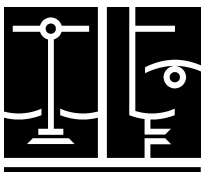

Victorian

Law Reform

Commission

Review of the Bail Act

Consultation Paper

Victorian Law Reform Commission

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Call for Submissions

The Victorian Law Reform Commission invites your comments on this Consultation Paper and seeks your responses to the questions raised.

How to Make a Submission

A submission may be made in writing or by phone or in person.

You may choose to answer all of the questions or only those questions in which you have a particular interest or expertise. There is no particular form or format you need to follow.

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- Email: law.reform@lawreform.vic.gov.au
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- If it would assist you to make a submission by phone or in person;
- if you require an interpreter; or
- if you require some other assistance to have your views on these issues heard,

please telephone the Commission on 8619 8619 and ask to speak to a researcher working on the Bail reference.

What to put in a Submission

You are not expected to answer every question in this paper, just the questions you are interested in. If you have something to say about bail that is not raised in the paper please include it in your submission, one of the purposes of a consultation paper is to discover whether there are any issues we have missed.

A Word document with the questions asked in this paper is available on <www.lawreform.vic.gov.au> to help you make your submission.

Confidentiality

Submissions are public documents and may be accessed by any member of the public. If you want your submission to remain confidential you must clearly advise us whether:

- you want your submission to be quoted or sourced but your name not to be disclosed; or
- you do not want your submission to be quoted or sourced to you in a Commission publication.

Deadline for Submissions
30 January 2006

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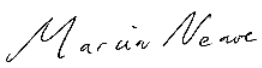
Preface

The purpose of this Consultation Paper is to explain the law governing bail and the way the bail system operates and to ask questions about possible reforms. The commission is also publishing a booklet that has been prepared for victims of crime which asks questions about issues that are likely to be particularly important for them.

To prepare this paper researchers conducted extensive consultations with people involved in the criminal justice system, including police, prosecution authorities, bail justices, judicial officers, defence lawyers, organisations providing bail support services and organisations providing victim support services. I thank all those who took time to participate in these consultations, or who provided us with information in other ways. The individuals are acknowledged on page xii. This paper draws on comments and issues raised in consultations and submissions, and on the commission's research. I would also like to thank the members of our Advisory Committee for providing direction for this project.

I am grateful for the outstanding contribution made by the policy and research officers who worked on the paper. As Team Leader Angela Langan was responsible for project management, including organising consultations, overseeing the drafting of the paper and ensuring the project was completed on time. She also wrote chapters 1 and 2 and the sections of the paper covering statistical data. After her return from maternity leave, Siobhan McCann wrote the material in chapters 3 and 5 dealing with victims of crime and the parts of Chapter 10 dealing with homelessness, people with cognitive impairment and women. She also drafted the victims' brochure. Daniel Evans did an excellent job in drafting the bulk of the paper—chapters 3 to 11, excluding parts written by Angela or Siobhan. Miriam Cullen undertook an analysis of all the consultations we conducted and prepared graphs and tables. Alison Hetherington edited the paper, Trish Luker proofread it, Kathy Karlevski finessed the graphs and Simone Marrocco helped organise consultations. Views expressed in the Consultation Paper are, of course, those of the commissioners and not of policy and research officers, or necessarily of the Advisory Committee.



Professor Marcia Neave

Chairperson

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Acknowledgments

Bail Advisory Committee

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* Bail Division, constituted under section 13 of the *Victorian Law Reform Commission Act 2000*.

Terms of Reference

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

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

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

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

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

Abbreviations

ACAS	Adult Court Advice and Support Service
A Crim R	Australian Criminal Reports
ACT	Australian Capital Territory
AJA	Acting Justice of Appeal
c	chapter (Canadian legislation)
CBD	central business district
CJ	Chief Justice
cl	clause
CAHABPS	Central After Hours Assessment and Bail Placement Service
CETS	Council of Europe Treaty Series
CREDIT	Court Referral and Evaluation for Drug Intervention and Treatment
Cth	Commonwealth
DHS	Department of Human Services
DNA	Deoxyribonucleic acid
DPP	Director of Public Prosecutions
eg	example
et al	and others
GA Res	General Assembly resolution
ITP	Independent Third Person
J	Justice (JJ plural)
JA	Justice of Appeal
JJA	Justices of Appeal
LEAP	Law Enforcement Assistance Program
LRCV	Law Reform Commission of Victoria
n	endnote
NART	Northern Arrest Referral Team
NSW	New South Wales

NT	Northern Territory
OPA	Office of the Public Advocate
OPP	Office of Public Prosecutions
para	paragraph
pt	part
Qld	Queensland
RS	Revised Statutes
RVAHJ	Royal Victorian Association of Honorary Justices
s	section (ss plural)
SA	South Australia
sch	schedule
Tas	Tasmania
UK	United Kingdom
UNGAOR	United Nations General Assembly
UNTS	United Nations Treaty Series
USCS	United States Code Service
v	and (civil) or against (criminal)
Vic	Victoria
VLR	Victorian Law Reports
VR	Victorian Reports
VSC	Victorian Supreme Court
WA	Western Australia
YTC	youth training centre

Terminology

Accused

Throughout this paper we use the term 'accused' to describe a person charged with an offence. It highlights that when a person is first charged, and bail is being considered, the person is still only accused of an offence. At this stage the person has not been found guilty of an offence and is entitled to the presumption of innocence. Using this term also removes the need to refer interchangeably to a 'defendant' when talking about criminal proceedings, and an 'applicant' when talking about the bail process.

Indigenous

When we use the term 'Indigenous' in this paper we are referring to Indigenous Australians unless otherwise specified.

Police informant

We use this term to describe the police officer who is in charge of the investigation involving the accused. This person is generally known as the 'police informant' in the Victorian criminal justice system.

Executive Summary

This Consultation Paper is the first publication for the commission's reference to review the *Bail Act 1977* and its practical operation. The terms of reference direct the commission to make recommendations for any procedural, administrative and legislative changes that may be necessary to ensure the bail system functions simply, clearly and fairly.[1]

The commission examined the Bail Act, undertook research on bail and remand issues, and conducted extensive informal consultations with users of the Act. This paper asks a considerable number of questions based on that research and consultation, and is intended to determine whether there is support for various possible reforms to the Bail Act.

The principal issues raised in the paper are:

Should the Bail Act be Re-drafted?

Our initial consultations revealed considerable support for the Bail Act to be re-drafted to simplify the language, structure and concepts in the Act. The commission heard in consultations that the current Act is not easily navigated or understood, particularly by non-legal decision makers such as police and bail justices. This is discussed in Chapter 2.

Tests for Granting and Refusing Bail

Many groups consulted raised problems with the 'reverse onus' tests in the Bail Act. Some thought that these tests make the Act too 'offence focused', when it should be focused on the individual seeking bail. Selection of the offences that attract a reverse onus test was considered by some to be arbitrary, leading to frustration for both defence and prosecution lawyers. We heard that the tests are difficult to understand and explain to accused and victims, and do not assist with consistency in decision making. Issues were also raised about the administrative difficulties with such provisions, which can be affected by changes in other legislation, because they require frequent monitoring and amendment to continue to fulfil their intended purpose. The tests are discussed in Chapter 6.

Children and Young People

Our current Bail Act applies to children in the same way as adults. No specific considerations are taken into account by a decision maker when deciding whether or not to grant a child bail. The *Children and Young Persons Act 1989* contains specific considerations relating to bail but these do not go to the basis of the bail decision. A suggestion has been made that the Bail Act could contain a list of factors to be taken into account by a decision maker when hearing a child's bail application. These could be similar to factors contained in the Children and Young Persons Act in relation to sentencing.

In Victoria there is no ability for a decision maker to remand young people (18–21) to a specific juvenile facility. Young people are generally more vulnerable than adults and many decision makers are concerned about remanding them in adult prisons. Issues relating to bail of children and young people are covered in Chapter 9.

Bail Decisions by Police and Courts

Police make the initial decision about whether to charge accused people by summons, or by arrest and charge. Once accused people have been arrested, a decision must be made

[1] For the full terms of reference see page xv.

about whether to release them on bail or remand them in custody. Police are the primary bail decision makers. Police made more than 25 000 decisions to grant bail in 2004–05. We do not know the total number of bail applications considered by police, although it would be considerably higher. An accused refused bail by police must be taken before a bail justice or court to apply for bail.

The other main bail decision maker is the Magistrates' Court, which considered approximately 3500 applications in 2004–05 and granted approximately 2700.

We discuss court bail in Chapter 5 and police bail in Chapter 3. One issue considered is how to ensure that police have up-to-date information about accused people's bail status if they are arrested on further offences, including sharing of information between courts and police.

After-hours Bail Decisions

Victoria is the only state in Australia that has bail justices, who are volunteer lay people who act as bail decision makers after hours. Bail justices hear applications in police stations when courts are not open and the police are not willing to grant bail. In consultations we heard many criticisms of the bail justice system, including concerns that bail justices are reluctant to grant bail, there are no guidelines governing how a bail hearing before a bail justice should be conducted, and that the voluntary nature of the position of bail justices makes it difficult for them to keep up to date with changes in the law. The nature of the current system also makes it difficult to oversee the performance of bail justices. Chapter 4 contains an in-depth discussion of these issues.

Bail Support

In recent years specialist bail support services have been established in Victorian Magistrates' Courts. Our consultations raised both criticism and support for these programs, including the CREDIT–Bail Support Program and community-based bail support initiatives. Overall, there appears to be support for the programs and an acknowledgement of their benefits. Bail support services and issues relating to disadvantaged and vulnerable accused are covered in Chapter 10.

Victims and Bail

Several consultations raised issues with current information provided to victims about the bail process and bail decisions. Interaction between police and victims is discussed in Chapter 3, and victims and the court in Chapter 5. The commission has also produced a booklet for victims of crime that provides information and asks questions about bail which are likely to be of particular importance to them.

Questions

Chapter 2

1. Should the *Bail Act 1977* be rewritten to simplify its language and format and improve its accessibility, particularly for lay decision makers? 16

2. Is there a need for a statement of purpose or an objects clause in the *Bail Act 1977*? If so, what do you think the objects of the Act should be? What should the purposes of the Act be?.....17

Chapter 3

3. Are police using arrest and summons appropriately? Do the processes involved in arrest and bail or issuing a summons disproportionately affect the decision about which course is adopted?.....22

4. Should section 10(1) of the *Bail Act 1977* be amended so that police can grant bail even on occasions where it is 'practicable' to take an accused before a court?.....24

5. Should the *Bail Act 1977* be amended to prevent police from being able to decide bail in matters where an accused is charged with a serious indictable offence? If so, should the limitation be restricted to those offences that are currently termed exceptional circumstance offences?.....24

6. Does the requirement that the police informant attend a bail hearing the morning after working a night shift cause undue hardship for police? If so, what measures could be put in place to improve this situation?.....26

7. Is there a problem with police using a promise of the grant of bail inappropriately?.....27

8. Should police be required to inform victims about the provisions in the *Bail Act 1977* which require their views (when expressed) to be taken into consideration? 29

9. Should victims have to request that they be informed about the outcome of bail hearings? Should this information include the details of any bail conditions? 30

10. Should police be required to inform victims about the outcome of bail hearings? If so, should police have to do this for all cases, or should this only happen for more serious or violent crimes? What (if any) other information or support should victims be given in relation to bail and who should be responsible for delivering it? 31

11. Will E-Justice eliminate the problems of LEAP not containing up-to-date information of whether an accused is on bail? If not, are other mechanisms required? 34

12. Would it be beneficial for further guidance to be provided to police officers about making bail decisions? For example, would it be desirable to have a clear, plain English guide that sets out the powers police have under the *Bail Act 1977* and the appropriate procedures to be adopted in a bail application? Would police benefit from guidelines detailing what sort of matters are relevant to the bail decision?.....35

Chapter 4

13. Are the criticisms of the current bail justice system valid? If so: 46

- Should measures be implemented to ensure that bail justices are more representative of the general community? 46
- Should bail justice appointments be of limited tenure? If so, what period is appropriate?.....46
- Is the training that bail justices currently receive sufficient? 46

- Should bail justices be required to undertake mandatory refresher courses? Should reappointment be linked to successful completion of ongoing training? 46

- Is there a need for regular communication between the Department of Justice and bail justices? 46

- Should the provisions in the Magistrates' Court Act concerning the removal of bail justices be repealed and replaced with a simpler model? If so, what sort of model should be implemented? 46

- Is the draft code of conduct for bail justices adequate? Should there be a sanction, less than removal, for breach of the code? 46

- Should detailed guidelines be issued to bail justices about how a bail hearing is to be conducted? If so, how should hearings before a bail justice proceed? What status should such guidelines have? 46

Are there any other issues with the bail justice system that have not been identified? 46

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Chapter 1
Introduction

Background

On 22 November 2004, the Attorney-General, Rob Hulls, asked the commission to review the *Bail Act 1977* and its practical operation to ensure it is consistent with the overall objectives of the criminal justice system. The commission has been directed to make recommendations for any procedural, administrative and legislative changes necessary to ensure the bail system functions simply, clearly and fairly. In reviewing the Act, the commission must consider:

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

The full terms of reference for the review are set out on page xv.

The Bail Act is the main law governing bail in Victoria. The Act is for the most part based on the common law, which continues to influence interpretation of the Act. The Act has been amended many times since it came into effect in September 1977 to remedy particular problems or implement new policies. However, the drafting style and structure of the Act are much the same as they were in 1977. The Act has not been comprehensively updated or modernised since it was enacted.

Common law is created by decisions of higher courts, rather than law created by parliament through legislation.

Previous Reviews

The Bail Act was reviewed by the former Law Reform Commission of Victoria (LRCV) in 1992. The terms of reference required the LRCV to:

- consider whether the Act was consistent with the overall objectives of the criminal justice system, particularly the presumption of innocence, the desirability of speedy trials, the protection of the public and fairness in decision making;
- assess the impact of the Act on remand populations and on providers of legal, welfare, law enforcement and other community services.

Remand refers to the holding of unsentenced people in custody, typically in prison, until their cases are determined. Remandees are people who are being held on remand.

The LRCV produced a report on the first term of reference in October 1992, intending to report on the second issue separately. However, the LRCV was abolished shortly after the first report and its bail recommendations were not implemented. We have found that most of the issues and problems raised by the LRCV are still relevant today. The research and findings of the LRCV are considered in our review.

One of the functions of the current Victorian Law Reform Commission is to undertake minor law reform projects suggested by the community. The first community law reform project undertaken by the commission, suggested by the Victorian Aboriginal Legal Service,

A person who is charged with a crime is referred to as the **accused**.

looked at section 4(2)(c) of the Bail Act. Section 4(2)(c) stated that if an accused is in custody for failing to answer bail, the decision maker 'must' refuse bail unless satisfied by the accused that the failure was due to causes beyond his or her control. This provision was found to have a disproportionate impact on Indigenous people and those from other disadvantaged groups accused of crimes. In a report produced in 2002, the commission recommended repeal of section 4(2)(c). This recommendation was adopted by the Victorian Government and the section was repealed on 18 May 2004.[1]

Human Rights and Bail

Human rights law is relevant to the operation of bail law at the international as well as at the regional and national level. The *International Covenant on Civil and Political Rights* provides that as a general rule a person awaiting trial should not be detained in custody and allows that release be subject to guarantees from the accused that he or she will appear for trial.[2] The covenant also provides that a person is entitled to be brought before a judge or other authorised officer promptly, tried within a reasonable time or released.[3] The *European Convention on Human Rights* broadly reflects the principles set out in the covenant, but provides more specifically that the detention of a person is permissible where it is effected for the purpose of bringing that person before the competent legal authority or when it is 'reasonably considered necessary to prevent his [sic] committing an offence or fleeing after having done so'.[4] There are also provisions relevant to bail in a number of national human rights instruments, including the recently introduced *Human Rights Act 2004* in the Australian Capital Territory (ACT).[5]

The Victorian Government is currently considering whether or not to adopt a state-specific charter of rights. Consultation on the charter has been completed and the human rights charter group is currently writing its final report for the Attorney-General. The commission will take account of developments in the charter process through our own consultation process and in the preparation of our final report.

Research Process

Preliminary Consultation

Between April and July 2005, the commission consulted widely with people who come into contact with the bail process to assess the need for reform. Close to 50 meetings were held with various groups involved in the bail system, including police, bail justices, courts, defence and prosecution lawyers and bail service providers. The most consistent requests that emerged from the consultations were the need to re-draft the Act to simplify the language, improve the format and accessibility of the Act and simplify the concepts involved in determining bail. We heard that section 4 of the Bail Act is particularly problematic and in need of re-drafting.

Bail justices are volunteers who make bail decisions at night and on weekends when courts are not open.

Bail service providers are organisations that provide support to people on bail.

We also discussed our review with the Victims Support Agency and representatives from the Victims Assistance and Counselling Program. The Victims Support Agency is responsible for coordinating a whole-of-government approach to services for victims of crime. The Victims Assistance and Counselling Program provides case management and counselling services for victims of crime throughout Victoria. The commission has also produced a booklet about bail for victims of crime with summarised information. The booklet asks questions about aspects of the bail process that are of particular interest to victims and will be distributed through these agencies.

Advisory Committee

The commission has established an advisory committee comprising individuals with expertise and/or experience in matters relevant to this review, including police, courts, prosecutors, defence lawyers, bail support services and a victim of crime. An Indigenous bail worker was invited to join the committee but subsequently left her position as the Magistrates' Court Aboriginal Liaison Officer and was therefore unable to be involved. When a new worker is appointed by the court, he or she will be invited to join the commission's advisory committee.

The role of the advisory committee is to provide advice about our proposed approach and the directions we take during the course of this review. The committee has met twice and will meet next year to consider the direction of the final report.

Data Collection

The commission decided not to undertake empirical research in the first stage of this review. Various government agencies hold information about the bail process, although it is not collected for statistical purposes and much of it is not published. It therefore has a number or limitations. However, we decided to begin by requesting data from these agencies, to see what could be obtained and then make a decision about whether we need to conduct our own empirical research.

Data for this review, discussed throughout this paper, was requested from: Victoria Police, the Juvenile Justice section of the Department of Human Services and Corrections Victoria. Data about the Magistrates' and Children's Court was also obtained from the Department of Justice's Court Services Unit. There are various limitations to the data, which we report on, and some important questions cannot be answered on the basis of this information, such as rates of re-offending while on bail. The Magistrates' Court has obtained some data about re-offending through its Court Referral and Evaluation for Drug Intervention and Treatment (CREDIT) program for participants in its program, which is discussed in Chapter 10. Obtaining good information about re-offending on bail would require a major longitudinal study, as often offending is not detected for some time. At this stage, the commission is not proposing to undertake such a study as part of this review.

Despite these limitations, we believe we have sufficient data to inform the review and at this stage do not intend to undertake any empirical research. Empirical research involves considerable time and resources and has only been undertaken by the commission for other reviews when data that is needed to make policy recommendations is not otherwise available.

Consultation Paper

The first round of consultations undertaken by the commission involved informal meetings with individuals and agencies to identify important issues. We wanted to know what people thought the particular problems were with the Bail Act, if any, and with the bail system generally. As is generally the case with law reform, it is important to examine the processes that surround legislation as well as the legislation itself.

The consultations, along with research undertaken by the commission, inform the content of this paper. We refer to issues raised and views expressed during our consultations, including issues and views where there was no consensus among consultation participants. Therefore, where we attribute a view to a particular consultation, this does not necessarily mean that all participants who attended that consultation agreed with the view.

In addition, where we report issues raised by those consulted, such as police officers and juvenile justice workers, these are issues raised by the individual and do not necessarily represent the views of the organisation.

Process from Here

The next stage of the review will involve developing our recommendations for reform. This paper invites submissions on the questions raised and on any other issues relating to the Bail Act or the bail process. The commission will conduct a second round of consultations in the first half of 2006 involving structured and targeted meetings about specific issues. These consultations will be used to develop and test our final recommendations for reform.

The feedback we receive from submissions and our second round of consultations, combined with additional research, will inform our final recommendations to the Attorney-General. A final report setting out our recommendations will be provided to the Attorney-General in 2006. All the commission's final reports must be tabled in parliament by the Attorney-General. The government then decides whether the commission's recommendations will be implemented.

Chapter 2
Overview of Bail

Introduction

In chapters 3–5 of this paper, we discuss the decision makers involved in bail (police, bail justices and courts). In chapters 6–8, we examine the tests for bail, sureties and the conditions of bail and in chapters 9–10, we discuss bail and particular groups of accused—young people and disadvantaged or vulnerable people. Finally, we look at particular aspects of the Bail Act that were raised in consultations but do not fall within any of the preceding discussion.

This chapter gives a general overview of bail and remand, covering:

- an explanation of what bail is;
- when an accused is entitled to bail;
- who makes bail decisions;
- the consequences of remand;
- remand and bail patterns in Victoria and other states.

What is Bail?

A **charge** is a formal accusation of criminal conduct that is recorded on a charge sheet and filed at a court by police.

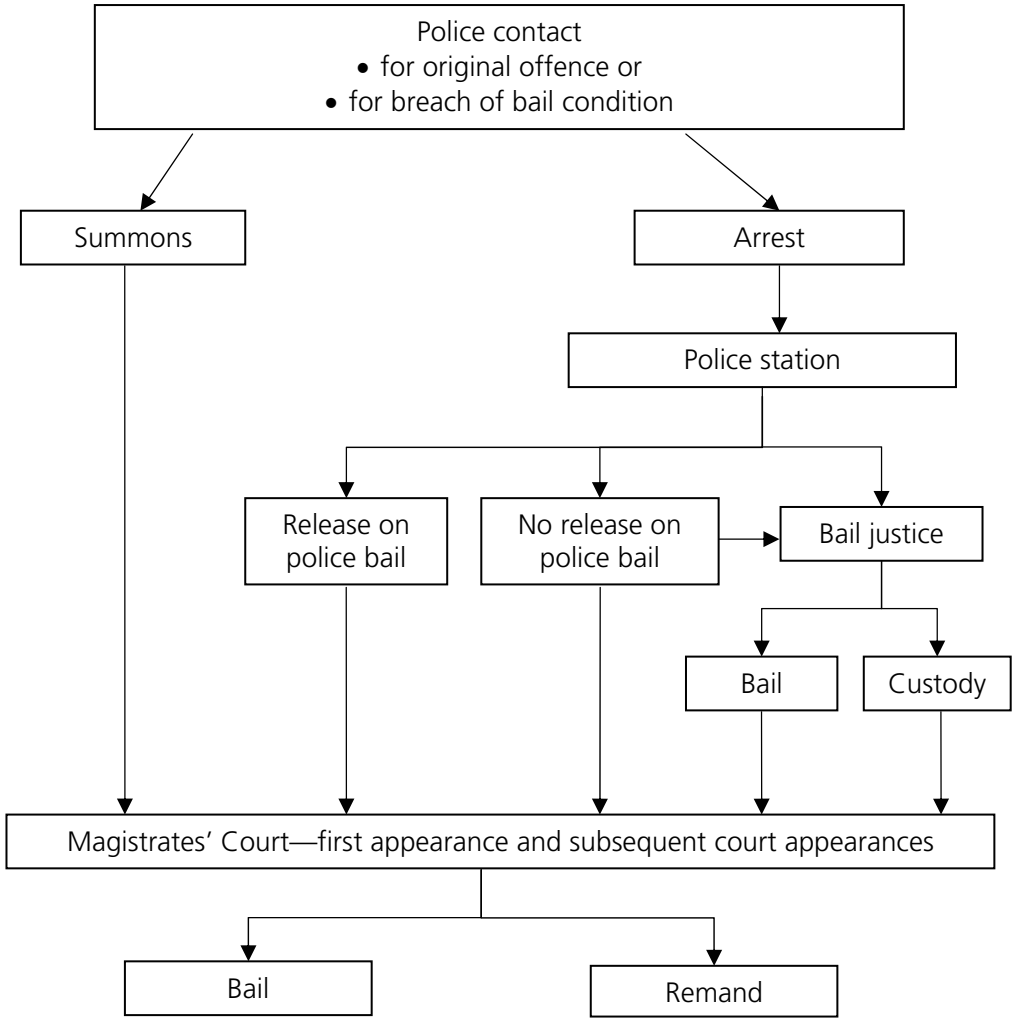
When people accused of committing an offence are arrested and **charge**d by police, a decision must be made about whether to remand (hold) them in custody, or release them on bail. The word 'bail' is used to describe the process of release, and the agreement the person makes to return to court, and sometimes to comply with other conditions. Once an accused person is charged with an offence, the police file the charge with the Magistrates' Court and a date is set for the accused to return to the court for the charge to be heard. Under Victorian law there are three ways to require accused people to appear in court.

- **Summons**: the police may serve a summons on the accused. A summons is a court document that sets out the offence alleged to have been committed and directs an accused to attend court on a specified date to have the matter heard. A summons can be used for any charge.
- **Arrest, charge and bail**: the police may arrest the accused and charge him or her with an offence. The charge is filed with the court. After arrest, the police may decide to release the accused on bail. Alternatively, the accused may be taken before a bail justice or a court and released on bail.
- **Arrest, charge and remand**: the arrest and charge process is the same, but the police decide not to grant bail. The accused is held by police, usually in police cells, until a court or bail justice is available. The court or bail justice decides not to grant bail, and the accused is held on remand in police cells or a prison until either the matter is dealt with or a further application for bail is made to the court and is successful.

Figure 1 is a flow chart setting out how accused people are dealt with after they come into contact with the police. Police procedures and police bail are discussed in more detail in Chapter 3 and bail justices are discussed in Chapter 4.

It should be noted that accused people can apply for bail at any stage between being charged and when their matter is finally dealt with by the court. In a small proportion of cases it may take a long time—possibly months or years—for charges to be finally dealt with, particularly if they are dealt with in the County or Supreme Courts. There are also sometimes lengthy delays in the Magistrates' Court. If accused people are refused bail on their first applications, they can apply again if they can show new facts or circumstances. This is discussed in more detail in Chapter 5.

Figure 1: Remand in custody process[1]



When is a Person Entitled to Bail?

Before the Bail Act was introduced, bail decisions were guided by the common law. The common law favoured accused being released on bail rather than being held on remand.[2] The onus was on the prosecution to show why the accused should not be given bail.

The Bail Act contains a general presumption in favour of bail—that is, an accused is generally entitled to bail. This is in section 4 of the Act, as is the general test for bail and the exceptions to the general entitlement.

The general criteria is that accused people are entitled to be released on bail unless the prosecution satisfies the court that there is an unacceptable risk that, if they are released on bail, they would:

Accused people are considered to be an **unacceptable risk** if the decision maker believes they would fail to reappear in court, commit an offence while on bail, endanger others or obstruct the course of justice.

- fail to appear in court in compliance with bail;
- commit an offence while on bail;
- endanger the safety or welfare of members of the public;
- interfere with witnesses or otherwise obstruct the course of justice.[3]

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

- nature and seriousness of the offence;
- accused's 'character, antecedents [any prior convictions], associations, home environment and background';
- accused's compliance with any previous grants of bail;
- strength of the evidence against the accused;
- attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail.[4]

There are two exceptions to the general entitlement to bail. If accused people are charged with any of the offences listed in section 4(2)(a) or (aa), they must be remanded in custody unless the decision maker is satisfied there are exceptional circumstances to justify granting bail. These offences include murder, trafficking in a commercial quantity of drugs and other serious drug offences.

An **intervention order** is a civil order that restrains the behaviour of the respondent in some way, for a limited or indefinite period of time. Breaching an intervention order is a criminal offence.

Another exception arises if the defendant is charged with any of the offences listed in section 4(4). These include allegedly committing a further offence while on bail, breach of an intervention order, aggravated burglary, and some drug offences of a less serious nature than those listed in section 4(2)(aa). If charged with any of the offences listed in section 4(4), the decision maker must remand the accused unless the accused 'shows cause' why remand is not justified.

To **show cause** means to provide good reasons.

Who Makes Bail Decisions?

It is possible for bail to be granted by:

- police; or
- bail justices; or
- courts—Children's, Magistrates', County or Supreme.

Figure 2 shows the decisions made by each decision maker for initial bail applications made by adult accused for the years 2000–01 to 2004–05. The table includes all applications to decision makers; therefore some accused will be counted in more than one category. This is because it is possible that an accused who has been refused bail by the police could then apply to a bail justice and, if refused again, to a court. The number of accused granted bail by police only for the summary offence of 'drunk in a public place' has been excluded for the purposes of this analysis. It is discussed below.

Summary offences are the least serious of crimes and are usually heard by a magistrate.

The commission obtained data from the Department of Justice's Court Services about the first decision made by each decision maker, although in the case of police decisions, the court only has a record of when bail was granted. Police clearly consider and grant bail far

more often than any other decision maker. Courts consider just over twice as many applications as bail justices, but grant bail far more often. Some of the possible reasons for this difference are discussed in Chapter 4 when we discuss the bail justice system.

Figure 2: First bail applications considered by decision maker[5]

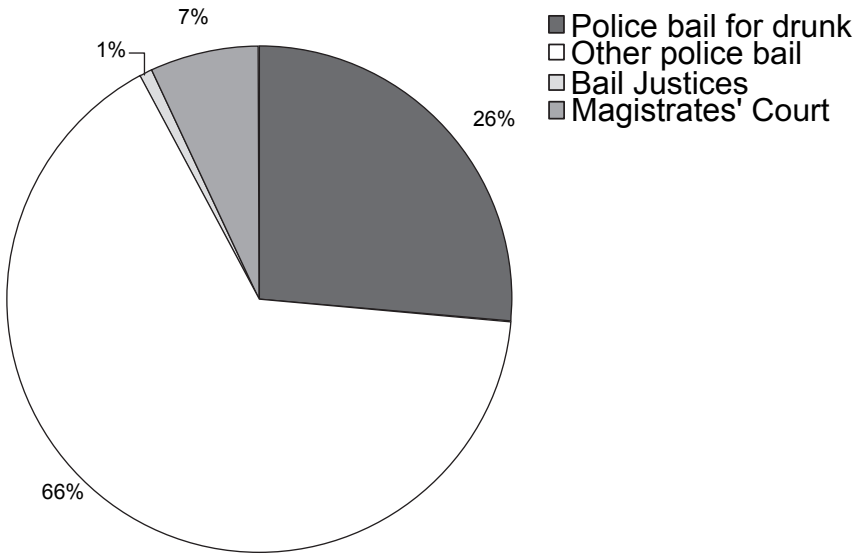
	2000–01		2001–02		2002–03		2003–04		2004–05	
	No	**%**	**No**	**%**	**No**	**%**	**No**	**%**	**No**	**%**
Police										
Granted[6]	21 512		22 328		25 280		26 717		26 169	N/A
Bail justices										
Granted	313	20	295	19	314	23	244	18	255	16
Refused	1227	80	1226	81	1027	77	1141	82	1325	84
Total considered	1540		1521		1341		1385		1580	
Magistrates										
Granted	2478	73	2406	74	2777	76	2740	78	2773	79
Refused	899	27	851	26	854	24	760	22	730	21
Total considered	3377		3257		3631		3500		3503	

Police

As can be seen from Figure 2, police are the principal bail decision makers. During the period covered in the table, police considered approximately 93% of total bail applications, bail justices 2% and courts 5%.

Figures 2 and 3 show that police are responsible for granting bail to the highest number and percentage of accused.[7]

Figure 3: First applications for bail granted in Victoria by decision maker: average 2000–01 to 2004–05



The Bail Act currently provides that police are only to make bail decisions when it is 'not practicable' to bring a person before a court, that is, outside court hours. Police can grant

bail for all offences apart from murder and treason. We discuss police bail in greater detail in Chapter 3.

Figure 3 shows that a significant proportion of people bailed by police have been arrested for the minor offence of being drunk in a public place. This charge is generally dealt with by people being 'lodged' in police cells overnight and released on bail when they are sober.[8] Being drunk in a public place is a summary, not indictable offence. If accused people do not appear at court on the date required by their bail undertaking, the matter can be dealt with in their absence.[9] As bail for the offence of drunk in a public place is almost automatic due to the nature of the offence and the way that it is dealt with, it has been excluded from the table above and from other data throughout this paper. This has been done to give a clearer indication of the number of accused who are actually 'considered' for bail by a decision maker.

An **indictable offence** is a serious offence usually dealt with by a judge or judge and jury. In Victoria, many indictable offences can be heard summarily, that is, in the Magistrates' Court.

Bail Justices

Bail justices are volunteers. The Bail Act stipulates that they are to be called on to make a bail decision when the police refuse bail and it is not possible to take the accused before a court, that is, outside court hours. Because of this, bail justices make the least number of bail decisions of the three decision makers, as can be seen in Figure 2. For instance, in 2004–05 bail justices considered 1580 bail applications. The data shows that bail justices are much more likely to refuse bail than any other decision maker. We discuss the possible reasons for this in Chapter 4, where we look at the bail justice system in greater detail.

Courts

If a person is arrested during court hours, the Bail Act requires that he or she be brought before a court for a bail decision to be made. In most cases this will be the Magistrates' Court. We discuss bail decisions made by courts in Chapter 5.

If accused people's initial application for bail to a court is refused, they can make further application for bail to the court at any time before the charges are finally dealt with. The only requirement is that they be able to show there are new facts or circumstances. There are no rules about how many bail applications people can make. At this stage of proceedings they have been accused of a crime but have not been found guilty and are entitled to the presumption of innocence. As they are deprived of their liberty, it is important that accused people who have been refused bail and remanded in custody be able to apply for bail if they have information to put to the court that may result in the grant of bail.

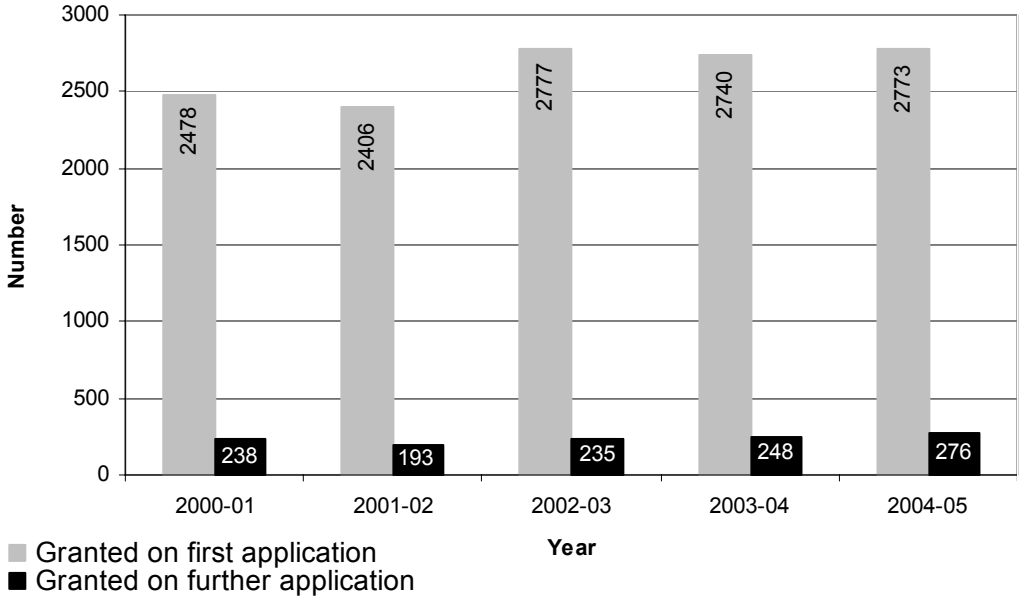
Data could only be obtained from the Magistrates' Court about first applications, which is why only first applications are shown in Figure 2 and Figure 3. However, we were also able to obtain data about how often further bail applications to a magistrate were successful. Figure 4 shows how often an accused was granted bail by a magistrate after being initially refused bail by a magistrate.[10]

In 2004–05, 2773 first applications for bail before a magistrate were granted. A further 276 applications were granted when an accused made a further application for bail. A significant number of accused are therefore granted bail on a subsequent rather than a first application. This demonstrates the importance of allowing accused people to re-apply when they have new facts and circumstances to put before the court.

In some cases, a bail decision will be dealt with by the County and Supreme Courts, though this usually only occurs when these courts are actually hearing the charges, not when the accused is first arrested. The exception is that applications for bail on murder charges can generally only be heard in the Supreme Court.[11] The County and Supreme Courts do not

have data available about the number of bail applications they hear, which is why they are not included in the graphs. However, in a consultation with the County Court, judges estimated that the court hears approximately 2–3 applications for bail per week.[12]

Figure 4: Initial and further applications for bail to a magistrate



Consequences of Remand

When an accused person is arrested, a decision must be made about whether he or she should be released on bail or remanded. The decision maker has to balance two competing interests when making the decision:

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

Holding people on remand will fulfil the first of these two interests. However, it can have serious social and financial consequences for the accused. The consequences for accused people may include the following:

- They will be unable to care for children or other family members and contact with family and friends will be limited.
- If they are employed they could lose their job.
- They will be deprived of their liberty and unable to participate in the ordinary activities of daily life within their community.
- It may be more difficult for them to prepare their defence to the charge than if they were on bail in the community.
- There is a stigma associated with being in prison, whether on remand or serving a sentence.
- If they are found not guilty of the charges, the hardship they have suffered by being on remand cannot be redressed.
- If they are found guilty, the court may find that their wrongdoing does not justify a prison sentence and impose a lesser penalty.

- Even if the court does impose a prison sentence, the sentence may be for a shorter period than the time the accused has spent on remand. The time served on remand must be counted as time already served for the sentence unless the court orders otherwise.[13] However, the accused may have served more time in custody for the offence than was necessary. Again, there is no redress for the hardship suffered by being on remand.
- The conditions in which people are held on remand in police cells are often significantly worse than the conditions in which sentenced prisoners are held in a prison. Even if they are held in a prison, they do not have the same access to employment, education, drug and alcohol rehabilitation and recreation as prisoners serving sentences.

For these reasons, accused people should only be held on remand if the decision maker believes there is a risk they will not attend court, will interfere with witnesses, or commit other offences, and that the risk cannot be overcome by imposing strict bail conditions. Magistrates told us that remanding a person in custody is the most difficult decision they make because it involves depriving people of their liberty before they are convicted of any offences.

When accused people are convicted of offences, imprisonment is a sentence of last resort. It can only be imposed if the court considers that no other sentence is appropriate. It follows that, as a matter of policy, placing accused people on remand should also be a last resort.

A further reason why remand should be a last resort is that it is very expensive. The average recurrent cost for keeping each prisoner each day in Victoria is approximately $165.[14]

Bail and Remand Patterns

Ross Report

In 2004, Dr Stuart Ross prepared a report on remand patterns in Victoria and South Australia for the Criminology Research Council. Ross made the very interesting finding that recent increases in remand are not attributable to increases in crime rates but rather to 'net-widening'.[15] A summary of Ross's findings follows. This research is to form part of a larger project on factors affecting remand in custody in Victoria, South Australia and Western Australia that will be released by the Australian Institute of Criminology and will further work done for the institute in 1999.[16] We hope to be able to discuss the findings of that report in our final report.

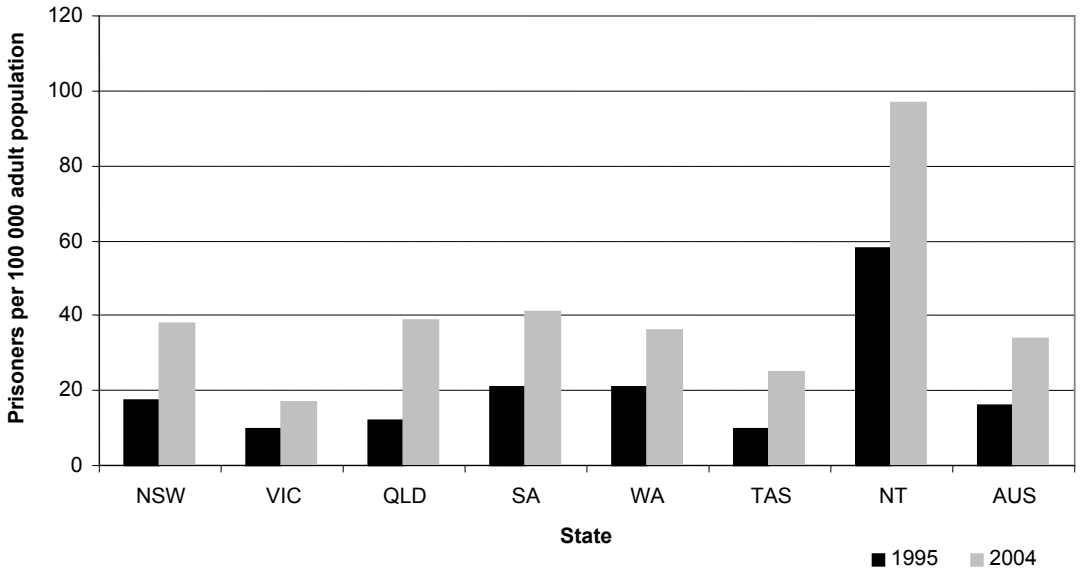
Net-widening refers to a higher number of accused being remanded in custody, without a corresponding increase in the crime rate.

As can be seen in Figure 5, Victoria's remand rate is the lowest of all the Australian states.[17] However, as with all other states, the remand rate has increased dramatically in Victoria in the past 10 years. In 1994 it was 9.7 per 100 000, increasing to 16.7 per 100 000 in 2004.

The actual numbers of people on remand also increased considerably. In July 1994, 333 people were held on remand in Victoria. By June 2004, the number had nearly doubled, to 645 (with a peak of 733 in December 2003).[18] This increase accords with the perceptions of some stakeholders we consulted with for this report.[19] For all the reasons considered above, it is important to look at why the number and rate of accused on remand has increased.

Ross found that use of remand has increased over the past 10 years.[20] Use of imprisonment in sentencing has also increased, although since 2001 remand numbers have increased at a much faster rate. Since 2001, the difference in the rates is such that the increase in remand cannot be explained by an increase in sentences of imprisonment.[21]

Figure 5: Custodial remand rates—Australia: 1995 and 2004



Accused charged with property offences accounted for almost the entire increase in remand receptions. The number of accused remanded for property offences increased by 30% between 2000–01 and 2002–03, from 924 to 1200 people.[22] Burglary, aggravated burglary, and motor vehicle theft accounted for almost half of the total increase in remand over that period. There was also an increase in remand for drug trafficking, although this was mainly associated with an increase in the number of trafficking charges over that time.

Ross analysed this further by examining whether there had been an increase in those types of offending. In fact, in all four categories—burglary, aggravated burglary, motor vehicle theft and drug trafficking—the number of offences recorded by Victoria Police fell significantly. Aggravated and non-aggravated burglaries fell by approximately 25%, motor vehicle thefts by 40% and drug trafficking by about 10%.[23] Ross also examined the number of cases in those categories that were actually processed by the courts over the same period. This could only be done for burglary and drug trafficking due to the way court statistics are compiled. The data showed that the number of burglaries dealt with by the Magistrates', County and Supreme Courts was stable over the period, and the number of drug trafficking offences fell. His conclusion was that the rise in remand receptions could not be accounted for by any of those factors and must have resulted from an increase in accused being refused bail or not applying for bail.

Ross then looked at general characteristics of the remand population to determine whether a change in characteristics of accused people could have led to them being more likely to be remanded. He found that the representation of women and Indigenous Australians on remand had not changed.[24] He found that the remand population is ageing, in line with the prison population generally. Using Australian Bureau of Statistics data about ageing of the population generally, Ross noted that the remand population is ageing much faster than the Australian population—around three times as fast.[25] He also found that the increase in age is consistent across all charge types.

As noted, Ross sees the increase in remand as a result of net-widening, given that it is not explicable by an increase in crime. This is further supported by Corrections Victoria data that shows there was a decline in the seriousness of the criminal histories of remandees over the three years, measured by looking at previous terms of imprisonment and community corrections orders. Ross notes:

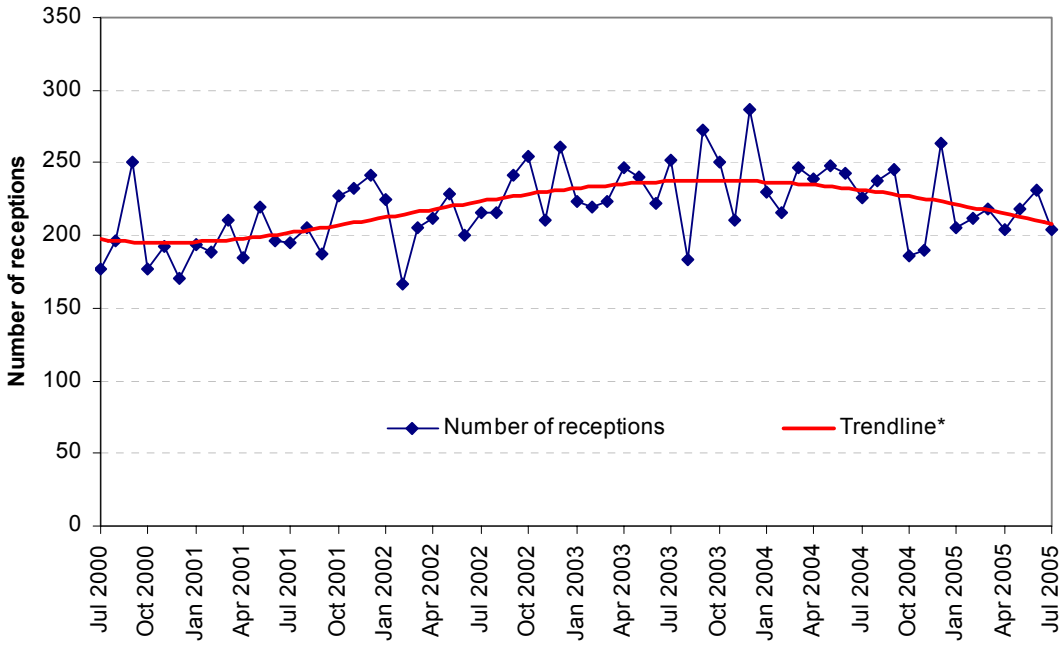
> Both of these changes are remarkable given the rise in the average age of remandees. All things being equal, older remandees should have longer criminal histories than younger ones.[26]

Ross also found evidence that Victorian remandees 'became more "problematic" over the period', with alcohol and drug abuse and mental disorder appearing to have become more prevalent.[27]

Ross notes that the changes documented in his research are the result of relatively small changes in the outcomes of bail hearings. He also notes that the observed net-widening in the use of remand 'appears to be the result of changes in the characteristics of the population of defendants rather than in the decision making process'.[28] He considers programs such as the Bail Support Program in the Magistrates' Court to have potential to address this, as it addresses the risk factors that result in remand. We look at the Bail Support Program in Chapter 8.

Ross's report looked at changes over a three-year period from July 2000 to June 2003. Corrections Victoria data shows that remand receptions continued to increase until the beginning of 2004, but have been steadily declining since then—see Figure 6.[29] Although they have not quite gone back to the levels in 2000, the trendline suggests this may occur.

Figure 6: Unsentenced receptions to prison July 2000 to July 2005



* Polynomial trendline, order = 4, R squared = 0.32

Indigenous Australians on Remand

In 1987, a Royal Commission was established to inquire into the high number of Indigenous deaths in custody since 1980 throughout Australia and to examine the social, cultural and legal factors contributing to those deaths.

The highest number of deaths occurred in states with large Indigenous populations: Western Australia (32 deaths) and Queensland (26 deaths). Aside from Tasmania and the Australian Capital Territory, Victoria had the lowest number (3 deaths). The Royal Commission found that throughout Australia, more Indigenous people died while on remand than when serving a sentence.[30]

The Royal Commission concluded that the high number of Indigenous deaths was a reflection of the extremely high rate at which Indigenous people were placed in custody, compared to non-Indigenous people.

In addition to Indigenous deaths in custody, the disproportionately high rate at which Indigenous people are taken into custody is itself a significant matter of concern. The Royal Commission's reports analysed in detail some of the economic, social and cultural factors contributing to the high rate of incarceration.

Although the number of deaths of Indigenous people in custody in Victoria continues to be much lower than in other Australian jurisdictions, the remand rate for Indigenous Victorians is still high. In the June quarter of 2005, the remand rate for Indigenous Victorians was 244.7 per 100 000 of the adult Indigenous population.[31] Over the same period, the remand figure for non-Indigenous Victorians was 16.5 per 100 000 of the adult population.[32] This means that in the June quarter, the remand rate for Indigenous Victorians was approximately 15 times higher than for non-Indigenous Victorians.

Generally, the remand rate of Indigenous Victorians has fluctuated over the past six years between 12 to 16 times higher than the non-Indigenous adult population.

The Royal Commission's report contains recommendations that endeavour to reduce the incidence of Indigenous contact with the criminal justice system. Throughout this paper we refer to several of the Royal Commission's recommendations that relate to bail and discuss issues relevant to Indigenous Australians and the bail system within Victoria.

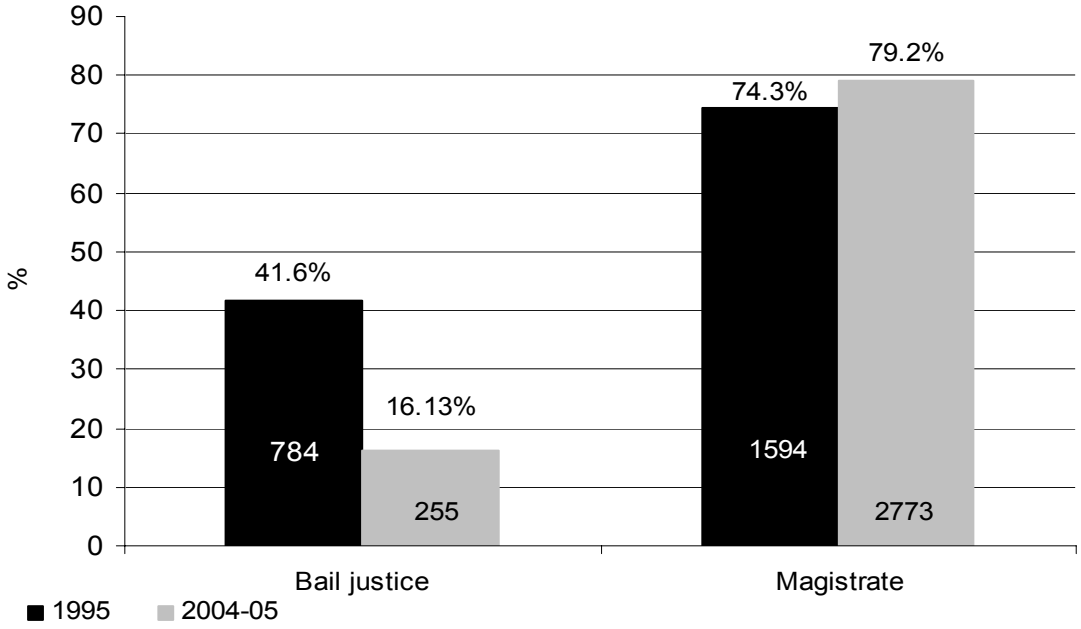
Changes in Bail Granted

In 1999, a study of bail practices in Victoria, South Australia and Western Australia was undertaken by the Australian Institute of Criminology.[33] Victorian data on first bail applications was obtained for that study from the Department of Justice.[34] We obtained current comparative data from the Department of Justice's Court Services Unit to examine any change that may have occurred over the 10-year period. The two sets of data are compared in Figure 7.[35] The graph does not include first applications for bail considered by police, because relevant data for 2004–2005 was not available.[36] Figures on bail granted by higher courts were also not included due to unavailability of data.[37]

The total number of applications dealt with by each decision maker has changed over the 10-year period, particularly in the Magistrates' Court. In 1995, bail justices dealt with 1883 applications and the Magistrates' Court with 2146. In 2004–05, bail justices dealt with 1580 applications and the Magistrates' Court with 3503.[38]

A slight increase in the percentage of applications granted by the Magistrates' Court is evident.[39] This may be as a result of the bail support services that have been put in place at the Magistrates' Court during the period. These services are discussed in more detail in Chapter 10. The most significant change can be seen in bail justice decisions. In 1995, bail justices granted more than 40% of bail applications that came before them. In 2004–05 this figure had dropped to approximately 16%. Therefore, while the number of total applications heard by bail justices remained fairly stable between the two periods, they became less willing to grant bail. The reasons for this change are not known. However, we discuss a number of criticisms of the bail justice system in Chapter 4.

Figure 7: First applications for bail granted—10-year comparison



Should the Bail Act be Rewritten?

As noted in Chapter 1, the commission consulted widely before producing this paper to identify what problems and issues bail system users have with the Bail Act. The most consistent theme that emerged from the consultations was the need to re-draft the Act to simplify the language used, improve its format and accessibility, and to simplify the concepts involved in determining bail. Simplifying the concepts involved in bail determinations is dealt with in Chapter 6.

The overwhelming majority of the frequent users of the Bail Act thought the Act should be re-drafted in plain language.[40] Many thought the Bail Act was difficult to read, understand and explain to an accused or interested parties such as victims.[41]

Most bail decision makers, including members of the Magistrates', Children's, County and Supreme Courts, also thought the Act should be re-drafted.[42] It was noted that provisions in the Act were difficult to find, the drafting is complex and section headings are often not sufficiently explanatory.

Bail justices said the Act is not sequential and it would be more helpful if it followed the order of how a decision is actually made. The group consulted were experienced bail justices and had developed familiarity with the Act, but recalled the Act being very complex to understand initially.[43] Some police and magistrates who had used the Act for many years also said they were used to it now and did not see rewriting as essential. However, as with bail justices, they recalled the Act being difficult to understand when they first encountered it. In one consultation, a concern was raised that rewriting the Act would cause an increase in litigation about bail as new provisions were tested.[44]

It is worth noting that the most frequently raised problem with the Act was section 4. This covers both the accused's entitlement to bail and exceptions to that entitlement, including the reverse onus 'show cause' and 'exceptional circumstances' tests. Many people thought section 4 was particularly problematic and in need of re-drafting.[45]

Reverse onus means that the accused must convince the decision maker that bail should be granted.

In considering the need for a plain language Act, it must also be remembered that the overwhelming majority of bail decisions are made by lay people, not lawyers—that is, the police and, to a lesser extent, bail justices. Clear, simple language and concepts may assist with understanding and consistent application of the Act.

A plain language version of the Bail Act was produced by the LRCV as part of its review of the Act in 1992. The LRCV was abolished in 1992 and is a different entity to the current commission, which was constituted in 2000. To avoid confusion between the recommendations made by the LRCV and our current process we have not included the LRCV plain-language draft with this paper. The contents of the LRCV draft reflect the final recommendations of the 1992 review. Although our terms of reference require us to have regard to the LRCV review, the current commission is conducting its own review and the final recommendations may differ. However, the LRCV re-draft is a useful reference in that it provides an example of how a plain language version of the Act may look. A copy of the LRCV re-draft may be obtained by calling the commission.

Question 1 ?

Should the *Bail Act 1977* be rewritten to simplify its language and format and improve its accessibility, particularly for lay decision makers?

Inclusion of Objectives in the Bail Act

In our consultations there was some discussion about how the Bail Act is applied and the purposes of bail and remand.[46] In several consultations, issues were raised about remand being used punitively or bail conditions being imposed to punish the accused. Other consultations raised concerns about the Act having become more focused on offences, rather than on the characteristics of individual accused when considering bail.

The Bail Act does not contain a statement of purpose or objectives, which are now commonly included in new legislation in Victoria. The purposes of the Bail Act could include to:

- provide accused people with a general entitlement to bail and encourage the use of bail over remand whenever possible, keeping in mind the safety of the community;
- provide fair, and as far as possible, simple criteria for refusing bail;
- ensure accused people are only refused bail if it is necessary to ensure their attendance at court, to prevent re-offending, or to ensure the safety of the public, including victims and witnesses;
- provide for the consideration of the views of victims of crime by decision makers;
- ensure victims are informed about outcomes of bail hearings that may affect them;
- provide open, accountable and fair procedures for the consideration of bail by decision makers;
- provide for release on bail with conditions that are the least onerous that may be imposed on the accused, while still considering the safety of the community and particularly any victims of crime;
- promote transparency in bail decision making;
- require decision makers to provide reasons for refusal of bail.

Question 2 ?

Is there a need for a statement of purpose or an objects clause in the *Bail Act 1977*? If so, what do you think the objects of the Act should be? What should the purposes of the Act be?

Chapter 3
Police and Bail

Introduction

Police are the first contact an accused will have with the criminal justice system and, in many instances, will decide whether an accused should be remanded or bailed. Of all decision makers involved in our bail system, police make the vast majority of bail decisions.[1]

In this chapter we look at the circumstances where police become involved in the bail decision and what process they go through in deciding whether to grant accused people bail or remand them in custody. In particular, we look at:

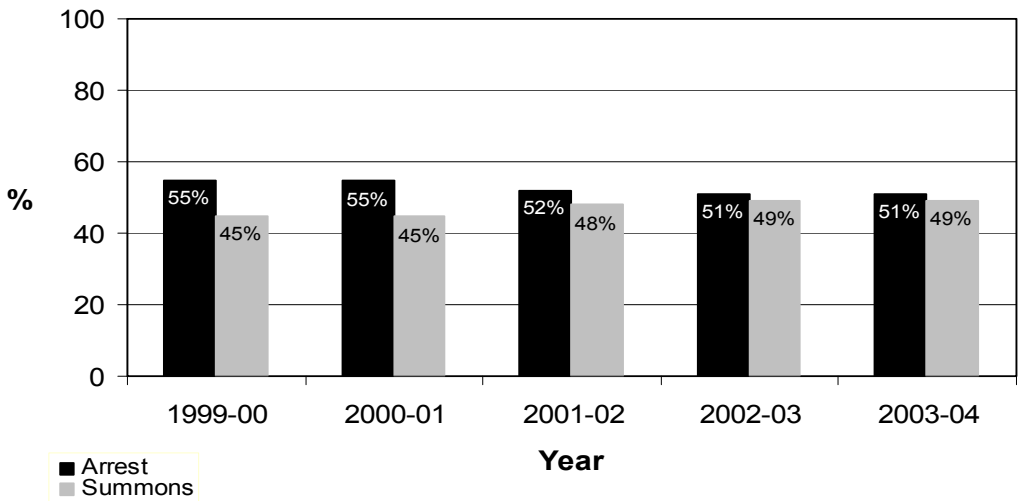
- police and the decision whether to arrest or summons an accused;
- the procedures surrounding bail granted by police;
- specific reforms to the Bail Act that are relevant to bail granted by police;
- police and victims and the bail process;
- the Law Enforcement Assistance Program (LEAP) and bail;
- the general understanding of bail procedures among police officers.

Arrest or Summons

Police can adopt one of two courses when they decide to charge an accused with a criminal offence. Which of these two courses is adopted has important repercussions for bail. They may either release the accused on the basis that a summons will be issued at a later date, or they may arrest the accused.

Figure 8 gives an overview of Victoria Police's charging practice for the five-year period from 1999–2000 to 2003–04.[2]

Figure 8: Method of processing alleged offenders by Victoria Police



Summons

A summons is a court document directing accused people to go to court to answer a charge at a particular time. It is one of two methods—the other being arrest—by which to compel an accused's attendance in court. A police officer may issue a summons or when the police file charge sheets with a court, the court may issue a summons. The registrar *must* either issue a summons or a warrant of arrest.[3] Before police officers issue a summons, they must seek approval from an officer of the rank of sergeant or senior sergeant, or a police officer approved to authorise prosecutions.[4]

A **warrant** is a document, usually issued by a court, that authorises police to arrest people and take them before a court.

A summons may be issued for both indictable and summary offences. The summons may be given personally to the accused or, in the case of certain offences, sent by post.[5]

Summons are generally issued for less serious offences. The *Magistrates' Court Act 1989* contains a preference for the use of summons.[6] The *Children and Young Persons Act 1989* directs that a child is to be proceeded against by summons except in exceptional circumstances.[7] Understanding why there is a legislative preference for the use of summons requires consideration of the differences between summons and arrest.

Arrest

Police can use the arrest process for any charge—summary or indictable. An important consequence of arrest is that bail may be granted and therefore conditions may be imposed. This is not the case for summons.

In some cases police will apply to the court for a warrant to arrest an accused.[8] However, an accused may also be arrested without the police first obtaining a warrant of arrest. The circumstances in which an accused can be arrested by a police officer without a warrant are as follows:

- where the police believe on reasonable grounds that the accused has committed an indictable offence;[9]
- when the accused is found committing an offence;[10]
- to prevent the accused escaping, or helping another escape, from lawful custody or to prevent the accused from avoiding lawful apprehension;[11]
- where the accused is charged with a specific offence for which legislation provides that the police may arrest without a warrant.[12]

Whether the accused is arrested with or without a warrant, the issue of bail typically arises. A person who is arrested without warrant must either be released unconditionally or on bail or, like a person arrested with a warrant, be taken before the Magistrates' Court, the Children's Court or a bail justice 'within a reasonable time'.[13]

There are greater restrictions on the way in which police can deal with an accused who is arrested rather than summonsed, such as the requirement to consider the issue of bail. Therefore, arrest is typically used for more serious offending. In deciding whether to proceed by means of arrest, police consider a number of factors: the level of seriousness of the offence, prior criminal history and background of the accused and the strength of the police case.[14]

Appropriate Use of Arrest

The decision of whether to arrest or summons carries significant consequences for the liberty of an accused, as a decision will then be made about bail or remand. It is therefore important to look at how that decision is being made by police. An issue raised in consultations was whether police are only using their power of arrest where the

circumstances warrant such a course. We look at this issue again in Chapter 9 in relation to children because of the specific legislative direction for summons of children.

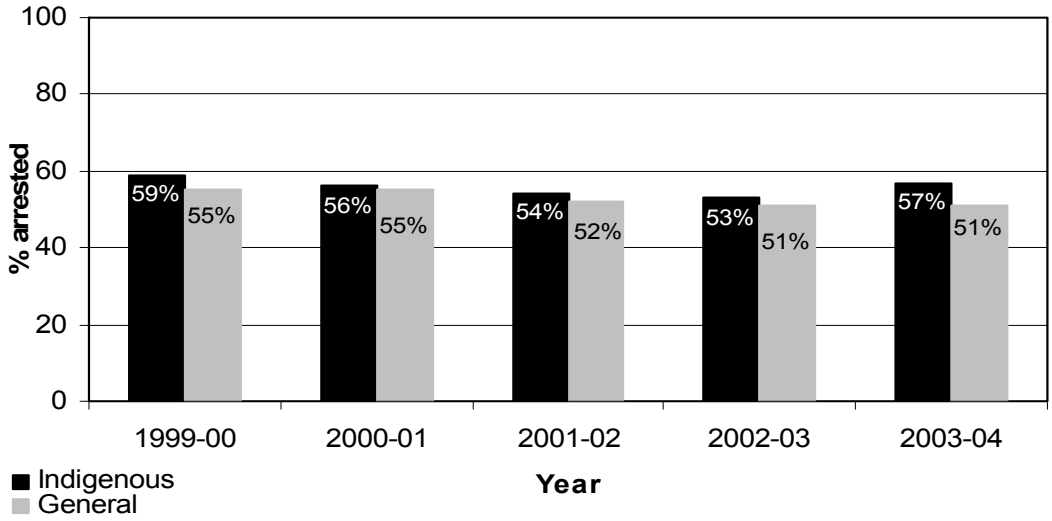
Victoria Police data for the past four financial years shows a slight preference in favour of the use of arrest by police, as seen in Figure 8. Figures for 2003–04 show that 51% of people charged were proceeded against by means of arrest. This figure is the same for the previous financial year.

In some consultations, concern was expressed that Indigenous Australians are more likely to be proceeded against by arrest than non-Indigenous accused.[15] The use of arrest is proportionally higher for Indigenous accused than non-Indigenous accused, although the difference is marginal in most years and no trend is indicated. Figures for 2003–04 show that 57% of Indigenous accused charged were proceeded with by means of arrest.

…data for the past four financial years shows a slight preference in favour of the use of arrest by police

Figure 9 depicts the percentage of Indigenous and non-Indigenous accused proceeded with by means of arrest over the five financial years from 1999–2000 to 2003–04.[16]

Figure 9: Use of arrest for Indigenous alleged offenders compared with alleged offenders generally



While there are no Victoria Police guidelines to assist police in deciding whether to proceed with arrest or summons, we are aware of at least one police station that has developed a checklist for supervising officers to assist in the arrest/summons determination. The Melbourne East Police Station has a document which it calls a Supervisors' Bailing Questionnaire. The questions are primarily directed towards the strength of the police case. The stronger the case, the greater the argument for the use of arrest. However, it is stressed that each case is to be assessed on its merits.

Police, and others, told us they may decide to arrest an accused for reasons of expediency and convenience. This may occur despite the legislative preference for summons that we have discussed. Police policy dictates that a charge and summons should be issued within two months of the accused having been interviewed.[17] This provides enough time for a senior officer to decide whether there is sufficient evidence for a matter to be proceeded with. This can be contrasted with arrest. Upon being arrested, an immediate decision must be made about how the accused will be dealt with. As outlined, the accused may be released unconditionally, released on bail or remanded in custody.

Arrest and bail is often seen as being more convenient than summons. Accused people are told immediately of their court date. The accused is served with the appropriate documents at the police station when released. Also, the authorisation for the prosecution is made

immediately by a supervising officer. We were told that from an administrative point of view, the bail process is a lot more straightforward than the summons process.[18] We do not know how frequently police opt to use the arrest procedure primarily for reasons of expediency and convenience.

A **police informant** is the police officer who is in charge of the investigation involving the accused.

The **first mention** date is the date that the accused first comes before the court, usually the Magistrates' or Children's Court.

