics, Victoria Police. Extracted from LEAP on 18 July 2006 and subject to variation.

Appendix 4

Office of Public Prosecutions Data

Warrants issued for failure to answer bail

	2000	2001	2002	2003	2004	2005	2006
County Court	143	144	100	113	136	107	96
Supreme Court	1	1	0	0	1	0	1
Magistrates' Court	79	147	176	167	165	170	176

Notes: The Magistrates' Court figures relate only to indictable matters proceeding by way of committal, not all Magistrates' Court cases. Data supplied by Registry Section, Office of Public Prosecutions, 15 January 2007.

Appendix 5

Method of Processing Children by Victoria Police

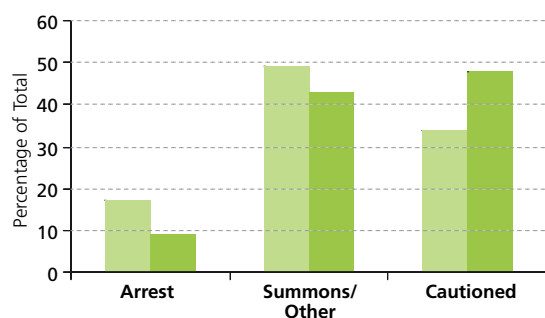
Children processed in Victoria 2004–2005

	ARREST		SUMMONS/OTHER		CAUTIONED		TOTAL
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	
Indigenous	69	17	205	49	143	34	417
Non-Indigenous	821	9	4173	43	4570	48	9654

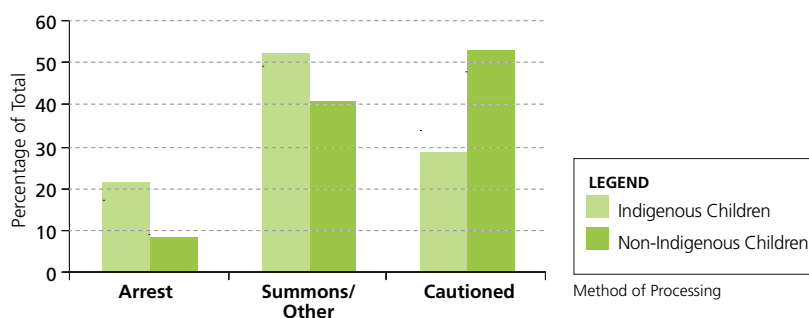
Children processed in Victoria 2005–2006

	ARREST		SUMMONS/OTHER		CAUTIONED		TOTAL
	NUMBER	PERCENT	NUMBER	PERCENT	NUMBER	PERCENT	
Indigenous	83	21	204	51	113	28	400
Non-Indigenous	727	8	3961	40	4986	52	9674

Children Processed in Victoria 2004–2005



Children Processed in Victoria 2005–2006



Victoria Police Data provided by the Indigenous Unit, Department of Justice, 29 March 2007.

Appendix 6

Consultations

CONSULTATION	PARTICIPANTS	DATE
1	Terry Hannon, researcher	13 April 2005
2	Commonwealth Department of Public Prosecutions	14 April 2005
3	CREDIT Bail Support program	15 April 2005
4	Strategic Policy and Diversity Unit, Corrections Victoria	18 April 2005
5	Juvenile Justice, Department of Human Services	19 April 2005
6	Federation of Community Legal Centres	20 April 2005
7	Victoria Legal Aid	22 April 2005
8	Victorian Aboriginal Legal Service	22 April 2005
9	Office of Public Prosecutions	26 April 2005
10	Criminal Law Section, Law Institute of Victoria	28 April 2005
11	Prosecutor, Victoria Police	4 May 2005
12	Aboriginal Liaison Officer, Magistrates' Court of Victoria	5 May 2005
13	Client Service Officers, Victorian Aboriginal Legal Service	4 May 2005
14	Children's Court of Victoria	5 May 2005
15	Operational Police Officer, Victoria Police	10 May 2005
16	Disability Coordinator, Melbourne Magistrates' Court	16 May 2005
17	Daniel Gurvich, Barrister-at-Law	17 May 2005
18	Magistrates, Melbourne Magistrates' Court	19 May 2005
19	Australian Federal Police	22 May 2005
20	Criminal Justice Enhancement Program	24 May 2005
21	Youth Unit, Port Phillip Prison	31 May 2005
22	Victorian Criminal Bar	1 June 2005
23	Office of the Public Advocate	3 June 2005
24	Registrars, Melbourne Magistrates' Court	7 June 2005
25	Central After Hours Assessment and Bail Placement Service, Department of Human Services	8 June 2005
26	State Training Office, Court Services and Justices of the Peace and Bail Justices' Registry, Department of Justice	16 June 2005
27	Shepparton Police	20 June 2005
28	Client Service Officer, Victorian Aboriginal Legal Service, Shepparton	20 June 2005
29	Shepparton Magistrates' Court	20 June 2005
30	Victoria Legal Aid, Shepparton	21 June 2005
31	Moe Magistrates' Court	23 June 2005
32	Court Drug Assessor, Moe Magistrates' Court	23 June 2005
33	Moe Police	23 June 2005
34	Defence lawyers, Moe	23 June 2005
35	Murray Mallee Community Legal Centre	27 June 2005
36	Mildura Police	27 June 2005
37	Juvenile Justice, Mildura	27 June 2005
38	Mildura Magistrates' Court	27 June 2005
39	Juvenile Justice, Gippsland	29 June 2005
40	Indigenous community representatives, Geelong	30 June 2005
41	Police Prosecutions Unit, Geelong	30 June 2005

