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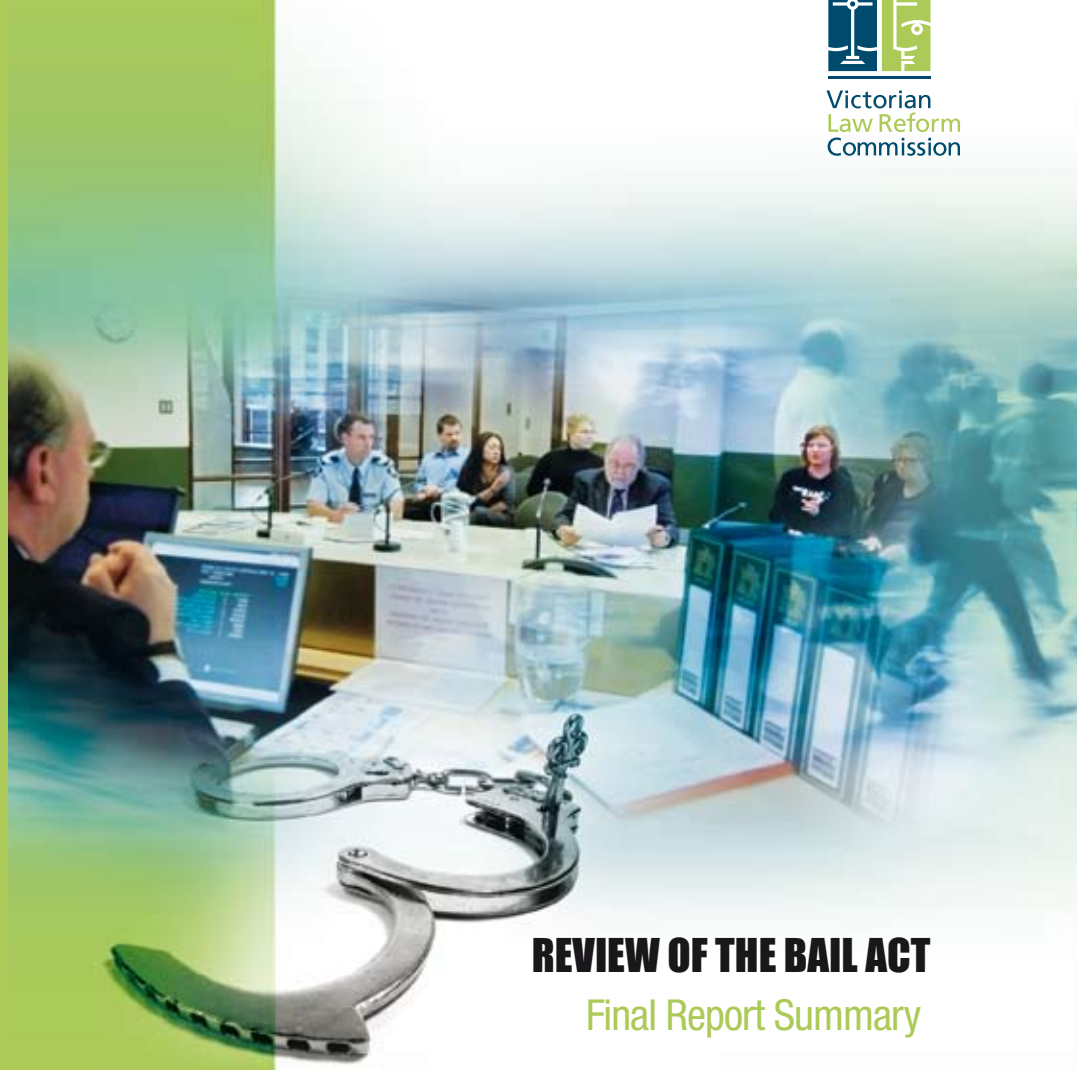

REVIEW OF THE BAIL ACT

Final Report Summary

This is a brief summary of the Victorian Law Reform Commission's *Review of the Bail Act: Final Report.*

The Victorian Attorney-General asked us to review the Act to ensure it functions simply, clearly and fairly. In particular, that it protects the presumption of innocence, protects the public and victims of crime, and quickly resolves detention issues.

The current Act is difficult to read because of its language and structure. We believe there should be a new Act written in plain English. Our 157 recommendations should make a new Act easier to use and understand.

