# Bail Review

## First advice to the Victorian Government

**The Hon. Paul Coghlan QC**

3 April 2017

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# Executive Summary

## Overview

The provisions relating to bail in Victoria are already very strict. I do not consider that the *Bail Act 1977* (the *Bail Act*) needs a major overhaul in terms of its theoretical underpinnings. In particular, I consider that there should continue to be a general presumption for bail, subject to the reverse onus and unacceptable risk tests.

However, the *Bail Act* is difficult to follow and apply. In particular, it is often difficult to work out what offences are in the reverse onus categories, and the provisions relating to grant of bail should be clarified.

I also consider that greater emphasis should be placed on assessment of risk. My proposed rewrite of section 4 places the assessment of risk upfront, retains two reverse onus categories and clarifies that both those categories involve a two step process. Additional offences would be added to the 'exceptional circumstances' category. The 'show cause' category would become the 'show good reason' category, with new offences added, such as rape and sexual penetration of a child. The offences to which the reverse onus provisions apply would be set out in schedules for clarity.

I also consider that more emphasis should be placed on offending whilst on bail, including making it more difficult for further bails to be granted.

In relation to who may grant bail, I recommend making it clear that police have power to grant bail in most cases. However, police and bail justices should not have power to grant bail in exceptional circumstances cases.

I note that the decisions of bail justices are largely uncontroversial. They consider bail in a very small number of cases and mostly refuse bail. I recommend that bail justices should be retained subject to further review. In the meantime, police should be able to apply to the duty magistrate for a stay of bail granted by a bail justice.

## Chapter 1 – Introduction

This Chapter sets out the Terms of Reference, information on how the Review was conducted, and the scope and structure of this advice. I note some issues that are likely to be covered in my second advice (such as proposals to remove lower level offenders from the bail/remand system). I make no recommendations in this Chapter.

## Chapter 2 – Bail in Victoria

This Chapter contains general discussion on Victoria's bail laws. I note that they are already arguably the most onerous in Australia and discuss the desirability of ensuring that the right people are on remand. I also examine public perceptions about bail. I make no recommendations in this Chapter.

## Chapter 3 – Purposes of bail

In this Chapter, I recommend inserting a purposes clause and guiding principles in the *Bail Act*. These would assist to inform the community about what the Act aims to achieve, and the main factors that need to be balanced in making bail decisions (such as protection of the community on the one hand, and presumption of innocence on the other).

## Chapter 4 – Tests for granting bail

In this Chapter, I recommend reforming section 4 of the *Bail Act*. I recommend retaining the current general presumption for bail, the two reverse onus categories and the unacceptable risk test (although I propose replacing the 'show cause' wording with 'good reason'). My further recommendations include:

- placing additional offences in each of the reverse onus categories to better address violent offending and reoffending whilst on bail, and
- making it clear that the reverse onus categories involve two stage tests, to address conflicting case law on this issue.

## Chapter 5 – Who grants bail?

In this Chapter, I recommend reforming sections 10, 12 and 13 of the *Bail Act*, to clarify the powers of police, bail justices and courts to grant bail, and to simplify the structure of these provisions. I recommend retaining the bail justice system, pending a further review. However, I recommend a number of reforms relating to bail justices, including allowing police to apply for a stay from a decision of a bail justice to grant bail.

## Chapter 6 – Family violence

In this Chapter, I recommend enacting the draft provisions developed to address Recommendations 79 and 80 of the Royal Commission into Family Violence (except for the proposed new offence in section 30A(1A) of the *Bail Act*, which I discuss in Chapter 7).

## Chapter 7 – Bail conditions

In this Chapter, I recommend redrafting section 5 of the *Bail Act*. In addition to providing clarity regarding the imposition of conditions, I recommend that section 5 be amended to provide that bail conditions continue in effect until bail is continued, varied or revoked, or the matter is finally determined. Given the importance of conditions in promoting victim and community safety, it is important that bail conditions continue operating if the accused fails to appear in accordance with their bail undertaking and/or a warrant has been issued.

# List of recommendations

**Recommendation 1**

That the *Bail Act* include a purposes section and guiding principles to reflect that decisions on whether or not to grant bail are made in the context of broader policy considerations, particularly the balance between community safety and the presumption of innocence.

**Recommendation 2**

That section 4 be replaced by a new provision which clearly sets out the following:

a) that there is a general entitlement to bail unless otherwise provided, and
b) in all cases bail must be refused if the prosecution satisfies the bail decision maker that the accused poses an unacceptable risk, and
c) in addition to satisfying the unacceptable risk test, an accused person charged with a specified offence is placed in one of two reverse onus positions requiring they show exceptional circumstances or good reason why bail should be granted.

**Recommendation 3**

That the unacceptable risk test be amended to provide as follows:

In all cases bail must be refused if the prosecution satisfies the bail decision maker that there is an unacceptable risk that the accused if released on bail would:

a) endanger the safety or welfare of any person; and/or
b) commit an offence; and/or
c) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person; and/or
d) fail to appear in court in answer to bail.

**Recommendation 4**

That the concept of 'show cause' be replaced with 'show good reason'.

**Recommendation 5**

That section 4 provide that, in applying the unacceptable risk, exceptional circumstances and show good reason tests, a bail decision maker must take into account all relevant circumstances including but not limited to the following:

a) the nature and seriousness of the alleged offending, including whether or not it is a serious example of the offence
b) the strength of the prosecution case
c) the accused's criminal history
d) the accused's compliance with any previous grants of bail
e) whether, at the time of the alleged offending, the accused was on bail, on summons, at large, on parole or undergoing a sentencing order
f) the accused's personal circumstances, associations, home environment, and background
g) any special vulnerability of the accused, including by reason of youth, being an Aboriginal person, ill health, cognitive impairment, intellectual disability or mental health
h) the availability of treatment or support services
i) any view or likely view of the alleged victim of the offence to the grant of bail
j) the length of time the accused is likely to spend in custody if bail is refused
k) the likely sentence should the accused be found guilty of the offence charged, and
l) whether the accused has publicly expressed support for a terrorist act, terrorist organisation or the provision of resources to a terrorist organisation.

That section 4 also provide that a bail decision maker must consider whether or not any conditions could be imposed to reduce any risks associated with granting bail.

**Recommendation 6**

That any accused who is charged with an indictable offence which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for another indictable offence must be refused bail unless the accused shows good reason why bail should be granted.

**Recommendation 7**

That any accused who is charged with an offence listed in Schedule 2 which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for an offence listed in Schedule 1 or Schedule 2 must be refused bail unless the accused shows exceptional circumstances why bail should be granted.

**Recommendation 8**

The offences which place an accused person in an exceptional circumstances or show good reason test be listed in Schedules 1 and 2 of the *Bail Act*.

**Recommendation 9**

That the following offences be added to Schedule 1, requiring an accused to show exceptional circumstances why bail should be granted:

- Aggravated home invasion
- Aggravated carjacking
- Additional drug offences under the Criminal Code (Cth)
- Conspiracy to commit, attempt to commit or incitement to commit an offence listed in Schedule 1.

**Recommendation 10**

That the following offences be added to Schedule 2, requiring an accused to show good reason why bail should be granted:

- Manslaughter
- Child homicide
- Causing serious injury intentionally in circumstances of gross violence
- Causing serious injury recklessly in circumstances of gross violence
- Causing serious injury intentionally
- Threats to kill
- Rape
- Rape by compelling sexual penetration
- Assault with intent to commit a sexual assault
- Incest - in circumstances other than where both people are aged 18 or older and each consented (as defined in section 36 of the *Crimes Act 1958*) to engage in the sexual act
- Sexual penetration of a child under the age of 16 - in circumstances other than where at the time of the alleged offence the child was aged 12 years or older and the accused was not more than 2 years older than the child
- Persistent sexual abuse of a child under the age of 16
- Abduction or detention
- Abduction of a child under 16
- Kidnapping
- Armed robbery
- Culpable driving causing death
- Dangerous driving causing death or serious injury
- Dangerous or negligent driving while pursued by police
- Additional drug offences under the Criminal Code (Cth)
- Persistent contravention of a family violence intervention order.

**Recommendation 11**

That sections 4(2)(d)(iii) and 14 be retained.

That the *Bail Act* contain a new provision permitting a bail decision maker to defer making a bail decision for a limited period of time where an accused person is unable to participate in the bail hearing by reason of intoxication.

**Recommendation 12**

That the *Bail Act* be amended to:

a) resolve the ambiguity that presently exists between section 10 of the *Bail Act* and the operation of section 464A of the *Crimes Act*
b) clarify the power of police to grant bail, and
c) clarify the power of bail justices to grant or refuse bail.

**Recommendation 13**

That if Recommendation 12 is adopted, a note be added to section 464A of the *Crimes Act* providing that section 10 of the *Bail Act* is to operate upon the expiration of the reasonable time referred to in subsection (1).

**Recommendation 14**

That only a magistrate or judge may grant bail to an accused in the exceptional circumstances category (subject to the current restrictions relating to murder and treason).

**Recommendation 15**

That any accused who is already on two undertakings of bail with respect to indictable offences should not be able to be granted bail by a police officer or bail justice in relation to a further indictable offence, but must be brought before a court for the question of bail or remand to be determined.

**Recommendation 16**

That implementation of Recommendation 15 be deferred pending reforms relating to after-hours remand courts and alternative methods of dealing with lower level offenders (which will be discussed in my second advice).

**Recommendation 17**

That section 12 of the *Bail Act* be amended to clarify and simplify the powers of a court to grant or refuse bail.

**Recommendation 18**

That a further review of the role of bail justices be conducted. Pending that review, the bail justice system should be retained.

**Recommendation 19**

That bail justice hearings be recorded and the Honorary Justice Office examine the method of recording, and retention of recordings.

**Recommendation 20**

That the *Bail Act* and the Bail Regulations 2012 be amended to allow police to apply for an immediate stay from a decision of a bail justice to grant bail.

**Recommendation 21**

That section 13 of the *Bail Act* be amended to provide that bail may only be granted to a person charged with treason or murder by –

a) in the case of a person charged with treason – a judge of the Supreme Court

b) in the case of a person charged with murder - a judge of the Supreme Court or the magistrate who commits the person to trial for murder.

**Recommendation 22**

That the substance of clauses 12, 38, 39, 44 -47, 49A and 50 of draft 9 of the Family Violence Protection Amendment Bill 2017 (Vic.) be enacted (subject to further consultation with stakeholders).

**Recommendation 23**

That amendments be made to:

a) section 5 of the *Bail Act* to provide that any conduct conditions continue in effect until bail is continued, varied or revoked, or the matter is finally determined; and

b) the Bail Regulations 2012 to ensure that accused entering undertakings of bail are made aware of the continuing nature of the conditions.

**Recommendation 24**

That section 5 of the *Bail Act* be redrafted to refer specifically to bail undertakings and to improve its structure and wording.

# Chapter 1 – Introduction

## Terms of Reference

Following the events of 20 January 2017, I was asked to advise the Government on how Victoria's bail system should be reformed to best manage risk and to maximise community safety. I have been asked to specifically consider the following:

1. How the necessary balance between protection of the community and the presumption of innocence should be best reflected in section 4 of the *Bail Act 1977* (the *Bail Act*);

2. The appropriateness of the current tests of exceptional circumstances, show cause and unacceptable risk, and an examination of the offences to which those tests apply;

3. Whether additional offences should be added to the list of offences which place an accused person into the show cause or exceptional circumstances categories;

4. The way in which other relevant circumstances (for example, a history of prior offending or offences committed while on bail), are considered in assessing whether an accused person should be granted bail;

5. Whether information available for consideration by decision-makers in the bail system is sufficient to properly consider and assess the risks that are posed by accused persons, including those with complex risks, needs and case histories;

6. The conduct of bail applications out of hours including the role of Bail Justices; and

7. Whether, in relation to out of hours applications, different rules are required for different types of offences.

The Government requested that I provide advice on practical legislative reform by 3 April 2017, and on any other relevant matters by 1 May 2017.

## Approach to this Review

1.1 I formally commenced my Review on 25 January 2017, along with Michèle Briggs from the Department of Justice and Regulation (the Department). By mid-February, my team had grown to include John Kelly SC, Karen Argiropoulos and Sarah Bruhn from the Victorian Bar, and Emma Hunt and Lee Wallis from the Department.

1.2 In addition to research and analysis of the legislation, case law, and materials from Victoria and other relevant jurisdictions, my team and I had over 30 meetings with groups including:

- the Supreme, County, Children's and Magistrates' Courts
- bail justices, including representatives from Honorary Justice organisations
- the legal profession, including the Law Institute of Victoria, Victoria Legal Aid, the Criminal Bar Association/Victorian Bar, the Office of Public Prosecutions and Director of Public Prosecutions (Victoria), the Commonwealth Director of Public Prosecutions and the Victorian Aboriginal Legal Service
- Victoria Police and the Victoria Police Association
- the Attorney-General and the Minister for Police, and
- victims' advocates, including the Victims of Crime Commissioner and representatives from the Victims of Crime Consultative Committee and the Victim Survivor Advisory Council.

1.3 I also invited public submissions on the Review. In addition to contacting a number of interested parties directly, members of the public were invited to

upload submissions or answer one or more of the questions via the engage.vic.gov.au website. Given the short time frame for my Review, I initially requested submissions by 28 February 2017, but I later extended this time frame to 10 March 2017 to give more people the chance to express their views.

1.4 More than 110 submissions were received (see Appendix 1). As is to be expected on an issue such as bail, a wide range of views was expressed in submissions. I thank each group and individual who took the time to prepare a submission. Many of the submissions were very helpful to me in considering the issues and developing my recommendations.

1.5 Some submissions, such as the submission from Jesuit Social Services, also raised general issues about the criminal justice system. Whilst helpful in providing context, many of these issues are not directly relevant to my Review but may merit consideration by government at a later date. In addition, a large number of submissions raised practical and operational issues relating to the bail justice system, which the Department may wish to consider if bail justices are retained. I deal with some aspects of these submissions in my second advice.

1.6 Another significant aspect of my Review involved the collection of information and statistics. I thank the staff from the Courts, government departments, the Sentencing Advisory Council, the Crime Statistics Agency and Victoria Police, for providing us with information, data and statistics relevant to this Review within short time frames. Particular thanks to the Magistrates' Court and Victoria Police for their generous assistance.

## Other Reviews

1.7 This is only one aspect of the Government response to the events of 20 January 2017. I have, for example, met with the Complex Needs Review, which is reviewing the effectiveness of legislation and service frameworks in managing the risks of violence by persons with multiple and complex needs, both within and outside the criminal justice system. Other related work includes the Review of Youth Support, Youth Diversion and Youth Justice Services, which is due to

report mid-2017. I discuss the Royal Commission into Family Violence later in this advice.

## Scope and structure of this advice

1.8 This advice sets out an overview of the bail system in Victoria, including its main problems, and statistics about bail applications and accused people on remand.

1.9 This advice then discusses the two issues that appear to be central to current community concerns in respect of bail:

- when an accused may be granted bail (i.e. section 4 of the *Bail Act*), and
- who may grant bail (including bail justices).

1.10 These issues are relevant to questions 1 – 4, 6 and 7 of the Terms of Reference.

1.11 Finally, the advice discusses family violence issues and bail conditions.

1.12 This advice will need to be read in conjunction with my second advice, which is due on 1 May 2017. The second advice will discuss further issues relevant to questions 4 – 7 of the Terms of Reference as well as other relevant matters. In addition to practical and systemic issues relevant to the bail system in Victoria (such as what information is given to bail decision makers), the second advice is likely to include further recommendations for legislative reform (for example, a proposal to remove summary and minor indictable offences from the bail system, changes to appeal provisions and discussion on the proposed rewrite of the *Bail Act*).

1.13 This advice is structured as follows:

- Victoria's bail system (Chapter 2)
- Purpose of the Bail Act (Chapter 3)
- Tests for granting bail (Chapter 4)

- Who grants bail? (Chapter 5)
- Family violence (Chapter 6)
- Bail conditions (Chapter 7)

# Chapter 2 – Victoria's bail system

## Introduction

2.1 Bail is a long established practice in the criminal law. It allows, in appropriate cases, accused people to remain in the community until their charges can be determined in court.

2.2 Under the *Bail Act*, and the common law which preceded it, the primary purpose of bail is to ensure an accused person's attendance at court.[1] This is reflected in s 5(1) of the Act, which requires a court releasing an accused person on bail to impose a condition requiring the attendance of the accused at court at a specified time and date.

2.3 Other important purposes of bail are directed towards managing risks that might arise while an accused person is on bail and ensuring the safety of the community. Accordingly, the *Bail Act* requires bail decision makers to consider whether there is an unacceptable risk of the accused committing further offences whilst on bail, endangering the safety or welfare of members of the public, interfering with witnesses or otherwise obstructing the course of justice.[2]

## Context of this Review

2.4 Hundreds of bail decisions are made every day across Victoria – by police, bail justices, magistrates and judges. As a result of these decisions, tens of thousands of Victorians are on bail in Victoria every day. The overwhelming number of these decisions do not attract controversy and a large majority of accused persons on bail do not breach their bail.

2.5 However, in recent times, there has been significant publicity about armed robberies, aggravated burglaries and carjackings. It is the public perception that many of the alleged offenders have been on bail. That situation has probably

[1] *Woods v DPP* [2014] VSCA 1 [30] (Bell J); *Cozzi* (2005) 12 VR 11 [33]; *R v Light* [1954] VLR 152, 155-7.
[2] *Bail Act 1977*, s 4(2)(d).

led to some undermining of the confidence in the criminal justice system. It was in that context that the events of 20 January 2017 occurred.

2.6 The events of 20 January 2017 appear to have further undermined public confidence in the criminal justice system. That is because the accused, Mr Gargasoulas, was on bail at the time he is alleged to have committed the horrific offences with which he is charged. He had several warrants executed and had been released on bail earlier on 14 January 2017 by a bail justice. If bail had been refused then, these offences might not have occurred. I say 'might' because the question of bail would have been considered by a magistrate as early as 15 January 2017.

2.7 The fact that Mr Gargasoulas was on bail (and other publicised cases of people offending whilst on bail) has caused significant community concern about whether the bail system is working properly. These concerns prompted the Government to commission this advice on aspects of Victoria's bail system and how it should be reformed to best manage risk and to maximise community safety.

## How does our bail system compare to other jurisdictions?

2.8 Victoria's bail system has a general entitlement to bail, subject to the unacceptable risk test and two reverse onus categories (the exceptional circumstances and show cause categories).

2.9 The general entitlement to bail is consistent with the bail laws from other Australian jurisdictions and relevant overseas jurisdictions (particularly Canada, the United Kingdom and New Zealand). All those regimes have a general entitlement to bail subject to exclusions for particular offences or categories of offences.

2.10 The reverse onus provisions in other jurisdictions tend to be broadly similar to the Victorian show cause test (although language differs, as do the offences to which the reverse onus provisions apply). Most Australian jurisdictions only have one reverse onus category. NSW and Western Australia each have two

reverse onus categories, but both jurisdictions limit their exceptional circumstances category to a very small number of offences. NSW's 'exceptional circumstances' category applies only to terrorism offences, while Western Australia's 'exceptional reasons' category is limited to murder, serious offences committed while on bail or early release for another serious offence, and while awaiting the disposal of appeal proceedings.[3]

2.11 Victoria's two reverse onus categories, and the breadth of offences to which they apply, arguably make Victoria's bail laws the most onerous in Australia. I have kept this in mind when developing my recommendations.