Before a summons may be issued, the police informant is required to compile a 'brief of evidence' and submit it for approval by a senior officer. This is a more onerous requirement than arrest in terms of the informant's time and the paperwork required. It is also necessary to find the accused and serve the summons prior to the first mention date at court. This may be particularly problematic if the accused lives some distance from the police station or has moved and must be located.

In 2004, the Victorian Parliament Law Reform Committee released a Discussion Paper that comprehensively examined warrant powers and procedures within Victoria. One of the questions the committee asked was whether there was a need for changes 'to police standing orders or procedures in the police manual concerning the arrest of vulnerable and disadvantaged people'. It also asked what changes were appropriate. The committee was due to report back to parliament on 31 October 2005. We will address any of the committee's relevant recommendations in our final report.

Question 3 ?

Are police using arrest and summons appropriately? Do the processes involved in arrest and bail or issuing a summons disproportionately affect the decision about which course is adopted?

Police Bail and Bail Procedures

When police arrest an accused, and the issue of bail arises, the procedures to be followed are set out in the Bail Act.[19] It is important to note that the bail decision may only be made by police when it is not 'practicable' to take the accused before a court 'forthwith'.[20] In addition, not all police officers can make decisions about bail. The officer must be of or above the rank of sergeant, or be the officer-in-charge of a police station.

In those circumstances where it is not 'practicable' to take an accused before a court, the police officer may grant the accused bail unless the provisions of the Bail Act require otherwise. However, a limitation is added to this provision. If an accused cannot be taken before a court within 24 hours of being taken into police custody, the police 'shall' grant an accused bail unless the provisions of the Bail Act require otherwise.[21] Subject to the provisions of the Bail Act, the accused is to be released on bail immediately. Contrary to some beliefs, the provision does not mean than an accused can be held by police for 24 hours before being released on bail.[22]

In exercising their powers under the Bail Act, the police exercise powers similar to that of a court. Police will consider the reasons why an accused should or should not be granted bail and will make a decision accordingly. If the police decide to grant bail they may impose bail conditions in accordance with the Bail Act.[23] Bail conditions imposed by police may be challenged by an accused before a bail justice.[24]

In Chapter 5 we will look at the bail decision in matters where an accused is charged with murder or treason. Police are not empowered to make a decision about bail for an accused who is charged with either of those two offences.[25] Police can, however, make bail decisions for any other alleged offence where it is not practicable to take an accused before a court. Police are not allowed to make a decision to remand a child in custody.[26]

If police officers refuse to grant bail to accused people, they will be remanded in custody. In such circumstances, accused people must be notified by the police of their right to seek a review of the decision by a bail justice.[27] Although an accused may decline to exercise the entitlement to have the bail decision reviewed, it is police practice to take the accused before a court or bail justice where bail is to be refused.[28] How long can the police keep an accused in custody? Police policy dictates that an accused must appear before a court or bail justice 'as soon as practicable'.[29] So, an accused must be remanded to the next available court sitting date.[30] Alternatively, if a bail justice is to be used, the accused is to be taken before the bail justice 'as soon as practicable'.[31]

Police are required to record their reasons when they refuse to grant an accused bail.[32] In Chapter 5 we discuss in detail the requirement to record reasons in the context of a court's bail decision. Many of the considerations raised concerning the extent and nature of reasons to be recorded are equally applicable to police.

in cases where the police believed a court would grant bail, it was considered a drain on police resources to go before a court

Not Practicable to Bring an Accused before a Court

As we have discussed, the bail decision is only to be made by police when it is not practicable to take the accused before a court. Accordingly, if the applicable court is open (the Magistrates' Court or the Children's Court), and there are no impediments to taking the accused there, the Bail Act stipulates that police are not to make the bail decision.

However, in consultations we heard that police often make bail decisions in the above circumstances.[33] For example, in the case of a first-time offender charged with shop theft, we were told that it was commonplace for police to ignore the relevant provisions of the Bail Act and grant bail at the police station.[34]

It is important to look at the reasons behind police non-compliance. We were told that in cases where the police believed a court would grant bail, it was considered a drain on police resources to go before a court. Taking an accused to court may involve the use of two police officers, a police vehicle and sometimes hours of waiting. This may place considerable strain on resources, especially in regional areas where there often are only one or two police vehicles and a small number of police officers. When the matter does proceed before the court, the fact that the police are not opposing bail is likely to mean that in the vast majority of cases bail will be granted. It is likely that an accused would also prefer to be bailed without delay from a police station rather than being held in custody to be taken before a court.

The practical difficulties caused by the police having to take every accused before a court when it is open raises the question of whether they should continue to be required to do so. It might be considered anomalous that the police are entrusted to make the bail decision in relation to some accused but not others, depending on whether or not the court is open. An alternative may be to allow the police to grant bail and if accused people object to any bail conditions imposed by the police they could then be taken before a court.

In circumstances where the police are opposing bail it would be appropriate to retain the requirement that the accused be taken before the court 'if practicable'. This recognises the importance surrounding a decision to remand an accused in custody and the requirement that an accused be brought before a court as soon as possible.

Question 4 ?

Should section 10(1) of the *Bail Act 1977* be amended so that police can grant bail even on occasions where it is 'practicable' to take an accused before a court?

Offences for Which Police Decide Bail

The Bail Act allows police to make bail decisions for all offences, except murder or treason, where it is not practicable to take the accused to court. This means that police are able to make a decision about the bail of an accused who is charged with a serious indictable offence.

…it is rare for a police officer to decide to grant bail to people charged with exceptional circumstance offences

In consultations, some concern was expressed about the ability of a police officer to make a bail decision in circumstances where an accused is charged with an exceptional circumstance offence.[35] It was suggested that in such instances police should not be able to make the bail decision and that only a court should be able to do so. Part of the reasoning behind this argument is a concern that police have the opportunity to offer to grant bail if admissions are made, or refuse if they are not.

An argument can also be made that because courts routinely deal with bail applications for serious offences, they are in a better position to hear such matters, weigh up the competing concerns and apply relevant legal principles. There seems to be a greater trust in the decision-making ability of courts, especially among defence practitioners.

We heard that in practice it is rare for a police officer to decide to grant bail to people charged with exceptional circumstance offences (or even a show cause offence).[36] Instead, it appears that police are more likely to call on a bail justice to make the bail determination. However, we also heard about instances of contrary practice—cases of police granting bail to an accused charged with an exceptional circumstance offence, including alleged drug offending in which a commercial quantity of drugs was said to be involved.[37]

In Chapter 4 we raise the question of whether bail justices should be able to grant bail in situations where an accused is charged with an exceptional circumstance offence. If the power of police and bail justices to grant bail for an exceptional circumstance offence is removed, then the issue of what happens to the accused arises. Is it fair that accused people should remain in custody until they are able to go before a court? This may entail an accused spending a weekend in custody before a decision concerning bail is made.

Question 5 ?

Should the *Bail Act 1977* be amended to prevent police from being able to decide bail in matters where an accused is charged with a serious indictable offence? If so, should the limitation be restricted to those offences that are currently termed exceptional circumstance offences?

Police Attendance at Court

When a court hears a bail application that is opposed by the police, or an application to vary bail conditions that is opposed, the arresting officer or his or her corroborator must be present in court.[38] As discussed, an accused is generally remanded by police or a bail justice to the court's next sitting date. In practice, this means that when an accused is arrested late at night or during the early hours of the morning, the police informant will be required to attend court the next day or the same morning to give evidence at a bail application.

corroborator A **corroborator** is a police officer who assists the 'informant', who is the main coordinating officer of the investigation. Whenever an accused is arrested an informant and a corroborator are assigned to the case.

In one consultation, a concern was raised about police officers remaining on duty following night shift because they have to attend court.[39] As the accused has just been arrested, they are unlikely to have legal representation arranged, and will have to do so in the morning. It is therefore unlikely that the bail application will proceed at 10am—the time at which the court begins to hear matters. It will take time for accused people to find representation and give instructions to their lawyer. Lawyers from Victoria Legal Aid, in particular, often have a large workload and deal with many accused. Large court lists also complicate matters. An officer who has been working all night and whose shift should have finished at 7am is required to wait at court, sometimes until the afternoon, before a matter actually proceeds or a decision is made by the accused not to proceed with a bail application that day.

This situation raises health and safety concerns. Police will typically be required to work again the night following the bail hearing. Fatigued police officers are a risk not only to themselves, but to others.

…a concern was raised about police officers remaining on duty following night shift

The Victorian procedure can be contrasted with the situation in other Australian states. This issue has been explored in an Australian Institute of Criminology study of factors affecting remand in custody. The authors make the following comment:

> There are significant differences in the conduct of contested bail hearings. In Victoria, there is a substantial hearing into the matter … Contested bail applications can take several hours. In South Australia and Western Australia, even the contested hearings are usually done without oral evidence. The nature of the bail hearing in the magistrates' court is usually on the documents with evidence from the bar table. The facts are generally not disputed and the time is spent in the arguments, which are generally brief, going to the criteria for bail.[40]

The authors state that the demands made on police in Victoria might be viewed as an interference with normal police duties and could therefore act as a disincentive to seeking remand.[41] However, without further research it is difficult to draw any conclusions about whether the requirement to attend court does influence the police decision of whether to seek the remand of an accused. Police consulted did not raise this issue.

We asked various groups during consultations whether a paper-based system, as described above, would be an improvement on the current requirement for police to attend court. Bail applications heard in the Supreme Court in Victoria are conducted 'on the papers'. This proposal did not receive any support.[42] Those consulted said it was necessary to have police present in court when bail applications are heard so they can be cross-examined about the alleged offending and other relevant matters. It was pointed out that affidavits or statements are incontrovertible and unable to be expanded upon.[43] Decision makers were also of the view that police attendance was necessary to provide the court with a greater appreciation of all of the circumstances of the case.[44]

An **affidavit** is a written statement by one of the parties involved in a court proceeding. Making an affidavit is usually an alternative to giving evidence in person in the court.

A move to a greater reliance on affidavits or statements would require police to draft such documents before attending court. In those instances where there is only a matter of hours between arrest and the matter being brought before a court, this requirement would be onerous.

There is a protocol in place at the Melbourne Magistrates' Court whereby magistrates will endeavour to accommodate police officers who have worked a night shift. This involves magistrates listing such matters early and trying to deal with them expeditiously. While helpful, this alone cannot solve the problem. It is necessary for all parties to be ready to proceed and defence practitioners require adequate time to take instructions.

Alternatives such as remanding accused to a court sitting date other than the one immediately following arrest, such as the second sitting date, are also problematic. Accused people's right to seek their liberty is fundamental and any undercutting of such a right for

the sake of police convenience is likely to attract criticism, especially when children are held in custody. Moreover, there is no guarantee that remanding an accused to a later date would result in the necessary instructions having been taken in the interim. Where Victoria Legal Aid is to act for an accused, it is usually only able to gain access to the client in court on the morning of the appearance. It would be difficult to access clients being held in custody elsewhere, such as suburban police stations.

Given the measures put in place by the Magistrates' Court, we are interested to know whether this is a continuing problem, and to hear any ideas for improvement of the system that have not been canvassed.

…in the vast majority of instances police do exercise their bail powers appropriately

Question 6 ?

Does the requirement that the police informant attend a bail hearing the morning after working a night shift cause undue hardship for police? If so, what measures could be put in place to improve this situation?

Arrest and Detention of a Primary Carer

In one consultation, a concern was raised about the lack of police protocols where a primary carer is taken into custody or remanded. A primary carer is a person who is responsible for looking after a child or children—most often this will be their mother. We discuss the issues surrounding remand of primary carers in Chapter 10, particularly the processes for ensuring that children are cared for. There is nothing in the Victoria Police Manual about arrest, bail and remand procedures for women who are primary carers and at present police practice varies from case to case.

Potential Misuse of Bail by Police

The provisions of the Bail Act and the Victoria Police Manual reinforce the importance of bail being used in a responsible and appropriate manner. Legislative measures endeavour to ensure that an accused is only remanded after consideration of various factors, and that the imposition of bail conditions is approached in a graduated and structured fashion.

It would appear that in the vast majority of instances police do exercise their bail powers appropriately. This was reinforced during several consultations. However, we also heard about instances of police misusing their powers.[45]

Threats Surrounding the Grant of Bail

Accused often find themselves in the confines of a police station without legal representation and without an awareness of the bail process. There is a risk in such circumstances that some police may be tempted to promise bail to elicit admissions or obtain certain information. There could be a threat or implied threat that, if such information is not forthcoming, bail will be refused or police will oppose bail.

There are various checks that are built into the bail system to ensure police do not misuse their powers. For example, a decision to remand is likely to be reviewed by a court shortly after such a decision is made. Moreover, the actual bail or remand decision would be made by a senior police officer who is not usually the investigating officer. Any confession or information said to be obtained by illegitimate means may not be admissible evidence.[46]

However, it is important to realise that the issue being discussed here is one of threat or implied threat in instances where police have no intention of carrying such a threat out. For example, police may tell accused people that if they do not give them the name of an alleged co-accused then they will be remanded in custody. This may be done in

circumstances where police have no intention of actually remanding the accused but hope that such a threat will result in the information being provided.

More broadly, we heard anecdotal evidence that an accused's attitude towards police may also have a disproportionate bearing on the bail decision or the imposition of bail conditions.[47] We were told that if an accused is rude to police and generally difficult, then some police will be more inclined to oppose bail or impose onerous bail conditions. Clearly, such matters should be irrelevant to the bail decision.

Question 7 ?

Is there a problem with police using a promise of the grant of bail inappropriately?

Police and Bail Justices

There was a belief expressed in several consultations that police are able to choose individual bail justices of their liking.[48] Accordingly, they could choose bail justices who they felt would readily agree with their views, typically concerning remand. This concern appears to have been ameliorated to some extent by the recent imposition of measures to ensure that police cannot choose which bail justice hears a matter.

During consultations we also learnt that some police will not call a bail justice after a certain time of the day.[49] For example, after midnight on a weekday they would not call a bail justice but instead keep the accused in custody until the court opened at 10am the next day. On a weekend they might wait until 2am, after which they would wait until the next morning and then call a bail justice. This is arguably contrary to the requirement that police are to take an accused before a bail justice 'as soon as practicable'. We discuss these issues in greater detail in Chapter 4.

…it is important that victims' views and concerns be heard during the bail process…

Police and Victims

In certain cases, a victim may be particularly concerned about the bail decision and may have very strong views about bail or remand. Specifically, some victims of sexual or violent offences may feel fearful about an accused being released on bail. In these cases there is a tension between the victims' concerns about safety and the right of accused people to be granted bail and to the presumption of innocence until the charges against them can be properly heard. The interests and concerns of the victim are only one of a number of factors that must be considered in making a decision to grant bail.

The fact that a decision maker grants bail does not mean that the interests and concerns of the victim have not been taken into account. However, it is important that victims' views and concerns be heard during the bail process and that they be kept informed about the criminal justice process. Indeed, it is information which victims groups commonly identify as a primary requirement.[50] The victim's first experience with the criminal justice system will usually be with the police and it will therefore generally fall to police to provide victims with information and to refer them to support services.

Case Study 1

One night when Betty was in bed, a man broke in to her flat. When Betty woke up and surprised him, he knocked her to the ground, breaking her wrist and one of her ribs. The man took the TV and left.

Michael was arrested by the police and Betty identified him from a photo board. He had prior convictions for burglary and drug possession, but had not previously

been charged with assault. Michael was refused bail by the police but his lawyer argued in the Magistrates' Court that he should be granted bail because of the lack of evidence against him and his good family support.

Michael was released on bail on the conditions that he stay with his parents until the trial and participate in the Magistrates' Court drug rehabilitation program. When Betty found out that Michael had been released, she was surprised and frightened that he might harm her again. She was also angry that the police had not told her. Betty had not told the police that she wanted to be kept informed about Michael, but thought they would know how important this would be for her.

It is not usual for a victim to give evidence at a bail hearing…

Victims' Rights in Victoria

In the Attorney General's Justice Statement, emphasis was given to treating victims with compassion and respect for their dignity.[51] The Justice Statement draws upon the United Nations' *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which sets out principles for responding to the needs of victims. Included among these principles are:

- the need to inform victims about the process and their role;
- the importance of allowing victims to present their views without prejudice to the accused person.[52]

While it could be said that the Bail Act, along with police procedural guidelines, does give effect to these principles, it is also arguable that these provisions do not go far enough.

Two issues have been raised in relation to victims and bail: how victims' views are taken into account by a decision maker, and how victims are kept informed about an accused's bail status.

Taking Victim's Views into Account

As discussed, the Bail Act allows for victim's attitudes to bail to be taken into account when making a decision about bail.[53] In one consultation, however, it was apparent that victims are not routinely informed about this provision in the Act and their views may not always be actively sought.[54] Some participants thought it was usually clear what the victim's concerns were from the context of the case and therefore it was not necessary to ask the victim to express these views.

In practice, the police will either take the views of the victim into account when they make a bail decision or represent these views if they are appearing before a bail justice or a court. The police informant gives evidence about all of the issues, including the strength of the evidence against the accused and any safety concerns raised by the victim.

It is not usual for a victim to give evidence at a bail hearing, although there is nothing in the Bail Act to prevent it. There may, however, be practical difficulties with the victim communicating directly with the decision maker. When the decision is being made at a police station, the accused will have just been arrested. If this is immediately following the alleged offence, the victim may be present at the station making a statement. However, there are many cases where the victim requires urgent medical treatment or the statement has been taken elsewhere. In cases where the offence has allegedly occurred some time earlier it may be difficult to locate the victim. Locating the victim would delay the processing of the accused and divert police resources that may not be readily available, particularly in regional areas.

While there is nothing to prevent victims from attending a bail hearing in court, they would have to be notified that the hearing is occurring and this would involve allocating police time that may not be available. When a bail application is made to a court it is not possible to know what time the application will be heard, or even if an application will be made on the day following arrest. Consequently, a victim may have to wait for long periods of time, possibly over several days. Given these considerations, it is likely to be impractical in most cases for a victim to attend court and wait for the matter to be heard.

Keeping Victims Informed

There is nothing in legislation to ensure victims are informed of bail outcomes. The Victoria Police Manual instructs police officers to inform victims of the outcome of any court proceedings.[55] The Code of Practice for the Investigation of Family Violence requires police to advise victims if the offender is bailed.[56] The Code of Practice for the investigation of Sexual Assault also requires police to advise the victim of the outcome of bail applications and any conditions of bail that are designed to protect the victim.[57] In consultations with police, the commission was told that this was not done universally.[58]

The Victoria Police Manual instructs police officers to inform victims of the outcome of any court proceedings

Question 8 ?

Should police be required to inform victims about the provisions in the *Bail Act 1977* which require their views (when expressed) to be taken into consideration?

Victims Support Agency and Victims Assistance and Counselling Program

The Victims Support Agency was established on 20 May 2004 in response to a review of existing victims' services. The agency is responsible for planning, developing and delivering services to victims of crime.

The Victims Assistance and Counselling Program is funded by the Victims Support Agency and provides case management and counselling services to victims of violent crime. The program provides five free counselling sessions. If victims require more counselling support, they will be referred to the Victims of Crime Assistance Tribunal to make a claim for further counselling services to be paid for. The program supports victims by linking them with other support services. Sometimes victims will need to change residence; often this is so they are no longer living close to the perpetrator of the crime against them. In such instances the program may assist with transportation and removal expenses. Case managers will also provide victims with information about the legal system and liaise with police about the status of a particular accused.

In one consultation with representatives from victims' programs, they said explaining the legal process was a significant part of their role. Victims are very often confused about the operation of the legal system. For example, victims sometimes do not understand that there can be a long period of time between a person being charged and the final conviction or acquittal of that person. There was also often a perception that people would only be released on bail if they had access to a surety with large amounts of money.[59]

A **surety** is a person or people who give an undertaking to ensure that an accused will appear in court. The surety puts up security, such as money or title to a residential property, which can be taken by the court if the accused fails to appear.

Victims were often unaware they needed to tell police that they wanted to be informed—they often assumed they would be informed as a matter of course and were not asked whether they wanted to be kept informed. Examples were given where victims had been seriously injured and hospitalised and had been told nothing by the police about what had occurred after the offence had been committed. Particular mention was made of the importance of informing victims about bail conditions so they could report breaches of these conditions, for example, an accused approaching them in breach of a condition.

Question 9 ?

Should victims have to request that they be informed about the outcome of bail hearings? Should this information include the details of any bail conditions?

Proposed Victims' Charter

In 2004, the Attorney-General asked the Victims Support Agency to develop a discussion paper for community consultation on the content and format of a Victims' Charter. The agency released the paper on 14 September 2005, containing a draft victims' charter. The draft charter draws upon the United Nations' principles and seeks to improve the experiences of victims in their dealings with the criminal justice system.[60] The draft charter sets out a range of principles in relation to the treatment of victims of crime, including the need to treat victims with respect and dignity and to keep them informed about the prosecution process.[61] Principle 5 of the draft charter says:

> (a) a victim should be able, on request, to be informed by the police, Office of Public Prosecutions or the courts of the outcome of any bail application and of any special bail conditions imposed on the accused that are intended to protect the victim or the victim's family.
>
> (b) where relevant, when an application for bail is being considered, the physical protection of the victim and victim's family should be taken into account.

The draft charter provides for complaints to be lodged by victims if they feel their entitlements have not been upheld and also provides that ongoing monitoring and evaluation of the charter should be undertaken.[62] The agency's consultation paper does not provide details about who should deal with complaints and how the charter should be monitored and evaluated but rather invites submissions on these issues. The agency is currently holding community consultations about the charter and is inviting submissions from victims and the broader community.[63]

Victims' Rights in Other Jurisdictions

Australia

The emphasis in the Justice Statement and Victims' Charter on keeping victims informed about the justice process and allowing them to have their views heard is echoed in other states' legislation. In New South Wales, Queensland, South Australia, Western Australia and the ACT there is specific legislation dealing with victims' rights.[64]

In the ACT, where a police informant is aware that a victim has 'expressed a concern' about a need for protection, the police must take all reasonable steps to notify the victim about the bail decision.[65] In Western Australia, Queensland and South Australia, the police must inform victims of the outcome of bail applications if they have requested this information.[66] In Queensland and South Australia this extends to information regarding any bail conditions that are imposed.[67] In New South Wales, victims are to be informed about the outcome of bail hearings where the accused has been charged with sexual assault or other serious personal violence.[68] In addition to this, victims are to be informed of any bail conditions that relate to the safety of the victim or the victim's family.[69]

In the ACT, South Australia and Western Australia, legislation requires victims' views be considered when making a bail decision.[70] In the ACT, this requirement only exists where the prosecutor is aware of a concern expressed by the victim about a need for protection from violence or harassment. In New South Wales, there is no specific requirement to consider victims' views, merely a requirement to take the 'likely effect' on them into account when making a decision.[71] In Queensland, there is a requirement that the victim's version of events be recorded as soon as possible, but no actual requirement that it be

taken into account. Instead there is a requirement that the 'welfare' of the victim be considered at all appropriate stages.[72]

United Kingdom

There are also a number of overseas jurisdictions which have considered the issue of victims' rights and attempted to set out guidelines for their appropriate treatment. In the United Kingdom, a code of practice for victims has recently been released and will become law in April 2006. The draft code requires police to notify victims that an accused person has been released on bail or remanded, whether or not this information has been requested by them.[73] In the case of vulnerable victims, this information must be provided within the first working day after the alleged offence.[74] For other victims, the information must be provided within the first three working days.

United States of America

In the United States of America, the *Victims Rights and Restitution Act 1990* provides for victims to be provided with the 'earliest possible notice' of the 'release or detention status of … a suspected offender'.[75] The Act requires the relevant government departments to engage officials who have responsibility for identifying victims of crime and delivering particular services to them, including keeping them informed about the process and the whereabouts of the accused.[76] As with the United Kingdom, there is no requirement that the victim request information before it is given.

Canada

There is no specific legislation concerning victims in Canada. There is a general statement of principles—the *Canadian Statement of Basic Principles of Justice for Victims of Crime, 2003*.[77] These principles are intended as a guide to the development of policy and legislation in relation to victims. The principles include a requirement that information be provided to victims about the status of the investigation for a particular accused person. The statement also says that victims should be given information about their role and any opportunities to participate in the criminal justice process, and that their views are an important consideration in the process.

The Canadian Criminal Code has recently added sections that specifically relate to the treatment of victims in bail applications. The code provisions do not talk about informing victims of bail outcomes, but they do require the safety of the victim be taken into account when making a bail decision.[78]

New Zealand

New Zealand has recently introduced the *Victims Rights Act 2002,* which makes explicit and mandatory provisions that were more vaguely expressed in earlier legislation.[79] The Act requires the Commissioner of Police to give victims notice of every release on bail of accused people as well as informing victims of any terms and conditions of release that relate to the safety and security of victims or their families.[80] In cases involving sexual assault, serious physical injury, or where offences have resulted in victims having ongoing and reasonable fears for their safety or the safety of their families, the Act requires police to ascertain and make known to the court the victims' views about the release of accused people on bail.[81]

Question 10 ?

Should police be required to inform victims about the outcome of bail hearings? If so, should police have to do this for all cases, or should this only happen for more serious or violent crimes? What (if any) other information or support should victims be given in relation to bail and who should be responsible for delivering it?

LEAP Police Database and Bail

Victoria Police use a database known as LEAP. The database, implemented in 1993, stores a variety of information, including details of accused and convicted offenders. It is capable of keeping information about whether an accused is on bail.

It is critical that decision makers be made aware of whether an accused who comes before them is already on bail. Not only will this have a bearing on the bail decision, but it may also mean that an accused is required to show cause. Accused people are required to show cause why they should be granted bail if they are charged with an indictable offence that is alleged to have been committed while they were awaiting trial for another indictable offence.[82] The Bail Act specifically directs decision makers to consider any previous grants of bail in determining whether or not an accused is an unacceptable risk.[83]

…we heard about problems with the accuracy of the LEAP database

To find out whether an accused has previously been granted bail, or is currently on bail, the police will rely upon the contents of the LEAP database. It is therefore important that the LEAP database be up-to-date and be checked prior to any bail hearing. The Victoria Police Manual directs officers to check the LEAP database to determine bail status and to bring the accused's bail status to the attention of the bail decision maker.[84]

In August 2005 the Victorian Government announced the LEAP database would be replaced.[85] The replacement of LEAP with a new database is to be a three-year process. We do not currently have any information on what effect this will have on bail information. The following section of this paper is concerned with the current operation of the LEAP database.

Updated LEAP Bail Status

In consultations we heard about problems with the accuracy of the LEAP database.[86] Police update LEAP by faxing details such as charge sheets and bail forms to the Central Data Entry Bureau, where it is then placed on the LEAP database. Police do not update the LEAP database themselves. One of the problems reported in consultations was police not promptly forwarding the appropriate forms to the bureau after they have processed an accused, or bail details not being promptly entered onto the LEAP database by bureau staff.

We were told in one consultation that the entry of bail information on the LEAP database by the data entry bureau is given a high priority and it should be entered within approximately six hours.[87]

Case Study 2

Brian is currently on bail for aggravated burglary allegedly committed one week ago. Brian was arrested and bailed for this offence from St Kilda Police Station. Brian is later charged by police from Nunawading Police Station for theft from a shop. LEAP has not been updated and, accordingly, the Nunawading police who are dealing with the alleged theft do not know of the prior aggravated burglary charge and so decide to bail Brian.

In Case Study 2, owing to a failure to promptly update LEAP, the police who made the second bail decision were not able to act with a complete picture of Brian's bail history. Also, they have not applied the required show cause test.

It may be the case that Brian is charged with a series of further offences, perhaps a string of burglaries, all by different police stations. For some of these offences Brian is bailed, for others he is released pending summons. Again, decision makers who make subsequent

decisions about how to charge Brian and whether to bail him may not have a complete understanding of his alleged criminal behaviour owing to a failure to update the LEAP database.

It is possible that in these circumstances Brian would have been remanded in custody had there been a greater appreciation of his alleged offending. If a court did grant him bail, it probably would have been granted on the basis of him complying with strict bail conditions, including drug treatment if that is one of the reasons for his offending. These circumstances could see Brian being released on bail for a more serious offence, such as the burglary, but eventually remanded for a less serious offence, such as a shop theft, when the full extent of his alleged criminal behaviour becomes known to a decision maker.

In Brian's case, a failure to promptly identify a pattern of criminal offending has meant that possible initiatives to put a stop to such behaviour have not been implemented. We discuss initiatives available to people like Brian in Chapter 8 when looking at bail conditions and support services, and also in Chapter 10 when discussing bail and accused people who are dependent on drugs.

If the police informant is not present at a hearing and does not update LEAP then it does not get done

LEAP Bail Status Following Court Appearance

Accused people are required to attend court on the first date to which they are bailed. Often the case will then be adjourned, with the accused having bail extended. If the accused is charged with further offences following that initial court appearance, confusion may arise about the bail status on the original charge. It will be difficult for police to determine whether the initial matter has been finalised or whether the accused is still on bail because only the first court date would be apparent from LEAP. Following the accused's initial appearance at court, LEAP is typically not updated with details of new court dates or bail extensions. Such information is not automatically transferred from the court's computer system to the LEAP database.[88]

It is currently possible for the police, and the general public, to obtain details about an accused's next hearing date in the Magistrates' Court via a search function on the Magistrates' Court website.[89] This function allows users to search the court list using either the name of the accused, the name of the police informant or the case number. Information displayed includes the date of the next hearing, the location of the next hearing, the prosecuting agency and the type of hearing. However, it seems that not all police are aware of this service or have easy access to it. It also has a limitation in that it does not indicate whether an accused is on summons or on bail, which would require crosschecking with the LEAP database.

If the police informant is not present at a hearing and does not update LEAP then it does not get done. There is no procedure in place to ensure that the prosecutor who hears a matter informs the data entry bureau of the new court hearing date or the extension of the accused's bail. Also, if bail is varied by the court this information is not, as a matter of course, relayed to the police informant. While informants would typically be present in court, if they are not, and the matter is adjourned, the prosecutor—typically a police prosecutor—keeps the brief of evidence until the next court hearing date. The prosecutor may send an email to the police informant to advise of the new court date, whether the officer is required to attend and the bail status of the accused. However, this is not universally done by all prosecutors.

Prosecutors told us their workload makes it impossible for them to take on additional responsibility for data entry, or relaying information to the bureau. An initiative that may improve the flow of information between the police and courts is discussed below.

E-Justice and Bail

The Department of Justice's Criminal Justice Enhancement Program aims to 'introduce improved business processes, new technology and major cultural change into Victoria's criminal justice system'.[90]

As part of the program, a new computer-based application known as E-Justice is being implemented. Among other things, this initiative is designed to assist various justice agencies manage information relevant to an accused. It will involve the exchange of information between the LEAP database and Courtlink (the Magistrates' Court database).

…we were told that police are sometimes reluctant to make a bail decision owing to a fear of litigation

As we have discussed, there is presently no interface between the court's computer system and LEAP. LEAP relies on information being entered by Victoria Police data personnel, who are provided with information by operational police officers. This can lead to the various problems that we have discussed above. It is envisaged that E-Justice will remedy this situation, as information will be exchanged between the court system and LEAP. This will be an electronic transfer and will occur automatically. By accessing a certain screen in LEAP, police will then be able to ascertain up-to-date information about an accused's bail status.

Question 11 ?

Will E-Justice eliminate the problems of LEAP not containing up-to-date information of whether an accused is on bail? If not, are other mechanisms required?

Misunderstanding of Bail Act

In consultations we were told that there is a general misunderstanding among many police about the processes surrounding the Bail Act.

We heard that police routinely call a bail justice when there is no need to do so. For example, since May 2005 there have been at least two murder cases reported in the media where bail justices attended the police station following a charge being laid. In such instances a bail justice has no power in relation to an accused.[91]

We heard that often police officers call a bail justice whenever an accused is alleged to have committed a serious offence. Clearly, the rights of an accused are paramount and bail justices must be used when accused request their attendance. However, if police call a bail justice without first turning their mind to the issue of bail, this has the potential to place additional stresses on the bail justice system and is not what is envisaged by the Bail Act. It appears police sometimes call a bail justice in those circumstances, even if they are of the view that the accused should be granted bail, preferring the decision be left to a bail justice. In one consultation with police, we were told that if the imposition of bail conditions was being considered then a bail justice would be called.[92]

In several consultations we were told that police are sometimes reluctant to make a bail decision owing to a fear of litigation.[93] There appears to be an exaggerated concern about civil legal action should an accused granted bail by police go on to commit an offence, especially an offence of violence. Such anxiety extends to allegations of wrongful imprisonment should the police decide to remand an accused.[94] This concern has reached a point where police will often call a bail justice in the early hours of the morning in circumstances where an accused could be taken before a court within several hours. We were also told that police have enough concerns in processing an accused, without the further worry of making a decision about bail.[95]

As discussed, police policy does dictate that in circumstances where police are seeking to refuse bail or have doubts about whether bail is appropriate they are to refer the matter to a court or bail justice. Both should be employed as 'soon as practicable'.

We have already discussed situations where police ignore the provisions of the Bail Act by making a decision concerning bail in circumstances where it is 'practicable' to take an accused to court. We have also explored concerns about potential abuse of bail by police.

It may be the case that police need clear guidelines about the procedures to be utilised and the powers they can exercise with bail. The police processes that currently exist surrounding bail seem to have evolved more through custom than a clear understanding of the provisions of the Bail Act. Although the Victoria Police Manual contains police policies concerning bail, it does not provide operational members with a clear and simple overview of the bail decision-making process.

Question 12 ?

Would it be beneficial for further guidance to be provided to police officers about making bail decisions? For example, would it be desirable to have a clear, plain English guide that sets out the powers police have under the *Bail Act 1977* and the appropriate procedures to be adopted in a bail application? Would police benefit from guidelines detailing what sort of matters are relevant to the bail decision?

Chapter 4
Bail Justices

Introduction

Bail justices are ordinary members of the community who play an important role in the bail system. In certain situations they will be directly involved in decisions of whether to remand accused people in custody or grant them bail. They are called in when an accused is first brought in to custody and a court is not open. Bail justices are a unique feature of the Victorian bail system—no other state has bail justices.

Who are Bail Justices?

Because decisions involving bail justices are not made in open court—they are almost always made in a police station—there is not a great deal of public knowledge surrounding their functions, powers and procedures. We will therefore start by looking at who bail justices are, when bail justices are used and what powers they exercise.

Bail Justice Criteria

The role of bail justice is established by the Magistrates' Court Act.[1] Bail justices are appointed by the Attorney-General and perform a voluntary role.[2] They must be aged under 65 at the time of appointment.[3]

Bail justices are not required to have a legal background. The Department of Justice advises that recruitment practices focus on a commitment to maintaining the integrity, impartiality and independence of bail justices in Victoria.[4] These principles include the appointment and retention of fit and proper people who will make themselves available for duty as required, and who are trained and competent in the performance of their duties.

A person can apply to become a bail justice by sending a written application, including three character references, to the Justices of the Peace and Bail Justices Registry—a business unit of the Department of Justice. Potential candidates are then scrutinised by a selection panel. If approved, applicants are required to successfully complete a three-day accreditation course. This course, run by the State Training Office of the Magistrates' Court, covers both the Bail Act and the Children and Young Persons Act. It involves lectures, role play, discussion groups, demonstrations and assessment.

Characteristics of Bail Justices

Data collected by the Department of Justice shows that as at May 2003, 83.7% of bail justices are male and 72.5% of all bail justices are aged 51 or over.[5] Only 0.2% of bail justices are aged under 30. The Department of Justice recently undertook an internal review of the bail justice system. As part of this review, the department looked at concerns about the current characteristics of bail justices and whether they are representative of the wider community.[6]

There are 491 bail justices throughout the state.[7] However, it has been estimated that only about one-quarter of accredited bail justices are actively carrying out their role.[8]

When Bail Justices are Used

When police arrest an accused and the issue of bail arises, the procedure to be followed is set out in the Bail Act. When the bail decision is to be made outside normal business hours, a bail justice may be called to a police station to hear an application for bail.

The Bail Act envisages that a bail justice will be called to a police station when the police refuse bail and the accused requests the decision be reviewed by a bail justice.[9] However, as we have seen in Chapter 3, it appears that in many instances police call bail justices as a matter of course. Bail justices are being called when police refuse bail and to make an initial decision about the bail or remand of an accused in other cases. Police policy dictates that a bail justice can be called for reasons other than the accused requesting their attendance after being refused bail, contrary to the requirements of the Act.[10]

…it appears that in many instances police call bail justices as a matter of course

Where bail justices are to be used, an accused is to be brought before one 'as soon as practicable'.[11] This is achieved by police contacting a bail justice to come to the police station where the accused is being held.

Bail Applications before Bail Justices

A bail application before a bail justice need not follow any set procedure. It typically occurs outside normal business hours and takes place over the front counter or in a separate room at a police station.

During the course of the application, the bail justice will hear from both the accused and police. If the accused has a criminal history, the bail justice will look at his or her prior convictions. Subject to the limitations we have discussed in Chapter 3 concerning LEAP, the bail justice will also be told whether the accused is already on bail for other alleged offences. If the accused falls within an 'exceptional circumstance' or 'show cause' category, he or she will be required to show the bail justice why bail should be granted. If bail is opposed, the police must demonstrate to the bail justice that there is an unacceptable risk that the accused will re-offend or fail to answer bail.

It is uncommon for witnesses, other than the police, to be called at a bail application before a bail justice. It is also rare for an accused to be represented by a defence practitioner.

The bail justice considers the competing arguments and comes to a decision about whether bail should be granted or refused. If bail is granted, a bail justice is able to impose bail conditions in accordance with the Bail Act.[12] If the accused falls within a 'show cause' category and bail is refused, the bail justice is required to 'record and transmit' the reasons for refusing bail.[13] More generally, the Bail Act states that in circumstances where a bail justice refuses bail and the police have sought the accused's remand, the warrant shall include a statement of refusal and the grounds of refusal.[14] We look at the requirement to record reasons—and ask questions about this requirement—in Chapter 5 in the context of a court decision. Many of the issues discussed there are equally relevant to bail justices.

Specific Limitations on Power

The Bail Act envisages that bail justices will act in a similar way to a court when making a decision about bail. However, this is not to say that the powers of a bail justice are completely commensurate with that of a court. It also does not mean that bail justices are expected to strictly abide by court protocol or procedure.

In the case of children, the Children and Young Persons Act specifically provides that a bail justice can only remand a child in custody until the 'next working day' of the court or, in certain circumstances, two working days.[15]

Also, like police, bail justices are not empowered to make a bail decision for an accused charged with either murder or treason. However, as we have discussed, it appears that bail justices are occasionally called to a police station where an accused has been charged with murder.[16] As police cannot make a decision about the remand of a child in custody, bail justices are frequently called when police oppose bail and the Children's Court is not open.

Perceived Problems with Bail Justices

The decision of whether to remand accused people in custody or grant them bail can be extremely difficult. These difficulties are often compounded for bail justices. They are frequently involved in making a bail decision in difficult circumstances, without the support structures that a court may have.

The decision of whether to remand accused people in custody or grant them bail can be extremely difficult

In consultations we were told that bail justices rarely grant bail.[17] Defence practitioners viewed bail applications before a bail justice as being a fruitless exercise in which it was generally not worth participating. This is because they believe their client will be refused bail and will then have to show 'new facts or circumstances' to apply again.[18] Coupled with this belief were questions surrounding the independence of bail justices. Some groups we spoke to believed bail justices are too familiar with the police and, therefore, lack impartiality.[19]

Further concerns about bail justices centred on their unrepresentative composition. As noted, the overwhelming majority of bail justices are male and aged over 50. Finally, problems were identified with the lack of ongoing training of bail justices, the lack of clear guidelines for bail applications involving bail justices and, to a lesser extent, the conduct of certain bail justices.

We will address these criticisms separately. The questions posed at the end of this discussion are premised on the continuation of the bail justice system. We will discuss and raise questions about whether the bail justice system is the best method for dealing with out-of-court bail later in this chapter.

Several of the concerns raised in our consultations have already been addressed in the recent internal Department of Justice review of the bail justice system. The review addressed the future role of bail justices and justices of the peace and involved consultations with select criminal justice system stakeholders. We will refer to the departmental review throughout the chapter.

Before looking at criticisms of the bail justice system, it is important to explore the context in which bail justices make their decisions and the difficult circumstances that they often find themselves in. These include:

- Bail justices should only be used outside court hours. If a court is open, an accused should be taken there so that the bail decision can be made. This means that bail justices will often be utilised late at night or early in the morning.
- Bail justices are typically called where police have already decided that an accused should not be granted bail. Accordingly, the police have conducted a preliminary analysis of whether bail is appropriate in the circumstances and have determined that it is not. Bail justices are therefore likely to be presented with bail decisions that are particularly challenging and complex.
- Bail justices see accused people shortly after they have been arrested, which is often shortly after they are said to have been involved in the alleged offending. This means that bail justices will often see accused who are agitated, disorientated and suffering from the effects of drugs and/or alcohol. Accused people may be unresponsive, uncooperative and sometimes violent.

- Accused people who appear before bail justices are almost always unrepresented. Many lack the confidence or skills to effectively advocate on their own behalf.
- In relation to adult accused, bail justices do not have access to the various support services that a court can utilise because they conduct hearings outside business hours. Many accused seen by bail justices may not have accommodation, family networks and rehabilitative or counselling services in place.[20]

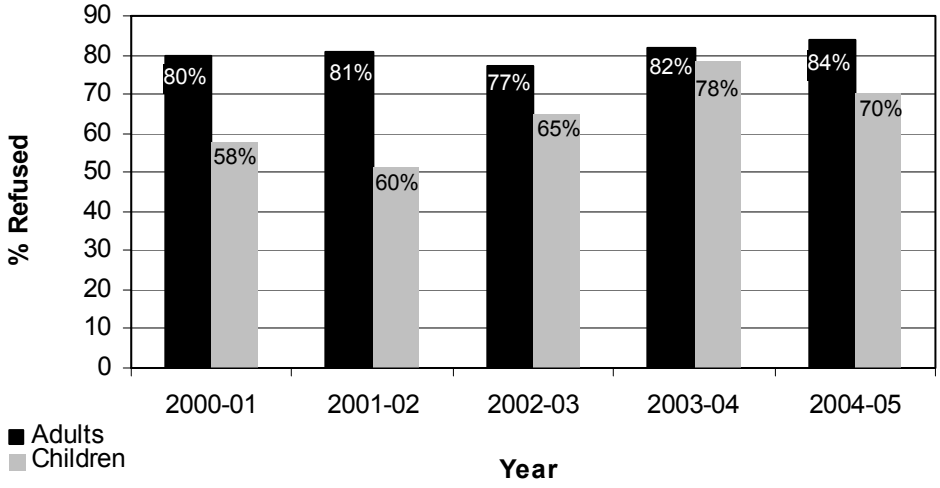
Tendency Not to Grant Bail

The available data suggests that in most instances bail justices do refuse bail

Consultations disclosed a commonly held view that bail justices rarely grant bail. In fact, some people we spoke to said they had never known a bail justice to grant bail.[21] The available data suggests that in most instances bail justices do refuse bail. Over the past five financial years, where a bail justice order has been recorded on a Magistrates' Court file, in approximately 80.8% of cases bail had been refused. In other words, in four cases out of five bail had been refused by a bail justice. The figures for the past five financial years are depicted in Figure 10. [22]

Similar data for the Children's Court discloses that where children are involved a bail justice is more likely to grant bail. However, bail was still refused in the majority of cases. Over the past five financial years, where a bail justice order had been recorded on a Children's Court file bail had been refused by a bail justice in approximately 66.2% of cases. The figures for the past five financial years are also shown in Figure 10.

Figure 10: Bail applications refused by bail justices



We examine what happens in court after bail has initially been refused by a bail justice later in this chapter. While courts do not review the bail justice's decision, we will look at how often the court makes a different decision.

As we have pointed out, bail justices operate in an environment that is different from a court. They are frequently required to make decisions with limited information. Also, they make decisions knowing that the issue of bail will, in all likelihood, be looked at again by a court within a relatively short time frame. Therefore, bail justices will arguably be more likely to remand an accused in custody in instances where they have some doubt about whether bail is appropriate. This was affirmed in our consultation with bail justices.[23] They do so knowing that a court may ultimately be in a better position than they are to weigh up all of the competing issues in relation to bail.

Due to the various qualifications we have discussed, it would be dangerous to draw a conclusion that the high proportion of bail refusals by bail justices for adults is due to any general predisposition to oppose the grant of bail.

Impartiality

Bail justices are required to be impartial decision makers. They should not prejudge a case and must act fairly in relation to all accused. A concern was expressed in consultations that bail justices are not impartial. A view was advanced that some bail justices may be unduly influenced by police.[24] Bail justices we spoke to confirmed that they sometimes feel they are the subject of 'subtle pressure' by police.[25]

Bail justices are required to be impartial decision makers

In consultations, it was suggested that the behaviour of bail justices contributes to a perception that they are not impartial. We were told that some bail justices meet privately with police prior to the bail decision, accept transport from police to the police station, or behave in a very familiar manner with police. In such instances accused people may feel as though they are not receiving a fair hearing before an impartial decision maker. If magistrates or judges acted in a way that suggested a degree of partiality it may lead to a challenge of their decisions.

The above concern is counterbalanced to some extent by the requirement for bail justices to record reasons for refusing bail in some instances, coupled with the fact that an accused will appear before a court shortly after being remanded in custody by a bail justice.[26] A decision to remand an accused in custody without sufficient justification, or based upon irrelevancies, is likely to be reversed. However, no information about the court decision is provided to bail justices so they will not be aware of criticism of their decisions.

A concern voiced in consultations was that police are able to choose a bail justice of their liking and are therefore more likely to select a bail justice whom they believe will endorse their decision.[27] It appears that this problem has been ameliorated to some extent by the implementation of roster systems throughout the state.

In all of the regional areas we visited, a roster system was in place whereby an individual bail justice is 'on call' for a specified period of time.[28] Police were directed to phone the rostered bail justice and only contact others if the person on call was not available. In Melbourne, certain police stations hold a roster. Other nearby police stations contact the applicable station to be allocated a bail justice.

The Royal Victorian Association of Honorary Justices (RVAHJ) has developed an online bail justice rostering system with support from the Department of Justice.[29] Membership of the RVAHJ is voluntary and all bail justices are invited to join, though not all bail justices are members. Its main role is to provide support and services for bail justices and justices of the peace. The new roster system is being piloted in Victoria Police Region 1. The system automatically updates availability as advised by individual bail justices, allocates them to the rotating roster for the relevant police stations, and provides online access to contact details.

Under this system, less time and fewer calls are required for operational police to access a bail justice, and out-of-hours call-outs are more equitably shared across available volunteers. The names and contact phone numbers for all bail justices in the region have been provided by the department to the association of justices to ensure all available bail justices are included in the roster system, whether or not they are members of the RVAHJ. This trial will be evaluated later in 2005, after which it is expected that the online rostering system will be progressively rolled out to all regions across Victoria.

Various people we spoke to said the introduction of roster systems had reduced or even remedied the likelihood of police calling out bail justices of their liking.[30]

Representativeness

As we have discussed, the vast majority of bail justices are male and aged over 50. In this sense, they are not representative of the Victorian community. This was an issue that was raised in consultations.[31] Data from the latest Australian census discloses that in 2001 the median age of Victorians was 35, and the population was comprised of more females than males.[32] Only 4.5% of bail justices fall within the 31–40 age bracket and of all bail justices 16.3% are female.[33] There is no data kept on the ethnicity of bail justices, although the generally held view in consultations was that most were of Anglo-Saxon background.

The bail justice system is currently open to criticism as it does not adequately reflect the multicultural nature of Victoria's population

An Aboriginal Bail Justice Program was established in 2000 as an initiative of the Victorian Aboriginal Justice Agreement.[34] The program was designed to recruit and train Indigenous Australians as bail justices. At present, there are 19 accredited Indigenous bail justices.[35] However, only a small number of these are presently functioning as bail justices.[36] Indigenous bail justices do not deal exclusively with Indigenous Australians. In fact, in one consultation we were told that it would be particularly difficult for an Indigenous bail justice to make a decision involving an Indigenous Australian.[37] We were told that this was because Victoria's Indigenous community is relatively small and in many instances the bail justice would be known to the accused or the accused's family.

In Chapter 10 we will discuss the potential for a conflict between the roles of Indigenous bail justices and another volunteer position, Aboriginal Community Justice Panel members.

The issue of representativeness of decision makers is not confined to bail justices. It is probable that the make-up of the police, magistrates and judges is also not representative of the wider community. The concern about representativeness among bail justices most likely stems from a belief that bail justices hold conservative views about 'law and order'. It could be argued that a more representative group of bail justices would better reflect Victoria's diverse community. Our society must be sure that those exercising powers—especially powers that affect the liberty of other citizens—have an appreciation of the problems that all sectors of our community face. The bail justice system is currently open to criticism as it does not adequately reflect the multicultural nature of Victoria's population.

A move towards a more representative make-up of bail justices would parallel wider public service initiatives. For example, the Attorney-General's Justice Statement recognises the desirability of having a diverse judiciary:

> The Government believes that, subject to the fundamental requirement for excellence, community confidence in the justice system is enhanced where people perceive that those who occupy the highest position come from a mix of backgrounds that represent the community as a whole … The Government will continue to encourage women and people from multicultural and other diverse backgrounds to seek judicial office, subject to their merit.[38]

Victoria Police has also introduced recruitment strategies that endeavour to ensure police officers come from a diverse background.

As a result of the recent internal review of the bail justice system, the Department of Justice has recognised the need to increase diversity among bail justices, including diversity in gender, age, ethnicity and location. The department intends to focus future recruitment of bail justices in areas where there are operational shortages, particularly in regional and rural settings, and to attract more young people, women and members of multicultural communities. This will include identifying suitable applicants through liaison with local governments, members of parliament, regional departmental officers and the Victorian Multicultural Commission.[39]

Further Training

There is no requirement that bail justices undertake any ongoing training following successful completion of the accreditation course that we discussed above. The RVAHJ offers refresher training courses, but attendance is voluntary.

The issue of ongoing training was raised in the recent Department of Justice internal review and during consultations a similar concern was voiced.[40] There is a view that some bail justices have been operating for many years without having received any refresher training. This is of particular concern where a bail justice may not be active for a period of time and then recommences duties.

It is imperative that bail justices be informed of any relevant changes to the law. A failure to apply the correct law or applying a law incorrectly can have serious consequences for an accused. For example, we learnt of one instance where a bail justice was applying a section of the Bail Act that had been repealed in 2004 and had the effect of placing the onus to demonstrate the requirement for bail on the accused.[41] The change to the Bail Act had not been communicated to the bail justice. Other consultations highlighted similar inadequacies in bail justices' knowledge of other areas of the Bail Act.[42] A participant in one consultation said bail justices do not give reasons for their decisions in circumstances where there was a legislative requirement to do so.[43]

Some bail justices we spoke to said they had considered the show cause test to be an extremely high hurdle

The internal Department of Justice review looked at the future training needs of bail justices and the possibility of fixed-term appointments of three or five years.[44] One option being considered is to make reappointment conditional upon attendance at refresher training sometime during the course of a bail justice's tenure, or prior to reappointment.

In one consultation, bail justices pointed out the benefits of retraining and some were of the belief that it should be mandatory.[45] The advantage of retraining was demonstrated in relation to the show cause test. Some bail justices we spoke to said they had considered the show cause test to be an extremely high hurdle. Bail justice training now includes a strong emphasis on the right to bail. Some bail justices we spoke to said that retraining has led them to reconsider their approach about dealing with accused charged with a show cause offence.

Refresher training is only part of the answer. There appears to be no communication between the Department of Justice and bail justices. Information about changes to the law is disseminated by the RVAHJ through a quarterly newsletter. However, not all bail justices are members of the association. The RVAHJ is a voluntary association and it would not be appropriate to require all bail justices to be members.

Training will only ever reflect the state of the law and practice at the time it is undertaken. A formal means of communication from the department to bail justices would be a convenient way to convey relevant information, including relevant legislative changes. In Queensland, justices of the peace are informed of the latest developments in the law by the Department of Justice and Attorney-General via an annual bulletin and updates posted to the department's webpage.[46] This model could be considered in Victoria.

Training on Indigenous Issues

The need for training for bail decision makers in issues affecting Indigenous Australians has been raised by the Victorian Aboriginal Legal Service.[47] It has also been the subject of comment by the Royal Commission into Aboriginal Deaths in Custody. One of the recommendations of the Royal Commission was that:

> … judicial officers and … [those] whose duties bring them into contact with Aboriginal people be encouraged to participate in an appropriate training and development program, designed to explain contemporary Aboriginal society, customs and traditions. Such programs should emphasise the historical and social factors which contribute to the disadvantaged position of many Aboriginal people today and to the nature of relations between Aboriginal and non-Aboriginal communities today. The Commission further recommends that such persons should wherever possible participate in discussion with members of the Aboriginal community in an informal way in order to improve cross-cultural understanding.[48]

The State Training Office advises that issues affecting Indigenous Australians are raised in bail justice training. The magistrates involved in the bail justice training course speak about issues relevant to Indigenous Australians. Senior court registrars who work in areas with large Indigenous populations also address participants on issues specific to Indigenous Australians, including reasons for non-appearance.[49]

…given the seriousness of the decision that bail justices are involved in, it is imperative that all bail justices act appropriately

We have already discussed the Aboriginal Bail Justice Program. The Magistrates' Court ran two Aboriginal bail justice courses in 2001 and 2002 as part of this initiative. These courses were not only for Indigenous, but also non-Indigenous bail justices. The course ran for four days and was developed in conjunction with the Indigenous Issues Unit of the Department of Justice.[50]

The training offered to bail justices is conducted over three days. This means that the ability to explore Indigenous issues in-depth is limited. Only a minority of bail justices are likely to live in areas in which they will routinely come into contact with Indigenous Australians. Arguably, particular training should be available or even required for such bail justices.

The commission understands that the next round of bail justice training will take place at Echuca in October and November 2005. The department is arranging for an Indigenous Australian to speak on cross-cultural awareness issues and provide contacts that bail justices can utilise if they require more information.[51]

Police, magistrates and judges receive Indigenous awareness training.[52]

Bail Justices' Conduct

In consultations, concerns were raised about the conduct of bail justices.[53] We were told of instances where bail justices had acted in an inappropriate way when conducting bail hearings.

Undoubtedly, the vast majority of bail justices do act professionally. The problems voiced in consultations most likely reflect the actions of a small minority. However, given the seriousness of the decision that bail justices are involved in, it is imperative that all bail justices act appropriately.

Arguably, problems concerning bail justice behaviour are a result of various factors. These include the unstructured nature of hearings that bail justices are involved in, no clear guidelines surrounding the appropriate conduct of the bail hearing, a lack of oversight of bail justice hearings, and a lack of feedback to bail justices about their decisions.

The RVAHJ does have a code of conduct for its members.[54] This addresses issues such as 'Personal Propriety and Behaviour', 'Judicial Responsibilities' and 'Relationship with (Police) Informant and Accused'. The sanctions it can impose on those who breach the code are limited to expulsion from the association.

The Department of Justice issued a code of conduct for bail justices in 1997. An updated draft of the code of conduct can be found in Appendix 1. The code is currently being

reviewed by the Department of Justice. The draft code, which has been prepared for discussion purposes at this stage, has not yet been adopted by the department.

Removal Procedure

Linked with the issue of conduct of bail justices is the removal process, which was raised in our consultations.[55] A determination that a bail justice should be removed from office may be made on the basis that the bail justice is 'incompetent or guilty of neglect of duty' or 'guilty of unlawful or improper conduct in the performance of the duties of his or her office'.[56] The bail justice removal process entails suspension followed by removal. It involves the Governor in Council, the Attorney-General and the Supreme Court. The relevant provision from the Magistrates' Court Act pertaining to removal is contained in Appendix 2.

We have been unable to find any case in which a bail justice has been removed

The removal process is complex, time consuming and expensive. We have been unable to find any case in which a bail justice has been removed under the existing regime. The removal process is identical to that for removal of a magistrate.[57] This might be considered odd given that bail justices are voluntary office holders, there are a great many more bail justices than magistrates and bail justices do not exercise judicial powers comparable with those of a magistrate. Even the removal procedure for the newly created office of judicial registrar—the holders of which will exercise many more powers than a bail justice and receive remuneration at 70% of that a magistrate—is simpler than that of a bail justice.[58] We will look at judicial registrars in greater detail later in this chapter.

The Department of Justice, as part of its internal review, is looking at the appointment and removal process for bail justices, including reviewing equivalent provisions in other Australian and international jurisdictions.[59] As discussed, the department is also considering limited tenure for bail justices.[60]

Sanction

Aside from removal and suspension, there are no other legislatively prescribed sanctions directed towards bail justices for cases of misconduct in office. Moreover, there is no formal complaints procedure. The Department of Justice is preparing revised internal complaint handling procedures, and is considering the inclusion of a formal complaint handling mechanism in the draft code of conduct. These processes would include provisions for complaints to initially be conciliated through discussion with the parties, mediated if required, and then investigated by a senior departmental officer if previous attempts to find resolution have not been successful. Serious breaches of the code may lead to initiation of removal procedures.[61]

The issue of a complaint handling mechanism coupled with sanctions was not raised in any of our consultations.

Bail Hearing Process Guidelines

Bail justices are not legally trained. Most bail justices would be unfamiliar with day-to-day court room procedure and the rules of evidence. It would therefore be inappropriate to expect bail justices to conduct a bail application in the same way as a court.

While bail justices are given powers largely commensurate with that of a court in bail decisions, they lack the resources, training and support of a court. Bail justices receive three days of formal training and are then called upon to make decisions that will affect a person's liberty.

We heard in consultations that some bail justices do endeavour to conduct bail applications similarly to a court. That is, they will require witnesses to be called and questioned and will expect to be addressed in a formal manner. We have been told that in such circumstances

the bail application can take several hours.[62] Other bail justices have an informal conversation with the police and the accused and then reach a decision.[63]

The current procedures adopted by bail justices vary widely. This raises questions as to whether a bail justice hearing should be conducted in a particular way. Do we want bail justices to act in a judicial manner; referring to precedents, hearing from witnesses other than the police and questioning the accused in a formal manner? If so, what changes would have to be made to their training? Should the proceeding be informal? Should the conduct of hearings be 'standardised' or left up to the individual bail justice?

The current procedures adopted by bail justices vary widely

There are no guidelines for how bail justices are to conduct bail hearings. The Bail Act does not differentiate between bail applications that are to be heard before bail justices and those to be heard before courts. During training, prospective bail justices are involved in role-play exercises that demonstrate methods of how a bail hearing can be conducted. Brief procedural guidelines about hearings are also issued.

A lack of guidelines means that bail justices are sometimes unaware of what procedures they should adopt. For example, in one consultation with bail justices, the issue of the media's role in bail hearings arose.[64]

The Magistrates' Court Act provides that the business of the court is to be conducted in the open.[65] This means that members of the public, including the media, should be allowed in court, subject to the power of the magistrate to hold closed proceedings in defined circumstances.[66] There was discussion in the consultation about whether the same procedures applied to bail hearings conducted in a police station before a bail justice. Police policy provides that members of the public and media are able to attend a bail hearing in a police station, the only provisos being where it is 'impractical' or where their attendance poses a 'security risk'.[67] It does not appear that the police policy has been widely communicated to bail justices and there was a belief that this was an area that could benefit from clearer guidelines.

If guidelines were to be created, the content of such guidelines and whether they could, or indeed should, be backed by legislative force are issues that would need to be addressed.

Question 13 ?

Are the criticisms of the current bail justice system valid? If so:

- Should measures be implemented to ensure that bail justices are more representative of the general community?
- Should bail justice appointments be of limited tenure? If so, what period is appropriate?
- Is the training that bail justices currently receive sufficient?
- Should bail justices be required to undertake mandatory refresher courses? Should reappointment be linked to successful completion of ongoing training?
- Is there a need for regular communication between the Department of Justice and bail justices?
- Should the provisions in the Magistrates' Court Act concerning the removal of bail justices be repealed and replaced with a simpler model? If so, what sort of model should be implemented?
- Is the draft code of conduct for bail justices adequate? Should there be a sanction, less than removal, for breach of the code?
- Should detailed guidelines be issued to bail justices about how a bail hearing is to be conducted? If so, how should hearings before a bail justice proceed? What status should such guidelines have?

Are there any other issues with the bail justice system that have not been identified?

Court Result Following Bail Justice Refusal

We have mentioned that a court is not involved in reviewing the bail justice's decision. Instead, a fresh decision is made based on the evidence presented.

We have also stressed throughout this chapter that the circumstances under which bail justices operate are often very different to that of a court.

Figure 11 shows that over the past five years bail justices have generally refused approximately 80% of applications before them.[68] This can be contrasted with initial decisions of magistrates, where bail refusals have dropped over each of the five years from 27% in 2000–01 to 21% in 2004–05. This may be as a result of an increase in support to accused provided through the Magistrates' Court, including specific bail support. These services operate only during court hours and are therefore generally not available to bail justices.

Figure 11: Percentage of first bail applications refused by bail justices and magistrates

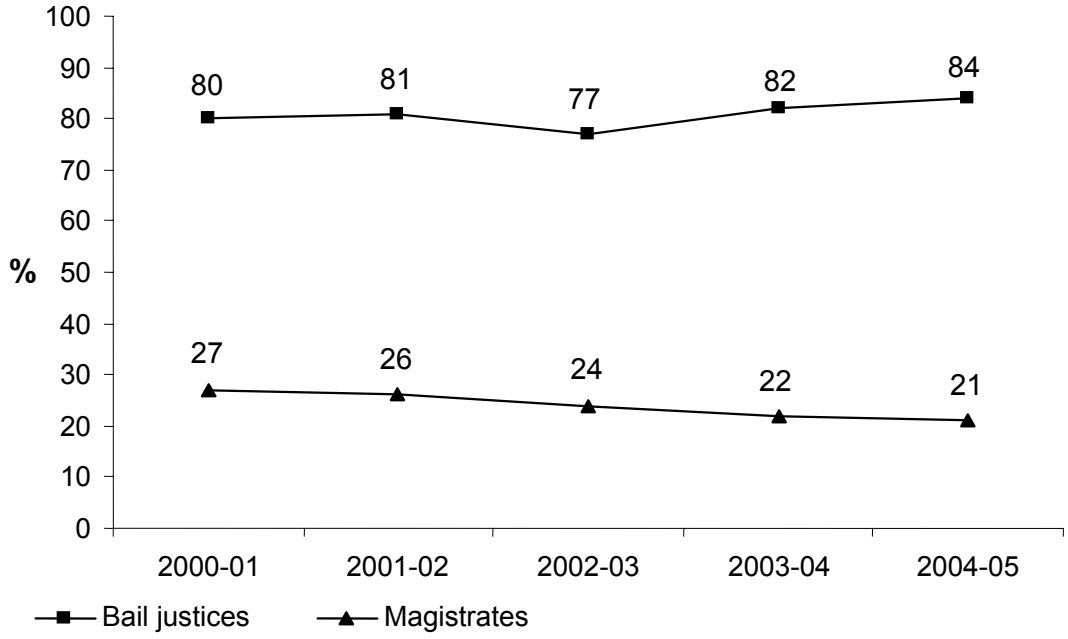


Figure 12 shows the number of times that a magistrate granted bail on first application after a bail justice had refused bail. Magistrates made different decisions to bail justices in approximately 34% of cases over the five-year period.[69] The graph is based on data recording only the first application to a magistrate, not subsequent applications. That is, it shows how often accused people who were refused bail by a bail justice were granted bail the first time they subsequently applied to a magistrate. Without analysing the court files, we cannot say what period of time elapsed between the two decisions.

