Law Institute Victoria

Submission

Criminal Law Section

Review of Bail Act

To: Victoria Law Reform Commission

A submission from the Criminal Law Section of the Law Institute of Victoria (Submission: CRIM16)

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1 Introduction

The Law Institute of Victoria (LIV) is pleased to make this submission to the Victorian Law Reform Commission (VLRC).

The aim of this submission is to provide answers to the particular questions posed in the Review of the Bail Act Consultation paper produced by the VLRC. Generally the LIV has supplied an answer to each question. In some places we have answered a number of questions together as we considered the issues interrelated. The LIV makes no comment to some questions and we have indicated this where appropriate.

The LIV would welcome the opportunity to make further oral or written submissions regarding bail should that be considered appropriate.

2 Recommendations

This submission makes the following recommendations:

R1 ***The LIV recommends that an application to vary bail conditions by consent require that the:***

Applicant ***– draw variations and provide supporting affidavit***

Respondent ***– provide written consent witnessed by a person qualified to receive an affidavit in Victoria.***

Applicant ***– file completed documents with the registry of the relevant Court***

On consideration of the application the relevant Court Official be able to:

(a) ***Approve the application;***

(b) ***Reject the application;***

(c) ***List the matter for hearing.***

R2 ***The LIV recommends that legislative power be given to the Department of Human Services to supervise young people on bail.***

R3 ***The LIV recommends that the Department of Human Services be funded and required to source, approve and supervise services for children and young people on bail.***

2.1 General Comments

The LIV strongly stresses that those accused of offending are entitled to the presumption of innocence until proved otherwise.

The LIV considers that conditions and special conditions of bail should be imposed only if they are necessary to assist the bailed person and/or ensure that the bailed person meets the obligations of bail, namely:

- appears to answer the charges

- does not interfere with witnesses and/or evidence
- does not commit offences while on bail.

Bail conditions and special conditions must not be imposed for a 'sentencing' reason, most particularly as punishment, specific deterrence or denunciation of specific or general offending.

2.2 Chapter 2 Overview

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

The LIV supports rewriting the *Bail Act 1977* (the Act) in plain language. A rewrite must be undertaken carefully to ensure that:

(a) The meaning of terms is clear

(b) The rights and obligations of parties are clear

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?

The LIV supports the inclusion of a statement of purpose that includes the amplification of the presumption of innocence, the presumption in favour of bail and the need to ensure justice is achieved.

2.3 Chapter 3 Police and Bail

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?

The LIV considers that there are many instances were the police have elected to arrest an accused person where the matter should have proceeded by summons. It would seem that the police acknowledge this situation[1].

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?

The LIV supports allowing the police to grant bail even if it is practicable to take an accused person before a court. In such circumstances the LIV considers it imperative that the accused person must still be able to appear in court to have the matter of bail determined if the accused person determines this is a preferable course of action. In these circumstances the police must present the accused person and not be permitted to rely on the accused persons right to make an application.

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

[1] *Review of the Bail Act Consultation Paper*, Victorian Law Reform Commission, Melbourne, November 2005, p21-22

offence? If so, should the limitation be restricted to those offences that are currently termed exceptional circumstance offences?

The LIV supports police being able to grant bail in any matter as they see appropriate.

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?

The LIV understands the onerous situation that bail appearances can impose upon police informants. The LIV considers that the inconvenience to informants is outweighed by the rights of the accused person to the presumption of innocence and to liberty. In these circumstances the LIV cannot consider the requirement that the informant attend a bail hearing as an ***undue*** hardship.

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

The LIV is aware of complaints that the described situation has occurred. The LIV considers that the appropriate response is to put matters of impropriety to the Court if the accused person wants to. It is submitted that the limiting of the range or scope of police to grant bail will not stop some cases of police using their powers to pressure accused persons.

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?

The LIV supports the rights of victims to be treated properly by the justice system and acknowledges the importance to some victims of involvement in proceedings that relate to them. The LIV makes no comment on whether the responsibility of informing victims is properly placed with police. The LIV is concerned that the bail hearings remain focussed on ensuring the accused person will:

(a) appear in court

(b) not interfere with witnesses (including any victims)

(c) refrain from offending while on bail.

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?