## Are the right people on remand?

2.12 In general, I support the theoretical underpinning of the *Bail Act* and consider that it mostly strikes an appropriate balance between protection of the community on the one hand, and the presumption of innocence on the other. However, I consider that my recommendations (in both this advice and the second advice) will address specific community concerns relating to particular types of offending (such as people who reoffend whilst on bail). Public perceptions are discussed further below.

2.13 Ultimately, the question is how to ensure that the right people are on remand. It is untenable from a practical viewpoint, and undesirable from a principled viewpoint, to simply remand more and more people, although mere numbers cannot govern who should be on remand.

2.14 The recommendations in this advice, particularly in relation to section 4 of the Act, will probably result in more people charged with violent offences, or with relevant offending whilst on bail, being remanded in custody. I consider this an appropriate outcome, given how such offending adversely impacts community safety, and the perception of community safety.

[3] Section 22A *Bail Act 2013* (NSW) and s 3A, 3C and 4A *Bail Act 1982* (WA). Canada and New Zealand also have two reverse onus categories. See also the discussion in Chapter 4.

2.15 However, it is also incumbent on me to consider ways of removing those who should not be on remand from the remand system. Accordingly, my second advice will include recommendations that aim to get people at the other end of the offending scale (i.e. those accused of minor or non-violent offending) out of the bail/remand system.

## Public confidence and perceptions

2.16 As I note above, a significant problem with the bail system at present is the apparent lack of public confidence in the system. A widespread public perception seems to be that too many people are being granted bail. A related perception seems to be that bail decision makers (particularly the courts) are not taking the issue of bail sufficiently seriously.

2.17 These perceptions are not necessarily reflected by the data. The number of people received into adult prison on remand in 2015-16 was 70% higher than in 2010-11 (4,034 additional remand receptions).[4] As of 23 March 2017, 2,328 adults were on remand in correctional facilities in Victoria, with a further 297 in police cells, almost all of whom are on remand.[5] Traditionally, approximately 18-20% of adults in correctional facilities have been on remand. However, in the three years since 2014, this has increased to 33% (for men) and 44% (for women).[6]

2.18 The data also shows that bail is refused more often now than five years ago. For example, from 2015/16, Magistrates' Court data shows that 33% of bail applications were refused, compared to 2011/12, when 21% of applications were refused. Bail justices are also remanding a slightly higher percentage of applications before them (85.5% in 2016 compared to 83.7% in 2015).[7]

[4] Corrections Victoria, Data provided to the Bail Review, 15 February 2017.
[5] Corrections Victoria, Data snapshot provided to the Bail Review, 23 March 2017, shows 256 unsentenced people and 41 sentenced people in police cells.
[6] Corrections Victoria, above n.4.
[7] Department of Justice and Regulation (DJR), Honorary Justice Office, Data provided to the Bail Review, 15 February 2017.

2.19 The data in relation to young people follows similar trends. Department of Health and Human Services (DHHS) data shows that approximately half the young people in youth detention are on remand (99 out of 200).[8]

2.20 These higher remand numbers across the whole justice system are likely to have a number of causes, including increased police numbers and increased risk aversion by police and other decision makers as a result of high profile cases such as the murders of Jill Meagher and Luke Batty. There has been a perceptible increase in remand numbers since the Gargasoulas incident which is revealed in the Corrections Victoria data over the last month.[9]

2.21 Whatever the reasons, the increase in remand numbers demonstrates that, contrary to public perceptions, the decision of whether or not to grant bail is taken seriously.

2.22 Related perceptions are that people are being granted bail in inappropriate cases, and that many people are going on to commit serious offences whilst on bail. It is difficult to determine absolutely from available data how many people are reoffending while on bail. I have been provided with data from the Crime Statistics Agency (extracted through LEAP) which shows the number of charges laid in Victoria for offences against the *Bail Act* (i.e. failure to appear, commit indictable offence on bail and breach a condition of bail) has increased overall in 2012 from 4,593 to 2016 to 14,214, with most of the increase beginning in 2014, attributable to new offences of breaching bail which were introduced into the Act in 2013.

2.23 There is a lack of available data to establish what type of offending is most prevalent among those on bail. The news media often concentrate on the most serious and dramatic cases. Although Adrian Bayley and Sean Price were both on bail at the time of their most serious offending, the issue of parole in Bayley's

[8] DHHS, Data provided to the Bail Review, 23 March 2017.
[9] Corrections Victoria, Daily Prisoner and Police Cells Report Data provided 15 February 2017 and 23 March 2017. The data shows record numbers are being remanded, with a significant increase in the last month.

case and supervision orders in Price's case were much more important than bail.

2.24 In recent times, there has been a significant amount of publicity about offenders, particularly young offenders, reoffending whilst on bail for serious offending. I have addressed such reoffending in this advice by addressing the question of multiple bails. I provide more detailed statistics in Chapter 5.

2.25 There has also been media attention focusing on delay in the criminal justice system affecting the bail system. Related to delay is the problem of system capacity. Remand numbers have increased significantly (see above), as have the numbers of sentenced prisoners. As of 23 March 2017, 6,990 people were imprisoned in Victoria, which is the highest number to date.[10] The bail system cannot be considered in isolation. I discuss aspects of delay and capacity later in this advice, and will further discuss the issue in my second advice.

## Problems with the Bail Act

2.26 The Act has been amended many times since its enactment in 1977. This has resulted in a complex, cumbersome Act, which has significant internal inconsistencies and is difficult to read, understand and apply. As has previously been noted, for example by the Victorian Law Reform Commission (VLRC) in 2007, the *Bail Act* needs to be rewritten.[11]

2.27 It seems that those using the *Bail Act* make it work in practice by a pragmatic interpretation of provisions (e.g. the notion of 'practicability' in section 10). While this may be necessary to enable the system to operate, it would clearly be preferable for the *Bail Act* itself to work properly, and for its provisions to be as clear, simple and transparent as possible.

[10] Corrections Victoria, Data provided to the Bail Review, 23 March 2017.
[11] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) p. 26. This was also raised in submissions including those from the Supreme Court, Victoria Legal Aid and the East Gippsland Honorary Justices Inc.

2.28 I propose to discuss the overhaul and rewrite of the Act further in my second advice. Recommendations for reform of specific provisions of the *Bail Act*, particularly sections 4, 5, 10 and 12, are discussed later in this advice.

## Effect of delay and capacity issues on recommendations for reform

2.29 If implemented, a number of my recommendations for reform will further impact on delay and capacity issues in the bail system. I have been mindful of this in developing my recommendations. However, I have tried not to allow these pressures to unduly restrict me from making recommendations that I believe should be made. For example, Recommendations 4, 6 and 10 (to clarify the current show cause test and include more offences in the current show cause category) are likely to result in more accused on remand. Recommendation 15, which would require bail applications in relation to accused on two bail undertakings to be heard by courts (not police or bail justices), would impact agencies including the courts (particularly the Magistrates' Court, with possible flow on to the Supreme Court), Victoria Legal Aid and Victoria Police, and place further pressure on the Melbourne Custody Centre and cells.

2.30 Due to time constraints and the nature of this Review, I have not consulted with interested parties on my recommendations (except for a limited consultation on the proposed new section 4 tests). Some further consultation on my recommendations, particularly in relation to the schedules, would assist to ensure the workability of the proposals and minimise the risks of unintended consequences.

# Chapter 3 - Purpose of the Bail Act

## Background

3.1 The primary purpose of bail laws, at least historically, has been to ensure an accused's attendance at court. This may not be well understood by the general public. In any event, it would appear that in the current climate, the other important purpose of bail laws – to manage risks that might arise while an accused person is on bail and ensure the safety of the community – is taking greater precedence among the broader community.

3.2 The *Bail Act* does not have a purposes clause. As the VLRC noted:

> 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.[12]

## Discussion

3.3 I agree with the VLRC and some submissions made to this Review[13] that a purposes clause would assist to inform the community and remind decision makers of the important legal principles engaged in considerations regarding bail, in particular, the balance to be struck between the presumption of innocence and the protection of the community. For the reasons discussed below, I consider that this could be achieved by both a purposes clause and guiding principles.

3.4 Such clauses would also reflect the human rights of accused persons recognised by the common law and *Victorian Charter of Human Rights and Responsibilities Act 2006* (the *Charter Act*).

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[12] VLRC, *Review of the Bail Act: Final Report* (2007) p. 29.
[13] Submissions to the Bail Review from the Law Institute of Victoria, Victoria Police, Liberty Victoria and Jesuit Social Services.

3.5 The presumption of innocence, prosecutorial onus of proof and right to personal liberty are fundamental common law rights.[14] Each of these are engaged by the provisions of the Act and in decisions about bail.

3.6 The *Charter Act* recognises various human rights relevant to bail, including the right to freedom of movement (section 12), the right to liberty and security (section 21) and certain rights of persons charged with a criminal offence (section 25).

3.7 Under section 12 of the *Charter Act*, every person "has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live".

3.8 Section 21 of the *Charter Act* protects the human right to liberty and security. It provides, for example, that a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law (section 21(3)) and that a person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to appear for trial and at any other stage of the judicial proceedings (section 21(6)). Many of these procedural obligations are reflected in the *Bail Act*.

3.9 Section 25 protects a range of rights applicable to persons charged with a criminal offence. These include:

a) the right to be presumed innocent until proved guilty according to law (section 25(1)).

b) the right to be tried without unreasonable delay (section 25(2)(c)).

c) a child[15] charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation (section 25(3)).

[14] *Woods v DPP* [2014] VSC 1, [3]-[7] and the authorities referred to therein (Bell J).
[15] The *Charter Act* defines a child as a person under the age of 18: s 3.

3.10 Like all rights recognised by the *Charter Act*, the human rights protected by sections 12, 21 and 25 are not absolute. They may justifiably be limited in order to reconcile the competing interests of individual persons with those of the broader community. Section 7(2) prescribes the test to be applied to determine whether any limitation on a human right is incompatible with the right.

3.11 Section 7(2) provides as follows:

> 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 including:
>
> a) the nature of the right;
>
> b) the importance of the purpose of the limitation;
>
> c) the nature and the extent of the limitation;
>
> d) the relationship between the limitation and its purpose; and
>
> e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

3.12 A purposes/principles clause would reflect these justifiable limits by referring to the balance of the rights of the accused with the protection of the community and other legitimate purposes, such as ensuring that witnesses are not interfered with and preserving the integrity of the justice system.

3.13 There are other human rights protected by the *Charter Act* that are relevant to bail, including:

a) the rights of an accused child to be brought to trial as quickly as possible and detained separately from adults (section 23), and

b) the rights of Aboriginal persons to enjoy their distinct cultural rights and not be denied those rights (section 19(2)).

3.14 The current *Bail Act 2013* (NSW) provides an example of a purpose clause in its Preamble, which states that the Parliament of NSW, in enacting this Act, has regard to the need to ensure safety of victims of crime, individuals and the

community, the need to ensure the integrity of the justice system and the common law presumption of innocence and the general right to liberty.

3.15 I recommend a purposes section and guiding principles along the following lines:

Purpose

The purpose of the *Bail Act* is to provide a legislative framework for deciding whether an accused person should be granted bail, with or without conditions, or remanded in custody.

Guiding principles

The Parliament recognises the importance of -

a) maximising the safety of the community and persons affected by crime to the greatest extent possible;
b) having regard to the presumption of innocence and the right to liberty;
c) promoting fairness, transparency and consistency in bail decision making; and
d) promoting public understanding of bail practices and procedures.

3.16 The purposes section is modelled on section 3 of the *Bail Act* (NSW). The guiding principles are modelled on the VLRC recommendations and the *Bail Act* (NSW).[16]

**Recommendation 1**

That the *Bail Act* include a purposes section and guiding principles to reflect that decisions on whether or not to grant bail are made in the context of broader policy considerations, particularly the balance between community safety and the presumption of innocence.

[16] Other Victorian Acts containing 'guiding principles' are the *Jury Directions Act 2015* s 5 and the *Criminal Procedure Act 2009* s 338.

# Chapter 4 – Tests for granting bail

## Current tests for bail

### General presumption in favour of bail

4.1 Section 4(1) contains a general presumption in favour of bail. It provides that 'any person accused of an offence and being held in custody in relation to that offence shall be granted bail'. This is consistent with the presumption of innocence and recognises the significance of a decision to deprive a person of his or her liberty pending trial.

### Limitations on the general presumption

4.2 The presumptive entitlement to bail is subject to the 'unacceptable risk' test and is displaced where an accused person is charged with a specified offence which places the onus upon the accused to satisfy the 'exceptional circumstances' or 'show cause' test.

### Unacceptable risk

4.3 By section 4(2)(d)(i) the Act obliges a bail decision maker to refuse bail if satisfied that there is an unacceptable risk that the accused, if released on bail, would:

a) fail to appear in court in compliance with bail

b) commit an offence whilst on bail,

c) endanger the safety or welfare of members of the public, or

d) interfere with witnesses or otherwise obstruct the course of justice.

4.4 Section 4(3) provides a non-exhaustive list of the criteria the decision maker must consider in assessing whether there is an unacceptable risk. They are:

a) the nature and seriousness of the offence

b) the accused's character, antecedents, associations, home environment and background

c) whether the accused has previously expressed publicly support for a terrorist act or organisation or the provision of resources to a terrorist organisation

d) the history of any previous grants of bail to the accused

e) the strength of the evidence against the accused, and

f) the attitude, if expressed to the court, of the alleged victim to the grant of bail.

4.5 The onus is on the prosecution to persuade the decision maker that an accused person represents an unacceptable risk.[17]

**Exceptional circumstances**

4.6 Section 4(2) provides that persons charged with certain offences must not be granted bail 'unless the court is satisfied that exceptional circumstances exist which justify the grant of bail.'

4.7 The onus is on the accused to prove to the court that exceptional circumstances exist.

4.8 When the exceptional circumstances category was first introduced in 1981 it applied only to murder.[18] It now includes treason, various drug offences involving commercial or large commercial quantities and terrorism offences.[19]

4.9 The Act does not define what is meant by 'exceptional circumstances', nor have the courts sought to define the expression. However, it has been held that there must be 'something unusual or out of the ordinary in the circumstances relied

[17] Doubt has been expressed about whether the prosecution retains this onus in show cause applications if the one step test enunciated in *Re Asmar* [2005] VSC 487 is applied. See the discussion at paragraph 4.39 below.
[18] *Bail (Amendment) Act 1981*, s 3.
[19] Drug offences were first added in 1986 (by the *Bail (Amendment) Act 1981*) and terrorism offences in 2016.

on by the applicant before those circumstances can be characterised as exceptional'. Exceptional circumstances may be constituted by a single circumstance or by a combination of circumstances.[20]

4.10 Factors which have been held by courts to establish exceptional circumstances, usually in combination, include:

a) inordinate delay (i.e. more than the usual delay between arrest and trial)

b) youth or advanced age

c) lack of prior convictions, and

d) ill health of the accused, particularly if reasonable medical care and treatment would be difficult to obtain in custody.[21]

4.11 An accused person charged with murder or treason may only be granted bail by a judge of the Supreme Court or, where the charged offence is murder, by the magistrate who commits the person to stand trial for murder.[22]

**Show cause**

4.12 Section 4(4) provides that persons charged with certain offences shall be refused bail 'unless the applicant shows cause why his detention in custody is not justified.'

4.13 The show cause test applies where an accused is charged with one or more of the following offences:

a) an indictable offence committed while at large awaiting trial for another indictable offence

b) a 'serious offence' (defined by reference to section 3(1) of the *Sentencing Act 1991*)[23] and has, during the preceding 5 years, as an adult been convicted of an offence of failing to answer bail

[20] *Re Scott* [2011] VSC 674 [14].
[21] Hampel et al, *Bail Law in Victoria,* Federation Press (2015) at pp. 12-43 and the authorities referred to therein.
[22] *Bail Act 1977*, s 13(2).

c) stalking or contravening a family violence or personal safety in certain circumstances

d) aggravated burglary, home invasion, aggravated home invasion or aggravated carjacking

e) any indictable offence in the course of which the accused is alleged to have used or threatened to use a firearm, offensive weapon or explosive

f) arson causing death

g) various drug offences involving quantities less than a commercial quantity (including Commonwealth drug offences involving a marketable quantity)

h) an indictable offence committed by a person who is the subject of a supervision or interim supervision order pursuant to the *Serious Sex Offenders (Detention and Supervision) Act 2009*, or

i) an offence under the *Bail Act 1977* (except for contravention of a condition to attend and participate in bail support services and contravention of a conduct condition by a child).

4.14 The Act does not define show cause, nor does it contain a list of criteria that an accused can rely upon to show cause. Like exceptional circumstances, a combination of factors can result in an accused having shown cause.

4.15 Factors which have been held by courts to establish show cause, either alone or (more usually) in combination, include:

a) delay

b) youth or advanced age

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[23] This includes the offences of attempted murder, manslaughter, child homicide, causing serious injury intentionally or recklessly in circumstances of gross violence, causing serious injury intentionally, threats to kill, rape, rape by compelling sexual penetration, assault with intent to commit a sexual offence, incest (except where both accused are aged 18 or over and each consented to the sexual activity), sexual penetration of a child under 16, persistent sexual abuse of a child under 16, abduction or detention, abduction of a child under 16, kidnapping, armed robbery and an offence of conspiracy to commit, incitement to commit or attempting to commit any of these offences.

c) lack of prior convictions

d) family situation and support networks available to the accused if released on bail

e) employment

f) ill health of the accused, particularly if reasonable medical care and treatment would be difficult to obtain in custody

g) availability of drug treatment and/or support services such as Court Integrated Services Program (CISP)

h) a weak prosecution case, and

i) an absence of unacceptable risk.[24]

## Complexity of current tests for bail including reverse onus provisions

4.16 The current tests for bail are complicated and confusing. Section 4 is a complex section both structurally and linguistically. It does not clearly state the various bail tests and the offences to which they apply. In particular, it is difficult to ascertain which offences are captured by the show cause test without reference being made to multiple other statutes.

4.17 The legal profession has expressed support for a single test of unacceptable risk, with no reverse onus provisions for any offence.[25] This was the model recommended by the VLRC in 2007. The main advantage of a single test is simplicity – it makes the law easier for bail decision makers to apply and for victims and the community to understand. The single test also focuses the decision maker's attention on risk, which is the key determinant in all bail applications.

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[24] Hampel et al, *Bail Law in Victoria,* Federation Press (2015) at pp. 12-59 and the authorities referred to therein.

[25] Victoria Legal Aid, Criminal Bar Association, Aboriginal Legal Service, Liberty Victoria, Youth Law. In its initial submission to the Review, the Law Institute of Victoria advocated for the abolition of the show cause test but retention of the exceptional circumstances test. In a more detailed submission received on 31 March 2017, the Law Institute suggested that, if a reverse onus test was to be retained for serious offences, it should be a reverse onus unacceptable risk test.

4.18 Victoria Police also advocated for a single risk based test, with eligibility criteria reflecting the existing unacceptable risk test, but say that the onus should be on the accused in all cases to show why bail should be granted. Victoria Police would therefore favour the abolition of the exceptional circumstances and show cause categories.

4.19 Applying the Victoria Police model, an accused person would only be entitled to bail if they meet certain eligibility criteria addressing the following elements:

a) protection of the victim

b) protection of the community

c) history of bail compliance (including failing to answer bail and offences committed on bail)

d) risk of an accused failing to appear at subsequent hearings

e) risk of an accused committing further offences on bail, and

f) risk of an accused interfering with witnesses or obstructing the course of justice.