Figure 12: Number of bail applications refused by a bail justice that were subsequently granted by a magistrate in the Magistrates' Court

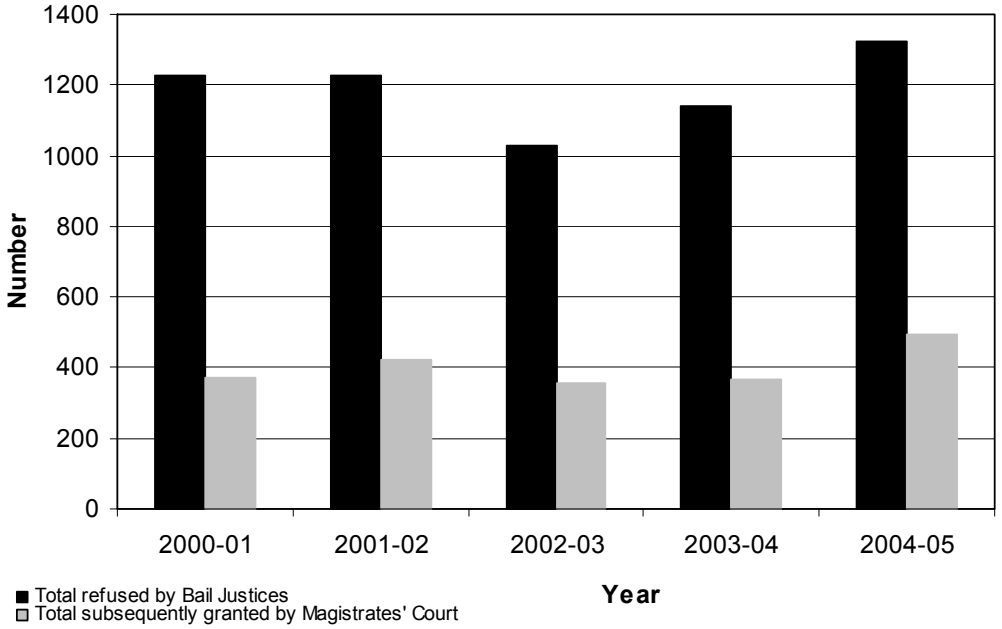
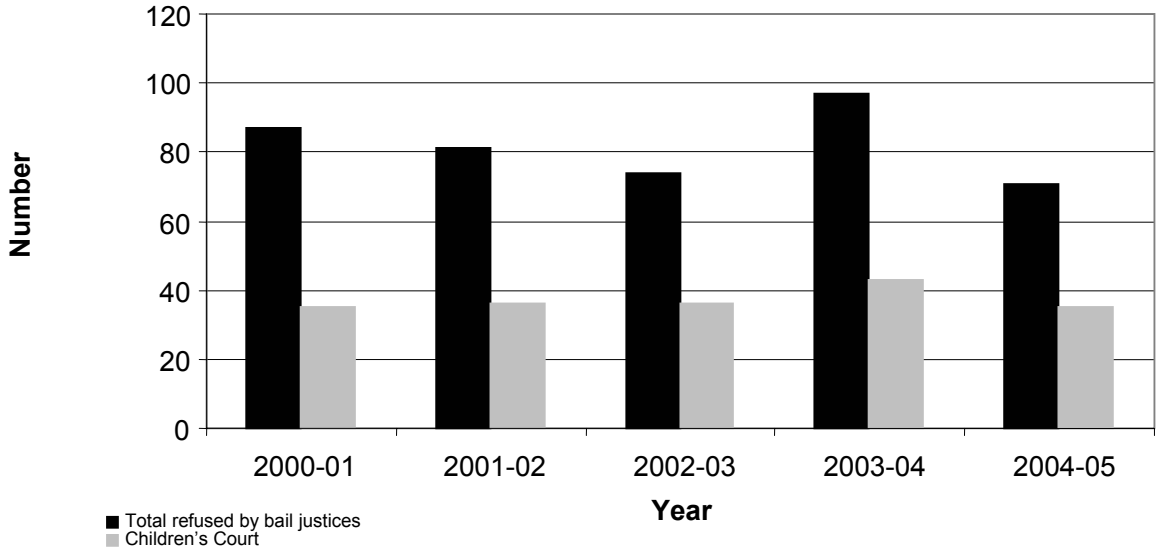


Figure 13 shows comparable data for children refused bail by a bail justice and subsequently granted bail on first application to a magistrate in the Children's Court.[70] The number of applications being considered in this case is much lower in the Children's Court—less than 100 each year compared with over 1000 in the Magistrates' Court. This is a reflection of the fact that the number of matters dealt with by the Children's Court is much lower than in the Magistrates' Court. However, the percentage of times the court makes a different decision to a bail justice is higher for children than adults. In relation to children, the court made different decisions to bail justices in approximately 45% of cases over the five-year period.

Figure 13: Number of bail applications refused by a bail justice that were subsequently granted by a magistrate in the Children's Court



Data showing how often the court first refuses and then grants an accused bail on subsequent application is discussed in Chapter 2.

Limiting Bail Justices' Powers

In several consultations, the extent of the legislative power exercised by bail justices was raised as an issue. Several people we spoke to said that in certain areas the statutory powers of bail justices should be curtailed.

Scope of Offences

In Chapter 3, we looked at the nature of alleged offences for which police are able to make a bail decision. As in the case of police, the Bail Act presently allows bail justices to make a bail decision for all offences except murder and treason. This means that bail justices are frequently involved in making decisions concerning accused who are charged with serious indictable offences.

a view was put that bail justices should only be able to remand an accused to the next sitting date of a court

A concern was raised about the ability of a bail justice to make a bail decision in circumstances where an accused is charged with an offence that requires exceptional circumstances to be shown to obtain bail.[71] It was suggested that in such instances only a court be able to make the bail decision. Because courts routinely deal with bail applications for serious offences they are arguably in a better position to weigh the competing concerns and apply relevant legal principles.

Defence practitioners in particular seem to have a greater confidence in the ability of a court to make a balanced and legally sound assessment where an accused is charged with a particularly serious offence. To some extent this may be because courts deal with matters in their entirety and therefore have an understanding of matters that may impact on bail decisions, such as possible delay in the provision of the brief of evidence by the police, delays in court listings and the ultimate sentences accused are likely to receive if found guilty. However, the belief most likely stems from a combination of factors, including the criticisms that have been raised about bail justices.

As we discussed in Chapter 3, if police and bail justices no longer had the power to make bail decisions in cases where an accused is charged with an exceptional circumstance offence, the issue of the accused's rights arises. Is it satisfactory that accused people in such instances may spend several days in custody before they are able to make a bail application? Should some other mechanism be instituted to deal with the bail decision?

Question 14 ?

Should the *Bail Act 1977* be amended to prevent bail justices from being able to decide bail in those matters where an accused is charged with a serious indictable offence? If so, should the limitation be restricted to exceptional circumstance offences? Alternatively, is the fact that an accused can apply again before a magistrate a sufficient safeguard?

Period of Remand

The Bail Act provides that a bail justice cannot remand an accused for a period of 'more than eight clear days'.[72] This provision, added in 1997, ensures that bail justices have powers commensurate with that of a magistrate.[73]

In one consultation, a view was put that bail justices should only be able to remand an accused to the next sitting date of a court.[74] This was also the position adopted in the Victoria Legal Aid review of the Bail Act.[75] This view stems from a belief that accused people

should have their remand status looked at by a court as soon as possible. Addressing the issue of an accused's liberty in a proper judicial forum is seen to be of utmost importance.

Bail justices can currently remand a child only until the next sitting date. It appears that remand to the next sitting date—for all accused—is in fact already common practice. We were not told of any instances where an accused had been remanded by a bail justice to a date other than the next sitting date. Accordingly, any change to the law is unlikely to see a major change to the operation of the current system.

Bail justices typically do not have the same information as a court

There is also no apparent reason why the current eight-day remand period for bail justices was chosen—other than a desire that bail justices have the same powers as a magistrate. However, as we have seen, bail justices operate under different conditions than magistrates. Bail justices typically do not have the same information as courts. Accused people appearing before bail justices are rarely represented by lawyers and do not have the same access to support services. Most bail justices would be aware of the limitations under which they function and know that courts are often in a far better position than they are to assess an accused's remand status. Accordingly, they will remand an accused to the next working date of the court.

Police policy provides that where accused people are remanded by police they are to be remanded to the next available court sitting date.[76]

If a legislative change were to be made so that bail justices could only remand an accused to the next sitting date of the court, consideration may need to be given to the fact that police officers working night shift would often be required to attend court the next day. If, as has been suggested in consultations, the present practice of bail justices is to bail the accused to the next court sitting date, then it is unlikely to mean any great change to police attendance. Also, as we have mentioned, it is police policy that where police remand an accused they are to be remanded to the next available sitting date.

Question 15 **?**

Should section 12(1A) of the *Bail Act 1977* be amended so that bail justices can only remand accused to the next sitting date of the court?

When Bail Justices are Called

During our consultations we were told that in some places police will not call a bail justice after a certain time of the day.[77] For example, police may decide that after midnight on a weekday they will not call a bail justice and instead keep the accused in custody until the court opens at 10 am the next day. On a weekend they might call a bail justice up until 2 am, but for an arrest after that time they wait until the next morning.

This procedure is not detailed in legislation or provided for in police policy. It is an unofficial practice that appears to vary from police station to police station. It would appear to be contrary to the requirement that police are to take an accused before a bail justice 'as soon as practicable'.[78] Police are making a determination about whether it is appropriate to disturb a bail justice late at night or early in the morning to conduct a bail hearing or whether an accused should remain in police custody until a court opens. Often the decision will be an easy one. If accused people are brought into custody at 6 or 7am—and it takes an hour or more for questioning and processing—then it would seem a pointless task to call a bail justice given that the court will open a couple of hours later. The issue is more problematic when police decide not to call a bail justice after midnight.

The purpose of bail justices is to operate as an after-hours alternative to court. When people decide to become bail justices they appreciate that it may be an onerous position

and may involve working difficult hours. It is noteworthy that most other Australian jurisdictions have a cut-off time after which no bail decision maker is available.

The commission is interested in hearing more about people's experiences and attitudes about the police practice we have described above.

Question 16 ?

Should there be a limitation on the time at which a bail justice is called to a police station? If so, at what time is it appropriate that police no longer call a bail justice but instead detain an accused in custody until a court opens?

Future of After-hours Hearings

Throughout this chapter we have covered various criticisms of the bail justice system that were raised in consultations. We have also endeavoured to explain the difficult circumstances under which bail justices frequently operate. Given the criticisms that we have discussed in this chapter, and given the dissatisfaction with various aspects of the bail justice system, it is appropriate that we address the question of whether the bail justice system is the most effective means to deal with out-of-court bail applications.

What Happens in Other States and Territories?

Victoria is the only Australian state that uses bail justices. In other states and territories various mechanisms are used to deal with after-hours bail. These range from volunteer office holders with powers similar to that of a bail justice, to the use of legally qualified decision makers.

We have not obtained information about the effectiveness of the systems in place in other Australian states and territories.

ACT

The ACT does not have any specific after-hours bail system. The *Bail Act 1992* (ACT) does provide that certain police are, subject to express statutory limitations, able to grant bail from a police station.[79] Where bail is refused, the accused is to be 'brought before a court as soon as practicable' and not later than 48 hours after having been taken into custody.[80]

In the ACT, if the police refuse bail accused people will remain in custody until they can be taken before a court.

New South Wales

The *Bail Act 1978* (NSW) provides that certain police are capable of granting bail to an accused who is present at a police station.[81] If bail is refused, the accused shall 'as soon as practicable' be taken before a court so that the issue of bail can be determined.[82]

Where accused people are refused bail by police on a weekend or a public holiday, they can be taken before a Local Court (equivalent to Victoria's Magistrates' Court) which sits as a Bail Court.

In regional NSW, the Bail Court is specifically convened to hear a bail application if required. The bail application is not heard by a magistrate, but by a registrar of the court. The process involves the local police contacting the registrar of the Local Court who arranges for the Bail Court to sit. The court does not hear matters late at night or early in the morning. The registrar is paid an on-call allowance and then paid overtime if required to convene the court.

There is a Metropolitan Bail Court in Parramatta in Sydney. This court sits all weekend and on public holidays and, unlike courts in regional NSW, is not convened on an ad hoc basis. The court covers the greater Sydney area. Again, this court is presided over by a registrar (named a Bail Registrar). A roster of Legal Aid solicitors is also in place to assist accused. The court opens at 9 am and stays open until bail applications for all accused who have been brought into custody are dealt with. If police arrest an accused and the accused is not placed in the court cells by around midday, then it is unlikely that the bail application will be heard that day. Instead, the application will be dealt with the following day.

We have been told that one of the advantages of the Sydney Metropolitan Bail Court is that, given the volume and complexity of both state and federal matters determined during each sitting, bail registrars have developed a level of expertise in bail hearings.[83]

Bail courts are not convened in the evening on weekdays. If accused people are not taken before the Local Court before the end of its sitting on a weekday then they will remain in custody overnight and be brought before the court the following day.

We understand that the operation of Bail Courts in NSW is currently being reviewed, with a particular focus on the operation of Bail Courts in regional areas.[84] A key issue that has been identified has been the lack of legal representation for accused in some country areas. A Legal Aid roster does not operate in regional Bail Courts. One initiative being considered to overcome this problem is the trial of audiovisual links to conduct country hearings from a central metropolitan location.

Queensland

The *Bail Act 1980* (Qld) gives powers to various police officers to grant bail.[85] Where bail is refused by police, an accused may make an application to a court.[86]

If accused people are arrested outside normal court hours, they remain in custody until they can be taken to court on the next sitting date.

Queensland also has justices of the peace who may hear a bail application in certain situations. There are various levels of justices of the peace in Queensland. Those who can hear bail applications are referred to as Justices of the Peace (Qualified) or Justices of the Peace (Magistrates' Court). The latter are restricted to remote Indigenous Australian communities where there is no resident magistrate. To become a Justice of the Peace (Qualified) or Justice of the Peace (Magistrates' Court) applicants must sit an exam.[87]

Justices of the peace hear bail applications when it is not possible for a magistrate to hear the matter. This occurs when an accused is arrested in a remote area of the state. If the accused people are remanded by a justice of the peace, they are remanded to appear in a regional centre or until a date when a magistrate can attend to deal with the matter. Although one justice of the peace can convene a court, typically more than one will hear a matter. We have been told that justices of the peace in remote areas do not operate outside normal court sitting hours.[88]

Specific initiatives have been put in place to train Indigenous Australians as justices of the peace so they are able to hear bail matters within their communities.[89]

South Australia

As is the case in other states, the *Bail Act 1985* (SA) gives power to a police officer of a certain rank to grant bail.[90] If the police decide not to release the accused, then he or she must be taken before the Magistrates' Court, or, in the case of a child, the Youth Court of South Australia, 'as soon as reasonably practicable on the *next* working day following the day of arrest' and not later than 4 pm on the next working day.[91]

If an accused cannot be taken before the Magistrates' Court not later than 4 pm on the next day following arrest, then a telephone 'review' procedure can be instituted.[92] This entails a police officer contacting a magistrate by telephone, the magistrate conducting a 'review', and a decision being made. In conducting the review, magistrates 'must' make 'such inquiries as they think necessary to satisfy [themselves] of the genuineness of the application for review'.[93] This will involve talking to the police and speaking to the accused or any lawyer representing the accused.[94] We have been told that the telephone review can be conducted at any hour.[95]

Northern Territory

The *Bail Act 1982* (NT) allows a police officer of a certain rank to grant bail.[96] Where bail is refused by the police, an accused may seek a review of that decision by a justice of the peace or a magistrate.[97] In such instances, the accused is to be brought before a magistrate or justice 'as soon as practicable', or arrangements are to be made for the accused to make an application by 'telephone, telex, radio or similar facility'.[98]

In practice, we have been told that there is 24 hour access for telephone applications to magistrates via a roster system. A list of rostered magistrates is sent out to police stations. Police utilise rostered magistrates as required.[99]

The issue of whether we should retain a bail justice system in Victoria was raised in our consultations

Tasmania

In certain defined circumstances, a police officer can grant bail pursuant to the *Justices Act 1959* (Tas).[100] Where a police officer refuses bail, the accused must be taken before a justice of the peace 'as soon as practicable' or 'without delay'.[101] The justice of the peace can make a decision about bail.

Like bail justices, justices of the peace in Tasmania are required to hear bail applications outside court hours and at different locations.[102] We have been told that out-of-court sessions have generally not been convened after 9.30 pm and not before 11 am on weekdays.[103]

Western Australia

A police officer of a certain rank may grant bail in Western Australia in certain defined circumstances.[104] If a police officer refuses bail and the accused is not taken before a court, then the accused is to be taken 'as soon as practicable' before a justice. A justice is a reference to a justice of the peace. The justice is to consider the accused's case for bail.[105]

Justices of the peace in Western Australia operate on a roster system. We have been told that they are used after 4 pm and on weekdays continue their duties until around midnight.[106]

Should the Bail Justice System be Retained?

The issue of whether we should retain a bail justice system in Victoria was raised in our consultations.[107] People who were supportive of abolishing the bail justice system typically expressed a desire that an issue as important as bail—involving the liberty of an individual—should be addressed by a legally qualified person; someone who routinely deals with bail and has a clear appreciation of the competing arguments.

It is imperative that accused people who are refused bail by police do not simply remain in custody until they can be taken before a court. If this were the alternative, it would mean that accused—who are presumed to be innocent—could remain in custody for a number of days before the issue of bail could be looked at by a court.

Alternative Systems

Any move to abolish the bail justice system would require adoption of a replacement system. Naturally, this system would need to be cost effective and eliminate or minimise the concerns about the bail justice system that have been raised.

The advantage of the bail justice system is that it is relatively inexpensive and the structures to support it are already in place. The main expense involved in the current system is in training bail justices. However, cost effectiveness means little if the system is not operating as the community expects and there is little faith in the decisions being made.

The advantage of the bail justice system is that it is relatively inexpensive and the structures to support it are already in place

Over the past five financial years, bail justices made approximately 1473 bail decisions per annum.[108] This equates to about four decisions for every day of the year. Any replacement system would need to be able to cope with a similar level of demand.

An alternative to the current system, suggested during one consultation, was after-hours courts.[109] It was suggested that such courts should be presided over by a magistrate. There would not need to be a magistrate sitting at every Magistrates' Court throughout the state. Instead, similar to the NSW system, a central court or several central courts could be utilised. Linking 24-hour regional police stations to a central after-hours Magistrates' Court by means of video-link for the purposes of hearing bail applications was also raised.[110]

Victoria has recently enacted legislation to create a new class of judicial officer—the judicial registrar.[111] Judicial registrars must be legally qualified and are appointed by the Governor in Council upon recommendation of the Chief Magistrate to the Attorney-General.[112] They have been described as an office that carries out a 'hybrid' of judicial and administrative functions.[113] Among other things, it is envisaged that judicial registrars could hear bail applications.[114] Judicial registrars will work outside standard office hours, and possibly on weekends. As we have seen, a similar system exists in NSW in relation to bail registrars.

The Melbourne Magistrates' Court is about to commence a two-year pilot program of the office of judicial registrar. The court advises that judicial registrars will not hear bail applications, though this decision may be reviewed in the future.[115]

If after-hours courts are considered to be an appropriate means to deal with after-hours bail, judicial registrars could potentially be considered as an alternative to having a magistrate preside over proceedings. Whether judicial registrars will actually hear bail applications will ultimately be decided by the Chief Magistrate together with two or more Deputy Magistrates.[116] Judicial registrars are not remunerated on the same scale as magistrates and are, therefore, cheaper to fund.

Many of the problems raised in relation to bail justices, including a perceived lack of impartiality, inappropriate conduct and lack of training, would presumably be averted by having judicial registrars determine bail matters. Clear provisions for appointment, suspension, investigation, and removal have been legislated, as well as provision for the court to make rules about the kinds of matters that could be heard by a judicial registrar.[117] The bail decision would be made in a court, and be open to scrutiny in the same way. Provision has been made for review of a judicial registrar's decision by a magistrate.[118] The review is to be conducted as a hearing *de novo*, that is, a fresh hearing rather than a review of the judicial registrar's decision.

We would like to hear your views about alternatives to the bail justice system. Is an alternative required, or is the bail justice system adequate? Is it in need of the improvements raised in this chapter, or other improvements?

Question 17 ?

Should the bail justice system be retained? If so, what improvements are needed? If not, the commission is interested in hearing suggestions for an alternative model. What type of system should be instituted in replacement?

Chapter 5
Court Decision Making

Introduction

In Chapters 3 and 4 we discussed the different people who can be involved in decisions of whether to grant accused people bail or whether to remand them in custody. In Chapter 3 we looked at the role of the police in making bail decisions, while in Chapter 4 we looked at bail justices. Who actually makes the decision depends on a number of factors. These include the seriousness of the alleged offending and the stage in the criminal justice process at which the bail decision is made.

This chapter will focus on decision making by magistrates and judges. We will explore issues raised in our consultations about bail and the judicial decision-making process. It is important to note that some of the issues raised in the chapter are also relevant to decision making by police and bail justices. These include our discussion on the provision of reasons by a decision maker when refusing or granting bail, and issues raised about warrants.

Overview of Courts and Bail

Before discussing bail decision making by courts, it is useful to provide a brief overview of the criminal jurisdiction of the four courts within Victoria that make bail decisions. We also discuss how frequently each of these courts hears bail applications.

Magistrates' Court

Criminal cases make up the majority of the Magistrates' Court workload.[1] The Magistrates' Court hears the less serious criminal offences, often referred to as summary offences. It also hears some serious offences with the consent of the accused (indictable offences triable summarily).[2] Criminal matters that will eventually be heard in higher courts are generally commenced in the Magistrates' Court where the accused is then 'committed' for trial in a higher court.

As the Magistrates' Court initially hears most criminal matters, it is not surprising that of all the courts it makes most bail decisions. The Magistrates' Court hears bail applications for most indictable (serious) criminal offences as well as bail applications for summary offences. Over the 2004–05 financial year the Magistrates' Court heard approximately 3503 first applications for bail.[3] The figure is similar to the number for the previous financial year.[4]

Children's Court

The Children's Court is created and governed by the Children and Young Persons Act. The court has a criminal division that has the power to hear most matters involving children (those aged 10–18).[5] Certain serious offences, such as murder and manslaughter, cannot be heard in the Children's Court.[6] While the Children's Court can determine most indictable offences summarily, it cannot hear such matters where the child does not consent to the jurisdiction of the court or where the charges are deemed 'unsuitable' to be heard in the Children's Court by reason of 'exceptional circumstances'.[7]

The Children's Court hears applications for bail involving children in all matters that fall within its criminal jurisdiction. Essentially, the same procedures apply to a child's application as to an adult's.[8] We explore issues involving bail and young people in greater detail in Chapter 9.

Over the 2004–05 financial year the Children's Court of Victoria heard approximately 288 first applications for bail.[9]

County Court

The County Court is the intermediate criminal court in Victoria, falling between the Magistrates' Court and the Supreme Court. It is the main trial court in the state. The County Court deals with almost all serious criminal offences.[10] In certain circumstances the County Court can also hear less serious criminal matters that are usually heard in the Magistrates' Court.[11]

Bail applications are generally only heard in the County Court after an accused has had the first hearing date in that court. Accused people who wish to make a bail application after their committal hearing, but prior to their first appearance at a pre-trial conference in the County Court, make their application in the Magistrates' Court.[12] The County Court will only hear an application for bail after a pre-trial conference has taken place in the County Court.[13]

A **committal hearing** is a pre-trial hearing held in the Magistrates' Court. The magistrate determines whether there is sufficient evidence to 'commit' an accused to a higher court for trial.

It is not possible to obtain figures detailing the annual number of bail applications heard in the County Court. This is because court records are not yet kept on a computerised system from which information is easily extracted. During our consultation with County Court judges we were told that typically two to three bail applications per week are heard in the County Court.[14]

Supreme Court

The Criminal Division of the Supreme Court hears the most serious criminal cases in the state. It has exclusive jurisdiction to hear cases of murder, attempted murder and treason.[15] The Director of Public Prosecutions (DPP) can also choose to present a person for trial in the Supreme Court.[16] This typically occurs where the offending is very serious or complex.

The Bail Act provides that only the Supreme Court can grant bail to a person charged with treason or murder.[17] However, a magistrate who commits a person charged with murder may also grant bail if exceptional circumstances exist.[18]

The Supreme Court also has an 'inherent power' to hear and determine bail applications. If a magistrate refuses bail, an accused may choose to make a fresh application in the Supreme Court. In such circumstances, the bail hearing would typically be heard by the principal judge sitting in the Criminal Division.[19] We will discuss the Supreme Court's inherent bail power later in this chapter.

As in the County Court, it is not possible to obtain figures detailing the annual number of bail applications heard in the Supreme Court. This is also because the court records are not yet on a computerised system from which information can be readily extracted. However, we do know that over the 2003–04 financial year the Supreme Court heard 54 bail applications for matters prosecuted by the state DPP. This figure is similar to the number for the previous financial year.[20]

Delay and Remand

The length of time taken for matters to be heard and finalised in courts is an issue of increasing concern. New and sophisticated methods of investigation are often said to be

relevant factors in drawing out criminal trials. The Attorney-General's Justice Statement recognises the dilemma that 'new forensic and surveillance technologies' pose.[21] While assisting in the police investigation they may also result in extensive delays in the court process. This is largely due to the additional evidence that needs to be collected and the subsequent presentation of such evidence in court.

Any delay in the court process is of concern for people remanded in custody. All accused are presumed to be innocent. Delays mean that people on remand spend increased periods of time in detention. Understandably, people on remand who are ultimately found innocent are likely to feel a sense of grievance at having spent considerable time in detention prior to their trial.

Delay in the listing of hearings may influence an accused's decision to plead guilty or not guilty. This was raised in one consultation, where we heard that in giving advice, defence practitioners advise their clients to consider that if they plead guilty their case can be dealt with quickly, but a plea of not guilty will result in delay.[22] We heard that accused people may maintain their innocence to their lawyer but still plead guilty. This is because they cannot get bail, but will ultimately receive a non-custodial penalty or a shorter sentence than the time they would spend on remand waiting for a hearing.[23]

Delay can occur at several steps throughout the criminal justice process. During our consultations concerns were expressed about delays in the police investigation.[24] Delay at this stage can cause a consequent delay in the court process.

Delay and Drug Matters

While delay in the police investigatory process can occur for any type of alleged offending, in consultations a particular concern was raised about drug matters. Concern was expressed about the time it takes to receive DNA evidence, drug analysis results and the transcripts of listening device and telephone intercept material. In drug matters it is not uncommon for an accused to be arrested and remanded in custody without a finalised drug analysis or without transcripts of covert surveillance. Drug analysis results are critical in most serious drug matters. They are relied upon to confirm the type of drug and the quantity of the drug that is said to be the subject of the alleged offending.

When delays occur in obtaining the above analyses in indictable drug matters the police will often seek an extension of time for service of the police brief on the defence.[25] Any delay at this early stage is of particular concern when an accused is in custody and awaiting a contested committal hearing. The whole process is prolonged.

A **police brief** contains all the statements of evidence from witnesses and details of any other evidence, such as drug analysis results, that set out the case against the accused. It also includes the charge sheet and transcripts of interviews, such as the record of interview with the accused.

How do courts take into account delays when hearing a bail application about an accused who is on remand? Delay is a relevant matter when assessing whether there is an unacceptable risk. In *Mokbel v DPP (No 3)*, which concerned a bail application heard in the Supreme Court, the issue was one of extensive delay before committal proceedings.[26] Justice Kellam stated:

> The question of unacceptable risk is to be judged according to proper criteria, one of which is the length of delay before trial; that is, although the risk might be objectively the same at different times, the question of unacceptability must be relative to all the circumstances, including the issue of delay.

If accused people are in custody for a serious drug offence, they will usually fall under a reverse onus category in the Bail Act. This means they must either show exceptional circumstances or show cause as to why their continued detention is not justified. We will discuss the reverse onus provisions in detail in Chapter 6. There has been much judicial comment on the issue of delay in such cases. Where delay exists, it is routinely raised as a matter to be considered by the magistrate or judge when deciding the issue of bail.

In a recent case, *Director of Public Prosecution v Cozzi*, where the respondent was charged with a serious drug offence, Justice Coldrey made the following comment:

> The concept of delay has been dealt with in many cases. It is a matter of some sensitivity where the person incarcerated has the benefit of the presumption of innocence and it must be born steadily in mind that bail is not about punishment in advance of a jury trial, but is designed to secure attendance at that trial. Accordingly, whilst there is necessarily a level of pragmatism involved in the concept of delay its operation cannot be limited by reference to what is currently regarded as 'normal' for the prosecutorial process.[27]

A recent media report suggests there are still long delays in indictable drug offending cases and that the delay has a major bearing on bail decisions.[28]

Taking Delay into Account

Unfortunately, it is difficult to discern any clear rules from the numerous Supreme Court authorities concerning how delay should be taken into account in a bail hearing.[29] Lillian Lieder has made the comment that for 'every case where bail has been granted for delay, one can find another case where bail has not been granted for precisely the same sort of delay'.[30]

It was suggested in consultations that delay should be addressed in the Bail Act. That is, delay should be recognised in the Act as a factor to be taken into account in determining whether there is an unacceptable risk, exceptional circumstances or whether 'cause' has been shown. Although it appears that most judges and magistrates already take the issue of delay into account when considering bail, making specific reference to it in the legislation would ensure it is given prominence. It would reinforce the undesirability of detaining people presumed to be innocent for lengthy periods as their matters progress through the system.

However, delay can be subjective: what constitutes an unacceptable delay? While we all may share a general opinion about whether a delay has become 'inordinate', arguably it is more difficult to draw a line about what is and what is not acceptable. What level of delay is the community willing to accept? Also, should we accept different degrees of delay according to the seriousness or complexity of the alleged offending?

In NSW, delay is indirectly recognised in the *Bail Act 1978*. The criteria for making a bail determination require the decision maker to consider 'the period that the person may be obliged to spend in custody if bail is refused'.[31]

Question 18 ?

Should the *Bail Act 1977* make specific reference to delay as a factor to be taken into account in determining whether there is an unacceptable risk, exceptional circumstances or whether 'cause' has been shown? If delay is to be taken into account, how should it be incorporated into the *Bail Act 1977*? Should reference be made to specific time periods? Alternatively, should any decision about what level of delay is unacceptable be left to the judge or magistrate?

In-person Bail Applications

Usually, accused people have a lawyer to appear on their behalf at a bail application made in a court. An in-person bail application refers to the situation where accused people make their own application for bail. They address the court directly with reasons why they should be granted bail. This part of our paper is concerned only with those situations where an

accused makes an in-person or self-represented application for bail before a magistrate or judge.

Unfortunately, it is not possible to obtain reliable figures on the number of in-person bail applications made in the Magistrates' Court.[32] Similarly, no such figures exist for other courts within Victoria.

People are likely to be unrepresented when they are first brought before a court to make an initial application for bail. This is not always because they cannot find legal representation. Many see a lawyer that day but are advised not to make a bail application with representation at that time. During our consultations several groups pointed out that this is largely due to the operation of what is known as the 'new facts or circumstances' rule.

When people are remanded in custody often their first priority is to seek bail

New Facts or Circumstances

The new facts or circumstances rule is contained in section 18(4) of the Bail Act. Essentially, it provides that after making an initial bail application an applicant must show 'new facts or circumstances' to make any further application. The rule is intended to prevent people from repetitively making bail applications that have already been found to lack merit. It also prevents what is colloquially known as 'magistrate shopping'—the process of going from magistrate to magistrate, or judge to judge, with the hope of obtaining a different outcome.

The new facts or circumstances rule applies to all further applications for bail, with one exception. If the accused is unrepresented at the first bail application then new facts or circumstances do not need to be shown to make a further application. This proviso recognises that an accused will often lack the necessary skills to present the case well and should not be prejudiced through an initial inability to obtain representation.

When people are remanded in custody often their first priority is to seek bail. However, their lawyers are often wary of making an application at such an early stage in the process. This is typically because they are not in a position to mount a well prepared and supported application. In preparing a bail application it is often necessary for the defence to organise reports, references, character witnesses, accommodation, support services and sometimes a surety. It will also be necessary to obtain and consider the details of the prosecution case. Such preparation takes time. In circumstances where accused people are unwilling to wait, a defence practitioner will often advise them to make their own initial bail application, as if they are represented it will mean that new facts or circumstances will have to be shown on any subsequent application. The accused may then decide to make an in-person bail application.

In its review of the Bail Act, Victoria Legal Aid made the following comments about the new facts or circumstances rule:

> The effect of the current section [section 18(4)] is that defendants get just one attempt at bail when they are legally represented. If that application fails, most defendants are unable to demonstrate new circumstances and will remain in custody until their cases are heard. As a consequence, many lawyers are extremely cautious about representing defendants on the day they are taken into custody. [33]

Several of the groups that we consulted expressed dissatisfaction with aspects of the new facts or circumstances rule. The Victorian Aboriginal Legal Service has said it should be reviewed.[34] We were told that the rule discouraged professional intervention at an early stage, the result being that people may spend time on remand which could potentially have been avoided had they initially been represented.[35] One magistrate said that in-person bail applications were 'demeaning to the whole [criminal justice] process'.[36] It was also pointed

out that accused people risk prejudicing their defence when they make their own bail application, by inadvertently raising issues relevant to the alleged offending.

Changes to the rule need to be considered carefully. If the rule was removed the system could be flooded with repeat bail applications. There needs to be some form of check on the number of applications brought before the courts. However, if the current process discourages lawyers from acting for accused people in circumstances where it is appropriate that they have representation, then it may be a system that does a disservice to the accused, defence practitioners and the courts.

…it was rare for an accused to be granted bail following an in-person application

It has been suggested that the Bail Act be amended to allow for legal representation when an application is made shortly after a person is remanded in custody, without the requirement to show new facts or circumstances on the following application. Victoria Legal Aid has suggested the introduction of a system where accused people can make a represented application for bail shortly after arrest, for example two business days, without penalty. This may facilitate an earlier release from custody in those instances where bail is likely to be granted but for the reluctance of accused people to apply without legal representation or their inability to effectively argue their case in support of bail.

It was pointed out in several of our consultations that it was rare for an accused to be granted bail following an in-person application.[37] Defence practitioners stressed the undesirability of taking preliminary instructions from clients, giving them advice, and then having to leave them to carry out their own bail applications. It is difficult to explain to clients why it may not be in their interest to be legally represented on an application so soon after arrest.

However, there are some issues that need to be considered in the Victoria Legal Aid proposal. Magistrates we consulted thought that it was rare for bail applicants to be denied the ability to mount a second application on the basis of failing to show new facts or circumstances.[38] The magistrates believed that the new facts or circumstances rule is relatively easy to satisfy with factors such as the provision of a medical report often being sufficient. This would be relevant where an accused had raised, for example, treatment for drug addiction in the first application and was then able to provide a report from a doctor at the next application.

Unfortunately, it is not possible to obtain reliable data for those cases where new facts or circumstances have been argued. As the rule is relatively subjective, it is likely that magistrates or judges will interpret the rule differently, some being more open to the finding of new facts or circumstances than others.

If the Legal Aid suggestion was adopted there may be an increase in the number of represented bail applications following arrest. This may have resource implications. Defence practitioners may be more likely to carry out an initial bail application, aware that they have nothing to lose should they be unsuccessful. It may create an increase in applications to courts, many of which may, at such an early stage, lack merit.

Question 19 ?

Should the *Bail Act 1977* be amended to allow an accused to be represented at a bail application made shortly after arrest without having to show 'new facts or circumstances' on a subsequent application? If so, what is the most appropriate way to achieve this?

Abuse of the In-person Bail Application Process

During our consultations, there was some suggestion that the in-person bail application procedure is open to abuse.[39] Again, this is due to the new facts or circumstances rule.

As discussed above, if accused people are unrepresented they need not show new facts or circumstances upon a subsequent bail application. There is nothing in the Bail Act to prevent an accused making numerous in-person bail applications.

The commission has learnt of a recent case before the Melbourne Magistrates' Court in which the accused made more than ten bail applications over ten months. Such a process uses valuable court, police and prosecution resources and can place additional stress on victims.

The Chief Magistrate has issued a practice direction that provides that where bail has previously been refused by a magistrate any further application is, where possible, to be heard by the same magistrate.[40] This helps to ensure that one magistrate can control the process and prevent any abuse of the court process if an accused makes repeat in-person applications. Magistrates consulted said the in-person bail application process is not generally abused as they can control the hearing.[41]

Magistrates consulted said the in-person bail application process is not generally abused as they can control the hearing

Question 20 ?

Are there problems with the in-person bail application procedure and the new facts or circumstances rule? Is there a problem of the process being abused by accused people making repeat in-person bail applications?

Confessions or Admissions Volunteered

The rules of evidence generally do not apply in bail applications. The court may make such inquiries 'of and concerning the accused as the court considers desirable'. [42]

Problems can arise if, during the course of a bail application, an accused volunteers information that is relevant to the alleged offending and is adverse to his or her case. The Bail Act provides that during examination or cross-examination accused cannot be questioned about the offence charged.[43] As this questioning is not allowed, any adverse evidence obtained through such questioning is unlikely to be admissible at the bail hearing or in any subsequent trial.

However, the problem still remains of information volunteered by the accused through a confession or an admission.[44] If information is volunteered, it cannot be said to have been obtained through examination or cross-examination. While it is unlikely this would arise very often, it was an issue that several of the bail justices we consulted had experienced.[45] It would most likely occur when an accused was making an in-person bail application. This has occurred in at least one recorded case: *The Queen v Kathleen Therese MacBain*.[46] In this case the accused made a confession about alleged offending that was not the subject of the bail application being heard. The confession was made during a bail application before a bail justice and was heard by two police officers. At a pre-trial hearing in the County Court the trial judge ruled that the confession was voluntary and admissible.[47] The decision was subsequently overturned on appeal.

It has been suggested that specific guidance should be included in the Bail Act about whether confessions or admissions volunteered by an accused during a bail application should be admissible or inadmissible in the trial. In one of our consultations there was a belief that this could benefit from legislative clarification.[48]

The Court of Appeal in *MacBain's Case* held that the so-called 'confession' was inadmissible. There are strong public policy reasons for why this should be the case. Unrepresented accused people at bail applications are often in a vulnerable position. Usually, they have not benefited from legal advice and their main concern is to be released from custody. In such circumstances, especially when the hearing is in a police station rather than open court, any alleged confession or admission should be treated with caution.

If the Bail Act was amended to allow for the admissibility of such evidence, strict safeguards would need to be put in place to ensure its voluntariness and that accused people understood their legal rights and the consequences of such a confession or admission. The impact, if any, of section 464H of the *Crimes Act 1958* where a bail application for an indictable offence is heard by a police officer, or where a police officer is present, would also have to be considered. Section 464H generally requires tape-recording or videorecording of confessions and admissions made to investigating officers.

It would also be necessary to consider the provisions of the Uniform Evidence Act that relate to admissions.[49] It is anticipated that the uniform Act will soon be introduced in Victoria. The Act currently excludes admissions obtained in the course of official questioning unless 'the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected'.[50] It provides discretion to exclude admissions in a criminal proceeding where, having regard to the circumstances in which the admission was made, it would be unfair to the accused to use the evidence.[51]

At the moment, if an accused made an apparent admission or confession at a bail application a decision about the voluntariness of the statement would initially be made by the trial judge or magistrate in a pre-trial hearing (as occurred in *MacBain's Case*). If the confession or admission was ruled admissible then the weight to be attached to it would be an issue for the jury or the magistrate, depending on which court the matter was heard in.

Question 21 **?**

Should the *Bail Act 1977* contain provisions specifying how to use confessions or admissions volunteered during a bail application that are not elicited through examination or cross-examination? If so, should there be a general rule in favour of admissibility or against admissibility?

Provision of Reasons by Decision Maker

In certain circumstances individual decision makers are required to record their reasons for refusing or granting bail. The Bail Act makes two references to decision makers recording their reasons:

- First, where a judge or magistrate decides that an accused has shown cause why his or her detention in custody is no longer justified and grants bail.[52] The reasons are to be incorporated into the formal order of the court. Police officers and bail justices are also required to record reasons where an accused has shown cause and been granted bail. The police officer or bail justice is required to 'record' and 'transmit' the statement of reasons.[53] The Bail Regulations 2003 contain a form that police or bail justices must use when recording their reasons.[54]
- Secondly, in certain circumstances where bail is refused—If a court refuses an accused bail where the police have sought his or her remand, reasons must be recorded on the relevant warrant.[55] Also, where an accused charged with an indictable offence has been committed from the Magistrates' Court to a superior

> court for trial, a magistrate who refuses bail at that time must also give reasons.[56] The decision maker must give a statement of refusal detailing the grounds for refusal. There is no specific legislative requirement that the reasons be incorporated into the order of the court.

Judges and magistrates, even where not specifically directed to do so under the Bail Act, usually give oral reasons when granting or refusing bail. Consideration of procedural fairness and natural justice also dictate that decision makers give reasons for their decisions.[57]

What is sufficient to comprise 'reasons' for the purpose of the Bail Act? In *Director of Public Prosecutions v Philip Anthony Harika*, Justice Gillard made the following comment:

> … the statement must be comprehensible to the reasonable reader and satisfy the description of 'reasons'. The object of the requirement is to ensure that judicial officers turn their minds to the issues and determine the matter in accordance with the law.[58]

Oral reasons form part of the decision and are incorporated into the record of the court

In *Harika* the reasons given by the magistrate in the order read as follows: 'age, supports, structure, has shown cause'.[59] Upon appeal it was held that the reasons given were sufficient, although they constituted the 'barest minimum'. However, it was also pointed out that the written reasons were not to be considered in isolation, but with the transcript of the proceedings and the documentary evidence presented.

Further comment on the nature of the reasons to be given in a bail decision is found in the case of *Boris Beljajev v Director of Public Prosecutions (Vic)*:

> In a bail application which is necessarily interlocutory and founded largely on hearsay and assertion, the judge is not obliged to state in his reasons every matter which he has taken into account or the weight which he has attributed to any particular matter. A decision to grant or refuse bail must necessarily be to a very considerable extent a matter of impression or an instinctive synthesis of the considerations involved.[60]

If a magistrate, or indeed any decision maker, fails to record reasons where required to do so under the Bail Act then any subsequent order is legally void.[61]

The present practice of recording reasons in the Magistrates' Court involves a magistrate noting reasons on Courtlink, the computer program used in the Magistrates' Court. The system allows magistrates to 'tick a box' and incorporate their own comments. We have been told that some magistrates will record on Courtlink, and on the subsequent order, that bail was granted 'as per oral reasons'. Oral reasons form part of the decision and are incorporated into the record of the court.[62] This process has been considered by the Supreme Court.[63] The reasons given orally by a magistrate in court are recorded.[64]

During consultations, some concern was expressed about the nature and extent of reasons given by decision makers.[65] In our consultations with the Melbourne Magistrates' Court it was pointed out that magistrates often operate in a hectic environment that does not allow the luxury of drafting detailed written reasons. We were told that while often incorporating brief reasons on the order, magistrates were much more likely to expand on them orally.[66]

There is an incongruity in the Bail Act's requirement to record reasons for some matters but not others.[67] While decision makers must record reasons when granting bail for a 'show cause' offence, there is no specific requirement that they do so when refusing bail in such a case. Also, there is no specific legislative requirement to give reasons when granting bail for an 'exceptional circumstance' offence.[68]

The provision of reasons for an exceptional circumstance offence was discussed briefly in the matter of *Director of Public Prosecutions v Spiridon* in the context of serious drug offending.[69] It was said that the failure of the Bail Act to require the recording of reasons for an 'exceptional circumstance' offence was an 'oversight'.[70]

In a meeting with our bail reference advisory committee we also heard of a problem involving the provision of the written reasons of police and bail justices to the court.[71] It appears that the Magistrates' and Children's Court are not always provided with reasons where police and bail justices are required to record them. This was an issue that was also raised in the commission's discussions with other judicial decision makers, who described the provision of reasons to the court as 'ad hoc'.[72]

In a consultation with regional police, they told us they had been made aware by the local Magistrates' Court of the requirement to record reasons when granting bail for a show cause offence, a practice which they had not been following.[73]

…the Magistrates' and Children's Court are not always provided with reasons where police and bail justices are required to record them

There may be a need to further educate police to record reasons where required to do so under the Bail Act and ensure they are transferred to the appropriate court.

Question 22 ?

Are the reasons currently being provided by decision makers, where they are required to do so under the *Bail Act 1977*, adequate? Should the *Bail Act 1977* be amended to stipulate that reasons are given in all cases? If so, what is the appropriate method for reasons to be recorded? Should written reasons be required in all cases?

Further Applications for Bail and Appeals

The Bail Act contains a number of provisions that allow an accused person to make a further application for bail or allow the prosecution to appeal against a decision to grant bail. In this part of the paper, we will explore further bail applications and appeals, especially from a decision of the Magistrates' Court or from a single judge of the Supreme Court.

Further Applications for Bail Following Refusal

We have already discussed the right of accused people to make further applications for bail upon showing new facts or circumstances or where they did not have legal representation at their preceding bail applications. If bail is refused by a magistrate, the new application for bail will typically go back before him or her.[74] However, under the Bail Act it may also be heard by the court which the accused will eventually be required to appear before, for example, the County Court.[75]

An accused has the ability to make a further application for bail in the Supreme Court. In such a situation, the accused need not show new facts or circumstances or have been previously unrepresented. This is referred to as invoking the inherent jurisdiction of the Supreme Court.

The ability of an accused to invoke the inherent jurisdiction of the Supreme Court appears to be a well established and accepted feature of our bail system. However, it does not appear to be invoked frequently. This may be due, in part, to the increased legal costs of bringing a matter before the Supreme Court. The issue of the Supreme Court's inherent jurisdiction was not raised at any of our consultations. However, we are interested in hearing more on this topic. In particular, we are interested in whether the inherent power of the Supreme Court to hear a bail application for an accused in custody should be specifically referred to in the Bail Act.

Question 23 ?

Should section 18 of the *Bail Act 1977* make specific reference to the right of an accused to make a further application for bail to the Supreme Court? Or, is the present inherent power of the Supreme Court sufficient?

Appeals by the Director of Public Prosecutions

Both the state and Commonwealth DPP have a specific power under the Bail Act to appeal bail decisions to the Supreme Court. The DPP can appeal against a decision where:

To **revoke** bail means to cancel an accused's bail, the result being that an accused is remanded in custody.

- a court has refused to revoke bail upon an application of the Crown or the police to do so;[76]
- a grant of bail has been made and the amount of security set appears 'inadequate' or the conditions imposed are seen to be 'insufficient';[77]
- it appears that the provisions of the Bail Act have not been complied with or have been contravened;[78]
- a court or bail justice has refused to revoke bail following the arrest of an accused by police where the police had 'reasonable grounds for believing' that the accused would break, had been in the process of breaking or had broken a bail condition;[79]
- a court or bail justice has refused to revoke bail following the arrest of an accused where a member of the police was given notice by a surety that the accused was unlikely to appear at court as required and the surety therefore wished to be discharged of their obligations;[80]
- a court or bail justice has refused to revoke bail following the arrest of an accused by police where the police had 'reasonable grounds for believing' that a surety is dead or 'for any other reason the security is no longer sufficient'.[81]

These appeals are commonly referred to as 'director's appeals' or 'section 18A appeals'. The Bail Act stipulates that director's appeals should be brought 'in the public interest'.[82]

Director's appeals are not common. In any given year, there are usually less than five appeals brought by either the state or Commonwealth DPP under section 18A. For example, this year there has only been one director's appeal by the Commonwealth DPP and the state DPP has brought two, one of which was ultimately withdrawn.[83]

Director's appeals are heard by a single judge of the Supreme Court who has the power to quash the original decision and substitute another.[84] This may include the Supreme Court revoking a decision to grant bail or imposing additional bail conditions.

As the law presently stands, the DPP may use section 18A to appeal a bail decision from the Magistrates' Court or the County Court.

Fernandez v DPP

The Supreme Court decision of *Fernandez v DPP* is an important decision concerning appeal powers in bail matters.[85] Prior to *Fernandez*, the established position within Victoria was that an accused had no right of appeal from a decision of a single judge of the Supreme Court exercising his or her powers under section 18A of the Bail Act. This was the position established in the matter of *Beljajev*.[86]

In *Fernandez* the Court of Appeal overturned the rule established by *Beljajev*. The court explored the reasoning behind the decision in *Beljajev* as well as recent statutory and case law developments. In his concluding remarks President Winneke said:

> There is no unequivocal expression of legislative intention of s 18A of the *Bail Act* that the issue should 'stop' with the decision of the judge of the Trial Division. Hence it seems to me … that the conclusion of the Appeal Division in *Beljajev* can no longer be regarded as good law.[87]

The effect of the *Fernandez* decision is that an accused now has a right to appeal from the decision of a single judge of the Supreme Court on a director's appeal. There is still a question about whether the DPP can appeal a decision of a single Supreme Court judge on a section 18A appeal. While not making a definitive ruling, President Winneke thought this would be the case, subject to the DPP obtaining the court's permission to bring the appeal:

> If it is accepted that the appellate rights conferred by s18A are 'unrestricted', then—as it seems to me—either party would be entitled to challenge the single judge's decision on appeal.[88]

The issue of the status of director's appeal rights following the decision in *Fernandez* was raised in one of our consultations. It was suggested that the Bail Act should clarify what the situation is concerning the DPP's appeal rights in this situation.[89]

A broader issue is whether there should be a right of appeal beyond a single judge of the Supreme Court to the Full Court at all. It has been pointed out that from a practical viewpoint the Court of Appeal is already overburdened and a further layer of appeal may not necessarily provide a significant benefit to either the bail applicant or the DPP.[90] As we discuss below, and as was contended in *Fernandez,* it could be argued that the concept of appellate rights is at odds with the 'dynamic influences' governing bail.[91] Is it simpler to just have an unrestricted right to apply for bail, or revocation, whenever new facts or circumstances arise?

Appellate rights refers to the right of every accused to seek the review of a decision in a higher court. For example, an appeal from a single judge of the Supreme Court to the Full Court of the Supreme

Question 24 ?

In a director's appeal, should the right of an accused to appeal from a decision of a single judge of the Supreme Court to the Full Court of the Supreme Court be retained and incorporated into the *Bail Act 1977*? If so, should a corresponding right for the DPP also be included? Or should the appeal right be removed?

Appeals by the Commonwealth DPP

In the next chapter we will discuss reverse onus offences, which we have already mentioned briefly in Chapter 2. The Bail Act refers to Victorian and Commonwealth offences that attract a reverse onus. The Commonwealth has gone further and actually legislated on the appropriate reverse onus test that should be used by a Victorian decision maker for various federal offences.[92] Commonwealth legislation requires a decision maker to apply an exceptional circumstance test when considering bail for the Commonwealth offences we outline in Chapter 6. Accordingly, two Acts—Commonwealth and state—now make reference to a test for the granting of bail within Victoria.

The Commonwealth DPP discussed the problem of insufficient links between the Bail Act and Commonwealth legislation at one of our consultations.[93] The Bail Act does not contemplate the Commonwealth Parliament legislating on a reverse onus test for bail. The Commonwealth DPP thought this may be problematic, especially for director's appeals. For example, the Bail Act provides for the DPP to appeal where the DPP believes there has been a contravention or a failure to comply 'with any of the provisions of the Bail Act'. There is no reference to a failure to comply with Commonwealth legislation, which may also have a bearing on a bail hearing in which Commonwealth criminal offences are alleged to have been committed. The DPP believes this could potentially create a problem where the Commonwealth DPP brings a director's appeal for an offence for which the Commonwealth Parliament has set a reverse onus test.

We were also told that from a practical viewpoint it may be helpful if the Bail Act made reference to reverse onus tests where they arise in Commonwealth legislation.[94] The majority of bail decisions are made by police and bail justices who do not have a legal background and who may not come into contact with legislation other than the Bail Act or the Children and Young Persons Act. There is a chance that Commonwealth provisions about the grant of bail will be ignored. Although these provisions are unlikely to arise frequently, they are important. In particular, there was a view that the Bail Act should contain reference to the provisions of the Crimes Act 1914 (Cth) that relate to bail.[95]

Question 25 ?

Should the *Bail Act 1977* make reference to Commonwealth legislation that has a bearing on the bail decision? If so, how is this best achieved and where should such reference be made?

…from a practical viewpoint it may be helpful if the Bail Act made reference to reverse onus tests where they arise in Cth legislation

Nature of Further Applications or Appeals

Section 18 of the Bail Act is entitled 'Appeal against refusal of bail or conditions of bail'. The section is actually concerned with further applications for bail by accused who are in custody, subject to the new facts or circumstances rule that we have already discussed. The word 'appeal' in the heading is therefore misleading.[96] This has been put succinctly by Lieder:

> ... the word 'appeal' seems to be a misnomer since it would appear to be a fresh application although albeit based on new ground. This should be contrasted with an appeal by the crown under s 18A.[97]

When an accused invokes the inherent jurisdiction of the Supreme Court to have a fresh bail hearing then the Supreme Court hearing is a completely new hearing, not a review of the decision of the court below. This is known as a hearing *de novo*.

In contrast, as Leider points out, section 18A appeals are not hearings *de novo*. They are a review of the previous decision. The principles that apply to a director's appeal were detailed in *Beljajev*:

> It is not essential that the Director should be able to show an error of law in the narrow sense, although of course if error of law were demonstrated this Court would be obliged to substitute its own view of the order which should have been made. It is open to the Director to show that in all the circumstances of the case the order was manifestly the wrong order to make even though it is not possible to point to any other identifiable error in the process by which the authority granting bail arrived at the order made.[98]

The DPP must therefore show that the discretion of the initial decision maker had 'miscarried'.

The nature of fresh applications for bail and appeals under section 18 and section 18A of the Bail Act respectively are a source of confusion. In one of our consultations it was suggested that the Bail Act should more accurately clarify the nature of further applications for bail and the nature of director's appeals.[99] That is, the Act should clearly detail just what the role of the court hearing the fresh application or the appeal is.

Question 26 ?

Should the *Bail Act 1977* set out the nature of further applications for bail and the nature of director's appeals?

Court of Appeal Bail

The Court of Appeal has power to grant bail in three circumstances:

- where people have been convicted of an offence in the County or Supreme Courts and they are appealing against their conviction or sentence, the Court of Appeal has power to grant bail pending the determination of their appeal;[100]
- having heard an appeal against conviction or sentence, if a new trial is then ordered the Court of Appeal has the ability to make a determination about bail at that stage;[101]
- having heard a successful appeal by an accused from a Director's appeal in accordance with the position established by *Fernandez*, the Court of Appeal can change or make new bail orders.

For bail to be granted by the Court of Appeal pending appeal, the applicant must show that there are 'very exceptional circumstances'.[102] This is not a test prescribed by the Bail Act, but comes from the common law. In Re Clarkson there was discussion concerning the word 'very'. The court said it reflects:

> … the difficulty of persuading the court that the circumstances put forward as special or exceptional are strong enough to overcome the powerful considerations of a general character which militate against the grant of bail pending appeal.[103]

In practice, where the Court of Appeal quashes a conviction and directs that a new trial should be heard, any application for bail pending the hearing of the trial 'should ordinarily' be made by a single judge of the Supreme Court Trial Division—not by the Court of Appeal.[104] When bail is applied for pending appeal then the bail decision will 'ordinarily' be exercised by the Court of Appeal comprised of two judges.[105]

We are interested in hearing about whether the current procedures are working well and if there are any problems with the legislative provisions governing Court of Appeal bail.

Question 27 ?

Are the processes for bail applications to be heard by the Court of Appeal adequate? Are there any difficulties with sections 568(7), 579 and 582 of the *Crimes Act 1958* or Practice Statement No 2 of 1997?

Revocation of Bail Post-committal

At the conclusion of committal proceedings in the Magistrates' Court the accused's bail status is in issue. If the accused is on bail, then the presiding magistrate must decide whether bail should be extended, varied or revoked. Similarly, if an accused is on remand a fresh application for bail may be made without having to show new facts or circumstances.

A concern was expressed to us in several of our consultations about magistrates revoking bail at the conclusion of a committal hearing.[106] We were told that this sometimes occurs despite the prosecution making no application to do so and the accused having successfully abided by all of the bail conditions. Our consultations suggested that this is most likely to

occur at the conclusion of a contested committal hearing. That is, where prosecution witnesses have come to court to give evidence and be cross-examined.

At the conclusion of a committal proceeding, the magistrate will generally have formed an opinion about the strength of a prosecution case. This is because the magistrate will have perused the police brief and may have also heard cross-examination of prosecution witnesses. It is probable that magistrates who revoke bail at the conclusion of a committal proceeding do so because, having reviewed the strength of the police case, they believe the accused should not have initially been granted bail. Victoria Legal Aid submitted:

> The justification used by Magistrates is that, as the evidence against the defendant is strong, the position on bail has changed. Victoria Legal Aid regards this as disingenuous and feels that what is really happening is a decision to punish the [alleged] offender.[107]

…revocation of bail post-committal does not occur often

We were told that revocation of bail post-committal does not occur often.[108] As we have discussed, the primary purpose of bail—although not its exclusive purpose—is to ensure that an accused turns up to court as required. Accused people are likely to feel aggrieved if, having been granted bail and having abided by all their bail conditions, bail is then revoked. Defence practitioners told us they feel 'ambushed' when a magistrate proposes the revocation of bail at the conclusion of committal proceedings.[109]

It was suggested in one consultation that if an accused has been granted bail there should be a presumption in favour of bail continuing throughout the course of a matter unless an application for revocation is brought by the prosecution.[110] A further suggestion was that revocation of bail should only take place following an application brought by the prosecution and with notice of such an application given to the defence.[111]

Question 28 ?

Should the *Bail Act 1977* contain a provision that prevents bail being revoked by a court without an application for revocation having been made by the prosecution and no notice having been given to the accused?

Bail for Murder and Treason

In 1992, the LRCV in its review of the Bail Act posed the following question: is it necessary for the Supreme Court to deal with bail applications in murder or treason cases?[112]

The Bail Act provides that the Supreme Court is the only court able to grant bail to an accused who has been charged with murder or treason.[113] There is, however, an exception to this general rule: the magistrate who commits a person charged with murder for trial may also grant bail.

During the course of its analysis, the LRCV referred to a report on homicide it had produced.[114] The report recommended that the requirement that the Supreme Court deal exclusively with bail in murder and treason matters be abolished. The main reasons advanced were as follows:

- There are no such restrictions in relation to other serious offences. Bail can be granted by the Magistrates' Court for other offences which attract a maximum sentence of life imprisonment.
- The Magistrates' Court is already entrusted with granting bail following a committal in a murder case.
- A significant number of people who are charged with murder do not actually go on to be prosecuted with the offence.[115] The LRCV made the point that the charging

decision, that dictates which court can grant bail, 'is a very inexact measure of the final outcome'.[116]

The greater expense involved in having a bail application heard in the Supreme Court was identified in our consultations as another reason why it may be preferable to allow bail applications for murder and treason to be heard in the Magistrates' Court.[117]

Ultimately, the LRCV believed that 'the seriousness of the crime of murder was not a sufficient reason for having bail decisions made in the Supreme Court'.[118] They were of the same belief about the offence of treason.

Magistrates we spoke with believed that the Magistrates' Court should be able to deal with bail applications for people charged with murder.[119] A Supreme Court judge that we consulted with also believed that the Magistrates' Court should be able to hear bail applications for accused charged with murder.[120]

Question 29 **?**

Should the *Bail Act 1977* be amended so that bail applications for accused charged with murder and treason can be heard in the Magistrates' Court?

Warrants

Warrants are documents, usually issued by a court, that authorise the police to arrest people and bring them before a court.

The Bail Act makes various references to warrants. For example, a court may issue a warrant for the accused where the surety seeks to be discharged of their obligations,[121] where the court decides that additional bail conditions should be imposed on an accused,[122] or where the court deems that the security provided—either by the surety or the accused—is insufficient.[123] We discuss sureties in detail in Chapter 6. Under the Bail Act, a court may also issue a warrant for accused people's arrest where they fail to appear in court in accordance with their bail conditions.[124]

No Warrant for Breach of Condition

An issue that was raised with us was the inability of a magistrate to issue a warrant where an accused does not abide by the conditions of bail.[125] The Bail Act provides that where accused people do not abide by the conditions of bail, their bail can be revoked upon application.[126] In addition, the police may arrest an accused without a warrant where they believe the accused is likely to break, is breaking or has broken a bail condition.[127] So, even though a magistrate cannot issue a warrant in instances of breach, there is a procedure whereby bail can be revoked and the police can arrest the accused *without a warrant*. Given these powers, is it necessary that a court also have the ability to issue a warrant?

This issue is important owing to a deficiency in the sharing and recording of information between the court and the police. If an accused's bail is revoked by a court this will not necessarily be registered on the LEAP database. If an accused's bail has been revoked by a court, and he or she is subsequently intercepted by the police for another matter, a check of LEAP would not disclose that the accused's bail had been revoked for failing to comply with bail conditions. However, if a court issues a warrant this would be registered on LEAP, and would show there is an outstanding warrant of arrest.

A submission to the commission gave an example of an accused granted bail with a condition that he participate in the CREDIT–Bail Support Program. On the day he was directed to attend the program he failed to do so. Family members informed the police that he had 'disappeared'. The next date on which he was required to attend court was some

months away. When the matter was mentioned before the court in the absence of the accused, bail was revoked by the court but a warrant could not be issued. As we have noted, LEAP would therefore not be updated with details of the accused's failure to abide by his bail condition. A warrant could only be issued if he failed to appear on the next court date on which he had been directed to attend.

We were told that sometimes magistrates will 'get around' the inability to issue a warrant by utilising sections 25 or 26(1) of the Bail Act.[128] These sections allow for a warrant to be issued where a court is of the opinion that additional bail conditions or amended bail conditions should be imposed on the accused or further security should be found. These sections were not intended to be used to issue a warrant to revoke bail. Owing to a deficiency in the Bail Act, decision makers have resorted to the artificial use of these sections as a means of having an accused brought back before the court.

It was suggested that the above problem could be overcome if a court that revokes bail also has the power to issue a warrant of arrest. The other method by which this problem could potentially be overcome is to ensure that a revocation of bail due to a failure to comply with bail conditions is accurately recorded on the LEAP database so that any police officer can then arrest the accused without a warrant.

Question 30 ?

Should section 18(6) of the *Bail Act 1977* be amended to enable a court to issue a warrant of arrest when an accused's bail is revoked?

We were told that police are sometimes reluctant to arrest an accused without a warrant.[129] We have discussed the power of the police under the Bail Act to arrest an accused without a warrant where they believe the accused is likely to break, is breaking or has broken a bail condition.[130] Police may also arrest an accused without a warrant where they are notified by a surety that the accused is unlikely to appear at court and the surety therefore wishes to be discharged of their obligations.[131] Finally, the police may arrest an accused without a warrant where they have 'reasonable grounds' for believing that a surety is dead or 'for any other reason the security is no longer sufficient'.[132]

If police are reluctant to arrest an accused without a warrant, there is a risk that the sections of the Bail Act that allow for this are not being properly enforced. This could potentially be remedied by allowing for a warrant of arrest to be issued by the court, as detailed above. This power of the court could operate in tandem with the police power to arrest without warrant. If the Act was amended to allow for the court to issue a warrant in these circumstances, the police would have the ability to arrest an accused without warrant or go before a court to obtain a warrant.

Question 31 ?

Is there reluctance by police to arrest an accused without a warrant as provided for under the *Bail Act 1977*? If so, should section 24 of the *Bail Act 1977* be amended so that a warrant can be obtained from a court in the circumstances detailed in that section?

Execution of Warrants

The Victorian Parliament Law Reform Committee released a Discussion Paper last year entitled *Warrant Powers and Procedure*. The paper comprehensively examines the existing warrant powers and procedures within Victoria and raises various questions.[133]

One of our consultations raised a particular concern with the execution of warrants by police.[134] This issue was raised by the Victorian Aboriginal Legal Service in its submission to the inquiry into Warrant Powers and Procedure.[135] The service expressed the view that the police were inconsistent in the manner in which they informed it about the existence of warrants for its clients. The service represents Indigenous Australians. There was a belief that this has an impact on the likelihood of an accused being granted bail following execution of the warrant.

…the client is denied the advantage of being able to surrender peacefully into police custody…

In its submission, the service presented two scenarios. In the first scenario it is made aware of the existence of a warrant and an arrangement is made with police for the client to present at the police station, often with support, and the warrant is executed by the police. In the second scenario it is not informed of the warrant and the client is stopped by police in a public place and questioned. The police check LEAP and find there is a warrant in existence and the client is taken into custody. The service argued that the second situation creates a potential for confrontation. It also means that the client is denied the advantage of being able to surrender peacefully into police custody and thereby increase the likelihood that he or she will again be granted bail.

In its submission to the committee, Victoria Police disputed the suggestion that Indigenous Australians were 'deliberately targeted under warrant provisions'.[136]

The Victorian Parliament Law Reform Committee is due to report to Parliament on 31 October 2005. We will address any of the committee's relevant recommendations about the execution of warrants in our final report.

Endorsement of Warrants Upon Failure to Appear

Under the Bail Act a court may issue a warrant to arrest an accused who fails to appear in court as required by bail.[137]

A warrant may be 'endorsed' with various instructions to whoever is directed to execute it, typically the police. A magistrate may endorse a warrant to arrest with a direction that the accused must, upon arrest, be released on bail as specified.[138] The magistrate may direct, for example, that upon arrest the accused be bailed on a condition that he or she find a surety of a stated value.[139]

When a warrant is executed upon accused people they 'must' be taken before a bail justice or a court within a 'reasonable time of being arrested'.[140] The bail justice or court then has the power to let the accused go free, grant bail, or remand the accused in custody.[141] However, when there is an endorsement on the warrant about bail the bail justice or court must follow that direction. Bail justices criticised the endorsement of warrants in one of our consultations.[142] A concern was expressed that excessive conditions could be attached to warrants. Several bail justices thought they should be able to determine the appropriate conditions when warrants are executed, rather than magistrates or judges endorsing warrants with bail conditions.

There is no legislative provision that allows magistrates issuing warrants for failure to appear to endorse them to the effect that the accused can *only* be granted bail by that magistrate or another magistrate. This is important because a magistrate may wish to address the accused directly after he or she has failed to appear. Also, a magistrate may consider the accused's past failure or failures to attend court so serious that the decision to again grant bail should only be made by a court.

If the power was given to magistrates to endorse warrants to direct that accused could only be granted bail by that particular, or another, magistrate, the accused would have to remain in custody until he or she could be taken before the Magistrates' Court. This means

that if the warrant was executed on a Friday the accused would remain in custody until the Monday morning.

It should be noted that judges of the County and Supreme Courts have the ability to endorse warrants to require accused to be brought back before them, another judge or the Magistrates' Court.[143] However, in one consultation County Court representatives said there needs to be greater clarity about where an accused is taken following the execution of a warrant for having failed to appear.[144] It was pointed out that accused people are not always taken back before the County Court when they ought to be.

Question 32 ?

Is there a need for greater clarity about where an accused is to be taken following the execution of a warrant for failing to appear? Should the *Bail Act 1977* or the *Magistrates' Court Act 1989* contain a provision that enables a magistrate to endorse a warrant for an accused who has failed to appear in court to require that the accused be brought back before that particular, or another, magistrate?

Extension of Bail in the Absence of the Accused

The Bail Act provides for accused people's bail to be extended by a court in their absence in certain circumstances.[145] In those circumstances, rather than revoking bail and issuing a warrant for the accused, the court may extend bail to the next hearing date.