Appendix 6

Consultations

CONSULTATION	PARTICIPANTS	DATE
42	BAYSA Youth Services, Geelong	30 June 2005
43	Defence lawyers, Geelong	30 June 2005
44	Geelong Magistrates' Court	30 June 2005
45	Victims Support Agency	1 July 2005
46	County Court of Victoria	6 July 2005
47	Royal Victorian Association of Honorary Justices	11 July 2005
48	Supreme Court of Victoria	3 August 2005
49	Victims Assistance and Counselling Program	1 September 2005
50	Sentencing Advisory Council	5 January 2006
51	Court Integrated Services Program	5 January 2006
52	Indigenous Issues Unit, Department of Justice	25 January 2006
53	Koori Court Unit, Court Services	6 April 2006
54	Victoria Police Legal and Corporate Policy	10 May 2006
55	Victims Support Agency and Victoria Police Victims Strategy Project Team	18 May 2006
56	Honorary Justices Project, Court Services, Department of Justice	22 June 2006
57	Victims of Crime Coordinator, South Australia	1 August 2006
58	Criminal Justice Enhancement Project	8 August 2006
59	Honorary Justices Project, Court Services, Department of Justice	13 September 2006
60	Indigenous Issues Unit, Department of Justice	19 September 2006
61	Victoria Police Legal and Corporate Policy	3 October 2006
62	Court of Appeal, Supreme Court of Victoria	13 October 2006
63	Melbourne Magistrates' Court	25 October 2006
64	Court Integrated Services Program	7 December 2006
65	Indigenous service provider	12 December 2006
66	Police Officer, Moreland Criminal Investigation Unit	7 February 2007
67	Victims Support Agency, Department of Justice	15 March 2007
68	Koori Court Unit, Court Services	3 April 2007
69	Koori Court Officer, Broadmeadows Magistrates' Court	3 April 2007