4.20 A fundamental difficulty with the Victoria Police model is that, in all cases, it imposes an onus on the accused to demonstrate why bail should be granted. This is inconsistent with the presumption of innocence and the right to liberty, as protected by the common law and the *Charter Act*. Furthermore, all bail regimes in Australia, in New Zealand, the United Kingdom and Canada have a statutory entitlement to bail subject to various exceptions. No other jurisdiction has a presumption against bail as a starting point.

4.21 While there is some attraction in a single unacceptable risk test for bail as supported by the profession and recommended by the VLRC, in my view, retention of the reverse onus provisions for serious offences is more likely to enhance public confidence in the bail system. Removal of these provisions may be seen by the community as weakening the current law by making it easier for

accused persons to be granted bail. Retention of the reverse onus tests is also supported by various victims' advocates.[26]

4.22 I note that in NSW a single unacceptable risk test was in place for a short time, with only terrorism offences being subject to a reverse onus (exceptional circumstances) test. However, the Act was amended in 2013 to reintroduce a reverse onus show cause test for serious offences. The Hatzistergos Review of NSW bail laws found that,

> On balance the show cause test in conjunction with the risk based assessment would provide a useful level of reassurance for the community in relation to serious offenders whilst also providing greater level of consistency. It parallels provisions in similar risk models in Queensland and Victoria.[27]

4.23 An intermediate position could be to have a single reverse onus test, which is the position in most other Australian jurisdictions that have reverse onus provisions.[28] However, properly applied, I consider that retention of the two reverse onus tests is appropriate. Exceptional circumstances is a higher test that is attached to more serious offences than those offences that attract the show cause test. Retention of the exceptional circumstances category will ensure that Victoria's bail laws remain among the most stringent in Australia and the common law world. Western Australia is the only other Australian state that has an exceptional circumstances category for offences other than terrorism, while similarly strict tests form part of the bail laws of the United Kingdom and New Zealand.[29]

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[26] E.g. Victims of Crime Commissioner, Victims of Crime Consultative Committee and Victims Working Group.
[27] Hatzistergos J, *Review of the Bail Act 2013* (NSW) (July 2014) at [220].
[28] Queensland and Western Australia each have a single reverse onus test. In Queensland it is a show cause test, while in Western Australia it is an exceptional circumstances test. NSW has an exceptional circumstances test that only applies to terrorism offences (and certain offences pending appeal following trial or plea). Murder and other serious offences are in a show cause category in NSW.
[29] An exceptional circumstances test is used in the UK. The New Zealand *Bail Act 2000* does not use the language of exceptional circumstances, however, its restrictions on bail for persons charged with murder, treason, espionage and specified offences impose a similarly strict test.

## Recommendations

4.24 I recommend that the current tests for bail be retained but redrafted in clearer terms. There should remain a general entitlement to bail, unless otherwise provided by the statutory tests. Those tests should emphasise the primacy of an analysis of risk in all decisions concerning bail while preserving the two reverse onus categories.

4.25 As explained below, I also recommend some minor changes to the unacceptable risk test, and the re-naming of the show cause test to a test that requires the accused to show 'good reason why bail should be granted'.

4.26 I recommend that section 4 contain a more detailed list of factors relevant to all bail decisions, as detailed below.

4.27 In addition, I recommend that the offences subject to a reverse onus be listed in schedules to the Act to enable simpler identification of these offences. The inclusion of schedules received widespread support during consultations and in various submissions.[30]

4.28 A proposed form of section 4 and schedules are set out at the end of this Chapter.

**Recommendation 2**

That section 4 be replaced by a new provision which clearly sets out the following:

a) that there is a general entitlement to bail unless otherwise provided, and
b) in all cases bail must be refused if the prosecution satisfies the bail decision maker that the accused poses an unacceptable risk, and
c) in addition to satisfying the unacceptable risk test, an accused person charged with a specified offence is placed in one of two reverse onus positions requiring they show exceptional circumstances or good reason why bail should be granted.

[30] E.g. Submissions to the Bail Review from the Office of Public Prosecutions, Law Institute of Victoria, Victims of Crime Commissioner and Submission I. The Commonwealth DPP suggested that the schedules be placed in Regulations rather than the Act to make them easier to amend over time.

## Unacceptable risk test

4.29 The unacceptable risk test currently requires a bail decision maker to consider whether there is an unacceptable risk that the accused, if released on bail, would:

a) fail to appear in court in compliance with bail

b) commit an offence whilst on bail

c) endanger the safety or welfare of members of the public, or

d) interfere with witnesses or otherwise obstruct the course of justice.

4.30 I regard the specified factors in section 4(d)(ii) as being sound, but recommend they be reordered so that primacy is given to considerations concerning further offending and community safety rather than a failure to appear in court. I also recommend that the phrase 'endanger the safety or welfare of members of the public' be changed to 'endanger the safety or welfare of any person'. This would include an alleged victim of the crime and any other person, including members of the public.

**Recommendation 3**

That the unacceptable risk test be amended to provide as follows:

In all cases bail must be refused if the prosecution satisfies the bail decision maker that there is an unacceptable risk that the accused if released on bail would:

(a) endanger the safety or welfare of any person; and/or

(b) commit an offence; and/or

(c) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person; and/or

(d) fail to appear in court in answer to bail.

## Exceptional circumstances

4.31 The phrase 'exceptional circumstances' appears to be reasonably well understood and consistently applied by bail decision makers. It is therefore not necessary, in my view, for there to be any further explanation of this phrase in the Act.

4.32 However, as explained in Chapter 5, I recommend that accused persons who are in an exceptional circumstances category, should only be granted bail by a court, not by police or a bail justice.

## Clarify meaning of 'show cause' by replacing with 'show good reason'

4.33 Unlike the position with regards to exceptional circumstances, concerns have been expressed regarding the ambiguity of the phrase 'show cause'. The meaning of the phrase does not appear to be widely understood, and this may have contributed to a 'watering down' of the concept of show cause. Anecdotally at least, it appears that some decision makers are not giving appropriate weight to show cause considerations.[31] It is unclear whether, for example, police officers considering the grant of bail are aware if an accused is in a show cause position. Police officers (and bail justices) who release a person in a show cause position on bail must submit the required form to explain their reasons for doing so.[32] It seems that bail justices routinely do so, while police officers appear not to. This is despite police officers regularly granting bail to people in a show cause position.

4.34 To simplify the show cause test and ensure that proper weight is given to the onus placed on accused persons in category, I recommend replacing the show cause test with a test which requires the accused to 'show good reason why bail should be granted'.

[31] This was a common theme in submissions to the Bail Review, for example: Victoria Police, Victims of Crime Consultative Committee, Police Association of Victoria, Office of Public Prosecutions, and three bail justices.
[32] Regulation 6 and Form 3, Bail Regulations 2012.

4.35 The proposed new test is intended to have the same meaning as 'show cause' (properly applied). Therefore, the sorts of factors which have been held by the courts to establish show cause, either alone or (more usually) in combination, should remain relevant to the show good reason test. In particular, more than one reason may be relied upon by an accused person to satisfy this test.

**Recommendation 4**

That the concept of 'show cause' be replaced with 'show good reason'.

## Relationship between show cause (good reason) and unacceptable risk

4.36 The law regarding the relationship between the show cause and unacceptable risk tests is an unsatisfactory state in Victoria. This Review provides a convenient opportunity to resolve the issue by statutory amendment.

4.37 Since 2005 there have been two lines of authority in the trial division of the Supreme Court regarding the way in which the unacceptable risk and show cause tests should be applied in show cause bail applications, based on the court's interpretation of the current section 4. The Court of Appeal has not yet determined which of these approaches is correct.[33]

4.38 The line of authority commencing with *DPP v Harika*[34] states that a show cause bail application involves a two step process. First, the accused must show cause why their detention is not justified. Secondly, if cause is shown, the court has to consider whether the accused represents an unacceptable risk. The accused bears the onus at the first stage, while the prosecution bears the onus of establishing unacceptable risk. By contrast, in *Re Asmar*[35] the court held that a show cause bail application involved only one step, namely whether the accused has shown cause why his or her detention in custody is not justified. On this analysis, there is no second step requiring the unacceptable risk test to

[33] The Court of Appeal in *Robinson v The Queen* [2015] VSCA 161 did not find it necessary to determine the issue.
[34] *DPP v Harika* [2001] VSC 237 (Gillard J).
[35] *Re Asmar* [2005] VSC 487 (Maxwell P).

be applied, although issues concerning unacceptable risk form part of the process of considering whether the accused has shown cause.

4.39 Concerns have been expressed with the reasoning in *Asmar.* In *Woods v DPP*[36] Bell J opined that the two step process was more consistent with the presumption of innocence and the prosecutorial onus of proof, and that the *Asmar* approach might be seen to reverse the onus of proof regarding unacceptable risk.[37] In *Robinson v The Queen*[38] Priest JA, construing section 4(2)(d)(i) stated that the burden of satisfying the court that one or other or all of the enumerated unacceptable risks would be realised must rest with those opposing the grant of bail.[39]

4.40 In practice, there is little difference between the two approaches. In many cases, an accused will be taken to have shown good reason by demonstrating that they do not pose an unacceptable risk. Subsequent decisions of the trial division of the Supreme Court confirms this to be so.[40] Nonetheless, there should be clarity as to the way in which the law is applied in show cause bail applications.

4.41 My recommended redraft of section 4 contains a clear two step process. In all cases, unacceptable risk is the primary consideration, and is the first step in the bail consideration process. Where an accused is charged with an offence listed in Schedules 1 or 2, there is a second step, in which the accused bears the onus of establishing exceptional circumstances or good reason why bail should be granted. The prosecution has the onus of demonstrating unacceptable risk, while the accused bears the onus of showing exceptional circumstances or good reason. As the courts have recognised, there is a degree of overlap between the issues that arise in determining the first and second steps, particularly in the show good reason category. Factors relevant to the unacceptable risk test will significantly inform the court's assessment of whether good reason has been shown.

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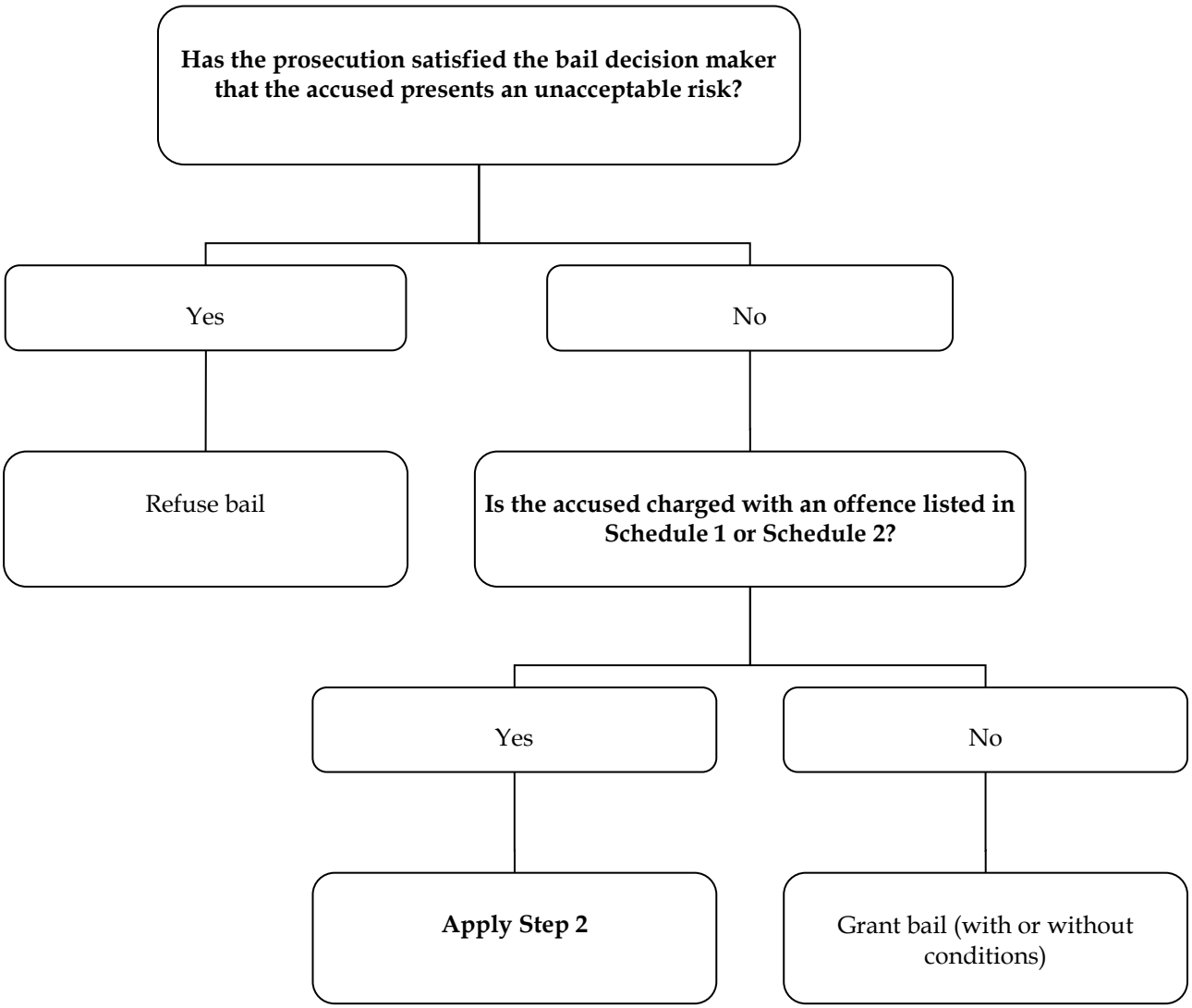
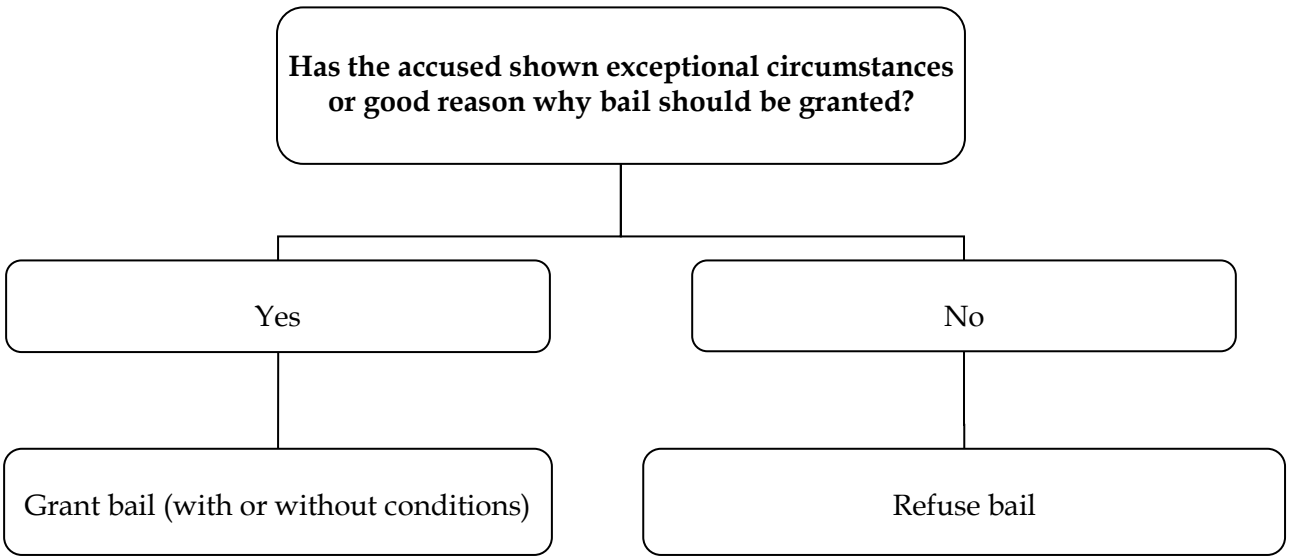
[36] *Woods v DPP* [2014] VSC 1 (Bell J).
[37] Ibid at [56].
[38] *Robinson v The Queen* [2015] VSCA 161 (Maxwell P, Redlich & Priest JJA).
[39] Ibid at [62].
[40] *Woods v DPP* [2014] VSC 1 (Bell J) at [30] and the authorities cited therein.

4.42 The two step process may be illustrated as follows:

**Step 1:** **Unacceptable risk test (all offences)**




**Step 2:** **Exceptional circumstances and show good reason tests (offences listed in Schedule 1 and Schedule 2)**



## Factors to be considered in determining unacceptable risk, exceptional circumstances and good reason

4.43 As previously indicated, I recommend that section 4 include a more detailed list of factors relevant all bail decisions. These factors should be taken into account by all bail decision makers applying the unacceptable risk, exceptional circumstances or good reason tests.

4.44 Presently, section 4(3) provides a short, non-exhaustive list of the criteria the bail decision maker must consider in assessing whether there is an unacceptable risk, while the Act contains no guidance regarding factors that may be relevant to exceptional circumstances or show cause.

4.45 The proposed section 4C will provide an expanded list of factors. This is intended to provide improved guidance to bail decision makers in applying the unacceptable risk, exceptional circumstances and show good reason tests. In particular the proposed section 4C should ensure that greater emphasis is given to factors such as the accused's criminal history, the behaviour of the accused during any previous grants of bail and whether, at the time of the alleged offending, the accused was on bail, at large (i.e. a person who has failed to appear at court and had a warrant issued for their arrest which has not yet been executed), on parole or undergoing a sentencing order (such as a community correction order).

4.46 This list is comprehensive, and is likely to be particularly helpful to non-qualified persons (i.e. police and bail justices) making decisions about bail. While the list is expressed to be non-exhaustive, it contains all of the factors that the courts usually consider in determining bail applications. It is intended to operate in conjunction with sections 3A and 3B of the Act, which apply to Aboriginal persons and children.

4.47 The first factor listed in the proposed section 4C is 'the nature and seriousness of the alleged offending including whether or not it is a serious example of the offence'. The addition of the words 'including whether or not it is a serious

example of the offence' may be regarded as tautologous, but is intended to focus the bail decision maker's attention on the level of criminality of the present circumstances of the offence. Many offences can be committed in a broad range of circumstances. For example, the offence of armed robbery (a Schedule 2 offence) would encompass various factual scenarios including the following:

a) A pre-planned robbery of a busy gaming venue by a group of offenders each wearing disguises and armed with firearms; and

b) An accused making a demand for a person's mobile telephone or wallet, while displaying the handle of a knife which the accused has secreted in his clothing.

While armed robbery is always a serious offence, the first scenario is clearly a more serious example of the offence than the second.

4.48 Proposed section 4C(d) refers to 'the accused's compliance with any previous grants of bail'. This is intended to include any previous offending whilst on bail, compliance with bail conditions and failures to appear.

4.49 Proposed section 4C(e) refers to 'whether, at the time of the alleged offending, the accused was on bail, on summons, at large[41], on parole or undergoing a sentencing order'. Although these factors are arguably captured by 'the accused's criminal history', they have been listed separately to ensure that bail decision makers place greater weight on the accused's status at the time of the alleged offending.

4.50 Proposed section 4C(i) refers to 'any view or likely view' of the alleged victim to the grant of bail. This is deliberately broader than current section 4(3)(e) of the Act, which refers only to the alleged victim's attitude if it is expressed to the court. If the alleged victim's view is known, that should clearly be considered (as under the current provision). However, if the alleged victim's view can

[41] 'At large' should be defined as meaning a person who has failed to appear at court and had a warrant issued for their arrest which has not yet been executed.

reasonably be deduced from the circumstances of the offence (for example), that should also be taken into account, hence the inclusion of 'likely view'.

