Failure to Appear in Court in Response to Bail

Draft Recommendation Paper

Victorian Law Reform Commission

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CALL FOR SUBMISSIONS

The Victorian Law Reform Commission invites your submissions on this Draft Recommendation Paper and seeks your responses to the recommendation made. You can send your written submissions by post, or by email to <law.reform@lawreform.vic.gov.au>. If you need any assistance with preparing a submission, please contact the Commission.

Please note that all submissions made to the Commission are treated as public documents, unless they are identified otherwise. If you do not want your name to be identified or if you want your submission to be confidential, please make this clear on the document. Members of the public can contact the Commission to obtain copies of submissions.

DEADLINE FOR SUBMISSIONS: 15 FEBRUARY 2002.

Published by the Victorian Law Reform Commission.

The Victorian Law Reform Commission was established under the *Victorian Law Reform Commission Act 2000* as a central agency for developing law reform in Victoria.

This Draft Recommendation Paper reflects the law as at 1 November 2001.

The publications of the Victorian Law Reform Commission follow the Melbourne University Law Review Association Inc *Australian Guide to Legal Citation* (2000).

Note: Unless otherwise stated, all references to legislation in this Paper are to Victorian legislation.

National Library of Australia
Cataloguing-in-Publication

1. Bail–Victoria. 2. Criminal law–Victoria.

I. Victorian Law Reform Commission.

345.945072

ISBN 0 9579678 2 9

Contents

Preface

This is the Victorian Law Reform Commission's first community law reform publication. Minor law reform projects of this kind can be initiated by the Commission without a reference from the Attorney-General. The Commission undertook this project at the suggestion of the Victorian Aboriginal Legal Service.

The Draft Recommendation Paper is the responsibility of the Commission as a whole, as no Division of the Commission was constituted for the purpose of the project.

The Commission acknowledges the valuable contribution of Stephen Farrow, who had primary responsibility for drafting this Paper. We also acknowledge the editing of Trish Luker and the desktop publishing work undertaken by Naida Jackomos and Lorraine Pitman.

The Commission gratefully acknowledges the assistance of the Victorian Aboriginal Legal Service, Victoria Police, Victoria Legal Aid, the Magistrates' Court and the Indigenous Issues Unit of the Department of Justice. The views expressed in this Draft Recommendation Paper are those of the Commission and are not necessarily those of the organisations with which we have consulted.

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Scope of this Paper

One of the functions of the Victorian Law Reform Commission is to examine any matter that the Commission considers raises relatively minor legal issues that are of general community concern.[1]

This Paper examines and makes a recommendation in relation to a relatively minor legal issue arising under the *Bail Act 1977* which was brought to our attention by the Victorian Aboriginal Legal Service.

The issue arises when a person who has been charged with a criminal offence is released on bail for the period until their court hearing and fails to appear at the court hearing. The court will issue a warrant for the police to arrest the person and bring them to court. Under the *Bail Act 1977*, the person will be held in custody until the court hears their charge. The person can only be released on bail again if they satisfy certain tests. The issue examined in this Paper is whether these tests are appropriate and whether they should be changed.

This Paper explains what bail is and describes the policies behind the law regarding bail. However, the Paper does not provide a comprehensive review of Victorian laws relating to bail.

The issue that we examine in this Paper is particularly significant for members of the Aboriginal community,[2] but it also affects other disadvantaged groups in Victoria.

We propose an amendment to the *Bail Act 1977* to address this issue. We would welcome any comments from members of the community about this issue and about our reform proposal, prior to 15 February 2002.

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[1] *Victorian Law Reform Commission Act 2000* s 5(1)(b).

[2] Concerns were raised about the impact of bail laws on Aboriginal people as early as 1991 by the Royal Commission into Aboriginal Deaths in Custody.

TERMINOLOGY

BAIL

A person who is in custody (see below) may be released on bail on the condition that they undertake to appear in court on a specified date.

CHARGE

A charge is a formal document filed in the Magistrates' Court alleging that a specified person has committed a specified offence.

COMMON LAW

Common law is the law developed by the courts, as distinct from the laws passed by Parliament.

CUSTODY

A person who has been arrested or is being questioned by the police in relation to an offence is considered to be in the custody of police. A defendant (see below) who is in court is in the custody of the court.

DECISION-MAKER

A range of different people can grant bail. Depending on the nature of the charge, bail can be granted by a member of the police force, a bail justice, a magistrate or a judge. Because of the range of different people who may have the power to grant bail, we use the general term 'decision-maker' when referring to the person responsible for granting or refusing bail.

DEFENDANT

A defendant is a person who has been charged with an offence. In this Paper the term 'defendant' includes children and adults.

REMAND

A person is on remand if they are held in a police cell or a prison after they have been charged with an offence but have not been found guilty by a court.

Chapter 1
Background

THE ORIGINS OF THIS PAPER

1.1 In May 2001, the Victorian Aboriginal Legal Service wrote to the Victorian Law Reform Commission asking the Commission to review the operation of section 4(2)(c) of the *Bail Act 1977*. Section 4(2)(c) covers the situation when a person who has been charged with an offence is released on bail to appear in court on a particular date and the person fails to appear on that date.

1.2 The Victorian Aboriginal Legal Service expressed a number of concerns about the operation of the section. Those concerns are examined in more detail in Chapter 2. Before examining these concerns, it is useful to outline the context in which they arise.

WHAT IS BAIL AND WHAT IS THE CONTEXT IN WHICH IT ARISES?

1.3 When the police suspect that a person (whether an adult or child)[3] has committed an offence, they may file a charge against that person. The charge is filed in the Magistrates' Court.[4]

1.4 Once a person who is suspected of committing an offence has been charged, steps must be taken before the charge can be determined in court. For example, evidence may have to be gathered, scientific tests may need to be conducted and witnesses may need to be found. This means that there is usually a substantial period of time between when the person is charged and when the charge is dealt with by the court.

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[3] The *Children and Young Persons Act 1989* contains specific provisions (ss 128–131) regarding custody and bail of children. For example, a child cannot be remanded for more than 21 days. Aside from those provisions, the issues discussed in this Paper apply to children as well as adults.

[4] Almost all criminal charges in Victoria are initiated in the Magistrates' Court. The more serious offences are ultimately tried in the County Court or the Supreme Court; however, they almost invariably commence with a charge filed in the Magistrates' Court.