Plain English avoids long sentences, complexity and jargon.

A new Act should make it clear that bail should be granted unless the accused poses an unacceptable risk of failing to appear in court or re-offending.

We have sent the report to the Attorney-General. Now the report has been released, it is up to the government to respond to the recommendations by proposing legislation to change the law.

We have summarised the report's main issues in this brochure, but you will need to read the full report for all of the recommendations and explanations.

Copies of the *Review of the Bail Act: Final Report* are available from the website <www.lawreform.vic.gov.au> or you can request a hard copy by email law.reform@lawreform.vic.gov.au or phone 03 8619 8619.

Our Process

The Victorian Law Reform Commission was established to look at ways to improve the state's laws. We receive the terms of reference for our projects from the Attorney-General but otherwise operate independently of government.
Eight people sit on the commission, including judges, academics and lawyers.

The commission received the terms of reference for the project (November 2004).

Commission staff began researching the issues.

Commission staff travelled across the state to talk to users of the bail system (April–July 2005).

A Consultation Paper was published (November 2005) and attracted 49 submissions.

Roundtable discussions were held (March–May 2006) on the topics of:
the tests for bail; children and young people; victims and bail; after-hours bail decisions; and Indigenous Australians and bail.

More consultations were held throughout 2006 into 2007.

The commission developed recommendations for the final report, which was given to the Attorney-General in August 2007.

The Attorney-General tabled the report in parliament.

Summary

When people are accused of committing a crime, police can:

- charge them and keep them in custody
- charge them and release them on bail
- give them a summons to appear in court on a particular day.

When people are granted bail they sign a form promising to go to court and follow conditions as part of the bail agreement. If police think there is an unacceptable risk people will commit crimes or not go to court, they can remand them in custody. People can then apply to a court to be granted bail.

Bail has a long history in our criminal law. The law says that a person accused of a crime is innocent until proven guilty. Bail law strikes a balance between the right of people to be free until proven guilty with the protection of the community.

Because of the importance of the principle "innocent until proven guilty", our law presumes bail should be granted. This means prosecutors have to prove accused people are an "unacceptable risk" rather than accused people having to prove they should remain free.

A summons is a notice to go to court on a particular date.

When accused people are put in prison until their charge is dealt with by the court, it is called being remanded.

Prosecutors present the case in court against someone accused of a crime. They can be lawyers for the Victorian or Commonwealth Public Prosecutions offices or police prosecutors.

REWRITING THE BAIL ACT

The one thing that everyone involved in this project agreed with was the need to rewrite the 30-year-old Bail Act.

People who are affected by a law and who are applying it should be able to understand it.

The Bail Act needs to be understood by people who apply for bail, sureties for the bail applicant, police officers, bail justices and magistrates.

The term surety is an example of how the Act can be confusing. In the Act surety refers to the person or people who agree to put up money or assets as a guarantee the accused person will go to court, but it also generally used within the justice system to refer to the value of assets that are put up or the condition itself.

Simplifying the language and structure of the Act will make it easier to use. It could also improve the way bail operates because decision makers, accused people and sureties will better understand what is expected of them.

We recommend the current Bail Act be replaced with a new Act written in plain English with a simpler structure.

We also recommend simplifying the bail forms so people better understand the bail conditions or surety requirements they agree to.

Bail justices are trained volunteers who decide whether to grant bail when a court is not open.

Summary

BAIL DECISIONS

Police officers, magistrates, judges, or bail justices can make bail decisions.

Police make most bail decisions—more than 90%. If the police decide to remand an accused person their decision has to be reviewed by a bail justice or court.

The Bail Act uses the term "court" to refer to police, bail justices, magistrates, judges and court registrars. The new Bail Act should refer to specific decision makers so there is no confusion about their powers.

Only judges can decide bail for murder charges but magistrates, bail justices and police can decide bail for other serious offences which carry the same punishment as murder. We think all decision makers should be able to decide bail for all offences, but that courts should continue to review police and bail justices' remand decisions.

BAIL TESTS

When making the bail decision, police, bail justices, magistrates and judges have to apply the "unacceptable risk test".