4.51 The factors set out in the proposed section 4C are derived from section 18 of the *Bail Act 2013* (NSW), section 8 of the *Bail Act 2000* (NZ), submissions made to this Review and from factors commonly identified in Victorian superior court decisions concerning the exceptional circumstances and show cause tests.

4.52 One of the factors a bail decision maker must also consider is whether or not bail conditions could be imposed to reduce any risks associated with granting bail. This is presently reflected in section 5(3) of the Act. I recommend that a consideration of conditions be included in section 4 of the Act, but in a separate section to those factors listed in the proposed section 4C.

**Recommendation 5**

That section 4 provide that, in applying the unacceptable risk, exceptional circumstances and show good reason tests, a bail decision maker must take into account all relevant circumstances including but not limited to the following:

a) the nature and seriousness of the alleged offending, including whether or not it is a serious example of the offence
b) the strength of the prosecution case
c) the accused's criminal history
d) the accused's compliance with any previous grants of bail
e) whether, at the time of the alleged offending, the accused was on bail, on summons, at large, on parole or undergoing a sentencing order
f) the accused's personal circumstances, associations, home environment, and background
g) any special vulnerability of the accused, including by reason of youth, being an Aboriginal person, ill health, cognitive impairment, intellectual disability or mental health
h) the availability of treatment or support services

i) any view or likely view of the alleged victim of the offence to the grant of bail

j) the length of time the accused is likely to spend in custody if bail is refused

k) the likely sentence should the accused be found guilty of the offence charged, and

l) whether the accused has publicly expressed support for a terrorist act, terrorist organisation or the provision of resources to a terrorist organisation.

That section 4 also provide that a bail decision maker must consider whether or not any conditions could be imposed to reduce any risks associated with granting bail.

## Multiple bails

4.53 There is an apparently high level of community concern about accused persons who offend while on bail, particularly those who commit serious violence offences while on bail. Submissions I have received from victims' groups, bail justices and members of the public echo these concerns.[42]

4.54 This Review has revealed that there are many accused who appear before the Magistrates' Court who are on multiple sets of bail, often in excess of three sets of bail. The offending in these cases is typically fairly serious, involving burglaries or driving offences, but rarely involve actual violence. Just how and why offenders are released on multiple bails is hard to understand because such offenders, once they have committed an indictable offence while at large for another indictable offence, are in a show cause position by reason of section 4(4)(a). This risk of reoffending would also be an important consideration for a bail decision maker applying the unacceptable risk test. I do understand that in some cases a court may decide that the availability of CISP might be a factor which would go towards cause being shown and acceptability of risk.

[42] E.g. Victims of Crime Commissioner, Victims of Crime Consultative Committee Victims Working Group, Bail Justice Working Party, Co-founder of #Enough is enough and Submission F.

4.55 It has been difficult to obtain data on the number of adult offenders currently on multiple sets of bail. Data obtained from DHHS shows that, of the 77 children and young people on remand on 5 January 2016:

a) 53 children and young people (69%) were on bail when they were remanded; and

b) Of those 53 children and young people on bail when they were remanded, 7 (9%) were subject to three or more sets of bail.[43]

4.56 Data has also been provided to us based on an analysis of cases listed at the Magistrates' Courts at Melbourne, Sunshine and the La Trobe Valley on 15 March 2017. This data confirms that there are a significant number of accused persons who attend court on multiple sets of bail and having been charged with several charges of failing to answer bail, committing an indictable offence on bail and and/or contravening a conduct condition of bail. For example:

a) Of the 27 consolidated pleas listed for hearing at the Melbourne Magistrates' Court on 15 March 2017:
   - ten accused had multiple charges of failing to answer bail
   - two accused appeared on bail and had their bail extended by the court, despite having four and nine charges of failing to answer bail respectively, and
   - one accused, facing twenty drug possession charges and one charge of failing to answer bail had been granted bail with CISP.

b) At the La Trobe Valley Magistrates' Court, four of the seven accused with consolidated pleas listed had three or four charges each of failing to answer bail.

c) At the Sunshine Magistrates' Court, two of the seven accused with consolidated pleas listed were charged with the offence of failing to answer bail, while three of the seven were charged with multiple charges

[43] DHHS, 'Reducing un-sentenced detention in the youth justice system – Comparative results of a survey of children and young people remanded in January 2015 and January 2016' (May 2016) at p. 2

of committing an indictable offence whilst on bail (2, 3 and 4 charges respectively).

4.57 It appears that many multiple bails are granted at police stations. It is not known whether, or to what extent, police granting bail in such circumstances rigorously apply the show cause and unacceptable risk tests.

4.58 I have also been informed of cases involving accused persons being granted bail for offences committed whilst on bail and undergoing a community correction order. For instance, an accused was granted bail by a Magistrates' Court in January 2017 for alleged offending committed when the accused was already on two sets of bail and undergoing two community correction orders (which he had not complied with, in addition to the further offending). The accused was in a show cause situation. The court granted bail, deciding that cause was shown due to a combination of factors, namely the accused's absence of offending until the age of 28, family support, his suitability for CISP and a perceived bureaucratic problem with Corrections which prevented the accused from obtaining drug counselling and treatment (even though the accused had disavowed the need for such counselling and treatment). The Director of Public Prosecutions lodged an appeal against the grant of bail, which was dismissed.[44]

4.59 To provide greater scrutiny for multiple bail situations, and ensure that sufficient weight is given to public safety in these circumstances, I recommend three amendments to the current law.

4.60 First, the current section 4(4)(a) should be reworded to make it clear that any accused who is charged with an indictable offence which is alleged to have been committed while the accused is on bail, summons, at large[45], on parole or undergoing a sentence for another indictable offence is in a reverse onus

[44] Orders have been made dismissing the appeal but at the time of writing this advice the Supreme Court's reasons have not yet been published.
[45] A person is 'at large' if they have failed to appear at court and a warrant has been issued by a court but not yet executed.

position. This category of offending is now included as item 1 in my proposed Schedule 2.

4.61 Secondly, I recommend adding a new category of offending to Schedule 1, placing the accused in an exceptional circumstances reverse onus position. Any accused person who is charged with a Schedule 2 offence which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for a Schedule 1 or Schedule 2 offence should have to show exceptional circumstances why bail should be granted.

4.62 Thirdly, as recommended in Chapter 5, any accused who is already on two undertakings of bail with respect to indictable offences should not be able to be granted bail by a police officer or bail justice in relation to a further indictable offence, but must be brought before a court for the question of bail or remand to be determined.

**Recommendation 6**

That any accused who is charged with an indictable offence which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for another indictable offence must be refused bail unless the accused shows good reason why bail should be granted.

**Recommendation 7**

That any accused who is charged with an offence listed in Schedule 2 which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for an offence listed in Schedule 1 or Schedule 2 must be refused bail unless the accused shows exceptional circumstances why bail should be granted.

## Offences in the reverse onus categories

4.63 The reverse onus categories of offences require review to ensure that the right balance is struck between protection of the community and the presumption of innocence.

4.64 In 2007 the VLRC stated:

> 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.[46]

4.65 These sentiments have been echoed in a number of submissions to the Review, which have suggested that additional offences be added to the reverse onus categories. In particular, various individuals and institutions support the inclusion of additional serious violent and sexual offences. For example:

a) The Office of Public Prosecutions suggest that rape, attempted murder and indictable breaches of intervention orders be added.

b) The Commonwealth DPP suggest additional drug offences including inchoate offences be included.

c) Judge Hannan, Head of the Criminal Division, County Court notes that serious offences including manslaughter, culpable driving, rape, incest, persistent sexual abuse of a child under 16, gross violence offences, intentionally cause serious injury and kidnapping are not currently subject to a reverse onus.

d) In several consultations the anomalous example was given of a person charged with shoplifting while on bail being in a show cause situation, while someone charged with rape or sexual offending against children is not subject to any reverse onus.

[46] VLRC, *Review of the Bail Act: Final Report* (2007) p. 38.

4.66 Some submissions I have received caution against the addition of any further offences to the reverse onus categories.[47]

4.67 As noted above, I recommend that the offences subject to a reverse onus test be listed in two schedules to the Act. In my view, the listing of all of the applicable offences, organised by statute, is the clearest and most effective way of communicating to bail decision makers, users of the criminal justice system and the general public all of the relevant offences to which these tests apply.

## Schedule 1 offences (exceptional circumstances)

4.68 As indicated above, I recommend that any person who is charged with a Schedule 2 offence which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for a Schedule 1 or Schedule 2 offence should have to show exceptional circumstances why bail should be granted.

4.69 In addition, I recommend that offences of aggravated home invasion and aggravated carjacking be included in Schedule 1. These are both relatively new offences, punishable by 25 years imprisonment. Each of the offences have significant aspects of aggravation built into them and there is, justifiably, a high level of public concern about such offending.

4.70 I have considered whether the offences of causing serious injury intentionally in circumstances of gross violence, causing serious injury recklessly in circumstances of gross violence and causing serious injury intentionally should be added to Schedule 1. These are each very serious offences, particularly since the introduction of the current definition of serious injury, namely, 'an injury (including the cumulative effect of more than one injury) that (i) endangers life or (ii) is substantial and protracted'.[48] However, I have decided against recommending that these offences be elevated to Schedule 1 due to practical considerations. First, in many cases, it is not known at an early stage of the

[47] E.g. Victoria Legal Aid, Liberty Victoria, No to Violence (Men's Referral Service).
[48] *Crimes Act 1958*, s 15 as amended by the *Crimes Amendment (Gross Violence Offences) Act 2013* and applicable to offences committed on or after 1 July 2013.

proceedings (i.e. when bail is being considered) whether or not the injury suffered by the victim is protracted and therefore a serious injury. Secondly, I anticipate that persons accused of committing serious examples of these offences would be unlikely to show good reason why bail should be granted.

4.71 I have also considered whether armed robbery should be added to Schedule 1. However, I have concluded that it should remain in Schedule 2 due to the wide variety of circumstances in which the offence can be committed.[49]

4.72 I recommend that additional drug offences under the Criminal Code (Cth) be added to Schedule 1. These offences are all equivalent to the existing exceptional circumstances drug offences in that they are offences punishable by life or 25 years imprisonment and involve quantities equivalent to large commercial or commercial quantities of drugs (as defined by Victorian law).

4.73 I also recommend that inchoate offences be added to Schedule 1. In other words, a conspiracy to commit, attempt to commit or incitement to commit a Schedule 1 offence should also be a Schedule 1 offence. A person charged with attempted murder would therefore have to show exceptional circumstances why bail should be granted.

4.74 It may be worth reconsidering whether commercial quantity drug offences should remain as exceptional circumstances Schedule 1 offences, or be moved to Schedule 2. There is some sense in reserving Schedule 1 for the most serious offences known to law, in order to prevent potential devaluation of the exceptional circumstances test.

## Schedule 2 offences (show good reason)

4.75 I recommend that the following further offences be added to Schedule 2:

- Manslaughter
- Child homicide

[49] As illustrated in paragraph 4.47 above.

- Causing serious injury intentionally in circumstances of gross violence
- Causing serious injury recklessly in circumstances of gross violence
- Causing serious injury intentionally
- Threats to kill
- Rape
- Rape by compelling sexual penetration
- Assault with intent to commit a sexual offence
- Incest - in circumstances other than where both people are aged 18 or older and each consented (as defined in section 36 of the *Crimes Act 1958*) to engage in the sexual act
- Sexual penetration of a child under the age of 16 - in circumstances other than where at the time of the alleged offence the child was aged 12 years or older and the accused was not more than 2 years older than the child
- Persistent sexual abuse of a child under the age of 16
- Abduction or detention
- Abduction of a child under 16
- Kidnapping
- Armed robbery[50]
- Culpable driving causing death
- Dangerous driving causing death or serious injury
- Dangerous or negligent driving while pursued by police
- Additional drug offences under the Criminal Code (Cth)
- Persistent contravention of a family violence intervention order

[50] I note that armed robbery is already a show cause offence by reason of s 4(4)(c).

4.76 Most of these offences[51] are 'serious offences' within the meaning of section 3(1) of the *Sentencing Act 1991* and are, by reason of section 4(4)(ab), currently show cause offences where committed by an accused who is an adult and has, within the preceding 5 years, been convicted or found guilty of an offence of failing to answer bail. In my view, however, these offences should place an accused in a reverse onus category irrespective of whether or not the accused has previously failed to answer bail.

4.77 I have included the offence of making a threat to kill in the list of proposed additions to Schedule 2. I have some concerns about its inclusion, however, because it is a commonly charged offence although in many cases the alleged conduct is at a lower level of seriousness. When committed within a family violence context, however, making a threat to kill is a particularly serious offence which can indicate a risk of further violence. I have therefore included this offence in Schedule 2, although I note that a large number of offences are likely to be captured by this.

4.78 I also recommend that the offence of persistent contravention of a family violence order (contrary to section 125A of the *Family Violence Protection Act 2008)* be included in Schedule 2 in its own right, without the qualifying circumstances that apply to offences against sections 37, 37A, 123 and 123A of that Act. This is because the elements of the section 125A offence require the accused to have engaged in contravening conduct on at least three occasions during a four week period, therefore making it an aggravated contravention of the intervention order or safety notice.

4.79 The increase in the number and type of offences suggested to be included in Schedule 2 may well be controversial. That is because it will be said to attract too many cases and of itself create an expectation that bail will be refused. It seems to me to be likely that, although more accused will be in a good reason category, it does not necessarily follow that they will be refused bail. However,

[51] With the exception of culpable driving causing death, dangerous driving causing death or serious injury, dangerous or negligent driving while pursued by police, attempted murder, the additional Commonwealth drug offences and persistent contravention of a family violence intervention order.

in my opinion, they are offences for which good reason should be shown rather than there being an entitlement to bail.

4.80 The schedules as proposed will require amendment as and when legislative changes are made to offence provisions as listed. For example, the references to incest and sexual penetration of a child will need to reflect the reforms to those offences made by the *Crimes Amendment (Sexual Offences) Act 2016*, which commences operation on 1 July 2017.

**Recommendation 8**

That the offences which place an accused person in an exceptional circumstances or show good reason test be listed in Schedules 1 and 2 of the *Bail Act*.

**Recommendation 9**

That the following offences be added to Schedule 1, requiring an accused to show exceptional circumstances why bail should be granted:

- Aggravated home invasion
- Aggravated carjacking
- Additional drug offences under the Criminal Code (Cth)
- Conspiracy to commit, attempt to commit or incitement to commit an offence listed in Schedule 1

**Recommendation 10**

That the following offences be added to Schedule 2, requiring an accused to show good reason why bail should be granted:

- Manslaughter
- Child homicide
- Causing serious injury intentionally in circumstances of gross violence
- Causing serious injury recklessly in circumstances of gross violence
- Causing serious injury intentionally
- Threats to kill
- Rape
- Rape by compelling sexual penetration

- Assault with intent to commit a sexual assault
- Incest - in circumstances other than where both people are aged 18 or older and each consented (as defined in section 36 of the *Crimes Act 1958*) to engage in the sexual act
- Sexual penetration of a child under the age of 16 - in circumstances other than where at the time of the alleged offence the child was aged 12 years or older and the accused was not more than 2 years older than the child
- Persistent sexual abuse of a child under the age of 16
- Abduction or detention
- Abduction of a child under 16
- Kidnapping
- Armed robbery
- Culpable driving causing death
- Dangerous driving causing death or serious injury
- Dangerous or negligent driving while pursued by police
- Additional drug offences under the Criminal Code (Cth)
- Persistent contravention of a family violence intervention order

## Children and young people charged with reverse onus offences

4.81 As is currently the situation in Victoria, I recommend that the reverse onus provisions continue to apply to children and young people, subject to the special considerations regarding children set out in section 3B of the Act.

4.82 I support retention of sections 3A and 3B, which received widespread support in submissions received by the Review.

## Deferring bail decisions in certain circumstances

4.83 Currently, section 4(2)(d)(iii) allows a court to refuse bail if the court is satisfied:

> that it has not been practicable to obtain sufficient information for the purpose of deciding any question referred to in this subsection for want of time since the institution of the proceedings against him.

4.84 I recommend that this provision be retained, but redrafted in simpler terms. The provision should apply to all bail decision makers, including police and bail justices. However, where a police officer seeks to refuse bail due to insufficient information, the police must still bring the accused before a court or bail justice within the time limits set out in the Act.

4.85 I further recommend that a provision be inserted into the Act which allows a bail decision maker to defer making a bail decision where an accused person is unable to participate in the bail hearing by reason of intoxication. Anecdotally, I am told that bail justices are regularly called upon to hear bail applications made by persons in police custody who are intoxicated by drugs or alcohol. Often such persons behave violently and/or damage police property. In these circumstances, the bail decision maker should be able to defer the consideration of bail for a limited period, for instance, 4 hours. Section 56 of the *Bail Act 2013* (NSW) provides an example of such a provision.

4.86 Finally, I note that section 14 allows the court to refuse to grant bail where the injuries suffered by the victim are such that it is uncertain, as of the date of the application for bail, whether the person will die or recover. This provision should be retained, but relocated to the part of the Act containing the other deferral of bail provisions.

**Recommendation 11**

That sections 4(2)(d)(iii) and 14 be retained.

That the *Bail Act* contain a new provision permitting a bail decision maker to defer making a bail decision for a limited period of time where an accused person is unable to participate in the bail hearing by reason of intoxication.

## Retention of section 4(2A)

4.87 Section 4(2A) of the Act currently provides as follows:

> A court is not required to refuse bail in the case of an accused who is serving a sentence of imprisonment for some other cause but any bail granted must be subject to the condition that the person will not be released on bail before he or she is entitled to be released under a parole order made, or which may be made, in respect of him or her.

4.88 I recommend that this provision be retained but redrafted in simpler terms.

## Proposed new section 4

4.89 My proposed new section 4 is as follows:

> 4. Any person accused of an offence and being held in custody in relation to that offence is entitled to bail unless otherwise provided by sections 4A and 4B.
>
> 4A. In all cases bail must be refused if the prosecution satisfies the bail decision maker that there is an unacceptable risk that the accused if released on bail would:
>
> (a) endanger the safety or welfare of any person; and/or
>
> (b) commit an offence; and/or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person; and/or
>
> (d) fail to appear in court in answer to bail.
>
> 4B. In addition:
>
> (a) for an offence listed in Schedule 1 bail must be refused unless the accused shows exceptional circumstances why bail should be granted; and
>
> (b) for an offence listed in Schedule 2 bail must be refused unless the accused shows good reason why bail should be granted.
>
> 4C. In considering sections 4A and 4B, a bail decision maker must take into account all relevant circumstances including but not limited to the following:

(a) the nature and seriousness of the alleged offending, including whether or not it is a serious example of the offence;

(b) the strength of the prosecution case;

(c) the accused's criminal history;

(d) the accused's compliance with any previous grants of bail ;

(e) whether, at the time of the alleged offending, the accused was on bail, on summons, at large, on parole or undergoing a sentencing order;

(f) the accused's personal circumstances, associations, home environment, and background;

(g) any special vulnerability of the accused, including by reason of youth, being an Aboriginal person, ill health, cognitive impairment, intellectual disability or mental health;

(h) the availability of treatment or support services;

(i) any view or likely view of the alleged victim of the offence to the grant of bail;

(j) the length of time the accused is likely to spend in custody if bail is refused;

(k) the likely sentence should the accused be found guilty of the offence charged; and

(l) whether the accused has publicly expressed support for a terrorist act, terrorist organisation or the provision of resources to a terrorist organisation

4D In all cases a bail decision maker must consider whether or not conditions could be imposed to reduce any risks associated with the granting bail.