In May 2004 the Bail Act was amended to 'broaden the basis on which a court can extend a person's bail in their absence'.[146] The amendment was made at the request of the courts. The effect of the 2004 amendment was to allow a court to extend an accused's bail where the accused is not present for 'sufficient cause'.[147] Sufficient cause is not defined in the Act, giving the court a degree of flexibility in determining what constitutes sufficient cause in each case. For example, a court may find sufficient cause to extend an accused's bail where there has been a death of a close family member or where the accused is suffering from a serious illness.

We were told that there needs to be a degree of flexibility in the extension of bail in an accused's absence. The commission is interested in hearing about whether the 2004 amendment to the Bail Act has improved the ability of courts to extend an accused's bail.

Question 33 ?

What effect has the 2004 amendment to section 16(3) of *Bail Act 1977* had in relation to the extension of bail in an accused's absence? Are there any problems with the 'sufficient cause' test?

Victims and the Granting of Bail by Courts

In Chapter 6 we discuss the fact that the Bail Act specifies that bail should be refused if there is found to be an 'unacceptable risk' that the accused would endanger the safety or welfare of members of the public, interfere with witnesses or otherwise obstruct the course of justice.[148] If a court is satisfied that a victim is endangered or likely to be interfered with, then the court should refuse to grant bail unless conditions can be imposed that the court believes will be sufficient to protect the victim or witnesses. We will discuss conditions of bail in Chapter 8. In assessing whether or not there is an unacceptable risk, the court is required to consider a number of factors, including the attitude of the victim to the grant of bail.[149] In practice, the views of the victim will usually be explained to the court by the

police or the prosecution, although there is nothing to stop the prosecution from calling a victim to give evidence in a bail hearing.[150]

During consultations, both police and the courts said victims' views were represented by the police and the prosecution and that they were seriously considered by the courts.[151] However, it was also made clear that victims were not routinely informed of the provision in the Bail Act for their views to be taken into account.[152]

The views of victims are only one of the considerations that have to be taken into account when deciding whether to grant bail. It was also pointed out during consultations that victims' fears of accused people can sometimes be out of proportion with the actual danger that the accused person presents—the actual incidence of accused people tracking down victims and harming them is believed to be very small.[153]

Question 34 ?

Are the views of victims adequately taken into account during bail hearings? (In answering this question, the commission is particularly interested in hearing about the personal experiences of victims.) Should there be a requirement that victims be informed of the fact that their views may be considered in making a bail decision?

When a Victim has a Life-threatening Injury

In some situations a person may be seriously injured as the result of an offence and it may be unclear whether or not that person will recover. The Bail Act currently provides specifically for this situation by allowing the court to refuse bail where there is doubt about the degree or quality of an offence because it is uncertain whether the person injured will recover or die.[154] In one consultation the view was expressed that there should be a requirement for a court to refuse bail in such contexts.[155]

Changing the Act in such a way would require a radical departure from the presumption in favour of bail that otherwise underpins the legislation. There is no other section in the Act that imposes a blanket prohibition on the grant of bail. Such a provision would also lead to the outcome that while accused people might be granted bail after a charge of murder, they could not be bailed while it remained unclear whether the charge would be murder or something less serious.

Chapter 6
Presumption Against Bail

Introduction

As discussed in Chapter 2, the Bail Act creates a general presumption in favour of bail, with the onus on the prosecution to show why the accused should not be granted bail. However, the Act also contains certain provisions that create a presumption against bail, reversing the onus. In these circumstances, accused people must show why they should be given bail. Some would argue that in such situations the provisions are inconsistent with the presumption of innocence and the requirement that the prosecution must prove the case against the accused.

This chapter is concerned with situations where the Bail Act provides for a presumption against bail. This occurs when an accused is charged with one of various offences detailed in the Bail Act. Throughout this chapter we will refer to such offences as 'reverse onus offences'. We will discuss issues that were raised in our consultations about reverse onus offences, the various tests that an accused must satisfy when there is a reversal of onus and whether there should be a presumption against bail at all.

Reverse Onus Offences

There are two exceptions in the Bail Act where the general presumption in favour of bail for the accused does not operate. That is, where accused people must show decision makers why they should be granted bail. The two exceptions are where an accused is charged with a reverse onus offence—either a 'show cause' offences or 'exceptional circumstance' offences. It is generally considered more difficult to establish exceptional circumstances than to show cause. The requirement to show exceptional circumstances is attached to more serious offences.

Show Cause Offences

The Bail Act provides that for certain offences, 'the court shall refuse bail unless the accused person shows why his detention in custody is not justified…'.[1]

This requirement is commonly referred to as an accused having to show cause.

The offences that require an accused to show cause are detailed in the Bail Act. The following offences are show cause offences:

- any indictable offence alleged to have been committed while the accused was awaiting trial for another indictable offence;
- stalking;[2]
- contravening an order under the *Crimes (Family Violence) Act 1987*;[3]
- aggravated burglary;[4]
- any indictable offence in the course of which the accused, or any person acting in concert with the accused, is alleged to have used or threatened to use a firearm, offensive weapon or explosive;

Acting in concert involves two or more people agreeing to commit a crime, with at least one of the parties being present at the scene.

- arson causing death;[5]
- trafficking in a drug of dependence to a child or attempting or conspiring to traffick in a drug of dependence to a child;[6]
- trafficking in a drug of dependence or attempting to or conspiring to traffick in a drug of dependence;[7]
- cultivation of a narcotic plant, attempting to cultivate a narcotic plant or conspiring to cultivate a narcotic plant;[8]
- assembly for unlawful purposes in relation to narcotic goods of a commercial or traffickable quantity;[9]
- various offences of possessing, bringing, importing, conveying or failing to disclose a commercial or traffickable quantity of narcotic goods;[10]
- an offence against the Bail Act.

Prior to December 2001, a person in charge of a ship or aircraft who intentionally allowed the ship or aircraft to be used for smuggling, importation, exportation or conveyancing of narcotic goods of a commercial or traffickable quantity would be required to show cause why he or she should be granted bail.[11] However, Commonwealth legislative amendments to the *Customs Act 1901* have meant that the Commonwealth provisions referred to in the Bail Act are no longer the relevant provisions.[12]

Exceptional Circumstances Offences

In addition to show cause offences, the Bail Act also provides that for select offences, 'a court shall refuse bail … unless the court is satisfied that exceptional circumstances exist which justify the grant of bail'.[13]

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

Exceptional circumstance offences are detailed in the Bail Act and, in the case of federal offences, the *Crimes Act 1914*.[14] The following are exceptional circumstance offences:

- treason;[15]
- murder;
- trafficking, attempting to traffick, or conspiring to traffick a commercial quantity or large commercial quantity of a drug of dependence;[16]
- cultivation, attempted cultivation, or conspiring to cultivate a commercial quantity or large commercial quantity of a narcotic plant;[17]
- assembly for unlawful purposes in relation to narcotic goods not less than a commercial quantity;[18]
- various offences of possessing, bringing, importing, conveying or failing to disclose a quantity of narcotic goods of not less than a commercial quantity;[19]
- a Commonwealth 'terrorism offence';[20]
- an offence against a law of the Commonwealth involving the death of a person where the accused intentionally engaged in the conduct causing the death;[21]
- espionage and similar activities;[22]
- treachery against the Commonwealth.[23]

Prior to December 2001, a person in charge of a ship or aircraft who intentionally allowed his or her ship or aircraft to be used for smuggling, importation, exportation or conveyancing of narcotic goods of not less than a commercial quantity would be required to show exceptional circumstances why he or she should be granted bail.[24] However,

Commonwealth legislative amendments to the *Customs Act 1901* (Cth) have meant that the provisions referred to in the Bail Act are no longer the relevant provisions.[25]

Using Show Cause or Exceptional Circumstances

Show Cause

There is no definitive definition of show cause. Nor is there an exhaustive list of criteria that accused can rely upon to show cause. Instead, each individual case must be assessed on its own unique facts. We do know that a combination of factors can result in an accused having shown cause.[26]

Factors which have been found to contribute to an accused having shown cause, either in combination or in isolation, include:

- permanent employment;[27]
- permanent and stable accommodation;[28]
- delay;[29]
- conditions in custody;[30]
- ill health (of the accused or family members);[31]
- a weak prosecution case;[32]
- the criminal history of the accused.[33]

The above list is by no means exhaustive.

Case Study 3

Elizabeth was separated from Ernie and had obtained an intervention order which prevented him from coming near her. The order had been granted after Ernie had violently assaulted Elizabeth on a number of occasions while they were still living together.

One Friday night, Ernie went to Elizabeth's flat to talk to her about his access arrangement with their children, which he was unhappy about. Ernie and Elizabeth argued and Elizabeth claimed that Ernie became very angry and threatened to hurt her if she didn't do as he said. Elizabeth called the police. The police arrived at Elizabeth's flat and arrested Ernie and charged him with contravening an intervention order under the *Crimes (Family Violence) Act 1987*.

The police explained to Ernie that he had to give them a very good reason why they should release him on bail. This was because Ernie was in a show cause situation.

Ernie told the police he had longstanding employment and would lose his job if he was not granted bail.

The police granted Ernie bail. One condition was that he not approach Elizabeth.

During our consultations, a commonly expressed concern was raised about the ambiguity or uncertainty surrounding the term 'show cause'.[34] We were told that the phrase lacks meaning. Defence practitioners in particular said that it is difficult to explain to clients and, given its subjectivity, becomes a 'hit-and-miss' process—some decision makers will find that cause has been shown while others, in an almost identical factual scenario, will not. In contrast, some groups we spoke to said the flexibility surrounding the term show cause is

one of its greatest assets.[35] It means that decision makers can partake in a process of intuitive synthesis: the weighing up of individual factors to reach the ultimate decision.

In some consultations there was discussion of whether there could be greater legislative guidance concerning show cause.[36] Our consultations did not disclose a widespread belief that the term should, or indeed could, be specifically defined in the Bail Act or that the Act should include a list of definitive factors, akin to a check list, that go towards constituting cause. This would be extremely difficult given the many unique, and sometimes interconnected, matters that have been found to contribute to cause having been shown.

Rather, there was some support for having a provision in the Bail Act that directs decision makers to broad matters that may potentially be considered when an accused is endeavouring to show cause. Presumably, any such list would be similar to that which is already found in the Act for 'unacceptable risk'. In assessing whether an accused is an unacceptable risk, the Bail Act directs decision makers to have regard to 'all matters appearing to be relevant', particularly the:

- nature and seriousness of the offence;
- character, criminal history, associations, home environment and background of the accused;
- history of any previous grants of bail to the accused;
- strength of the evidence against the accused;
- attitude of the alleged victim to the grant of bail.[37]

We have already raised the issue of whether decision makers should be specifically directed to take into account the issue of delay.[38] Other matters that could potentially be considered by a decision maker are, for example, the health of the accused or the effect of detention on an accused's family members or employment.

Exceptional Circumstances

All of the matters that are relevant in showing cause are equally applicable in showing exceptional circumstances. However, it is generally accepted that to show exceptional circumstances requires something more than showing cause. It is a 'high hurdle'.[39] The term exceptional circumstances is not unique to bail and judges in many cases—both bail and non-bail alike—have commented on what exceptional circumstances are, often seeking guidance from common dictionary definitions of 'exceptional' and 'circumstances'.[40] However, courts have generally expressed the undesirability of defining such a term:

> Courts have been both slow and cautious about essaying definitions of phrases of this kind, leaving the content of the meaning to be filled by the ad hoc examination of the individual cases. Each case must be judged on its own merits, and it would be wrong and undesirable to attempt to define in the abstract what are relevant factors.[41]

Like show cause, an individual factor or a combination of factors, which alone is not exceptional, can constitute exceptional circumstances.[42] Having analysed various exceptional circumstance cases Lieder concludes that:

> speaking pragmatically, the best way to succeed in an application where exceptional circumstances must be demonstrated is to have a combination of circumstances which in totality bring the case out of the ordinary.[43]

We look at how a combination of factors can contribute to a finding of exceptional circumstances in Case Study 4.

Case Study 4

The police arrested Hugh on a property in rural Victoria as he was entering a hothouse filled with cannabis plants on a property with many other similar hothouses, all with cannabis growing in them. There were over 150 cannabis plants in total. Hugh denied any knowledge of the cannabis and claimed he was there to pick vegetables. While there were vegetables growing on the property, they were not in the hothouse that he was found entering. On the same day, police arrested another man on the same property, Mark, who admitted to cultivating cannabis and told the police that Hugh was also involved in the illegal business. Hugh was arrested and charged and the police refused bail. Hugh's lawyers applied for bail in the Magistrates' Court.

During his bail hearing Hugh's lawyers argued that there were exceptional circumstances to justify Hugh's release on bail.

Hugh's lawyer raised the following arguments as to why he should be granted bail:

- there was likely to be a long delay before the trial for the police to scientifically analyse the evidence;
- Mark had been granted bail and it would be unjust not to grant bail to Hugh;
- Hugh suffered from chronic back pain owing to a degenerative back condition and was receiving ongoing treatment for this complaint;
- Hugh's wife had been diagnosed with breast cancer and was undergoing an intensive course of chemotherapy and radiotherapy and Hugh was her primary carer.

Due to the combination of all these factors, Hugh was granted bail by the magistrate.

…it is much less common for accused people to be in positions where they must argue exceptional circumstances

Again, the provision for exceptional circumstances is open to criticism owing to the many differing decisions made by courts. We looked at this briefly in Chapter 5 in relation to delay. Like show cause, what actually constitutes exceptional circumstances in any given case is highly subjective. Naturally, when one accused receives bail and another is refused bail on a similar factual scenario, the latter is likely to feel unfairly done by.

Consultations did not raise as many criticisms of exceptional circumstance offences as were raised against show cause. In part, this may be because it is much less common for accused people to be in positions where they must argue exceptional circumstances. In contrast, many of the groups and individuals we spoke to in consultations are routinely involved with accused who are required to show cause. Some people we spoke to thought that the phrase exceptional circumstances is more easily understood than show cause.[44] This may be because it is a term that has been frequently considered by superior courts, as it is used in other legislation.

No one we spoke to in consultations suggested that the term exceptional circumstances should be defined in legislation. It would be extremely difficult to do so and, in any event, would not of itself fix any problems perceived with the test. However, if it is decided that a non-exhaustive set of factors be considered when evaluating whether cause has been shown, then arguably something similar should also be considered for exceptional circumstances.

Question 35 ?

Should the Bail Act contain a list of broad matters that decision makers should have regard to in deciding whether there are exceptional circumstances or whether cause has been shown?

Unacceptable Risk Test

If an accused successfully shows cause or demonstrates exceptional circumstances, bail is not automatically granted. A further requirement must be met, often described as the 'unacceptable risk test'.

It is the role of the prosecution to convince a decision maker that an accused is an unacceptable risk

The Bail Act provides that a court is to refuse bail where it is satisfied there is an unacceptable risk that accused people, if granted bail, would:

- fail to turn up at court (fail to surrender themselves into custody);
- commit an offence while on bail;
- endanger the safety or welfare of the public;
- interfere with witnesses or otherwise obstruct the course of justice.[45]

We have already looked at the types of matters that a decision maker is directed to look at when assessing whether an accused is an unacceptable risk.

It is the role of the prosecution to convince a decision maker that an accused is an unacceptable risk.[46] There is no set standard which the prosecution must reach. It must be established that there is a 'sufficient likelihood of the occurrence of the risk, having regard to all relevant circumstances' to stop bail being granted.[47]

Sometimes accused people are able to show cause or exceptional circumstances but are still refused bail on the basis that they are an unacceptable risk. One of the most well-known examples is *Beljajev v Director of Public Prosecutions* where Justice Kellam found that despite there being exceptional circumstances owing to delay, there was still an unacceptable risk that the accused would fail to surrender himself into custody and would commit further offences while on bail.[48] In doing so, Justice Kellam was following a two-step process previously set out by the Appeal Division of the Supreme Court.[49] While still following that process, Justice Kellam has recently commented on the overlap of the considerations in each step:

> The burden of establishing unacceptable risk lies upon the prosecution. I suppose it can be said that the two inquiries overlap in the sense that the unacceptable risk factors have to be weighed when considering whether the applicant for bail has shown cause. The Act has not defined what is meant by the phrase 'show cause why his detention in custody is not justified'. It is trite to observe that all the relevant circumstances must be considered.[50]

Similarly, in the case of *DPP v Philip Anthony Harika* Justice Gillard explored show cause and unacceptable risk, making the following comment 'the two queries can overlap, in the sense that the unacceptable risk factors have to be weighed, when considering whether the applicant has shown cause'.[51]

Our consultations with magistrates and judges, in particular, have highlighted the overlap that often exists between either of the two reverse onus exceptions and the unacceptable risk test.[52] Matters that may potentially go towards showing cause or demonstrating exceptional circumstances will likely interconnect with unacceptable risk factors. So, for example, if an accused argues stable accommodation or employment as part of showing cause, this will also be considered when looking at the unacceptable risk that he or she would not turn up to court. An attempt to follow two discrete tests can be somewhat

artificial. We were told that decision makers sometimes partake in 'verbal gymnastics' when giving a decision in such a situation.

There was a suggestion in consultations that if an accused can satisfy the requirement to show cause or demonstrate exceptional circumstances, there should be no need to move onto the second unacceptable risk step.[53] This is because the issues connected with risk would generally have been taken into account. However, as we have seen from Justice Kellam's decision in *Beljajev*, there are times when one discrete issue will be discussed under one of the reverse onus exceptions—in that instance, delay—while the unacceptable risk factors set out in the Bail Act will be discussed separately.

Is Reform Needed?

Our consultations revealed a number of concerns about the reverse onus tests in the Bail Act. The complexity of the current structure of the tests has been discussed above. The remaining concerns are:

- the offences currently included and excluded from the categories;
- the problems raised by having the offences in section 4 of the Bail Act and whether they should be included in a schedule to the Act;
- the possibility of having only one reverse onus category;
- the issue of whether there should be any presumption against bail for specific offences.

schedule A schedule is located at the rear of an Act and contains matters that are typically subsidiary to the Act's main purpose.

The first two points assume the continuation of the current reverse onus categories. The last two consider changes to that structure.

More Reverse Onus Offences

Earlier in this chapter we outlined the offences that currently require an accused to show cause and demonstrate exceptional circumstances. When first enacted, the Bail Act contained a much more limited list of show cause offences and circumstances, and no exceptional circumstance offences.[54] Over the past 28 years further offences have gradually been added, although few have been removed.

It was pointed out in several consultations that many of the offences that attract a reverse onus appear ad hoc and anomalous.[55] It is difficult to see why certain offences have been included while others have been excluded. Seriousness or prevalence of offence alone do not appear to be the criteria in deciding whether an offence should attract a reverse onus. The LRCV had the following to say on this topic:

> Treason and murder are very serious offences, it is true. But many murders are committed in the heat of the moment and in special circumstances by people who have no history of violent crime and who are unlikely to re-offend, or to fail to attend for trial. The crimes associated with the use of weapons … and the drug offences … are serious, but not nearly as serious as attempted murder (with its obvious risk of re-offending) or rape [neither of which attract a reverse onus].[56]

In several of our consultations, the question arose as to why rape was not a reverse onus offence. If seriousness of offence is to be one of the key criteria for inclusion as a reverse onus offence, then rape is a noteworthy omission as it attracts a maximum penalty of 25 years imprisonment.[57] Other serious sexual offences, such as incest, do not require an accused to show cause or demonstrate exceptional circumstances. A similar concern was voiced about inchoate murder offences. As discussed by the LRCV, people alleged to have committed attempted murder do not fall within either of the reverse onus categories. Again, this is considered one of the state's most serious crimes, carrying a

Inchoate offences are preliminary offences such as 'attempt', 'conspiracy' or 'incitement'.

maximum penalty of 25 years imprisonment.[58]

In contrast, accused people who fail immediately to notify the DPP in writing of a change to their residential address need to show cause for bail to be granted again.[59]

It was suggested in one consultation that offences alleged to have been committed by people on parole should attract a reverse onus.[60] An argument was advanced that people on parole should be treated consistently with those alleged to have committed offences while on bail, both being under the supervision of the court.

…people on parole should be treated consistently with those alleged to have committed offences while on bail

Victoria is not alone in adopting various reverse onus categories. Other states within Australia, as well as jurisdictions overseas, also adopt offences that require an accused to argue that his or her release on bail is justified. Like Victoria, the reverse onus categories are generally show cause or exceptional circumstances. Naturally, the offences that fall within these categories vary from jurisdiction to jurisdiction. Appendix 3 contains a table that compares reverse onus provisions in other select jurisdictions within Australia.

There are obvious problems with having anomalous groups of offences falling within 'reverse onus' categories. It may create a feeling of unfairness for those accused who are charged with one of the 'reverse onus' offences. It may also contribute to a perception that the criminal justice system does not treat those other equally serious offences, which do not fall within the exceptions, with the same degree of seriousness.

Suggested Model for Reform

One suggestion raised in consultations to overcome this disparity between show cause and exceptional circumstance categories was for offences that attract a certain maximum penalty to automatically require an accused to show cause or demonstrate exceptional circumstances.[61] So, for example, those accused charged with offences that attract a maximum penalty of 25-years imprisonment or more would automatically be required to show exceptional circumstances as to why they should be granted bail. The advantage in such a system is that it eliminates concerns about the subjective choice of which offences attract a reverse onus. All offences that the legislature deems to be of a certain level of seriousness, as gauged by their maximum penalty level would be included.

It was suggested that such a model need not be inflexible. Should policy reasons dictate the exclusion or inclusion of a certain offence then this could be accommodated. For example, whether to include existing reverse onus categories of an accused allegedly committing an indictable offence while awaiting trial for another indictable offence, or an accused allegedly committing an offence against the Bail Act. These circumstances would not automatically be accommodated under a model based on maximum penalties.

This model raises several questions. What would be the maximum penalties that attract a reverse onus? Would this lead to the legislature being unduly swayed by a belief that a certain offence should attract a 'reverse onus' and set the penalty accordingly? Should seriousness of offence be the main criterion by which we gauge whether an offence should attract a reverse onus, or are factors such as risk of absconding or re-offending of equal or higher importance?

There is a risk, however, in making the model so flexible. The main advantage of the suggested model is that there is a consistency in those offences that fall within the two categories. Allowing for certain offences to be added or removed waters down this uniform approach. It may result in so many offences being included or excluded that it would defeat the very objectivity that such a model was designed to achieve.

Question 36 ?

Should there be more reverse onus offences in the Bail Act? If so, on what basis should offences that attract a reverse onus be chosen? Are the current offences that attract a reverse onus appropriate?

Commonwealth Drug Offences

As a result of recent amendments to Commonwealth legislation, offences that previously attracted a reverse onus requirement under the Bail Act no longer do so, causing problems with the operation of section 4 of the Act.

Under the Bail Act a person charged with certain serious drug offences contrary to section 233B of the *Customs Act 1901* (Cth) must satisfy the court that there are either exceptional circumstances to warrant bail or must show cause and exceptional circumstances as to why continued detention in custody is not justified.[62] The applicable test is dependent upon the quantity of the narcotic goods involved in the alleged offending.[63]

Section 233B of the Customs Act was amended in 2001 to move offences of attempting to and conspiring to commit an offence from that section to the *Criminal Code Act 1995* (Cth).[64] There has been no corresponding change to the Bail Act to reflect the change in the Commonwealth legislation.

As a result of the Commonwealth amendments, the Bail Act no longer reflects the intention of the Victorian legislature. For example, people who attempted to or conspired to bring into Australia a commercial quantity of narcotic goods would, prior to December 2001, have needed to satisfy the court that exceptional circumstances existed to justify their release on bail. The deletion of these offences from section 233B of the Customs Act means the general presumption in favour of bail now applies in Victoria for these Commonwealth offences.

The Commonwealth amendments also mean there is an inconsistency in the way the Bail Act deals with serious state drug offences and serious Commonwealth drug offences. Those alleged to have attempted or conspired to commit serious state drug offences contrary to the *Drugs, Poisons and Controlled Substances Act 1981* are placed in a reverse onus category.[65] Those alleged to have attempted or conspired to have committed equally serious Commonwealth drug offences contrary to the Criminal Code are not placed in a reverse onus category and benefit from the general legislative presumption in favour of bail.[66]

To rectify the present problem it is necessary in the Bail Act to refer to the federal Criminal Code as well as the Customs Act. The Commonwealth DPP has suggested various amendments to the Bail Act to ensure that attempting to and conspiring to commit various offences under the Customs Act attract the exceptional circumstances test or show cause test. The proposed amendments are contained in Appendix 4.[67]

Commonwealth legislation is expected to be passed into law by the time this paper is published, which will result in numerous Commonwealth drug offences being taken out of the Customs Act and placed in the Criminal Code.[68] Without action by the Victorian legislature, several serious Commonwealth criminal drug offences would no longer attract the appropriate reverse onus test under the Bail Act. However, unlike the other issues we have discussed above, the passage of the new Commonwealth legislation has been anticipated. An amending Act is currently being passed by the Victorian Parliament, to ensure the Bail Act refers to the appropriate provisions of the Criminal Code.[69]

In detailing the various offences that currently attract a reverse onus earlier in this chapter, we discussed other changes to the Customs Act as a result of Commonwealth legislative

amendments in 2001. These changes mean that a person in charge of a ship or aircraft who intentionally allows the ship or aircraft to be used for smuggling, importation, exportation or conveyancing of narcotic goods will, most likely, not have to show cause or exceptional circumstance. To rectify this problem, and ensure greater certainty, further amendments would need to be made to the Bail Act.

Later in this chapter we discuss the possibility of including reverse onus offences in a schedule to the Bail Act. This would potentially make the process of making amendments such as those detailed above more straightforward.

Question 37 ?

Should the *Bail Act 1977* be amended so that the offences of attempting to and conspiring to commit an offence contrary to section 233B(1) of the *Customs Act 1901* (Cth) continue to attract the appropriate reverse onus test? If so, do you agree with the amendments as proposed by the Commonwealth Director of Public Prosecutions? Should the *Bail Act 1977* be amended to ensure that a person in charge of a ship or aircraft who intentionally allows the ship or aircraft to be used for smuggling, importation, exportation or conveyancing of narcotic goods falls within the appropriate reverse onus category?

Exclusion of Certain Reverse Onus Offences

In addition to criticisms about the offences that are excluded from the various reverse onus categories, we also heard some criticism of those offences that currently fall within the categories. In one of our consultations, a concern was raised about two situations where an accused must show cause as to why bail should be granted.[70]

The first situation is where people are charged with the offence of stalking.[71] If they are charged with stalking and have, within the preceding 10 years, been convicted or found guilty of stalking in relation to any person, or been convicted or found guilty of any offence during the course of which they threatened to use violence against any person, they must show cause as to why bail should be granted.[72] This also applies if the court is 'satisfied' that on a separate occasion they used or threatened to use violence against the person they are alleged to have stalked but have not been charged for such behaviour. [73]

The second situation is where accused people are charged with the offence of breaching an intervention order or an interim intervention order and, in the course of doing so, it is alleged that they used or threatened to use violence.[74] Intervention orders are court orders that impose restrictions or prohibitions on family members interacting with other family members, typically in a domestic violence context. If accused people are charged with breaching such an order and have, within the preceding 10 years, been convicted or found guilty of any offence during the course of which they threatened to use violence against any person, then they must show cause as to why bail should be granted.[75] Provision is also made for situations where the court is 'satisfied' that the accused on a separate occasion used or threatened to use violence against the person who is the subject of the order, but has not been charged for such behaviour.[76] In such situations the accused must also show cause.

Case Study 3 relates to the second situation we have discussed. Ernie finds himself needing to show cause because he has been charged with breaching an intervention order and there are allegations that he previously assaulted Elizabeth.

Criticisms surrounding the two provisions largely stem from the untested nature of the behaviour that may be alleged. The two provisions were added to the Bail Act in 1994. They were the subject of discussion by Lieder in 2001, who said that they may see the 'same sort of rumour and hearsay which customarily takes place in a bail application which

is opposed'.[77] She pointed out that there had been a proliferation of intervention orders in the past few years—which is still the case[78]—and that they had become 'the preferred tool of redress' for many different parties, not only spouses.[79] In relation to stalking, she made the following comments:

> As a charge, it is an extremely useful one, because the width of its ambit really means that people who previously were harassed and intimidated but not actively physically threatened, had no redress … It would be singularly unfortunate, if a charge which has the enormous potential for community justice that this has, is flawed by having appended to it a bail disentitlement arising from what might be a totally unrelated and irrelevant criminal history—since the criminal history relevant to stalking is not limited to the putative victim …[80]

…it is odd that stalking attracts a reverse onus whereas offences of actual violence and sexual assault carry no such burden

Lieder goes on to make another valid point concerning whether there should be more reverse onus offences. She says it is odd that stalking attracts a reverse onus whereas offences of actual violence and sexual assault carry no such burden.[81]

Anecdotally, and despite the increase of intervention orders that are being granted, it does not appear that many accused fall into the show cause category owing to the above provisions.[82]

Another situation where criticisms have arisen is where an accused must show cause for various drug offences. This particular concern stems from the quantity of drugs involved in the alleged offending that results in an accused having to show cause. People alleged to be found growing a single cannabis plant, or conspiring or attempting to grow a single cannabis plant, are guilty of a criminal offence and must show cause.[83] This is irrespective of whether a decision maker thinks the cultivation was for trafficking purposes. They are therefore put in the same situation as an accused alleged to have grown just under a 'commercial' quantity of cannabis. A commercial quantity of cannabis is 100 plants or 25kg or more.[84] Accordingly, someone who grows 99 plants for the sole purpose of sale—provided the plants weigh less than 25kg—is required to show cause just like the person found growing the single plant. A similar situation also arises for other types of drugs.

A decision maker will take into account the level and seriousness of an offence when deciding whether bail should or should not be granted. However, in the circumstances described above, the presumption in favour of bail is lost and the burden of convincing the decision maker that bail is warranted rests with the accused.

Question 38 ?

Should any of the current reverse onus offences be removed from the Bail Act?

Schedule of Reverse Onus Offences

Section 4 of the Bail Act is the longest section of the Act and its complex nature drew many complaints in our consultations.[85] The section's structure and language is convoluted and lacks aides to assist the reader—such as subheadings—contributing towards its difficulty for readers. Much of the section is taken up with listing the various reverse onus offences that we have discussed.[86] In Chapter 2 we raised the question of whether the Bail Act should be redrafted, with particular mention of section 4.

In one consultation it was suggested that the various reverse onus offences should be removed from the body of the Act and listed in a schedule.[87] It was a suggestion that appealed to many people we consulted with, on the assumption that the current Act continues to apply. There are various advantages in adopting such a measure. Not only would it reduce the contents of section 4, making it easier to read, but it would enable easier inclusion or deletion of reverse onus offences at a later date.

The *Bail Act 1992* (ACT) provides a good example of the inclusion of reverse onus offences in a schedule.[88]

Question 39 ?

Should the Bail Act be amended to place reverse onus offences in a schedule?

One or Two Reverse Onus Categories?

The current two-tiered approach was considered illogical and conceptually difficult

In one consultation, the issue of restructuring the Act to contain only one rather than two reverse onus categories was raised.[89] The current two-tiered approach was considered illogical and conceptually difficult. There was disagreement within that consultation as to whether show cause or exceptional circumstances should be the applicable test. Some thought the show cause requirement was difficult to understand and to explain to an accused. Those participants thought that exceptional circumstances presented less difficulty as it has been extensively judicially considered and is more easily understood. Other participants thought show cause was easier to understand and apply.

Participants in the consultation raised initial ideas, but thought the idea of having one test required further thought and development. Problems were raised with each of the current tests, including the fact that the same circumstances will in some cases lead to a finding that an applicant has shown cause or exceptional circumstances but not in others. This highlights the importance of the decision maker's synthesis of information in each case when making the final decision. It may also suggest, as we have pointed out, that the two discrete tests—reverse onus and unacceptable risk—overlap, with factors relevant to risk being considered when determining if the accused has shown cause or exceptional circumstances. The artificiality of the current division of those considerations was also raised.

Apart from the issue of deciding which test should apply in a single test model, there is also the problem of what to do with the offences to which the other test currently applies. For example, if a single test of exceptional circumstances was adopted, how should offences that currently attract the show cause test be treated? As exceptional circumstances is a higher test, which is attached to more serious offences than fall under the show cause requirement, it would not seem logical to put all offences currently in the Act under that category. The same would apply if show cause was adopted as the single test. If the exceptional circumstances category was adopted as the single test, one approach may be to have no reversal of onus for the offences currently in the show cause category.

Question 40 ?

Should the Bail Act be amended so that there is only one reverse onus category? If so, what test should apply and how should the offences currently in the reverse onus categories be allocated?

Should the Presumption Against Bail be Retained?

In 1992 the LRCV explored arguments about whether the presumption against bail should be retained.[90] Despite the passage of time, this is still a live issue and it arose in a number of our consultations.[91]

The LRCV recommended that the presumption against bail where an accused must show cause or exceptional circumstances should be abolished. A general presumption for bail combined with the unacceptable risk criteria presently found in the Bail Act was preferred.

Another option could be to have a general presumption for bail with modified unacceptable risk criteria.[92]

Generally, it is a principle of the criminal law that all accused are presumed to be innocent until proven guilty. It is the role of the prosecution to prove guilt. It could be argued that the presumption of innocence is undermined by the inclusion of reverse onus offences in the Bail Act. It places accused people—who are presumed to be innocent—in a situation where they are required to convince a court why bail should be granted. Many would argue that the burden should, in a bail application, remain with the prosecution.

There is no research to indicate that people charged with offences that have been classified as reverse onus are more likely to fail to appear in court or commit further offences while on bail. The LRCV said, '[t]he seriousness of an offence is not a good surrogate for the significance of either of those risks'.[93] In our consultations a concern was expressed that the Bail Act has become 'offence specific' as opposed to 'person specific'.[94] That is, simply because accused people are charged with a certain offence, they must carry the burden of showing why bail should be granted. Factors relevant to the offence, as opposed to the individual, take precedence in decision makers' deliberations.

…there is a strong incentive for an accused to abscond

We have seen in Case Study 4 just how important factors unique to the individual accused can be when it comes to deciding the issue of bail.

If exceptional circumstances and show cause were abolished and an unqualified presumption in favour of bail was introduced, what would be the potential effect? Undoubtedly, the same issues that are already explored under show cause or exceptional circumstances would still be canvassed upon a bail application and, arguably, the decision maker would still reach the same conclusion in the majority of cases. The decision maker would still need to consider factors that bear on the accused being an unacceptable risk.

It could be argued that the rules as they now stand only have a limited relevance to the eventual decision. The LRCV presented the following example:

> … the offence of cultivating a narcotic drug carries a presumption against bail, but in 1991 only 0.3% of persons charged with cultivation as a principal offence were denied bail. By contrast a substantial proportion of persons charged with rape or aggravated rape were denied bail even though for those offences there is no general presumption against bail.[95]

Another reason the rules have limited relevance is that a significant proportion of alleged offenders are issued with a summons to attend court, rather than being charged. In 2003–04, 68 518 adults were arrested for offences and 51 687 adults were summonsed.[96] As a summons is an alternative to charge and bail, the issue of bail—and therefore the issue of reverse onus—is irrelevant. It is presumed that police are making an assessment of risk when deciding to issue a summons rather than making a charge. As a significant proportion of accused charged with serious offences such as homicide and sexual offences are summonsed, it would appear that police are making the decision about risk by considering a range of factors, not just the seriousness of the offence.[97] On the other hand, and as we have seen in Chapter 3, once people are arrested it is often administratively easier to charge and bail them than it is to summons them. This may explain why a significant proportion of offenders are arrested rather than summonsed for offences like theft from a shop, even though it is a relatively minor offence.[98]

The only 'reverse onus' requirement that does not relate to a specific offence is where accused people are charged with an indictable offence that is alleged to have been committed while they were awaiting trial for another indictable offence. However, there is no reason why such a factor could not be taken into account on a general unacceptable risk test. Indeed, when determining whether an accused is an unacceptable risk, decision makers are already required to consider the history of any previous grants of bail.[99]

We have examined the anomalous nature of offences that attract the show cause and exceptional circumstance exceptions. We looked at the absence of various offences from these two categories, as well as criticisms about various offences that currently fall within the reverse onus ambit. We have also discussed the overlap that decision makers often encounter when endeavouring to work through the two-step process, and the synthesis of information that decision makers undertake to determine risk. All of these factors could be seen as arguments in favour of the removal of the presumption against bail and reverse onus for certain offences.

Ultimately, it was the view of the LRCV that there should be no presumption against bail for any offence.[100] In coming to this conclusion, the LRCV made the following point:

> The Commission believes that the rules requiring exceptional circumstances or the showing of cause in relation to certain types of offences should be abolished. Shifting the burden of proof in such cases imposes a strictly adversarial model on what should incorporate some aspects of an inquisitorial process. Bail should be available on the same basis and according to the same criteria in relation to all offences.[101]

Of course, many people would argue against the above position and maintain that for certain offences the presumption against bail should remain. One of the reasons why certain offences attract the presumption against bail and fall within the reverse onus categories is because there is a belief that people who commit certain types of offences will re-offend or abscond. This argument is often raised in relation to serious drug offences, where there is a concern that many accused possess the means and ability to leave the jurisdiction. A similar argument is mounted in relation to serious offences for which there is a reversal of onus, such as murder. Given the potential repercussions of a finding of guilt, there is a strong incentive for an accused to abscond.

Unfortunately, we have been unable to obtain statistics that detail the rate of absconding for different offences. In one consultation there was a belief that the level of absconding actually decreased for more serious matters. We were told that accused on bail appearing in the County or Supreme Courts were much less likely to abscond than accused who appear in the Magistrates' Court for less serious matters.[102]

The legislature has decided that accused charged with particular offences should have to prove to the court why they should get bail. The reasons for the inclusion of particular offences are not clear, although in some cases it would appear to have been motivated by prevalence of a particular crime. While prevalence is a legitimate concern, the offences appear to have been included on an ad hoc basis and most people consulted thought the current inclusions were problematic in some way.

In addition, structuring the tests in their current form may be causing frustration with the bail system within the community. We have found that similar considerations are taken into account by the decision maker when considering show cause or exceptional circumstances and then when considering unacceptable risk. Therefore, satisfying one stage of the process is likely to satisfy the other.[103] In cases where the accused does not show cause or exceptional circumstances, the ultimate issue for the decision maker is unacceptable risk. Therefore, the deciding factor in a bail consideration will be risk, whether or not a reverse onus applies. The nature of the offence is only one consideration in making a decision about unacceptable risk. The issue then is whether the two stage process of first considering show cause or exceptional circumstances and then considering unacceptable risk is useful.

The current structure of the Act may be creating an expectation that bail is less likely to be granted for reverse onus offences and more likely to be granted for other offences. This is a false perception that is likely to be particularly frustrating for victims of crime, as they may have an expectation that an accused person will be refused bail. The process might be

more easily understood if it was restricted to the concept of risk and it was clear that the victims' views were one of the factors in assessing risk.

The inclusion of particular offences in reverse onus categories gives the appearance of being 'tough' on those issues, but obscures the complexity of the bail decision. Modifying the unacceptable risk criteria so that the decision maker must consider particular offending when considering risk would serve the same purpose and provide a much simpler model for decision makers, prosecutors, accused and their representatives to understand.

Question 41 ?

Should the *Bail Act 1977* continue to have a presumption against bail for any offence? Are there other arguments for and against the retention of the presumption against bail?

Finally, it should be noted that any decision to remove the presumption against bail from the Bail Act would not see the presumption against bail for all offences being removed. Various offences referred to in the Commonwealth Crimes Act would continue to attract a reverse onus. These offences—while not particularly prevalent—have been prescribed by the Commonwealth Parliament to be exceptional circumstance offences. The offences relate to areas where the Commonwealth has powers to legislate under the federal Constitution. Any legislative amendment to the Bail Act by the Victorian Parliament would not interfere with the continued operation of the exceptional circumstance test that concerns these offences.

Chapter 7
Surety for Bail

Introduction

A surety is a person, or a group of people, who enter into an undertaking to ensure that an accused person will appear in court. The surety puts up security, usually in the form of money or residential property title, which can be taken by the court should the accused fail to appear. Daniel Gurvich and George Hampel write that a surety is used 'to ensure that someone other than the accused has a direct interest in seeing [that] the accused … answers bail'.[1]

A surety is expected to take all reasonable steps to ensure the attendance of an accused in court.[2]

Both the accused and surety sign an Undertaking of Bail form.[3] This form confirms that the surety is aware of the obligations imposed upon the accused and of the consequences should the accused fail to comply with the undertaking. It also confirms that a surety understands their own obligations. By signing the undertaking the surety agrees to pay a set amount of money to the court if the accused fails to adhere to his or her bail conditions. A surety is also required to sign an affidavit or declaration of Justification by Surety to Undertaking form.[4] These forms confirm that the surety has the necessary funds to meet any future payment if required.

From our consultations it would appear that sureties are mostly used for indictable offences and are less likely to be utilised for less serious offending.[5] In particular, we heard that sureties are commonly used when an accused is charged with 'high end' drug offending, such as trafficking large quantities of drugs. We were told that the police rarely impose sureties because they are less commonly involved in setting bail conditions for the type of offences that warrant their imposition.[6] Unfortunately, it is not possible to obtain data about the extent to which sureties are used by the police or the type of offending for which they are commonly used.[7]

Suitability of a Proposed Surety

The Bail Act contains details about the attributes that a surety must possess. A surety must be over 18 years of age, must not be under any 'disability in law' and must have money or assets to make the necessary payment if required.[8]

A proposed surety will not always be present at the bail application. Accordingly, the prosecution will not always be given the opportunity to cross-examine a prospective surety. Typically, the legal representative of the accused will simply inform the court that a surety is available or the court will decide that a surety is appropriate in a given matter. The magistrate or judge will then set the amount of the security that they deem is appropriate. The magistrate or judge is not involved in the process any further from that point. A registrar, usually of the Magistrates' Court, supervises the entering of the undertaking by the surety.[9] The registrar plays an important role in the surety process. The registrar assesses the suitability of the prospective surety and ensures that the surety has the means to pay the

A **registrar** is a court official who provides administrative support to the court and deals with enquiries from people attending court.

security should the accused fail to abide by his or her bail conditions.

When assessing the suitability of a proposed surety, the registrar must consider the following: financial resources; character, including any prior convictions; and the relationship of the surety to the accused. Registrars may also consider any other matters that they believe are of relevance.[10]

In our consultation with registrars of the Melbourne Magistrates' Court we were told that if a registrar has a concern about the suitability of a proposed surety, the surety would generally be refused.[11] One concern expressed was that registrars have a limited ability to check the criminal records of a proposed surety and will usually only find out about a relevant criminal history should the police inform them.[12]

There was also a suspicion that sometimes it was the accused providing his/her own funds through the surety, rather than the security being provided by the surety. The appeal of using a surety is, as discussed, the 'supervisory' aspect of a third party having responsibility to ensure that an accused appears in court as required, whereas allowing the accused to use his or her own money as security means that this undertaking by a third party is lost.

Reservations about the current procedure of assessing a prospective surety were raised in two consultations.[13] It was considered that in certain cases a magistrate or judge hearing the bail application should play a greater role in overseeing the surety process. We heard that police sometimes learn of a criminal connection between a surety and an accused, which, if disclosed to the court, may have led to the prospective surety being found unsuitable. It was suggested that a judicial officer, as opposed to a court official, is often in a better position to explore any questions that may arise about the appropriateness of a prospective surety.

Question 42 ?

Should magistrates and judges play a greater role in assessing the suitability of a proposed surety? If so, how could this be achieved? Should it be done in every case or only in those matters involving allegations of serious criminal offending?

It was further suggested that the police and prosecution could be given certain information about a prospective surety prior to the bail hearing. If name, date of birth and residential address were provided, police could carry out a background check. This would help to determine if the proposed surety had any relevant prior criminal convictions or if there have been previous suggestions of a criminal relationship between the surety and the accused.

To an extent, the above concerns are ameliorated by the ability of a court to issue a warrant for the arrest of an accused should it become aware of the unsuitability of the surety.[14] However, this may be perceived as a less desirable solution, given the time and resources involved in obtaining a warrant and executing it.

Question 43 ?

Should there be a requirement in the *Bail Act 1977* that the details of a prospective surety, such as name, date of birth and address, be given to the prosecution prior to a bail application for the purposes of a criminal history check?

Source of Surety's Funds and Deposits

The issue of the surety not being the source of the security, where the security is money, was discussed in several of our consultations.[15] It was suggested that in some instances the money is provided by the accused and not the surety. In one of our consultations it was said that the current system creates an 'artifice' whereby an accused often transfers his or her own money to a third person to act as surety.[16] The purpose of a surety condition is largely defeated if the surety simply uses the accused's money. Although a registrar may have suspicions about the source of funds, it is difficult to act on these when a surety presents at court with a bank cheque or cash.

In one of our consultations it was suggested that an accused should be able to provide money or security themselves, the source of the funds being somewhat irrelevant.[17] The Bail Act does contain provision for the use of deposits—money provided by the accused rather than a third party, as is the case with a surety.[18] The Act provides that prior to the consideration of the use of a surety, regard should be had to the release of an accused on a deposit of money or other security.[19] The Bail Act does not contain any details concerning the source of the deposit and therefore allows for the deposit to be the accused's own money or security.

From consultations it appears that the deposit condition is rarely, if ever, utilised. Throughout our consultations we did not hear of any court having recently imposed a deposit condition. In contrast, the deposit condition is apparently widely used in NSW.[20]

In 1992, the LRCV explored the possibility of abolishing deposits.[21] It did so on the basis that deposits were only very rarely used, there was a risk that they discriminate against the poor, and there was no evidence to suggest that the use of deposits increased the likelihood of an accused appearing in court. The commission ultimately decided not to recommend their abolition, instead finding that:

> … it may be that decision-makers should be more prepared to use deposits than sureties. For example, there is some evidence that many of the persons who provide sureties are mothers, wives or girlfriends of accused persons. These people are required to act as private police on pain of losing their money. In such cases a deposit may well be the preferable alternative.[22]

Question 44 ?

Should the *Bail Act 1977* retain the option of a deposit as a condition of bail?

Surety's Financial Position

The repercussions for a surety if an accused breaches his or her conditions of bail can be very serious. In some instances it may result in large amounts of money being forfeited, in others it may mean the surety's home is liable to forfeiture. If the surety is unable to raise the funds that are the subject of the surety, then they face the prospect of a prison sentence.[23]

As discussed, a registrar or court official must consider the financial resources of a prospective surety when assessing their suitability. The Queensland *Bail Act 1980* contains a further limitation:

> A person shall not be accepted as a surety if it appears to the justice … that it would be particularly ruinous or injurious to the person or the person's family if the undertaking were forfeited.[24]

…would forfeiture of the security leave the surety without a house to live in?

The Queensland provision goes further than the Victorian Bail Act.[25] It means that the decision maker must consider more than a prospective surety's immediate financial resources and whether they can raise the requisite security. Decision makers are directed to specifically consider the impact that forfeiture would have on the surety or the wider financial circumstances of the surety's family. For example, would forfeiture of the security leave the surety without a house to live in or without enough money to live on?

There have been instances where courts have reduced the amount a surety had to pay upon learning that forfeiture of the relevant security would leave the surety and their family in a dire financial situation.[26] To avoid such situations, greater consideration could be given to a potential surety's complete financial position when assessing their suitability. This could be achieved, in part, by incorporating a provision similar to that found in the Queensland *Bail Act 1980* into our own legislation.

Another issue about the financial position of sureties was raised in a written submission received by the commission.[27] The submission argued that the current system—where a court is not required to consider a surety's resources—is discriminatory. It means that bail may be granted to one accused because he or she has access to sufficient resources, but denied to another who is in 'exactly the same position save access to surety'. It was suggested that a decision maker should tailor the amount of the security to the particular financial circumstances of the prospective surety. This would ensure that there is a 'degree of proportionality' between the amount of the security and the financial resources of the surety. The incentive for a surety with limited financial resources to ensure that an accused attends court would be the same, as the amount of the security would reflect the same proportion of the surety's assets or income, even if the actual amount of the surety was smaller.

The above suggestions would require decision makers to thoroughly consider the complete financial position of a surety. In all likelihood, this would require documentary evidence and has a potential to further increase the time it takes for a court to determine whether a surety should be imposed.

Question 45 ?

Should the *Bail Act 1977* contain a provision similar to section 21(8) of the *Bail Act 1980* (Qld) so that greater consideration is given to the surety's complete financial position? Should the *Bail Act 1977* direct decision makers to set a surety amount that is proportionate to a surety's overall financial situation?

Lodging of Passbook and Authority for Withdrawal

In consultations it was suggested that the ability of a surety to lodge their savings passbook with the court as a means of security is outdated.[28]

In assessing the 'sufficiency of the means' of a surety, the court or court official may require the surety to lodge a savings passbook which shows a 'credit balance equal to or in excess of the amount' of required security, together with a document authorising withdrawal from the surety's account and payment to the applicable court registrar.[29]

The lodgment of a passbook and withdrawal authority is no longer used by the registrars of the Magistrates' Courts we consulted.[30] When the Bail Act was drafted the use of bank passbooks was commonplace. The advent of electronic banking has meant that the use of passbooks is now the exception rather than the rule. The passbook requirement also appears to be no guarantee of the availability of necessary funds. When this option was commonly used, the surety lodged a completed bank withdrawal form with the passbook. However, this procedure provided no real guarantee that the funds as shown in the passbook would be available to satisfy any court order. To be of any real use, the process would also require funds contained in the passbook account to be frozen. Again, this would require additional administration and time.

Question 46 ?

Should section 9(3)(a)(ii) of the *Bail Act 1977* continue to provide for the use of passbooks and withdrawal authorities as a means of security for a surety? Or, should this provision be repealed?

Requirement for Registrar to Explain Obligations

As discussed, relevant court officials, usually registrars of the Magistrates' Court, play a central role in the surety process. They are responsible for ensuring that a surety signs the Undertaking of Bail form and the appropriate Justification by Surety to Undertaking form. The latter document requires the surety to declare or affirm that they have sufficient assets to meet the cost of the security.

…a concern was expressed that sureties are not given sufficient information about their obligations and rights…

The Undertaking of Bail form is an important document. By signing the undertaking, the surety acknowledges that they have received a notice setting out the obligations of the accused and the consequences of the accused failing to abide by those conditions. The notice that the surety receives is called the Notice of Undertaking of Bail.[31] This document contains a list of the accused's conditions of bail, including any special conditions, and a short warning to the surety of the consequences to them of the accused failing to adhere to his or her bail conditions. The most important warning to the surety reads:

> Where a court is satisfied that the defendant has failed to observe a condition of bail the court shall declare the bail to be forfeited and shall order that the amount undertaken by the surety or sureties to be paid in accordance with section 6 of the *Crown Proceedings Act 1958*.

In addition to receiving the Notice of Undertaking of Bail form, a surety will receive an explanation of their obligations from the registrar. Registrars also sign the Undertaking of Bail form to acknowledge that they are satisfied that the surety understands the nature and extent of the obligations of the accused.

Two protections for sureties are contained within the Bail Act. These are the ability of a surety to seek to be discharged from their responsibilities and the ability of a surety to apprehend the accused.[32] There is no statutory requirement that a surety have these two 'rights' explained to them, although from our consultations it would appear that a registrar or court official routinely does so.

Despite the above procedures, in one of our consultations a concern was expressed that sureties are not necessarily given sufficient information about their obligations and rights and the potential consequences they face should the accused not adhere to the bail conditions.[33] The repercussions to a surety if an accused breaches bail conditions can be very serious.

The most recent bail forfeiture case on this issue demonstrates the difficulties that a surety may have in fully understanding the obligations imposed upon them. The case of *Melincianu* involved a surety, a refugee without extensive education, who was of the belief that his obligations as a surety had lapsed following the first court appearance of the accused.[34] In fact, as detailed in the Undertaking of Bail form, the surety's obligation was ongoing. Justice Kaye stated:

> By a footnote to the bail bond [the Undertaking of Bail], it is stipulated that a surety remains bound by his undertaking until the hearing is complete. It was, of course, the obligation of the surety to acquaint himself with his obligations, and it appears that he did not do so in this case.[35]

There are no official guidelines for registrars or court officials detailing what information they must impart to a surety. From our consultations it would appear that it may be helpful to establish guidelines for registrars concerning what should be explained to sureties. At the moment, registrars satisfy themselves as to the adequacy of the information given. Given the consequences that flow from potential forfeiture, it is important that simple and consistent information is given to prospective sureties about their obligations and rights. The guidelines would most likely be in the form of a practice direction from the chief magistrate or judge of each court.

In Chapter 11 we discuss the adequacy of the forms contained in the Bail Regulations. As various forms are given to sureties any potential redraft of the regulations—with the goal of making the forms easier to understand—should also consider what information these forms contain.

Question 47 ?

Are sureties given sufficient information concerning the nature of their obligations? Should there be guidelines detailing what information a court official should impart to a surety?

Right of Surety to Apprehend Accused

The Bail Act contains a provision that allows a surety to apprehend an accused.[36] It provides that sureties may apprehend accused people before the day on which they are bailed to appear and bring them before a bail justice or the court to which they are bailed.

Throughout our consultations, we did not hear of any instances of a surety apprehending an accused. No mention is contained in the various forms given to a surety of their ability to apprehend an accused. As discussed above, it would typically fall upon a registrar to explain to a surety their rights in this regard.

If a surety was to apprehend an accused it would typically occur when they learn that an accused has breached or is about to breach a bail condition. Under the Act, the police are directed to assist in the apprehension of the accused if need be.[37]

It is difficult to see how the process of sureties apprehending accused people would occur in practice. It would be rare that sureties would seek to physically restrain accused people and bring them before a court. This is especially so in the majority of cases because the surety is usually a friend or relative of the accused. The ability of sureties to apprehend accused people also raises the question of just how long they can detain them.

On those unusual occasions where a surety does see a need to apprehend an accused, it is more probable that they would contact the police or the court rather than seek to make a physical apprehension themselves. Alternatively, they may come before the court seeking to be discharged of their obligations as a surety.[38]

The Bail Act also contains provision for the surety to notify the police in writing if they believe the accused is unlikely to abide by his or her conditions of bail. Upon receiving written notification from the surety, a police officer may arrest the accused without a warrant.[39]

New South Wales, the Northern Territory and the Australian Capital Territory have all abolished the traditional common law right of a surety to arrest or apprehend an accused.[40] Queensland has not abolished the power. However, in 1991 the Queensland Law Reform Commission was also of the view that the surety's power to arrest should be abolished. It argued that in practice the power was 'never used'. They went on to state that '[i]n the Commission's view, members of the public should not be encouraged to arrest others—such a job should be left to the police'.[41]

There are grounds that mitigate against a surety being able to arrest or apprehend an accused

In Western Australia, where the provision allowing a surety to arrest an accused remains, there is a proviso that the surety must only apprehend the accused where 'it is not expedient' to obtain the assistance of the police because of likely delays.[42] The provision also requires a surety to deliver the accused to the police 'as soon as is practicable' after the arrest.[43]

There are grounds that mitigate against a surety being able to arrest or apprehend an accused. It is generally considered undesirable that a layperson be in a position to arrest or apprehend another; the function being one that is best carried out by police. The power seems to have little relevance to today's bail system. The Victorian provision is particularly problematic because it gives the power to the surety but does not provide any clear guidelines on how the power is to be exercised.

In its review of the Bail Act, Victoria Legal Aid was of the belief that the power of a surety to apprehend an accused should be repealed, the police being in a better position to exercise such authority.[44]

Question 48 ?

Should section 21 of the *Bail Act 1977* be repealed? Alternatively, should section 21 of the *Bail Act 1977* be amended to follow a process similar to the Western Australian model?

Attendance at Court

Section 18(7) of the Bail Act requires that a surety must be given written notice if an accused intends to make an application for an order varying his or her bail conditions. Such notice is to be given a 'reasonable time' before the application and the surety is entitled to appear in court and give evidence if they so desire. The Bail Regulations contain the relevant notice that is to be given personally, or by post, to the surety.[45]

In practice, courts are wary about varying bail conditions without some indication from the surety that they consent to the proposed amendment. The appropriate form of consent is not detailed in the Bail Act. Depending on the nature of the variation sought, some decision makers may require sureties to attend court to personally indicate their consent, others may be satisfied by the production of some form of written consent.

A submission received by the commission suggested that the procedure involving a surety attending court should be reformed.[46] The submission specifically detailed the situation where the variation sought is a reduction in police reporting. Put simply, police reporting involves an accused on bail going to a police station on a set day and signing a form to confirm his or her attendance. We discuss police reporting in greater detail when we look at bail conditions in Chapter 8.

The submission stated that the requirement that a surety attend court can be an 'unfair burden on a working person who, by being a surety, is already under a substantial obligation to the court'. It suggested that in those instances where the only condition to be varied was the frequency of police reporting, then a surety should not be required to attend court. It suggested that notice be given to the surety instead who could sign an affidavit before the court registrar indicating their consent to the change. This could be done at a time that suited the surety, before the application for variation is heard by the court. This would remove the requirement that the surety be in court on the day of the hearing.

This issue has been covered by a practice direction in the Magistrates' Court since 2002.[47] The practice direction provides that where a surety does not appear at the bail variation hearing, the accused 'will be required to produce either oral or affidavit evidence to satisfy the Court of compliance with section 18(7) of the Bail Act'.

There does not appear to be an equivalent practice direction in either the County or Supreme Courts. If those courts thought it necessary, a practice direction similar to the Magistrates' Court direction could be introduced. Alternatively, it could be addressed by amending the Bail Act.

Question 49 **?**

Should the Bail Act be amended to provide that a surety need not attend court on the date of a proposed bail variation but instead lodge an affidavit of consent with the court on a prior date?

Incorporation of Forfeiture Provisions into Bail Act

As discussed above, when an accused fails to abide by bail conditions and there is a surety, the surety's security is liable to forfeiture. If the court orders forfeiture, the surety's security is forcibly paid over to the state. The procedure governing forfeiture is set out in the *Crown Proceedings Act 1958*.[48] Forfeiture will be ordered if the court is satisfied that the accused has failed to abide by the bail conditions.

The court may set a time limit for payment. If payment is not forthcoming, the amount may be obtained by seizing and selling the surety's property. If the surety still defaults in making the payment, he or she may be imprisoned for up to a maximum of two years.[49]

The Crown Proceedings Act contains provisions that allow a surety to seek a variation or withdrawal of a court order directing the forfeiture of the security. The surety must make an application to the court within a specific time frame and show that the order would be 'unjust' having regard to all of the circumstances of the case.[50]

From our consultations, it would appear that most people are unfamiliar with the process governing the forfeiture of a surety's security. The Crown Proceedings Act is not a commonly used Act and most legal practitioners would not come across it in their day-to-day work. Minimal reference is made to the Crown Proceedings Act in the Bail Act. Where it is referred to, it is in the context of deposits, not sureties.[51]

Most other jurisdictions within Australia incorporate bail forfeiture provisions into their Bail Acts.[52] In one of our consultations, it was suggested that we should also have the provisions relating to the forfeiture of a surety's security in the Victorian Bail Act.[53] There are advantages in including forfeiture provisions within the Bail Act. Not only would it be beneficial to those who frequently use the Act, but, perhaps more importantly, it would be more accessible to sureties or prospective sureties.

Question 50 ?

Should the *Bail Act 1977* contain provisions governing the procedure involved in forfeiting a surety's security as presently contained in the *Crown Proceedings Act 1958*?

Bail Justices and Sureties

As we have said, sureties are more likely to be imposed when an accused is charged with a serious indictable offence. However, in consultations we also heard that a surety condition is sometimes imposed by bail justices where, although the alleged offending is relatively minor, the accused may already be on bail for other offences.[54] We were told that in such situations a bail justice may impose a surety condition as an extra assurance that an accused will appear at court.

…a bail justice may impose a surety condition as an extra assurance

The surety condition is seen as being more appropriate than a deposit in these circumstances as it does not necessarily require funds to be provided, which would be difficult for many accused. Instead, an undertaking is required from the person providing the relevant security that he or she will be able to provide it if required. Bail justices we consulted also stressed that they impose surety conditions not only to ensure an accused appears at court as required, but to ensure a third person takes an interest in the welfare of the accused. Bail justices operate outside normal court hours and can have difficulty accessing the support services that are available to a court. For this reason, a surety may be seen as providing some measure of support where otherwise there would be none. We will touch on the difficulty for bail justices in accessing court-based support services in Chapter 9.

Finally, bail justices we spoke to also said they believe there is sometimes confusion among police and registrars about the difference between the use of sureties and deposits. In cases where bail justices had imposed sureties, they had heard that police or registrars sometimes insisted on an actual lodgment of money, which is not always a requirement of sureties, but is of deposits.

Anomaly in the Crown Proceedings Act

Hampel and Gurvich raise an interesting point concerning the intersection of the Crown Proceedings Act and the Bail Act:

> The Bail Act gives the court a discretion, in cases of breaches of bail, including non-appearance, to refrain from revoking bail, where there is good cause or circumstances beyond the accused's control. Yet the mandatory nature of s 6 of the *Crown Proceedings Act 1958*, on its literal interpretation, provides that the court must declare bail to be forfeited for the purposes of dealing with the surety.[55]

Hampel and Gurvich point out that it is hard to understand why a relatively insignificant breach of bail by an accused should result in the surety potentially having his or her security forfeited and the onus being placed on them to make an application to be relieved from forfeiture. They go on to state:

> It is, we think, arguable that one reading of s 6 [of the *Crown Proceedings Act 1958*] when it refers to 'failure to observe a bail condition' is that the reference is to the primary condition that the applicant must appear in answer to their bail.

It is likely, in practice, that a court would not order the forfeiture of the surety's security upon a relatively minor breach of bail. Also, as Hampel and Gurvich state, it is probable that only 'significant' breaches of bail come to the court's attention.

Question 51 ?

Should section 6 of the *Crown Proceedings Act 1958* be amended so that bail is not automatically forfeited by a court upon being satisfied that there has been a breach of a bail condition? Should bail only be forfeited when an accused has failed to appear in court?

Chapter 8
Conditions of Bail

Introduction

Accused people can be released on bail on their own undertaking to attend court on a nominated date, or be released on an undertaking to comply with various conditions. Such conditions generally fall into one of two categories: general conditions of bail and special conditions of bail.

General conditions of bail are found in section 5(1) of the Bail Act. The Act provides a list of four escalating bail conditions. A decision maker is to consider each in sequence and is directed to only impose the condition that is necessary in the circumstances. The section provides that the court:

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

The four conditions that the court is directed to consider are as follows:

- the release of the accused on his or her own undertaking without sureties and without a deposit of money or security;
- the release of an accused on his or her own undertaking with a deposit of money or other security;
- the release of the accused upon entering into an undertaking with a surety;
- the release of the accused on his or her own undertaking with a deposit of money or other security and a surety.

Decision makers regularly attach other conditions when granting bail, such as a direction that the accused report to a police station or surrender a passport. Such conditions are called special conditions. These conditions are generally combined with one of the general conditions listed above. The Bail Act provides for the imposition of special conditions but it does not contain a list of individual conditions. Instead, under section 5(2) of the Act decision makers are to consider the imposition of any special condition that is 'necessary' to ensure that accused people:

- appear in accordance with their bail and surrender themself into custody;
- do not commit an offence while on bail;
- do not endanger the safety or welfare of the public;
- do not interfere with witnesses or obstruct the course of justice.

Common special conditions include: directing an accused to reside at a certain address; to regularly report to a police station; not to have contact with certain individuals; to surrender a passport; to abide by a curfew; and not to go to certain areas (geographical exclusion zones).

Police and bail justices are also empowered under the Bail Act to impose conditions. Therefore the issues discussed here will be relevant to their decisions as well as decisions made by courts.

Bail Conditions and Support Services

Courts frequently impose special bail conditions that order accused people to use support services. This can include both specific bail support services and any other services that assist people on bail in their rehabilitation and help to reduce the possibility of future contact with the criminal justice system.

…the grant of bail is not to be contingent upon acceptance into the program

Structured support services for accused on bail are a relatively recent phenomenon within Victoria, although they reflect a trend in many criminal justice systems. The Bail Act does not address the use of bail for rehabilitative purposes.

The first bail support service in Victoria established by a court was the CREDIT program. The CREDIT program was established as a pilot at the Melbourne Magistrates' Court in 1998 and has since expanded to other Magistrates' Courts throughout Victoria. It seeks to reduce the risk of drug-addicted accused breaching bail by making drug treatment a condition of bail. A special condition is imposed that accused 'comply with all requirements of the CREDIT program'.

The CREDIT program merged with another service, the Bail Support Program, in late 2004 at nine Magistrates' Courts across Victoria.[1] The Bail Support Program offers assistance to accused on bail by providing support services, however, unlike the CREDIT program, the support offered does not focus only on drug use. It assists with accommodation, disability support, anger management and job training.

The CREDIT–Bail Support Program is available only to accused who have been granted bail. In theory, the grant of bail is not to be contingent upon acceptance into the program. A decision maker must decide to grant bail without taking into account whether the accused would be a suitable participant in the program. This issue was highlighted in an evaluation of CREDIT that we discuss below.

There are advantages to the community and the accused in making treatment and rehabilitation services available shortly after arrest and before sentence. By imposing a condition to utilise the services of the CREDIT–Bail Support Program as a condition of bail, an accused is able to demonstrate to the court a commitment to rehabilitation at the time of sentencing. Achievements while on supported bail may ultimately mean the difference between a custodial or non-custodial sentence.[2]

The Bail Act does not contain any reference to bail support services. This is not surprising given that at the time of drafting the Act, bail support services did not exist. It was suggested in some of our consultations that the Bail Act should make specific reference to the use of support services as a special condition of bail.[3] By doing so, such services would be given greater legitimacy, recognising the important role they now play for many accused in our bail system. It may also potentially encourage greater utilisation of the services not only by courts, but also by police and bail justices.