1.5 There are some circumstances in which the defendant does not have to be present in court when the charge is heard by a magistrate.[5] In many cases, however, the defendant must be in court for the trial to proceed. In these cases, if the defendant does not turn up to court, the consequences may include:

- a waste of court resources, because the trial will have to be postponed until another date and the court will need to issue a warrant to arrest the defendant;
- a waste of police resources, because the police may have to search for the defendant;
- loss of evidence due to memories fading over time, witnesses dying or moving away from the address known to the prosecution or defence; and/or
- additional anxiety for witnesses, particularly victims required to give evidence about matters which may be distressing.

1.6 Under Victorian law, there are three ways to require the defendant to appear in court.

- **Summons** A summons can be used for any charge. If the police decide to use a summons, they apply to a registrar of the Magistrates' Court[6] to issue a summons instructing the defendant to appear in court.[7] The summons describes the charge against the defendant and identifies the member of the police force[8] who filed the charge. It tells the defendant to attend at a specified Magistrates' Court on a specified date to answer the charge.
- **Bail** The police may decide to arrest the defendant, who may then be released on bail. Bail involves an undertaking by the defendant to appear in court. When a defendant is released on bail they have to sign a document that records this undertaking. The document also states that the defendant has received a notice setting out their

[5] *Magistrates' Court Act 1989* s 41.
[6] *Magistrates' Court Act 1989* s 28.
[7] The police do not need to apply if the defendant has already been released on bail or placed on remand at the time the charge is filed with the registrar.
[8] Most charges are filed by the police. Other people, such as wildlife inspectors or fair trading inspectors, also have the power to file charges in some circumstances.

obligations while under bail and the consequences of failing to comply with those obligations. The main obligation is to appear in court. However, other obligations may include regularly reporting to a police station, not approaching witnesses and not going to certain locations, such as the place where the offence is alleged to have occurred.

- **Remand** The defendant may be arrested and held in custody in a police cell or prison until their court appearance.

1.7 The Victoria Police *Operating Procedures* state that a member of the police force of a certain seniority must be consulted before a decision is made as to whether a defendant should be summonsed, bailed, or remanded in custody.[9] The *Operating Procedures* do not specify any criteria to guide this decision.[10] The Magistrates' Court can deal with some less serious charges in the absence of the defendant. However, the decision whether to charge on summons or to release a person on bail is not necessarily linked to whether or not the charge against the defendant is one that can be heard in their absence or can only be heard if the defendant is present in court.

1.8 If the defendant is arrested and a decision is to be made about whether they should be released on bail or remanded, the decision-maker has to balance two competing interests. These interests are:

- to ensure that the defendant will attend the court and will not interfere with witnesses or commit other offences; and
- to ensure that the defendant, whose charges have not been finalised and who cannot be assumed to be guilty of that offence, is not deprived of their liberty without good reason.

1.9 Holding the person on remand will satisfy the first of these two interests. However, it can have serious social and financial consequences for the defendant. These consequences 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.

[9] Victoria Police, *Operating Procedures* (revised 29 November 1999, updated to 2 July 2001) 7.8.1.1.

[10] Except for minor offences where a simplified procedure (known as the ex-parte hand up brief procedure) is available: ibid 7.8.1.

- If the defendant is 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 had been released on bail.
- They may be held in a police cell or prison together with people who have been found guilty of offences and who have been sentenced to a term of imprisonment.
- There is a stigma attached to being in prison, whether on remand or serving a sentence.
- If at the end of their trial they are found not guilty of the charge, the hardship they have suffered by being on remand cannot be redressed.
- If they are found guilty, their wrongdoing might not justify a prison sentence. A court may take the view that a fine or a community-based order is the appropriate penalty. This is particularly relevant to less serious offences dealt with in the Magistrates' Court.
- Even if the court imposes a prison sentence, the sentence might be for a shorter period than the time the defendant has spent on remand. Whilst the time spent on remand must, unless the court orders otherwise, be counted as a period of imprisonment already served for the offence,[11] this may result in the defendant spending more time in custody for the offence than they should have. Again, there is no redress for the hardship suffered by being on remand.[12] This, too, is particularly relevant to less serious offences dealt with in the Magistrates' Court.
- A person may be held on remand for two or more separate sets of offences. That may result in a court deciding their time on remand

[11] *Sentencing Act 1991* s 18.

[12] The former Law Reform Commission of Victoria noted that, as a matter of strict logic, there is no inconsistency in refusing bail in cases where, in the event of a finding of guilt, a non-custodial sentence is likely. Decisions on bail are based on different considerations. Nevertheless, the Commission considered that it was anomalous and undesirable that a person who was unlikely to receive a sentence of imprisonment should be refused bail: Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992) para 29.

was attributable to the offences other than the ones it is dealing with, and therefore not counting the time they have spent in custody as part of the sentence it is imposing.[13] If the person is then acquitted of the other offences, or punished by a non-custodial sentence or a sentence of imprisonment shorter than the time they spent on remand, again they have suffered hardship which cannot be redressed.

- 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.

1.10 For these reasons, a defendant should only be held on remand if the decision-maker concludes that there is a risk that they will not attend court, will interfere with witnesses, or will commit other offences.

1.11 When a defendant is convicted of an offence, imprisonment is a sentence of last resort. It can only be imposed if the court considers that the purpose or purposes of the sentence cannot be achieved by a sentence (such as a community-based order) that does not involve imprisonment.[14] It follows that, as a matter of policy, placing a defendant on remand should also be a last resort.

1.12 A further reason why remand should be a last resort is that it is very expensive. Figures provided to the Productivity Commission by the Victorian Government show that the average recurrent cost for each prisoner each day in Victoria is approximately $130.[15] Housing a person in custody for a short period is proportionally more expensive than housing a person in custody for a longer period.

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[13] *Sentencing Act 1991* s 18.

[14] *Sentencing Act 1991* s 5(4).

[15] Steering Committee for the Review of Commonwealth/State Service Provision, *Report on Government Services 2001* (2001) Attachment 10A, Table 10A.29, available at:<http://www.pc.gov.au/gsp/2001/attachment10.pdf>. Note that this figure applies only to remand prisoners housed in prisons. There is no comparable data available on the cost of remand prisoners in Victoria who are housed in police cells.