## Proposed Schedule 1

4.90 I propose that Schedule 1 be added to the Act in the following terms:

**Schedule 1 offences**

**(Exceptional circumstances test)**

**Schedule 2 offence committed in certain circumstances**

1. An offence listed in Schedule 2 which is alleged to have been committed while the accused:

   (a) was on bail or summons or at large for an offence listed in Schedule 1 or Schedule 2; and/or

   (b) undergoing sentence or parole for an offence listed in Schedule 1 or Schedule 2.

**Common law offences**

2. Murder

**Crimes Act 1958 offences**

3. An offence against the following provisions of the **Crimes Act 1958**:

   s 9A Treason

   s 77B Aggravated home invasion

   s 79A Aggravated carjacking

**Criminal Code (Cth) offences**

4. An offence against the following provisions of the **Criminal Code (Cth)** where the offence is alleged to have been committed in relation to a substance in respect of a quantity that is not less than a commercial quantity (as defined in s. 70(1) of the **Drugs, Poisons and Controlled Substances Act 1981**) applicable to the drug of dependence as defined in that Act constituted by that substance:

   s 302.2 Trafficking commercial quantities of controlled drugs

   s 302.3 Trafficking marketable quantities of controlled drugs

   s 303.4 Cultivating commercial quantities of controlled plants

s 303.5 Cultivating marketable quantities of controlled plants

s 304.1 Selling commercial quantities of controlled plants

s 304.2 Selling marketable quantities of controlled plants

s 305.3 Manufacturing commercial quantities of controlled drugs

s 305.4 Manufacturing marketable quantities of controlled drugs

s 307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

s 307.2 Importing and exporting marketable quantities of border controlled drugs or border controlled plants

s 307.5 Possessing commercial quantities of border controlled drugs or border controlled plants

s 307.6 Possessing marketable quantities of border controlled drugs or border controlled plants

s 307.8 Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

s 307.9 Possessing marketable quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

**Drugs, Poisons and Controlled Substances Act 1981**

5. An offence against the following provisions of the **Drugs, Poisons and Controlled Substances Act 1981**:

s 71 Trafficking in a drug or drugs of dependence in a quantity not less than a large commercial quantity applicable to that drug or drugs

s 71AA Trafficking in a drug or drugs of dependence in a quantity not less than a commercial quantity applicable to that drug or drugs

s 72 Cultivation of a narcotic plant in a quantity not less than a large commercial quantity applicable to that narcotic plant

s 72A Cultivation of a narcotic plant in a quantity not less than a commercial quantity applicable to that narcotic plant

**Terrorism (Community Protection) Act 2003 offences**

6. An offence against the following provisions of the **Terrorism (Community Protection) Act 2003**:

   s 4B(1) Providing documents or information facilitating terrorist acts

   s 21W Obstruct or hinder search or exercise of other powers by police

**Inchoate offences**

7. An offence of conspiracy to commit, incitement to commit or attempting to commit any of the above offences

## Proposed Schedule 2

4.91 I propose that Schedule 2 be added to the Act in the following terms:

**Schedule 2 offences**

**(Show good reason test)**

**Indictable offences committed in certain circumstances**

2. An indictable offence alleged to have been committed while the accused:

   (a) was on bail or summons or at large for another indictable offence; and/or

   (b) undergoing sentence for another indictable offence; and/or

   (c) was on parole; and/or

   (d) was the subject of a supervision order or interim supervision order within the meaning of the **Serious Sex Offenders (Detention and Supervision) Act 2009**.

3. An indictable offence in the course of committing which the accused or any other person involved in the commission of the offence is alleged to have used a firearm, offensive weapon or explosive within the meaning of section 77 of the **Crimes Act 1958**.

**Common law offences**

4. Manslaughter

**Bail Act 1997 offences**

5. An offence against the following provisions of the **Bail Act 1997**:

| | |
|---|---|
| s 30 | Fail to answer bail |
| s 30A(1) | Contravention of certain conduct conditions |
| s 30B | Commission of an indictable offence whilst on bail |

**Crimes Act 1958 offences**

6. An offence against the following provisions of the **Crimes Act 1958**:

| | |
|---|---|
| s 5A | Child homicide |
| s 15A | Causing serious injury intentionally in circumstances of gross violence |
| s 15B | Causing serious injury recklessly in circumstances of gross violence |
| s 16 | Causing serious injury intentionally |
| s 20 | Threats to kill |
| s 21A | Stalking – in circumstances where the accused has within the preceding 10 years been convicted or found guilty of an offence of stalking involving the use or threatened use of violence against any person |
| s 38 | Rape |
| s 39 | Rape by compelling sexual penetration |
| s 42 | Assault with intent to commit a sexual offence |
| s 44 | Incest - in circumstances other than where both people are aged 18 or older and each consented (as defined in section 36 of the **Crimes Act 1958**) to engage in the sexual act |
| s 45 | Sexual penetration of a child under the age of 16 - in circumstances other than where at the time of the alleged offence the child was aged 12 years or older and the accused was not more than 2 years older than the child |

s 47A Persistent sexual abuse of a child under the age of 16

s 55 Abduction or detention

s 56 Abduction of a child under 16

s 63A Kidnapping

s 75A Armed robbery

s 77 Aggravated burglary

s 77A Home invasion

s 197A Arson causing death

s 318 Culpable driving causing death

s 319 Dangerous driving causing death or serious injury

s 319AA Dangerous or negligent driving while pursued by police

**Criminal Code (Cth) offences**

7. An offence against the following provisions of the **Criminal Code (Cth)**, other than an offence listed in Schedule 1:

s 302.2 Trafficking commercial quantities of controlled drugs

s 302.3 Trafficking marketable quantities of controlled drugs

s 303.4 Cultivating commercial quantities of controlled plants

s 303.5 Cultivating marketable quantities of controlled plants

s 304.1 Selling commercial quantities of controlled plants

s 304.2 Selling marketable quantities of controlled plants

s 305.3 Manufacturing commercial quantities of controlled drugs

s 305.4 Manufacturing marketable quantities of controlled drugs

s 306.2 Pre-trafficking commercial quantities of controlled precursors

s 307.1 Importing and exporting commercial quantities of border controlled drugs or border controlled plants

s 307.2 Importing and exporting marketable quantities of border controlled drugs or border controlled plants

s 307.5 Possessing commercial quantities of border controlled drugs or border controlled plants

s 307.6 Possessing marketable quantities of border controlled drugs or border controlled plants

s 307.8 Possessing commercial quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

s 307.9 Possessing marketable quantities of border controlled drugs or border controlled plants reasonably suspected of having been unlawfully imported

s 307.11 Importing and exporting commercial quantities of border controlled precursors

s 309.3 Supplying marketable quantities of controlled drugs to children for trafficking

s 309.4 Supplying controlled drugs to children for trafficking

s 309.7 Procuring children for trafficking marketable quantities of controlled drugs

s 309.8 Procuring children for trafficking controlled drugs

s 309.10 Procuring children for pre-trafficking marketable quantities of controlled precursors

s 309.11 Procuring children for pre-trafficking controlled precursors

s 309.12 Procuring children for importing or exporting marketable quantities of border controlled drugs or border controlled plants

s 309.13 Procuring children for importing or exporting border controlled drugs or border controlled plants

s 309.14 Procuring children for importing or exporting marketable quantities of border controlled precursors

s 309.15 Procuring children for importing or exporting border controlled precursors

**Drugs, Poisons and Controlled Substances Act 1981 offences**

8. An offence against the following provisions of the **Drugs, Poisons and Controlled Substances Act 1981**:

   s 71AB Trafficking in a drug or drugs of dependence to a child

   s 71AC Trafficking in a drug or drugs of dependence

   s 72B Cultivation of a narcotic plant

**Family Violence Protection Act 2008 offences**

9. An offence against the following provisions of the **Family Violence Protection Act 2008**:

   s 37 Contravention of family violence safety notice – in circumstances where:

   (a) the accused's offending is alleged to have involved the use or threatened use of violence; and

   (b) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of which he or she used or threatened to use violence against any person.

   s 37A Contravention of notice intending to cause harm or fear for safety – in circumstances where:

   (a) the accused's offending is alleged to have involved the use or threatened use of violence; and

   (b) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of which he or she used or threatened to use violence against any person.

   s 123 Contravention of family violence intervention order - in circumstances where:

   (a) the accused's offending is alleged to have involved the use or threatened use of violence; and

   (b) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of

which he or she used or threatened to use violence against any person.

s 123A Contravention of family violence intervention order intending to cause harm or fear for safety – in circumstances where:

(a) the accused's offending is alleged to have involved the use or threatened use of violence; and

(b) the accused has within the preceding 10 years been convicted or found guilty of an offence in the course of which he or she used or threatened to use violence against any person.

s 125A Persistent contravention of a family violence intervention order

**Personal Safety Intervention Orders Act 2010 offences**

10. An offence against the following provision of the **Personal Safety Intervention Orders Act 2010**:

s 100 Contravention of personal safety intervention order – in circumstances where:

(a) the accused's offending is alleged to have involved the use or threatened use of violence; and

(b) the accused has within the preceding 10 years been convicted or found guilty of an offence of staking involving the use or threatened use of violence.

**Inchoate offences**

11. An offence of conspiracy to commit, incitement to commit or attempting to commit any of the above offences

# Chapter 5 – Who grants bail?

## Overview

5.1 Section 3 of the *Bail Act* defines 'court' as 'court or judge and, in any circumstances where a police officer or other person is empowered under the provisions of this Act to grant bail, includes that member or person.' This allows bail to be granted by:

- a court
- a judge
- a police officer in certain circumstances where the Act empowers the officer to consider bail, and
- a person other than a police officer in certain circumstances where the Act empowers that person to consider bail (i.e. a bail justice[52]).

5.2 While the *Bail Act* is the primary Act relating to bail, other Acts such as the *Magistrates' Court Act 1989* (the *Magistrates' Court Act*), the *Crimes Act 1958* (the *Crimes Act*) and the *Criminal Procedure Act 2009* also refer to the grant of bail.

5.3 The *Bail Act* is not always clear on when police officers and bail justices may grant bail. For example, section 4(1) implies that police officers may grant bail where it is impracticable to bring an accused before a bail justice or magistrate within 24 hours of being taken into custody, but does not make this clear.

5.4 This Chapter discusses the current law and practices on police bail, and the grant of bail by bail justices and the role of bail justices more broadly. It also discusses the granting of bail by the courts, but in less detail, as those aspects of the Act are not as problematic. This Chapter also makes recommendations to clarify and improve various aspects of the Act relating to the grant of bail.

[52] Other persons, such as the sheriff and a person authorised under the *Infringements Act 2006*, may also grant bail in some circumstances, but these persons are not relevant for the purposes of this advice.

## Grant of bail by police

### The current law

5.5 Sections 4 and 10 of the *Bail Act* allow police officers to grant bail in certain circumstances. These sections need to be read in conjunction with sections 458 and 464A of the *Crimes Act*.

5.6 Section 4(1)(a) of the *Bail Act* provides that where it is impracticable to bring an accused before a bail justice or magistrate within 24 hours of being taken into custody that person shall be granted bail. By implication, this allows police officers to grant bail from police stations.

5.7 Section 10 of the *Bail Act* deals with the situation where a person has been arrested and is in police custody but cannot be brought before a court 'forthwith'. In that situation, a police officer of or above the rank of sergeant, or any officer for the time being in charge of a police station, must inquire into the case. In addition, the officer:

- *may* release the accused on bail unless the Act otherwise requires; or
- *must,* if it is not practicable to bring the accused before a court within 24 hours, release the person on bail unless the Act otherwise requires.

5.8 Where the relevant police officer has inquired into the case and has refused to discharge the accused to bail under subsection (1) or the accused objects to a condition of bail or the amount fixed for bail, the officer is obliged to tell the accused that they can go before a bail justice and if they elect to apply for bail, to bring the accused before a bail justice 'as soon as practicable'.[53]

5.9 There is some tension between the term 'forthwith' in section 10 and the expression 'within 24 hours' in sections 4 and 10. 'Forthwith' in the context of section 10 seems to be interpreted as 'immediately.' In any event, on a plain reading, if the relevant police officer forms the view that it is impracticable to

[53] Section 10(2) *Bail Act*

get an accused to a court within 24 hours of the accused being taken in to police custody, they are obliged to release the accused on bail.

5.10 Section 458 of the *Crimes Act* requires people who are arrested to be taken before a bail justice or the Magistrates' Court to be 'dealt with according to law'.

5.11 Section 464A(1) of the *Crimes Act* deals with detention of a person in custody and provides that every person taken into custody for an offence (whether committed in Victoria or elsewhere) must be-

- released unconditionally; or
- released on bail; or
- brought before a bail justice or the Magistrates' Court - within a reasonable time of being taken into custody.

5.12 Section 464A(4) then sets out the matters to be considered when determining what constitutes a reasonable time, such as the period of time reasonably required to bring the person before a bail justice or the Magistrates' Court, and the number and complexity of offences to be investigated.[54]

5.13 There is some tension between the need to release suspects or bring them before a bail justice or court within a reasonable time of being taken into custody and the obligation to release arrested persons where it has been concluded that it is not practicable to bring them before a court within 24 hours of having been taken into custody. This is especially given that the definition of 'reasonable time' in section 464A encompasses 'the period of time reasonably required to bring the person before a bail justice or the Magistrates' Court.'

5.14 Section 10 of the *Bail Act* re-enacted a number of provisions from section 460 of the *Crimes Act*, the predecessor to section 460A. Prior to the introduction of the *Bail Act* in 1977, section 460(1) of the *Crimes Act* provided that every person taken into custody for an offence must be brought before a justice or the

[54] I note that the proposed Criminal Investigation Powers Bill being developed by the Department may amend this section slightly, for example, to add further matters to subsection (4), but that subsection (1) is unlikely to change substantively.

Magistrates' Court 'as soon as practicable after they had been taken in to custody'. The *Crimes Act* was subsequently amended. Initially, a person taken into custody was obliged to be brought before a bail justice or magistrate within six hours from being taken into police custody.[55] This was subsequently amended so that the person had to be brought before the court 'within a reasonable time' of being taken into custody.[56] This amendment empowered police to postpone bringing a suspect before a bail justice or magistrate for as long as was reasonably necessary to carry out an interview or make enquiries or investigate the whereabouts of co-accused or other associated investigations.[57]

5.15 Given this legislative history, it appears that police have the power, and were intended by Parliament to have the power, to hold a suspect for as long as reasonably necessary to conduct whatever investigative enquiries they need to conduct before taking the suspect before a court. It does not seem to me that section 464A(1) itself gives power to police officers (or other investigating officials) to grant bail. Rather it seems to me to be the point at which section 10 of the *Bail Act* comes into play, although it is not all that clear.

5.16 The Victoria Police Manual identifies two sources of the authority held by police to grant bail, section 464(1)[58] of the *Crimes Act* and section 10 of the *Bail Act*.[59] It does not instruct its members on how the tension between these two sections is to be resolved in practice and the question of when in the investigative process the question of bail falls to be determined is not answered.[60] However, as discussed above, it is my opinion that the 'reasonable time' contemplated by section 464A is to run before the obligations imposed by section 10 of the *Bail Act* are engaged.

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[55] Section 460 as amended by the *Crimes (Criminal Investigations) Act 1984*
[56] Ibid. Section 464A
[57] Refer Explanatory Memorandum to the Crimes (Custody and Investigation) Bill 1987
[58] This should be a reference to section 464A(1).
[59] Victoria Police Manual - Procedures and Guidelines, Bail and Remand, p.2 and 3
[60] The Bail Review has been provided with an Advice to Victoria Police from the Victorian Government Solicitor's Office dated 2 December 2015 which relates to the situation where an accused in police custody declines to apply to a bail justice for discharge from custody after being advised of their right to make an application.

**How do these provisions work in practice?**

5.17 From my understanding of the practices in the Magistrates' Court,[61] unless the appropriate paperwork is filed by 3:30 p.m. it will not be possible to have an application for bail determined by a magistrate before the close of court that day. Likewise, in the Children's Court, applications need to be filed with the court by 1:00 p.m. in order for the application to be heard before court closes for the day. Accordingly, it is arguably not practicable for the police to bring an accused before a court the same day unless that person has been taken in to custody in the morning and the inquiry into the case has been conducted before lunch time.

5.18 However, given the availability of Magistrates' Courts during working hours and now in the evening and on weekends, it is debateable whether it is ever impracticable to bring an accused before a court within 24 hours, particularly in the metropolitan area. I believe that in practice, police grant bail if it is not practicable to take a person before a court immediately (c.f. within 24 hours).

5.19 Some instances of the grant of bail by police, therefore, might be technically unlawful. In practice, though, the courts would be overwhelmed if police were only granting bail in accordance with a strict interpretation of the Act.

5.20 In 2016, Victoria Police created approximately 153,000 attendance register records. Those entries related to approximately 88,000 individuals.[62] Once irrelevant categories (e.g. PIN issued or intent to summons) are excluded from this overall figure, bail was considered for 72,675 individuals. Of these, police granted bail in 62,554 instances and refused bail in 10,121 instances.

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[61] Magistrates' Court of Victoria, Practice Direction 2 of 2013 nominates that the accused must be lodged in the cells by 3:30 pm and charges need to be filed by that time also for remand hearings and bail applications after 2:00 pm. In consultations, it was suggested that these times may vary between courts.

[62] Victoria Police submissions to the Bail Review, *Disposition of Persons in Police Attendance*, p. 3, (although the pie chart's total is 149,708 and not 153,000)

5.21 According to the Police Association, one of the motivations for police in granting bail is the rationale that the Magistrates' Court is likely to grant bail whether or not the informant opposes it.[63]

5.22 Capacity issues are also likely to be relevant to decision making by police. Prisoners and remandees have now for some time been moved around Victoria to various police cells due to availability. This is unsatisfactory for many reasons, including the size of cells, facilities in cells (including the lack of programs) and the effect on the person's ability to prepare their case or see family etc. It also has a flow on effect on police, who have nowhere to put newly arrested accused or those who are required to be placed in police cells in order to appear in court, and who are effectively acting as gaolers for persons who are properly the responsibility of Corrections. Police cells have a notional capacity of 161 according to Victoria Police and 150 according to Corrections,[64] but as of 23 March 2017, contained 297 people (55% more than the same time last year).[65] Remandees spend hours in vans queued in Lonsdale Street because there is no room in the cells. Such arrangements and overcrowding raise significant health and safety and *Charter Act* considerations. Victoria Police have advised that in borderline cases, members may err on the side of granting bail due to the lack of space at police stations.

**Recommendations**

5.23 It would be preferable to clarify the ambiguity between section 10 of the *Bail Act* and section 464A of the *Crimes Act*, and clarify the powers of police (and bail justices) to grant bail.

5.24 The interaction of section 12 of the *Bail Act* with section 10 of the *Bail Act* and section 64 of the *Magistrates' Court Act* should also be clarified. Section 12 of the *Bail Act* gives courts and bail justices the power to hear remand applications.

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[63] Police Association submission to the Bail Review p.4. For Magistrates' Court data, see paragraph 5.86.

[64] Information provided to the Bail Review from Victoria Police Prisoner Management Unit; Corrections Victoria, *Remand numbers and prison system challenges* provided to the Bail Review, 15 February 2017

[65] Corrections Victoria, Daily Prisoner and Police Cell Report, 23 March 2017.

Section 10 also deals with bail justices. It would make more sense for the bail justice provisions to be consolidated. Section 12 could then relate only to courts. I discuss section 12 further in the 'Grant of bail by the courts' section, below.

