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Bail Amendment (Stage One) Bill 2017

1. As made clear in our submission to the Bail Review,[1] Liberty Victoria is opposed to the State Government's proposal to reverse the presumption of bail in a wide number of offences in the Bail Amendment (Stage One) Bill 2017 ('the Bill').

2. Under the *Bail Act 1977* (Vic), in most cases an accused person is entitled to bail unless they pose an unacceptable risk of: re-offending; endangering the community; absconding; or interfering with witnesses. For more serious offences the accused must 'show cause' why bail is justified. In the most serious cases the accused must establish 'exceptional circumstances' (murder, terrorism offences, the most serious drug offences).

3. The Bill expands the number of offences for which there is no presumption of bail.

4. The Bill creates two new categories of offences relevant to bail. Schedule 1 offences for which 'exceptional circumstances' must be shown for bail to be granted, and Schedule 2 offences for which a 'compelling reason' must be established.

[1] https://libertyvictoria.org.au/content/bail-review.

5. The Bill replaces the 'show cause' test with a requirement that bail must be refused unless an accused provides a compelling reason why their detention is not justified. An accused person must provide a compelling reason if they have committed a Schedule 2 offence.

6. A 'compelling reason' is likely to be a higher bar than the show cause test.[2]

7. Liberty Victoria opposes the Bill is for the following reasons:

    (1) The Bill undermines the presumption of innocence by requiring an accused person to establish a 'compelling' reason they should not be detained. The practical experience of criminal lawyers is that often at the time of arrest the police case is flawed or incomplete, and further inquiries lead to charges being withdrawn and/or the matter resolving to less serious charges. To remand an accused person in custody, often when an investigation is in its infancy, is a very serious measure. It can result in a person being in custody on remand when they are ultimately acquitted or receive a sentence less than they the time they have spent on remand.

    (2) Liberty Victoria believes there should be a presumption in favour of bail in most circumstances. That presumption should be rebutted when the risk to the community is grave. This is already achieved by the "unacceptable risk" test. Indeed, in 2007 the Victoria Law Reform Commission recommended there only be a single test of bail, with an unacceptable risk test. The Law Reform Commission said:[3]

> 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 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.

[2] *DPP v Hudgson* [2016] VSCA 254 at [112] – [114].
[3] Review of the Bail Act: Final Report (2007), 7. See also 54 (emphasis added).

> 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.

The Court of Appeal in *Robinson*[4] said "[t]his reform would greatly simplify Victorian bail law, without weakening it in any way. The Commission's reasoning is compelling".

(3) The 'exceptional circumstances' standard is extremely high. For example, in *Bchinnati v DPP*[5] the Supreme Court held it was not satisfied that exceptional circumstances were present to justify bail where the accused suffered from bi-polar disorder, the prosecution case had difficulties, the trial was expected to be delayed for almost two years after arrest, and the accused's family had put up a significant surety. Where parties fall into the exceptional circumstances categories for anomalous reasons such as those described above, Courts will have little option but to refuse bail.

(4) The provisions in the Bill can combine to operate in a draconian way. Suppose an accused person without a prior criminal history but with mental health issues gets in an argument with their neighbour. The accused is charged with making a threat to kill (a schedule 2 offence). He is granted bail based on compelling reasons. While on bail he is then charged with cultivating cannabis (another schedule 2 offence). That accused person would be placed in an exceptional circumstances position. He may well be acquitted of the threat to kill, and then found to have been growing cannabis primarily to self-medicate for personal use. He will likely spend an extended period of time on remand.

(5) The Bill lists serious offences in Schedule 1 or Schedule 2 for which there is no presumption of bail, without regard to the actual risk. While the offences listed are very serious, that does not necessarily mean an individual accused will pose an unacceptable threat to the community. For example, consider

[4] *Robinson v The Queen* (2015) 47 VR 226, [47] (Maxwell P and Redlich JA).
[5] [2016] VSC 815.

the example of a young offender, with no criminal history, who is roped in to act as a getaway driver for an aggravated home invasion - that person would be in an exceptional circumstances position. They may well claim duress, ignorance of the criminal enterprise, or some other defence. It may take years to get to trial.

(6) The Government's goal for the Bill is to reduce the number of people on bail. The Government has not provided detail about how it intends to fund and deal with the additional pressure on the prison system. This is yet another example of short-term policy in relation to criminal justice. Over recent years the prison population has already increased greatly at a massive cost to the community.

(7) The effect of the bill will be to expose young offenders and those without a significant criminal history to the chromogenic effects of incarceration. In *Azzopardi v The Queen*,[6] Redlich JA held:

> … courts sentencing young offenders are cognizant that the effect of incarceration in an adult prison on a young offender will more likely impair, rather than improve, the offender's prospects of successful rehabilitation. While in prison a youthful offender is likely to be exposed to corrupting influences which may entrench in that young person criminal behaviour, thereby defeating the very purpose for which punishment is imposed. Imprisonment for any substantial period carries with it the recognised risk that anti-social tendencies may be exacerbated. The likely detrimental effect of adult prison on a youthful offender has adverse flow-on consequences for the community.

8. The Government claims that the Bill will not lead to more young people being unnecessarily detained. That is doubtful. The expansion of offences covered and reversing the onus is designed to achieve the outcome of more people, adults or juvenile offenders, being refused bail. The home invasion and carjacking offences have been purported to be aimed at youth 'gang' activity. As stated above there will be circumstances in which a young offender could commit a Schedule 1 or Schedule 2 offence which is in a lower range of seriousness. Further, the bar for bail is extremely

[6] (2011) 35 VR 43, [36] (citations omitted).

high. The practical consequence of the Bill will be to see a further increase in accused persons, including young persons, remanded in custody, and exposed to the deleterious effects of imprisonment.