WHEN IS A PERSON ENTITLED TO BAIL?

1.13 The factors discussed above are reflected in the law which governs the granting of bail. Historically, the common law favoured defendants being released on bail rather than being held on remand.[16] The prosecuting authorities had to show why the defendant should not be released until the trial.

1.14 In 1977 the Victorian Parliament passed the *Bail Act 1977*, which is now the main law that governs bail in Victoria. Much of that Act is derived from the common law and the common law continues to influence the way that the Act is interpreted.

1.15 The *Bail Act 1977* was based[17] on a report of the Victorian Parliament's Statute Law Revision Committee.[18] The Committee recommended legislation setting out criteria for a decision-maker to consider when deciding whether a defendant should be held on remand or released on bail. The Committee stressed that it is important for the decision-maker to be able to exercise discretion when applying the criteria.[19] The approach adopted in the Act is not entirely consistent with the Statute Law Revision Committee's recommendations.

1.16 Section 4 of the *Bail Act 1977* contains a general entitlement to bail. The defendant is entitled to be released on bail unless the prosecuting authorities satisfy the court that there is an unacceptable risk that, if the defendant is released on bail, they would:

- fail to surrender themself into custody in answer to bail;
- commit an offence while on bail;
- endanger the safety or welfare of members of the public; and/or
- interfere with witnesses or otherwise obstruct the course of justice.[20]

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[16] See, for example, *R v Light* [1954] VLR 152, 157 (Sholl J).
[17] Victoria, *Parliamentary Debates*, Legislative Council, 15 March 1977, 6339 (Haddon Storey, Attorney-General).
[18] Parliament of Victoria, Statute Law Revision Committee, *Bail Procedures* (1975) Parl Paper No 2154/75.
[19] Ibid 12, para 54.
[20] *Bail Act 1977* s 4(2)(d).

1.17 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;
- the 'character, antecedents [meaning the presence or absence of any prior convictions], associations, home environment and background of the defendant';
- the history of any previous grants of bail to the defendant;
- the strength of the evidence against the defendant; and
- the attitude, if expressed to the court, of the alleged victim of the offence to the grant of bail.[21]

1.18 The general entitlement to bail is subject to a number of exceptions. One exception arises if the defendant is charged with any of the offences listed in section 4(2)(a) and (aa). These include murder and trafficking in a commercial quantity of drugs. In this situation, the decision-maker must remand the defendant unless they are satisfied that there are exceptional circumstances that would justify granting bail.

1.19 Another exception arises if the defendant is charged with any of the offences listed in section 4(4). These include certain stalking offences and aggravated burglary. In this situation the decision-maker must remand the defendant unless the defendant can persuade the decision-maker that the remand is not justified.

1.20 A further exception arises if the defendant has been released on bail on the condition that they appear in court on a specific date, and the defendant fails to appear in court on that date. This is dealt with under section 4(2)(c), which requires the decision-maker to remand the defendant unless the defendant can satisfy the court that their failure to appear was due to causes beyond their control. We discuss this in detail below.[22]

[21] *Bail Act 1977* s 4(3).
[22] See paras 1.38-1.50.

HOW OFTEN IS BAIL USED IN COMPARISON TO SUMMONS OR REMAND?

1.21 Statistics compiled by the Department of Justice indicate that a summons is used in at least approximately two fifths of criminal charges that are finalised in the Magistrates' Court. The question of bail does not arise in those cases.

1.22 In most cases where the question of bail does arise, the defendant is released on bail.

1.23 Defendants who are placed in custody for all or part of the time until their charges are finalised comprise a relatively small proportion (at least 14%) of all defendants.

1.24 More detailed statistics are set out in Appendix 1.

WHAT HAPPENS IF THE DEFENDANT FAILS TO APPEAR IN COURT?

Failure to Appear—Defendant on Summons

1.25 If the defendant has been summonsed and they do not appear in court as required by the summons, the court can simply proceed in the defendant's absence (for certain relatively minor offences),[23] or it can issue a warrant to the police to arrest the person. If the defendant is arrested, they can then apply for bail for the period until the court deals with their charge. Whether or not they can be released on bail will depend on the general criteria set out in the *Bail Act 1977*, which are discussed above.

1.26 There are no additional restrictions on granting bail to a person who has failed to comply with a summons.[24]

1.27 In deciding whether or not to release the defendant on bail, the decision-maker would need to take into account the fact that the

[23] *Magistrates' Court Act 1989* s 41*(2)*.

[24] Indeed, s 62 of the *Magistrates' Court Act 1989* anticipates that a person can be released on bail and permits the court to endorse the arrest warrant with the form of bail that would be acceptable.

defendant has failed to appear in response to the summons. The defendant's reasons for failing to appear would be a significant consideration. The decision-maker would have to assess matters such as whether the failure was deliberate or unintentional when deciding whether or not there would be an unacceptable risk in releasing the defendant on bail.

Failure to Appear—Defendant on Bail

1.28 What happens if the defendant was initially dealt with by bail, rather than by summons, and fails to appear in court?

1.29 As in cases dealt with by summons, the court can either proceed to hear the charges in the defendant's absence (for certain relatively minor offences),[25] or it can issue a warrant to the police to arrest the defendant.[26] If the defendant is arrested, they can then apply for bail for the period until the court deals with their charge.

1.30 However, there are two important differences between failing to appear in response to a summons and failing to appear in response to bail.

- Failure to appear in response to a summons is not in itself an offence. Failure to appear in response to bail is an offence under section 30(1) of the Bail Act, unless the defendant can show that there was a 'reasonable cause' for their failure. The phrase 'reasonable cause' means that the person has a justification or excuse that is considered acceptable by a court. It requires the court to evaluate the acceptability of the reason given for the particular act or omission. The maximum penalty for an offence under section 30(1) of the *Bail Act 1977* is 12 months imprisonment.

[25] *Magistrates' Court Act 1989* s 41(3).

[26] The *Bail Act 1977* s 24(1) gives the police a power to arrest the defendant without a warrant if the police have reasonable grounds for believing that the defendant is likely to fail to appear in court (the section does not apply if the defendant has actually failed to appear). If the police exercise this power, the defendant must be brought before a bail justice or a court. If a person has been arrested under s 24(1), s 24(3) permits the bail justice or court either to remand the defendant or to release the defendant again on bail. Section 24 does not specify any criteria to which the bail justice or court must have regard when exercising this power.