**Powers of police and bail justices**

5.25 I recommend removing the need for police to determine whether it is practicable to have the person brought before a court with 24 hours of that person being taken into police custody and, if not, to discharge the person on bail. That obligation potentially overrides the ability of the police to have an accused in custody whilst lengthy investigative steps are undertaken if those steps render it impracticable to have the accused brought before a court within 24 hours.

5.26 A note in section 464A of the *Crimes Act* referring to the *Bail Act* would make it clear that bail decisions are governed by the *Bail Act*, and emphasise that section 464A does not in itself create a power to bail.

5.27 The current time restrictions on remand by bail justices, and the safeguards relating to children, should remain.

5.28 Section 10 (and section 12(1), (1A), (3) and (4)) could be replaced with provisions along the following lines:

**Power of police and bail justices to grant or refuse bail**

(1) A person arrested[66] by police[67], including a person in relation to whom the reasonable time in section 464A of the *Crimes Act* has expired, must without delay have his or her case considered by a police officer of or above the rank of sergeant (or an officer for the time being in charge of a police station) and that officer may grant bail to the accused in accordance with this Act.

(2) If the officer considering the matter refuses to grant bail, police must –

[66] This should apply whether the person is arrested pursuant to a warrant or otherwise.
[67] The same rules should apply to the sheriff or a person authorised under the *Infringements Act 2006*.

(a) bring the accused before a court as soon as practicable, and

(b) if bail is being considered outside ordinary court sitting hours, bring the accused before a bail justice.

(3) A bail justice must hear the application for bail or for remand and may either grant bail or refuse bail in accordance with this Act.

(4) A bail justice who refuses to grant bail must remand the accused to appear before a court:

(a) on the next working day, or

(b) in the case of a child, if the proper venue of the Children's Court is in a region of the State prescribed under the *Children, Youth and Families Act 2005*, within 2 working days, or

(c) in any other case, if the next working day is not practicable, within 2 working days.

(5) In the case of a child, the bail justice or officer must ensure that a parent or guardian of the child, or an independent person, is present when bail is being considered. An independent person may take steps to facilitate the grant of bail, for example, by arranging accommodation.

5.29 The reference of granting or refusing bail 'in accordance with this Act' is meant to make it clear that the rules about when bail is granted (i.e. section 4) must be applied, and that other rules in the Act (such as the ability to impose conditions and require a surety) also apply.

5.30 I also recommend providing that police and bail justices may not grant bail to an accused:

- in the exceptional circumstances category, or
- who is already on two or more bail undertakings (subject to my discussion below about implementation).

5.31 Anecdotally, I understand that police have been advised that they are not to grant bail where an applicant is in either of the reverse onus categories. I have been advised in consultations with magistrates however that it is not uncommon for accused to appear before the Magistrates' Court having been granted bail by police whilst facing charges that create a presumption against bail. Bail justices may currently hear any bail matter except for murder or treason cases.

5.32 Given the seriousness of the exceptional circumstances category, I recommend requiring all such cases to be heard by a magistrate or judge. (This is subject to the current restrictions relating to murder and treason – see Recommendation 21.)

5.33 Multiple bail situations are discussed in Chapter 4. A person who is already on multiple bails must necessarily (in most cases at least) pose an increased risk of reoffending whilst on bail. It is not surprising that the community is concerned about people on six or seven sets of bail. Requiring such accused to come before a court would ensure that the question of bail is thoroughly considered. This approach may also assist an accused on more than one bail to access the services of CISP if appropriate.

5.34 However, this reform is likely to significantly impact a number of agencies, particularly the Magistrates' Court, Victoria Legal Aid and Victoria Police. Accordingly, I recommend that implementation of this reform be deferred pending other reforms that I will discuss in my second advice, particularly after-hours remand courts and alternative methods of dealing with lower level offenders. After-hours remand courts will assist to address delays in the court system by increasing the availability of magistrates, while removing lower level offenders will make more room in the bail/remand system. Once those reforms are underway, this recommendation would be more workable.

**Recommendation 12**

That the *Bail Act* be amended to:

a) resolve the ambiguity that presently exists between section 10 of the *Bail Act* and the operation of section 464A of the *Crimes Act*,

b) clarify the power of police to grant bail, and

c) clarify the power of bail justices to grant or refuse bail.

**Recommendation 13**

That if Recommendation 12 is adopted, a note be added to section 464A of the *Crimes Act* providing that section 10 of the *Bail Act* is to operate upon the expiration of the reasonable time referred to in subsection (1).

**Recommendation 14**

That only a magistrate or judge may grant bail to an accused in the exceptional circumstances category (subject to the current restrictions relating to murder and treason).

**Recommendation 15**

That any accused who is already on two undertakings of bail with respect to indictable offences should not be able to be granted bail by a police officer or bail justice in relation to a further indictable offence, but must be brought before a court for the question of bail or remand to be determined.

**Recommendation 16**

That implementation of Recommendation 15 be deferred pending reforms relating to after-hours remand courts and alternative methods of dealing with lower level offenders (which will be discussed in my second advice).

5.35 In line with my recommendations in relation to section 10 above, I consider that section 12 could be simplified and clarified. Section 12 currently relates to the

power of courts and bail justices to hear remand applications. If my recommendation in relation to section 10 is adopted, section 12 could relate only to courts (as the powers of police and bail justices would be covered by the provisions replacing section 10).

5.36 There seems no reason why the section should not cover both bail and remand hearings. The current time restrictions for remand of children should remain.

5.37 Section 12 could be replaced with provisions along the following lines:

**Power of courts to grant or refuse bail**

(1) When a court is dealing with a person in custody (whether as a result of section 10, following the committal of that person for trial or otherwise) the court must hear an application for bail or for remand and may either grant bail or refuse bail in accordance with this Act.

(2) A court that refuses bail must provide reasons for the refusal.

(3) A court that refuses bail to a child must not remand the child in custody for longer than 21 days.

(4) When a child is brought before the court on the expiry of a period of remand in custody, the court must not remand the child in custody for a further period longer than 21 days.

5.38 Proposed provision (1) is intended to continue the effect of current section 12(1) and (2) in a simpler form, but only in relation to courts. It does not appear necessary to specifically refer to sureties and conditions as in subsection (1)(a), given that these aspects are dealt with elsewhere in the Act. Current section 12(1A), (3) and (4) would be covered in my recommendations relating to section 10, above.

5.39 Section 64(3) of the *Magistrates' Court Act* provides that a person arrested on a warrant to arrest may be discharged from custody on bail under section 10 of the *Bail Act*. It is not clear why this subsection is required. If it is retained, and my recommendations are adopted, it would need to be amended to refer to

both sections 10 *and 12* of the *Bail Act*. If the purpose of that subsection is to alert magistrates to where the power to grant bail to persons arrested on warrants lies, a note at the foot of section 64 would suffice. Section 64(2)(a) likewise provides that someone arrested pursuant to a warrant is to be brought before a bail justice or the Court within a reasonable time of being arrested. In determining reasonable time for this purpose, regard is to be had to the factors in section 464A(4) of the *Crimes Act*. Given the pains taken elsewhere to clarify the relationship between the concept of 'reasonable time' in section 464A and the operation of section 10, a note at the foot of sections 10 and 12 might be advisable referring to section 64(2)(a) of the *Magistrates' Court Act*.

**Recommendation 17**
That section 12 of the *Bail Act* be amended to clarify and simplify the powers of a court to grant or refuse bail.

## Grant of bail by bail justices

### Current law

5.40 Bail justices exercise powers to grant bail or remand children and adults charged with criminal offences under the *Bail Act* and *Children, Youth and Families Act 2005*. In applying the legislation, bail justices must have regard to the rights of the accused under the *Charter Act*, especially when imposing conditions of bail.[68]

5.41 The main provisions relating to bail justices in the *Bail Act* are sections 10 and 12. Section 10 of the *Bail Act* provides that where a police officer refuses to grant bail under subsection (1) or an accused objects to the amount fixed for bail or any condition of bail, the police officer shall advise the accused that they are entitled to apply to a bail justice for discharge from custody or for variation of the amount of bail or the conditions of bail. If the accused elects, the police officer is obliged to cause the person to be brought before a bail justice 'as soon

[68] *Woods v DPP* [2014] VSC 1(17 January 2014)

as practicable'. As I understand it, except in circumstances where an accused says that they do not want to apply for bail, a hearing before a bail justice is organised as a matter of course.

5.42 Section 12 of the Act provides that where a person is apprehended, whether by virtue of a warrant or otherwise, that person may be brought before a bail justice where the informant applies to remand the person in custody. The bail justice may then remand the person in custody or grant them bail. If bail is refused, a statement of refusal and grounds for the refusal need to be certified on the remand warrant.

**Current practice**

5.43 Bail justices conduct bail hearings at the following times:

- 4pm to midnight (weekdays)
- Midnight to 6am (weekdays)
- Midnight (Friday) to 7am (Saturday)
- 7am (Saturday) to 7pm (Saturday)
- 7pm (Saturday to 7am (Sunday)
- 7am (Sunday) to 6am (Monday)
- 7am to 7pm (public holidays)
- 7pm to 7am (public holidays)

The weekend court operates in some locations (with specified catchments) between 9am and 3pm on Saturday and Sunday. In these catchments, bail justices provide a service prior to 9am and after 3pm on Saturday and Sunday.[69]

[69] The weekend court also operates at the court's discretion on public holidays. The court notifies the HJO of these locations so that bail justices within the catchment can be advised. Where a weekend court is operating, bail justices will provide a service before 9am and after 3pm.

5.44 There is high demand for bail justices from 4pm to 3am, with the number of requests gradually reducing throughout this period. The majority of bail hearings are conducted at police stations or remand centres, but bail justices may be requested to attend a hospital or other facility.

5.45 Bail justices deal with bail hearings concerning adults and children. They are also separately responsible for hearing Interim Accommodation Order (IAO) applications for children.

5.46 Each hearing may take a number of hours for a bail justice, including travel, conduct of the hearing, completing paperwork and logging the hearing outcome. Fifty one percent of actual bail hearings take less than 30 minutes, but a small percentage of complex matters may take in excess of 90 minutes. Ninety-three percent of requests for bail justices are responded to.[70]

5.47 In 2016, bail justices presided over 10,525 bail or remand applications and granted bail in 1,527 cases, refusing bail in 8,998 instances (85.5%).[71] Bail justices remand adults in 86.7% of cases and children in 74% of cases. Under section 12(1A) of the *Bail Act*, a bail justice who remands an accused must generally remand the person to appear before a court on the next working day (or if not, within 2 working days).

5.48 Given that hearings take place outside ordinary court hours, that accused persons are not represented and often not in a fit state, and the remand being sought will be relatively short, it is not surprising that a large number of hearings result in remand. The experience of those appearing in the Night Court appear to have been similar.

5.49 In some cases bail justices decide that the proper application of the Act requires the granting of bail and in some cases the police make it clear that although they would not grant bail they do not strenuously oppose bail being granted. In

[70] Honorary Justice Office data provided to the Bail Review, 8 February 2017, and includes requests for bail justices to hear applications for bail and IAO but does not include requests cancelled as bail justice no longer required.
[71] Ibid

other cases it is the perception of some bail justices that some applications are not being strenuously opposed and bail is granted.

5.50 Bail justices impose bail conditions in 91% of adult and 93% of child cases. Bail justices must ensure that the conditions of bail are no more onerous than are necessary and are proportionate to the seriousness of the offence. The risk of a bail justice imposing onerous bail conditions for children is mitigated by the requirement for a court, at the first hearing at which the child is present, to ensure that the conditions imposed are no more onerous than required and proportionate with the nature of the alleged offence and circumstances of the accused.[72] The court may vary any of the conditions.

**The bail justice system**

5.51 Bail justices have been in existence for 27 years. The office of the bail justice was created under the *Magistrates' Court Act* [73] and continued in existence under the *Honorary Justices Act 2014* (the *HJO Act*).[74] Bail justices hear out of court hours applications for bail, remand and IAOs.

5.52 The *HJO Act* regulates the appointment, functions, training, powers, suspension and removal from office of bail justices and justices of the peace. The Honorary Justice Office (HJO) in the Department oversees recruitment, appointment, training, support, the management of the call-out system and disciplinary action relevant to bail justices.

5.53 Bail justices are appointed or reappointed under sections 14 and 15 of the *HJO Act* for 5 year terms.[75] There are currently 220 bail justices,[76] of whom 171 are male and 49 female. Bail justices tend to be mature adults, with 51% of bail

[72] *Bail Act 1977*, ss 5AA(2), 5(4)
[73] *Magistrates' Court Act 1989*, s120
[74] *Honorary Justices Act 2015*, Part 3
[75] Prescribed officeholders such as Magistrates' Court registrars may also be appointed as bail justices under the Honorary Justice Regulations, but this group is not relevant for present purposes.
[76] Reflects the number of current registered bail justices as of 8 February 2017 from the submission to the Bail Review from the HJO, not the number of active bail justices.

justices being over the age of 60 years, and 30% between 50-59 years old. About 70% of bail justices are, or have been, managers or professionals.[77]

5.54 The training program mandated by the HJO includes a one day induction, a three day training intensive and 15 online units. The HJO mandates ongoing training when required (e.g. to reflect legislative amendments). There are also bi-monthly refresher courses. Bail justices are provided with a handbook which, for example, sets out the procedures and checklists for conducting a bail hearing or IAO hearing.

**Should bail justices be retained?**

[Paragraphs 5.55-5.62 have been redacted as the matter discussed is currently before the Court.]

5.63 There appear to have been very few complaints over many years relating to granting bail. As I have observed, bail justices refuse bail in a large percentage of cases (85.5% in 2016). That percentage is understandable given the circumstances in which the decisions are made and given the remands are short particularly in the metropolitan area.

5.64 A large number of bail justices made both written and oral submissions to this Review. They take pride in the work that they do and the community service they provide. They support the continued use of bail justices. They were given support by some others who made submissions. For instance, the Criminal Bar

[77] Information provided by the HJO.

Association says that bail justices have a role in dealing with bail issues until the first practicable opportunity for the matter to go before a court.[78] The Law Institute of Victoria favours the retention of bail justices, but says they need additional training.[79]

5.65 On the other hand Victoria Police, the Police Association, the State and Commonwealth DPPs and others did not favour their continued use. The two major criticisms were that bail should be considered by magistrates or judges rather than persons in the community who had limited training. Police do not appear to have issues with the conduct of bail justices or the vast majority of bail justice decisions. Rather, their opposition to the bail justice system is based on efficiency, particularly the time taken for bail justices to attend and conduct hearings.

5.66 Victoria Police and the Police Association favour police officers having the power to both grant and refuse bail based largely on the position in New South Wales.

5.67 In New South Wales, if a police officer refuses bail the accused must be taken before a court as soon as practicable.[80] Provision is made for review of this decision by a more senior police officer.[81] At present, there is no after-hours court system operating in New South Wales, other than a centralised weekend bail court that sits on Saturdays, Sundays and public holidays. New South Wales is currently considering introducing a night court, modelled on its weekend bail court.

5.68 From a police point of view, the advantages of a New South Wales style system is that bail decisions are made very quickly. It avoids any delay occasioned by arranging, awaiting the arrival of, and conducting a hearing before a bail justice. However, such a system would mean means that an individual in custody would not have access to an independent person for up 18 hours after

[78] Criminal Bar Association submission to the Bail Review
[79] Law Institute of Victoria interim submission to the Bail Review
[80] *Bail Act 2013 (NSW)*, s 46.
[81] *Bail Act 2013 (NSW)*, s 47.

charge in the city. Outside the metropolitan area it could be significantly longer. By the time an accused person is charged, they may have already been in the police station for some time while investigations are undertaken and an interview conducted.

5.69 A number of submissions I received oppose police officers having increased powers concerning bail. The Victorian Aboriginal Legal Service, for instance, says that it does not oppose the abolition of bail justices, but does not support having police officers determining after-hours bail applications because there is an inherent conflict of interest when those laying charges also determine who is at liberty pending the resolution of these charges in court. Liberty Victoria, likewise, strongly supports bail decisions being made by independent judicial officers. It opposes any expansion of police powers that would allow senior police to make decisions about an accused person's liberty and favours magistrates hearing out-of-hours bail applications.[82]

**Advantages and disadvantages of the bail justice system**

5.70 I consider the main advantages and disadvantages of the bail justice system to be as follows:

a) Advantages:

- they are drawn from local community and reflect community values
- they are independent of the police
- they can make a welfare assessment of the applicant and field complaints about an applicant's treatment whilst in police custody
- they can witness interactions between police and an accused and guard against false claims of inappropriate treatment
- they are available at short notice

[82] Liberty Victoria submission to the Bail Review

- they are inexpensive, cost-effective, reasonably well-trained and are kept abreast of legislative changes
- they are willing to travel considerable distances late in the evening and in the early hours of the morning
- they are prepared to hear urgent applications for IAOs involving vulnerable children
- they are chosen randomly from a roster
- they assume the responsibility of making difficult decisions about bail when police may be reluctant to make the decision
- they provide a service in rural areas where there may be no sitting magistrate for days or longer and, in doing so, ensure that the question of bail is addressed without delay
- they perform a function that might otherwise tie up a magistrate or senior police officer, leaving that person free to do other, possibly more urgent, work
- they represent a bulwark against arbitrary detention and reflect that detention in police custody is sufficiently serious to warrant urgent independent review
- they are a minimal risk to the community as reflected in refusals in about 86% of applications they determine
- they tend to be conscientious about recording their reasons for granting bail in 'show cause' applications and discharging their duties generally
- in addition to police stations, they are available to travel to hospitals, remand centres and DHHS offices in order to hear applications

- their work attracts very few complaints[83]

- they are trained to ask the informant about special circumstances (disability, language, alcohol or drug dependency) and can make an independent, lay assessment of an applicant's demeanour

- they are trained to be aware of the disadvantages posed by disability, and

- in the 12 months until 30 June 2016, there were 12,044 requests for the bail justice service.[84] 93 percent of these requests were allocated, suggesting both that demand for the service is very high and that the demand has, for the most part, been met.

b) Disadvantages of the bail justice system include:

- they mostly have no legal training

- they may be vulnerable to developing a rapport with police over time which may erode independence

- the material provided to them is occasionally inadequate (given the early stage at which the hearing is convened) and compromises the capacity to make an informed assessment of risk, the seriousness of charges, the strength of prosecution case and/or whether the applicant bears a reverse onus, thus compromising decision-making

- their decisions are necessarily made at a time when no support services are available, legal representation is generally unavailable and few enquiries can be made on behalf of an accused, limiting still further the relevant information available to them in assessing the application

[83] In 2016, the HJO received three written complaints relating to the conduct of a bail justice
[84] HJO Report on Bail Justice service in Victoria, 30 June 2016

- the need to travel to country locations and some suburban stations can create delays which tie up informants awaiting the arrival of the bail justice inordinately[85]

- about 86% of applications are refused; this necessarily conservative approach may not add much value to the system

- the increase in serious violent offending means there are now more matters that may be inappropriate for a bail justice to consider

- the existence of a Night Court and access to Weekend Court serve to reduce the need for bail justices, and

- in the year to June 2016, 699 requests for a bail justice were not allocated due to lack of call acceptance or a lack of availability of a bail justice; 8 requests were not allocated due to unacceptable expected time of attendance at hearing and 178 requests were cancelled. In total, 654 unallocated requests related to bail/remand requests. This number, although representing 7 percent of the requests made, is too high.

