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14 March 2017

Bail Review
26/121 Exhibition Street
Melbourne VIC 3000

By email: bailreview@justice.vic.gov.au

Submission to Bail Review

1. Thank you for the opportunity to provide a submission to the Bail Review. Thank you for granting an extension of time to make this submission.
2. Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. It is concerned with the protection and promotion of civil liberties throughout Australia. As such, Liberty Victoria is actively involved in the development and revision of Australia's laws and systems of government.
3. The members and office holders of Liberty Victoria include persons from all walks of life, including legal practitioners who appear in criminal proceedings for the prosecution and the defence.
4. This submission will focus on five topics related to the *Bail Act 1977* (Vic) ("the *Bail Act*");
 - (A) Who should make bail decisions?;
 - (B) The construction of section 4 of the *Bail Act*;
 - (C) The need for improved information-sharing;
 - (D) The need for bail support programs; and
 - (E) The impact on indigenous accused persons.

A. Who Should Make Bail Decisions?

5. Liberty Victoria is strongly of the view that bail decisions should be made by an independent judicial officer. Decisions about an accused person's liberty should be guided by the presumption of innocence, and made by an impartial, independent judicial officer, who is best placed to apply the law uninfluenced by police investigation or the prosecution of a matter.
6. Liberty Victoria strongly opposes any expansion of police powers that would allow senior police officers to make decisions regarding an accused person's liberty. While many police may exercise their powers appropriately, the potential for misuse of such power is high, and there is too great a risk that the misuse of such power would lead to the unfair and unjustified detention of accused persons.
7. Giving police the power to refuse bail could lead to accused persons being held for up to 72 hours without having an opportunity to apply for bail before an independent decision-maker. This would represent a grave erosion of the right to apply for bail in a timely fashion, and would likely mean that many accused persons who under the previous system would have been granted bail, will spend a considerable period of time in police detention.
8. Liberty Victoria is not opposed to the abolition of Bail Justices, and supports the notion of Magistrates hearing out-of-hours bail applications instead of the current Bail Justice system. This needs to be properly resourced so that accused persons who are charged out of hours are brought before a Magistrate in a timely manner.

B. The Construction of Section 4 of the *Bail Act*

9. Liberty Victoria supports the approach suggested by the Law Reform Commission in 2007 which was endorsed by the court of appeal in *Robinson v The Queen* ("*Robinson*").¹
10. The Law Reform Commission said:²

We recommend the removal of reverse onus tests so all bail decisions are made on the basis of unacceptable risk. We do not believe this will alter the outcome of bail decisions because decision makers have told us

¹ [2015] 47 VR 226; [2015] VSCA 161.

² Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007), 7. See also 54.

unacceptable risk is always the ultimate test. Reverse onuses apply to a small number of offences, many of which do not commonly come before the court. They include: murder and treason; arson causing death; serious drug offences; a violent breach of a family violence or stalking order by a person with a history of violence; aggravated burglary; and indictable offences where a weapon is used.

The commission believes decision makers will continue to treat seriously bail applications for offences that currently attract a reverse onus. There is no suggestion that applications for offences not currently included in the reverse onus categories are treated lightly.

...

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

11. The court in *Robinson* said “[t]his reform would greatly simplify Victorian bail law, without weakening it in any way. The Commission’s reasoning is compelling”.³
12. Liberty Victoria supports the removal of reverse onus provisions in the *Bail Act*, favouring a simplified approach involving one test around the question of risk.
13. However, if the current construction of section 4 of the *Bail Act* is to be maintained, Liberty supports the view that where an accused person is in a “show cause” position, there should be a two-stage approach, with the prosecution bearing the onus of establishing unacceptable risk.
14. Often contested bail applications before an independent judicial officer demonstrate that a police case is flawed in significant ways, and that alleged unacceptable risk is based on spurious and unsubstantiated claims. Requiring an accused person to establish that they are not an unacceptable risk before they can show cause places an unreasonable burden that is inconsistent with the presumption of innocence.
15. With regard to the interpretation of the current legislation, Liberty Victoria supports the approach of Justice Bell in *Woods v DPP* (“*Woods*”).⁴

³ *Robinson v The Queen* (2015) 47 VR 226; [2015] VSCA 161, [47].

⁴ [2014] 238 A Crim R 84; [2014] VSC 1.