- If a person is arrested for failing to appear in response to a summons and then applies to be released on bail, their application for bail is governed by the general bail criteria. If the person is arrested for failing to appear in response to bail, their bail application is governed by more limited criteria.

1.31 These differences reflect the fact that a person who fails to appear in court after they have been released on bail has given an undertaking to appear. Breaking that undertaking is more serious than failing to appear in response to a summons.

1.32 The significance of the two differences may be more easily understood by looking at the following examples.

Summons

Tran owns a shop in Mildura. Someone has sprayed graffiti all over the outside wall of the shop. Tran is sure it has been done by a man called Rick, who regularly hangs about in the pedestrian mall near the shop. Tran reports his suspicions to the police, who investigate the report. A neighbouring shop owner says that she saw the incident. Her general description of the offender broadly matches Rick. The police file a charge of criminal damage against Rick with the Magistrates' Court and obtain a summons for him to appear in court on 2 September.

The summons is given to Rick but on 2 September Rick does not come to court. The court issues a warrant to the police to arrest him.

1.33 Rick's failure to appear in Court is not in itself an offence. When Rick is arrested he can apply for bail until the court decides his criminal damage charge. The decision-maker would have to consider the general criteria mentioned above[27] in deciding whether bail should be granted or whether he should be remanded in custody. The fact that Rick has failed to appear in response to the summons would be taken into account in making this decision, but would not be decisive.

[27] See paras 1.16-1.17.

Bail

Max owns a hardware shop in Mildura. A cordless drill has gone missing, and Max is sure it has been stolen by a man called Charlie, who regularly hangs about in the pedestrian mall near the shop. Just after the police have spoken to Max they see Charlie in the mall. They take him to the station for questioning. They decide to charge him with theft and they then release him on bail to appear in the Mildura Magistrates' Court on 2 September.

On 2 September Charlie does not come to court. The court issues a warrant to the police to arrest him. The police are unable to locate him. However, a week later the police are walking through the mall and they see Charlie. They arrest him.

The court hearing for his theft charge is rescheduled to take place on 15 October.

Charlie applies to be released on bail until that date. He explains that the reason he failed to answer bail was that his uncle had suffered a stroke and was in hospital in Warrnambool. Charlie had gone to Warrnambool to see his uncle. He ran out of money while he was there and couldn't get back to Mildura until his dole money came through. He knew that he was supposed to come to court, but he'd left the bit of paper he'd been given when he was released on bail somewhere back in Mildura and so he couldn't remember exactly when he was supposed to be in court.

1.34 As failure to appear in court in response to bail is itself an offence under section 30(1) of the *Bail Act 1977* unless the defendant can show a 'reasonable cause' for their failure to appear, the police have to consider Charlie's reasons for failing to appear.

1.35 In this example, the police might decide not to charge him under section 30 on the basis that a court is likely to consider that the reasons given by Charlie are an acceptable excuse for his failure to appear.

1.36 Alternatively, the police might consider that a court is likely to find Charlie's excuse unpersuasive, and charge him with the separate offence of failing to answer bail.

1.37 Each of these situations raises different consequences for Charlie's application to be released again on bail.

SITUATION 1: NOT CHARGED WITH SEPARATE OFFENCE OF FAILING TO ANSWER BAIL

1.38 In this situation, whether or not Charlie can be released on bail again until the hearing of his theft charge on 15 October depends on section 4(2)(c) of the *Bail Act 1977*. Section 4(2)(c) states that if the defendant is in custody for failing to answer bail, the decision-maker[28] shall refuse bail:

> '…unless the [defendant] satisfies the [decision-maker] that the failure was due to causes beyond his[29] control;'

1.39 Failure to 'answer' bail means failure to appear in court on the specified date.[30] It is the defendant who must satisfy the decision-maker that the failure was due to causes beyond their control. The section does not permit the decision-maker to take into account any other considerations.

1.40 The section does not say that the failure to appear in court must have been beyond the defendant's control. It says that the *causes* of the failure must have been beyond their control. In many cases it is likely to be difficult to apply these words literally.[31]

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[28] The section refers to a 'court'; however, s 3 of the Act states that 'court' means 'court or judge, and in any circumstances where a member of the police force or other person [such as a bail justice] is empowered under the provisions of this Act to grant bail, includes that member or person'.

[29] The *Interpretation of Legislation Act 1984* s 37 states that in an Act, unless the contrary intention appears, 'words importing a gender include every other gender'.

[30] This interpretation of 'failing to answer bail' is supported by the *Bail Act 1977* s 30.

[31] See *Criminal Law, Investigation and Procedure, Victoria* Vol 2, para 2.8.610.

1.41 In the example above, Charlie's failure to appear in court on 2 September was due to a number of different causes. Some of these may be said to be beyond his control; others may not. His uncle's stroke was beyond his control, but his decision to visit his uncle, rather than to stay in Mildura to attend court, was arguably within his control. Running out of money while he was in Warrnambool may have been beyond his control, or it may have been within his control. Mislaying his bail paperwork and forgetting the date of his court appearance is likely to have been within his control, but in some circumstances (for instance, if Charlie has no fixed address) it might arguably have been beyond his control.

1.42 Unlike section 30, section 4(2)(c) does not require the decision-maker to evaluate the defendant's conduct in light of what the decision-maker considers to be reasonable. Section 4(2)(c) does not use the word 'reasonable'; it simply requires the decision-maker to make a finding of fact. The section does not give any guidance on what should be done if the finding of fact is that there were a number of different causes, some of which were beyond the defendant's control and some of which were not.

SITUATION 2: CHARGED WITH SEPARATE OFFENCE OF FAILING TO ANSWER BAIL

1.43 What would happen if the police decided to charge Charlie under section 30 with the offence of failing to answer bail, after they arrested him?

1.44 The question of granting bail until the charges are heard would arise for the new charge (failing to answer bail) and for failing to appear in relation to the old charge (theft).