This means they have to decide whether there is a risk the person will not go to court, or while on bail will commit crimes, threaten or hurt other people, or interfere with witnesses or the court case. They must also think about the crime and how serious it is, the accused person's background and criminal history, whether the accused has complied with bail before, protection of the victims and the strength of the evidence against the accused.

In Victoria accused people must also pass another test if they are charged with some crimes. These are called "reverse onus" tests because accused people have to convince the court why they should get bail rather than the prosecutors having to convince the court why they should not get bail.

There are no clear rules about why reverse onuses apply to some offences and not others. For instance, a reverse onus applies to murder and aggravated burglary but not rape and attempted murder.

We think these different tests complicate bail decisions. It would be easier for decision makers to concentrate on the main issue—whether the accused is an unacceptable risk. We were told by many decision makers that this is the most important test and the same arguments used in the reverse onus tests are used for unacceptable risk.

POLICE AND BAIL DECISIONS

Police make the important decision of whether to charge someone or issue a summons. If they charge someone they then have to decide whether to bail or remand them. About half of all accused people are charged and half receive a summons.

There are no rules for police to follow when deciding whether to charge someone or issue a summons. The police could charge someone with shoplifting but then issue a summons to someone accused of rape. We think the police should develop a policy to guide officers in this decision.

When a court is open the Bail Act says police have to take accused people there to apply for bail. We think it is a waste of police time to go to court when they would be trusted to make the same decision if the court was closed. In practice, police grant bail if they think it is appropriate, even if the court is open. We recommend police be allowed to grant bail when courts are open. They must still take accused people to court if they deny bail.

Police often bail people who are already on bail for other charges. It would be better if they referred such people to services to get help with problems that may be leading to offending, such as drug addiction. We recommend police be required to check if accused people are already on bail if they are charging them with another crime. If accused people are already on bail, police should take them to court for the bail application.

Part of the reason people already on bail are bailed again is that police databases are not always updated quickly. We make recommendations to improve Victoria Police's record keeping systems, including warrants records.

We are concerned that some police officers grant bail with conditions that set an accused person up to fail, such as requiring an alcoholic not to drink. The new Bail Act should clearly state when and why conditions can be used and magistrates/judges should review all bail conditions when they first see accused people in court.

Only senior police officers should make bail decisions.

Summary

COURTS AND BAIL DECISIONS

Courts make roughly 5% of all bail decisions, but also make decisions about the law that other bail decision makers follow.

Bail decision makers only have to provide written reasons for refusing or granting bail for a few types of bail cases. We think they should have to do it for all bail hearings and the accused and prosecution should receive a copy.

Many accused people who want to apply for bail are told not to use a lawyer because if they are refused bail they have to show "new facts and circumstances" to apply again. If they didn't have a lawyer they can apply again without restrictions. If more people used a lawyer on their first bail application they might be granted bail sooner. We recommend that people who apply for bail within the first two days of arrest should be able to apply for bail again without showing new facts and circumstances, even if they had a lawyer the first time.

The sections in the Act about appeals and bail variations are confusing so we have made recommendations to improve the wording and change some of the processes.

If accused people want to change their bail conditions they have to go to court. We think this is time consuming if it is a minor change and both sides agree to it. We recommend that when accused people want to change a minor bail condition and the police agree, then a magistrate or judge can approve this without having a court hearing.

BAIL CONDITIONS

When people are granted bail they often have to follow certain "conditions". These conditions are imposed to help ensure accused people turn up in court and do not commit crimes.

One condition that everyone has to follow is that they go to court for their hearing. Other conditions can include having to sign in at a police station and agreeing not to contact certain people or go to certain places.

Some conditions punish accused people before a court finds them guilty. We believe the Bail Act should be clear about what bail conditions are for: to ensure the accused goes to court; to stop the accused committing crimes; to protect the public; and protect witnesses and the justice process.

Conditions which support people to get treatment for problems such as drug addiction or anger management, or help homeless people find housing have been successful in reducing breaches of bail. Support services for people on bail should be well funded and police should refer accused people to them more often.

BAIL JUSTICES AND BAIL DECISIONS

Victoria is the only state that has bail justices, although other states have systems for after-hours applications.

The bail justice system has been the subject of many complaints, which is why the commission prefers an after-hours court system. However, because of problems with video links and staffing costs, we think attempts should first be made to improve the current system.