Appendix 7

Submissions

NO	SUBMITTED BY	AFFILIATION	DATE RECEIVED	SURETY SUBMISSION RECEIVED
1	B Doogue and R Edney	Doogue & O'Brien, Criminal Defence Lawyers	21 April 2005	
2	Tom Munro	Solicitor	9 May 2005	
	Tom Munro	Outer Eastern Suburbs Regional Office, Victoria Legal Aid	11 May 2005	
3	CONFIDENTIAL		2 June 2005	
4	Jon Klestadt	Geelong Magistrates' Court	24 August 2005	
5	Sergeant Kyle McDonald	Prosecutions Division Research and Training Unit, Victoria Police	10 October 2005	
6	Paul Mullett	The Police Association, Victoria	16 December 2005	6a
7	Derek Sauer	Bail Justice	21 December 2005	
8	Michael Wilson	Bail Justice	11 January 2006	8a
9	Tom Munro	Solicitor	13 January 2006	
10	Arthur Rogers	Disability Services Division, Department of Human Services	18 January 2006	10a
11	Stephen Mayne	Bail Justice	24 January 2006	
12	Father Peter Norden SJ	The Ignatius Centre, Jesuit Social Services	24 January 2006	
13	Dr Chris Corns	La Trobe University	25 January 2006	13a
14	ANONYMOUS		31 January 2006	
15	Kristen Hilton	PILCH Homeless Persons Legal Clinic	31 January 2006	
16	Justin Quill	The Herald and Weekly Times	31 January 2006	
17	Associate Professor John Willis	Latrobe University	31 January 2006	17a
18	Steve Kirby	Bail Justice	31 January 2006	
19	John Fox	Bail Justice	30 January 2006	19a
20	Kerrie Bence	South Eastern Centre Against Sexual Assault	31 January 2006	
21	Lynnette Barratt	Solicitor	7 February 2006	21a
22	Chief Magistrate Ian Gray	Magistrates' Court of Victoria	7 February 2006	22a
23	Jenny Peachey	Victoria Police Corporate Strategy and Performance	7 February 2006	23a
24	Tony Parsons	Victoria Legal Aid	7 February 2006	24a
25	Jill Gleeson	Victims Assistance Program, Sunraysia Community Health Service	9 February 2006	
26	Toni Ditz	Eastern Victims Assistance and Counselling Program	10 February 2006	
27	Janelle Morgan	Courts and Programs Development Unit, Department of Justice	10 February 2006	
28	David Christian	WISE Employment Services	13 February 2006	
29	Catherine Gale	Law Institute of Victoria	15 February 2006	29a
30	Paula Grogan	Youthlaw	20 February 2006	
31	Pauline Spencer	Federation of Community Legal Centres	21 February 2006	
32	Stan Winford	Fitzroy Legal Service	21 February 2006	32a
33	Mark Pedley	Deputy Director (Melbourne), Commonwealth Director of Public Prosecutions	22 February 2006	33a
34	Frank Guivarra	Victorian Aboriginal Legal Service	22 February 2006	34a
35	Vanda Hamilton	St Kilda Legal Service	25 February 2006	
36	Lindsay Smail	Geelong Association of Honorary Justices	25 February 2006	

Appendix 7

Submissions

NO	SUBMITTED BY	AFFILIATION	DATE RECEIVED	SURETY SUBMISSION RECEIVED
37	Graeme Johnson	Justice of the Peace	28 February 2006	37a
38	Vivienne Topp	Mental Health Legal Centre	28 February 2006	
39	His Hon Chief Judge Michael Rozenes	Bail Act Review Sub-Committee, County Court of Victoria	03 March 2006	39a
40	Sue Hogan	Urban Seed	06 March 2006	
41	Glenn Barr	Office of Public Prosecutions	10 March 2006	41a
42	Gill Callister	Department of Human Services	17 March 2006	
43	Phil Grano	Office of the Public Advocate	05 April 2006	
44		Knox Honorary Justices Group	03 May 2006	
45	Stephen Shirrefs	Criminal Bar Association	12 May 2006	
46	D Leo King	Royal Victorian Association of Honorary Justices	25 May 2006	46a
47	Peter Matthews	Barrister	26 June 2006	
48	Nancy Hanley	Court Network	26 July 2006	
49	Pauline Spencer	Magistrate	30 March 2007	

Appendix 8

Roundtables

ROUNDTABLE	PARTICIPANTS	DATE
1: The Tests for Bail	Richard Blackwell, Victoria Legal Aid Serge Sztrajt, Victoria Legal Aid Tony Parsons, Victoria Legal Aid Mark Higginbotham, Police Prosecutions Jessie Hughes, Law Institute of Victoria Chief Judge Michael Rozenes, County Court Judge Roy Punshon, County Court Stephen Shirrefs SC, Criminal Bar Association Magistrate Lisa Hannan, Magistrates' Court (now Judge Hannan) Paul Coghlan QC, Director of Public Prosecutions President Chris Maxwell, Court of Appeal Chief Magistrate Ian Gray, Magistrates' Court of Victoria Stan Winford, Federation of Community Legal Centres Joel Orenstein, Federation of Community Legal Centres	21 March 2006
2: Children and Young People	Sally Reid, Youth Referral and Independent Third Person Program Jan Noblett, Juvenile Justice, DHS Cherie Thompson, Police Prosecutions Sue Hay, Police Prosecutions Jane Gibson, Victoria Legal Aid Stella Stuthridge, Law Institute Victoria Bernie Geary, Child Safety Commissioner Anna Radonic, Youthlaw Jack Vandersteen, Office of Public Prosecutions Magistrate Peter Power, Children's Court	29 March 2006