1.45 This situation is more complex than the previous one because it is governed by both section 4(4)(d) and section 4(2)(c). As indicated above, under section 4(2)(c) if the defendant is in custody for failing to answer bail the decision-maker must refuse bail unless the defendant:

> …satisfies the [decision-maker] that the failure was due to causes beyond his control;

1.46 Under section 4(4)(d), if the defendant has been charged with the offence of failing to answer bail, the decision-maker must refuse bail unless the defendant:

> …shows cause why his detention in custody is not justified…

1.47 The phrase 'show cause' requires a person to provide reasons for their behaviour.[32] Section 4(4)(d) is broader than section 4(2)(c). Section 4(2)(c) only allows the decision-maker to look at one consideration (whether the cause was within or beyond the defendant's control). It does not allow the decision-maker to evaluate that consideration in light of any other considerations, such as the gravity of remanding the defendant. By contrast, section 4(4)(d) requires the decision-maker to consider whether or not remand would be justified in light of the reasons given by the defendant (which could include the consideration used in section 4(2)(c), but which could also include other considerations, such as the defendant's 'background', whether or not they have prior convictions, the strength of the case against them and whether or not they are likely to receive a prison sentence if found guilty).[33]

1.48 There are no authoritative decisions on the relationship between the two provisions. It appears that the test in section 4(4)(d) is limited by the test in section 4(2)(c). In other words, if Charlie has been arrested and charged with failing to answer bail he must satisfy both tests. He would only be able to 'show cause' for the purposes of section 4(4)(d) if the cause or causes of his failure to answer bail were beyond his control.

1.49 This is incongruous and unfair. It means that Charlie must satisfy a higher test to obtain bail for the section 30 offence (that the causes were beyond his control) than would be necessary for him to be acquitted of the offence (reasonable cause for failure to appear). The situation highlights the onerousness of the test in section 4(2)(c).

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[32] See, for example, Peter Nygh (ed) *Butterworths Australian Legal Dictionary* (1997) 1082.
[33] *DPP v Harika* [2001] VSC 237 [63]–[64].

1.50 If a person is convicted of an offence under section 30(1), the court must sentence them. The aim of sentencing includes emphasising the importance of honouring a bail undertaking, punishing the defendant, deterring the defendant from committing a similar offence again and deterring others.[34] However, punishment and deterrence should not be relevant to the considerations that apply in considering whether or not the defendant should be able to be released again on bail pending the hearing of the charges.

[34] *Sentencing Act 1991* s 5(1).

Chapter 2
Concerns About the Existing Law

2.1 Chapter 1 provides an outline of some of the difficulties that arise under section 4(2)(c) and its relationship with other sections of the *Bail Act 1977*. In this Chapter, we analyse the relevant policy considerations in more detail.

ROYAL COMMISSION INTO ABORIGINAL DEATHS IN CUSTODY

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

2.3 The highest numbers of deaths had occurred in those States, such as Western Australia (32 deaths) and Queensland (26 deaths), with a high Aboriginal population. Aside from Tasmania and the Australian Capital Territory, Victoria had the lowest number (3 deaths). Throughout Australia, more Aboriginal people had died while on remand than those who died while serving a sentence.[35]

2.4 The Royal Commission concluded that the high number of Aboriginal deaths in custody was a reflection of the extremely high rate at which Aboriginal people come into custody, compared to non-Aboriginal people.

2.5 Aside from its impact on Aboriginal deaths in custody, the disproportionately high rate at which Aboriginal people are taken into custody is itself a matter of significant concern. The Royal Commission's reports analyse in detail some of the economic, social and cultural factors contributing to the high rate.

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[35] Elliot Johnson, *Royal Commission into Aboriginal Deaths in Custody, National Report* (1991), Volume 1, para 2.5.2, available at: <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/national/vol1/46.html>.

2.6 Although the number of deaths of Aboriginal people in custody in Victoria continues to be much lower than other Australian jurisdictions, the imprisonment rate for Aboriginal people in Victoria is still more than eleven times higher than the rate for non-Aboriginal Victorians.[36]

2.7 The Royal Commission's reports contain a large number of recommendations. We examine here only the recommendations concerning failure to answer bail.

2.8 The Royal Commission noted that it was 'not uncommon' for Aboriginal people to be detained in custody for failing to answer bail.[37] It noted that a submission from the Queensland Attorney-General's Department pointed out that sometimes Aboriginal people fail to attend court, not because they disregard the obligation to attend, but because of physical difficulty, communication difficulties, lifestyle, or lack of education. In particular, the Royal Commission noted that '[o]ne other factor that can create a dilemma for Aboriginal defendants is a strongly felt obligation associated with the death of a family member not contemplated when the bail agreement was entered into'.[38]

2.9 The Royal Commission recommended that:

> …governments, in conjunction with Aboriginal Legal Services and Police Services, give consideration to amending bail legislation […] to revise any criteria which inappropriately restrict the granting of bail to Aboriginal people.[39]

[36] The imprisonment rate in Victoria in 1999 was 80.4 per 100,000 adults. The imprisonment rate for Indigenous Victorians in 1999 was 903.2 per 100,000 Indigenous adults. See Office of the Correctional Services Commissioner, *Statistical Profile: The Victorian Prison System 1995–1996 to 1999–2000* (2001) Table 6.

[37] Elliot Johnson, above n 35, Volume 3, para 21.4.27.

[38] Ibid para 21.4.27.

[39] Ibid Recommendation 91.

LAW REFORM COMMISSION OF VICTORIA'S REVIEW OF THE *BAIL ACT 1977*

2.10 In 1991 the former Law Reform Commission of Victoria (LRCV) released a Discussion Paper on a review of the *Bail Act 1977*.[40] The Discussion Paper accepted that the fact that a person has not honoured a bail obligation once is a strong reason not to trust the person to honour a similar obligation again. However, it went on as follows:

> 'But that hardly justifies a blanket denial of bail. There may be cases where the reason for not honouring the bail obligation has passed and is unlikely to recur. There seems no reason for not allowing the courts to make their own assessment of the likelihood of the person's honouring a new bail agreement as they are required to do in other cases. On that basis, paragraph 4(2)(c) should be repealed.'[41]

2.11 If section 4(2)(c) were repealed, an application for bail by a person who was in custody for failing to answer bail would be dealt with according to the ordinary criteria that apply to any other application for bail.

2.12 In 1992 the LRCV published its Report on the review of the *Bail Act 1977*.[42] The Report noted that most submissions received in response to the Discussion Paper indicated a high level of support for the proposal to remove statutory presumptions against bail.[43]

2.13 Despite that support, the LRCV recommendation was not implemented.

2.14 Although the LRCV Report on bail has not been implemented, in recent years a number of other programs have been adopted to improve the situation of defendants on bail or to divert low-level offenders away from the court system. These programs include the following:

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

[41] Ibid para 32.