The CREDIT program was comprehensively evaluated in late 2004, including an assessment from a legislative and policy perspective. In the course of the evaluation the following comments were made:

> Several stakeholders mentioned that some Magistrates consider the CREDIT program to be inconsistent with the Bail Act. Anecdotally, some Magistrates prefer to bail defendants and subsequently decide whether they are suitable for CREDIT, while others prefer to base the decision whether to grant bail on whether the defendant is suitable for CREDIT. Undercurrents of dispute regarding this issue are thought to have affected the uptake of the program. In the words of one stakeholder, 'some Magistrates really don't want to go there, unless there is the protection of the legislation'. However, there were many stakeholders who did not consider that a legislative backing would be necessary or helpful to the utilisation of the CREDIT program.[4]

One possible way to incorporate the use of support services into the Bail Act—if it is considered necessary—is to expand the criteria found in section 5(2). An additional purpose could be added that allows a decision maker to impose a special condition to ensure that an accused seeks rehabilitation, treatment or support while on bail.

This may give greater legitimacy to special conditions currently employed by courts that are directed towards the pre-sentence rehabilitation of an accused. It has been suggested that the imposition of a special condition to comply with the CREDIT–Bail Support Program is 'stretching' the reasons for which a special condition can presently be imposed under the Act.[5]

In Western Australia, the *Bail Act 1982* provides an example of a legislative reference to the imposition of conditions directed towards care and treatment for drug abuse:

> Where a judicial officer is of the opinion that a defendant is suffering from alcohol or drug abuse and is need of care or treatment either on that account, or to enable him to be prepared for his trial, the judicial officer may … impose any condition which he considers desirable for the purpose of ensuring that the defendant receives such care or treatment, including that he lives in, or from time to time attends at, a specified institution or place in order to receive such care or treatment.[6]

Deferral of sentence is an option open to a decision maker when dealing with a young person under the age of 25

The use of special conditions of bail as a method of pre-sentence intervention is also used in Victoria when magistrates opt to defer sentencing. Deferral of sentence is an option open to a decision maker when dealing with a young person under the age of 25.[7] Under this option the court can defer, for up to six months, the sentence of a person who has pleaded guilty, during which time the accused remains on bail.[8] Within that six-month period the accused will be directed to comply with special conditions of bail that focus on rehabilitation. The *Sentencing Act 1991* therefore indirectly recognises the use of bail conditions as a method to achieve pre-sentence rehabilitation, though the Bail Act does not.

Question 52 ?

Should the *Bail Act 1977* specifically refer to the use of special bail conditions as a means of utilising support services? Is the suggestion of amending section 5(2) of the Bail Act, so that a decision maker can consider using a special condition to ensure that an accused seeks rehabilitation, treatment or support, an appropriate method?

Special Conditions of Bail

An advantage of the present special condition provisions in the Bail Act is that they allow for flexibility. Decision makers are able to assess what conditions are appropriate for individuals accused in any given case. However, with flexibility and discretion comes an expectation that conditions will be used in a measured and appropriate manner. Our consultations did not disclose a need for any major change to the current provisions in the Bail Act concerning special conditions. We were told that there is no need for specific special conditions to be included in the Act.

In this chapter we discuss concerns that were expressed about the use of some special bail conditions by decision makers. In Chapter 9 we look at additional special bail conditions that are frequently imposed on children and young people, namely geographical exclusion conditions and curfews.

Police Reporting Condition

A commonly imposed special condition is a requirement than an accused regularly report to a police station. This involves an accused on bail going to a police station on a set day and 'signing on'. The accused will sign a bail report sheet that is kept at the front counter of the police station. The frequency of reporting imposed varies: it may be once a week, three times a week or even daily. The accused will usually report at a police station close to his or her home or workplace.

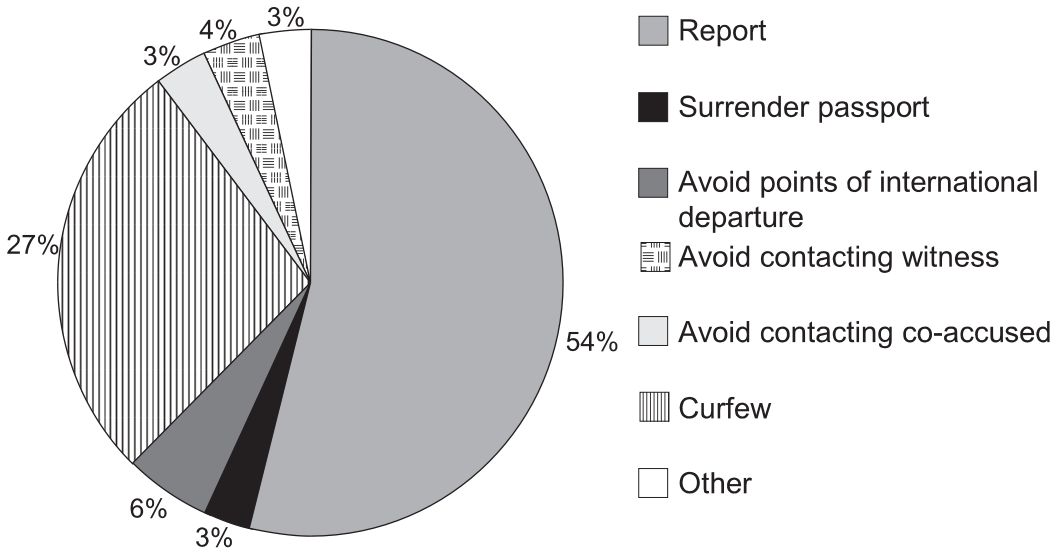
During several consultations a concern was raised about the inappropriate imposition of reporting conditions.[9] In April 2004, Victoria Police introduced a new policy on reporting conditions. The policy, now incorporated into the Victoria Police Manual, states that 'reporting to a police station has been found to be ineffective and should only be used in relation to serious offences'.[10]

According to police policy, a reporting condition is only to be sought or imposed where: no other bail conditions are appropriate; a sergeant or senior sergeant has approved the use of such a condition; there is a risk that the accused would fail to appear without a reporting condition; and reporting is warranted in the circumstances of the case. The imposition of reporting conditions must be for no other reason than in accordance with the Bail Act.[11]

A recent Victoria Police review of reporting on bail found that despite the introduction of the above policy there had been no change in the level of use of reporting conditions.[12] The review disclosed that reporting conditions are frequently a cause of inconvenience for police officers who are responsible for processing accused people who come to 'sign on'. The review also revealed that many police officers were not seeking the approval of a senior officer when seeking the imposition of a reporting condition.

Data obtained by the commission shows that reporting conditions are the most frequently used bail condition. This is shown in Figure 14.[13]

Figure 14: Conditions Imposed 2004–2005



In our consultations, questions were raised about the purpose of reporting conditions. It was suggested that if an accused has decided to abscond, reporting will do little to prevent this from happening. It was also said that reporting is of little value in preventing an accused from re-offending. However, there are opposing arguments in support of reporting. By imposing reporting conditions, authorities become alerted to potential absconding faster than would otherwise be the case, and can respond sooner. It could also be argued that reporting creates a strong psychological deterrent against absconding and re-offending. Accused people who are directed to report to a police station may feel that they are being more closely monitored by the police.

Unfortunately, it is not possible to obtain data about the nature of the offences for which reporting conditions are being imposed, and their effectiveness in stopping re-offending and/or absconding. The concerns expressed to us seem to pertain more to those instances where it is considered reporting is imposed unnecessarily and without any real consideration of the purpose it serves. In some instances it appears that reporting is being used as a form of control and punishment. In other cases it is used as a compromise: if, contrary to prosecution requests, an accused is given bail then the police will generally ask for a reporting condition.

In some instances it appears that reporting is being used as a form of control and punishment

Clearly, reporting conditions will be appropriate in some instances, however, they will not be appropriate for every accused. As the new Victorian Police policy becomes more widely known and used there should be a decrease in the imposition of inappropriate reporting conditions.

Substance Abuse Conditions

Special bail conditions are sometimes imposed to stop individuals from becoming involved in addictive behaviours that are seen to be linked to their alleged offending. For example, an accused may be directed to refrain from drinking alcohol or from visiting places that sell alcohol. Similarly, and especially in the case of young people, they may be told not to use certain inhalants.

In our consultations, concern was raised about the use of such conditions being a simplistic response to what are often complex and entrenched behaviours.[14] We were told that the imposition of such conditions was likely to fail unless coupled with tailored support initiatives, such as those offered by the CREDIT–Bail Support Program or other drug and alcohol counselling initiatives. There can be little argument that the imposition of a special bail condition alone is unlikely to stop addictive behaviour.

The use of special conditions that direct accused Indigenous Australians to refrain from consuming alcohol has been the subject of particular criticism in NSW:

> Many Aboriginal people often suggest that bail conditions that are imposed are inappropriate … Communities also complain that courts impose unworkable conditions that defendants simply cannot meet. One common complaint is that some courts impose a condition of a blanket ban on alcohol consumption for people who clearly have an alcohol addiction. Aboriginal communities often complain that imposing such conditions on people who obviously cannot meet them is simply setting them up to fail.[15]

In one of our consultations, concern was especially expressed about the imposition on young people of the condition to abstain from 'chroming'.[16] Chroming refers to the inhaling of various substances such as spray-paint fumes. We were told that in the region in question young people were being remanded in custody because they were breaching special conditions not to use inhalants that had been imposed by bail justices. Examples of such conditions include directions to the accused:

- not to be affected by inhalants;

- not to chrome by way of inhaling paint fumes;
- not to be affected by inhalants or other toxic substances.

There was a belief that such conditions were an 'unrealistic' response to what is a difficult behavioural problem. Many would contend that it is inappropriate that the end result of failing to break an addiction may be incarceration.

Question 53 ?

Are special conditions that direct an accused to refrain from taking certain drugs, without establishing accompanying support structures, an appropriate use of the bail system?

Public Transport Condition

Another special condition that was raised in our consultations is a requirement that an accused not travel on public transport.[17]

Preventing an accused from using public transport and thereby accessing important services, going to work or shopping may have severe repercussions not only for an accused, but also for any family members. We were told that the condition is more likely to be imposed where an accused commits an offence on public transport, for example repetitive vandalism or assault.

Given the significant repercussions of this condition on an accused, the commission is interested in learning more about its use and whether it is being imposed only in those circumstances where it is warranted.

Question 54 ?

Are special conditions prohibiting an accused from using public transport being imposed appropriately?

Bail Hostels

Bail hostels are specific premises where accused on bail can be directed to reside. An order to reside at a bail hostel would be a special condition of bail. The advantage of bail hostels is that they provide housing for those accused who do not otherwise have any suitable form of accommodation. Within Victoria there are various accommodation options for those on bail, however, purpose-specific bail hostels are not commonly used. In fact, during our consultations we learnt of only one establishment located within Victoria. This is similar to the situation in other Australian states.

In contrast, bail hostels have long played an important role in the bail system in the United Kingdom (UK). Bail hostels typically house both people on bail and on probation (those who have been recently released from prison but still under court-imposed conditions). They are run by a probation service or a voluntary management committee and receive government funding.[18]

Within Victoria bail hostels are unregulated. There is no requirement that they meet any specific standard of accommodation or offer any particular service. Staff are not required to supervise accused. The unregulated nature of bail hostels was raised in one consultation as a matter of concern.[19]

Indigenous Australians and Bail Conditions

The difficulties that Indigenous Australians often face in adhering to bail conditions owing to socioeconomic and cultural differences was the subject of comment by the Royal Commission into Aboriginal Deaths in Custody.[20]

The Royal Commission highlighted various problematic bail conditions:

> Examples were given to the Commission of conditions such as prohibition on entering the home town of the arrested person; daily reporting for summary offences; and prohibition on the consumption of alcohol and being within a designated distance of licensed premises. When such conditions are breached, the likelihood of the person returning to custody is increased. Even if such a result is not immediate, a progression to more stringent conditions for future release on bail becomes inevitable, with the ultimate conclusion being refusal of bail on the basis of prior failure to abide by conditions of release.[21]

The Royal Commission pointed out that in Victoria bail for simple offences is most often set on an accused's 'own undertaking'.[22] This undertaking is a reference to bail being granted without the imposition of financial conditions, such as the requirement for a surety or a deposit. However, accused people can be bailed on their own undertaking with non-financial conditions, for example, police reporting conditions. An issue of some concern to the Victorian Aboriginal Legal Service is whether Indigenous Australians are in fact less likely to be granted bail on their own undertaking. This concern stems from the fact that Indigenous Australians are more likely than other accused to be unemployed and from a poorer socioeconomic background. The imposition of financial conditions can have a particularly onerous impact on Indigenous Australians who may have difficulties in raising the required funds.

The data presented in Figure 15 shows that the majority of Indigenous accused granted bail by Victoria Police have been granted bail on their own undertaking. This proportion appears to have increased quite dramatically over the past five years, so much so that it has exceeded the proportion of non-Indigenous people granted bail on their own undertaking in some years and is now equal to it. In the 2003–04 financial year, 92% of Indigenous accused were released on bail on their own undertaking.

Figure 15: Accused people granted bail on their own undertaking: 1990–00 to 2003–04[23]

	1990–00	2000–01	2001–02	2002–03	2003–04
Indigenous accused	73%	83%	80%	88%	92%
All accused	72%	82%	82%	86%	92%

Figures also disclose that the imposition of bail conditions for Indigenous accused has remained stable over the five financial years including and preceding 2003–04. Over this period approximately 41% of Indigenous accused were granted bail on conditions.[24] This compares to approximately 40% for non-Indigenous accused.[25] Unfortunately, we do not have a breakdown of the type of conditions that are being imposed on Indigenous Australians.

Question 55 ?

Are the bail conditions imposed on Indigenous accused adequately taking into account cultural and socioeconomic differences? Are excessive financial conditions being imposed on Indigenous accused within Victoria?

Suggested Initiatives for Indigenous Accused

The commission is aware of two bail initiatives that have been suggested for Indigenous accused:

- using the circle sentencing model when imposing bail conditions on Indigenous accused;
- allowing for on-the-spot bail by police.

Circle Sentencing Model with Bail

The Aboriginal Justice Advisory Council of NSW has recommended a pilot program for the imposition of bail conditions based on the circle sentencing model. The Advisory Council was established to provide advice to the NSW Government on law and justice issues that affect Aboriginal people in NSW.[26] Circle sentencing is an informal process of sentencing that involves the decision maker and other interested parties, such as the victim and the accused's family members, meeting together and agreeing on an appropriate outcome. Circle sentencing is typically used in specialist Aboriginal courts and is the method used in the Koori Court of Victoria.

The Advisory Council suggested testing a procedure whereby decision makers discuss bail conditions informally with accused people and their families to 'ensure that … [bail] conditions are appropriate and that defendants and their families fully understand those conditions'.[27] Police prosecutors and defence practitioners would also need to be involved.

Bail decisions made by police frequently occur shortly after the alleged offending.[28] This may be late at night or early in the morning. Police cannot delay the bail decision as it would mean the accused person would be held in custody for a longer period; this would be contrary to the Deaths in Custody recommendations. It is difficult to see therefore how a special forum based on circle sentencing could be convened by police to discuss issues relevant to an accused's bail conditions.

The Advisory Council initiative is more likely to be successful for a bail application heard in court. It would be easier to have an accused's family or members of an accused's community attend court for a bail hearing than a police station after hours. A court usually hears the views of an accused's family through the accused's lawyer, and this would generally only be about any support the family could offer through accommodation, supervision etc. There are advantages in having a specialist Indigenous forum that is involved in setting bail conditions. These may include:

- increased ownership of the legal process for Indigenous Australians;
- increased participation and accountability of the Indigenous community and family of an accused, resulting in a degree of shared responsibility;
- the imposition of bail conditions that are less likely to be breached, potentially resulting in fewer Indigenous accused being detained in custody;
- increased awareness in the Indigenous community about the criminal justice system and, in particular, the bail system.

Several questions require consideration before this initiative could be tried. For example, should it be available to all Indigenous accused irrespective of the type of charge they face?

Will there be logistical difficulties in having an accused's family or community members attend court? Will the process unduly prolong the bail hearing? Should such an initiative only be used after a decision to grant bail is made? In other words, should the decision maker first decide to grant bail and only then consider convening a specialist forum to consider the imposition of bail conditions? This could be difficult to achieve in practice as the bail decision is often intimately linked to the nature of the bail conditions that can be imposed.

We understand that the recommendation for a pilot bail project in NSW has been adopted and is currently being developed. It is envisaged that it will be trialled next year.[29] The commission has learnt that it is possible that the jurisdiction of the Victorian Koori Court may be extended to enable it to hear bail applications.[30] We do not have details about how it is proposed to conduct bail hearings and whether a circle sentencing model will be adopted.

Question 56 ?

Should a specialist forum based on circle sentencing be convened in Victorian courts to deal with the imposition of bail conditions on Indigenous accused? Are there any difficulties with this initiative? Are there any other ways to achieve the involvement of an Indigenous accused's family and community members in ensuring compliance with bail conditions?

On-the-spot Bail

The Royal Commission into Aboriginal Deaths in Custody recommended that consideration be given to amending bail legislation 'to enable police officers to release a person on bail at or near the place of arrest without necessarily conveying the person to a police station'.[31] It was suggested that this be discussed between state governments, Indigenous legal services and police.

The Royal Commission made the following point about the requirement to take an Indigenous accused to a police station:

> In practical terms, this often means that the arrested person is taken to a location some distance from the point of arrest. In very remote areas, this legislative requirement could have quite oppressive consequences for both police and offenders … If the person is released on bail, there is no obligation on police to return that person to the place of arrest.[32]

The problems evident in many other Australian jurisdictions over the time it takes to transport an accused to a police station may be more acute than those experienced within Victoria. The geography of Victoria differs from that of Queensland, Western Australia, South Australia or the Northern Territory, where large Indigenous populations are often located vast distances from the nearest police station.

The practice in Victoria is to take an accused to a police station following arrest. This need not be the police station where the arresting officer is based. It is considered necessary to take the accused to the station so questioning is on record. Accused people can be compelled to attend a police station for questioning once they have been arrested.[33] There are no legislative provisions in Victoria that allow an accused to be released on bail at the place of arrest. This is similar to the situation in NSW where bail can only be granted to an accused 'who is present at a police station'.[34]

This can be contrasted with the UK, where there is a procedure that allows police officers to issue bail 'in the field'. In the UK, a constable can release an accused who has been arrested at a place other than a police station on bail 'at any place other than a police station'.[35] However, this procedure is still subject to the requirement that an accused must

attend a police station on a subsequent date.[36] The police constable granting bail must give the accused a notice that states:

- the offence for which he or she was arrested;
- the ground on which he or she was arrested;
- the requirement to attend a police station.[37]

The notice may specify the police station which the accused is required to attend and the date to attend.[38] If the notice does not contain this information it must subsequently be given in writing to the accused.[39]

If this model was adopted in Victoria, consideration would have to be given to the imposition of bail conditions by police. Should police be able to issue bail on the spot with bail conditions? Is there a risk that onerous conditions would be imposed by police? The UK provisions do not allow police to impose bail conditions when they grant bail in the field.[40] Another consideration is possible non-compliance with the requirement to subsequently attend a police station. Would the degree of non-compliance be such that the additional work created in pursuing absconders outweigh the benefits that the procedure is designed to achieve? Also, should the procedure be open to only select offences or should discretion rest with the police as to when it is to be applied? The UK provisions appear to apply to any offence.

Further concerns were raised about on-the-spot bail. Some people consulted thought that the current system contributes to a level of professionalism as the bail process is scrutinised at the police station by a senior officer.[41] In contrast, there was a fear that on-the-spot bail may encourage more use of bail and less use of summons, with a corresponding increase in the possibility of breach and remand in custody of an accused. From a practical viewpoint, it was pointed out that accused people who are drug affected, suffering from mental illness or cognitive impairment, or are homeless, may lose any notice given to them by the police or not be able to understand what it means.

Question 57 **?**

Should police within Victoria be able to issue bail at a place other than a police station? Are there any potential problems with the imposition of such a procedure?

By-consent Variations of Bail Conditions

The Bail Act allows both an accused and the prosecution to apply to the court for the accused's bail conditions to be changed.[42] After hearing arguments about the accused's bail conditions and why they should or should not be changed, the court may: vary the accused's bail conditions, revoke the accused's bail or impose a condition or conditions of bail where previously there were none.

It is common for accused people to seek to vary their bail conditions. During 2003–04 the Magistrates' Court of Victoria heard 1254 applications to vary bail.[43] A similar number of variations were heard during the preceding two years. An accused will often make an application to change a bail condition that is relatively minor. Examples include applications by accused people to change their residential address, to change the police station at which they report or the frequency with which they are required to report. When accused people seek a variation they give notice to the prosecution, who often agree to the change. Where the police agree with the variation, the subsequent court hearing is usually referred to as a 'by-consent' bail variation.

By-consent bail variations usually involve the accused, or his or her legal representative, telling the court why a change in bail conditions is being sought and the prosecution informing the court of their consent to such a change. In most instances where the prosecution agree to the change, the court will also agree.

Bail variations are time consuming. They involve all of the parties, and sometimes a surety, returning to court. Accused people who use Legal Aid will generally have to appear on their own behalf, and other accused people will incur additional legal expenses in having someone represent them at the hearing. Legal Aid does not provide funding for bail variations. Time must be set aside in the court list to hear the matter. Where the variation is by-consent, and the court is unlikely to disagree with the change, the process of going before the court may be an inappropriate use of time and resources.

In many instances the decision to grant bail will be dependent on the imposition of a specific condition

The possibility of minor by-consent bail variations being dealt with out of court, between the parties, was explored in consultations.[44] Possible minor conditions discussed were changes to a residential condition, the station at which an accused reports, or the frequency with which an accused must report. It was envisaged that such a process would only apply to defence-initiated variations, not those of the prosecution. In some instances courts currently impose a condition that allows an accused to notify the police of any change of residential address with 24 hours notice.

If an appropriate process could be devised to allow for out-of-court, by-consent bail variations, it would be necessary for decision makers, in each individual case, to set parameters on when it could be employed. In many instances the decision to grant bail will be dependent on the imposition of a specific condition. A decision maker may, for example, decide to grant bail only on the basis that an accused reside at a certain address where they will be supervised by a parent or responsible person. In other instances, particularly in cases of very serious offending or repeat offending, the court will wish to impose stringent conditions to monitor an accused.

The majority of people we discussed this matter with expressed initial support for not having to go back before the decision maker for minor, by-consent bail variations.[45] It was pointed out that it would still be necessary for accused people, and sometimes sureties, to return to court as they would be required to sign a revised Undertaking of Bail form. However, this would entail a visit to the registry, not an additional hearing before the decision maker involving all of the parties.

We have discussed issues relevant to variations and sureties in Chapter 6.

Question 58 ?

Should there be a process for minor, by-consent, defence-initiated bail variations without the requirement of a court hearing? If so, do you have any suggestions about how such a process could be formalised?

Bail to a Date to be Fixed

Sometimes a court, other than the Magistrates' or Children's Court, will bail or remand an accused 'to a date to be fixed'. This means that the matter is adjourned without a specific return date. Instead of being directed to come back to court on a specific date, accused people will be advised at some later time of the date they are next required at court. A court may bail or remand an accused to a date to be fixed for various reasons. For example, they may be unsure of when a report about an accused will be completed, or there may be a problem with the future attendance of the judge or a lawyer that cannot be resolved immediately.

In one consultation, dissatisfaction was expressed with the practice of bailing an accused to a date to be fixed.[46] We heard that one of the possible consequences of doing so is that matters may become 'lost in the system'. Because there is no set date recorded for the matter to return to court there is a risk that it will be inadvertently neglected. The County Court conducted a 'clean up' of its registry earlier this year and found that a number of matters had become lost in this way.

Adjourning to a date to be fixed is particularly problematic for accused people remanded in custody who will be keen to know the progress of their matters. In consultations, the view was expressed that accused in custody should not be remanded to a date to be fixed,[47] as occurs in the Magistrates' and Children's Court.

While bailing or remanding an accused to a date to be fixed can create problems, there was discussion in the consultation about whether the solution was as simple as judges setting a specific return date. There is a risk that by doing so, all of the parties will have to unnecessarily come back to court despite the matter not being ready to proceed.

Question 59 **?**

Is the practice of a court bailing or remanding an accused 'to a date to be fixed' a problem? If so, what, if any, problems could arise if judges were unable to bail or remand an accused to a date to be fixed?

Victims and Bail Conditions

The point of view of victims and any concerns for their safety are considered by a decision maker not only in granting bail, but also in relation to bail conditions.[48] For example, bail conditions may include a requirement that the accused person not go near the alleged victim. Often bail conditions are aimed at helping an accused person to avoid offending behaviour, such as conditions requiring attendance at drug or alcohol programs, anger management courses or counselling for gambling addiction.

Victims of Family Violence

One group that may be particularly concerned about bail decisions are victims of family violence. A victim of family violence can obtain an intervention order against the perpetrator of the violence under the *Crimes (Family Violence) Act 1987*. Where people breach an intervention order they may be charged with a criminal offence. The Bail Act reflects community concern about family violence by making it more difficult for accused people to be granted bail in certain situations.

If, in breach of an order, an accused person:

- is alleged to have used violence or threatened to use violence; or
- has been convicted or found guilty of an offence in the preceding 10 years in the course of which he or she threatened to use or used violence; or
- if the court is satisfied that the person has used or threatened to use violence against a person who is subject to an intervention order,

that person will need to provide the court with good reasons (or show cause) why bail should be granted and the court will need to provide reasons if it does grant bail.[49]

The Bail Act also requires an accused person to show cause why bail should be granted for the offence of stalking.[50] The requirement to show cause arises where a person has been charged with stalking and:

- has been found guilty or convicted of an offence in the preceding 10 years and in the course of that offence the person is alleged to have used or threatened to use violence against any person; or
- the court is satisfied that the person has used or threatened to use violence against the person whom he or she is alleged to have stalked.[51]

In spite of these reverse onus provisions in the Bail Act, people accused of these offences may still be granted bail with conditions. The conditions may include a requirement that they not have any contact with the alleged victim. In some circumstances such conditions may co-exist with intervention orders already in place under the Crimes (Family Violence) Act, and with residential or contact orders under the *Family Law Act 1975* (Cth). There may also be circumstances in which bail conditions and an intervention order are made at the same time and are similar in detail.

The RVAHJ told us there were situations in which bail conditions conflicted with other orders. For example, a bail condition requiring an accused to reside at a particular address might conflict with an intervention order stipulating that the accused not have contact with a person who lives at that address. Alternatively, bail conditions ordering an accused to stay away from his or her family may conflict with orders allowing him or her to have contact with his children. The issue was not raised in any other consultations. The commission is unclear about how often such orders may conflict with bail conditions or the extent to which this might be a problem.

Question 60 ?

The commission is interested in hearing of problems arising from conflicts between bail conditions and other orders.

Breach of Bail: A New Offence?

Accused people who breach their bail conditions, for example by failing to report to a police station or breaking a curfew, risk having their bail revoked. If bail is revoked the accused is remanded in custody. If there is a financial condition, such as a surety or deposit, then that money or security may be forfeited.

An accused who does not appear at court in compliance with bail 'without reasonable cause' is guilty of the offence of failing to answer bail and is liable to a maximum term of imprisonment of 12 months.[52] This is the only condition which it is an offence to breach under the Bail Act.

Any other breach of bail conditions is not in itself a criminal offence. Nevertheless, the Bail Act does provide that police who suspect an accused may break a bail condition, or has broken a bail condition, can arrest the accused. The accused must then be taken before a bail justice or court to decide whether bail should be revoked or whether the accused should be released on the original bail conditions.[53]

It was suggested that consideration should be given to creating a separate offence of breaching a bail condition.[54] This would mean that in addition to potentially having bail revoked, an accused would also face the prospect of an additional criminal charge for not adhering to his or her bail conditions. It could be argued that the risk of revocation of bail is a sufficient incentive not to breach bail and that there is no need to then introduce the possibility of an additional offence. However, it could also be argued that bail conditions are imposed to reduce the risk of an accused absconding or offending, and should be strictly adhered to, with any breach being the subject of investigation and prosecution.

This proposal for a new offence raises several issues. An initial question is whether any breach of bail should be an offence? Should a one-off failure by a child to adhere to a curfew be the subject of a new charge? This can be contrasted with an adult accused who, having been ordered not to make contact with his or her partner continues threatening or intimidating behaviour. There will always be a discretion vested in the police as to whether a new charge should be instituted. It is probable that minor or technical breaches would not be proceeded with because they would create additional work for police. The offence would have to be investigated, statements taken, summons served, a brief of evidence prepared and a prosecution commenced. Given the amount of work involved, it is possible that many breaches would not be considered serious enough by police and decisions made not to pursue them.

Many accused people live chaotic lives and may have little understanding of their offending behaviour. They may have a long history of contact with the criminal justice system for relatively minor offences. Should such an accused repeatedly breach bail conditions by, for example, failing to inform the police of a change of address or not reporting at a police station as required, then further charges would be risked. Such an accused is likely to become further entrenched in the criminal justice system. In this respect, it is possible that the creation of a new offence could have a disproportionate effect on marginalised and disadvantaged members of our society, such as the homeless, Indigenous Australians or people who have a cognitive impairment. We will discuss these groups in Chapter 10.

The Bail Act does not contain an exhaustive list of all special conditions of bail that can be imposed by a decision maker. If breach of a bail condition was made a separate offence this would need to be taken into account.

QUESTION 61 ?

Should breaching a bail condition be a criminal offence? Should this relate to all bail conditions or just certain conditions? If it is only to apply to certain bail conditions, which conditions should the breach offence apply to?

Chapter 9
Children and Young People

Introduction

Placing a child or young person in custody is perhaps one of the most difficult decisions that a magistrate, judge, or bail justice must make. It is a particularly difficult decision to make in the context of bail, where the person before the court is presumed to be innocent.

From 1 July 2005, in Victoria, a 'child' is defined as a person aged over 10 and under 18 at the time of committing the alleged offence. Previously, it was 10–17. If the accused is aged 19 by the time court proceedings are commenced, he or she is no longer considered a child.[1] A 'young person' is defined as being aged over 18, but at the time of sentencing under 21.[2]

The vulnerability of children and young people is recognised in our criminal justice system through the enactment of specific legislation—the Children and Young Persons Act—and the requirement that children's matters be dealt with in the Children's Court. For children, there are also custodial facilities known as detention centres that are operated by the Juvenile Justice branch of the Department of Human Services, rather than by Corrections Victoria.

Juvenile Justice is a division of the Department of Human Services that deals with children who come into contact with the criminal justice system.

The potentially harmful effects of detention are recognised by a provision in the Children and Young Persons Act that the court must not sentence a child to detention unless satisfied that no other order is appropriate.[3] There are also specific provisions about bail. The Children and Young Persons Act affords children special protections. However, there is no recognition of the particular considerations relevant to children in the Bail Act.

This chapter will explore the manner in which the bail system deals with children and young people. In particular, we will look at:

- the bail procedure as it applies to children and, in particular, the provisions of the Children and Young Persons Act;
- the support services offered to children and young people on bail;
- certain bail conditions that are imposed on children and young people;
- particular concerns that arise about the remand of young people;
- potential reform of the Bail Act to recognise particular considerations that apply to children.

We will also discuss other issues surrounding children and young people that were raised during our consultations.

Bail and Children

For the most part, the Bail Act applies to children in the same way as to adults. Accordingly, the general presumption in favour of bail applies to children, subject to the various limitations we have discussed in Chapter 6. However, where provisions of the Bail Act are inconsistent with provisions of the Children and Young Persons Act, then the latter Act is to be followed.[4] This is the case for:

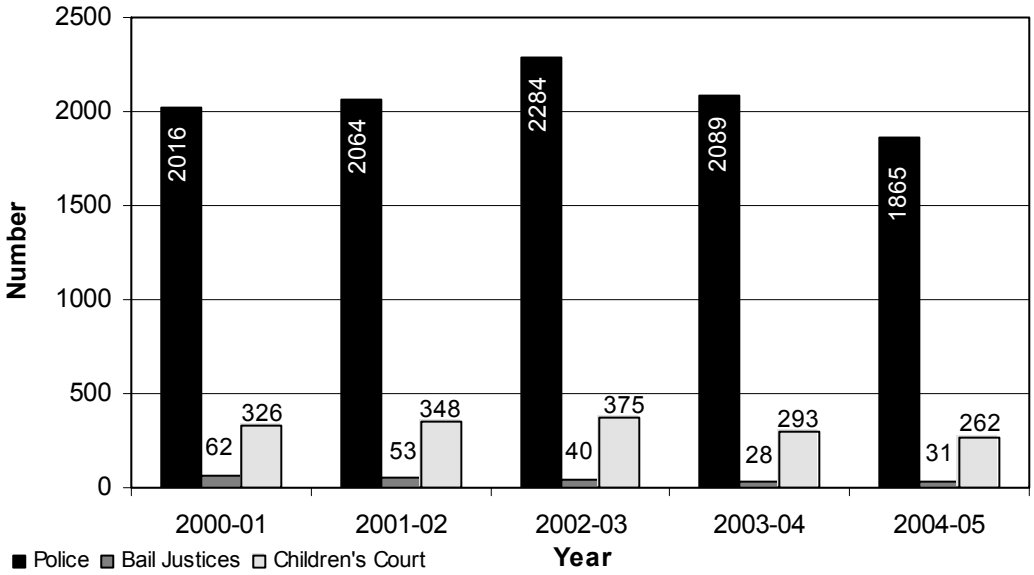
- the maximum period a child can be remanded in custody;[5]
- the people who must be present when a police officer is deciding whether to grant bail to a child.[6]

The Children and Young Persons Act also provides protection for children facing bail. The Act states that children are not to be refused bail solely on the basis that they do not have adequate accommodation.[7] It also allows a decision maker to release a child on bail even if the child does not have the capacity or understanding to enter into an undertaking of bail.[8] In such circumstances the parent or guardian enters into an undertaking to produce the child at court. The Act also contains provisions about where a child can be held on remand.[9]

It is important to note that neither the Children and Young Persons Act nor the Bail Act allow a police officer to remand a child in custody. In circumstances where the police seek the remand of a child, and it is not practical to take the child before a court, they are required to contact a bail justice.

We noted in Chapter 2 that police are the principal bail decision makers for adults. The same is true for children. Police make the overwhelming majority of decisions to bail children, followed by courts and then bail justices, as can be seen in Figure 16.[10]

Figure 16: Children's Court number of bail applications granted by bailing authority



Child Arrests

In Chapter 3 we looked at the arrest and summons procedure. The decision of whether to arrest or summons carries significant consequences for bail, and therefore the liberty of the accused. There are two key differences in this procedure when it comes to children:

- The Children and Young Persons Act directs that a child is to be proceeded against by summons except in exceptional circumstances.[11] This provision relates to the situation where the police are filing a charge at court.
- Following arrest, a child must be released on bail by the police or taken before a bail justice or court within a 'reasonable time', but 'not later than 24 hours of having been taken into custody'.[12]

The International *Convention on the Rights of the Child* provides that the arrest of a child is to be a measure of 'last resort' and that detention should be for the 'shortest appropriate

period of time'.[13] Australia has ratified the convention. A similar statement is also contained in the United Nations' *Standard Minimum Rules for the Administration of Juvenile Justice*.[14]

An issue that has been raised in our consultations is whether police are only using their power of arrest of children where the circumstances warrant such a course.

Melbourne Children's Court magistrates thought that police use their arrest powers appropriately. They believed that in the majority of cases involving children police issue a summons, and that problems due to the inappropriate use of arrest or summons only arise in a small number of cases.[15] Other consultations disclosed some concerns. We heard in more than one consultation that children are sometimes arrested for stealing from a shop.[16] Conversely, we also heard that when the use of arrest was considered more appropriate—mainly owing to the seriousness of the offence or repeat offending—the summons process was sometimes being used.[17]

Police data for 2003–04 discloses that police dealt with 23 056 children accused of having committed an offence. Of those, 10 006 (43.4%) were proceeded with by way of summons, while 5033 (21.8%) were arrested.[18] A table in Appendix 5 shows the method of processing children by offence category in 2003–04.[19]

While the figures detailed above are important, it is difficult to draw concrete conclusions without having an understanding of what factors police are relying on when deciding whether to use summons or arrest for a child. As we discussed in Chapter 3, there is a legislative preference for the use of summons over arrest. However, there are no official guidelines specifying precisely when police should utilise the summons or arrest procedure or what factors should be taken into account when making a decision. In Chapter 3 we suggested that administrative convenience may sometimes play a role in deciding whether to proceed by means of summons or arrest.

Arrest of Indigenous Children

The Royal Commission into Aboriginal Deaths in Custody investigated 99 deaths in custody, six of them being deaths of children. The Royal Commission recommended that governments should review their legislation and police policies to ensure that children from Indigenous communities are not proceeded with by means of arrest 'unless there are reasonable grounds for believing that such action is necessary'.

> The test whether arrest is necessary should, in general, be more stringent than that imposed in relation to adults. The general rule should be that if the offence alleged to have been committed is not grave and if the indications are that the juvenile is unlikely to repeat the offence or commit other offences at that time then arrest should not be effected.[20]

The Royal Commission went on to recommend that police should be given 'greater encouragement' to proceed by way of caution rather than arrest or even summons.[21]

A study carried out in 2001 found that during the 1990s there was an increasing tendency by Victoria Police to proceed by means of arrest against children.[22] The findings of this study were reported on by Gardiner:

> … there was an alarming pattern of growth in arrest rates for Indigenous juvenile males. Between 1993/94 and 1996/97 the arrest rate for Indigenous male juveniles rose from 155 in 1000 population to 186 in 1000 population. In other words, arrests of Indigenous young males were averaging 19% of the Indigenous youth community—almost one in five.[23]

A significant rise in the use of arrest was also reported for female children.[24] The arrest figures over the period were much higher for Indigenous children than for non-Indigenous children.[25] Moreover, in relation to the method of processing Indigenous children, figures

from the 1996–97 financial year showed that the arrest and summons procedure was used more commonly than caution, with 12% of Indigenous children being cautioned, 46.2% being arrested, 39.8% being summonsed and 2.1% being processed by other means.[26] The caution figure is much lower than the comparable figure for non-Indigenous children and is important in light of the Royal Commission's recommendation 240, which provided that police should be given 'greater encouragement' to proceed by means of caution.[27]

Gardiner comments that underlying higher arrest rates for Indigenous male children is a broader issue of greater contact between Indigenous male children and Victoria Police. He notes that the number of Indigenous male children being processed by Victoria Police increased by almost 30% in the period from 1993–94 to 1996–97, with a similar upward trend being reported for Indigenous female children.[28] Gardiner states that:

> These increases are not supported by shifts in population, and there is clearly a need for all agencies, and authorities to review all aspects of Indigenous youth contact with the Victoria Police and the criminal justice system.[29]

In 2003–04, 41% of Indigenous children were processed by police by means of arrest.[30] This compares to 21.8% for non-Indigenous accused.[31] We will seek to obtain updated figures on the method of police processing of Indigenous children for our final report.

Question 62 ?

Are police using their powers of arrest of children appropriately? What steps should be taken to reduce the arrest rate of Indigenous children?

People to be Present at Bail Hearings Involving Children

When children are taken into police custody and it is not practicable for a police officer to take them before the Children's Court immediately, the police must ensure the presence of 'a parent or guardian' or an 'independent person'.[32] If present, an independent person may assist to 'facilitate' the grant of bail, for example, by arranging accommodation.[33]

The Victoria Police Manual directs police to organise for third parties to be present at any after-hours bail application involving a child.[34] It states that if a child is not represented at a bail hearing before a bail justice, contact must be made with a regional office of the Department of Human Services (DHS) or a unit of DHS known as the Central After Hours Assessment and Bail Placement Service (CAHABPS). DHS or CAHABPS will usually arrange for a CAHABPS worker to go to the police station where the child is being held. We will discuss the role of DHS, in particular CAHABPS, in greater detail later in this chapter.

The DHS or CAHABPS worker is to be given access to the child prior to any bail hearing and bail hearings are to be organised to allow for the attendance of DHS or CAHABPS staff.[35]

DHS or CAHABPS workers are not only called out when the issue of remand is being considered, they may also be called when police or bail justices seek assistance in finding accommodation for a child who is to be bailed.

Maximum Period of Remand in Custody

The remand of a child should be considered a last resort. Children who are remanded in custody may be stigmatised by their peers, lose the opportunity for community-based rehabilitation, come into contact with more hardened and older offenders, and in some instances find themselves at risk of physical or mental harm. A period spent in detention may also influence future sentencing decisions.

Owing to the undesirability of remand, various legislative mechanisms endeavour to ensure that the issue of a child's detention is considered by a court as soon as possible and that a child's remand is adequately monitored.

The Children and Young Persons Act provides that a bail justice may only remand a child in custody until the 'next working day' of the court or, in certain circumstances, two working days.[36] This can be contrasted with the Bail Act, which provides that bail justices may remand adults for a period of up to eight 'clear' days.[37] As we have mentioned, police cannot remand a child in custody.

The Children's Court can remand a child for a period not exceeding 21 days.[38] A child on remand must return before the Children's Court within 21 days.

… when children are remanded in custody it is sometimes necessary to drive them or fly them to Melbourne

Where are Children Remanded to?

The Children and Young Persons Act provides that a child must generally be remanded to a remand centre.[39] In Victoria there are specialist detention environments that cater only for children. There are two remand centres within Victoria that accommodate children: the Parkville Youth Residential Centre and the Melbourne Juvenile Justice Centre. The former caters for males aged 10 to 14 and females aged 10 to 18. The latter caters for males aged 15 to 18.

Data provided by DHS shows that the number of children in remand centres—as measured by new admissions—while fluctuating, has dropped over the past four financial years. The figure in 2000–01 was 326 new admissions, while in 2003–04 there were 254 new admissions.[40]

The Children and Young Persons Act also provides for the remand of children in police jails. The Children and Young Persons (Children's Court) Regulations 2001 stipulate that remand to a police jail is only to occur if the period of remand is not to be longer than two days.[41] If children are to be remanded for a period exceeding two days they must go to a remand centre.

Not all police jails can be used to hold children. The regulations contain a list of rural and regional police stations where a child may be kept for the requisite period. If a child is to be remanded to a police station, certain requirements must be met by the police.[42] For example, children must be kept separate from adults, must be separated according to sex, and reasonable efforts must be made to meet medical, religious and cultural needs. Police must also abide by directions contained in the Victoria Police Manual for the keeping of a child in remand, including contacting DHS or the regional cell visitation program.

The remand of children in regional areas can be problematic owing to a lack of police cells. In regional consultations with police, we were told that when children are remanded in custody it is sometimes necessary to drive them or fly them to Melbourne.[43] This is so they can be accommodated in a remand centre. This situation arises when all of the police cells are being used and the child cannot be separated from adults. For the same reason, it may not be possible to keep the child in the cells of a neighbouring police station. Transporting a child to Melbourne places a considerable strain on police resources. It can mean that two officers and a police vehicle are 'off the road' for more than five hours.

Bail Justices and Children

In Chapter 4 we discussed issues relevant to bail justices and the grant of bail. We also provided figures on how often bail justices grant bail where the accused is a child. All of the issues discussed in Chapter 4 are equally pertinent to a bail decision involving a child.

As we have mentioned, if police are considering the remand of a child after hours they must contact a bail justice. Police are unable to remand a child in custody.

Information provided by DHS shows there are several main reasons why bail justices refuse bail for children. These include: a refusal by the child to abide by proposed bail conditions; a belief that the child will pose an unacceptable risk to the community if released on bail; and when the child is alleged to have committed a serious indictable offence. However, of all of the reasons for refusing bail to a child, the key reason for bail refusal is an inability of the child to show cause.[44] In Chapter 6 we discussed the presumption against bail and show cause. We asked the question of whether there should be a presumption against bail.

CAHABPS workers provide children with information about the bail system

Figure 13 shows the number of times a Children's Court magistrate makes a different decision to a bail justice.[45] Children's Court magistrates we consulted thought that bail justices didn't 'get it wrong' very often, and estimated that for criminal matters they would make a different decision to a bail justice only 10–15% of the time.[46] However, data shows that in the last financial year the court made a different decision to a bail justice in almost half of cases, as can be seen in Figure 13. Children's Court magistrates also noted the very different circumstances that bail justices operate under when hearing bail applications. However, in relation to children, bail justices do have the support of CAHABPS workers, which we discuss below.

Support Services for Children and Young People

In Chapter 8 we discussed bail conditions and looked at support services for accused on bail. Specifically, we looked at the CREDIT–Bail Support Program. Accused are directed to take part in these programs as a special condition of bail. While these services accommodate young people, they do not usually accommodate children. Moreover, they are located within Magistrates' Courts rather than Children's Courts.

In this chapter we will look at the support services that are in place for children and young people and issues about these services that arose during our consultations.

Support Services for Children on Bail

Like adults, children may be directed to undertake a program or programs as a special condition of bail. Such programs are commonly directed towards assisting children in their rehabilitation and therefore helping to find alternatives to crime. Programs may include, for example, drug and alcohol counselling, anger management or psychological counselling. Typically, such programs are run by community welfare organisations.

From our consultations it would seem that lawyers most commonly arrange support services for an accused child.[47] Less frequently, children are placed under the supervision of Juvenile Justice and are directed to abide by the directions of a worker from Juvenile Justice. As part of such supervision, children may be directed by Juvenile Justice to undertake programs of the type we have detailed above. Even in those instances where Juvenile Justice is not involved in the direct supervision of a child, it may still be involved in helping to source programs for children on bail, particularly where the child in question is one of its existing clients.

The CREDIT–Bail Support Program generally works only with adult offenders. However, in some circumstances children may be ordered to take part in it.[48]

After-hours Bail Assessment and Placement

As already discussed, when a child comes into contact with the bail system outside normal business hours CAHABPS will typically be involved. CAHABPS plays an important role in providing advice to bail justices and the police about a child's suitability for bail. CAHABPS

workers can assist by finding accommodation for children to be bailed to and can link children to various support services. It is a statewide service that began as a pilot in Melbourne in 1994 and was extended to regional Victoria in 1997. CAHABPS evolved out of recognition that a large number of children were being remanded in custody by a bail justice after hours, only to be released by a court on the following sitting day.

As discussed, Victoria Police are directed in certain circumstances to contact CAHABPS where consideration is being given to the remand of a child. In metropolitan areas CAHABPS workers will typically go to the police station where the child is being held. They will then undertake an assessment of the child's suitability for bail and make recommendations to the police or bail justice. In regional areas, a juvenile justice worker or a trained CAHABPS volunteer may carry out the assessment at the police station (a process referred to as outreach) or do a telephone assessment.

In 2004 the majority of CAHABPS work was by outreach—that is, the CAHABPS worker attended the police station rather than conducting an assessment over the telephone. Outreach comprised 72.5% of all work conducted and phone assessments occurred in 27.5% of matters.[49]

In addition to undertaking an assessment, CAHABPS workers provide children with information about the bail system, including their rights and responsibilities. They also, where appropriate, assist in finding bail accommodation and refer children to youth and family support services. A child is under no compulsion to utilise the services of CAHABPS.

In some circumstances, CAHABPS will be contacted where the police are willing to grant bail but there is an issue of finding appropriate accommodation.

The CAHABPS service operates from 5pm to 3am on weekdays and from 9.30am to 3am on weekends and public holidays. During business hours, when police are considering granting bail and require additional assistance they may contact Juvenile Justice.[50]

As mentioned, CAHABPS function is to undertake an assessment of an accused's suitability for bail. The CAHABPS' assessment takes into account various factors, including a determination of whether children are a risk to the community or themselves if released on bail. Various matters are taken into account, including:

- the nature of the alleged offences;
- the manner in which children present and their attitude;
- the risk to any accommodation provider if accommodation is required;
- if risks are identified, whether they can be minimised or contained through the use of appropriate bail conditions.

Information provided by DHS shows that in 2004 CAHABPS was involved in 207 assessments. There were 307 referrals to CAHABPS over the same period. Referrals are higher than assessments for a number of reasons: some are inappropriate, such as the child being too old for the service and others are requests for information in matters where CAHAPBS are not involved but their knowledge of available services is called upon by police. In keeping with broader trends throughout the criminal justice sector, the majority of accused assessed were male (67%) and there was a high proportion of Indigenous Australians (15%).[51]

Support Services for Young People on Bail

We have discussed support services for children on bail. We will now look briefly at support services for young people. Like children, it is not uncommon for young people to have

special conditions attached to their bail which require them to undertake a support program or programs.

Young people can be directed to take part in supervised bail through the CREDIT–Bail Support Program. In addition, a bail supervision program is conducted by the Adult Court Advice and Support Service (ACAS), a division of DHS.

…police or bail justices rarely refer accused to such programs

Supervised bail overseen by ACAS is directed exclusively to young people aged 18 to 21 years. The service adopts a case management approach. This means that a unique program is tailored for the accused and he or she is assigned a particular ACAS worker. Programs may involve, for example, the imposition of drug and alcohol counselling, psychiatric intervention, urine screening, job skills assistance, anger management courses and family support programs. Accused people are required to be in regular contact with their ACAS worker. The ACAS worker supports the accused to comply with the bail conditions.

ACAS staff often provide advice to a court that is considering bail. For example, they may inform the court of services that are available to assist the accused or provide the court with information relevant to the remand of a young person.

Since the inception of the ACAS program in 2001, 422 young people have been assessed as suitable participants in the program, while 213 have been deemed unsuitable. As with CAHABPS, the vast majority of those who have been assessed for participation in the program are male and aged between 17 and 20.[52]

Information from DHS indicates that accused on bail supervision with ACAS who are ultimately found guilty of an offence are more likely to receive a Youth Training Centre (YTC) order or a non-custodial order than an adult custodial sentence.[53]

Concerns Surrounding Support Services

A recent New South Wales study suggests that a high proportion of children who make their first appearance in the Children's Court will continue to offend into adulthood, especially if their first court appearance occurred when they were young.[54] This would suggest that initiatives aimed at preventing re-offending are important. The authors of the New South Wales study made the following comments:

> One important policy implication of the current findings is that efforts to reduce the risk of reoffending should not be delayed in the belief that most young people making their first appearance in the Children's Court will never reappear in court again … Of course there is no point in intervention for its own sake—the intervention programs we employ have to be effective in reducing the risk of reoffending.[55]

There is limited evaluative data surrounding the success or otherwise of support services within Victoria. There is evaluative data concerning the CREDIT program that we will discuss in Chapter 10. The CAHABPS and ACAS programs have been scrutinised within DHS and found to be successful, which has led to their continuation and expansion. Our consultations disclosed a very positive view of bail support programs for children and young people. Keeping young people and children out of custody and having them supervised in the community, where appropriate, is seen as being of great benefit not only to the individual accused but also the community at large. However, some concerns were raised in consultations that these programs could be better utilised.

Referral Source

Consultations disclosed that in situations where dedicated support programs are in place for children or young people—such as the ACAS Bail Supervision Program, Juvenile Justice bail supervision and the CREDIT–Bail Support Program—referrals were most likely to come

from the court or individual defence practitioners. We were told that police or bail justices rarely refer accused to such programs.

Children and young people are often bailed directly from a police station by police or a bail justice. It seems that in many instances they are being bailed without the imposition of any support structures in situations where such assistance would clearly be appropriate.[56] This is particularly problematic if there is delay between a child or young person's arrest and first court hearing date. In this case the possibility of early intervention in the form of structured support is lost.[57] There may also be an increased risk of offending where a child or young person is released on bail without appropriate support.

There is little data concerning the source of referrals to bail supervision. The most noteworthy study has been undertaken in relation to the CREDIT program.[58] Anyone can refer a person to the CREDIT program. If police wish to refer to the program, they must bail the accused to the next Magistrates' Court sitting date so they can be assessed by a CREDIT clinician. The Victoria Police Manual provides directions to police if they wish to refer an accused to the CREDIT program.[59]

The available data discloses that for the 12 months ended 30 September 2003, over three-quarters of all referrals to CREDIT were made by legal practitioners and magistrates.[60] Police ranked fifth in terms of overall referrals, comprising 4.6% of referrals.[61] Self referrals were more common than police referrals. The data for the period January 1999 to May 2003 shows that police referrals were most likely to come from police located in Melbourne and the inner suburbs.[62]

The CREDIT program is the most well known and most widely utilised support service for all accused on bail—not only for young people. Owing to the level of awareness of CREDIT, it would be expected that referrals from police would occur more often for that program than for the other supervised services we have discussed. Therefore, it is likely that police referrals to other support services are minimal.

In consultations, concern was expressed about the lack of police referrals to bail supervision programs.[63] We were told that children and young people are often bailed for very serious offending without any support structures in place. The importance of early intervention was raised. It was also pointed out that the present system results in a level of unfairness. Some accused people are being referred to services—and therefore receive support and potentially reduce their likelihood of receiving a custodial sentence—while others are not. Some concern was also expressed about individual magistrates and judges refusing to consider the utilisation of such services.[64]

A lack of police or bail justice referrals to supervised bail programs is likely to be due to a number of reasons other than a non-inclination to utilise the programs. A lack of awareness about the services offered, difficulties in accessing the services after hours, and an absence of procedures surrounding their use may also be causes. Communication between the groups was cited in one consultation as a matter of some concern.[65]

A greater appreciation by police of the important role that they could play in early intervention may also be required. It is likely that many police consider the referral of accused people to services that may benefit their early rehabilitation as outside the scope of their duties. We were told in one consultation that some police view the CREDIT–Bail Support Program as a 'soft touch'.[66] A similar view has been raised about other support services that rely upon police referral. The following quote from a senior police officer demonstrates this attitude:

> The nature of coppers are, we're all natural cynics, and we pick up these programs and think 'this is going to be a bullshit thing' and it's very difficult … for coppers to pick up a new program because we're natural born cynics and the longer you are in this job, the more cynical you get.[67]

The conclusion reached in the evaluation of the CREDIT program was that 'referrals to the program have been uneven between geographic areas and between and within professional groups'.[68] A recommendation was made that:

> A comprehensive communication strategy be implemented to promote the availability of the CREDIT program among those potentially referring eligible defendants to the program, and among Magistrates.[69]

Question 63 ?

What more could be done to encourage greater utilisation of supervised bail support programs for children and young people when they are being bailed by police and bail justices?

Notification Protocols for Young People on Bail or in Remand

As noted above, ACAS provide a bail supervision service for young people aged 18–21. ACAS workers raised a specific issue about the notification procedures for existing clients of the service who are either remanded in custody or granted bail.[70] Young people on remand are generally treated the same as adults. ACAS workers expressed a concern that there are no protocols in place concerning who informs them, or how they are informed, when their clients enter the adult custodial setting. This may occur if an accused who is currently being supervised by ACAS is arrested for an indictable offence. The accused may be refused bail and remanded in custody without ACAS being notified. There is also no procedure in place to advise ACAS that an existing client has been bailed following further offending.

It is important for ACAS workers to be notified if their clients are charged with further offending and bailed or remanded in custody. ACAS is directly involved in supervising the accused. Any change in an accused's bail or remand status would have a major bearing on the nature of future supervision. The supports or intervention put in place for accused people would naturally need to be reviewed in light of an accusation that they are continuing to offend.

The concerns expressed by ACAS workers about notification protocols would be equally relevant to the other bail supervision programs offered to children and young people.

Police Failure to Take Action on Breach

In Chapter 8 we discussed conditions of bail. When accused people are directed to participate in a structured support service as a condition of bail they are often directed to abide by the lawful directions of the service's manager or director. An issue that arose in consultations about young people—but is equally applicable to adults—is that police do not always take action when the service informs them of a breach of bail.[71] Examples of breaches that may come to the attention of a bail service include a persistent failure to abide by the lawful directions of the service in question, or a failure to adhere to other bail conditions, such as a curfew.

We were told that the response of the police upon being informed of a breach of bail is extremely varied. Sometimes they will not take immediate action and will instead wait until the next hearing date when the matter comes back before the court. This may be days, weeks or months later. This lack of immediate action is most likely due to the work involved in bringing an accused back before the court. The accused would have to be arrested, a decision made as to whether he or she should be remanded in custody, and then further release on bail decided by a bail justice or court.[72]

It could be argued that it is of utmost importance that an accused be brought back before a court immediately if bail is breached. A failure to do so undermines the condition imposed and does little to instil a sense of court supervision upon the accused. Moreover, it may lead to further, persistent breaching and possibly offending. It may also undermine the authority of the supervising service, such as the CREDIT–Bail Support Program or Juvenile Justice.

…lack of immediate action is most likely due to the work involved in bringing an accused back before the court

However, the difficulty is that there will always be degrees of breach. In many situations the police may decide that the nature of the non-compliance is not of such magnitude to warrant going through the breach process. The police prosecutor will have experience with the orders of the court and may be able to judge that the accused will simply be reprimanded and released again on bail. For this reason, it may be unwise to compel police to bring every reported breach of a bail condition before a court. Automatically arresting an accused who fails to adhere to a curfew, or who enters a geographical exclusion zone, would see an increase in the work of courts and the police. It may also contribute to further entrenching an accused in the criminal justice system. It could be argued, therefore, that a degree of discretion should remain with the police.

In Chapter 8 we discussed whether breach of a bail condition should be a separate criminal offence.

Sufficiency of Services for Children and Young People

In several of our consultations, particularly regional consultations, we were told there should be more services for children and young people on bail. We were also told that the services offered throughout regional Victoria were not commensurate with those offered in Melbourne.[73]

One consultation expressed the view that the CREDIT–Bail Support Program should be extended to children.[74] The Children's Court in Melbourne has a clinic that assists the court to deal with accused who have drug problems. The clinic undertakes assessments and makes recommendations about appropriate treatment. In addition, the clinic may conduct psychological and psychiatric assessments of children and families. Only a judge or magistrate can request an assessment by the Children's Court clinic.[75] However, other parties, including parents, can request that the judge or magistrate orders an assessment.[76]

While clinicians from the Children's Court clinic can be utilised for children on bail, it is unusual for them to be involved at that stage of the process. If requested by the court, a clinician would undertake an assessment for a child on bail or remand. Given that the clinic is located in Melbourne, it requires that accused people be brought before the Melbourne Children's Court. If they are on remand they would have to be held at Parkville.

Within regional Victoria, services for both children and young people are much more limited. CREDIT–Bail Support Program workers are located in Bendigo and Moe, although only part-time, and support is also available in Geelong. No other regional centres have access to the program. In such circumstances, it would typically fall upon defence practitioners to arrange programs for clients by utilising a variety of welfare-based, non-government services.

Juvenile Justice operates within regional Victoria and is involved in supervising children on bail. Likewise, CAHABPS and ACAS also operate outside Melbourne. There is an ACAS worker based at every regional Magistrates' Court. Bendigo and Mildura utilise the services of on-call Juvenile Justice managers. Elsewhere, trained volunteers are utilised or a telephone assessment is carried out.

Bail Conditions for Children and Young People

In Chapter 8 we looked in some detail at conditions of bail and discussed the ability of a decision maker to impose special conditions of bail.

Bail conditions that are imposed on children and young people were raised in several of our consultations.[77] A view was expressed that the conditions being imposed on children and young people were often overly punitive and were being used as a means of pre-sentence punishment. Some people voiced a concern that many decision makers were not adequately considering the level of development of children and young people. This can lead to the imposition of unrealistic conditions—more appropriate for an adult—that were likely to be breached. This was viewed as 'setting them up to fail', and leading them to possible incarceration.

The same bail conditions imposed on adults may be imposed on children and young people. However, during our consultations we were told that certain special conditions seemed to be applied to children and young people more frequently than to adults.[78] Conditions that were of particular concern included geographical exclusion conditions and curfews. We also heard about a special condition involving abstinence from 'chroming' which is commonly imposed on children and young people. Chroming refers to the inhaling of various substances such as spray-paint fumes. A discussion concerning chroming—in the broader context of substance abuse conditions—is contained in Chapter 8.

It is important to note that most special conditions are imposed on children and young people with a legitimate purpose in mind and are generally used only where their imposition is considered necessary. The use of one or more special conditions would be highly desirable in many cases. The concerns we discuss here were raised in consultations and arose only in the context of the conditions being used in a punitive manner and against accused who were considered to lack the maturity and understanding to adhere to them.

Geographical Exclusion Conditions

Geographical exclusion conditions are special conditions that prohibit an accused from visiting a certain geographical area. For example, an accused may be directed not to enter the town boundaries of Moe or the mall in Shepparton. A geographical condition may be imposed on adults, young people and children alike, though the concerns expressed to us in consultations tended to revolve around the imposition of the condition on the latter two groups.

When there is no particular reason for excluding an accused from a certain area, or the geographical area involved is unnecessarily large, the imposition of such a condition could be seen as a punitive measure that is unrelated to the factors to be considered when imposing a special condition under the Bail Act.[79]

A concern was expressed in consultations about the broad nature of exclusion conditions being imposed.[80] In particular, we were told that decision makers are occasionally imposing conditions that restrict an accused from visiting the Melbourne CBD.[81] It was pointed out that the CBD is the hub of public transport and is often the main area where accused go, or travel through, to access important support services. Preventing accused people from accessing services may be detrimental to their wellbeing, and sometimes their family's wellbeing. It was suggested that by imposing such a condition, a decision maker was often

setting an accused up for failure. That is, creating an environment where accused people are much more likely to breach their bail out of a necessity, or perceived necessity.

A similar condition is often imposed on young people and children, particularly in regional Victoria, that they do not visit the main shopping strip or shopping centre. There was a belief expressed during some of our consultations that this condition was being imposed to prevent groups of children or young people from 'hanging around' or mixing with one another. The concern expressed was that this condition is not being imposed to fulfil a legitimate objective of bail, but as a form of pre-sentence control and punishment. Where accused see no legitimate purpose behind the imposition of such a condition the risk of them breaching may be far greater.

Preventing accused people from accessing services may be detrimental to their wellbeing

In considering these issues it is important to realise that legitimate reasons may exist for the imposition of such a condition. Decision makers may believe that the best way to stop accused people from re-offending is to impose conditions that are likely to prevent them from associating with their offending peer groups.

We gained the impression from consultations that broad exclusion conditions were more likely to be imposed by police or bail justices. There was a belief that accused people would unquestioningly agree to the imposition of such a condition as their overriding concern was to be released from police custody. It may be less common to see onerous exclusion conditions imposed in court as lawyers would perhaps be more likely to advocate against their use.

As far as the commission is aware, the legality of excessive exclusion conditions has not been tested within Victorian courts.[82]

Curfews

A curfew is a special condition that directs accused not to leave their places of residence between certain hours. For example, an accused may be directed not to leave his or her home between the hours of 5pm and 8am. Again, while such conditions may be imposed on adults, the concerns expressed to us in consultations centred upon the imposition of these conditions on children and young people.

Curfews are most likely to be imposed as a preventative measure. It has been said that curfews are an important measure in keeping children and young people 'off the streets', reducing the risk of them re-offending, preventing groups of children or young people from associating with 'negative influences' and seeking to re-establish family relationships.[83]

In consultations, curfews were criticised as being an unrealistic response for many young people.[84] As in the case of geographic exclusion conditions, it was suggested that by imposing a curfew, a decision maker was often setting an accused up for failure; that is, imposing a condition that many children or young people would simply be unable to abide by, owing to a combination of their lifestyle choices, their level of maturity and their comprehension.

Some commentators see curfews as being a form of pre-sentence punishment.[85] They also argue against curfews on other bases, including that curfews in many cases are likely to be more intrusive than the ultimate sentence received:

> Many young people are in a pattern of sleep, recreation and social intercourse that involves late nights on the streets. To break this pattern requires a careful, supported intervention program that will inevitably have steps forward and steps backward.[86]

Curfews have been particularly criticised in relation to Indigenous Australians:

> Often curfews that are imposed as part of a bail condition limit people's ability to perform their cultural responsibilities such as taking care of relatives, attending funerals or other family and community functions.[87]

This issue was touched upon by the Royal Commission into Aboriginal Deaths in Custody when discussing attendance of Indigenous accused in court.[88]

Residential Conditions

A residential condition may be imposed on children or young people as a special condition of bail, directing them to live at a particular place. This may be with their parents, other family members, friends, or, sometimes, at a place deemed suitable by Juvenile Justice. If children or young people being supervised by Juvenile Justice are homeless, bail conditions may be imposed that direct them 'to reside as directed by Juvenile Justice'. Often Juvenile Justice cannot immediately place young people in stable accommodation and they will be moved to a number of different residences.

In one consultation, we heard that the court or the prosecution often object to a bail condition that gives Juvenile Justice the ability to move an accused to a number of different residential properties.[89] There appears to be a tension between police and the court wanting to adequately monitor the whereabouts of an accused—and therefore having a static or set residential address—and the nature of the accommodation service that Juvenile Justice is able to offer. Unfortunately, accommodation is often limited and Juvenile Justice may have little choice but to place an accused wherever a bed is available until stable accommodation is available.

If a fixed address is insisted upon by the court, whenever an accused child is moved by Juvenile Justice it is necessary to come back before the court to seek a variation of the bail conditions.[90] We have discussed problems associated with variations when addressing by-consent bail variations in Chapter 8. The most obvious problem in this context is that before Juvenile Justice can move its clients it is required to go back before a court. This may mean that an accused cannot be legally moved for a number of days before a bail variation can be listed.

Question 64 ?

Are decision makers imposing appropriate special conditions on children and young people?