**Recommendations**

5.71 Bail justices do bring an independent person in to the police station which covers both the welfare and rights of accused persons. I think this is to the benefit of both the accused and the police.

5.72 In the time available to me it has not been possible to deal with a comprehensive review of the work of bail justices. In my second advice I will provide further recommendations regarding the conduct of after-hours bail hearings, which is more challenging now that the Victoria Police and the Police Association recommend the abolition of the bail justice system.

[85] In 2016, police cancelled six requests due to a bail justice's expected time of arrival being too long (HJO Bail Review: Background Information paper)

5.73 At present, I am not inclined to allow police to refuse bail. In particular it does not solve the problem of dealing with the case in court at the earliest practicable opportunity.

5.74 Until such time as a further review is conducted, I recommend that the bail justice system be retained.

5.75 Recommendation 12 (above) proposes clarifying the powers of bail justices (and police).

5.76 I also recommend the following reforms to the bail justice system:

a) bail justice hearings should be recorded, and

b) there should be a stay procedure from a decision of a bail justice to grant bail.

**Recommendation 18**
That a further review of the role of bail justices be conducted. Pending that review, the bail justice system should be retained.

**Recording of bail justice hearings**

5.77 It would be useful to have bail justice hearings audio-recorded, similar to court hearings. Recordings can be a safeguard for the bail justice, the accused and the police, as they can help resolve complaints about a hearing, or conflicting views about what happened at a hearing.

[Part of paragraph 5.77 has been redacted as the matter discussed is currently before the Court.]

5.78 I understand from consultations that the issue of recording hearings has been raised before, but that some opposition was expressed by Victoria Police.

5.79 The HJO could be tasked with investigating the best way to record bail justice hearings (and how and where to retain those recordings for an appropriate

length of time). I raised this possibility with the HJO and bail justices during consultations, and the feedback was uniformly positive.

**Recommendation 19**
That bail justice hearings be recorded and the Honorary Justice Office examine the method of recording, and retention of recordings.

**Stay of decision to grant bail by a bail justice**

5.80 As discussed above, bail justices remand the majority of accused persons before them. However, if a bail justice grants bail, I recommend allowing police to apply for an immediate stay of the decision in certain circumstances. A proposed model is set out below.

5.81 Police already have options available to them if they oppose a grant of bail (e.g. a revocation application). However, this proposal would have the advantage of immediately preventing the release of an accused. In appropriate cases, it would assist to allay police and community concerns about bail justice decisions and minimise risks to community or victim safety.

5.82 This mechanism should only need to be used sparingly. In any event, the prospect of having to contact the duty magistrate should discourage unnecessary applications.

5.83 If a bail justice grants bail to an accused and a police officer of or above the rank of sergeant (or for the time being in charge of the police station) considers that the accused poses a serious risk of:

a) endangering the safety or welfare of any person, or

b) committing an offence whilst on bail -

that officer may immediately inform the bail justice and the accused that police will make an application for a stay.

5.84 The stay application would be made to the duty magistrate immediately and the stay would be effective immediately. A form (which will need to be developed) would be faxed to the duty magistrate that setting out the reasons for the application and attaching any relevant supporting documentation. The magistrate would be able to decide the matter on the papers (or if necessary, by telephone).

5.85 If the magistrate decides that there are reasonable grounds for granting the stay, the magistrate must remand the accused to appear before a court on the next working day (or if that is not practicable, within 2 working days). This will allow the merits of the bail application to be fully heard by a court, with the benefit of prosecutors and defence counsel (if any). If the magistrate declines to grant the stay, the accused must be immediately released in accordance with the bail justice's decision.

**Recommendation 20**

That the *Bail Act* and the Bail Regulations 2012 be amended to allow police to apply for an immediate stay from a decision of a bail justice to grant bail.

## Grant of bail by the courts

### Magistrates' Court

5.86 From statistics provided to us by the Magistrates' Court,[86] in 2015/16 25,964 people came to the Magistrates' Court having already been granted bail, 4,834 more came before the court having already had a bail application refused either by the police or a bail justice or both and a further 8,969 were brought to court in custody.

5.87 In addition, there were 35,667 applications for bail made in the Magistrates' Court in 2015/16, of which 21,336 were granted and 11,883 were refused with a further 2,448 struck out/withdrawn.

[86] Magistrates' Court of Victoria, State-wide Bail Data, 2015-16, 8 March 2017

5.88 Crudely, adding the 25,964 who have already been granted bail before they appear in the Magistrates' Court to the 21,336 successful applications in the same year (less the 3,935 revocations) provides some idea of the number of people appearing in the Magistrates' Court at any one time on bail, noting that the figure is a fluid one, shifting constantly as people are entered to bail on the one hand and are exited from the system on the other.

5.89 On the first hearing of a person's case before the Magistrates' Court, the accused is entitled to make an application for bail without notice. If the accused's first application is made without legal representation, they are entitled to make a further application when legally represented. If an accused makes an unsuccessful application for bail (or if bail has been revoked), a further application may be made if new facts and circumstances have arisen since the refusal (or revocation).

5.90 Where an accused has been granted bail, the informant or the Director of Public Prosecutions may apply either to have bail revoked or to have the conditions of the accused's bail varied.

5.91 It is not possible to determine how many applicants applying for bail in the Magistrates' Court do so whilst bearing a reverse onus and nor is it possible to determine how many applicants in either an exceptional circumstance or show cause position succeed in applying for bail in the Magistrates' Court. What the statistics do show is that the Magistrates' Court is second only to the police in granting bail and somewhat in excess of 25,000 people at any one time will be subject to bail granted by the Magistrates' Court.

5.92 It is not possible to closely analyse the reasons for granting bail in the Magistrates' Court save that from the statistics kept by the court, it can be determined that the most popular reason for granting bail in 2015/16 was that treatment was available (2,698) followed by the stability of the applicant's residence (2,325), family support (1,774) and the fact that the prosecution does not oppose (1,759).

5.93 Likely delay (649) was the eleventh most popular reason in a field of 14. This would indicate that delay was not a significant factor in the majority of applications granted in the Magistrates' Court.[87]

5.94 It would seem though, from consultations and submissions that delay is increasingly of concern, particularly in the summary system. For example, at the Melbourne Magistrates' Court it currently takes two weeks to obtain a date for a bail hearing and CISP appointment.[88] I note that the pilot CISP outreach to prisons may reduce this type of delay.

5.95 While particular courts seem to be operating efficiently, others do not. There may be many reasons for this, and this advice is not the forum to discuss these. However, the figures are concerning. I am advised that at Ringwood Magistrates' Court, it now takes about 35 weeks to list a one or two day contested hearing. In Gippsland, such hearings are not being listed until early 2018. A consolidated plea cannot be heard for three months in Heidelberg despite the accused being on remand.

5.96 Delays such as these are not tenable. Not surprisingly, courts are reluctant to remand an accused when that person is likely either to receive no sentence of imprisonment, or to receive a sentence that is less than the likely period of remand. Sentencing Advisory Council data states that in 2015, 37% of people who spent time on remand prior to being sentenced to imprisonment combined with a CCO received time served as the imprisonment component of this sentence.[89] For example, less than half of young people remanded go on to receive a custodial sentence.[90]

5.97 Anecdotally at least, it would appear that the issue of delay is assuming an increasingly greater importance in the minds of decision makers when weighing up the competing factors of a bail application. This is particularly so

[87] Magistrates' Court of Victoria, State-wide Bail Data, provided to the Bail Review
[88] Magistrates' Court of Victoria submission and Youthlaw submission p.7
[89] Sentencing Advisory Council, *Victoria's Prison Population* (2016). This recognises time served on remand. This also influences the custody rate because it means that these offenders are not counted as sentenced prisoners in reception data or in sentenced prisoners data p.52
[90] DHHS Remand Cohort Survey, May 2016 p.5

for magistrates and judges – bail justices only remand people for very short periods, and so are less likely to be constrained by the prospects of delay.

5.98 Capacity issues impact on delay in the court system. For example, matters are frequently adjourned or delayed because the remandee or prisoner is not brought to court. The recent case of *Stewart v Magistrates' Court of Victoria* [2017] VSC 110 highlights some of the issues that can flow from non-appearance.

5.99 Delay and capacity issues are also relevant to the *Charter Act*. The *Charter Act* refers to the right to be tried without unreasonable delay and to be released if that does not occur under sections 21(5)(b) and (c). The specific guarantee that you be able to face trial in a reasonable time under section 25(2)(c) and the right not to be deprived of your liberty other than according to law under section 21(3) have come into play in bail decisions considering delay where accused are facing a longer period in gaol on remand than they would be likely to serve under any sentence imposed.[91] Charter issues also arise in the context of overcrowding in gaols and police cells.

5.100 Notwithstanding, I note that of the 35,667 applications considered by the Magistrates' Court in the 2015/2016 financial year, 21,336 were granted, leaving 14,331 either refused or withdrawn,[92] i.e. three-fifths granted, two-fifths not granted. These figures somewhat undercut the perception that magistrates overwhelmingly grant bail.

**Failure to appear in the Magistrates' Court**

5.101 From the statistics held by the Magistrates' Court,[93] the number of cases of fail to appear in the Magistrates' Court has more than doubled in the four years from 2011-2012 to 2015-2016. In 2015/16, 35,722 cases of fail to appear were dealt with in the Magistrates' Court.

[91] *Gray v DPP* [2008] VSC 4
[92] Magistrates' Court of Victoria State-wide Bail Data, provided to the Bail Review, 8 March 2017 p.2
[93] Magistrates' Court Annual Report 2014-2015 and the Magistrates' Court State-wide Bail Data p.2

5.102 As to reoffending whilst on bail, statistics held by the Crime Statistics Agency[94] indicate an increase in the number of charges laid by police for the offence of committing an indictable offence whilst on bail. For example, from January to December 2015, 6,150 charges were laid, while 6,405 charges were laid from January to September 2016.

5.103 Bail was granted 4,222 times in the Magistrates' Court in 2015/16 for fail to answer bail. In 2014/15 it was granted 3,239 times.[95] Bail was granted by the Magistrates' Court 1,519 times for the offence of contravening a condition of bail in 2015/16 and 1,110 times in 2014/15. 1,519 grants of bail were made by the Magistrates' Court for the offence of committing an indictable offence whilst on bail in 2015/16.[96] This may demonstrate that amongst the population of people granted bail in the Magistrates' Court there is a substantial number who fail to take bail sufficiently seriously, but it is hard on the bare statistics to draw any firm conclusions, and it needs to be borne in mind that the general population of people on bail in the Magistrates' Court is sizeable, perhaps as high as 50,000.

5.104 The Magistrates' Court has the benefit of having an accused assessed for suitability for CISP if considering a grant of bail with conditions where there are identified drug or alcohol issues, mental health issues, housing or physical health issues or acquired brain injury risk factors.[97] This, in train with other factors, may explain the greater percentage of people admitted to bail by magistrates compared to bail justices. There are, of course, a number of other factors: the availability of legal representation, the availability in daylight hours of greater access to familial and other support, the opportunity to prepare an application supported by material and the fact that the application is being determined by someone with legal training.

[94] Provided to the Bail Review, 13 February 2017
[95] Magistrates' Court of Victoria, State-wide Bail Data - Bail Granted, Reasons for Granting Bail document, p.2
[96] Ibid, p.2
[97] Magistrates' Court of Victoria, *Annual Report* 2014-2015 p. 51

5.105 Amongst the challenges facing the Magistrates' Court are the difficulties encountered in recent times with overcrowding in remand facilities and police cells which in turn has led to difficulties with delivering remandees to court. This topic will be canvassed in greater depth in my second advice.

**The Children's Court**

5.106 A child is defined as a person aged between 10 and 17 at the time of the alleged offence and under 19 when proceedings commence.[98]

5.107 There is a presumption in favour of proceeding by summons if an accused is a child.[99] This should serve to lessen the number of children on bail in Victoria. A police officer must have regard to this presumption when commencing a criminal proceeding against a child.[100]

5.108 On the filing of a charge-sheet against a child, a registrar must not issue in the first instance a warrant to arrest unless satisfied by evidence on oath or affidavit that the circumstances are exceptional.[101]

5.109 A child taken into custody must be –

- released unconditionally; or
- released on bail under section 10 of the *Bail Act*; or
- brought before the court; or
- if the court is not sitting at any convenient venue, brought before a bail justice within a reasonable time of being taken into custody.[102]

5.110 The Bail Act, to the extent that it is not inconsistent with section 346 of the Children, Youth and Families Act 2005, applies to an application for bail by a child.[103]

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[98] Section 3(1) *Children, Youth and Families Act 2005*
[99] Section 345(1) *Children, Youth and Families Act 2005*
[100] Ibid, subsection (2)
[101] Ibid, subsection (4)
[102] Section 346(2) *Children, Youth and Families Act 2005*
[103] Ibid, section 346(6)

5.111 If a child is remanded in custody by a court or bail justice, the child must be placed in a remand centre except as otherwise provided by the Regulations with respect to prescribed regions of the State.104 If any children are remanded in a police gaol, they are entitled to be kept separate from adults who are detained there and are entitled to be kept separate according to their sex.[105]

5.112 As at 10 March 2017, 90 children are remanded at either Parkville Youth Detention Centre, Malmsbury or the Grevillea Unit at Barwon Prison. A further 100 children are presently undergoing sentence.[106]

5.113 In 2016 the Bail Act Amendment Act exempted children from the offence of breaching a bail condition and introduced section 3B into the Bail Act. Notwithstanding these legislative changes, the number of children on remand remains at levels significantly higher than those prior to 2013.

5.114 There has been a significant increase in the number of remand orders made in relation to children: in ten years, the number of remand orders has increased by almost two-thirds, from 381 in 2006-07 to 979 in 2015-16; according to DHHS data, the number of young people remanded has almost doubled in five years, from 115 in the first quarter of 2010 to 210 in the first quarter of 2016.[107]

5.115 Since 2012-2013, approximately 20% of those remanded are ultimately sentenced to a custodial order.[108] This leaves approximately 80% who do not attract a term of detention as their punishment despite having had bail refused.

5.116 The concern that has been expressed to me by various groups in consultations is the increasing prevalence of serious offending by younger accused

[104] Ibid, section 347(1)
[105] Ibid, section 347 (2) (a) and (b)
[106] Information provided to the Children's Court of Victoria by the General Manager at Malmsbury and the Operations Manager at Parkville
[107] DHHS review of unsentenced detention in the youth justice system, quarterly remand data 2009-2016
[108] DHHS Client Relationship Information System data provided to the Victorian Ombudsman on 18 January 2017

operating in groups and utilising social media to organise. A balance needs to be struck between ensuring, on the one hand, a therapeutic and rehabilitative regime for young people in the expectation that with encouragement they can outgrow antisocial conduct and, on the other hand, the need to protect the community from serious violent offending regardless of the age of the person or people responsible for it.

5.117 Of the 77 young people on remand at the Parkville Youth Justice Precinct on 5 January 2016, 69 (90%) had existing community youth justice involvement, 43 (56%) were remanded by a magistrate, 26 (34%) were involved with Child Protection and 34 (44%) were remanded out of hours by a bail justice, 24 (31%) were involved with both community youth justice and child protection, 14 (27%) were residing out of home, seventeen (22%) and were Aboriginal or Torres Strait Islander.[109] Of the 53 young people subject to bail when they were remanded, 45 (85%) were charged with breach of bail offences for reoffending whilst on bail, 23 (43%) were charged with a breach of bail offence for breaching a conduct condition of bail and one had a charge of breach of conduct bail condition as their most serious offence. Armed robbery (16%), aggravated burglary (16%) and theft of a motor vehicle were cited as the most serious offences for which these children were on remand at this time.

5.118 The 28% increase in youth remands over the last two years may be consistent with the seriousness of offending, but the data also reflects that a significant number of young people are being charged with a breach of bail offence which mostly occurs with further alleged offending.[110]

5.119 The data reveals that further alleged offending is the means by which bail was breached for the majority in this cohort, consistently with the previous year and an escalation in the seriousness of the alleged offending has also been detected.[111]

[109] DHHS, Remand Cohort Survey, May 2016
[110] Ibid p.2
[111] Ibid, p. 2

5.120 A problem has emerged in recent times with the quality of the conditions under which young people are being held on remand, a situation commented on by Elliott J in *HL*.[112] It is beyond the scope of this advice to make recommendations save to say that I will have something to say about this situation in my second advice. It is sufficient for present purposes, in keeping with observations made about the impact of delay elsewhere, that the same problem plagues the Children's Court. Delays in disposing of matters in the Children's Court are likely to result in grave injustices to young people who are not ultimately sentenced to a term of detention but who nonetheless spend months on remand in austere and primitive conditions awaiting the finalisation of their matters. The case for expedition in this jurisdiction is compelling. It also needs to be noted that the additions to Schedule 1 and Schedule 2 offences foreshadowed by this Review are likely to have a telling impact on the numbers of children whose applications for bail will attract a reverse onus.

**Superior Courts**

5.121 The systemic problems identified elsewhere in this advice do not appear to be as prevalent in the superior jurisdictions. The volume of applications is considerably lower than those being processed by magistrates, bail justices and police officers and this might be why. Between 1 January 2014 and 1 July 2016, for instance, the total number of bail applications heard in the County Court was 536. Of these, 322 were granted, 179 were refused and 35 were withdrawn. In addition, the court heard 999 applications to vary bail. Of these, 950 were granted, 26 were refused and 23 were withdrawn.[113]

5.122 Similarly, in the 18 month period from 1 July 2015 to December 2016, the Supreme Court determined 204 applications for bail; of these, 32 were applications for variation of conditions by an accused currently before the Supreme Court, three were applications for variation of conditions imposed by a lower court and 169 were applications for bail by an accused. Of the 169

[112] *In the Matter of An Application for Bail by HL* [2016]VSC 750
[113] Statistics provided to Bail Review, County Court of Victoria

applications for bail by an accused: 12 related to murder, five related to charges before the Supreme Court at the time, two were applications made on the return of a warrant to arrest and 150 were applications made following refusal of bail in a lower court. Of the 147 applications for bail by an accused, 91 were granted. 31 of these applications were made in relation to Children's Court matters and of these four were withdrawn, leaving 27 that were heard. Of these, 24 were granted. Excluding children, 67 applications were granted in 120 cases. Nine people in exceptional circumstances were granted bail out of 31 cases in that category. 59 people in a 'show cause' position were granted bail out of 101 applications. Seven people charged with armed robbery were granted bail out of 13 applications.[114] It is difficult, without knowing more, to draw any hard and fast conclusions about how difficult or easy it is for applicants to obtain bail in the superior courts compared to the Magistrates' Court - there are simply too many variables.

5.123 It would also appear from the statistics kept by the Sentencing Advisory Council that the approach taken by the superior courts to breaches of bail is quite firm. For the period from July 2010 to June 2015, for instance, failing to answer bail attracted a gaol term in 58.6% of cases in the superior courts. Contravene a conduct condition, in the same period, was dealt with by way of a term of gaol to serve in 52.2% of cases and commit an indictable offence whilst on bail attracted a gaol term in 55.3% of cases.

5.124 This compares to the Magistrates' Court statistics for the period of July 2011 to June 2014 when failing to answer bail attracted a gaol term in 17.9% of cases and fines in 30.6%. Contravening a conduct condition, in the same period, resulted in gaol in 41.5% of cases in the Magistrates' Court and fines in 12.6%. Committing an indictable offence whilst on bail was dealt with by gaol in 42.8% of cases with fines accounting for 9.5% of cases in the Magistrates' Court.[115]

[114] Statistics provided to the Bail Review, Supreme Court of Victoria
[115] Sentencing Advisory Council Statistics, Higher courts data re the *Bail Act*.