[42] Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992).

[43] Ibid para 23.

- **A police cautioning program**. This program involves issuing an offender with a formal caution and then releasing them, rather than arresting the offender and charging them.
- **Court Referred Evaluation, Drug Intervention and Treatment (CREDIT) Program**. This program is targeted at defendants who are dependent on illicit drugs. The program involves providing coordinated drug treatment and other support services to defendants who are on bail.

2.15 These programs appear to have been successful;[44] however, programs such as these have not overcome the particular issues relating to s 4(2)(c) identified in this Paper.

LETTER FROM THE VICTORIAN ABORIGINAL LEGAL SERVICE

2.16 In May 2001 the Victorian Aboriginal Legal Service (VALS) wrote to the Victorian Law Reform Commission expressing concern about the effect of section 4(2)(c). In its letter, the VALS noted that the Aboriginal community has the lowest levels of education and the highest levels of poverty in Australia. The VALS argued that, in many cases when their clients fail to answer bail, the failure is because of environmental and cultural reasons, rather than an intention to defy the court. Some of the particular factors identified by the VALS are the following.

- The defendant may forget a court date or make a mistake about the date. The reality of poverty means that many Aboriginal people will not have a calendar or private organiser.
- The defendant may have difficulty in understanding numbers or being able to read the date. A high proportion of Aboriginal people have low English literacy levels.
- The defendant may have difficulty in getting transport. Aboriginal

[44] Both started as small-scale pilot programs and both have now been extended.

people are often expected through custom and social obligation to move around to see relatives or attend funerals and other such community events. It may be difficult to appear in court because of a lack of money or a lack of public or private transport, particularly if the court is some distance away.

- The defendant may frequently change address or may not have a fixed address. This is common for many Aboriginal people.
- The defendant may misunderstand the need to appear in court. Some members of the Aboriginal community are aware that if they receive a document that says they have been charged with an offence and that they are required to attend court on a particular date, the court can deal with the charges even if they do not in fact attend court on that date. Some offences appear to be similar (such as 'wilful damage' and 'criminal damage'; or 'unlicensed driving' and 'driving while disqualified'), yet they are treated differently. Often there can be confusion about whether the case is one for which they must attend court.

Other groups in society can also experience these problems.

2.17 If the defendant's failure to appear is deliberate and results from an intention to obstruct the legal process, it may be entirely appropriate that the defendant be charged with the offence of failing to answer bail and punished for that offence, even if some of the factors mentioned above are present.

2.18 When a decision is being made about whether such a person should receive bail, the person's past behaviour will be a significant consideration. In many cases of this kind the person would be remanded rather than bailed. However, if the failure is due to factors such as those outlined above, the balancing exercise which the decision-maker must undertake in considering release on bail is more complex. It may be that in the particular circumstances of the case, the balance should be resolved in favour of remand. In other circumstances, bail may be more appropriate. As presently drafted, section 4(2)(c) does not permit this balancing exercise to take place.

2.19 A concern raised by the VALS is that a person who has been charged with a relatively minor offence, has been released on bail and has failed to answer bail because of factors such as those outlined above, but who is not guilty of the original charge, is faced with a choice between:

- having to spend days, weeks or even months in prison on remand waiting for the trial to take place; or
- pleading guilty to the offence and receiving a sentence such as a fine or a community-based order that does not involve any imprisonment.

2.20 In such cases the defendant is clearly under strong pressure to plead guilty, even though they are not guilty.

Chapter 3
How is this Issue Dealt with in Other Jurisdictions?

3.1 In all Australian jurisdictions except the Northern Territory it is an offence to fail to answer bail without a reasonable excuse.[45]

3.2 The following tables summarise the approach taken in each jurisdiction to the two situations discussed above.[46] In both situations the defendant has been charged with an offence, released on bail and has failed to appear in court in answer to bail.

3.3 Situation 1 is where the defendant *has not* been charged with the separate offence of failing to answer bail in addition to the original charge, and the defendant is seeking to be released on bail again until the original charge can be heard.

3.4 Situation 2 is where the defendant *has* been charged with the separate offence of failing to answer bail in addition to the original charge, and the defendant is seeking to be released on bail until both of the charges (the original charge and the additional charge of failing to answer bail) can be heard. (This situation does not arise in the Northern Territory because the Northern Territory does not have an offence of failing to answer bail.)

[45] *Bail Act 1992* (ACT) s 49; *Bail Act 1978* (NSW) s 51; *Bail Act 1980* (Qld) s 33; *Bail Act 1985* (SA) s 17; *Bail Act 1994* (Tas) s 9; *Bail Act 1977* (Vic) s 30; *Bail Act 1982* (WA) s 51.

[46] See paras 1.38–1.50.

Situation 1: No additional charge

Jurisdiction	Specific provision?	Onus on defendant?	Test
NSW	No	No	General criteria
VIC	Yes	Yes	Only if failure due to a cause beyond the defendant's control
QLD	No	No	General criteria
WA	No	No	General criteria
SA	No	No	General criteria
TAS	No	No	General criteria
NT	No	No	General criteria
ACT	No	No	General criteria

3.5 This table demonstrates that no other Australian jurisdiction has a provision comparable to section 4(2)(c) of the Victorian *Bail Act 1977* covering situation 1. In all other jurisdictions the decision-maker has a much broader discretion in this situation than in Victoria when deciding whether or not to grant bail.

Situation 2: Additional charge under Bail Act

Jurisdiction	Specific provision?	Onus on defendant?	Test
NSW	Yes	Yes	General criteria
VIC	Yes	Yes	Defendant must 'show cause'
QLD	Yes	Yes	Defendant must 'show cause'
WA	No	No	General criteria
SA	No	No	General criteria
TAS	No	No	General criteria
NT	N/A	N/A	N/A
ACT	No	No	General criteria

3.6 This table demonstrates that Queensland is the only other jurisdiction that has a 'show cause' provision similar to section 4(4)(d) in Victoria governing situation 2. In most jurisdictions the decision-maker has a broad discretion in that situation.