Bail of Children on the Undertaking of Other People

The Children and Young Persons Act allows a court, bail justice or police officer to release a child on bail even if the child does not have the capacity or understanding to enter into an undertaking of bail.[91] In such circumstances, the child's parent or 'some other person' enters into an undertaking on the child's behalf. It then becomes the responsibility of the parent or the other person to ensure the child appears at court on the correct date. The purpose of this provision is to allow for those situations where children lack the ability to fully appreciate the legal obligations created when they sign an undertaking of bail. It recognises that it may be more appropriate to place the obligation on a parent or other third party to ensure the child appears in court.

During one consultation it was suggested that the operation of the Children and Young Persons Act should be extended.[92] At present, this provision only applies where the decision maker believes the child does not have the requisite capacity or understanding. It was suggested that the provision be amended to allow for the imposition of an undertaking on a parent or another person in circumstances where the child does understand the nature of the undertaking.

The reasoning behind the suggested amendment is that children, while fully appreciating the nature of the undertaking at the time of entering into it, may subsequently forget about or disregard their obligation to the court. This is most likely to occur where a child is quite young and lacks the maturity to comply with the undertaking. If a responsible third person enters into the undertaking on the child's behalf, this will help to ensure the child appears in court on the correct date.

The Children and Young Persons Act already recognises that an undertaking may be imposed on another person where a child is involved. This amendment would extend the obligation and may reinforce the important role that a parent or other responsible person plays in a child's life. It would enable more parents to enter into undertakings on their children's behalf and could potentially empower parents. For example, parents could point out to their children that if they do not adhere to the conditions of bail, the parents could approach the court and seek a revocation of bail.

…an undertaking may be imposed on another person where a child is involved

There are issues that need to be debated before an amendment of this nature could be implemented. A failure to appear in court in accordance with an undertaking of bail is a criminal offence.[93] Should a parent or responsible person who has entered into an undertaking be liable for prosecution in circumstances where they are unable to ensure the child appears? Many would feel uncomfortable with parents facing criminal proceedings where, often for reasons beyond their control, they failed to bring their child to court. Of course, the police could exercise their discretion not to charge if they were satisfied reasonable steps had been taken by the third person to secure the attendance of the child at court. As the provision presently stands, the possibility that a parent or other responsible person may be prosecuted already exists. The consequences of entering into the undertaking would need to be carefully explained to the parent or other person by the decision maker.[94]

A further question that arises is whether guidelines would need to be put in place governing when a decision maker could impose an undertaking on a parent or other person in the circumstances discussed. Would it be sufficient to simply leave the discretion to decision makers or should the legislation require that they have regard to specific matters, such as the age, maturity and intellect of the child?

Question 65 ?

Should sub-section 129(8) of the *Children and Young Persons Act 1989* be amended so that an undertaking may be imposed on a child's parents or some other person in circumstances where the child has the capacity or understanding to enter into a bail undertaking? If so, should any amendment make reference to specific matters that a decision maker must consider when thinking of requiring an undertaking to be entered by a parent or another person?

Remand of Young People

Young people aged 18–21 are treated the same as adults in almost all respects under Victoria's bail system. This is because the provisions of the Children and Young Person's Act only apply to young people up to the age of 18. For young people above that age, only the provisions of the Bail Act apply to bail decisions.

There may, however, be differences in the way in which young people are dealt with on remand. We have briefly touched on what happens when a child is remanded in custody. A far more vexed issue is what happens to young people when they are remanded in custody. People we consulted expressed strong views on this issue and it has been a matter of debate for some time.[95]

This paper does not seek to address in detail the conditions that children and young people who are remanded in custody face, as such an analysis falls outside our terms of reference. We will, however, explore issues relating to the legislation, policies and procedure concerning the remand of young people. These are important to the issue of bail as they regularly have an effect on the bail decision.

If decision makers decide to remand young people they will enter the adult correctional system. This means they will be remanded with adult prisoners in an adult jail. This can be contrasted with a magistrate's or judge's ability to sentence a young person to YTC.[96] While young people may be *sentenced* to a youth-specific correctional environment they cannot be *remanded* to one.

If decision makers decide to remand young people they will enter the adult correctional system

Youth Unit

There is an exception to the general position that a young offender will be held on remand with other adult remandees or prisoners. Young offenders may be accommodated in the Youth Unit located at Port Phillip Prison in Laverton. The Youth Unit was established in 1999 to reduce the risk of suicide and self-harm among young people who enter into the adult correctional system. The Youth Unit caters for young people who:

- are aged 17–25 (with first preference going to prisoners aged 17–21 years);
- have a minimal history of prior incarceration in adult prisons;
- display a willingness to participate in the programs of the unit;
- agree to abide by the unit's rules and be of good behaviour;
- are not alleged to have committed an offence of a sexual nature.[97]

The Youth Unit is able to accommodate 72 remandees.[98] Magistrates and judges have no power to direct that an accused be assessed for or placed in the Youth Unit. Instead, allocations to the unit are made by an Induction Officer at Port Phillip Prison. There is no system of 'fast-tracking' young people into the unit, which means that considerable periods of time may be spent on remand elsewhere before a young person enters the unit. Allocation to the unit is largely dependent upon available bed space and whether the accused meets the above criteria. Therefore, many young people do not go to the Youth Unit. All remandees who enter the unit are required to undertake programs directed at education and rehabilitation that are run by the unit. Programs include communication skills, anger management skills, consequential thinking, basic English and maths and budgeting skills.

Of particular significance is the mentor system that operates in the Youth Unit, where carefully selected serving prisoners mentor young remandees. Discussions with staff at Port Phillip Prison indicated that the mentoring system is critical to the unit's success.[99] New remandees, who are often at their most vulnerable, tend to initially distrust corrections' staff and therefore do not seek help when they need it. According to those we consulted, the ability to talk to a mentor has alleviated some of the problems experienced by new remandees. It is also a way for peer pressure to be applied in a positive rather than negative way in the correctional system. The mentoring system is used to encourage new inmates to embrace a non-offending lifestyle and stay away from prison, rather than inducting them into seeing it as a way of life.

A new 600-bed remand facility, to be named the Metropolitan Remand Centre, is presently under construction. It is envisaged that it will be completed in March or April 2006. Located in Ravenhall, it will also have a unit dedicated to young people on remand. The unit will accommodate 35 people aged 18–25. It will operate in tandem with the existing Youth Unit at Port Phillip Prison.[100]

Reception of Young People in the Youth Unit

Remandees typically 'transit' through Port Phillip Prison. In other words, remandees will generally be held at Port Phillip Prison for some period, even if only to pass through while being transferred to another facility. Therefore, if young people meet the criteria we have described above, there is a chance they may be received by the unit.

An issue highlighted in consultations was the length of time it may take for a young person to enter the Youth Unit.[101] There is no 'fast-tracking' of young people within the prison system for reception in the youth unit. Nor is the unit advised of suitable young people or particularly vulnerable young people who have entered the corrections system. We have already noted that a decision maker is unable to direct that an accused be sent to the Youth Unit. Accordingly, a young person may spend several weeks, or sometimes more than a month, in police cells or other custodial facilities before being placed in the Youth Unit. In such circumstances, there is no guarantee they will not mix with older sentenced prisoners. The inability to fast-track young people into the unit contributes to a situation where potential harm may be inflicted upon them while they are associating with older and hardened accused.[102] It may also increase the risk of self-harm.

This concern is premised on the presumption that the youth unit is a safer custodial environment for young people than being housed in the general adult prison population. In some consultations this presumption was disputed.[103] It appears that the incident rate in the Youth Unit is highly dependent on the provision of enough prisoner mentors.[104] As we have discussed, prisoner mentors are older prisoners serving sentences who assist younger remandees during their time in the unit. We were told that there have been periods when the incident rate in the Youth Unit has been the highest of all units at Port Phillip Prison. This was said to have occurred when there was a lack of prisoner mentors.[105]

Incidents that are counted in the **incident rate** include acts of self-harm, acts of violence or other criminal conduct.

In one submission it was suggested that decision makers should have the ability to remand young people directly to the Youth Unit.[106] Such a legislative power does not currently exist. Also, it could not be accommodated under the present system without there being resource repercussions.

Young People Remanded to Youth Training Centres

In its review of the Bail Act, the LRCV addressed the issue of remand to a YTC for 18–21 year olds.[107] It posed the question of whether remand facilities should be established at YTCs so that, in appropriate cases, young people could be remanded to such facilities. In recommending such a course they made the following comments:

> This proposal received considerable support in submissions received in response to the discussion paper, with the Chief Magistrate and the Legal Aid Commission, among others, strongly endorsing the proposal.[108]

In the consultations we undertook, a similarly strong endorsement was voiced.[109] Magistrates expressed the view that it was very important that the ability to remand young people to YTCs be incorporated into our bail system.[110] They pointed out that the custodial setting to which an accused would be remanded was taken into account in making a bail decision. They said that the decision to remand a vulnerable and immature 17 year old to an adult prison was always an extremely difficult one.[111] Such sentiments were expressed in other consultations as a key reason for wanting an ability to remand young people to a YTC.

The issue of remanding a young person to a YTC was addressed in the case of *Department of Human Services v Magistrates' Court of Victoria* (*Kass' Case*).[112] While the judge said that in certain defined circumstances a young person could be remanded to a YTC, the ultimate result of *Kass' Case* has been that magistrates have not done so.

A young person may spend time on remand in an adult correctional facility but then serve his or her sentence in a YTC. The Sentencing Act details factors that a judge or magistrate must take into account when deciding whether to sentence a young person to a YTC. These include whether the young person is 'particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison'.[113] Such considerations are equally pertinent to young people on remand.

…while young people can be sentenced to a YTC they cannot be remanded to a YTC

As was recognised by the LRCV, any move to implement a system whereby young people could be remanded to YTCs would not automatically mean that every 17–21 year old was remanded in one. Instead, as is the case now with a young person who is to be sentenced to a YTC, an assessment would be carried out to determine an accused's suitability. Moreover, there is no reason why the possibility of a transfer to an adult facility could not be incorporated into any legislative change if a young person remanded to YTC was subsequently found unsuitable for placement there.[114] Such a power already exists for children aged over 16 who are serving sentences in YTCs.[115]

Those who argued against the ability to remand young people to YTCs in consultations pointed out that they are not presently geared towards the remand of 18–21 year olds, and are insufficiently resourced for it. A concern was also expressed about having older, potentially more 'experienced' remandees associating with younger accused. This issue was addressed by the LRCV. It said that while being important concerns, they 'may point to the need for new facilities'.[116] A further concern centred on the belief that YTCs lacked the appropriate structure and discipline to adequately deal with young people, as opposed to children.[117]

Clearly, young people would benefit most from their time on remand in YTCs if they had adequate supervision and support programs, similar to the initiatives that are in place for sentenced YTC detainees. However, given the uncertain position of accused on remand, the provision of such services can be difficult. This was raised by Arie Freiberg in his review of Victoria's sentencing laws:

> Some 20% of male detainees [in a YTC] are also on remand. DHS workers advise that this exacerbates overcrowding and adversely affects good running of centres because the detainees are concerned and unsettled by the unresolved nature of the outstanding cases, the staff cannot plan programs because of the uncertain duration of the stay …[118]

While it is not the function of the commission to make recommendations regarding resources, there are resource implications involved in this issue that it would be remiss not to report. Any move to remand young people to YTCs would require restructuring of resources and is likely to require additional resources and staff.

When considering potential resource implications, it is important to have an understanding of how many young people are presently being held on remand. Young people may be remanded in police cells or adult prisons. There was a daily average of 12 accused aged 17–21 and 18 accused aged 21–24 being held on remand in police cells for the 2004–05 period.[119] For the same period, there was a daily average of 44 accused aged 17–21 and 97 accused aged 21–24 held on remand in correctional facilities.[120] As we have mentioned, following the change in the law in 2005, 17 year olds can now be remanded to a YTC.

Question 66 ?

Should it be possible for decision makers, in appropriate circumstances, to remand young people (aged 18–21) to youth training centres?

Section 49 Procedure

There is an exception to the rule that a person aged 18–21 cannot be remanded to a YTC. This exception is referred to as a 'section 49'—a reference to the section of the Magistrates' Court Act which provides for such a process. Section 49 provides that where an accused who is charged with new offences is already undergoing a sentence in a YTC, the court may adjourn the new matters with which he or she is charged and instead of remanding the accused in an adult jail return him or her to a YTC.[121]

The above procedure may occur in different contexts. For example, accused who already have charges listed in the Children's Court may be brought before the Magistrates' Court. This would occur where the accused has allegedly committed an offence when aged 18, therefore falling under the jurisdiction of the Magistrates' Court, but was 17 at the time of allegedly committing the offence listed in the Children's Court. The Magistrates' Court may decide that it is appropriate to remand the young person in custody. As we have seen, the young person would be placed in the adult correctional system. In such a situation, if the accused pleaded guilty to the Children's Court charge, a YTC sentence could be received and section 49 could be used so that any period of remand for the Magistrates' Court charge would then be spent in a YTC, where he or she is already undergoing a sentence. The use of such a procedure minimises the time the young person spends on remand in adult prison.

The section 49 procedure may also be used where the young person is already on remand in an adult correctional facility on outstanding charges. As we have seen, although young people may be sentenced to YTCs, they cannot be remanded there. The young person's lawyer may advise him or her to plead guilty to one or more of the charges for which a YTC sentence may be likely. Once sentenced to a YTC, the young person would be removed from adult remand and placed in a YTC. A section 49 application for transfer could then take place on the outstanding charges so that the accused is serving time on 'remand' for those charges in a YTC.[122]

Information provided by DHS shows that over the past nine years approximately 169 young people have been 'returned to the custody' of a YTC through the section 49 procedure. The majority of those transferred were male and aged 17–19 years.[123]

In the circumstances described, some defence practitioners feel that they must 'rush' the matter and encourage their client to plead guilty to avoid them being remanded in an adult prison.[124] However, there is a danger in this procedure, as young people are not assured of receiving a YTC sentence when they plead guilty. More importantly, there is concern that young people are pleading guilty to offences in circumstances where they would not otherwise do so in an attempt to avoid being held in an adult prison. A further risk in this procedure is that an accused's YTC sentence may finish before the matters for which he or she is on 'remand' have been finalised. In such circumstances, the accused would go directly from the YTC to remand in an adult prison.

In has been suggested that where a young person has charges in the Children's Court and Magistrates' Court at the same time, the problem could be avoided if the Magistrates' Court had the power to remand a young person to a YTC. In doing so, the Magistrates' Court could make an assessment of the Children's Court matters and whether they would attract a YTC sentence.[125]

The section 49 procedure is quite complex. It is unlikely that the manner in which it is currently being used was envisaged by policy makers when it was included in the Magistrates' Court Act. We have not heard a great deal about section 49 in our consultations. One submission suggested that section 49 should be re-drafted. It was pointed out that 'practically the section works but it is not easy to understand how the process works in light of that section'.[126] We would like to hear more about specific concerns with the section 49 procedure.

Question 67 ?

Do sections 49 of the *Magistrates' Court Act 1989* and 5A of the *Bail Act 1977* operate effectively? What concerns, if any, are there with these sections?

Change in Approach to Bail Decisions for Children

For the most part, the Bail Act as it applies to adults also applies to children. We have already explored those areas where there is some variation between the manner in which adults and children are treated.

It is clear that the considerations involved in a bail decision for a child will differ from those involving an adult. The age, maturity and level of understanding of a child are all factors that need to be taken into account when making a bail decision. The possible negative effects of incarceration should also be considered. Superior courts have recognised the vulnerable position of children and young people in bail decisions when determining whether an accused has shown cause or demonstrated exceptional circumstances.[127] Similarly, comments from such courts when sentencing young offenders also demonstrate the special concerns that arise when young people are to be detained in custody.[128]

The lack of reference to the special circumstances of children in the Bail Act was raised in consultations.[129] It was said that it was odd to treat children like adults at the commencement of the criminal justice process and yet legislatively require different considerations and provide different sentencing options at the conclusion of the process. While matters relevant to young people would typically be taken into account when the bail decision is made, this is not reflected in the legislation. Given that decisions are often made under the Bail Act by people who are not legally qualified—and perhaps are not as familiar with issues surrounding the interaction of children with the criminal justice system—consideration could be given to including specific legislative guidance for decision makers who are dealing with the bail of children.

The Children and Young Persons Act directs that certain matters must be taken into account when a judge or magistrate is deciding what sentence to impose on a child.[130] This list of factors is reproduced in Appendix 6. The court is to have regard to matters such as the need to preserve and strengthen the family relationship, the desirability of allowing a child to live at home and the need to minimise the stigma to a child that results from a court determination. In one consultation, it was suggested that a similarly drafted section should apply for bail.[131] The inclusion of such a provision would ensure that decision makers are required to turn their minds to child-specific issues.

In one consultation the view was put that the Bail Act should specifically make reference to the remand of children as an option of last resort.[132] This would bring the Bail Act in line with the hierarchy of sentences as outlined in the Children and Young Persons Act, where detention in a YTC is not to be imposed if other less severe measures are considered appropriate.[133] The Victoria Police Manual also directs police that the remand of children 'should be considered as a last alternative' and that bail with conditions is preferable.[134]

There is also a broader issue about the interaction of the Bail Act and the Children and Young Persons Act. The Bail Act makes no reference to the provisions of the Children and Young Persons Act that apply to bail. In consultations we heard that when dealing with children some decision makers simply fail to consider the provisions of the Children and Young Persons Act. For example, we were told that police will not always contact an independent person, such as a CAHABPS worker, when considering bail, as is required under the Children and Young Persons Act.[135] This is a matter that has previously been investigated by the Victorian Ombudsman.[136]

One option for ensuring that the bail-specific provisions of the Children and Young Persons Act are considered could be to remove them from that Act and place them in the Bail Act. Having child-specific issues side-by-side with provisions relevant to adults may also help to reinforce the different considerations that come into play with the two groups. However, others may see it as desirable to keep all child-specific issues in a single Act.

Question 68 ?

Should the *Bail Act 1977* contain a provision similar to section 139 of the *Children and Young Persons Act 1989* so that child-specific factors must be considered when making the bail decision? If so, what matters should a decision maker be required to consider when dealing with a child? Should the provisions of the *Children and Young Persons Act 1989* as they apply to bail be moved to the *Bail Act 1977*?

Chapter 10
Marginalised and Disadvantaged Groups

Introduction

This chapter asks questions about improving the bail system for particular groups of people within the community. In particular, it looks at the interaction of the following groups with the bail system:

- women;
- drug dependent accused;
- homeless people;
- people with cognitive impairment.

People may fall into a number of these groups, however, for the purposes of discussing the particular issues we will deal with each separately. We have already discussed how the bail system affects Indigenous accused throughout the paper. In this chapter, we pay particular attention to the support services that are available for Indigenous accused who come into contact with the bail system.

The importance of ensuring that marginalised and disadvantaged groups are treated fairly by the criminal justice system is emphasised in the Attorney-General's Justice Statement:

> Members of marginalised and disadvantaged groups form a disproportionate number of the defendants coming before the courts. A key policy issue for the Government is determining what approaches might best take account of the disadvantage experienced by these groups.[1]

Throughout this paper we have referred to the support services that exist for children, young people and people with drug dependency problems who are on bail. In this chapter we look further at support services and, where possible, discuss the effectiveness of such services for marginalised and disadvantaged groups.

Although many of the issues discussed in this chapter were touched upon during preliminary consultations, they were not discussed in detail. This chapter therefore outlines what the commission understands to be the main issues for each group. We would welcome submissions alerting us to additional issues not covered in this chapter. The commission intends to deal with issues for marginalised and disadvantaged groups in more detail in its next round of consultations.

Women

Although women make up a smaller proportion of the offender population, the number of women in custody in Victoria has increased significantly in recent years.

Between 30 June 1998 and 30 June 2003 female prisoner numbers have increased by 84%, which is three times the growth in male prisoners in the same period.[2] A variety of reasons have been identified for this increase, including an increase in violent crime and drug-related offences among women.[3] A Deloitte study found that female prisoners are more likely to have mental health and drug dependency issues than male prisoners.[4]

Another reason identified is the general increase in remand, particularly remand of women with inadequate accommodation and mental health or drug addiction problems.[5] There has also been growth in remand rates of women from culturally and linguistically diverse communities, in particular Vietnamese women.[6] While figures on relative remand rates for Indigenous women are not available, it is clear they are over-represented within the prison system in Victoria. At the national level, Indigenous women are 20 times more likely to be imprisoned than non-Indigenous women.[7]

In consultations, the commission was told that the bail support program is less successful for women than men.[8] This was because women were less willing to participate in the program, there was a lack of available safe and supported accommodation, and women often had young children to care for.[9]

Question 74 ?

Are there particular measures which could be put in place to assist women from culturally and linguistically diverse backgrounds or Indigenous women?

Women as Primary Carers of Dependent Children

For women, the question of bail is complicated by the fact that they are often primary or sole carers of children. Victorian estimates put the number of children who are directly affected by the imprisonment of a parent at between 3–4000.[10] This figure includes parents who have been sentenced as well as those on remand. The percentage of women in custody with dependent children in Australia is estimated by the Australian Bureau of Statistics to be about 60%.[11]

Research indicates that while the children of male prisoners usually remain in the care of their mothers, the children of female prisoners are usually in the sole care of their mothers before they are imprisoned and are not usually cared for by their fathers during their mother's imprisonment.[12]

The existence of dependent children may make locating bail accommodation (where accommodation is an issue) more difficult because of the accused's need to look after the children. It may make it impractical for women to participate in a bail support program involving drug rehabilitation or employment training. It may also make it difficult and sometimes impossible for women to comply with some bail conditions, for example, regular reporting requirements.[13] Women from culturally and linguistically diverse backgrounds and Indigenous women may be reluctant to access support services within their own communities because they do not want people to know they have been accused of an offence.[14] Mainstream support services may be inappropriate for either cultural or linguistic reasons. All of these factors may combine to make it difficult for women to succeed in their application for bail.

For women remanded in custody, and their children, the social disruption can be considerable. They will be reliant upon others—family members, partners or even older children—to care for dependent children for an indefinite period. There may be severe psychological implications for women in such circumstances; anxiety associated with concern for children may lead to depression and self harm.[15]

The consequences for children may also be severe. Research suggests that children with parents in prison are likely to experience a range of psycho-social problems including fear and anxiety, separation anxiety, shame, depression and even post-traumatic stress disorder.[16] Some research links the experience of having a parent taken into custody during childhood with increased risk of antisocial and criminal behaviours.[17] Extended families, particularly grandmothers, can have considerable difficulty caring for children and may

experience practical and economic problems.[18] Although much of this research relates to the children of parents who are serving prison sentences, the issues are the same for people on remand, with the added factors of uncertainty about the length of time on remand, whether bail will be granted and when the case will finally be heard.

Question 72 ?

Should the *Bail Act 1977* specifically require a person's status as primary carer to be taken into account when deciding whether to grant bail? Should any accommodation provided for women also be equipped to accommodate children?

What Happens to Children of Female Accused?

Arrest and Charge

In Victoria, as in many other jurisdictions, there appears to be no clear guidelines or procedures for dealing with dependent children where their mother has been arrested and taken into custody.[19] There is nothing in the Victoria Police Manual dealing with arrest, bail and remand procedures for women. While there are protocols and procedures about child protection between Victoria Police and DHS, these relate to children at risk of physical and/or sexual abuse and child offenders. There is nothing in the protocol which deals directly with the dependent children of female accused or of any person in the position of primary carer. Police are not required, for example, to find out whether a woman has dependent children when she is arrested or to make arrangements for any children who are present when they make an arrest.

As a result, there seems to be little consistency in the way children are dealt with when their mother is taken into police custody. Police practice varies from case to case. This may lead to outcomes that are inappropriate for children. In interviews conducted by Terry Hannon as part of a research project on the children of imprisoned parents, women reported being given little or no time to arrange for childcare.[20] In some cases children might be left with neighbours if no one else is available. Others reported being remanded in custody with no idea where their children were.[21]

Children will not always be present when an arrest occurs. Arrangements may not be made for children at the time of arrest, either because the woman has no time to do so or because she believes she will be granted bail and therefore return home shortly.[22]

In other circumstances, children will accompany their mothers to the police station and be told to wait somewhere in the station while their mothers are being interviewed by police. If the woman is held overnight or longer, the police will ask her to nominate someone to come and collect and care for the children. These people may or may not be appropriate carers.

Question 73 ?

Should police be required to find out if the person they are arresting has dependent children? Should the police be required to make arrangements for the dependent children of people they arrest? What processes, if any, should be put in place to protect the dependent children of people when they are arrested and charged with an offence?

Remand in Custody with Children

Corrections Victoria has a Mothers and Children Program which allows for mothers who are pregnant or who have children up to the age of five to have those children stay with them in prison. This includes women who are on remand. The primary carer status of the

woman is the key in determining eligibility, which means women who are not the biological mother of a child can still apply to have the child reside in prison.[23]

There is some discretion with the upper age limit of the child eligibility. It may be extended if it is viewed to be in the best interests of children to remain with their mothers. Nevertheless, this will generally leave school-aged children outside the eligibility criteria. In such situations there are no set guidelines for what should be done. DHS may become involved, but only if it is contacted, and there is no mandatory requirement for the court or the police to contact DHS.

Better Pathways Strategy

Corrections Victoria has developed, and is currently finalising, a multi-agency strategy that will seek to reduce women's imprisonment and offending. Included in the strategy will be 12 transitional housing properties for women on bail and a 20-bed intensive support unit to accommodate and provide specialist care for women with mental health treatment needs. The strategy is to be released towards the end of 2005. Available descriptions of the strategy do not mention the specific issue of dependent children of women who are remanded in custody.

People who are Drug Dependent

The correlation between drug dependence and crime is well documented. Recent Australian studies of sentenced prisoners have shown that as many as 58% of women and 62% of men in prison were under the influence of drugs and/or alcohol when they committed the offence for which they were imprisoned.[24] The cost to the Australian community of drug-related offending is immense—it has been estimated at $1.96 billion annually.[25]

There has been growing recognition that traditional judicial responses to drug-related crime are inadequate. As a result, various initiatives have been put in place within Victoria to address drug-related offending. The most notable initiative is the introduction of drug courts. Drug courts operate as a specialist court of the Magistrates' Court and impose sanctions that allow eligible offenders to receive supervised drug treatment in the community.[26]

CREDIT–Bail Support Program

We have discussed several aspects of the CREDIT–Bail Support Program elsewhere in this paper.[27] The CREDIT–Bail Support Program aims to:

- provide early intervention through access to drug treatment and rehabilitation programs;
- provide access to accommodation, welfare, legal and other community support;
- establish monitoring and support of the accused by the court for three to four months;
- minimise the possibility of harm to the accused and the community by addressing an accused's drug problems.[28]

A broader objective of the CREDIT–Bail Support Program is to reduce the likelihood of an accused who has undertaken the program receiving a custodial sentence.

CREDIT–Bail Support is not limited to accused with drug dependency problems. However, most participants in the program do have drug or alcohol problems. The CREDIT–Bail Support Program uses a case-management approach. Each accused is assessed and individual services are put in place tailored to his or her specific needs. Assessments are

carried out by accredited alcohol and drug clinicians. In consultation with the accused they develop an individual treatment plan. Services offered by the CREDIT–Bail Support Program include:

- referral to drug treatment services, including detoxification and rehabilitation programs;
- referral to and payment of short-term crisis accommodation;
- the provision of passport photos for identification and medical services;
- referral to pharmacotherapies and payment of medication in the short term;
- referral to employment programs for training and employment assistance;
- referral to other government and non-government support services, such as anger management.

Case Study 5

Lisa is a 26-year-old woman living in a Housing Commission flat in Collingwood. Lisa is unemployed, having left school in year 10. She has a 3-year-old son, David. David's father no longer lives with Lisa and does not provide any financial assistance. Lisa has regularly been using heroin and amphetamines for the past five years. During that period she has had two overdoses. She also uses cannabis and tobacco.

Lisa has been committing house burglaries with her current boyfriend and pawning the stolen items to pay for drugs. Her boyfriend has also encouraged her to prostitute herself when they are unable to otherwise obtain money.

Lisa is arrested for shop theft when she steals food from a supermarket. Her fingerprints are taken and are found to match fingerprints found at the scene of a number of house burglaries that have occurred over the past four months. In addition, Lisa has a prior record for shop theft and prostitution. The police believe there is an unacceptable risk that Lisa will commit further offences if she is released on bail. They do not grant bail and take her to the Melbourne Custody Centre beneath the Melbourne Magistrates' Court.

Lisa sees a Legal Aid duty lawyer in the cells and says that she wants to apply for bail. Her lawyer has an initial discussion with the CREDIT–Bail Support Program worker at the court, who indicates that Lisa would probably be eligible to participate in the program. Lisa's lawyer discusses the program with her and Lisa says that she would comply with the conditions of the program if she was granted bail.

Lisa's lawyer makes an application to the court for bail. Following discussion with Lisa's lawyer, the magistrate directs Lisa to undergo an assessment for suitability to participate in the CREDIT–Bail Support Program. The CREDIT–Bail Support Program worker finds that Lisa is eligible. An assessment report is completed and given to the magistrate. Lisa is granted bail on the condition that she complies with a drug treatment program, attends regular sessions with a drug counsellor and regular appointments with her CREDIT–Bail Support Program worker.

Lisa's case is initially adjourned for two weeks so that all these arrangements can be made and Lisa can begin her treatment. The magistrate tells Lisa that if she has not commenced treatment when she comes back to court her bail will be revoked and she will be remanded in custody. If she has complied with her bail conditions her matter will be further adjourned for six weeks and her progress will be monitored when she returns to court.

CREDIT Evaluation

An independent evaluation and review of CREDIT was undertaken in 2004 from a legislative, policy and operational perspective.[29] We have already discussed the fact that there is no legislation underpinning CREDIT and have looked at perceived problems with the source of referrals to the program.[30]

The CREDIT evaluation and review showed that the majority of CREDIT participants were males aged 20–29 years.[31] This group accounted for approximately 45% of all participants from the inception of the program in January 1999 to May 2003.[32] The evaluation and review also showed that the vast majority of participants in the program had a prior criminal conviction.[33]

Some of the most interesting data from the review relates to the ultimate sentence received by accused who had taken part in the program. Figure 17 shows sentencing outcomes for CREDIT participants from January 1999 to 30 September 2003. During that time, 80% of participants were recorded as having successfully completed CREDIT.[34] The graph differentiates between those who successfully completed and those who failed to complete the program.

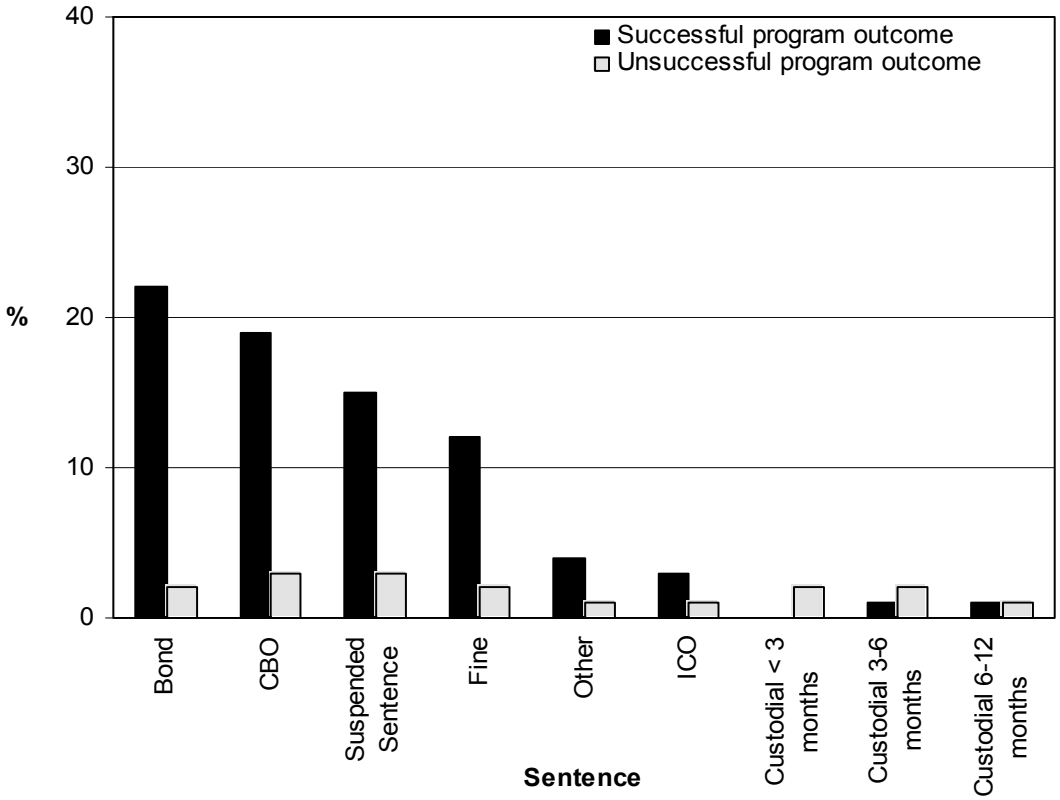
The data shows that, overall, approximately 92% of participants received a non-custodial sentence, with the most frequently imposed sentence being a bond (24%) followed by a community-based order (22%). These figures are most useful when compared to the general sentencing patterns for all accused in the Magistrates' Court. Unfortunately, the figures are not capable of being matched identically and not all sentencing outcomes can be compared. However, it is possible to say that for those accused who successfully completed CREDIT over the period discussed, only 2% received a custodial sentence.[35] In contrast, figures show that in 2001–02 approximately 8% of all accused sentenced in the Magistrates' Court received a custodial sentence.[36]

Measuring the success of the program in reducing re-offending is difficult. The evaluation took a sample of 100 accused people who had completed the program between 1 July 2002 and 31 December 2002. It tracked the sample for a minimum of 325 days to a maximum of 508 days after they had commenced CREDIT to see whether they were convicted of any criminal offences in that period. It did not include convictions that were recorded for offences that were committed prior to their commencement on the CREDIT program. The analysis found that between 54% and 70% of participants did not re-offend within the first 12 months after starting CREDIT.[37] However, no comparative data was provided for accused who had not participated in CREDIT, so it is difficult to draw any conclusions about the effect on recidivism. It also did not compare seriousness of offending before and after involvement in the CREDIT program. Anecdotal evidence from those consulted for the CREDIT evaluation and review was that participation in the CREDIT program did result in a reduced level of re-offending.[38]

Most of the groups that we consulted with expressed satisfaction with the CREDIT–Bail Support Program. This corresponds with comments in the CREDIT evaluation and review. The review assessed the views of those involved with CREDIT and discussed their perceptions of accused people's welfare and social functioning following participation:

> Stakeholders provided glowing anecdotal references to the positive outcomes experienced in participants' welfare and social functioning. Many stakeholders spoke of participants who might have died if they had not been involved in the CREDIT program, and those who have gone on to improve their life circumstances and activities, such as returning to study. Several stakeholders reasoned that, at minimum, involvement in CREDIT allows participants to understand what drug treatment involved and also assists their knowledge of various services that can support them in the future. In this sense, even a participant who 'failed' CREDIT compliance may nevertheless achieve benefits in the future.[39]

Figure 17: Sentencing outcomes following participation in the CREDIT program[40]



Question 75 ?

Are there any problems with the procedures or policies of the CREDIT–Bail Support Program that have not already been identified in this paper?

Community-based Drug Initiatives

CREDIT was developed through collaboration between the Magistrates' Court, the Department of Justice, the Department of Human Services and Victoria Police. There are other drug related services in place that have been developed by non-government service providers for accused people on bail. These services are often run by community health services in conjunction with other groups, such as local police and community bodies. These services often receive a portion of their funding from the state government.

We now look at community-based programs for accused on bail who have drug dependency problems. These services are representative of other initiatives that exist throughout the state. A key advantage of community-based initiatives is that they operate outside the normal court system. This means that they are able to pick up accused who don't respond well to structured, court imposed programs such as the CREDIT–Bail Support Program. Also, because they operate at a local level, they are capable of building effective working relationships with local groups, most importantly the police.

Northern Arrest Referral Team

An example of a community-based initiative that assists accused who have drug and alcohol dependency problems is the Northern Arrest Referral Team (NART). NART began in May 2003 in the communities of Whittlesea and Darebin. It was developed as a result of

collaboration between local police, the Plenty Valley Community Health Centre and an experienced drug and alcohol worker, with funding from Crime Prevention Victoria. A comprehensive evaluation of NART was undertaken in 2004.[41]

NART workers see accused people close to the time of their arrest and provide 'crisis-related support and referrals to services that can assist in addressing the issues that led to arrest'.[42] Workers assist participants' progress through the court system with the ultimate aim of reducing future contact with the criminal justice system. NART deals primarily with accused who are charged with domestic violence related offences (40% of participants recorded) and drug related offences (20% of participants recorded).[43] It also assists accused with psychiatric problems.

NART workers begin by conducting an assessment to work out the initial needs of the accused. In the majority of cases, an individual treatment plan is developed that puts in place programs and sets goals. Services utilised may include counselling, pharmacotherapy and mental health.

Not all NART program participants are on bail—only 20% are on bail or have been charged with an offence.[44] Like CREDIT, the majority of participants are males (63%).[45] According to the NART evaluation, the program enjoys strong police support and much of its success has been credited to this support. As a result, the majority of referrals into the program are via the police.[46]

Another evaluation of NART is currently being undertaken to track participants' offending behaviour following completion of the program. We hope to report on this evaluation in our Final Report.

Arrest Referral Program

The Arrest Referral Program operates in the City of Port Phillip. It caters primarily for sex workers who are charged with street prostitution offences, such as solicitation or loitering.[47] The program is an initiative of Inner South Community Health Centre and is supported by the City of Port Phillip, Victoria Police and other health and community agencies in St Kilda.

The majority of the program's participants are female (72% over the 2004–05 financial year) and have a drug dependency problem.[48] Participants can receive help from the program whether they are on bail or summons. Workers advocate on behalf of participants and arrange services including drug treatment, accommodation, legal advice and financial counselling.

Participants in the program are typically self-referred, referred by police or referred by health and community agencies.

The success of this program is linked to a specialist court that has been developed for sex workers. The Tuesday Afternoon Court sits on the first Tuesday of the month at the Melbourne Magistrates' Court. Police stations in the City of Port Phillip bail sex workers to appear at the court, which is crucial to the court's effectiveness.

The development of Tuesday Afternoon Court has seen an increase in the number of accused people appearing to answer their charge. Accused can also make contact with health and community programs while at the court, for example, accused are often referred to the CREDIT–Bail Support Program. Combined with the Tuesday Afternoon Court is a legal clinic operated by the St Kilda Legal Service that caters specifically to sex workers. Over the 2004–05 financial year, the program recorded 460 client contacts.[49]

The commission would like to hear more about community-based drug initiatives that cater for accused who are on bail. In particular, we would like to hear about other programs, especially in rural Victoria, and people's experience with these programs.

Question 76 ?

Do community-based programs for accused on bail who have drug dependency problems assist in rehabilitation and help minimise future contact with the criminal justice system? Are there any problems with such community-based programs? How should the success of community-based bail support drug programs be measured? What features of such programs make them likely to be successful?

Homeless People

There are many definitions of homelessness; lack of access to secure and safe accommodation is a suggested definition. The Australian Bureau of Statistics divides homelessness into three segments: primary homelessness, which covers people without conventional accommodation, such as those living on the streets, in cars or in squats; secondary homelessness, which covers people in temporary accommodation such as boarding houses, refuge or crisis accommodation; and tertiary homelessness, which covers people who are living in boarding houses in the medium to long term.[50]

On the basis of the bureau's definition, on census night 2001, the Australian homeless population was 99 900. Primary homelessness accounted for only 14% of this figure.[51] Approximately half of the people in Australia who were homeless had temporary shelter at night with friends, acquaintances and relatives.[52] These figures highlight the fact that homelessness is, to a large extent, hidden and that it encompasses a broader group of people than might commonly be perceived.

It appears that homeless people are more likely than others to come into contact with the criminal justice system. Once charged with an offence, a person's lack of accommodation can cause problems with bail. Before discussing these potential problems, however, it is useful to look briefly at how homelessness may lead to offending.

Homelessness and Crime

Recidivism is habitual or repeat offending.

As mentioned, homeless people are disproportionately represented within the criminal justice system and recidivism among homeless offenders is high. As Deputy Chief Magistrate of the Melbourne Magistrates' Court, Jelena Popovic has said, 'the day to day life of a homeless person is often chaotic, unstructured and can be taken up largely with where the next meal or bed is coming from'.[53] Homeless people will generally not be able to open bank accounts and will often be unable to access social security benefits.[54] Homeless people may often also have other problems or issues that coincide with and may have contributed to their homeless state, such as mental illness, cognitive impairment or drug and alcohol addiction.[55] Women and young people who are homeless may have left their homes due to violent domestic situations. Homeless people with mental illness are unlikely to be able to access mental health services. Homeless people with drug addiction will find it difficult to access drug treatment services.[56]

Arguably, the criminal justice system further entrenches the problems of homelessness and that the law discriminates against homeless people by criminalising activities such as begging and sleeping in certain places, which are often part of the poverty and disadvantage associated with homelessness.[57] Other common crimes linked to homelessness include car theft in situations where a person has broken into a car to sleep in it and shop theft where food has been stolen.[58]

Relationship between Homelessness and Bail

The lack of appropriate accommodation for homeless accused arose repeatedly during our consultations.[59] It was felt by many that lack of appropriate accommodation made it more likely that bail would be refused.[60]

Although homelessness is not of itself a reason to refuse bail, the availability of stable accommodation is a matter to be taken into account in a bail hearing. For example, in Chapter 6 we saw that permanent and stable accommodation can contribute to an accused having shown cause.[61] The court may also seek assurance that a person has stable accommodation in its general assessment of whether the release of that person would pose an unacceptable risk.[62]

While section 129(7) of the Children and Young Person's Act expressly prevents a child's lack of adequate accommodation from being taken into account when making a bail decision, there is no such provision in the Bail Act. It is not clear whether the existence of this provision makes children more likely to be granted bail. In practical terms, however, it does appear that homelessness does make it more difficult for adults, if not also children and young people, to be granted bail.

Question 69 ?

Should the *Bail Act 1977* expressly state that lack of accommodation should not be a factor in refusing bail in the same way that section 129(7) of the *Children and Young Persons Act 1989* does? Are the accommodation needs of homeless offenders being met adequately? If not, what kind of accommodation should be made available? Should support be provided with the accommodation?

Services for Homeless People on Bail

There are a number of support services that address the issue of homelessness and attempt to reduce the likelihood of a homeless person being remanded in custody.

- The CREDIT–Bail Support Program (discussed in Chapter 8): This program has access to 20 transitional properties around Melbourne that are available for accused on bail. Accused people are regularly visited by a housing worker to ensure they are attending appointments. The program also finds people crisis accommodation by liaising with organisations that provide housing. In addition, the program assists people on bail to find employment and provides information about the criminal justice process, particularly their responsibilities while on bail.[63]
- Bail Hostels: A bail hostel is accommodation for the specific purpose of housing people on bail. Accused people can be directed to reside at a hostel as part of their bail conditions. The commission is aware of only one bail hostel in Victoria; the majority of people are placed in accommodation through other services. We discussed bail hostels briefly in Chapter 8 when looking at special conditions of bail.
- CAHABPS: CAHABPS is a statewide after-hours service offered by DHS for children who are being considered for bail. CAHABPS provides workers outside business hours who assess a child's suitability for bail, provide the child with information about the bail process and, if appropriate, help to place the child in accommodation. We discussed CAHABPS in detail in Chapter 9.

Problems with Support Services for Homeless Accused

The view was expressed in our consultations that there is a shortage of accommodation available for homeless accused, particularly in regional and rural areas.[64] More specifically, appropriate accommodation is unavailable for women, the mentally ill, Indigenous

Australians and people with cognitive impairment. Several consultations and one submission linked lack of accommodation to an increase in the number of people on remand.[65]

Outside business hours, the decision about whether to grant bail to an adult accused will be made by either a police officer or a bail justice. Neither the police nor bail justices have access to court support services after hours so the decision maker may have to make arrangements for the accused person if they decide to grant bail.[66] After-hours decision makers do have access to support services for accused children through DHS, as discussed in Chapter 9.

Issues were also raised in our consultations about the quality of accommodation that is currently available. There is only one bail hostel in Victoria and it is not considered a good option as it provides no supervision of the accused.[67] There is no regulation of bail hostels in Victoria—hostels are not required to meet particular standards or provide support services. If more bail hostels were introduced they would need to provide supervision and be regulated. Hostels for Indigenous accused are said to be expensive, making it difficult to manage financially.[68]

People with Cognitive Impairment

Accused with cognitive impairment may not only have difficulty accessing appropriate support, but may also find the bail application process itself difficult. People with cognitive impairment may find it difficult to understand the legal process or their rights within that process. This could include difficulty in dealing with the police interview and the consequent decision to grant or refuse bail, and in accessing bail support services that meet their needs.

Cognitive impairment includes intellectual disability, mental illness (including a personality disorder), autism spectrum disorders, dementia and acquired brain injury.[69]

Cognitive Impairment in the Criminal Justice System

Numerous studies have indicated that people with cognitive impairment are over-represented in the criminal justice system compared with the general population. Research into the association between mental illness and violent offending has shown that men with schizophrenia were three to five times more likely to be convicted of a violent offence than the general population.[70] Research into intellectual ability and understanding of the legal process has shown that people with intellectual impairment are over-represented in all areas of the criminal justice system.[71]

The complexity of dealing with people with cognitive impairment in the criminal justice system was raised in our consultations.[72] There is a belief that people with cognitive impairment often end up on remand, rather than being granted bail, because there is no appropriate alternative.[73]

Cognitive Impairment and the Bail Process

People who have an intellectual disability may have difficulty understanding spoken and written language, and difficulty communicating verbally.[74] They may also be unable to read or write and may tend to understand things that they are told in a very literal way.

According to recent research, people with an intellectual disability can have difficulty understanding terms in the legal process such as ‘offence’, ‘legal practitioner’, ‘statement’ and ‘bail’.[75] There may also be a general lack of understanding about legal rights, an inability to concentrate in a police interview, and a susceptibility to suggestive questions because of a desire to please authority figures. In such circumstances, people with

intellectual disabilities may misunderstand what they are being asked and give false information or even make false confessions.[76]

The above difficulties may be complicated by some police officers' lack of understanding of intellectual disability. Police may, for example, confuse the person's disability with substance abuse or be unable to distinguish between intellectual disability and mental illness.[77]

These problems may prevent a person being dealt with fairly. For instance, there may be a tendency to refuse bail if the decision maker thinks that the person does not understand the conditions of bail.[78]

People with mental illness may be completely unable to participate in an interview with police or bail justices; they may be disorientated, aggressive or unresponsive. In one consultation, the commission was told that accused people with mental illness were refused bail because police and bail justices felt they had no other options available and it was not safe for the person to be released on bail.[79]

Support for People with Cognitive Impairment

There are a number of services that operate at different stages of the criminal justice process to provide support to people with cognitive impairment.

Independent Third Person Program

The Independent Third Person (ITP) program was introduced by the Office of the Public Advocate (OPA) in 1988 to provide assistance to people with cognitive impairment in police interviews. ITPs are available throughout Victoria and police are required under the Victoria Police Manual to involve an ITP when they intend to interview a person who has cognitive impairment, or if they are unsure whether the person has cognitive impairment.[80]

The role of the ITP is to facilitate communication between people with intellectual disabilities and the police, assist people with disabilities to understand their legal rights and provide them with practical support. It is not the role of the ITP to advocate on behalf of people with disabilities or to make decisions on their behalf or to give them legal advice. ITPs are trained to raise their concerns if they feel the person is not coping in the interview or that the process is disadvantaging him or her in some way. They are also instructed to keep records of their meetings with the person. The notes of an ITP may be subpoenaed and used as evidence by a court.

Magistrates' Court Services

There are a number of support services at the Melbourne Magistrates' Court and some at regional courts that provide assistance, referral or support to accused with cognitive impairment.

Situated at the Melbourne Magistrates' Court, the Disability Coordinator provides a statewide service assisting the court when it is dealing with people with disabilities, primarily within the sentencing process but also during bail. The Disability Coordinator ensures that the court has access to information about the person's history and background, including any history of treatment and information about programs and services appropriate for the person. The coordinator will also make recommendations about bail and in some circumstances may supervise a particular person on bail where there are no other alternatives available.[81]

The Mental Health Court Liaison Service is a court-based psychiatric support service providing a psychiatric nurse on site, and on call back-up by a consultant forensic psychiatrist. The aims of the service are to divert mentally ill offenders from the criminal

justice system into appropriate mental health facilities, reduce recidivism in mentally ill offenders, and facilitate the provision of psychiatric reports. The service is available in Melbourne and throughout regional Victoria.

The CREDIT–Bail Support Program arranges appropriate support services for accused with cognitive impairment and assists them to access those services. We discussed this service in detail in Chapter 8 and it is also discussed in this chapter under 'Drug Dependent Accused'.

Information about these and other support services offered through the Magistrates' Court can be obtained from the Magistrates' Court website.[82]

Department of Human Services

DHS provides a range of support services for accused with intellectual disabilities—as defined under the *Intellectually Disabled Persons' Services Act 1986*—and mental illness. These services provide support throughout the criminal justice process, including treatment and specialised accommodation for people with mental illness, and post-release accommodation and assistance. Support provided by Disability Services, a division of DHS, and emergency accommodation provided by DHS are the services most relevant to bail.

Disability Services

Disability Services supports people with a disability through direct service provision as well as by funding other agencies to provide services. Disability Services provides client service workers to assist individuals with an intellectual disability who are in contact with the criminal justice system.[83] The workers have specialist training in dealing with people with disabilities. Workers help the accused to find a solicitor, provide the solicitor with information about the accused's history and circumstances, find a support person to help in court and investigate available accommodation and support services before a bail application.[84] Client service workers also attend bail hearings to provide relevant information to the court or whoever is making the decision about bail. Workers inform the court about services that are available to clients and recommend services that are appropriate and available.[85] Workers also inform appropriate people of the accused's bail conditions, providing they have the consent of the accused to do so.[86]

Emergency Accommodation

Disability Services funds two emergency accommodation facilities for the whole of Victoria, with a capacity of ten clients at any one time. Accommodation at these facilities can be stipulated by the court as a condition of an accused's bail. As this is a statewide service, placement is determined by client need, rather than regional location. Clients may therefore be placed with either service, depending on eligibility, availability, urgency and suitability. The houses were established to provide a bail option for clients with intellectual disabilities, however, they can also be used as emergency accommodation for up to three months for clients in crisis situations. During the time a person is using emergency accommodation, workers organise more appropriate ongoing accommodation and other services for the client.

The houses are staffed by support workers and are not secure locked facilities, offering only sleep-over support. Residents can therefore leave any time they choose. If they do, staff notify local police that the accused has broken the bail conditions by leaving the facility. A further condition required as part of placement is that clients do not consume alcohol or drugs. This would normally be included as a condition of bail.

To access Disability Services, people with intellectual disabilities or a guardian acting on their behalf must voluntarily agree to participate. Although Disability Services cannot enforce accused people's compliance with bail conditions, they can monitor their activities and notify relevant authorities when a potential breach has occurred.

Problems with Existing Services

There was a view raised in some consultations that there is a lack of appropriate accommodation and support services for people with cognitive impairment.[87] In relation to mental illness, it was felt that granting bail without appropriate accommodation could be risky but it was also recognised that remanding such a person in custody could be equally problematic. Given that people with intellectual disabilities may have difficulty understanding the conditions of their bail, and in particular the requirement that they attend court on a set date, a lack of supported accommodation might increase the likelihood that they will not comply with their bail conditions. This risk may in turn increase the likelihood that bail is refused.

Another problem identified was that people with cognitive impairment may not always be given access to an ITP. There are two aspects to this problem.

First, an accused with a cognitive impairment may not have an ITP at the police interview stage. Both mental illness and intellectual disability can be difficult to identify so police may not always realise that people require an ITP to help them through the interview process.

Secondly, it is the policy of the OPA that ITPs do not assist accused during the bail decision-making process for three reasons:

- ITPs are there to support accused in their dealings with the police, not with bail justices or the court.
- OPA developed the ITP role as a support rather than advocacy role. It believes that ITPs at bail hearings will be called on to advocate on behalf of their client, which they see as beyond the ITP role.
- OPA does not think it is appropriate or reasonable for ITPs to be called to give evidence at bail hearings. An example was given of a bail justice wishing the ITP to give evidence and since that incident OPA has instituted the policy of ITPs not remaining at the station for bail hearings.

OPA noted that what an accused actually requires in a bail hearing is legal advice. As bail justices are independent and impartial people whose role is to listen to and consider both sides, OPA believes they are better skilled and resourced to look after the accused in that situation than an ITP.[88] They would like bail justices to be trained in disability issues. While this would assist bail justices in questioning accused with cognitive impairment, it does not address the lack of support for the accused.

Given the decision-making role of bail justices and the problems with bail justices raised in our consultations, particularly over impartiality, it could be argued that it is not appropriate to view a bail justice as a support person for the accused. This leaves accused people with cognitive impairment without support in after-hours hearings.

The commission is interested in hearing about what mechanisms could be put in place to support accused with cognitive impairment in bail justice or court bail hearings.

Question 70 ?

Should specialised support be available to an accused with cognitive impairment at bail hearings—both court hearings and after-hours hearings? Could Independent Third Persons fulfil this role with further training and a clear definition of their role? Would training bail justices in disability issues be an appropriate alternative? Is there a need for a new role to be created?

Other Jurisdictions

The Queensland *Bail Act 1980* allows the police to release people without bail if they have, or appear to have, an intellectual impairment and do not understand or appear not to understand the requirements of bail.[89] The release of the person in these circumstances may or may not be into the care of another person and is on condition that the person will attend court on a particular date and at a particular time.[90] These details are contained in a 'release notice' which also sets out the person's name, address, the charge and a warning that an arrest warrant will be issued if he or she fails to attend court on the specified date. If the person is released into the care of another person that person will also be given a copy of the release notice.[91]

The issue of intellectual disability is dealt with explicitly in bail legislation in other jurisdictions. The New South Wales' *Bail Act 1978* requires intellectual disability and mental illness to be taken into account when deciding whether to grant bail.[92] The Act also requires decision makers to consider the capacity of an accused person with an intellectual disability or mental illness to understand and comply with any bail conditions before imposing them.[93]

In its 1996 report, *People with an Intellectual Disability and the Criminal Justice System*, the New South Wales Law Reform Commission made recommendations relevant to bail. It recommended the development of a code of practice for police that would include guidelines to assist the police in identifying an intellectual disability and for questioning the person with the disability in an appropriate way.[94]

The report also recommended that police be required to ask accused whether they wish to have a support person present at the police interview.[95] The support person role outlined in the report differs from that of the ITP in Victoria in that the report does not require the person to be specifically trained for the task or to have a mandatory presence. The support person would be a person who is chosen by the accused and may be a family member, guardian or carer. The report also recommended that there be a list of people in the geographic area willing to act as support people in the event that the chosen support person is unavailable or inappropriate.[96] These recommendations have largely been adopted and are now reflected in the New South Wales Police Code of Practice, known as CRIME (Code of Practice for Custody, Rights, Investigation Management and Evidence).[97]

Question 71 ?

Should police be given specific training to assist them to identify a person with a mental illness or intellectual disability? Should they be given guidance on how to interview a person with an intellectual disability or mental illness? Should the *Bail Act 1977* include a section similar to the provision in the New South Wales *Bail Act 1978* requiring decision makers to consider the capacity of the accused person to understand bail conditions before imposing any?

Services for Indigenous Australians

Throughout this paper we have touched on issues in the bail system that particularly affect Indigenous accused. As we have discussed, Indigenous Australians are over-represented in the criminal justice system. Indigenous Australians may also be unemployed, have health problems, have received limited education and come from single parent families.[98] We now look at support services that exist for Indigenous Australians who come into contact with police or who are on bail.

In addressing support services, consideration should be given to the fact that Indigenous Australians may have little trust in judicial structures. This may extend to the formal court-based support services that we have discussed in this paper. Accordingly, it is important that any services offered must be culturally appropriate. This point has been made elsewhere:

> Aboriginal people display a low level of trust in the justice system's institutions. The relationship between Aboriginal communities and justice agencies continues to be affected by the role many of these institutions played in the lives of Aboriginal people and their communities … This lack of trust, coupled with the inherent complexities, culturally alien mechanisms and costs of the justice system, contribute to many Aboriginal people's unwillingness to use the police, courts and equity bodies to protect and enjoy their legal rights.[99]

The services we discuss here are generally operated and delivered by Indigenous Australians.

Client Service Officers

Client Service Officers are employed by the Victorian Aboriginal Legal Service, a specialist legal service for Indigenous Australians. Victoria Police are required to advise the service whenever an Indigenous accused is taken into custody. This is achieved by police entering the details of an Indigenous accused in custody into their computer based Attendance Registrar.[100] This automatically sends an email to the service to alert it that an Indigenous accused is in police custody. Alternatively, police may telephone a client service officer. The officer will then contact the person in custody or go to the police station.

The officer can assist accused people in custody in various ways:

- provide general advice about their rights;
- arrange for a solicitor to provide legal advice;
- take basic instructions and adjourn matters until a solicitor is available;
- act as an ITP.[101]

There are ten officers in Victoria: four based in the service's metropolitan office and six located in regional Victoria. All officers are Indigenous Australians.[102] Officers located in the metropolitan area are on an on-call roster. The roster operates after hours, weekends and

public holidays. According to the service, more than 70% of all officers' work involves Indigenous Australians in rural areas.[103]

In consultation with officers located in Melbourne, we were told that the vast majority of their work involves phone advice.[104] We were told that officers are much more likely to go to the police station when a child is involved.[105]

Some officers we spoke to said their role extended to advocating for accused during a bail hearing before a bail justice or the police.

Throughout our consultations we did not hear of any problems with the service's program. Officers believe an Indigenous accused is much more likely to be granted bail when they are involved.[106] In 2001, the Parliament of Victoria Law Reform Committee undertook a review of legal services in rural and regional Victoria.[107] It heard evidence that in a number of regional locations officers were often difficult to contact. This was a problem that was acknowledged by the service. This criticism was not repeated during our consultations. The committee made a recommendation that the service review the 'workload, job descriptions and work practices' of officers to ensure they are 'readily contactable and available to clients within a reasonable time'.[108]

Aboriginal Community Justice Panels

Aboriginal Community Justice Panels were established in 1988 as an initiative of the Aboriginal Legal Service and Victoria Police. The panels are currently funded and administered by Victoria Police. The program developed due to a concern about the over-representation of Indigenous Australians in the criminal justice system. Panel members are volunteers. In some respects, they play a role similar to that of a client service officer, however, their position is much more 'hands on'. They are on stand-by all day throughout the week to assist any Indigenous Australian who is taken into police custody. The role of panel members includes:

- advising police on any known medical or behavioural problems of a person in custody;
- where appropriate, taking custody of an accused person;
- speaking with the accused and assisting in welfare matters—this may include helping with bail;
- arranging legal assistance if required;
- notifying relatives and friends of the accused that he or she is in custody;
- informing police of specific problems that Indigenous Australians face.[109]

There are 13 panels operating in regional Victoria.[110] As with client service officers, Victoria Police are to notify a panel whenever an Indigenous Australian is taken into custody.[111] We spoke to a panel member in our consultations.[112] We did not hear any concerns about the panel program. However, we gained the impression that the effectiveness of panels—and Indigenous services in general—varied from location to location. This was also noted by the Parliament of Victoria Law Reform Committee.[113] A number of local factors seem to have a direct impact on the effectiveness of the services offered. These include the commitment and skills of the individual panel members, the attitude of local police to the Indigenous population in general and, perhaps most importantly, the working relationship of panel members and police and bail justices. It should be noted that our consultations were not as extensive as those of the Parliament of Victoria Law Reform Committee and were limited to addressing deficiencies with the bail system.

The panels were reviewed in 2001.[114] The review was undertaken by the police, representatives of the Victorian Indigenous community and researchers from the Department of Criminology at the University of Melbourne. The terms of reference of the

review were extensive. One issue was identified in relation to bail. This was the connection between panel members and the Aboriginal bail justice program that we discussed in Chapter 4:

> Some of the ACJP volunteers across the state have also participated in the Bail Justice Program, recently run by the Department of Justice in Victoria … The Bail Justice Program is a new initiative and it is not yet clear whether there is an inherent conflict between this role and that of ACJP member. However, the Review Team notes that there is potential for these roles to place conflicting demands on these volunteers.[115]

The type of conflict envisaged by the review is not elaborated upon. There has not been an analysis undertaken to determine whether the role of Indigenous bail justices and panel members conflict. As we said in Chapter 4, only a small number of the 19 accredited Indigenous bail justices actually carry out their duties as bail justices.[116] In addition, many appear to be reluctant to be involved in bail hearings that involve Indigenous accused. We do not know how many panel members are also bail justices. In practice, if panel members were called to a police station to assist an Indigenous accused they should be contacted before a bail justice. It is unlikely that the police would then seek to use the panel member to act as the bail justice and we were not told of any instances where this had occurred. While it is possible that the bail justice who attends may know the panel member, their roles are quite separate and this alone need not lead to any conflict.

Question 77 ?

Do the Client Service Officer and Aboriginal Community Justice Panel programs provide an effective service to clients who are in police custody and face the prospect of a bail hearing? If not, what specific problems are there with these services and the bail system? Is there any conflict between the roles of members of the Aboriginal Community Justice Panel and Aboriginal Bail Justices?

Aboriginal Liaison Officer—Melbourne Magistrates' Court

Situated at the Melbourne Magistrates' Court, the Aboriginal Liaison Officer assists Indigenous Australians who come into contact with the criminal justice system. The position was established in 2002 in an effort to address the over-representation of Indigenous Victorians in the justice system.[117] While the position is statewide, the majority of work is done in Melbourne.[118]

The officer may supervise accused on bail. As with the CREDIT–Bail Support Program, Indigenous accused may be bailed to follow the directions of the Aboriginal Liaison Officer. This occurs following an initial assessment of suitability. The officer organises services for the accused, which may include counselling, accommodation and health services. At the time of our consultation, the Aboriginal Liaison Officer was supervising approximately 25–30 accused on bail.[119]

A benefit of the position is that the Aboriginal Liaison Officer is able to develop strong working relationships with service providers, especially those who cater specifically for Indigenous people. They have good access to Indigenous-specific accommodation and services.

In addition to supervising accused on bail, the officer may also advise the court on cultural matters and inform Indigenous communities about the court process.

Warrakoo Station

During consultations the commission learnt of a program directed towards young male Indigenous accused who are on bail. Warrakoo Station, located in New South Wales, but

run by Indigenous Victorians, is a 10 000 acre farm that caters to accused on bail whose sentence has been deferred. We discussed deferral of sentence briefly in Chapter 8 when looking at bail conditions and support services.

Warrakoo Station was bought by the Mildura Aboriginal Corporation in 1994. It is managed by local Indigenous people. It teaches participants in the program rural skills and other life skills in a drug and alcohol free environment. Warrakoo can accommodate around 12 males. Participants work on the farm from 8 am to 5 pm every day.

Participants in the program are bailed to comply with the rules of the Warrakoo program and the directions of the program manager. Before being bailed an assessment is carried out by a panel, which includes a police officer, a representative of the Mildura Aboriginal Corporation and the Manager of Warrakoo. A psychological and medical assessment is also carried out.

The station received praise from a magistrate we consulted.[120] Warrakoo is often used for those accused who would otherwise receive a prison sentence. It was also stressed that Warrakoo is not an easy program, but has a degree of flexibility and allows participants to have access to family members. Warrakoo Station has also been commended by a Supreme Court judge:

> I would really hope that government see the good investment that places like Warrakoo are. There is a poor return from prisons just on economic grounds. Those who run prisons would not pretend that they have anything but a minimal rehabilitative capacity. If you couple better economics with the social benefits of a place like Warrakoo, it's a tremendous investment for any community.[121]

Positive experiences have also been relayed by participants:

> I've been to prison eight time—including Pentridge—and you pick up bad habits and bad ideas there because people are scheming how to get round things all of the time. I've seen more drugs on the inside than the outside. It becomes second nature—you come out harder than what you went in. Prison drives you crazy. They wonder why there's so many deaths, but if you're not killing yourself then someone's trying to kill you … These young blokes here [at Warrakoo Station] are lucky—half of them have never been to prison and I hope they never do. It's a really good idea—I can't believe there's not more places like this. If this place was around when I was younger, things might have been different.[122]

The Parliament of Victoria Law Reform Committee pointed out that initiatives such as Warrakoo provide an 'excellent example' of the type of initiatives recommended by the Royal Commission into Aboriginal Deaths in Custody. The committee recommended the development of:

> … similar innovative projects, designed and managed by the Aboriginal community as alternatives to imprisonment, to be developed in Victoria for both women and men, with the support of the Department of Justice.[123]

We did not hear of other initiatives similar to that of Warrakoo during our consultations.

Question 78 ?

Are there sufficient support services for Indigenous accused who come into contact with the bail system, especially in regional Victoria? Are there sufficient accommodation options for Indigenous accused on bail?

Chapter 11
Other Legislative Reforms

Introduction

During consultations we received several suggestions for minor legislative reforms to the Bail Act. These changes do not affect major areas of public policy or require extensive legislative drafting. This chapter discusses possible changes to:

- section 30(3) of the Bail Act;
- various words, phrases and concepts contained in the Bail Act;
- forms of undertaking, as contained in the Bail Regulations 2003;
- section 4(2)(b) of the Bail Act and any other redundant provisions.