We recommend the Department of Justice take control of the education and administrative organisation of bail justices, including a central call-out system. A central system will mean police cannot favour some bail justices over others.

Bail justices' training needs to be improved and a code of conduct introduced. Bail justices should have refresher training in bail law every three years when they apply for re-appointment.

Bail justices should be able to hear all bail applications but they should not have the power to remand someone. Instead, they should be able to authorise the continued police detention of a person until a court opens.

Bail justices are volunteers who receive no money for their time or expenses. We recommend the Department of Justice re-imburse active bail justices and provide re-accreditation training.

Victoria police should provide suitable places for bail justice hearings in police stations.

VICTIMS OF CRIME

Victims of crime are not routinely told what has happened in a bail hearing. Some victims, such as big department stores, do not want to be told what has happened, but people who are victims of violent crimes or know the acccused usually do want to know.

We believe Victoria Police, the Office of Public Prosecutions and the Victims Support Agency should develop a process so victims of "crimes against the person" are told as soon as possible about the result of a bail hearing.

It is also important that victims be told of any bail conditions which are designed to protect them so they can report accused people if they breach the condition.

The current Act says decision makers should consider the victims' attitudes to bail, but decision makers told us what is actually important is the victims' safety and welfare. The new Bail Act should include victims' safety and welfare in the decision about whether an accused person is an unacceptable risk.

Summary

BAIL GUARANTORS

In the past people could only be bailed if money was put up for their release. Jails released accused people into the hands of bail guarantors who lost their money if the accused people did not go to court. Over the years the use of bail guarantors has declined and now they tend to be used mainly for serious offences such as murder or drug trafficking.

Many people are familiar with the idea of providing money to ensure someone gets bail. The Bail Act uses the term surety to describe the people who put up money or assets to guarantee accused people will follow their bail conditions. We think a more understandable term to use would be 'bail guarantor', and 'guaranteed amount' to describe the amount of money or assets the people put up.

Bail guarantors have always had a right to 'apprehend' the accused but we believe the development of a modern police force means this is no longer appropriate.

Many bail guarantors are relatives or partners of the accused person. We have recommended measures in the new Act to check a guarantor's suitability and ability to pay the guaranteed amount if the accused does not turn up in court.

We have also recommended that decision makers set guaranteed amounts according to bail guarantors' ability to pay. They should not discriminate against accused people who do not have wealthy relatives or friends who can guarantee large sums of money.

Some people may not understand what is required of them when they become bail guarantors so the commission has recommended processes to ensure this is explained to them in a language they can understand.

We were asked to consider the jail penalty for not paying the guaranteed amount when an accused person does not turn up in court. Victoria is the only state other than Queensland to have a jail penalty, and the commission thinks the current two year jail term is adequate.

MARGINALISED GROUPS

Although bail law appears to apply equally to everyone, it doesn't operate that way in practice. Indigenous Australians, immigrants, children, young people, people with mental illnesses and women are all disadvantaged by the operation of the current bail law.

About one in four of all bail orders are for charges of public drunkenness. We agree with past reports that have recommended we deal with public drunkenness through the use of "sobering up centres" rather than locking people up.

We also need more emergency housing so people cannot be refused bail just because they do not have somewhere to live.

Indigenous Australians face specific disadvantages in our justice system. A long history of bad experiences with police, jails and courts was highlighted in the Royal Commission into Deaths in Custody. We recommend bail decision makers consider the needs of the accused as a member of the Indigenous community. It is also important that support services are offered to Indigenous Australians that acknowledge and respect their culture.

Everyone involved in the criminal justice system—judges, magistrates, lawyers, court staff and police—should receive training in the best way to deal with Indigenous Australians, new migrants and people with mental illness or brain injury.

Children and young people should also be specifically recognised in our Bail Act, which is currently not the case. Research has shown that the younger people are when they first go to jail, the more likely they are to return to jail. Police should develop a policy to issue a caution or summons to children rather than arrest them, unless there is a good reason to arrest them.

There should be a court-based support program for children on bail to help them avoid committing crimes and treat problems which might be causing their behaviour.

Courts should be able to remand a young person (aged 18–20) to a Youth Justice Centre or Youth Unit in a prison if they think it would be more suitable than adult jail.

To better protect the children of accused people, police should be required to check whether someone they arrest has children and if so ensure care is arranged for them.