16. In *Woods*, Justice Bell considered the operation and effect of the *Bail Act* in the context of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (“the *Charter*”). His Honour criticised the “one-stage” test for show cause bail adopted in *Re: Asmar*⁵ which had been applied in many Supreme Court cases, whereby an applicant for bail in a “show cause” position bears the onus of both showing cause and demonstrating that he or she is not an unacceptable risk.
17. Having given weight to the human rights of liberty and freedom of movement, and noting the importance of the presumption of innocence, Justice Bell preferred the two-stage test as held by Gillard J in *Re: Harika*⁶ and *Re: Paterson*.⁷
18. Justice Bell stated:⁸

I am respectfully in general agreement with the reasoning in Gillard J in *Harika* and *Paterson*. It is more consistent with the presumption of innocence and the prosecutorial onus of proof. A troubling feature of the interpretation of Maxwell P in *Asmar* is that, as regards unacceptable risk, it reverses the onus of proof. It effectively transfers that onus from the prosecution (who would normally carry it, as with the prosecutorial onus generally) to the applicant (who would normally not, consistently with the presumption of innocence). Having regard to the negative and evaluative nature of the test, this is surprising, for it is very difficult for someone to prove a negative, even more difficult for someone to prove that he or she does not offend a standard expressed in terms of risk and more difficult again when the standard is expressed in terms of unacceptable risk, especially because the relevant information will almost always be in the possession, or mostly in the possession, of the police.
19. Liberty Victoria is strongly of the view that where unacceptable risk is alleged, the prosecution should carry the onus of establishing this threshold. Such an approach is consistent with the plain meaning of the *Bail Act* and the *Charter*.

C. The Need for Improved Information-Sharing

20. It appears that some of the recent and tragic failures in the criminal justice system have not been due to inadequacies with the *Bail Act* or the framework for the decision-making process, but rather were due to decision-makers not receiving all relevant information relating to the bail decision.

⁵ [2005] VSC 487.

⁶ [2001] VSC 237.

⁷ (2006) 163 A Crim R 122.

⁸ *Ibid*, [56].

21. Liberty Victoria believes that better resourcing of agencies, as well as investment in technologies to promote timely information-sharing between agencies, will lead to better decision making by judicial officers. Liberty Victoria supports investment in an update of Victoria Police's LEAP system, so that the prosecution can provide the court with a more complete picture of factors relevant to an assessment of risk, such as previous bail/parole breaches.
22. Clearly such information must be handled in a manner that protects the privacy of the individual whilst allowing decision-makers to have the best information regarding the assessment of risk.

D. The Need for Bail Support Programs

23. Liberty Victoria is of the view that a properly functioning bail system needs to be complimented by bail support programs that identify and address matters such as mental health, substance addiction and accommodation.
24. Liberty Victoria acknowledges that such programs already exist in the Magistrates Court, but further attention needs to be given to the funding, resources and accessibility of these programs. The provision of such programs has the capacity to reduce the risks associated with the granting of bail, and to assist in monitoring the progress of accused persons on bail. Early intervention at the bail stage also has the capacity to promote rehabilitation and serves to protect the community.

E. The Impact on Indigenous Accused Persons

25. The Bail Review presents an opportunity to address the overrepresentation of Indigenous accused persons in Victoria's remand population.
26. Research shows that Indigenous accused persons are overrepresented in the remand population.⁹ A 2016 report stated that in Victoria the number of Aboriginal and Torres Strait Islander people in prison is growing at over twice the rate of that of non-indigenous prisoners.¹⁰ The 2007 Victorian Law Reform Commission's

⁹ Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007), 168.

¹⁰ Sentencing Advisory Council, *Victoria's Prison Population 2005 to 2016* (2016), 13. This reflects the total prison population, but does not specify the rates of Aboriginal and Torres Strait Islander people on remand.

Review of the Bail Act: Final Report discussed bail applications by Aboriginal persons and the gross over representation of Aboriginal persons in custody. That report, and its recommendations, were recently cited with approval by Bell, J in *DPP v SE*.¹¹

27. In order to reduce the high rates of incarceration of Indigenous people in Victoria's justice system, Liberty Victoria supports the Victorian Law Reform Commission's recommendation that one of the purposes of the Act be to "ensure that the bail system does not perpetuate the historical disadvantage faced by Indigenous Australians in their contact with the criminal justice system".¹²

Conclusion

28. Thank you for the opportunity to make this submission. If the Bail Review has any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor, Liberty Victoria Senior Vice President, Michael Stanton, or the Liberty office on 9670 6422 or info@libertyvictoria.org.au. This is a public submission and is not confidential.



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Michael Stanton
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¹¹ [2017] VSC 13, [20].

¹² Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007), 183.