Section 30(3)

It is an offence for an accused person to fail to appear at a trial in accordance with the undertaking of bail.[1]

One of the requirements of proving the offence of failing to answer bail is that the prosecution must show that notification of the trial time and venue were given to the accused.[2] This is reflected in the Undertaking of Bail for Appearance at Trial form that provides, as a condition of the undertaking, that the accused must appear at the trial at a 'day, time and place' as notified in writing by the DPP.[3]

To prove that the accused was notified, a certificate signed by the DPP may be produced in the proceedings.[4] This certificate confirms that the accused was sent by post, telegram or cablegram a notice detailing the time and place fixed for the trial. The certificate serves as evidence of the service of the notice.

This provision of the Act does not reflect the current practice of notifying an accused of upcoming trial details. It was pointed out in one consultation that the notification role is now carried out exclusively by the Criminal Trial Listings Directorate.[5] Reference to a certificate signed by the DPP is no longer appropriate and condition 1(a) of the Undertaking of Bail for Appearance at Trial form is incorrect. Both should be amended to accurately represent the current procedure. This will help to avoid problems in future prosecutions for failing to answer bail for appearance at a trial.

Words, Phrases and Concepts

During the process of researching this paper and during the course of our consultations, problems were identified with several words, phrases and concepts contained in the Bail Act.

Definition of 'Court'

In 2002 the commission released a report entitled *Failure to Appear in Court in Response to Bail*. In that report a problem with the definition of the word 'court' was identified. The Bail

Act defines 'court' to mean a 'court or judge'.[6] The Act also defines 'court' to include a police officer or other person when that officer or person is empowered to grant bail under the Bail Act. This definition creates confusion. As noted in our 2002 report, it can be unclear whether 'court' is meant to refer only to a magistrate or judge, or whether it is intended to also cover bail justices and police officers.

One section of the Act in which the definition of 'court' is likely to cause confusion is section 10.[7] It deals with the situation where it is not practicable to bring accused people before a court after they have been taken into police custody. The word 'court' in this section refers to a magistrate or judge. However, for those unfamiliar with the operation of the bail system this could be unclear.[8] Further confusion is created by other sections of the Bail Act where the word 'court' does not encompass bail justices, despite the inclusive definition.[9]

…it can be unclear whether 'court' is meant to refer only to a magistrate or judge

The definition of 'court' was identified in one of our consultations as being a concern.[10] While in practice there is an understanding of what the term means, the definition is likely to be confusing to people without practical knowledge of the bail system. In many sections of the Act, potential confusion could be avoided by simply referring directly to the appropriate decision maker, including a reference to either the Magistrates' Court or the Children's Court.

Question 79 ?

Does the definition of 'court' in section 3 of the *Bail Act 1977* create any confusion? Should it be retained?

Warrant of Commitment

Reference is made in the Bail Act to two types of warrants: a warrant of commitment and a warrant of remand. Put simply, a warrant is a reference to a document, usually issued by a court, that directs or authorises someone to do something, in this case directing that an accused be remanded in custody.

The use of warrants of commitment in Victoria dates back to the mid- to late-nineteenth century.[11] Section 12 of the Bail Act still makes reference to this type of warrant. A warrant of commitment is a warrant to commit a person to prison.[12] The section also makes reference to a warrant of remand. The historical development of these two types of warrants was discussed in detail in the case of *Secretary to the Department of Human Services v Magistrates' Court of Victoria.*[13]

Despite the reference to a warrant of commitment, it seems that this type of warrant is rarely, if ever, used. This is due in part to clause 11 of schedule 8 of the Magistrates' Court Act. Clause 11 provides that 'unless the context otherwise requires' a reference to a 'warrant of commitment' in 'any Act' is to be taken to be a reference to a warrant to imprison, a warrant to detain in a youth training centre or a remand warrant (whichever is appropriate).

When detaining someone in custody upon an adjournment, the Magistrates' Court routinely uses a remand warrant. In fact, there is no template form of warrant of commitment in the Magistrates' Court Act or in the Bail Regulations. When a magistrate is dealing with accused people after they have been committed for trial a remand warrant is also used.[14]

The continued reference to two different types of warrants creates confusion. As discussed, given clause 11 of schedule 8 of the Magistrates' Court Act, it also appears to be unnecessary. While there were historical reasons for referring to the two different types of

warrants, there does not appear to be any apparent justification for continuing to do so. Our consultations with the judiciary disclosed that warrants of commitment, as outlined in the Bail Act, are no longer used in courts today.

Question 80 ?

Should section 12(1) of the *Bail Act 1977* continue to make reference to a warrant of commitment? Would removing the reference to a warrant of commitment cause any problems?

Remand

Further uncertainty is created in the Bail Act by the use of the word 'remand' to refer to both remand in custody and remand while on bail. Section 12(1) refers to the court granting bail 'for the appearance of the person on the day to which he is *remanded* or the case adjourned'. In this context, remand is used to describe someone who is on bail. Other parts of the same section use 'remand' as a reference to a remand in custody. Today, most people would associate the word 'remand' with detention in custody.

Question 81 ?

Should the use of the term 'remand' in the *Bail Act 1977* be used only as a reference to 'remand in custody'?

Telegrams and Cablegrams

Both sub-section 30(3) of the Bail Act and Form 2 Undertaking of Bail for Appearance at Trial in the Bail Regulations make reference to telegrams. The former also refers to cablegrams. As we discussed above, these forms of communication can be used by the DPP to notify an accused of an upcoming trial. Neither form of communication is currently used when notifying an accused of an upcoming trial. The *Interpretation of Legislation Act 1984* contains a reference to the serving of documents by post, registered post or certified mail.[15] No reference is made to telegrams or cablegrams.

Question 82 ?

Should the reference to 'telegram' and 'cablegrams' in section 30(3) of the *Bail Act 1977* and in the Undertaking of Bail for Appearance at Trial form be deleted?

Surety

In one consultation it was pointed out that the word 'surety' is a source of confusion for people who are unfamiliar with the bail system.[16] We have already discussed sureties in detail in Chapter 7. A surety is a person, or a group of people, who enter into an undertaking to ensure that an accused will appear in court as required.

The word surety is not commonly used outside the criminal justice system. It is likely to be particularly confusing for accused people who come into contact with the bail system for the first time and are told they must find a surety. We were told that the term is anachronistic.[17]

Using words such as surety may help to perpetuate the perception of an exclusionary legal system that only those with 'inside knowledge' are capable of understanding.

Several other jurisdictions within Australia do not use the word 'surety'. In NSW, the term 'acceptable person' is used instead of surety. Acceptable person is not defined in the *Bail Act 1978* (NSW).

Question 83 ?

Should the term 'surety' in the *Bail Act 1977* be replaced with some other term, for example, 'acceptable person' or 'guarantor'?

Other Words and Phrases

The Bail Act was drafted in 1977 and has not had a comprehensive redraft. Since its introduction, the way legislation is drafted in Victoria has changed. An increased emphasis is now placed on accessibility and readability—drafting legislation in plain English.

The words and phrases discussed above were identified in consultations or during the course of researching this paper as being particularly problematic. We heard that the Bail Act is difficult for people without legal training to understand.[18] We are interested in hearing about any other words, phrases or concepts contained in the Bail Act that people find particularly confusing or difficult to understand.

Question 84 ?

Are there any words, phrases or concepts contained in the *Bail Act 1977* that require greater clarification, redrafting, amendment or deletion?

Forms of Undertaking

The Bail Regulations contain forms used in bail matters.[19] Commonly used forms found in the regulations include the Undertaking of Bail and Undertaking of Bail for Appearance at Trial forms.

In serious criminal matters for which an accused is on bail he or she is required to sign an Undertaking of Bail for Appearance at Trial form. This is completed after an accused has been through committal proceedings in the Magistrates' Court and is awaiting trial in the County or Supreme Courts. The undertaking details the venue, date and time of the upcoming criminal trial.

In one consultation, it was suggested that the Undertaking of Bail for Appearance at Trial form could be redrafted to more accurately reflect the numerous pre-trial hearings that an accused in the indictable offence system is now required to attend.[20] It is no longer the case that accused people would be committed directly from the Magistrates' Court to a trial. Instead, should they plead not guilty, they would be required to attend a pre-trial hearing, or several pre-trial hearings, in superior courts.

At the moment, when accused people are committed from the Magistrates' Court, a condition of their bail is that they attend the County Court on the date stated on the Undertaking of Bail for Appearance at Trial form. It was suggested that the title of the undertaking should be changed to reflect the current system. There could be an Undertaking of Bail for Appearance at Case Conference form or an Undertaking of Bail for Appearance at Directions Hearing form. Arguably, such a change would also help clarify in the accused's mind the various steps in the criminal justice process.

In another of our consultations, it was suggested that the forms of undertaking in the Bail Regulations are 'archaic' and need to be rewritten to be simpler and more user-friendly.[21] It

was suggested that making the forms of undertaking easier to understand may help to reduce the incidence of accused failing to appear in court. The present forms of undertaking have changed little since their introduction in 1977.

The Undertaking of Bail and other forms of undertaking could benefit from a plain English rewrite. There are obvious benefits in having forms that simply set out an accused's conditions of bail and the consequences of breaching such conditions. The risk of having forms that contain 'legalese' and dense blocks of writing is that they will add to non-compliance due to the difficulties that people may have in comprehending them.

It was also suggested that the Undertaking of Bail and the Undertaking of Bail for Appearance at Trial forms should contain a phone number for a person that accused people can contact if they believe they will have trouble attending their next court hearing. In many instances, accused people would be in regular contact with their legal practitioner and would be able to inform them of any problems relating to attendance. However, difficulties are likely to arise where an accused is unrepresented. Some accused people may, for various reasons, be reluctant to contact police where they are unable to attend court or abide by their bail conditions.

…bail cannot be granted to someone already in custody serving a sentence

The most obvious person that an accused could contact in the circumstances described above would be the relevant criminal registrar of the court to which he or she is bailed to attend. In deciding whether or not to issue a warrant for failing to appear, it would be desirable for a decision maker to have some understanding of why an accused has not appeared in court. If the decision maker is made aware of valid reasons for the accused's non-attendance, they can assess whether it is appropriate to extend an accused's bail in his or her absence.[22] This avoids the administration and delay involved in the issuing and execution of a warrant and the possibility of additional charges being brought against the accused.

Question 85 ?

Should the forms contained in the Bail Regulations 2003 be rewritten in plain English? If so, do you have any suggestions about how the forms should be rewritten and what they should contain? Should the forms of undertaking contain the contact details of a person that accused people can contact if they are unable to attend court?

Redundant Sections

Section 4(2)(b) of the Bail Act states that bail cannot be granted to someone already in custody serving a sentence. This is not a presumption against bail but a complete denial of bail. Its inclusion in the Bail Act most likely stems from a perceived need to avoid a situation where there are two competing court orders: one order directing the prisoner to serve a sentence of imprisonment, the other directing him or her to bail.

Section 4(2)(b) was superseded by the inclusion of section 4(2A) into the Bail Act in 1989, but has not been repealed. Section 4(2A) provides that a court is not required to refuse bail in the case of an accused person who is serving a prison sentence, but any grant of bail must be subject to the accused having completed the original term of imprisonment. In other words, accused people cannot be released on bail until they have finished their prison sentences.

It would appear that the two sections conflict and there is no longer a need for section 4(2)(b).

The commission is interested in hearing about other sections of the Bail Act similar to section 4(2)(b) that are no longer used and would appear to be redundant.

Question 86 ?

Should section 4(2)(b) of the *Bail Act 1977* be repealed? Are there any other sections of the *Bail Act 1977* that are no longer of any relevance and should be repealed?

Appendix 1

Department of Justice, Bail Justices' Draft Code of Conduct

Introduction

The office of Bail Justice was established by the *Magistrates' Court Act 1989* and came into effect in 1990. This office is held in high regard in the Victorian community and is associated with integrity, honesty and professionalism.

This code of conduct has been developed to ensure that Bail Justices have clear guidelines in relation to their responsibilities and standards of acceptable behaviour and ensures that they maintain a high level of service to the Victorian public and retain strong levels of respect and support in the community.

General Objectives

The following three guiding principles apply to all judicial officers in the State of Victoria:

- To uphold public confidence in the administration of justice;
- To enhance public respect for the institution of the judiciary; and
- To protect the reputation of individual judicial officers and of the judiciary.

Main Principles

Integrity

You must refrain from any private or public conduct that might cause your professional standards and good judgement to be questioned. There is an inherent need for you to abstain from behaviour that is, or may be seen to be, improper or that may weaken public trust in the office of Bail Justice.

Impartiality

You should not allow any person to influence your decisions. As stated in your Oath of Office, your duties should be performed 'without fear, favour or affection'.

Where your conduct, or the conduct of an acquaintance, may be seen to give rise to speculation about a conflict of interest, bias, or otherwise compromise the public's perception of your independence, then such conduct or association should be avoided.

Independence

The proper conduct of an 'out-of-sessions' hearing rests with the Bail Justice. Therefore you must be seen to be separate from the parties and the police. It is important that all parties are left with the impression that they have been given a fair hearing. Justice must not only be done, but be *seen* to be done.

Conduct of Hearings

A Bail Justice must be fair and even-handed during any 'out-of-sessions' hearings. This involves maintaining proper decorum, being punctual, sober, neatly dressed, courteous and tolerant. Whilst the conduct of a hearing is a serious matter, it does not mean that light humour has no place at all, especially if used to 'break the ice' and put the parties at ease. Any use of humour, however, must not involve any offensive, racist or sexist remarks, and must not embarrass any party.

If an accused person or a police member makes an adverse comment or disparaging remark, the Bail Justice should point out to the offending party that inappropriate comments will not be tolerated and, if appropriate, should request that an apology be made to the offended party.

Use of Official Information

As you may be privy to highly sensitive and confidential information, you must observe the highest degree of common sense and discretion at all times.

You must not use or communicate official information, other than for the purpose of conducting your duties as a bail justice pursuant to the Magistrates' Court Act, the Bail Act, and the Children and Young Persons Act, and you must not take improper advantage of any information gained in the course of your duties.

You may only disclose official information acquired in the course of your duty as a Bail Justice, when required to do so by law, in the course of that duty and if called to give evidence in court. In such cases, your comments should be confined to factual information and should not express an opinion on any policy or practice of the office of bail justice.

Public Comment

You should refrain from making public comment about cases in which you are involved, especially to the media. This includes public speaking engagements, comments on radio, television, on the Internet, or expressing views in letters to newspapers, in books, journals or notices, where it might be expected that the publication or circulation of the comment will spread to the community at large.

Behaviour

Bail Justices are held in high esteem in the community. It is therefore crucial to refrain from any improper conduct that might cause the public to question your professional integrity or the good reputation of Bail Justices. You should abstain from any private or public behaviour that is unlawful, unethical, inappropriate or any other conduct that may weaken public trust in the office of Bail Justice.

Neglect of Duty

Most Bail Justices conduct themselves in an appropriate and commendable manner. This includes making themselves available for duty when required, usually on rosters in areas where they exist, and perform their duties well.

There is an expectation that all Bail Justices will perform their duties at reasonable times throughout their term of office and will share the workload in a fair and equitable way. It is not acceptable for persons to hold office without performing the duties of a Bail Justice. Under the Magistrates' Court Act, a Bail Justice can be suspended and/or removed from office if he or she is found to be incompetent or guilty of neglect of duty.

Conflict of Interest

A conflict of interest with your official duties may arise for various reasons and, as an individual, you may have private interests that from time to time conflict with your public duties. There is, however, a public expectation that, where such conflict occurs, it will be resolved in favour of the public interest and not your own.

General Principles

It is not possible to define all potential areas of conflict of interest and, if you are in doubt as to whether a conflict exists, this should be raised with the President of the Royal

Victorian Association of Honorary Justices and/or with the Registrar of Honorary Justices at the Department of Justice.

If you consider that a conflict of interest has arisen or is likely to arise, you should stand down from any decision-making process where your independence and impartiality may be compromised.

You must not use your position to obtain a private benefit for any other person, body or organisation. Your decision must not be improperly influenced by any family members, friends, colleagues, relatives, or other personal relationships.

Personal and Business Relationships

There are certain types of relationships between Bail Justices and other people, where a self-disqualification is deemed necessary and appropriate. A Bail Justice should disqualify him or herself from hearing any cases involving the following personal relationships: husband, wife, partner, son, daughter, parent, grandparent, aunt, uncle, nephew, niece, cousins, in-laws or friends.

Other types of relationships that require your self-disqualification include the following current business relationships: employers, employees, work colleagues, business partners, or clients.

Any such persons with whom you have had a former business relationship, may or may not require your disqualification, depending on low long ago the relationship existed, for example, a past business associate of 12 months would still be considered close enough to warrant disqualification, whereas one that existed around 5 or 10 years ago, would require you to exercise your discretion.

Your discretion would also be required if dealing with any persons who were acquaintances, whether business or personal, where there was a possible perception of bias.

Membership of Clubs and Organisations

Many Bail Justices are engaged in various community organisations, such as social, religious, charitable or sporting groups. Whilst community involvement is encouraged, Bail Justices must, never the less, ensure that such memberships do not compromise their independence or influence their decision-making capabilities.

Some clubs or societies may be seen as having an undue influence on its members, particularly on people who are members of the judiciary. It is therefore imperative for Bail Justices to carefully consider whether it is appropriate for them to maintain such memberships after they have been appointed to the position of Bail Justice. If there is any doubt or accusation of any preferential treatment involved, you should err on the side of caution, in order to maintain your independence and impartiality.

Payments, Gifts or Favours

You must not seek or accept any money, favours or gifts for services performed in connection with your official duties as a Bail Justice. This includes gifts in kind, such as free accommodation, travel or entertainment vouchers, whether for you or for members of your family. The general principle to be followed is that you should not seek or accept any financial gain, favours or gifts from anyone who could benefit by influencing you in any way.

Independent Third Person

Where a Bail Justice has acted as an Independent Third Person for a defendant, the Bail Justice must not have any involvement in any subsequent bail application or hearing for that person.

Character Evidence in Court

The giving of character evidence in criminal proceedings is a matter of discretion and good judgement, however, you should carefully consider the wider implications of doing so, before choosing to accept that course. Generally speaking, unless there are compelling reasons to the contrary, a Bail Justice should not give any character evidence in a court or tribunal. Especially since the association with an accused person might tarnish the reputation and independence of Bail Justices.

Character and Reputation

The Victorian community expects Bail Justices to be beyond reproach and without blemish. In order to maintain this high standard and expectation, Bail Justices should be of impeccable character and not involve themselves with an activity or persons that could tarnish that reputation.

Whilst Bail Justices are private individuals and entitled to lead a private life, it is important to remember that persons who hold a position of respect in the community, would very quickly lose that respect if any untoward activity or behaviour became public knowledge. In these instances, Bail Justices should remember that it is not always a matter of how *they* see themselves, but how the *public* sees them and their behaviour. Sometimes, the type of behaviour that a Bail Justice might regard as his or her private business may be looked at quite differently by the public or by the media, who are often eager to expose the dealings of individuals of standing in the community.

Remember, it only takes one negative incident involving a Bail Justice to cause bad publicity in the community and to ruin the good reputation of other Bail Justices.

Discrimination

Bail Justices should have regard to the provisions of anti-discrimination legislation, which have been changed in recent years to include a wider range of areas that constitute discrimination. Victorian legislation now prohibits discrimination on the basis of a person's age, impairment (illness or injury), industrial activity, lawful sexual activity, gender identity, marital status, physical features, political belief or activity, pregnancy, race, religious belief or activity, sex, sexual orientation, status as a parent or carer, personal association (as a relative or otherwise) and breastfeeding.

Bail Justices should treat all persons fairly and in accordance with the law.

Indigenous Issues

Even though some Aboriginal Bail Justices have been appointed recently, it is important for all Bail Justices to be aware of the special needs of the Aboriginal/Koori community and to be sensitive to their cultural differences. The Royal Commission into Aboriginal Deaths in Custody highlighted the high number of Aborigines being held in police custody as a major cause of premature deaths in the Aboriginal community.

The State Government signed the Victorian Aboriginal Justice Agreement as one way to try to reduce the number of Indigenous Australians caught up in the criminal justice system.

Political Controversy

Subject to the restraints that come with judicial office, Bail Justices have the same rights as other citizens to participate in public debate. However, Bail Justices should avoid involvement in any political controversy or political activities.

Political Activities

As with other judicial officers, it is preferable for Bail Justices to not be directly involved in any political activities, political parties, demonstrations or protests. Care must be taken to not become involved in any public political activity, as the public might continue to associate the Bail Justice with that political party or organisation, thus placing their impartiality at risk.

Witnessing of Documents and Privacy Issues

Bail Justices may witness some documents for use within Victoria, however, any documents for use in other States and Territories usually require the signature of a Justice of the Peace.

When witnessing documents, you may come across private or confidential information. Following the introduction of the Privacy Act, it is now even more important to *not read* the contents of a declaration or affidavit. It is not your role to read or check the contents of documents for accuracy.

The only time that you would need to carefully read and check the contents of documents is if you are asked to certify true copies of original documents. If any declarations or affidavits contain false information, then the person who made the declaration or affidavit is the one who would be charged with an offence, *not* the person who witnessed it.

If you do happen to come across any private or confidential information, you must not use it or communicate it, other than for the purpose of conducting your duties as a Bail Justice. You must not take improper advantage of any information gained in the course of your duties.

Generally, Bail Justices should not consider the witnessing of documents to be their main role, as this can sometimes cause difficulties with having to disclose their private address details. Unless it is crucial for a Bail Justice to witness documents, this role should generally be left to JPs.

Use of Inappropriate or Unauthorised Titles

Some JPs and Bail Justices have enquired about the use of titles such as 'Honorary Magistrate' and 'Bail Magistrate'. These titles are not used in this State and are not permitted to be used in any way by Justices of the Peace or Bail Justices in Victoria. The full title 'Bail Justice' or initials 'BJ' should not appear on business letterheads or business cards. On personal stationery, the full title may be used, but not initials.

Use of Government Names, Addresses and Logos

The names, addresses and logos of the Department of Justice are not to be used by Bail Justices on any rubber stamps, stationery, business cards, etc. Similarly, the official crest or coat-of-arms of the State of Victoria is not to be used without written authority.

ID Cards and Badges

Your official Department of Justice ID card should be carried at all times when performing your duties as a Bail Justice. Some Bail Justices also have ID cards and badges issued by the RVAHJ that identify them as members of the association. Some of these metal badges look like police ID badges. Care must be taken to ensure that the public do not confuse RVAHJ badges with police badges. Bail Justices must be seen to be independent of the police

force. You must not give the impression that you work for the police or that you are biased towards police.

Charges and Convictions

A Bail Justice who is charged with an offence, or is found guilty of any offence, must immediately notify the Department of Justice, as this may affect his or her appointment. Under the provisions of the Magistrates' Court Act, a Bail Justice may be suspended and/or removed from office if he or she is guilty of unlawful or improper conduct in the performance of the duties of his or her office.

Appendix 2

Bail Justice Removal Process

Magistrates' Court Act 1989

122. Suspension or removal from office

(1) The Governor in Council may suspend a bail justice from office and cause notice of the suspension to be served on him or her.

(2) A bail justice must not be suspended from office unless the Supreme Court, on the application of the Attorney-General without notice to any person, has determined that-

(a) there are reasonable grounds to suspect that the bail justice is guilty of an indictable offence or of an offence which, if committed in Victoria, would be an indictable offence; or

(b) the bail justice is mentally or physically incapable of carrying out satisfactorily the duties of his or her office; or

(c) the bail justice is incompetent or guilty of neglect of duty; or

(d) the bail justice is guilty of unlawful or improper conduct in the performance of the duties of his or her office.

(3) If a bail justice is suspended from office the Attorney-General must, as soon as is practicable, apply to the Supreme Court for a determination as to whether proper cause exists for removing the bail justice from office.

(4) If the Supreme Court determines, on an application under sub-section (3), that the ground or grounds on which the bail justice was suspended from office have been established, the Governor in Council may remove the bail justice from office.

Appendix 3

Reverse Onus in Select Australian Jurisdictions

Jurisdiction	Statutory Presumption of Bail	Reverse Onus	Reverse Onus Test
NSW: *Bail Act 1978*	For certain offences[1]	Yes	Satisfy the decision maker[2] Exceptional circumstances[3]
WA: *Bail Act 1982*	No[4]	No	N/A
Tas: *Bail Act 1994 & Justices Act 1959*	For certain offences[5]	No	N/A
Qld: *Bail Act 1980*	For certain offences[6]	Yes[7]	Show cause
ACT: *Bail Act 1992*	For certain offences[8]	Yes	Special or exceptional circumstances[9]

1. Section 9 of the Act provides for a presumption of bail for certain offences. The section applies to all offences unless they are expressly excluded from the operation of section 9. Sections 9A and 9B detail further offences for which the statutory presumption in favour of bail is displaced. These include certain domestic violence offences, offences contravening apprehended domestic violence orders and offences committed while the accused was on bail, on parole, serving sentence, subject to a good behaviour bond or an intervention program order, in custody, or had previously been convicted of failing to appear or had previously been convicted of an indictable offence. Section 8 details 'minor offences' for which a person is 'entitled to be granted bail'.
2. For offences detailed under section 8A, 8B and 8C the accused is not to be granted bail, 'unless the person satisfies the authorised officer or court that bail should not be refused'. Section 8A includes offences under the *Drug Misuse and Trafficking Act 1985*, the *Commonwealth Customs Act 1901* and the *Commonwealth Criminal Code*. Section 8B lists serious firearms and weapons offences. Section 8C lists property offences for which an applicant must satisfy a decision maker.
3. Under section 9C a person is not to be granted bail for murder unless exceptional circumstances justify it. Under section 9D a person is not to be granted bail for repeat 'serious personal violence offences' unless exceptional circumstances justify it. In situations detailed in section 30AA (bail where an appeal against sentence or conviction is pending in the Court of Criminal Appeal or High Court), 'special or exceptional circumstances' must exist justifying bail.
4. Subject to certain limitations, a defendant is entitled to 'have his case for bail considered…as soon as practicable' (section 5(1)(a)).
5. 'Unless there is reasonable ground for believing that such a course would not be desirable in the interests of justice' police must give an accused bail for a simple offence (*Justices Act 1959* s 34).
6. See section 9.
7. Section 16(3) details circumstances where the defendant must show cause. This includes where he or she is charged with an offence which carries imprisonment for life (which cannot be mitigated or varied) or an indefinite sentence, with an indictable offence which allegedly involved the use, or threat of use, of a firearm, offensive weapon or explosive substance or with an offence against the Bail Act.
8. Section 8 details those offences (certain minor offences) for which an accused is entitled to be bailed. These include an offence not punishable by imprisonment (except fine default) and an offence punishable by imprisonment of not more than six months. Section 8A provides that for breaches of certain orders there may be a presumption of bail provided the original offence carried such a presumption. Section 9A also details a specific situation where a presumption of bail arises while section 9B lists certain offences where the presumption does not apply.
9. Pursuant to section 9C a court or authorised officer 'must not grant bail' for the offence of murder, 'unless satisfied that special or exceptional circumstances favouring the grant of bail' exist. The same test applies to an accused charged with a 'serious offence' and the offence is alleged to have occurred while a charge for another serious offence is outstanding (section 9D). The 'special or exceptional circumstances' test also applies to a convicted person appealing against a sentence of imprisonment (section 9E).

Appendix 4

Suggested Amendments by Commonwealth DPP

Suggested amendment to sub-paragraph 4(2)(aa)(ii) of the *Bail Act 1977*:

> an offence under section 231(1), 233A or 233B(1) of the Customs Act 1901 of the Commonwealth **or under section 11.1 or 11.5 of the Criminal Code (Commonwealth)** in circumstances where the offence is committed in relation to narcotic goods within the meaning of ~~that Act~~ **the Customs Act 1901** in respect of a quantity that is not less than the commercial quantity (as defined in section 70(1) of the Drugs, Poisons and Controlled Substances Act 1981) applicable to the drug of dependence constituted by those narcotic goods[10]

Suggested amendment to sub-paragraph 4(4)(cb) of the *Bail Act 1977*:

> subject to sub-section (2)(aa) with an offence under section 231(1), 233A or 233B(1) of the Customs Act 1901 of the Commonwealth **or section 11.1 or 11.5 of the Criminal Code** (as amended and in force for the time being) in relation to a commercial or traffickable quantity of narcotic goods within the meaning of ~~that Act~~ the **Customs Act 1901**; or[11]

[10] Additions in bold.

[11] Additions in bold.

Appendix 5

Alleged Juvenile Accused Processed by Offence Category and Method of Processing, 2003–04

	Arrest	Caution	Summons	Other*	Total
Crime Against The Person					
Homicide	5	0	5	0	10
Rape	5	0	56	29	90
Sex (non-Rape)	14	31	210	76	331
Robbery	282	51	199	53	585
Assault	420	400	1159	178	2157
Abduction/Kidnap	5	1	10	8	24
Sub-Total	*731*	*483*	*1639*	*344*	*3197*
Crime Against Property					
Arson	42	56	101	17	216
Property Damage	403	784	1552	176	2915
Burglary (Aggravated)	94	3	19	5	121
Burglary (Residential)	392	237	296	46	971
Burglary (Other)	552	458	403	36	1449
Deception	88	89	188	9	371
Handle Stolen Goods	162	85	249	16	512
Theft From Motor Vehicle	563	242	533	41	1379
Theft (Shopsteal)	370	2457	922	62	3811
Theft of Motor Vehicle	690	230	637	64	1621
Theft of Bicycle	70	74	153	9	306
Theft (Other)	292	550	609	65	1516
Sub-Total	*3718*	*5265*	*5662*	*546*	*15188*
Drugs					
Drug (Cult., Manuf., Traff.)	30	12	30	2	74
Drug (Possess, Use)	87	245	140	10	482
Sub-Total	*117*	*257*	*170*	*12*	*556*
Other Crime					
Going Equipped to Steal	31	8	43	4	86
Justice Procedures	174	77	258	33	542
Regulated Public Order	19	211	498	27	755
Weapons/Explosives	62	141	239	12	454
Harassment	11	43	29	4	87
Behaviour in Public	59	72	296	15	442
Other	111	387	1172	76	1746
Sub-Total	*467*	*939*	*2535*	*171*	*4112*
TOTAL	**5033**	**6944**	**10006**	**1073**	**23053**

* Includes the following: complaint withdrawn, alleged offender is under age, insane or deceased, or warrant issued.

Source: Victoria Police, *Victoria Police Crime Statistics 2003/04* (2004) Table 4.2.1, 38.

Data extracted from LEAP on the 18/07/04 and is subject to variation.

Appendix 6

Children and Young Persons Act 1989

139. Matters to be taken into account

(1) In determining which sentence to impose on a child, the Court must, as far as practicable, have regard to—

(a) the need to strengthen and preserve the relationship between the child and the child's family; and

(b) the desirability of allowing the child to live at home; and

(c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and

(d) the need to minimise the stigma to the child resulting from a court determination; and

(e) the suitability of the sentence to the child; and

(f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and

(g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.

Appendix 7

Consultations

Consultation	Participants	Date
1	Terry Hannon, researcher	13 April 2005
2	Commonwealth Department of Public Prosecutions	14 April 2005
3	CREDIT–Bail Support Program	15 April 2005
4	Strategic Policy & Diversity Unit, Corrections Victoria	18 April 2005
5	Juvenile Justice, Department of Human Services	19 April 2005
6	Federation of Community Legal Centres	20 April 2005
7	Victoria Legal Aid	22 April 2005
8	Victorian Aboriginal Legal Service	22 April 2005
9	Office of Public Prosecutions	26 April 2005
10	Criminal Law Section, Law Institute of Victoria	28 April 2005
11	Prosecutor, Victoria Police	4 May 2005
12	Aboriginal Liaison Officer, Magistrates' Court of Victoria	5 May 2005
13	Client Service Officers, Victorian Aboriginal Legal Service	4 May 2005
14	Children's Court of Victoria	5 May 2005
15	Operational Police Officer, Victoria Police	10 May 2005
16	Disability Co-ordinator, Melbourne Magistrates' Court	16 May 2005
17	Daniel Gurvich, barrister-at-law	17 May 2005
18	Magistrates, Melbourne Magistrates' Court	19 May 2005
19	Australian Federal Police	22 May 2005
20	Criminal Justice Enhancement Program	24 May 2005
21	Youth Unit, Port Phillip Prison	31 May 2005
22	Victorian Criminal Bar	1 June 2005
23	Office of the Public Advocate	3 June 2005
24	Registrars, Melbourne Magistrates' Court	7 June 2005
25	Central After Hours Assessment and Bail Placement Service, Department of Human Services	8 June 2005
26	State Training Office, Court Services & Justices of the Peace and Bail Justices' Registry, Department of Justice	16 June 2005
27	Shepparton Police	20 June 2005
28	Client Service Officer, Victorian Aboriginal Legal Service, Shepparton	20 June 2005
29	Shepparton Magistrates' Court	20 June 2005
30	Victoria Legal Aid, Shepparton	21 June 2005
31	Moe Magistrates' Court	23 June 2005

Consultation	Participants	Date
32	Court Drug Assessor, Moe Magistrates' Court	23 June 2005
33	Moe Police	23 June 2005
34	Defence lawyers, Moe	23 June 2005
35	Murray Mallee Community Legal Centre	27 June 2005
36	Mildura Police	27 June 2005
37	Juvenile Justice, Mildura	27 June 2005
38	Mildura Magistrates' Court	27 June 2005
39	Juvenile Justice, Gippsland	29 June 2005
40	Indigenous community representatives, Geelong	30 June 2005
41	Police Prosecutions Unit, Geelong	30 June 2005
42	BAYSA Youth Services, Geelong	30 June 2005
43	Defence lawyers, Geelong	30 June 2005
44	Geelong Magistrates' Court	30 June 2005
45	Victims Support Agency	1 July 2005
46	County Court of Victoria	6 July 2005
47	Royal Victorian Association of Honorary Justices	11 July 2005
48	Supreme Court of Victoria	3 August 2005
49	Victims Assistance and Counselling Program	1 September 2005

Submissions

Submission	Author
1	Doogue & O'Brien, criminal defence lawyers
2	Victoria Legal Aid, Outer Eastern Suburbs Regional Office
3	Confidential
4	Magistrate, Magistrates' Court of Victoria
5	Police Prosecutor, Victoria Police

Glossary

Abscond

To abscond means to leave the jurisdiction in order to avoid prosecution.

Accused

A person who is charged with a crime is referred to as the accused.

Acting in concert

Acting in concert involves two or more people agreeing to commit a crime, with at least one of the parties being present at the scene.

Affidavit

An affidavit is a written statement by one of the parties involved in a court proceeding. Making an affidavit is usually an alternative to giving evidence in person in the court.

Appellate rights

Appellate rights refers to the right of every accused to seek the review of a decision in a higher court. For example, an appeal from a single judge of the Supreme Court to the Full Court of the Supreme.

Bail justices

Bail justices are volunteers who make bail decisions at night and on weekends when courts are not open.

Bail service providers

Bail service providers are organisations that provide support to people on bail.

Charge

A charge is a formal accusation of criminal conduct that is recorded on a charge sheet and filed at a court by police.

Committal hearing

A committal hearing is a pre-trial hearings held in the Magistrates' Court. The magistrate determines whether there is sufficient evidence to commit an accused to a higher court for trial.

Common law

Common law is created by decisions of higher courts, rather than law created by parliament through legislation.

Corroborator

A corroborator is a police officer who assists the 'informant', who is the main coordinating officer of the investigation. Whenever an accused is arrested an informant and a corroborator are assigned to the case.

First mention

The first mention date is the date that the accused first comes before the court, usually the Magistrates' or Children's Court.

Inchoate offences

Inchoate offences are preliminary offences such as 'attempt', 'conspiracy' or 'incitement'.

Incident rate

Incidents that are counted in the incident rate include acts of self-harm, acts of violence or other criminal conduct.

Indictable offence

An indictable offence is a serious offence usually dealt with by a judge or judge and jury. In Victoria, many indictable offences can be heard summarily, that is, in the Magistrates' Court.

Intervention order

An intervention order is a civil order that restrains the behaviour of the respondent in some way, for a limited or indefinite period of time. Breaching an intervention order is a criminal offence.

Juvenile Justice

Juvenile Justice is a division of the Department of Human Services that deals with children who come into contact with the criminal justice system.

Police brief

A police brief contains all the statements of evidence from witnesses and details of any other evidence, such as drug analysis results, that set out the case against the accused. It also includes the charge sheet and transcripts of interviews, such as the record of interview with the accused.

Police informant

A police informant is the police officer who is in charge of the investigation involving the accused.

Registrar

A registrar is a court official who provides administrative support to the court and deals with enquiries from people attending court.

Reverse onus

Reverse onus means that the accused must convince the decision maker that bail should be granted.

Revoke

To revoke bail means to cancel an accused's bail, the result being that an accused is remanded in custody.

Schedule

A schedule is located at the rear of an Act and contains matters that are typically subsidiary to the Act's main purpose.

Show cause

To show cause means to provide good reasons.

Summary offences

Summary offences are the least serious of crimes and are usually heard by a magistrate.

Surety

A surety is a person or people who give an undertaking to ensure that an accused will appear in court. The surety puts up security, such as money or title to a residential property, which can be taken by the court if the accused fails to appear.

Unacceptable risk

Accused people are considered to be an unacceptable risk if the decision maker believes they would fail to reappear in court, commit an offence while on bail, endanger others or obstruct the course of justice.

Warrant

A warrant is a document, usually issued by a court, that authorises police to arrest people and take them before a court.

Other VLRC publications

Disputes Between Co-owners: Discussion Paper (June 2001)

Privacy Law: Options for Reform: Information Paper (July 2001)

Sexual Offences: Law and Procedure: Discussion Paper (September 2001)

Failure to Appear in Court in Response to Bail: Draft Recommendation Paper (January 2002)

Disputes Between Co-owners: Report (March 2002)

Criminal Liability for Workplace Death and Serious Injury in the Public Sector: Report (May 2002)

Failure to Appear in Court in Response to Bail: Report (June 2002)

People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care: Discussion Paper (June 2002)

What Should the Law Say About People with Intellectual Disabilities Who are at Risk of Hurting Themselves or Other People? Discussion Paper in Easy English (June 2002)

Defences to Homicide: Issues Paper (June 2002)

Who Kills Whom and Why: Looking Beyond Legal Categories by Associate Professor Jenny Morgan (June 2002)

Workplace Privacy: Issues Paper (October 2002)

Defining Privacy: Occasional Paper by Kate Foord (October 2002)

Sexual Offences: Interim Report (June 2003)

Defences to Homicide: Options Paper (September 2003)

People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care (November 2003)

Assisted Reproductive Technology & Adoption: Should the Current Eligibility Criteria in Victoria be Changed? Consultation Paper (December 2003)

People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care: Report in Easy English (July 2004)

Sexual Offences: Final Report (August 2004)

The Convention on the Rights of the Child: The Rights and Best Interests of Children Conceived Through Assisted Reproduction: Occasional Paper by John Tobin (September 2004)

A.R.T., Surrogacy and Legal Parentage: A Comparative Legislative Review: Occasional Paper by Adjunct Professor John Seymour and Ms Sonia Magri (September 2004)

Outcomes of Children Born of A.R.T. in a Diverse Range of Families by Dr Ruth McNair (September 2004)

Workplace Privacy: Options Paper (September 2004)

Defences to Homicide: Final Report (October 2004)

Review of Family Violence Laws: Consultation Paper (November 2004)

Review of the Laws of Evidence: Information Paper (February 2005)

Assisted Reproductive Technology & Adoption: Position Paper One: Access (May 2005)

Assisted Reproductive Technology & Adoption: Position Paper Two: Parentage (July 2005)

Family Violence Police Holding Powers: Interim Report (September 2005)

Workplace Privacy: Final Report (October 2005)

Endnotes:

Chapter 1: Introduction

1 *Justice Legislation (Sexual Offences and Bail) Act 2004* s 10.

2 *International Covenant on Civil and Political Rights*, GA Res 2200 (XXI)), UN GAOR, 21st sess, UN Doc A/6316 (1966), 999 UNTS 171, art 9(3) (entered into force March 23, 1976).

3 Ibid.

4 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950,CETS No 005, art 5(1)(c), (entered into force 3 September 1953).

5 *Human Rights Act 2004* (ACT) s 18(5); *Canadian Charter of Rights and Freedoms* (1982) article 11(e); *Human Rights Act 1988* (UK) (which adopts the rights set out in the *European Convention on Human Rights* including article 5(1)(c)); *Human Rights Act 1990* (NZ) s 24(b).

Chapter 2: Overview of Bail

1 Chart modified from one appearing in David Bamford, et al, *Factors Affecting Remand in Custody: A Study of Bail Practices in Victoria, South Australia and Western Australia* (1999) 32.

2 See, eg, *R v Light* [1954] VLR 152, 157 (Sholl J).

3 *Bail Act 1977* s 4(d)(i).

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

5 Victoria Police were not able to provide us with figures for 'total considered' or 'refused' bail by police. Information on bail granted is for first applications to each decision maker only. This is significant only in relation to the court, as further applications can be made to a court. Data in the table was provided by Court Services, Department of Justice, 10 August 2005. Information was only available on first applications. Information about grants of bail by police and bail justices is held by the court because bail that has already been granted by police or a bail justice before the matter comes to court must be noted on the court file.

6 The figures for 'granted' by police are taken from data provided by Court Services, Department of Justice, 10 August 2005, not Victoria Police. Victoria Police advised that court data about bail was likely to be more reliable. Victoria Police data relies on individual police officers arranging for data to be entered onto the LEAP database and there is a reasonable likelihood of some error: information provided by Corporate Statistics, Victoria Police, 28 September 2005. Court records of bail status are likely to be reasonably accurate both because an offender on bail must be dealt with in a particular way and because there are three parties involved in ensuring the data is accurate: the accused's lawyer and/or the accused, the police prosecutor, and court staff. As a result, any error in information is likely to be remedied before the accused's matter is finalised by the court. However, data is drawn from Courtlink which is a case management, rather than data collection, system so precise statements about accuracy cannot be made. For some of the years we considered, there was a high degree of correlation between the Court Services' data and Victoria Police data, but from 2002–03 the data varied considerably. Victoria Police provided data on 'bailed from station', which includes bailed by police and bailed by bail justices. A comparison of court data and police data shows:

Year	Victoria Police data on police bail	Court data on police bail
2000–01	22 896	21 512
2001–02	22 742	22 328
2002–03	22 339	25 280
2003–04	23 780	26 717

As a result, we cannot validly draw data from the two sources to make any comparisons.

7 Data provided by Court Services, Department of Justice, 10 August 2005.

8 *Summary Offences Act 1966* s 13.

9 *Magistrates' Court Act 1989* s 41(3).

10 Data provided by Court Services, Department of Justice, 10 August 2005. Data about the total number of further applications for bail made by accused was not available, only data showing how often a further application was granted.

11 *Bail Act 1977* s 13(2). The exception to this is that the Magistrates' Court may make a bail decision at the conclusion of a committal hearing.

12 Consultation 46.

13 *Sentencing Act 1991* s 18.

14 Steering Committee for the Review of Government Service Provision, *Report on Government Services 2005* (2005), Vol 1, Figure 7.15. This figure relates to prisoners generally, not just remand prisoners. It is an estimate from the graph contained in Figure 7.15 because the actual figure is not provided in the report.

15 Stuart Ross, *Remand Patterns in Victoria and South Australia* (2004) 15, 42.

16 Bamford (1999) above n 1.

17 Ross (2004) above n 15, Figure 1, 4, based on Australian Bureau of Statistics information.

18 Ibid 5.

19 Consultation 46.

20 Ross (2004) above n 15, 3. The report looked at remand patterns in both South Australia and Victoria, but for the purposes of this paper we look only at the Victorian research.

21 Ibid 7.

22 Ibid 14.

23 Ibid 26.

24 Ibid 29–31.

25 Ibid 33.

26 Ibid 37.

27 Ibid 42.

28 Ibid 43.

29 Data, graph, and trendline calculation provided by Corrections Victoria, 6 October 2005.

30 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody*, *National Report: Volume 1* (1991) para 2.5.2.

31 Australian Bureau of Statistics, *Corrective Services* (June quarter 2005) table 13, 20. People in custody are asked their Indigenous status (whether they are of Aboriginal or Torres Strait Islander origin) when taken into custody. The rates calculation uses the Indigenous population projection for 30 June of the applicable calendar year as the denominator. For full details of the calculation method, definitions and limitations refer to the Explanatory Notes in the publication.

32 Ibid, table 8, 15.

33 Bamford (1999) above n 1.

34 Ibid para 4.4.2. The data is said to have been obtained from 'Court Flow Analysis, Ministry of Justice'. This appears to be an error; at that time the relevant section was called the Caseflow Analysis Section of the Court Management Division, and it was part of the Department of Justice, not Ministry of Justice. It became known as the Court Statistical Services Unit in 1991.

35 Data for 1995 taken from ibid 39. Data for 2004–05 provided by Court Services, Department of Justice, 10 August 2005. The data is considered comparable as in each case it relates to first applications only, and was obtained from the same agency.

36 Police data for 1995 is contained in Bamford (1999) above n 1, 39. Figures for total bail considered by police for 2004–05 were not available, only for bail granted, so percentages of first applications granted by police could not be calculated. Numbers of bail applications granted by police for 2004–05 are recorded by both Victoria Police and Court Services, but these numbers are very different. We were not able to ascertain the reasons for this difference, but may undertake further analysis for our final report.

37 Higher courts' records are not yet kept on a computerised system and are therefore not easily accessible.

38 Data provided by Court Services, Department of Justice, 10 August 2005.

39 Although there has been an increase in the percentage of successful bail applications in the Magistrates' Court, the number of people remanded has also increased (see Figure 5). We have been unable to link data on successful bail applications in Figure 2 to the data on receptions in Figure 6, because the information comes from different data sets.

40 Consultations 2, 5, 6, 7, 8, 9, 10, 14, 17, 18, 22, 24, 25, 27, 29, 38, 43, 44, 46, 47, 48.

41 Consultations 8, 10, 17, 18, 22, 24, 27, 34, 36, 41, 43, 44, 46, 47.

42 Consultations 14, 18, 29, 38, 44, 46, 47, 48.

43 Consultation 47.

44 Consultation 31.

45 Consultations 9, 17, 30, 34, 38, 43, 46, 47; submissions 2, 3.

46 Consultations 7, 8, 12, 22, 25.

Chapter 3: Police and Bail

1 This is shown in Figures 2 and 3 in Chapter 2.

2 Data prepared by Corporate Statistics, Victoria Police, extracted from LEAP, 24 June 2005. Data is subject to variation. Data extracted was of the total number of offenders processed, being a count of the number of processes, not number of offenders. Arrest figures are the total number of offenders processed by arrest, and summons figures are the total number of offenders processed by summons. The proportion of arrest and summons were determined by the commission from those figures. Offenders who were processed more than once each year will be included more than once.

3 *Magistrates' Court Act 1989* ss 30(1), 28(1).

4 Victoria Police, *Victoria Police Manual: VPM Instruction: 113-8 Charge and Summons, and Ex-parte Summary Offences* (2003) para 4.1.

5 *Magistrates' Court Act 1989* s 36(1). Summonses can be served by post for summary offences committed pursuant to a number of Acts, including the *Education Act 1958*, the *Local Government Act 1989* and the *Vagrancy Act 1966*. In addition, they may be served by post for any offence punishable by a fine of 20 penalty units or less: *Magistrates' Court General Regulations 2000* r 601(a),(c).

6 *Magistrates' Court Act 1989* s 28(5).

7 *Children and Young Persons Act 1989* s 128(1). The registrar must be satisfied by evidence on oath or by affidavit by the police that the circumstances are exceptional. See Chapter 9 for a discussion of this issue in relation to young people.

8 Pursuant to the *Magistrates' Court Act 1989* s 28(5), the registrar of a court must not issue a warrant unless satisfied by evidence on oath or affidavit from the police that: it is 'probable' that the accused will not answer a summons; the accused has left the jurisdiction or is likely to leave, or is avoiding having the summons served; a warrant is required to be served under an Act; or there is other 'good cause' for the service of a warrant.

9 *Crimes Act 1958* s 459.

10 *Crimes Act 1958* s 458(1)(a).

11 *Crimes Act 1958* s 458(1)(c).

12 Eg, *Bail Act 1977* s 24, or breach of an intervention order contrary to the *Crimes (Family Violence) Act 1987* s 23.

13 *Magistrates' Court Act 1989* s 64(2)(a) provides that the arresting police officer must take the accused before a bail justice or the Magistrates' Court (or the Children's Court) within a 'reasonable time' so that a decision about bail can be made.

14 Consultation 15.

15 Consultations 6, 8, 12.

16 Data prepared by Corporate Statistics, Victoria Police, extracted from the LEAP database, 24 June 2005. The graph compares total number of alleged offenders processed by arrest, which includes alleged Indigenous offenders, with number of Indigenous alleged offenders processed by arrest.

17 Victoria Police (2003) above n 4, para 1.

18 Consultations 11, 36.

19 *Bail Act 1977* s 10.

20 *Bail Act 1977* s 10(1)(b).

21 *Bail Act 1977* s 10(1)(b).

22 LBC Information Service, *Criminal Law Investigation and Procedure Victoria* Vol 2 at Update 26 .

23 See Chapter 8 in this paper.

24 *Bail Act 1977* s 10(2).

25 *Bail Act 1977* s 13. Only the Supreme Court has this power.

26 See Chapter 9.

27 *Bail Act 1977* s 10(2). Notification shall be in writing. The applicable notification is found in the *Bail Regulations 2003* form 8.

28 Victoria Police, *Victoria Police Manual: VPM Instruction: 113-6 Bail and Remand* (2004) para 4.1.1.

29 Ibid para 4.1.2.

30 Ibid para 4.4.2.

31 *Bail Act 1977* s 10(2)(a).

32 *Bail Act 1977* s 10(2)(3).

33 Consultations 11, 33.

34 Consultation 11.

35 Consultations 9, 18. For a detailed discussion of exceptional circumstance offences see Chapter 6.

36 Consultations 20, 33, 36, submission 2. Some police we spoke to said it was 'force policy' not to make a decision in instances of exceptional circumstances or show cause. However, no such policy is detailed in the Victoria Police Manual.

37 Consultation 9.

38 Victoria Police (2004) above n 28, para 4.4.2.

39 Consultation 15.

40 Bamford (1999) above n 1, 51.

41 Ibid 51–2.

42 Consultations 7, 9, 17, 18, 27, 31, 34; submissions 2, 3.

43 Consultation 7.

44 Consultation 18.

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

46 Both the *Crimes Act 1958* and the *Evidence Act 1958* contain provisions that relate to the voluntariness of confessions.

47 Consultation 6.

48 Consultations 6, 7, 17, 23, 26, 34.

49 Consultations 36, 37, 44. In consultation 33 we were told that bail justices were not called at all on weekdays, instead accused were remanded and taken to court the next day.

50 Judith Dixon, 'Rights of Victims' (Paper presented at the Prosecuting Justice Conference, Melbourne, 18–19 April 1996) 15.

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

52 Ibid 65.

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

54 Consultation 45.

55 Victoria Police, *Victoria Police Manual*: *119-1 Welfare of Victims and Witnesses* (2004) 4.2.

56 Victoria Police, *Code of Practice: For the Investigation of Family Violence* (2004) 4.2.4.

57 Victoria Police, *Code of Practice for the Investigation of Sexual Assault* (1999) 71.

58 Consultations 11, 27, 36.

59 Consultation 45.

60 Victims Support Agency, *Victims' Charter Community Consultation Paper* (2005) 16.

61 Ibid 56.

62 Ibid 57.

63 For more information about the charter and the consultation process, see Victims Support Agency, *Victims' Charter*, <www.justice.vic.gov.au/victimsofcrime> at 26 October 2005.

64 *Victims Rights Act 1996* (NSW); *Criminal Offence Victims Act 1995* (Qld); *Victims of Crime Act 2001* (SA); *Victims of Crime Act 1994* (WA); *Victims of Crime Act 1994* (ACT). New South Wales also has a Victims' Charter, which predates the Act but which has since been incorporated into part 2 of the Act. The charter sets out general principles and guidelines about the treatment of victims of crime.

65 *Victims of Crime Act 1994* (ACT) s 4(l); *Bail Act 1992* (ACT) s 47A.

66 *Victims of Crime Act 1994* (WA), sch 1, guideline 6; *Criminal Offence Victims Act 1994* (Qld) s 15(1)(e); *Victims of Crime Act 2001* (SA) s 8(d). In Queensland, victims of sexual offences or personal violence must also be advised (on request) if an accused absconds prior to the trial.

67 *Criminal Offence Victims Act 1994* (Qld) s 15(1)(e); *Victims of Crime Act 2001* (SA) s 8(1)(d), any condition imposed to protect the victim for the alleged offender.

68 *Victims Rights Act 1996* (NSW) s 6.13.

69 *Victims Rights Act 1996* (NSW) s 6.12.

70 *Bail Act 1992* (ACT) s 23A; *Victims of Crime Act 2001* (SA) s 7; *Bail Act 1986* (SA) s 10(4); *Victims of Crime Act 1994* (WA) s 6.

71 *Bail Act 1978* (NSW) s 32(2A)(b).

72 *Criminal Offence Victims Act 1995* (Qld) ss 11, 13.

73 Home Office, *Victims' Code of Practice* <www.cjsonline.gov.uk/the_cjs/whats_new/news-3232.html> at 25 October 2005, principles 5.14–5.17.

74 The term 'vulnerable victim' is defined in the code to describe people vulnerable by virtue of their personal circumstances or by virtue of the circumstances of the offence. Examples provided of vulnerable victims include people under the age of 17, people suffering from mental disorders and people who have experienced domestic violence: See ibid, principle 4.

75 *Victims Rights and Restitution Act 1990*, 42 USCS §10607(c)(3)(E) (2005).

76 *Victims Rights and Restitution Act 1990*, 42 USCS §10607(a) (2005).

77 This is a modernised version of an earlier statement of principles issued in 1988.

78 *Criminal Code* RS 1985, c C-46, s 497 (iv).

79 *Victims of Offences Act 1987* (NZ).

80 *Victims' Rights Act 2002* (NZ) s 34(1).

81 *Victims' Rights Act 2002* (NZ) ss 29, 30.

82 *Bail Act 1977* s 4(4)(a). We discuss what it means to show cause in detail in Chapter 6.

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

84 Victoria Police (2004), above n 28, para 1.

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

86 Consultations 5, 14, 15, 16, 19, 20, 27, 33, 36, 41; submission 4.

87 Consultation 20.

88 Consultation 20.

89 See Magistrates' Court of Victoria <www.magistratescourtvic.ozehosting.com.au/cgi-bin/searchlist.pl> at 14 October 2005.

90 Department of Justice, *Case Study: Criminal Justice Enhancement Program* <www.justice.vic.gov.au/CA256902000fe154/Lookup/CJEP/$file/Case_Study_v2.0.pdf> at 14 October 2005.

91 Only the Supreme Court has power to grant bail in instances where an accused is charged with murder: *Bail Act 1977* s 13.

92 Consultation 27.

93 Consultations 11, 27.

94 Consultation 20.

95 Consultation 34.

Chapter 4: Bail Justices

1 *Magistrates' Court Act 1989* s 120.

2 *Magistrates' Court Act 1989* s 120(1).

3 *Magistrates' Court Act 1989* s 120(2).

4 Information provided by Court Services, Department of Justice, 26 September 2005.

5 Information provided by Court Services, Department of Justice, 27 July 2005.

6 Ibid.

7 Consultation 26.

8 Ibid. In consultation 33 we were told that there were not 'too many [bail justices] to choose from'.

9 *Bail Act 1977* s 10(2). This section also provides that in circumstances where an accused objects to a condition of bail, there may be recourse to a bail justice.

10 Victoria Police, *Victoria Police Manual: VPM Instruction: 113-6 Bail and Remand* (2004) para 4.1.1.

11 *Bail Act 1977* s 10(2)(a).

12 See Chapter 8 for a discussion about bail conditions.

13 *Bail Act 1977* s 4(4)(d)(ii).

14 *Bail Act 1977* s 12(1)(b). In this context, 'warrant' means a 'warrant of remand' or a 'warrant of commitment'. A discussion of these two terms is contained in Chapter 11.

15 *Children and Young Persons Act 1989* s 129(4). Two working days applies where the court falls within a specified regional area. Schedule 2 of the *Children's and Young Persons (Children's Court) Regulations 2001* contains a list of 'prescribed regions' where it is applicable.

16 See Chapter 3.

17 Consultations 11,13, 18, 20, 27, 28, 30, 34, 38.

18 *Bail Act 1977* s 18(4). We will look in detail at the new facts or circumstances rule in Chapter 5.

19 Consultations 7, 25, 30, 34. In consultation 28 there was discussion of bail justices speaking to the police prior to the bail hearing and a concern that this may result in a matter being prejudged. The issue of the impartiality of bail justices was also raised in submission 2.

20 When a bail justice is making a bail decision in relation to a child, CAHABPS, a DHS unit, must be contacted to undertake an assessment of a child as to his or her suitability for bail. In addition, the service will often facilitate the provision of support services, including accommodation. The service will be discussed in more detail in Chapter 9. Information provided by DHS, 30 August 2005, suggests that bail justices often still refuse bail to an accused child even when bail support is available and the placement service has assessed the child as suitable for bail. This is of concern given that bail justices consulted cited lack of availability of support services as one of the reasons why it is more difficult for them to grant bail than the court.

21 Consultations 10, 11, 13, 19, 22.

22 Data prepared by Court Services, Department of Justice, 10 August 2005. When a bail justice refuses bail and the matter goes to court, the decision of the bail justice is noted on the court file. Court Services drew out records of the total figures per year of refusals by bail justices noted on the court file for matters that proceeded in the Magistrates' Court and in the Children's Court.

23 Consultation 47.

24 Consultation 30.

25 Consultation 47.

26 Although, it is not the role of a court to review a decision of the bail justice.

27 Consultations 6, 7, 26, 34.

28 The regional areas visited were Shepparton, Moe, Mildura and Geelong.

29 See Royal Victorian Association of Honorary Justices, *Welcome to the RVAHJ Callout System*, <www.rvahj.org.au/BJ%20Callout.htm> at 17 October 2005. The site contains a demonstration of the callout system.

30 Consultations 15, 18, 47.

31 Consultations 25, 34.

32 Australian Bureau of Statistics, *2001 Census Basic Community Profile and Snapshot*, <www.abs.gov.au> at 21 October 2005.

33 Information provided by Court Services, Department of Justice, 27 July 2005.

34 The Victorian Aboriginal Justice Agreement is a joint agreement that was developed by the Department of Justice, DHS, the Aboriginal and Torres Strait Islander Commission and the Victorian Aboriginal Justice Advisory Committee. The agreement comprises a set of principles, objectives, strategies and initiatives directed towards addressing over-representation of Indigenous Australians within the criminal justice system, improving Indigenous access to justice-related services and promoting greater awareness in Indigenous communities of their rights: see Victorian Aboriginal Justice Advisory Committee, *Victorian Aboriginal Justice Agreement* (2004) 5.

35 Consultation 26.

36 Consultation 26.

37 Consultation 40.

38 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 42.

39 Information provided by Court Services, Department of Justice, 16 September 2005.

40 Consultations 7, 15, 23, 25, 44.

41 Consultation 44. This was section 4(2)(c) of the *Bail Act 1977*. See Victorian Law Reform Commission, *Failure to Appear in Court in Response to Bail: Report* (2002).

42 Consultations 15, 25.

43 Consultation 15.

44 Information provided by Court Services, Department of Justice, 27 July 2005.

45 Consultation 47.

46 See State of Queensland, Department of Justice and Attorney-General, *JPs/C.Decs,* <www.justice.qld.gov.au/jps/home.htm> at 17 October 2005.

47 Correspondence from Victorian Aboriginal Legal Service to the Department of Justice, 29 October 2004.

48 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody: National Report: Volume 3* (1991).

49 Information provided by the Magistrates' Court Training and Development Unit, 23 September 2005.

50 Ibid.

51 Information provided by Court Services, Department of Justice, 23 September 2005.

52 Victoria Police has an Aboriginal Advisory Unit. Part of the unit's responsibility is to advise police on issues affecting Indigenous Australians and organise and conduct lectures to police recruits on Indigenous issues: see Victoria Police, *Aboriginal Advisory Unit* (17 May 2005) <www.police.vic.gov.au/content.asp?Document_ID=287> at 17 October 2005. The Judicial College of Victoria provides training to judicial officers on various Indigenous awareness issues: information provided by the Judicial College of Victoria, 23 September 2005.

53 Consultation 25. In consultation 47 it was said that there should be some 'mechanism' for dealing with inappropriate conduct of bail justices.

54 See Royal Victorian Association of Honorary Justices, *Code of Conduct,* <www.rvahj.org.au/docsconduct.htm> at 17 October 2005.

55 Consultations 25, 26.

56 *Magistrates' Court Act 1989* s 122(2)(c),(d).

57 See *Magistrates' Court Act 1989* s 11.

58 See *Magistrates' Court Act 1989* s 16H.

59 Information provided by Court Services, Department of Justice, 16 September 2005.

60 Information provided by Court Services, Department of Justice, 27 July 2005.

61 Information provided by Court Services, Department of Justice, 16 September 2005.

62 Consultation 25.

63 Consultation 27.

64 Consultation 47.

65 *Magistrates' Court Act 1989* s 125(1).

66 *Magistrates' Court Act 1989* s 126.

67 Victoria Police (2004) above n 10, para 5.9.

68 Data prepared by Court Services, Department of Justice, 10 August 2005. Data was provided for each year 2000–01 to 2004–05 of number of first applications for bail, including both formal filed applications and 'on the day' applications, to bail justices and courts, divided into number granted and number refused for each decision maker.

69 Ibid. A specific data set was extracted of adult accused people refused bail by a bail justice who were subsequently granted bail by a magistrate in the Magistrates' Court for each year shown. In each year the percentage of decisions changed were: 30% in 2000–01, 34% in 2001–02, 35% in 2002–03, 32% in 2003–04, 37% in 2004–05.

70 Ibid. A specific data set was extracted of accused juveniles refused bail by a bail justice who were subsequently granted bail by a magistrate in the Children's Court for each year shown. In each year the percentage of decisions changed were: 40% in 2000–01, 44% in 2001–02, 49% in 2002–03, 44% in 2003–04, 49% in 2004–05.

71 Consultation 25.

72 *Bail Act 1977* s 12(1A). 'Clear days' is defined by the *Butterworths Australian Legal Dictionary* (1997) to mean 'whole days within the specified period'. This means that the day on which an accused is remanded by a bail justice would not be included in the eight-day period.

73 The equivalent provision in relation to magistrates can be found in the *Magistrates' Court Act 1989* s 82(1). It provides that a magistrate cannot remand an accused for more than eight 'clear' days unless the accused and the police informant agree.

74 Consultation 7.

75 Victoria Legal Aid, *Towards a Better Bail Act: A Review of the Bail Act 1977 by Victoria Legal Aid* (2004) 23.

76 Victoria Police (2004), above n 10, para 4.4.2.

77 Consultations 36, 37, 44. In consultation 33 we were told that bail justices were not called at all on weekdays; instead, accused were remanded and taken to court the next day.

78 *Bail Act 1977* s 10(2)(a).

79 *Bail Act 1992* (ACT) s 13(2).

80 *Bail Act 1992* (ACT) s 17.

81 *Bail Act 1978* (NSW) s 17(1).

82 *Bail Act 1978* (NSW) s 20.

83 Information provided by Donna Evans, Registrar, Parramatta Local and District Courts, 19 September 2005.

84 This review is being conducted by a subgroup of the Criminal Justice CEOs Standing Committee. This is a group of representatives from across the justice sector, including police, Legal Aid, Juvenile Justice, the Attorney-General's Department and Local Courts.

85 *Bail Act 1980* (Qld) s 7(2).

86 *Bail Act 1980* (Qld) s 19.

87 See the State of Queensland, Department of Justice and Attorney-General, *JPs/C.Decs,* <www.justice.qld.gov.au/jps/home.htm> at 20 September 2005.

88 Information provided by the Justices of the Peace Branch, Department of Justice and Attorney-General [Qld], 20 September 2005.

89 Ibid.

90 *Bail Act 1985* (SA) s 10.

91 *Bail Act 1985* (SA) s 13(4).

92 *Bail Act 1985* (SA) s 15(3).

93 *Bail Act 1985* (SA) s 15(2)(a).

94 *Bail Act 1985* (SA) s 15(2)(b)(c).

95 Information provided by the South Australian Magistrates' Court Registry, 31 August 2005.

96 *Bail Act 1982* (NT) s 16(3).

97 *Bail Act 1982* (NT) s 33(3).

98 *Bail Act 1982* (NT) s 33(4).

99 Information provided by the Northern Territory Magistrates' Court, 31 August 2005.

100 *Justices Act 1959* (Tas) s 34.

101 See the discussion concerning these two terms at Department of Justice [Tasmania], *Justice of the Peace Guide*, <www.justice.tas.gov.au/justice/Justices_of_the_Peace/jps_guide> at 17 October 2005.

102 *Justices Act 1959* (Tas) s 23A.

103 Information provided by the Hobart Magistrates' Court, 31 August 2005.

104 *Bail Act 1982* (WA) s 6(1)(a).

105 *Bail Act 1982* (WA) s 6(2)(b).

106 Information provided by City Services, Magistrates' Court and Tribunals, Western Australia, 26 August 2005.

107 Consultations 7, 22, 25.

108 Data prepared by Court Services, Department of Justice, 10 August 2005. This data is a total of all grants of bail and all refusals of bail by bail justices, where such information is noted on the court file of the Magistrates' Court and the Children's Court.

109 Consultation 25.

110 Ibid.

111 *Magistrates' Court Act 1989* s 16B.

112 *Magistrates' Court Act 1989* ss 16C(1), 16C(4).