Chapter 4
Summary and Options for Reform

4.1 The purpose of bail law is to strike a balance between:

- ensuring that the defendant will attend court and will not interfere with witnesses, endanger the community or commit offences; and
- ensuring that the defendant, who has been charged with an offence but who cannot be assumed to be guilty of that offence, is not deprived of their liberty without good reason.

4.2 We consider that, in its current form, section 4(2)(c) of the *Bail Act 1977* dealing with defendants who have been released on bail and who fail to appear in court in response to bail, does not strike an appropriate balance, particularly with regard to Aboriginal defendants and defendants from other disadvantaged groups.

4.3 Section 4(2)(c) only permits the decision-maker to release the defendant on bail again if the defendant satisfies the decision-maker that their failure to appear was due to causes beyond their control. If the failure was not due to a cause beyond the defendant's control, this should be an important consideration in deciding whether or not the defendant should be released on bail again, because in many cases it will be a significant indication of the risk that the defendant may fail to appear again. However, even if the cause (or one of several causes) of the failure was within the defendant's control, the decision-maker should be able to look at this factor in the light of other considerations before deciding whether or not to place the defendant on remand.

4.4 In addition, as discussed above,[47] there are problems in applying section 4(2)(c) to some factual circumstances and the relationship between section 4(2)(c) (where the defendant is in custody for failing to answer bail) and section 4(4)(d) (where the defendant has been charged with the separate offence of failing to answer bail) is unclear and unnecessarily complex and may produce an incongruous and unfair result.

[47] See paras 1.40-1.49.

4.5 There are several possible options for reform. This Paper examines two simple options that would not involve major changes to the *Bail Act 1977*:

- to repeal section 4(2)(c); or
- to amend section 4(2)(c).

4.6 The choice between these options will affect the test to be applied by the decision-maker in granting bail. Each of them would enable the decision-maker to look at a wider range of considerations than is currently possible. It would do this not only in situations governed by section 4(2)(c), but also in situations governed by both section 4(2)(c) (where the defendant is in custody for failing to answer bail) and section 4(4)(d) (where the defendant has been charged with the separate offence of failing to answer bail as well).[48]

4.7 The key difference between the two options is whether:

- the prosecuting authorities must persuade the decision-maker to refuse bail; or
- the defendant must persuade the decision-maker to grant bail.

4.8 Under the *Bail Act 1977,* defendants are entitled to bail unless they fall within certain exceptions.[49] When the defendant is entitled to bail, the prosecuting authorities must persuade the decision-maker that they should not release the defendant on bail. By contrast, if the defendant falls within one of the exceptions (such as under section 4(2)(c)), there is no entitlement to bail and the onus is on the defendant to persuade the decision-maker to release them on bail.

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[48] As discussed in paragraphs 1.45-1.48, when a defendant is charged with the separate offence of failing to answer bail under s 30 of the *Bail Act 1977* and they apply to be released on bail again, their application is governed by both s 4(2)(c) and s 4(4)(d). The cumulative effect of those two provisions appears to be that the defendant can only be released again on bail if they satisfy the decision-maker that the failure to appear was due to causes beyond their control. The decision-maker cannot have regard to any other considerations. If s 4(2)(c) was repealed, the matter would be simply dealt with under s 4(4)(d). This means that the defendant would not be entitled to be released on bail. The onus would be on the defendant to persuade the court (in other words, to 'show cause') that their detention in custody would not be justified.

[49] See above paras 1.16-1.20.

OPTION 1: REPEAL SECTION 4(2)(C)

4.9 If section 4(2)(c) were repealed, the defendant's application for bail would be dealt with under the general provisions applying to bail applications (unless, of course, the defendant had originally fallen within one of the other exceptions described earlier in this Paper,[50] in which case the defendant would be remanded unless they could satisfy the test that applies to those exceptions).

4.10 This means that the defendant would be entitled to be released on bail unless the prosecuting authorities could persuade the decision-maker that, if the defendant is not placed on remand, there is an unacceptable risk that they defendant would fail to appear in court, would commit an offence while on bail, would endanger the safety or welfare of members of the public or would interfere with witnesses.[51]

4.11 As discussed earlier,[52] the general provisions on bail require the decision-maker to consider various matters, including the history of previous grants of bail.[53] The decision-maker must take into account, as one of these matters, the failure to appear on the previous grant of bail, but the weight given to this factor will depend on the reason for failure to appear.

OPTION 2: AMEND SECTION 4(2)(C)

4.12 An alternative to repealing section 4(2)(c) is to amend the section so that it says that the decision-maker shall refuse bail unless the defendant shows cause why their detention in custody is not justified.

4.13 This would make the test in section 4(2)(c) the same as the test in section 4(4)(d), which applies if the defendant is charged with the separate offence of failing to answer bail.

4.14 As with Option 1, the decision-maker could have regard to any relevant consideration in deciding whether or not to grant bail. These

[50] See above paras 1.18-1.19.
[51] *Bail Act 1977* s 4(2)(d)(i).
[52] See above paras 1.16-1.17.
[53] *Bail Act 1977* s 4(3)(c).

could include any of the considerations listed above.[54] The only difference is that Option 2 places the onus on the defendant, rather than the prosecuting authorities, to persuade the decision-maker.

WHICH OPTION IS PREFERABLE?

4.15 For most offences,[55] when the defendant is initially taken into custody, they are entitled to bail unless the prosecuting authorities can satisfy the decision-maker that, if the defendant is released on bail, there is an unacceptable risk that the defendant will fail to appear, will commit an offence while on bail, will endanger the safety or welfare of members of the public or will interfere with witnesses.

4.16 If the defendant is taken into custody for failing to appear in response to bail, the risk that they will fail to appear has already been demonstrated. It is therefore arguable that they should have to satisfy the decision-maker that remand would not be justified.

4.17 The consequences of defendants failing to appear in court in response to bail are significant for alleged victims, witnesses, police and the criminal justice system generally.[56] It is important that the law emphasises the gravity of bail undertakings.

4.18 However the consequences of remand are also very significant.[57] We consider that remand should be used only as a last resort. Option 1 is consistent with this principle as it requires the prosecuting authorities to show good reasons why the defendant should be remanded (rather than requiring the defendant to show reasons why they should not be remanded but should be released on bail).