Appendix 8

Roundtables

ROUNDTABLE	PARTICIPANTS	DATE
3: After-hours Bail	Vivienne Topp, Mental Health Legal Centre Stephen Shirrefs SC, Criminal Bar Association Anna Radonic, Youthlaw Serge Sztrajt, Victoria Legal Aid Magistrate Lisa Hannan, Magistrates' Court (now Judge Hannan) John Fox, Bail Justice Michael Bourne, Court Services, Department of Justice Andrew Closey, Law Institute of Victoria Barry Bolton, Registrar, Magistrates' Court Magistrate Peter Power, Children's Court Leo King, Royal Victorian Association of Honorary Justices Rodney Stewart, Victoria Police Jan Noblett, Juvenile Justice, DHS Phil Grano, Office of the Public Advocate Rosemary Ebel, Central After Hours Assessment and Bail Placement Service Stan Winford, Federation of Community Legal Centres	4 April 2006
4: Victims and Bail	Kerrie Bence, South East Centre Against Sexual Assault Toni Ditz, Victims Assistance and Counselling Programs Karen Hogan, Gatehouse Centre Will Crawford, Federation of Community Legal Centres Noel McNamara, Crime Victims Support Association Lauren Darling, Victoria Police Chief Inspector Alan Kennedy, Victoria Police Inspector Richard Koo, Victoria Police Suzanne Whiting, Victims Support Agency Samantha Horsfield, Victoria Legal Aid Libby Eltringham, Domestic Violence and Incest Resource Centre Fred Kent, Court Network	9 May 2006
Indigenous Bail Forum	Ray Ahmat, Chair, Hume Regional Aboriginal Justice Advisory Committee Joanne Atkinson, Hume Regional Aboriginal Justice Advisory Committee Michael Bell, Barwon South West Regional Aboriginal Justice Advisory Committee Michael Bourne, Court Services, Department of Justice LeeAnne Carter, Aboriginal Liaison Unit, Melbourne Magistrates' Court Raylene Fennell, Loddon Mallee Regional Aboriginal Justice Advisory Committee Antoinette Gentile, Indigenous Issues Unit, Department of Justice William Glenbar, K Milward Consulting Services Rox Jackson, Barwon South West Regional Aboriginal Justice Advisory Committee Greta Jubb, Victorian Aboriginal Legal Service Ben Mante, Indigenous Issues Unit, Department of Justice Daphne Milward, K Milward Consulting Services Karen Milward, K Milward Consulting Services Peter Rotumah, Metro South East Regional Aboriginal Justice Advisory Committee Rosie Smith, Koori Court Unit, Department of Justice Matthew Stewart, Northern/Western Region, DHS Annette Vickery, Koori Court Unit, Department of Justice	4 May 2006

Glossary

Bail justices are volunteers who make bail decisions at night and on weekends when courts are not open.

Chroming refers to the practice of inhaling paint fumes.

Cognitive impairment includes, but is not limited to, impairment due to intellectual disability, mental illness, dementia and acquired brain injury.

Community-based dispositions include community-based orders, intensive corrections orders, combined custody and treatment orders and parole.

A **corroborator** is a police officer who assists the informant, who is the main coordinating officer of the investigation. Whenever an accused is arrested an informant and corroborator are assigned to the case.

Counsel is the term used to describe the lawyer who advocates for an accused in court.

Defendant means a person who is charged with an offence.

Emerging communities are those groups of new migrants who do not have a history of immigration to Australia.

The **first mention date** is the date the accused first appears before the court, usually the Magistrates' or Children's Court.

In chambers means in the judge or magistrate's office. Some decisions can be made in chambers rather than in open court.

Inherent jurisdiction in this case refers to the Supreme Court's ability to hear any matter.

Interlocutory applications are procedural matters decided during the course of a case. They are not determinative of the final outcome of the case.

Intervention orders restrain the behaviour of a person in some way for a set or indefinite period. Breaching an intervention order is a criminal offence.

Leave to appeal is the permission a court gives to a party to appeal a court decision. Parties have a right to appeal some decisions. For others, they must apply for leave.

A **police informant** is the officer in charge of the investigation of the accused.

A **schedule** is located at the back of an Act of Parliament.

Substantive provisions are sections of an Act that create, define and regulate people's rights or liabilities.

To **show cause** means to provide good reasons.

A **surety** is a person or people who undertake to ensure an accused will appear in court and abide by their other bail conditions. The surety puts up security, such as money or title to a residential property, which can be taken by the court if the accused fails to appear.

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