113 Victoria, *Parliamentary Debates,* Legislative Assembly, 21 April 2005, 653 (Rob Hulls, Attorney-General).

114 Ibid.

115 Information provided by Deputy Chief Magistrate Dan Muling, 14 September 2005.

116 *Magistrates' Court Act 1989* s 16I(a).

117 *Magistrates' Court Act 1989* ss 16C–16J.

118 *Magistrates' Court Act 1989* s 16K.

Chapter 5: Court Decision Making

1 In 2003–04 approximately 80% of the court's workload revolved around criminal matters: Magistrates' Court of Victoria, *Magistrates' Court of Victoria 2003–04 Annual Report* (2004) 8.

2 *Magistrates' Court Act 1989* s 53.

3 Information provided by Court Services, Department of Justice, 10 August 2005. This figure relates to first applications for bail only, and therefore the total number of bail applications heard by the Magistrates' Court would be higher. This figure is derived by adding total number of bail applications in the Magistrates' Court where bail was refused and total number of bail applications in the Magistrates' Court where bail was granted.

4 The figure for 2003–04 was 3500.

5 The age jurisdiction of the Children's Court increased to 18 on 1 July 2005 by virtue of the *Children and Young Persons (Miscellaneous Amendments) Act 2005.*

6 Pursuant to the *Children and Young Persons Act 1989* s 16(1)(b), the Children's Court cannot hear matters where a child is charged with murder, attempted murder, manslaughter, arson causing death or culpable driving causing death.

7 *Children and Young Persons Act 1989* s 134(3). Those offences that cannot be heard summarily are murder, attempted murder, manslaughter, arson causing death and culpable driving causing death.

8 *Children and Young Persons Act 1989* s 129(5) provides that, to the extent that it is not inconsistent with section 129, the *Bail Act 1977* is to apply to children.

9 Information provided by Court Services, Department of Justice, 10 August 2005. This figure relates to first applications for bail only, and therefore the total number of bail applications heard by the Children's Court would be higher. This figure is derived by adding total number of bail applications in the Children's Court where bail was refused and total number of bail applications in the Children's Court where bail was granted.

10 It does not hear treason or murder or various murder-related offences that can only be heard in the Supreme Court.

11 Under the *Crimes Act 1958* s 359AA, the County Court, and the Supreme Court, can determine summary matters on the application of the DPP or the accused where the accused is already before the County or Supreme Courts for an indictable offence, where the accused intends to plead guilty to the summary matter and where the accused consents to the County or Supreme Courts hearing the summary matter. In the County Court, the procedure by which a summary matter is 'uplifted' is regulated by a practice note issued by the Chief Judge of the County Court on 9 June 2004.

12 The reference to pre-trial conference here is a reference to a case conference or a direction's hearing.

13 Magistrates' Court of Victoria, Practice Direction No 3 of 2002.

14 Consultation 48.

15 *County Court Act 1958* s 36A.

16 The decision to 'present' an accused to the Supreme Court is called a 'special decision': see *Public Prosecutions Act 1994* ss 3(a),(c).

17 *Bail Act 1977* s 13(2).

18 *Bail Act 1977* s 13(2)(b)(iii).

19 By virtue of Practice Note (2004) 8 VR 500 issued on 17 December 2004.

20 Information provided by the OPP, 8 June 2005.

21 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 25.

22 Consultation 7.

23 Time spent on remand will generally be discounted from any eventual term of imprisonment: *Sentencing Act 1989* s 18(1).

24 Consultations 10, 17, 22.

25 The police brief must usually be served on the accused or his or her lawyer 'at least' 42 days before the committal mention date: *Magistrates' Court Act 1989* sch 5, cl 7(1).

26 *Mokbel v DPP (No 3)* (2002) 133 A Crim R 141.

27 *Director of Public Prosecution v Cozzi* [2005] VSC 195 (Unreported, Coldrey J, 8 June 2005), para 33.

28 Patrick O'Neil, 'Lab backlog forces release on bail—Magistrate slams delays', *Herald Sun* (Melbourne), 5 October 2005, 2.

29 See, eg, the contrasting decisions in *DPP v Tang* (1995) 83 A Crim R 593 (Beach J) and *R v Kantzidis* (Unreported, Supreme Court of Victoria, Smith J, 9 August 1996) and the analysis of Kellam J in *Beljajev v Director of Public Prosecutions* (1998) 101 A Crim R 362.

30 Lillian Lieder, *Criminal Law 2001: Bail Update and Review* (2001) 14.

31 *Bail Act 1978* (NSW) s 32(b)(i).

32 Meeting with Court Services, Department of Justice, 20 May 2005.

33 Victoria Legal Aid, *Towards a Better Bail Act: A Review of the Bail Act 1977 by Victoria Legal Aid* (2004) 28–9.

34 Correspondence from the Victorian Aboriginal Legal Service to the Department of Justice, 29 October 2004.

35 Consultation 7.

36 Consultation 18. Not all magistrates involved in the consultation agreed with this view.

37 Consultations 8, 9, 10, 34, 41. There is no publicly available data that discloses how often an unrepresented accused is granted bail.

38 Consultations 18, 29.

39 Consultations 9, 24.

40 Magistrates' Court of Victoria, Practice Direction No 1 of 2004.

41 Consultation 18.

42 *Bail Act 1977* s 8(a).

43 *Bail Act 1977* s 8(b).

44 In *Hazim v The Queen* (1993) 69 A Crim R 371, 380 Coldrey J stated that 'the accepted distinction between confessions and admissions is that the former involve admissions of actual guilt of the crime, whereas the latter relate to key facts which tend to prove the guilt of the accused of such crime'.

45 Consultation 47.

46 Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Buchanan JA and O'Bryan AJA, 17 July 2002. This was raised in consultation 9.

47 *The Queen v Kathleen Therese MacBain* (Unreported, County Court of Victoria, Kimm J, 10 October 2000).

48 Consultation 9.

49 In November 2004 the commission was asked by the Victorian Attorney-General to report on the action required to facilitate the introduction of the Uniform Evidence Act into Victoria. In July 2005 the commission released a joint Discussion Paper with the Australian Law Reform Commission and the New South Wales Law Reform Commission: *Review of the Uniform Evidence Act.* Chapter 9 of the paper is concerned with how admissions are treated under the uniform Act. A final report will be tabled in early 2006.

50 *Evidence Act 1995* (Cth) s 85.

51 *Evidence Act 1995* (Cth) s 90.

52 *Bail Act 1977* s 4(4)(d)(i).

53 *Bail Act 1977* s 4(4)(d)(ii). The reference to 'transmit' here would appear to mean that the reasons must be provided to the court that the accused will eventually appear before.

54 *Bail Regulations 2003* form 3.

55 *Bail Act 1977* s 12(1)(b).

56 *Bail Act 1977* s 12(2)(b). Reasons for refusal need not be given where no application for bail is made: *The Queen v The Director-General of Corrections ex-parte Peter John Allen* (Unreported, Supreme Court of Victoria, Tadgell J, 11 November 1986).

57 George Hampel and Daniel Gurvich, *Bail Law in Victoria: A Practical Guide to the Law, Procedure and Advocacy in Bail Applications* (2003) 26.

58 *Director of Public Prosecutions v Philip Anthony Harika* [2001] VSC 237 (Unreported, Gillard J, 24 July 2001) para 30.

59 Ibid para 29.

60 Unreported, Supreme Court of Victoria, Appeal Division, Young CJ, Crockett and Ashley JJ, 8 August 1991.

61 *Director of Public Prosecutions v Parker* (Unreported, Supreme Court of Victoria, Practice Court, Mandie J, 19 August 1994); *Director of Public Prosecutions v Sehevella* (Unreported, Supreme Court of Victoria, Beach J, 12 January 1997); *Director of Public Prosecutions (Cth) v Abbott* 97 A Crim R 19.

62 *Administrative Law Act 1978* s 10.

63 *DPP v Radev*, *DPP v Zayat* (1999) 108 A Crim R 121, paras 48–57.

64 The present practice is that recordings from the Magistrates' Court are kept for three months.

65 Consultations 7, 8.

66 For a discussion concerning unique problems involving the reliance on taped reasons see the comments of Teague J in the recent matter of *Director of Public Prosecutions (Cth) v Joseph Terrence Thomas* [2005] VSC 85 (Unreported, Teague J, 6 April 2005).

67 See, eg, *Bail Act 1977* s 7(1) where reference is made to the provision of reasons 'if any'. Although, as discussed, judges and magistrates do routinely give reasons for all bail matters that come before them.

68 Consultation 47.

69 *Director of Public Prosecutions v Spiridon* (1989) VR 352 (Hampel J).

70 See also *Director of Public Prosecutions (Cth) v Abbott* 97 A Crim R 19 (Gillard J), where, again in a case involving serious drug offending that constituted an exceptional circumstance offence, it was held that reasons had to be provided in the circumstances of that particular case.

71 Advisory committee meeting, 10 May 2005.

72 Consultation 14.

73 Consultation 36.

74 Magistrates' Court of Victoria, Practice Direction No 1 at 2004.

75 *Bail Act 1977* s 18(1)(b).

76 *Bail Act 1977* s 18(6A).

77 *Bail Act 1977* s 18A(1).

78 *Bail Act 1977* s 18A(1).

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

80 *Bail Act 1977* s 24(1)(b).

81 *Bail Act 1977* s 24(1)(c).

82 *Bail Act 1977* ss 18(6A),18A(1), 24(4).

83 Information provided by the OPP, 14 July 2005 and from the Commonwealth DPP, 27 May 2005.

84 *Bail Act 1977* s 18A(6).

85 *Fernandez v DPP* (2002) 5 VR 374.

86 *Boris Beljajev v Director of Public Prosecutions (Vic)* (Unreported, Supreme Court of Victoria, Young CJ, Crockett and Ashley JJ, 8 August 1991).

87 *Fernandez v DPP* (2002) 5 VR 386–7.

88 Ibid 388.

89 Consultation 9.

90 Information provided by a Supreme Court judge, 16 August 2005.

91 *Fernandez v DPP* (2002) 5 VR 386.

92 *Crimes Act 1914* (Cth) s 15AA.

93 Consultation 2.

94 Consultation 47.

95 Consultation 47; *Crimes Act 1914* (Cth) s 15AA.

96 *Boris Beljajev v Director of Public Prosecutions (Vic)* (Unreported, Supreme Court of Victoria, Young CJ, Crockett and Ashley JJ, 8 August 1991). In *Beljajev*, the court queried the use of the word 'appeal' in section 18(5) of the *Bail Act 1977* stating that 'we do not know to what "right of appeal" s 18(5) can refer … at common law the right of bail was to be asserted by successive applications, not by appeal against refusal of bail on a particular occasion'.

97 Lieder (2001) above n 30, 25.

98 *Boris Beljajev v Director of Public Prosecutions (Vic)* (Unreported, Supreme Court of Victoria, Appeal Division, Young CJ, Crockett and Ashley JJ, 8 August 1991) 29.

99 Consultation 18.

100 *Crimes Act 1958* s 579(2). For a detailed discussion on bail pending appeal after conviction and sentence, see John Willis, 'Bail Pending Appeal after Conviction and Sentence on Indictment' (2005) 29 (5) *Criminal Law Journal* 296.

101 *Crimes Act 1958* ss 579(2), 568(7).

102 Willis (2005), above n 100, notes that the test within Victoria has been described as requiring 'special circumstances', 'exceptional circumstances' and 'very exceptional circumstances'. Recent cases have referred to the latter test: *Re Jackson* [1997] 2 VR 1; *Re Pennant* [1997] 2 VR 85; *Re Clarkson* [1986] VR 583.

103 *Re Clarkson* [1986] VR 583, 584–5.

104 This practice is provided for in the Court of Appeal Practice Statement No 2 of 1997 [1998] 2 VR 405, and is allowed under the *Crimes Act 1958* s 582.

105 Court of Appeal Practice Statement No 2 of 1997 [1998] 2 VR 405.

106 Consultations 3, 7, 10, 22; submission 2.

107 Submission 2.

108 There is no data available about revocation of bail at the conclusion of committal proceedings.

109 Consultation 7.

110 Consultation 10.

111 Consultation 7.

112 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 9.

113 *Bail Act 1977* s 13.

114 Law Reform Commission of Victoria, *Homicid*e, Report No 40 (1991).

115 They may, for example, be prosecuted for the offence of manslaughter.

116 Law Reform Commission of Victoria (1991) above n 114, 9.

117 Consultation 18.

118 Law Reform Commission of Victoria (1991) above n 114, 9.

119 Consultation 18. This view was also advanced in consultation 10.

120 Consultation 48.

121 *Bail Act 1977* s 23(2).

122 *Bail Act 1977* s 25.

123 *Bail Act 1977* s 26(1).

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

125 Consultation 9; submission 4.

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

127 *Bail Act 1977* s 24(1)(a). We discuss the ability of police to arrest without a warrant in Chapter 3.

128 Consultation 9.

129 Consultation 9.

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

131 *Bail Act 1977* s 24(1)(b).

132 *Bail Act 1977* s 24(1)(c).

133 Victorian Parliament Law Reform Committee, *Warrant Powers and Procedures*, Discussion Paper (2004).

134 Consultation 6.

135 Victorian Parliament Law Reform Committee, *Inquiry into Warrant Powers and Procedures*, <www.parliament.vic.gov.au/lawreform/Warrant/Submissions/submissions%20page.htm> at 30 September 2005, submission number 23.

136 Ibid submission 25.

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

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

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

140 *Magistrates' Court Act 1989* s 65(2).

141 *Magistrates' Court Act 1989* s 79(1).

142 Consultation 47.

143 *Magistrates' Court Act 1989* s 66(2). This is in situations where a presentment has already been filed in court and the accused has not actually pleaded to the presentment.

144 Consultation 46.

145 *Bail Act 1977* s 16(3).

146 See *Justice Legislation (Sexual Offences and Bail Act) 2004* s 11; *Justice Legislation (Sexual Offences and Bail Act) 2004,* Explanatory Memorandum, 2004, 6; Victoria, *Parliamentary Debates*, Legislative Assembly, 21 April 2004, 718, Attorney-General, Rob Hulls.

147 *Bail Act 1977* s 16(3)(b).

148 *Bail Act 1977* s 4(2)(d)(i).

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

150 We were told that victims are rarely, if ever, present at bail hearings: consultations 31, 33, 36, 41.

151 Consultations 18, 27, 31, 36.

152 Consultations 11, 27, 33.

153 Consultation 18.

154 *Bail Act 1977* s 14.

155 Consultation 9.

Chapter 6: Presumption Against Bail

1 *Bail Act 1977* s 4(4).

2 *Crimes Act 1958* s 21A(1). Section 4(4)(b)(i) of the *Bail Act 1977* provides that the accused must, within the past 10 years, have been convicted or found guilty of stalking, or of an offence in the course of which the accused threatened violence against any person. In addition, an accused will fall within the show cause category where, contrary to section 4(4)(b)(ii) of the *Bail Act 1977*, the court is satisfied that the accused has, on a separate occasion, used or threatened violence against the person her or she is alleged to have stalked, irrespective of whether or not the accused has been charged, convicted or found guilty of an offence in relation to the use or threat of such violence.

3 In circumstances where the accused is alleged to have used or threatened to use violence and the accused has, within the last ten 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, or, the court is satisfied that the accused has, on a separate occasion, threatened violence against the person who is the subject of the

order (whether or not the accused has been charged, convicted or found guilty of an offence in relation to the use or threat of such violence).

4 *Crimes Act 1958* s 77.

5 *Crimes Act 1958* s 197A.

6 *Drugs, Poisons and Controlled Substances Act* s *1981* s 71AB.

7 *Crimes Act 1958* s 71AC.

8 *Drugs, Poisons and Controlled Substances Act* s *1981* s 72B.

9 *Customs Act 1901* (Cth) s 231.

10 *Customs Act 1901* (Cth) s 233B(1). We will discuss in detail complications relating to attempting to and conspiring to commit an offence contrary to section 233B of the *Customs Act 1901* (Cth) later in this chapter.

11 Submission 5.

12 The *Bail Act 1977* s 4(4)(cb) provides that a person who is charged with an offence under section 233A of the *Customs Act 1901* (Cth) 'in relation to a commercial or trafficable quantity of narcotic goods …' must 'show cause why his detention in custody is not justified'. In 2001 the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) made substantial changes to section 233A of the *Customs Act 1901* (Cth), such that section 233A no longer relates to narcotic goods. In fact, section 233A(1A) now states that the section does not apply 'if the goods smuggled, imported, exported or conveyed are narcotic goods.'

13 *Bail Act 1977* s 4(2).

14 *Bail Act 1977* s 4(2); *Crimes Act 1914* (Cth) s 15AA.

15 *Crimes Act 1958* s 9A. Pursuant to section 15AA(2)(c) of the *Crimes Act 1914* (Cth), this includes treason against the Commonwealth as detailed in Division 80 of the *Criminal Code Act 1995* (Cth) where the alleged offence results in the death of person owing to the physical element of the alleged offence, where conduct that comprises the alleged offence carried a 'substantial risk' of causing the death of a person or where the Act is an 'ancillary offence' within the meaning prescribed to that term by the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth) s 15AA(2)(d).

16 *Drugs, Poisons and Controlled Substances Act 1981* ss 71, 71AA.

17 *Drugs, Poisons and Controlled Substances Act 1981* ss 72, 72A.

18 *Customs Act 1901* (Cth) s 231.

19 *Customs Act 1901* (Cth) s 233B(1). We will discuss in detail complications relating to attempting to and conspiring to commit an offence contrary to section 233B of the *Customs Act 1901* (Cth) later in this chapter.

20 The *Crimes Act 1914* (Cth) s 15AA(2) provides that a 'terrorism offence (other than an offence against 102.8 of the Criminal Code)' shall be an exceptional circumstance offence. A 'terrorism offence' is defined in section 3 of the Act to be an offence against Division 72 of the *Criminal Code Act 1995* (Cth) or an offence against Part 5.3 of the *Criminal Code Act 1995* (Cth).

21 *Crimes Act 1914* (Cth) s 15AA(2)(b).

22 Pursuant to section 15AA(2)(c) of the *Crimes Act 1914* (Cth), an offence under Division 91 of the *Criminal Code Act 1995* (Cth) which deals with '[o]ffences relating to espionage and other similar activities' is to attract the exceptional circumstances test where the alleged offence results in the death of a person owing to the physical element of the alleged offence, where conduct that comprises the alleged offence carried a 'substantial risk' of causing the death of a person or where the act is an 'ancillary offence' within the meaning prescribed to that term by the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth) s 15AA(2)(d).

23 Pursuant to section 15AA(2)(c) of the *Crimes Act 1914* (Cth), an offence under section 24AA of the *Crimes Act 1914* (Cth) which deals with 'treachery' is to attract the exceptional circumstances test where the alleged offence results in the death of a person owing to the physical element of the alleged offence, where conduct that comprises the alleged offence carried a 'substantial risk' of causing the death of a person where the act is an 'ancillary offence' within the meaning prescribed to that term by the *Criminal Code Act 1995* (Cth) and the *Crimes Act 1914* (Cth) s 15AA(2)(d).

24 Submission 5.

25 The *Bail Act 1977* s 4(2)(aa)(ii) provides that a person who is charged with an offence under section 233A of the *Customs Act 1901* (Cth) 'where the offence is committed in relation to narcotic goods … in

respect of a quantity that is not less than the commercial quantity…applicable to the drug of dependence constituted by those narcotic goods' must show exceptional circumstances 'which justify the grant of bail'. In 2001 the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) made substantial changes to section 233A of the *Customs Act 1901* (Cth), such that section 233A no longer relates to narcotic goods. In fact, section 233A(1A) now states that the section does not apply 'if the goods smuggled, imported, exported or conveyed are narcotic goods'.

26 See, eg, *Re Browne-Kerr* (Unreported, Supreme Court of Victoria, Coldrey J, 10 August 1993); *Michael Kanfouche* (Unreported, Supreme Court of Victoria, Smith J, 4 April 1991); *R v Nezif* [2005] VSC 17 (Unreported, Habersberger J, 21 January 2005).

27 See, eg, *DPP v Ghiller* [2000] VSC 435 (Unreported, Eames J, 2 September 2000).

28 See, eg, *Phillip Michael Groch* (Unreported, Supreme Court of Victoria, Coldrey J, 13 June 1996); *R v Marcus Robert Ilsey* (Unreported, Supreme Court of Victoria, Williams J, 4 August 2003).

29 See, eg, *The Queen v Marcus Robert Ilsey* (Unreported, Supreme Court of Victoria, Williams J, 4 August 2003); *DPP v Ghiller* [2000] VSC 435 (Unreported, Eames J, 2 September 2000); *Michael Kanfouche* (Unreported, Supreme Court of Victoria, Smith J, 4 April 1991); *R v Alexopoulous* (Unreported, Supreme Court of Victoria, Hampel J, 23 February 1998).

30 See, eg, *Luscombe, Application for Bail* (Unreported, Supreme Court of Victoria, Harper J, 22 June 1993); *Re Application for Bail by Luke Aaron Self* [2005] VSC 108 (Unreported, Hollingworth J, 22 March 2005) paras 13–15.

31 See, eg, *Michael Kanfouche* (Unreported, Supreme Court of Victoria, Smith J, 4 April 1991); *R v Marcus Robert Ilsey* (Unreported, Supreme Court of Victoria, Williams J, 4 August 2003).

32 See, eg, *R v Sanareeve* (Unreported, Supreme Court of Victoria, Vincent J, 3 July 1986); *R v Cox* [2003] VSC 245 (Unreported, Redlich J,1 July 2003). Both are exceptional circumstance cases.

33 See, eg, *DPP v Nicholai Radev, DPP v Housam Zayat* (1999) 108 A Crim R 121; *DPP v Phillip Anthony Harika* [2001] VSC 237 (Unreported, Gillard J, 24 July 2001).

34 Consultations 5, 6, 8, 17, 30, 34, 43, 46, 47.

35 Consultations 18, 34.

36 Consultations 9, 18.

37 *Bail Act 1977* ss 4(3)(a)–(e).

38 See Chapter 5.

39 *Re Application for bail by Whiteside* [1999] VSC 413 (Unreported, Warren J, 6 October 1999).

40 See, for example, *DPP v Tang* (1995) 83 A Crim R 593 (Beach J); *Owens v Stevens* (Unreported, Supreme Court of Victoria, Hedigan J, 3 May 1991).

41 *Owens v Stevens* (Unreported, Supreme Court of Victoria, Hedigan J, 3 May 1991) 17. See also the comments of McDonald J in *DPP v Tong* (2000) 117 A Crim R 169.

42 See, eg, *R v Abbott* (1997) A Crim R 19 at 27 (Gillard J); *R v Sanareeve* (Unreported, Supreme Court of Victoria, Vincent J, 3 July 1986).

43 Lillian Lieder, *Criminal Law 2001: Bail Update and Review* (2001) 16.

44 Consultation 46.

45 *Bail Act 1977* s 4(2)(d)(i).

46 See, eg, *DPP v Philip Anthony Harika* (Unreported, Supreme Court of Victoria, 24 July 2001).

47 *Re application for Bail by Haidy (aka Vasailley)* (Unreported, Supreme Court of Victoria, Redlich J, 22 April 2004).

48 *Beljajev v Director of Public Prosecutions* (1998) 101 A Crim R 362.

49 *Beljajev v DPP (Victoria)* (Unreported, Supreme Court of Victoria, Appeal Division, Young CJ, Crockett and Ashley JJ, 8 August 1991) para 36.

50 *Re application for bail by Mark Clifford Hayden* [2005] VSC 160 (Unreported, Kellam J, 6 May 2005) para 10.

51 Unreported, Supreme Court of Victoria, Gillard J, 24 July 2001. See also *Re Rick Anthony Waters* [2005] VSC 443 (Unreported, Hollingworth J, 26 October 2005) para 7.

52 Consultations 10, 18, 46.

53 Consultation 46.

54 According to the first version of the *Bail Act 1977* s 4, accused had to 'show cause' when they were charged with: an indictable offence that was alleged to have been committed while they were 'at large' awaiting trial for another indictable offence; an indictable offence and were not ordinarily resident in Victoria; an offence of aggravated burglary or any other indictable offence in the course of which they used or threatened to use a firearm, offensive weapon or explosive; or an offence against the *Bail Act 1977*.

55 Consultations 9, 10, 18, 29, 34, 38.

56 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Discussion Paper No 25 (1991) 13–14.

57 Rape is an offence pursuant to the *Crimes Act 1958* s 38. Various consultations raised the issue of rape not being a reverse onus offence: consultations 9, 18, 33, 34, 38.

58 *Crimes Act 1958* s 321P(1A).

59 As they have committed an offence against the *Bail Act 1977*. See *Bail Act 1977* s 29(4).

60 Consultation 9.

61 Consultation 9.

62 *Bail Act 1977* ss 4(2)(aa)(ii), 4(4)(cb).

63 If the charge relates to a 'commercial quantity' of narcotic goods as defined in section 70(1) of the *Drugs, Poisons and Controlled Substances Act 1981* then the court must be satisfied that exceptional circumstances exist which justify the grant of bail. If the charge relates to a 'commercial or trafficable quantity' of narcotic goods within the meaning of the *Customs Act 1901* (Cth) then accused people must 'show cause' as to why their detention is not justified.

64 *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001* (Cth) sch 21.

65 State offences which attract a reverse onus test are: attempting to or conspiring to traffick in a large commercial quantity of a drug of dependence (s 71); attempting to or conspiring to traffick in a commercial quantity of a drug of dependence (s 71AA); attempting to or conspiring to traffick in a drug of dependence to a child (s 71AB); attempting to or conspiring to traffick in a drug of dependence (s 71AC); attempting to or conspiring to cultivate a large commercial quantity of a narcotic plant (s 72); attempting to or conspiring to cultivate a commercial quantity of a narcotic plant (s 72A); and attempting to or conspiring to cultivate narcotic plants (s 72B).

66 Commonwealth offences that no longer attract a reverse onus include: attempting to or conspiring to bring narcotic goods into Australia (pre December 2001 these were offences under s 233B(1)(aa) and s 233B(1)(cb)); attempting to or conspiring to import narcotic goods into Australia (pre December 2001 these were offences under s 233B(1)(b) and s 233B(1)(cb)); without reasonable excuse attempting to obtain possession of narcotic goods which have been imported into Australia (pre December 2001 being an offence under s 233B(1)(c)); and attempting to convey narcotic goods that have been imported into Australia (pre December 2001 being an offence under s 233B(1)(caa)).

67 Amendments to forms of undertaking in the *Bail Regulations 2003* would also need to be made if the suggested Commonwealth amendments were made.

68 Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Bill 2005 (Cth). This Bill was assented on 8 November 2005.

69 Road Safety and Other Acts (Vehicle Impoundment and Other Amendments) Bill 2005. As at the start of November 2005, this Bill had yet to be passed in the Legislative Council.

70 Consultation 7. There was also some discussion of this issue in consultation 30.

71 *Crimes Act 1958* s 21A(1).

72 *Bail Act 1977* s 4(4)(b)(i).

73 *Bail Act 1977* s 4(4)(b)(ii).

74 *Crimes (Family Violence) Act 1987* s 22.

75 *Bail Act 1977* s 4(4)(ba)(i).

76 *Bail Act 1977* s 4(4)(ba)(ii).

77 Lillian Lieder (2001), above n 43, 9.

78 See Department of Justice, *Statistics of the Magistrates' and Children's Courts of Victoria: Intervention Order Statistics 1998/99–2002/03* (2004) 26.

79 Lieder (2001) above n 43, 10.

80 Ibid 10–11.

81 Ibid 10.

82 Lieder was able to identify one unreported matter where the issue had arisen: *Phillip Michael Groch* (Unreported, Supreme Court of Victoria, Coldrey J, 13 June 1996).

83 *Bail Act 1977* s 4(4)(ca). Cultivating narcotic plants, of less than a commercial quantity, is an offence under the *Drugs Poisons and Controlled Substances Act 1981* s 72B. Cannabis is a narcotic plant.

84 An accused charged with having grown a commercial quantity of cannabis, that is 100 plants or 25kg or more must show 'exceptional circumstances' under the *Bail Act 1977* s 4(2)(aa)(i). Cultivating a commercial quantity of narcotic plants is an offence under the *Drugs Poisons and Controlled Substances Act 1981* s 72A.

85 Consultations 9, 17, 18, 30, 34, 38, 43, 46, 47; submissions 2, 3.

86 These are listed in *Bail Act 1977* ss 4(2)(aa)(i)–(ii), 4(4)(a)–(d).

87 Consultation 9. In consultation 47 it was suggested that reverse onus offences should be listed in a table with offences listed in order from least serious to most serious.

88 *Bail Act 1992* (ACT) sch 1.

89 Consultation 46.

90 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Discussion Paper No 25 (1991); Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992).

91 Consultations 6, 7, 22, 34.

92 The 'unacceptable risk' test is found in the *Bail Act 1977* s 4(2)(d)(i).

93 Law Reform Commission of Victoria (1991) above n 90, 14.

94 Consultation 7, 22.

95 Law Reform Commission of Victoria (1992) above n 90, 8.

96 Victoria Police, *Victoria Police Crime Statistics 2003/04* (2004) Table 4.2.1.

97 Ibid. Approximately 33% of adults processed for homicide offences (which include attempts, manslaughter and culpable driving) were summonsed and approximately 57% of adults processed for sexual offences (including rape and non-rape offences) were summonsed.

98 Ibid. Approximately 40% of adult offenders processed for shopsteal were charged, 30% summonsed and 30% cautioned.

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

100 Law Reform Commission of Victoria (1992) above n 90, 9.

101 Law Reform Commission of Victoria (1991) above n 90, 14.

102 Consultation 10.

103 Although we heard that sometimes a decision maker will find that cause was shown but then find the accused is an unacceptable risk; this was criticised by judges in consultation 46.

Chapter 7: Surety for Bail

1 George Hampel and Daniel Gurvich, *Bail Law in Victoria: A Practical Guide to the Law, Procedure and Advocacy in Bail Applications* (2003) 32.

2 *Re Condon* [1973] VR 427 at 431.

3 *Bail Regulations 2003* forms 1 and 2.

4 *Bail Regulations 2003* forms 5 and 6.

5 However, it does appear that individual magistrates and judges have their own practices when it comes to the use of sureties, with some imposing a surety condition for relatively minor charges.

6 Consultations 11, 13, 15, 27, 33, 36, 41.

7 Meeting with Court Services, Department of Justice, 20 May 2005; Corporate Statistics, Victoria Police, 29 April 2005.

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

9 *Bail Act 1977* s 27 provides that a prothonotary or deputy prothonotary of the Supreme Court or a registrar or deputy registrar of the County Court or Magistrates' Court may supervise the entering into the undertaking. However, even in those matters where bail can only be granted by the Supreme Court—such as murder—the surety process will typically be overseen by a registrar of the Magistrates' Court. As the court that hears the majority of bail applications, the Magistrates' Court routinely deals with sureties.

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

11 Consultation 24.

12 Registrars can check the Magistrates' Court database to see whether the proposed surety has been convicted in the Magistrates' Court but this is not always done.

13 Consultations 2, 19.

14 This could be done under section 25 of the *Bail Act 1977*.

15 Consultations 22, 24, 29, 31.

16 Consultation 22.

17 Consultation 7.

18 *Bail Act 1977* s 5(1)(b). The *Bail Act 1977* s 11 also contains a process whereby the police can accept a deposit from an accused who is apprehended for one of several summary offences.

19 *Bail Act 1977* s 5(1)(b).

20 Consultation 11.

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

22 Ibid.

23 *Crown Proceedings Act 1958* s 6(1).

24 *Bail Act 1980* (Qld) s 21(8).

25 A similar provision is found in the *Bail Act 1982* (WA) s 39(c).

26 See the discussion of Crockett J in *Re Condon* [1973] VR 427. See also the comments of Butler-Sloss LJ in *R v Crown Court at Maidstone; Ex parte Lever* [1995] 2 All ER 35 at 40; McCullough J in *R v Uxbridge Justice; Ex parte Howard-Mills* [1980] 1 WLR 56 at 62 and Kirby P in *Cucu v District Court of New South Wales* (1994) 73 A Crim R 240 at 242.

27 Submission 1.

28 Consultations 24, 29.

29 *Bail Act 1977* s 9(3)(a)(ii).

30 Consultations 24, 29, 38, 44.

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

32 *Bail Act 1977* ss 21, 23.

33 Consultation 9.

34 *Re an Application by Melincianu*, [2005] VSC 89 (Unreported, Kaye J, 31 March 2005).

35 Ibid para 31.

36 *Bail Act 1977* s 21.

37 *Bail Act 1977* s 21(1).

38 *Bail Act 1977* s 23.

39 *Bail Act 1977* s 24(1)(b).

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

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

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

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

44 Victoria Legal Aid, *Towards a Better Bail Act: A Review of the Bail Act 1977 by Victoria Legal Aid* (2004) 33.

45 *Bail Regulations 2003* form 14; *Bail Act 1977* s 18(8).

46 Submission 1.

47 Magistrates' Court of Victoria, Practice Direction No 1 of 2002. This was followed by Magistrates' Court of Victoria, Practice Direction No 4 of 2005.

48 *Crown Proceedings Act 1958* s 6. Prescribed forms relevant to the forfeiture process are contained in the *Crown Proceedings Regulations 2002*.

49 *Crown Proceedings Act 1958* s 6(1).

50 *Crown Proceedings Act 1958* s 6(4).

51 *Bail Act 1977* s 32.

52 *Bail Act 1982* (WA) s 49; *Bail Act 1980* (Qld) ss 31–32B; *Bail Act 1978* (NSW) ss 53A–53L; *Bail Act 1992* (ACT) s 37; *Bail Act 1995* (SA) s 19.

53 Consultation 46.

54 Consultation 47.

55 Hampel and Gurvich (2003), above n 1, 39.

Chapter 8: Conditions of Bail

1 Ringwood, Melbourne, Sunshine, Heidelberg, Broadmeadows, Dandenong, Frankston, Ballarat and Geelong. Drug referral services are also offered at Bendigo and Moe, although these are not part of the CREDIT–Bail Support Program.

2 We look at CREDIT program data in Chapter 10.

3 Consultations 18, 46.

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

5 Consultation 18.

6 *Bail Act 1982* (WA) sch 1, pt D, cl (4). See also *Bail Act 1982* (WA) s 17. South Australia has also recently enacted legislation to provide for 'intervention programs' as a condition of bail: *Statutes Amendment (Intervention Programs and Sentencing Procedures) Act 2005* (SA).

7 *Sentencing Act 1991* s 83A.

8 The accused must be aged 17 years or more but be under 25, must agree to a deferral of sentence, and the court must be of the opinion that deferral of sentence is in the interests of the accused: *Sentencing Act 1991* (Vic) s 83A(1)(a)–(c).

9 Consultations 7, 10, 12, 15, 30, 41.

10 Victoria Police, *Victoria Police Manual: VPM Instruction: 113-6 Bail and Remand* (2004) para 5.3.3.

11 Ibid.

12 Review by the Corporate Management Review Department, Victoria Police, 1 October 2004, Victoria Police file number 030384/02.

13 Data provided by Court Services, Department of Justice, 10 August 2005. Information on conditions is limited to what is entered by a magistrate into Courtlink when setting bail. The accuracy and completeness of the data therefore cannot be guaranteed. The percentages noted in the graph are only a percentage of the conditions noted, not all conditions.

14 Consultations 25, 34, 39.

15 Brendan Thomas, *Aboriginal People & Bail Courts in NSW* (2002) 16.

16 Consultation 39.

17 Consultations 18, 47.

18 *Criminal Justice and Court Services Act 2000 (Approved Premises) Regulations 2001* (UK) provide for the regulation and management of approved bail hostels.

19 Consultation 18.

20 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, National Report: Volume 3* (1991).

21 Ibid para 21.4.10.

22 Ibid.

23 Data provided by Corporate Statistics, Victoria Police as extracted from the LEAP database, 24 June 2005. 'Own undertaking' is a reference to accused released on bail without sureties and without deposits or other security.

24 Ibid.

25 Ibid.

26 See Aboriginal Justice Advisory Council, *Who Are We?* <www.lawlink.nsw.gov.au/ajac.nsf/pages/who> at 19 October 2005.

27 Thomas (2002) above n 15, 20.

28 See Chapter 3 of this paper under the heading, 'Taking Victims' Views into Account'.

29 Information provided by the NSW Attorney-General's Department, 27 September 2005.

30 Department of Justice, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (2005) 371.

31 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, National Report: Volume 3* (1991) recommendation 91(c).

32 Ibid para 21.4.14.

33 *Crimes Act 1958* s 464A(2)(a) states that an investigating official 'may' within a 'reasonable time' question the accused or carry out investigations in which the accused participates. Pursuant to s 464A(4)(d) in determining what constitutes a 'reasonable time', regard is to be had to the need to transport the accused from the 'place of apprehension' to a place where 'facilities are available to conduct an interview or investigation'. Sections 464G and 464H deal with the tape-recording of interviews.

34 *Bail Act 1978* (NSW) s 17(1).

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

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

37 *Police and Criminal Evidence Act 1984* (UK) ss 30B(2)(a)(b), 30B(3).

38 *Police and Criminal Evidence Act 1984* (UK) s 30B(4).

39 *Police and Criminal Evidence Act 1984* (UK) s 30B(5).

40 *Police and Criminal Evidence Act 1984* (UK) s 30A(4).

41 Consultation 7.

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

43 Figures provided by Court Services, Department of Justice, 23 May 2005. This figure refers only to specific applications to vary bail, and does not include variation applications that are made during the course of other hearings. The figure includes applications to revoke bail.

44 Consultations 6, 7, 9, 10, 14, 18, 34, 41, 46.

45 Consultations 6, 7, 9, 10, 34, 41. In consultation 14, there was discussion about the nature of the conditions that could be varied by consent and in consultation 46 there was discussion about variations where sureties are involved.

46 Consultation 46.

47 Consultation 46.

48 *Bail Act 1977* s 5(2)(d).

49 *Bail Act 1977* s 4(4). For more information about reverse onus offences see Chapter 5. Chapter 5 deals with the arguments for and against reverse onus offences and talks specifically about victims in that context.

50 *Bail Act 1977* s 4(4)(b). Stalking is an offence under the *Crimes Act 1958* s 21A.

51 *Bail Act 1977* s 4(4)(b).

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

53 *Bail Act 1977* s 24.

54 Correspondence with the OPP, 5 September 2005.

Chapter 9: Children and Young People

1 *Children and Young Persons Act 1989* s 3(1).

2 There is no widely accepted definition of 'young person'. The *Sentencing Act 1991* s 3 defines 'young offender' to be a person who at the time of sentencing is aged under 21. Whenever reference is made to young people in this paper it will be a reference to someone aged over 18 but under 21 at the time of sentencing.

3 *Children and Young Persons Act 1989* ss 137(1), 138.

4 *Children and Young Persons Act 1989* s 129(5).

5 *Children and Young Persons Act 1989* ss 129(3), 129(4).

6 *Children and Young Persons Act 1989* s 129(6A).

7 *Children and Young Persons Act 1989* s 129(7).

8 *Children and Young Persons Act 1989* s 129(8).

9 *Children and Young Persons Act 1989* s 130.

10 Data provided by Court Services, Department of Justice, 10 August 2005.

11 *Children and Young Persons Act 1989* s 128(1). The registrar of the Children's Court must be satisfied by evidence on oath or by affidavit by the police that the circumstances are exceptional.

12 *Children and Young Persons Act 1989* s 129(2).

13 United Nations, *Convention on the Rights of the Child*, UN GAOR, 44th sess, UN Doc A/44/736 (1990) Art 37(a).

14 United Nations, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('*The Beijing Rules*') GA Res 40/33, UN GAOR, 40th sess, UN Doc A/40/53 (1985).

15 Consultation 14.

16 Consultations 7, 30, 37.

17 Consultations 18, 40.

18 Victoria Police, *Victoria Police Crime Statistics 2003/04* (2004) Table 4.2.1, 38. The remainder were either dealt with by means of caution (6944) or some other means (1073). The figures relate to persons under 17 years of age.

19 Ibid table 4.1, 36.

20 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody, National Report: Volume 3* (1991) recommendation 239.

21 Ibid recommendation 240.

22 Greg Gardiner, *Indigenous People and Criminal Justice in Victoria: Alleged Offenders, Rates of Arrest and Over-representation in the 1990s* (2001).

23 Greg Gardiner, 'The Police and Indigenous Juveniles in Victoria' (2001) 26 (5) *Alternative Law Journal* 248, 250.

24 Ibid.

25 Gardiner reports that the rate of arrest for non-Indigenous male children was 41 in 1000 at the end of the 1993–4 to 1996–7 period. This being up from 37 in 1000 in 1993–4. He says that in terms of over-representation, Indigenous male children were 4.6 times more likely to be arrested for an offence in

1996–7 than non-Indigenous male children. This being an increase on the 1993–4 figure, when the over-representation factor was 4.2: ibid.

26 Ibid 251.

27 32.6% of non-Indigenous children were cautioned, 26.3% were arrested, 38.9% were summonsed and 2.2% were processed by other means: ibid.

28 Ibid 252.

29 Ibid.

30 Victorian Government, *Victorian Government Response to the Implementation Review of Recommendations for the Royal Commission into Aboriginal Deaths in Custody* (2005) 3.

31 Victoria Police (2004) above n 16.

32 *Children and Young Persons Act 1989* s 129(6).

33 *Children and Young Persons Act 1989* s 129(6A).

34 Victoria Police, *Victoria Police Manual: VPM Instruction: 113-6 Bail and Remand* (2004) para 4.4.5.

35 Ibid.

36 *Children and Young Persons Act 1989* s 129(4). Two working days apply where the court falls within a specified regional area. Schedule 2 of the *Children and Young Persons (Children's Court) Regulations 2001* contains a list of 'prescribed regions' where it is applicable.

37 *Bail Act 1977* s 12(1A). 'Clear days' is defined by the *Butterworths Australian Legal Dictionary* (1997), to mean 'whole days within the specified period'. This means that the day on which an accused is remanded by a bail justice would not be included in the eight-day period.

38 *Children and Young Persons Act 1989* s 129(3)(b).

39 *Children and Young Persons Act 1989* s 130(1).

40 Data provided by DHS, 30 August 2005. Data does not include re-remands. Single remandees can have more than one remand in a year.

41 *Children and Young Persons (Children's Court) Regulations 2001* r 7(2).

42 *Children and Young Persons Act 1989* ss 130(2)(a)–(f).

43 Consultations 27, 36.

44 Information supplied by DHS, 30 August 2005. Information was provided on the outcomes of after-hours bail hearings attended by, or with advice from CAHABPS, as recorded by CAHABPS workers. The information provided represents some, but not all, of the after-hours bail hearings or outcomes. The data is restricted to those circumstances where the bail justice provides the worker with the reasons for the decision not to grant bail. It does not include all outcomes and is subject to the interpretation of the CAHABPS worker involved in the hearing. DHS advise that information provided has been extracted from systems that were developed independently of the formal centralised database for Juvenile Justice. These systems do not have compulsory fields for data entry and therefore the accuracy and completeness of data cannot be guaranteed. A new electronic client information system is being developed and will be operational in 2006.

45 Figure 13 can be found in Chapter 4: data provided by Court Services, Department of Justice, 10 August 2005. This data was specifically extracted by drawing out cases where it was noted in Courtlink that a bail justice had refused bail and bail was then granted by a magistrate in the Children's Court.

46 Consultation 14.

47 This is often done while the accused is in custody and prior to a bail application to increase an accused's likelihood of being granted bail.

48 Consultation 3.

49 Information provided by DHS, 30 August 2005.

50 Although Juvenile Justice may not necessarily lend assistance when the accused is not an existing client.

51 Information provided by DHS, 30 August 2005. Information is obtained through records kept by CAHABPS workers, which is not recorded for statistical purposes and may not be a complete record. See also above n 44.

52 Data provided by DHS, 30 August 2005. DHS advise that figures for clients deemed unsuitable were derived by counting clients who had requested bail but were not recommended for supervised bail, and the accuracy of the information cannot be guaranteed. See also above n 44.

53 Information provided by DHS, 30 August 2005. Information is obtained through records kept by ACAS workers. Information is recorded for case management, not statistical purposes, and may not be a complete record. See also above n 44.

54 Shuling Chen, et al, 'The Transition from Juvenile to Adult Criminal Careers' (2005) 86 *Crime and Justice Bulletin* 1.

55 Ibid.

56 Consultations 5, 18.

57 This is not so much of an issue where children are initially remanded by a bail justice and then released on bail by the court, because when children are remanded by a bail justice they must be brought before a court on its next working day: *Children and Young Person Act 1989* s 129(4).

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

59 Victoria Police (2004) above n 34, paras 7.1–7.5.

60 Alberti (2004) above n 58, 59.

61 Ibid 60.

62 Ibid 61.

63 Consultations 4, 5, 18, 32.

64 Consultation 5.

65 Consultation 5.

66 Consultation 32.

67 City of Whittlesea, Northern Arrest Referral Team, *Arrest Referral Program Evaluations: Report 2* (2004) 84, quoting unnamed police officer.

68 Alberti (2004) above n 58, 85.

69 Ibid 87.

70 Consultation 5.

71 Consultation 5.

72 *Bail Act 1977* s 24.

73 Consultations 5, 30, 34, 35.

73 *Bail Act 1977* s 24.

74 Consultation 7.

75 Children's Court of Victoria, *Children's Court Clinic*, <www.childrenscourt.vic.gov.au> at 20 October 2005.

76 Ibid.

77 Consultations 5, 7, 10, 25, 37, 39, 42, 47.

78 Unfortunately, it is not possible to obtain data that discloses the frequency with which individual special bail conditions are imposed on children and young people or which groups of decision makers impose such conditions most often.

79 *Bail Act 1977* s 5(2).

80 Consultations 6, 10, 25, 42.

81 It is not possible to obtain statistics relating to the frequency of the imposition of individual special conditions.

82 However, the issue has been explored within Tasmania: see Kate Warner, 'The Dam Blockade: Bail Conditions & Civil Liberties' (1983) June *Legal Service Bulletin* 124.

83 Heilpern, D 'Curfews: Bail Gone Mad' (1991) December *Legal Service Bulletin* 294.

84 Consultations 25, 37, 39.

85 Heilpern (1991) above n 83, 294.

86 Ibid.

87 Brendan Thomas, *Aboriginal People & Bail Courts in NSW* (2002)15–16.

88 Commonwealth, *Royal Commission into Deaths in Custody, National Report: Volume 3* (1991) para 21.4.27.

89 Consultation 5. This issue was also discussed in consultation 38.

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

91 *Children and Young Persons Act 1989* s 129(8).

92 Consultation 14.

93 *Bail Act 1977* s 30.

94 Section 23(1) of the *Children and Young Persons Act 1989* requires that the meaning and effect of any order made needs to be explained as plainly and simply as possible and in a way which it considers the child's parents and other parties to the proceeding will understand.

95 See, eg, Professor Arie Freiberg, *Pathways to Justice, Sentencing Review 2002* (2002) 161–2.

96 *Sentencing Act 1991* s 32(1).

97 Anne Hooker, *Remanded Young Offenders' Program* (2005).

98 The figure is in fact around 68 or 69, as some beds within the unit are occupied by 'prisoner mentors'.

99 Consultation 21.

100 Although a decision had not, at the time of writing, been made as to whether the unit would operate a program similar to that in place at the Youth Unit in Port Phillip Prison.

101 Consultations 10, 21.

102 See, eg, the comments of Coldrey J in *R v Luke Speedie* [2005] VSC 195 (Unreported, Coldrey J, 8 June 2005).

103 Consultations 5, 22.

104 Consultation 21.

105 Consultation 21.

106 Submission 1.

107 Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) 15.

108 Ibid.

109 Consultations 6, 7, 10, 12, 14, 17, 18, 22, 29, 31, 34, 38, 43; submissions 1, 3. Two groups that we spoke to were opposed to the suggestion: consultations 5, 21.

110 Consultation 18.

111 Following changes to the age jurisdiction on 1 July 2005, 17 year olds may now be remanded to YTCs.

112 *Secretary to the Department of Human Services v Magistrates' Court of Victoria* [2002] VSC 257 (Unreported, Ashley J, 27 June 2002).

113 *Sentencing Act 1991* s 32(1)(b).

114 Consultation 10.

115 *Children and Young Persons Act 1989* s 240. In such circumstances it is the decision of the Youth Parole Board, on the application of the Secretary to the Department of Human Services, as to whether the child should be transferred.

116 Law Reform Commission of Victoria (1992), above n 107, 15.

117 Consultation 21.

118 Freiberg (2002) above n 95,162.

119 Information provided by Corrections Victoria, Research and Evaluation Unit, 1 August 2005. The figure is for remandees only and excludes dual status prisoners (those who are sentenced and unsentenced). The

number of prisoners in police cells varies considerably from day to day. The figure provided is the daily average.

120 Information provided by Corrections Victoria, Research and Evaluation Unit, 25 August 2005.

121 There are equivalent provisions in the *Bail Act 1977* s 49 for the County and Supreme Courts: *Bail Act 1977* s 5A.

122 The *Magistrates' Court Act 1989* and the *Bail Act 1977* do not refer to this process as being 'remanded' in a YTC, instead calling it a 'return' to a YTC.

123 Information provided by DHS, 30 August 2005. The figure provided may not include all young people in YTCs by means of the section 49 procedure. The information provided is limited to what is captured by DHS's data system. See also above n 44.

124 Submission 1.

125 Ibid.

126 Ibid.

127 See, eg, *Re an Application for Bail by Mark Clifford Hayden* [2005] VSC 160 (Unreported, Kellam J, 6 May 2005).

128 See, eg, *R v Mills* [1998] 4 VR 235 (Unreported, Philips CJ, Charles and Batt JJA, 26 February 1998), and *R v Misokka,* Supreme Court of Victoria, No 141 of 1995 (Unreported, Callaway and Charles JA and Vincent, AJA, 9 November 1995).

129 Consultations 7, 14, 25; submission 2.

130 *Children and Young Persons Act 1989* s 139(1).

131 Consultation 7.

132 Consultation 14.

133 *Children and Young Persons Act 1989* s 138. Likewise, the *Sentencing Act 1989* s 5(4) provides that a sentence involving confinement must not be imposed 'unless the court considers that the purpose or purposes for which the sentence is imposed cannot be achieved by sentence that does not involve the confinement of the offender'.

134 Victoria Police (2004), above n 34, para 1.

135 *Children and Young Persons Act 1989* s 129(6); consultation 25.

136 Ombudsman Victoria, *Twenty-Ninth Report of the Ombudsman: 30 June 2002* (2002) 30–2.

Chapter 10: Marginalised and Disadvantaged Groups

1 Department of Justice, *New Directions for the Victorian Justice System 2004–2014: Attorney-General's Justice Statement* (2004) 59.

2 Department of Justice, 'A Strategic Approach to Women's Offending' (2005) 2 (3) *Justice Review* 5. Since June 2003 the numbers have varied between 240 and 263. At June 2005 the total number of women was 263.

3 Ibid.

4 Deloitte Consulting, *Victorian Prisoner Health Study* (2003). For more information about bail and mental illness and bail and drug dependency see the sections dealing with these issues in this chapter.

5 Department of Justice (2005) above n 2, 5.

6 'A Strategic Approach to Women's Offending' (2005) 2 (3) *Justice Review* 5.

7 Australian Bureau of Statistics, Australian Social Trends: Other Areas of Concern: Women in Prison, Catalogue No 4102.0 (2004) 5.

8 Consultation 3.

9 Ibid.

10 Terry Hannon, 'Children: Unintended Victims of Legal Process' (Paper presented at the Is Prison Obsolete Conference, Melbourne, 20–22 July 2005); Victorian Association for the Care and Resettlement of Offenders, *Doing it Hard: A Study of the Needs of Children and Families of Prisoners in Victoria* (2000) 78—these are extrapolated estimates based on a questionnaire conducted by the association with prisoners in 1999.

11 Australian Bureau of Statistics (2004), above n 7. Similar figures have been reported in the UK see Emma Stanley and Stuart Byrne, 'Mothers in Prison: Coping with Separation from Children' (Paper presented at the Women in Corrections: Staff and Clients Conference, convened by Australian Institute of Criminology in conjunction with the Department of Correctional Services SA, Adelaide, 31 October–1 November 2000) 2.

12 Di Gursansky, et al, *Who's Minding the Kids—Developing Coordinated Services for Children Whose Mothers are Imprisoned* (1999) 16.

13 Consultation 7.

14 Consultation 3.

15 Sue King, 'Unsentenced Women in Custody' (Paper presented at the Women in Corrections: Staff and Clients Conference, convened by Australian Institute of Criminology in conjunction with the Department of Correctional Services SA, Adelaide, 31 October–1 November 2000) 3.

16 Rosemary Woodward, *Families of Prisoners: Literature Review on Issues and Difficulties* (2003) 7; Victorian Association for the Care and Resettlement of Offenders, *Doing it Hard. A Study of the Needs of Children and Families of Prisoners in Victoria* (2000) 7–8.

17 Women's Legal Service (SA), *Taken In: When Women with Dependent Children are Taken into Custody: Implications for Justice and Welfare* (2000) 5.

18 Ibid 5.

19 The lack of procedure has been also discussed in South Australia: see ibid.

20 Hannon (2005) above n 10.

21 Ibid; consultation 1.

22 In interviews done with women and their family members about children and the bail process, one woman who was the mother of an accused woman said: 'She never believed until the day she was sentenced, that she was going to get sentenced. She never believed it, she thought she was coming home' Unpublished, Terry Hannon *Children: Unintended Victims of the Legal Process* [Flat Out Inc report].

23 Corrections Victoria, *Mothers and Children Policy* (2005) 3.1.

24 Holly Johnson, *Drugs and Crime: A Study of Incarcerated Female Offenders* (2004) 36.

25 Pat Mayhew, *Counting the Costs of Crime in Australia* (2003) 5.

26 *Sentencing Act 1989*, ss 18X–18ZS.

27 A discussion of police referrals to the CREDIT–Bail Support Program can be found in Chapter 9. Discussion about whether the Bail Act should specifically refer to the use of special bail conditions as a means of utilising support services, such as the CREDIT–Bail Support Program, can be found in Chapter 8.

28 Magistrates' Court of Victoria, *CREDIT–Bail Support Program*, <www.magistratescourt.vic.gov.au> at 24 October 2005.

29 Silvia Alberti, et al, *Court Diversion Program Evaluation: Process Evaluation and Policy & Legislation Review: Final Report: Vol 2* (2004). At the time of the evaluation, CREDIT had not merged with the Bail Support Program.

30 See Chapter 8, 'Bail Conditions and Support Services' and Chapter 9, 'Source of Referral' in this paper.

31 Alberti (2004), above n 29, 64.

32 Ibid 64. This figure was taken from an analysis of data extracted from the 'Parallel Services System' database. There were 2703 client 'episodes' on the database for this period. A participant can have multiple court episodes.

33 An analysis of a sample of 100 CREDIT participants found that 96% had a prior criminal conviction: ibid 85.

34 A definition of 'successful completion' is contained in the review: ibid 74.

35 Ibid 75–6.

36 Department of Justice Court Services, *Victorian Magistrates' Courts Sentencing Statistics: 1996/1997 to 2001/2002* (2003) 24.

37 Alberti (2004), above n 29, 77.

38 Ibid 84.

39 Ibid 84. Those assessed included CREDIT clinicians, magistrates, Victoria Police, Legal Aid, treatment providers and participants in the program.

40 Data extracted from ibid 75–6. Sentencing outcomes were measured for the period spanning January 1999 to September 2003. Percentage values may not add up to 100% due to rounding. The figures were taken from an analysis of data extracted from the 'Parallel Services System' database. There were 2703 client 'episodes' on the database for the period January 1999 to May 2003. A participant in the CREDIT program can have multiple court episodes. Data for the months of June and July 2003 and supplementary 'summaries' for the 12 month period to 30 September were obtained from the CREDIT Statewide Coordinator.

41 Northern Arrest Referral Team, City of Whittlesea, *Arrest Referral Program Evaluations: Report 2 (*2004).

42 Ibid iv.

43 Ibid 34–5.

44 Ibid 34. Approximately 26% of participants had no or an unknown legal status but were referred to the program due to a domestic violence incident and 21% of participants had received some form of community based sentencing order. The review notes that the high number of participants referred to the program with no or an unknown legal status is 'indicative of police … using NART as an effective means to deal with difficult or problem people for whom traditional law and order responses, such as charging and incarceration, may not benefit or have any success'.

45 Ibid v.

46 Ibid vi. Some 60% of participants were referred by police and 19% were self-referred. At the time of the evaluation, 55 different police officers had referred individuals to NART.

47 See *Prostitution Control Act 1994* s 13.

48 Inner South Community Health Service, *Arrest Referral Program: Health Innovations Partnerships Program: Annual Report 2004/2005* (2005) 5. Information also provided by Arrest Referral Program, 21 September 2005.

49 Inner South Community Health Service (2005), above n 48, 15.

50 Australian Bureau of Statistics, *Counting the Homeless: Implications for Policy Development* Occasional Paper, Catalogue No. 2041.0 (1996) 1.

51 Australian Bureau of Statistics, *Hidden Homelessness in Australia* (Media Release, 18 November 2003).

52 Ibid.

53 Jelena Popovic, *Homelessness and the Law: A View from the Bench* (2002) 2.

54 Ibid 2; Philip Lynch, 'Begging for Change: Homelessness and the Law' (2002) 26 (3) *Melbourne University Law Review* 690, 695.

55 Lynch (2002) above n 54, 693; Philip Lynch, 'From "Cause" to "Solution": Using the Law to Respond to Homelessness' (2003) 28 (3) *Alternative Law Journal* 127.

56 Popovic (2002) above n 53, 2.

57 Philip Lynch above n 54, 697; see also Beth Midgley, *Improving the Administration of Justice for Homeless People in the Court Process: Report of the Homeless Persons' Court Project* (2004), 17, which found that 75% of the homeless people spoken to had received fines and charges for behaviour that was a direct consequence of their homelessness.

58 Popovic (2002) above n 53, 2.

59 The issue of accommodation arose in 15 of the 49 consultations conducted by the commission. Consultations 3, 4, 5, 6, 7, 8, 10, 12, 16, 18, 25, 30, 37, 40, 42.

60 Consultations 8, 25, 34, 40, 42; submission 1.

61 See, eg, *Phillip Michael Groch* (Unreported, Supreme Court of Victoria, Coldrey J, 13 June 1996); *R v Marcus Robert Ilsey* (Unreported, Supreme Court of Victoria, Williams J, 4 August 2003).

62 *Bail Act 1977* s 4(2)(d)(i). In assessing whether the accused is an unacceptable risk, the decision maker is to consider all relevant matters including, 'the character, antecedents, associations, *home environment and background* of the accused' (emphasis added): *Bail Act 1977* s 4(3)(b).

63 Consultation 3.

64 In relation to lack of accommodation generally see above n 59. Lack of accommodation in rural/regional areas was raised in consultations 3, 8, 12, 31, 40.

65 Consultations 8, 25, 34, 40, 42; submission 1.

66 Consultation 47. Bail justices said they would usually either contact the Salvation Army or arrange a motel room for the person.

67 Consultation 18.

68 Consultation 12.

69 'Cognitive impairment' has been the preferred terminology of the commission in its references, although we recognise that 'impaired mental functioning' is sometimes used in the literature and in the legislation. The commission's consultations and research in this area has indicated that cognitive impairment is a more appropriate and accurate term, see Victorian Law Reform Commission, *Sexual Offences: Law and Procedure: Final Report* (2004) 321; Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care Report* (2003) 114.

70 Cameron Wallace, et al, 'Serious Criminal Offending and Mental Disorder' (1998) 172 *British Journal of Psychiatry* 477, 482. There is an ongoing debate about the extent to which such correlations reflect causal relationships. Our intention is simply to highlight the comparatively high number of people with mental illness within the criminal justice system.

71 Felicity Parton, et al, 'An Empirical Study on the Relationship Between Intellectual Ability and an Understanding of the Legal Process in Male Remand Prisoners' (2004) 11 (1) *Psychiatry, Psychology and Law* 96; New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Research Report 5 (1996).

72 Consultations 10, 16, 18.

73 Consultations 10, 16.

74 Office of the Public Advocate, *A Practical Guide for Independent Third Persons* (2005) 11.

75 Office of the Public Advocate (2005) above n 74.

76 New South Wales Law Reform Commission (1996) above n 71, para 4.6.

77 Ibid para 4.7.

78 New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report No 80 (1996).

79 Consultation 47.

80 Victoria Police, *Victoria Police Manual: VPM Instruction: Instruction 103-9* (2005) 4.2.1.

81 Consultation 16.

82 Melbourne Magistrates' Court, *Court Support and Diversion Services* <www.magistratescourt.vic.gov.au> at 25 October 2005.

83 To receive assistance from the department, the person must meet the provisions of the *Intellectually Disabled Persons' Services Act 1986*.

84 Disability Services, Department of Human Services, *Criminal Justice Practice Manual* (July 1998).

85 Ibid.

86 Jim Simpson, et al, *The Framework Report: Appropriate Community Services in NSW for Offenders with Intellectual Disabilities and those at Risk of Offending* (2001) 111.

87 Consultations 10, 16, 43.

88 Consultation 23.

89 *Bail Act 1980* (Qld) s 11A(1).

90 *Bail Act* 1980 (Qld) s 11A(3).

91 *Bail Act* 1980 (Qld) s 11B.

92 *Bail Act 1978* (NSW) s 32(1)(b)(v).

93 *Bail Act 1978* (NSW) s 37(2A).

94 New South Wales Law Reform Commission (1996) above n 71, recommendation 6. The Victorian Law Reform Commission made similar recommendations in its final report on sexual offences: see above n 69, recommendation 150.

95 New South Wales Law Reform Commission (1996) above n 71, recommendation 8.

96 Ibid 4.98.

97 NSW Police Services, *Code of Practice for Custody, Rights, Investigation, Management and Evidence (CRIME)* (2002) 94–5.

98 For a discussion on the socio-economic position of Indigenous Australians see: Office of Aboriginal and Torres Strait Islander Affairs, *Key Social and Economic Indicators for Indigenous Australia: A Comparative Analysis* (2004).

99 Victorian Aboriginal Justice Advisory Committee, *Victorian Aboriginal Justice Agreement* (2004) 13.

100 Victoria Police, *Victoria Police Manual: VPM Instruction: 113-1 Taking a Person into Custody* (2003) 4.3.5.

101 Victorian Aboriginal Legal Service, *Legal Services* <www.vals.org.au> at 27 September 2005.

102 The role of client service officer is exempted under the *Equal Opportunity Act 1995*.

103 Victorian Aboriginal Legal Service Co-operative, *Annual Report 2003/2004* (2004) 5.

104 Consultation 13.

105 Ibid.

106 Consultation 6.

107 Parliament of Victoria Law Reform Committee, *Review of Legal Services in Rural & Regional Victoria: Report* (2001).

108 Ibid 159, recommendation 34.

109 Victoria Police (2003) above n 100, para 4.3.5.

110 These are located at Ballarat, Bendigo, Echuca, Geelong, Horsham, Robinvale, Shepparton, Swan Hill, Warrnambool, Heywood, Warragul, Mildura and Sale.

111 Victoria Police (2003) above n 100, para 4.3.5.

112 Consultation 40.

113 Parliament of Victoria Law Reform Committee, above n 107, 151.

114 Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel* Final Report (2001).

115 Ibid.

116 See section entitled 'Representativeness' in Chapter 4 of this paper.

117 Magistrates' Court of Victoria, *Aboriginal Liaison Officer*, <www.magistratescourt.vic.gov.au> at 21 October 2005.

118 The Aboriginal Liaison Officer told us that much of the regional work is done over the phone: consultation 12.

119 Consultation 12.

120 Consultation 38.

121 Aboriginal and Torres Strait Islander Commission, 'Sid Clarke's No Bleeding Heart', *ATSIC News*, September 1999, <www.atsic.gov.au> at 24 October 2005.

122 Ibid.

123 Parliament of Victoria Law Reform Committee (2001) above n 107, recommendation 30.

Chapter 11: Other Legislative Reforms

1 *Bail Act 1977* s 30.

2 *Bail Act 1977* s 30(3).

3 *Bail Regulations 2003* Form 2.

4 *Bail Act 1977* s 30(3).

5 The OPP no longer sends notices to the accused: consultation 9. Mr Mark Pedley, Deputy Director, Commonwealth DPP indicated that lawyers at the Commonwealth DPP do send letters to defence solicitors notifying them of their clients' trial details, 25 May 2005.

6 *Bail Act 1977* s 3.

7 Section 25 of the Act is another example of where the use of the word 'court' may cause confusion.

8 Furthermore, there is no indication of which court the arrested person is to be brought before. In practice, the police would take an accused person to the Magistrates' Court or the Children's Court.

9 Eg, section 12 makes reference to 'a court or bail justice'.

10 Consultation 9.

11 Reference was made to warrants of commitment in the *Justices of the Peace Act 1865*.

12 The *Magistrates' Court (General Regulations) 2000* contains a remand warrant —form 12.

13 *Secretary to the Department of Human Services v Magistrates' Court of Victoria* [2002] VSC 257 (Unreported, Supreme Court of Victoria, Ashley J, 27 June 2002).

14 This is in keeping with part 6 of schedule 5 of the *Magistrates' Court Act 1989*. Clause 24(1)(b) makes reference to the court remanding the defendant in custody or granting bail.

15 *Interpretation of Legislation Act 1984* ss 49(1), 49(2).

16 Consultation 7.

17 Ibid.

18 Consultation 34.

19 Provision is made for regulations in respect of forms in *Bail Act 1977* s 33(a).

20 Consultation 9.

21 Consultation 38.

22 Pursuant to section 16(3) of the *Bail Act 1977* s 16(3).