4.19 In addition, our preliminary consultation has indicated that many defendants who fail to answer bail for reasons such as those listed in paragraph 2.16 are likely to have no legal representation or to be represented by a duty lawyer or other publicly-funded lawyer who may

[54] See para 1.17.
[55] The exceptions are discussed in paras 1.18-1.19.
[56] See para 1.5.
[57] See paras 1.9-1.12.

ensure that they are only remanded if the prosecuting authorities persuade the decision-maker that remand is justified.

4.20 Finally, Option 1 is consistent with the approach recommended by the former Law Reform Commission of Victoria in 1992.[58] It is also consistent with other Australian jurisdictions.[59]

CONCLUSION

4.21 Our provisional view is that Option 1 is preferable because remand should be used only as a last resort, when prosecuting authorities have satisfied the decision-maker that the defendant would pose an unacceptable risk if released on bail.

DRAFT RECOMMENDATION

That section 4(2)(c) of the *Bail Act 1977* be repealed.

[58] Law Reform Commission of Victoria, *Review of the Bail Act 1977*, Report No 50 (1992).
[59] See above Chapter 3.

A NEED FOR FURTHER REVIEW

4.22 The *Bail Act 1977* is applied daily by courts, bail justices and police throughout Victoria. It is an Act that has grave significance for the defendants whose liberty is governed by it.

4.23 Since it was enacted, the *Bail Act 1977* has been amended by 27 other Acts. In that time there has been only one comprehensive review of the Act. The recommendations of that review were published in 1992. They have not been adopted.

4.24 This Paper analyses one aspect of the Act that is in need of improvement. While preparing this Paper we have become aware of a number of other problems with the Act. An example is the definition of 'court' in section 3 of the Act. Section 3 defines 'court' to mean a court or judge. It also defines 'court' to include a member of the police force or other person when that member or person has the power to grant bail under the *Bail Act 1977*. In some sections of the Act it is not clear whether 'court' is meant to refer only to a magistrate or judge, whether it is intended to also cover bail justices, or whether it is intended to also include members of the police force as well.[60]

4.25 A comprehensive review of the *Bail Act 1977* is highly desirable. Until such a review can take place, the recommendation made in this Paper will go some way towards improving the operation of the Act.

4.26 We welcome any comments about this Paper. We will release our final report on this issue early in 2002.

[60] See, for example, *Bail Act 1977* s 10.

Appendix 1

HOW OFTEN DOES THE QUESTION OF BAIL ARISE?

Table 1 indicates the proportion of defendants who are dealt with by summons, released on bail or held in custody before and during their trial.

The table is based on the number of charges finalised each financial year in the Magistrates' Court (comparable data is not available for the County Court or the Supreme Court). These statistics need to be used with some caution, because the custody status of the defendant in a significant proportion of cases is recorded as 'unknown'. Therefore, the figures for the remaining categories are minimum figures. Depending on the actual custody status of the defendant in the cases that are recorded as 'unknown', the figures in any of the remaining categories could be substantially higher, but not lower, than the figures given.

The table shows that most charges are dealt with by summons. In these cases the defendant is at liberty and the question of bail does not arise.

In most cases where the question of bail does arise, the defendant is released on bail.

Defendants who are placed in custody for all or part of the time until their charges are finalised comprise a relatively small proportion of all defendants.

Table 1

Custody status of defendant	Number		Percentage	
	1998-99	**1999-2000**	**1998-99**	**1999-2000**
Always on summons	130,765	127,516	41%	41%
Always on bail	88,237	77,516	28%	25%
Always in custody	18,566	20,165	6%	6%
Mixture	23,524	24,808	7%	8%
Unknown	57,373	62,533	18%	20%
Total number of charges finalised	318,465	312,538	100%	100%

Notes:

This is a count of the number of charges finalised in the Magistrates' Court of Victoria by custody status of the defendant.

This data may differ from other data released by the Magistrates' Court of Victoria as a result of different counting rules.

Source: Court Services, Department of Justice.

Appendix 2

HOW COMMON IS THE OFFENCE OF FAILING TO ANSWER BAIL?

Table 1 in Appendix 1 shows that each year bail is granted in relation to over 100,000 criminal charges in the Magistrates Court.[61]

There are no figures for how often defendants who have been released on bail fail to appear in court in response to bail.

In some of these cases the defendant will be charged with the separate offence of failing to answer bail under s 30 of the *Bail Act 1977*. In the 1998–99 financial year, 4595 charges for the offence of failing to answer bail were finalised in the Magistrates Court. In the 1999–2000 financial year, the figure was 5462.

These two figures do not encompass all cases where a defendant has been released on bail and fails to appear. Not all defendants who fail to appear are found and not all defendants who are found are charged with the separate offence of failing to appear.[62]

The outcomes of the prosecutions for failing to answer bail are set out in Table 2 below.

[61] This figure is based on the figures for 'always on bail' and 'mixture' in Table 1 in Appendix 1. It is assumed that in relation to most, if not all, of the charges listed as 'mixture', the defendant was at some stage released on bail. It should be noted that the figures for 'always on bail' and 'mixture' in Table 1 are minimum figures, because of the high number of cases (approximately 20%) in which the custody status of the defendant was recorded as 'unknown'. Therefore, the actual number of charges in relation to which bail is granted each year could be closer to 150,000.

[62] See paras 1.34–1.36.

Table 2

Outcome	Number		Percentage	
	1998–99	**1999–2000**	**1998–99**	**1999–2000**
Committed to trial	7	7	0.1%	0.1%
Imprisonment	1031	1256	22.4%	22.9%
Suspended sentence/ Combined Custody and Treatment Order	543	666	11.8%	12.2%
Intensive Correction Order/Community Based Order	961	1082	20.9%	19.8%
Fine	1044	1211	22.7%	22.2%
Adjourned undertaking	356	490	7.7%	9.0%
Convicted and discharged	124	159	2.7%	2.9%
Discharged	11	14	0.2%	0.3%
Dismissed	32	40	0.7%	0.7%
Struck-out	482	534	10.5%	9.8%
Other	4	3	0.1%	0.1%
Total number of charges finalised	4595	5462	100%[62]	100%

Notes:

This is a count of the number of charges finalised in the Magistrates' Court of Victoria by custody status of the defendant.

This data may differ from other data released by the Magistrates' Court of Victoria as a result of different counting rules.

Source: Court Services, Department of Justice.