5.125 There may be any number of reasons for the differences in approaches taken by the Magistrates' Court, on the one hand, and the superior courts on the other: the charges for which an accused is on bail in the superior courts are likely to be more serious and the possibility of receiving a gaol term for them if found guilty is higher.

5.126 That might explain why breaches of conditions attached to bail in the superior courts results in a greater likelihood of a custodial sentence, although it is to be noted that the offences of contravening a conduct condition and committing an indictable offence whilst on bail are both treated seriously in the Magistrates' Court.

5.127 The Supreme Court, in a submission to this Review, has identified reducing delays in our criminal justice system as a critical part of improving the bail system[116] and this observation accords with those made by the Magistrates' Court and the County Court also.

**Recommendations**

5.128 Section 13 relates to the power to grant bail in murder or treason cases. Given I am recommending reforms to sections 4, 10 and 12, it is a convenient time to also amend section 13. Section 13(1) is not necessary given my recommendations for reform of sections 10 and 12.

5.129 I recommend retaining the substance of section 13(2). However, it does not seem necessary to refer to 'the Supreme Court or a judge of the Supreme Court'. While a bail undertaking may be signed in front of a Prothonotary of the Supreme Court (for example), a decision on whether to grant bail to a person accused of murder or treason would only be made by a judge of the Court. Presumably the reference to '21 years' in that subsection was for historical reasons and is no longer required. The words 'is satisfied that exceptional circumstances exist which justify the making of such an order' in

[116] Supreme Court of Victoria submission to the Bail Review.

section 13(2) are also not necessary as my proposed section 4 makes it clear that both murder and treason are in the exceptional circumstances category.

**Recommendation 21**

That section 13 of the *Bail Act* be amended to provide that bail may only be granted to a person charged with treason or murder by –

a) in the case of a person charged with treason – a judge of the Supreme Court
b) in the case of a person charged with murder - a judge of the Supreme Court or the magistrate who commits the person to trial for murder.

# Chapter 6 - Family violence

## Background

6.1 The Royal Commission into Family Violence (the Royal Commission) delivered its report in March 2016 after a 13 month inquiry. The report contains 227 recommendations, all of which the Government has committed to implementing.

6.2 Recommendations 79 and 80 relate to the *Bail Act*. (Recommendation 66 mentions bail, but is not relevant for present purposes).

6.3 Recommendation 79 calls on the Government to 'legislate to empower courts to make interim family violence intervention orders on their own motion at any point during criminal processes – including bail proceedings and sentencing [within 12 months].'

6.4 Recommendation 80 calls on the Government to [within 12 months]:

a) encourage bail decision makers to seek, and prosecutors to provide, information on relevant risks of family violence in relation to a bail application;

b) whether by amendment to the *Bail Act 1977* (Vic) or by other means, provide that before setting or amending bail conditions, a bail decision maker must take into account:

- whether there is a family violence safety notice or family violence intervention order in place. If so, the decision maker should ensure that the bail conditions are compatible with the notice or order conditions, unless to do so would pose a risk to the victim and/or protected person, and

- in matters relating to family violence, whether there is a risk of family violence that could be managed by appropriate bail conditions or a family violence intervention order, or both;

c) add an avoidance of doubt provision in section 4 of the Bail Act to state that an unacceptable risk of committing an offence or endangering the safety or welfare of the public may include an unacceptable risk of perpetrating family violence whilst on bail; and

d) enact legislation to ensure that, if a warrant for the arrest of an accused is issued, bail conditions continue to operate until the arrest warrant is executed and the person is brought before the court.

## Draft provisions

6.5 The Department prepared, and consulted on, a Bill that addressed a number of recommendations, including Recommendations 79 and 80. The draft provisions addressing Recommendations 79 and 80 were then removed from the Bill, pending the completion of this Review. The remainder of the Bill, the Family Violence Protection Amendment Bill 2017, was introduced into the Legislative Assembly on 7 March 2017.[117]

6.6 I have been provided with a confidential draft of the provisions addressing Recommendations 79 and 80 (see Appendix 2).

6.7 Recommendation 79: Clause 12 of the confidential draft Bill would amend the *Family Violence Protection Act 2008*. In applications (including applications to vary, extend or revoke bail) and appeals under the *Bail Act* relating to a family violence offence, the provisions would allow courts, on their own motion, to make interim orders to protect an alleged victim in certain circumstances. The provisions would also deal with the making of final orders.

6.8 I note that these provisions were the subject of ongoing consultation with stakeholders including the Courts, Victoria Police and the Office of Public Prosecutions.

[117] I note that the submission from No To Violence, Men's Referral Service expressed concern that these amendments were removed from the Family Violence Protection Amendment Bill 2017 (Vic).

6.9 Recommendation 80: Clauses 38, 39, 44-50 of the confidential draft Bill would:

a) amend the *Family Violence Protection Act 2008* to:
   - clarify the relationship between bail conditions and family violence safety notices or family violence intervention orders, and ensure that to the extent of any inconsistency, the safety notice or intervention order prevails; and
   - allow courts hearing applications or appeals under the *Bail Act* to vary intervention orders on their own motion.

b) amend the *Bail Act* to:
   - insert new definitions and examples related to family violence, and ensure that the prosecution may submit evidence of the risk of an accused subjecting another person to family violence;
   - require decision makers to inquire whether there is an intervention order, safety notice or Domestic Violence Order (DVO) against the accused, and to specifically consider family violence risks when imposing conditions;
   - allow decision makers to impose bail conditions that are inconsistent with intervention orders, safety notices or DVOs in limited circumstances; and
   - make it a new offence to contravene bail conduct conditions after failure to attend.

## Discussion

6.10 Specific family violence matters do not fall within my Terms of Reference, nor would I presume to second guess the Royal Commission and its recommendations. I do not propose to comment further on these issues, other than to note my general support for Recommendations 79 and 80 and the substance of the draft provisions (except for clauses 48 and 49 as discussed below), subject to any further consultations that are required.

6.11 In Chapter 7, I make a recommendation on continuation of bail conditions. If that recommendation is adopted, clauses 48 and 49 (which propose a new

offence of contravening conduct conditions after failure to attend) will not be required. As discussed in that Chapter, I have some difficulty with the proposed new offence.

**Recommendation 22**

That the substance of clauses 12, 38, 39, 44 -47, 49A and 50 of draft 9 of the Family Violence Protection Amendment Bill 2017 (Vic.) be enacted (subject to further consultation with stakeholders).

# Chapter 7 – Bail conditions

## Continuation of bail conditions

7.1 The final dot point of Recommendation 80 of the Royal Commission calls on the Government to 'enact legislation to ensure that, if a warrant for the arrest of an accused is issued, bail conditions continue to operate until the arrest warrant is executed and the person is brought before the court.' (Chapter 6 discusses the rest of Recommendation 80.)

7.2 The Royal Commission referred to Judge Gray's findings in relation to the Luke Batty inquest, and took the view that 'the 'loophole' referred to by Judge Gray, which meant that bail (and attached conditions) was cancelled by the issuing of a bench warrant, must be rectified.'[118] The Commission went on to say that '[b]ail conditions must continue to operate until the warrant is executed and the person is brought before the court.'[119]

## Discussion

7.3 As noted in Chapter 6, I have been provided with a confidential draft of the provisions addressing Recommendation 80. I recommend enacting those provisions, except for clause 49 (and clause 48, which is consequential upon clause 49).

7.4 Clause 49 would address the final dot point in Recommendation 80 by creating a new offence of contravening conduct conditions after failure to appear.

7.5 Section 30A of the *Bail Act* currently contains the offence of contravening conduct conditions (except for conditions relating to bail support services), without reasonable excuse. It originally applied to both adults and children, but was amended in 2016 to apply only to adults.

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[118] State of Victoria, Royal Commission into Family Violence: Report and recommendations, Vol III, Parl Paper No 132 (2014-2016) Chapter 17 p. 226. See also paras 19, 199 and 529-533, and Recommendation 11(c) of Judge Gray, Finding - Inquest into the death of Luke Batty (28/9/2015).
[119] State of Victoria, Royal Commission into Family Violence: Report and recommendations, Vol III, Parl Paper No 132 (2014-2016) Chapter 17 p. 226

7.6 Proposed new section 30A(1A) would provide that:

> Subject to subsections (2) and (3), an accused who fails to attend in accordance with an undertaking of bail and surrender into custody, and who has neither had bail extended nor been taken into custody, must not, without reasonable excuse, engage in conduct that would contravene any conduct condition that was imposed in respect of that undertaking of bail.

7.7 Like the existing offence in section 30A, the new offence would be punishable by 30 penalty units or 3 months imprisonment.

7.8 This issue is not limited to accused in family violence matters. While the law on this issue is unclear, it appears that a common view is that conduct conditions in relation to any accused cease operation if the accused has failed to appear in accordance with his or her bail undertaking and/or a warrant has been issued. This result is clearly undesirable (as is the uncertainty surrounding this issue generally), given the important role that conduct conditions play in protecting alleged victims and the broader community.

7.9 I recommend amending section 5 of the *Bail Act* to provide that any conduct conditions imposed by a bail decision maker continue in effect until bail is continued, varied or revoked, or the matter is finally determined. It is important to ensure that an accused continues to be bound by their conduct conditions until a court has another opportunity to consider the issue of bail. This should apply regardless of how much time elapses between the date to which the accused was bailed and the subsequent court date, or whether a warrant has been issued.

7.10 The Bail Regulations 2012 would also need to be amended, to ensure that accused are made aware of the continuing nature of conditions (e.g. Form 2A).

7.11 This recommendation assumes that police will endeavour to execute warrants within a reasonable time. While I have not, within the time available, sought to obtain information about the length of time taken for warrants to be executed, I suspect that in many cases warrants are not able to be executed within a timely manner and may not be executed until the accused comes to police attention for

another reason. Accordingly, if this recommendation is adopted, its practical implications may need to be monitored and a time limitation considered.

7.12 Proposed clause 49 would make it an offence to do something (i.e. breach conduct conditions after failure to appear) which the Act does not, on its face, prohibit. It is preferable that the Act be clear and transparent in this regard, and that accused on bail are aware of their obligations.

7.13 This proposal would clearly set out these obligations, and give appropriate weight to the importance of conduct conditions. If this recommendation is adopted, an accused who breaches their conduct conditions could be charged with the existing section 30A offence. This will mean that, as is the case currently, it would not be an offence to breach conduct conditions requiring the accused to attend and participate in bail support services.

**Recommendation 23**

That amendments be made to:

a) section 5 of the *Bail Act* to provide that any conduct condition continues in effect until the condition is continued, varied or revoked, or the matter is finally determined; and

b) the Bail Regulations 2012 to ensure that accused entering undertakings of bail are made aware of the continuing nature of the conditions.

## Redraft of section 5

7.14 The language in section 5 is old fashioned and needs to be redrafted. The section could also be restructured and some aspects clarified. For example, it is not clear why current subsection (1) makes it a mandatory condition that the accused appear at court (etc.) given that appearance is part of a bail undertaking. If this is amended, it may be possible to simply refer to 'conditions' rather than 'conduct conditions' (since all remaining conditions will be conduct conditions and in practice they are simply referred as 'conditions'). Some consequential amendments could also be made (for example, to current subsection (3) to reflect the wording of the proposed unacceptable risk test).

7.15 A possible redraft is set out below. The redraft does not include current subsections (5) to (8), which deal with sureties, as my preference is to move those subsections alongside other provisions relating to sureties. I will discuss this further in my second advice.

7.16 The section could be redrafted along the following lines.

**Undertakings and conditions of bail**

(1) Any grant of bail will require the accused to enter into an undertaking to attend court at the time and place stated and not to leave the court without the permission of the court to do so and if permitted to do so, to return to the court at the time and place fixed.

(2) A court may impose conditions on that undertaking in accordance with this section.

(3) In considering the undertaking, the court must decide whether it is appropriate to:

(a) release the accused on his or her own undertaking without any conditions, or

(b) release the accused on his or her own undertaking with conditions, or

(c) release the accused with a surety of stated value or a deposit of a stated amount of money, with or without conditions.

(4) A court may only impose a condition in order to reduce the risk that the accused may:

(a) endanger the safety or welfare of any person, or

(b) commit an offence whilst on bail, or

(c) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person, or

(d) fail to appear in court in answer to bail.

(5) If a court imposes one or more conditions, each condition and the number of conditions –

(a) must be no more onerous than is required to achieve the purposes of subsection (4), and

(b) must be reasonable, having regard to the nature of the alleged offence and the circumstances of the accused.

(6) A court may impose any or all of the following conditions –

(a) reporting to a police station

(b) residing at a particular address

(c) complying with a curfew imposing times at which the accused must be at his or her place of residence, but which must not exceed 12 hours within a 24 hour period

(d) that the accused is not to contact specified persons or classes of person

(Example: Witnesses, alleged victims or co-accused)

(e) surrender of the accused's passport

(f) geographical exclusion zones, being places or areas the accused must not visit or may only visit at specified times

(Example: A gaming venue, a venue that sells alcohol or a point of international departure)

(g) attendance and participation in a bail support service

(h) that the accused not drive a motor vehicle or carry passengers when driving a motor vehicle

(i) that the accused not consume alcohol or use a drug of dependence within the meaning of the *Drugs, Poisons and Controlled Substances Act 1981* without lawful authorisation under that Act

(j) that the accused comply with any existing intervention orders

(k) any other condition that the court considers appropriate in relation to the conduct of the accused.

(7) If a court imposes a condition on an accused, the accused is bound by that condition until the condition has been continued, varied or revoked by a court, or the matter in relation to which the condition was imposed has been finally determined by a court.

**Recommendation 24**

That section 5 of the *Bail Act* be redrafted to refer specifically to bail undertakings and to improve its structure and wording.

## Appendix 1

### List of submissions received

| Date received | Author |
|---|---|
| 11-Feb-17 | Adam Trumble |
| 23-Feb-17 | Alex Trantor |
| 28-Feb-17 | Andrea Delaforce |
| 21-Feb-17 | Andrew Harrington |
| 06-Mar-17 | Andrew Howlett |
| 08-Feb-17 | Atlas Legal |
| 10-Mar-17 | Australian Community Support Organisation |
| 10-Mar-17 | Australian Federal Police |
| 20-Feb-17 | Bail Justice Working Party |
| 28-Feb-17 | Ben Czerniewicz |
| 07-Feb-17 | Bernard Denner |
| 27-Feb-17 | Brian Ross-Soden |
| 02-Mar-17 | Brian Woods |
| 27-Feb-17 | Bruce Levy |
| 10-Mar-17 | Children's Court |
| 16-Feb-17 | Chris Warwick |
| 03-Mar-17 | Commonwealth Director of Public Prosecutions |
| 25-Feb-17 | Community Advocacy Alliance |
| 08-Feb-17 | Craig Lloyd |
| 07-Mar-17 | Criminal Bar Association |
| 27-Feb-17 | Dianne Hadden |
| 10-Mar-17 | Dr James Roffee |
| 08-Mar-17 | Dr Max Travers |
| 19-Feb-17 | Elisabeth Barber |
| 28-Feb-17 | Emmanuel Spiteri |
| 27-Feb-17 | Enough is Enough |
| 25-Feb-17 | Gary Poole |
| 20-Feb-17 | Geelong Association of Honorary Justices |
| 28-Feb-17 | Gippsland East Honorary Justices |
| 26-Feb-17 | Grant-Coultman Smith |
| 27-Feb-17 | Jesuit Social Services |
| 28-Feb-17 | Joy Ahearn |
| 25-Feb-17 | Kathleen Stewart |
| 21-Feb-17 | Ken Coughlan |
| 23-Feb-17 | Kim McAliney |
| 10-Mar-17 | Law Institute of Victoria |
| 31-Mar-17 | Law Institute of Victoria |

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| 14-Mar-17 | Liberty Victoria |
| 20-Feb-17 | Michael Bower |
| 27-Feb-17 | Michael Cheshire |
| 10-Mar-17 | Michael Guinane |
| 10-Feb-17 | Mirko Bagaric |
| 27-Feb-17 | Murray Wilson |
| 10-Mar-17 | No to Violence Men's Referral Service |
| 10-Mar-17 | Office of Public Prosecutions |
| 01-Mar-17 | Patrick McGuire |
| 28-Feb-17 | Peter Elliott |
| 08-Feb-17 | Peter Wells |
| 28-Feb-17 | Police Association of Victoria |
| 11-Feb-17 | Ron Patterson |
| 10-Feb-17 | Ronald Egelberg |
| 24-Feb-17 | Royal Victorian Association of Honorary Justices |
| 20-Feb-17 | Sharon Andrews |
| 27-Feb-17 | Sheila Freeman |
| 26-Feb-17 | Submission A |
| 09-Feb-17 | Submission AA |
| 09-Feb-17 | Submission AB |
| 09-Feb-17 | Submission AC |
| 09-Feb-17 | Submission AD |
| 8-Feb-17 | Submission AE |
| 07-Feb-17 | Submission AF |
| 07-Feb-17 | Submission AG |
| 27-Feb-17 | Submission AH |
| 27-Feb-17 | Submission AI |
| 28-Feb-17 | Submission AJ |
| 02-Mar-17 | Submission AK |
| 03-Mar-17 | Submission AL |
| 04-Mar-17 | Submission AM |
| 04-Mar-17 | Submission AN |
| 06-Mar-17 | Submission AO |
| 08-Mar-17 | Submission AP |
| 08-Mar-17 | Submission AQ |
| 09-Mar-17 | Submission AR |
| 09-Mar-17 | Submission AS |
| 09-Mar-17 | Submission AT |
| 10-Mar-17 | Submission AU |
| 10-Mar-17 | Submission AV |
| 27-Feb-17 | Submission B |
| 26-Feb-17 | Submission C |

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| 24-Feb-17 | Submission D |
| 23-Feb-17 | Submission E |
| 23-Feb-17 | Submission F |
| 21-Feb-17 | Submission G |
| 21-Feb-17 | Submission H |
| 26-Feb-17 | Submission I |
| 19-Feb-17 | Submission J |
| 19-Feb-17 | Submission K |
| 18-Feb-17 | Submission L |
| 17-Feb-17 | Submission M |
| 16-Feb-17 | Submission N |
| 15-Feb-17 | Submission O |
| 13-Feb-17 | Submission P |
| 13-Feb-17 | Submission Q |
| 13-Feb-17 | Submission R |
| 11-Feb-17 | Submission S |
| 11-Feb-17 | Submission T |
| 10-Feb-17 | Submission U |
| 10-Feb-17 | Submission V |
| 10-Feb-17 | Submission W |
| 10-Feb-17 | Submission X |
| 09-Feb-17 | Submission Y |
| 09-Feb-17 | Submission Z |
| 02-Mar-17 | Sue Crawford |
| 21-Feb-17 | Terrence McKay |
| 22-Feb-17 | Terrence McKay |
| 09-Mar-17 | Terrence McKay |
| 27-Feb-17 | Vicki McGeoch |
| 01-Feb-17 | Victims of Crime Commissioner |
| 20-Feb-17 | Victims of Crime Consultative Committee |
| 27-Feb-17 | Victoria Legal Aid |
| 10-Mar-17 | Victoria Police |
| 10-Mar-17 | Victorian Women Lawyers Association |
| 28-Feb-17 | Wendy Williams |
| 07-Feb-17 | William McCluskey |
| 28-Feb-17 | Youthlaw |

## Appendix 2

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Appendix 2 starts on the following page.

[Appendix 2 has been redacted as it is a Cabinet-in-Confidence Bill.]