As stated in our response to question 8 the LIV supports the rights of victims and notes that in usual cases conditions and special conditions of bail will be announced in open court. The LIV considers it appropriate that, unless a court orders otherwise, information about the outcome of bail hearings should be available to victims.

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?

The LIV makes no comment as to whether the requirement to inform and support victims should rest with the police.

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?

The LIV makes no comment on E-justice, other than to note that where human interaction is a feature of any system it is to be expected that there will be errors and the right to be heard on the issue of recorded information must be maintained.

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?

The LIV supports any action that improves the application of law to bail decisions.

2.4 Chapter 4 Bail Justices

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?

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?

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?

The LIV supports the Bail justice system as an important safeguard for accused persons who might otherwise spend considerable time in custody. However we agree with many of the criticisms in the consultation paper regarding the system**.**

The LIV considers it appropriate that Victoria have an after-hours Court to consider bail matters (refer response to question 17).

Failing an after-hours Court being established the LIV recommends that the system of Bail justices should be professionalised. Bail Justices should be required to undertake specific training and ensure that such training is updated. Bail justices should be rewarded for the function they provide and accountable for delivering impartial decisions**.**

The LIV supports amending the Act so that Bail Justices can only remand (in custody) accused persons to the next sitting day of the court.

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?

The LIV does not support setting a mandatory time limit for calling a bail justice to a police station, however we consider that commonsense should prevail and note that any failure to act properly would reflect badly on police**.**

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?

The LIV supports the introduction of an after-hours court in Victoria and considers that the court could be presided over by a magistrate or if appropriate and subject to powers, a judicial registrar. Regional areas could be serviced by video link between regional police stations and the court. The LIV is concerned however, that an after-hours bail application not result in the accused being prevented from making further application for bail (where it was refused) or to amend conditions as it is presumed that many services may not be available to an accused who applies for bail after hours.

2.5 Chapter 5 Court Decision making

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?

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?

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?

The LIV considers the fundamental issue to be the depriving liberty to a person who has a fundamental right to be presumed innocent.

The decision to deprive an accused person of liberty must never be taken lightly and it is proper that the decision be subject to review and reconsideration.

The LIV considers that all efforts must be made to reduce delay.

The LIV believes that a single assisted bail application *made to the court* within 48 hours of the first opportunity to apply for bail should be available without prejudicing further bail applications. The LIV considers that such a provision will result in fewer applications in person and be a more useful application of court time. We do not consider that an application for bail made to the police or a bail justice (whether assisted or not) should operate to prevent an assisted or in person application to the court.

The LIV considers that the current test of whether facts and circumstances '***have arisen since the order was made'*** is too onerous. The LIV submits that in the area of bail applications facts may be led in support but must necessarily rely on the evidence as it exists. Usually this is a very early stage in the matter and the significance and strength of facts may not be well known until later. Facts may be led in a failed application that have a different significance even a short time later.

While the LIV supports assisted bail applications, we do not consider that the in person bail applications are abused. There are procedural considerations that make an application reasonably onerous for in person applicants. Further the LIV considers that the general right for a presumed innocent person to apply to have her or his liberty restored is paramount.

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?

The LIV considers that Admissions and confessions in the circumstances must be ruled inadmissible as future evidence against the accused. At the bail application the strength of the prosecution case is in issue and the LIV submits that accused persons (especially but not only those applying in person) can, through confusion, stress, distress or self-consciousness make statements against their interest.

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?

The LIV considers that reasons are required in all cases for procedural fairness/natural justice reasons. We consider that the current system in the Magistrates' Court is adequate, especially as hearings are recorded. The LIV submits that the police and bail justices should be required to provide written reasons where bail is refused.

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?

The LIV considers the inherent power of the Supreme Court is sufficient.

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?

The LIV considers that the appellate right is separate to 'dynamic influences' in bail applications. The LIV submits that often new facts or circumstances might arise and might influence an appeal (or the need to appeal), however the right to appeal the decision in the absence of new facts and circumstance for either party should not be removed.

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?

The LIV opposes 'reverse onus' tests for bail (refer also our response to question 35 and following). The LIV recognises that Commonwealth legislation may impose an obligation on the Victorian decision makers in relation to federal offences. The LIV supports a reference in the Act to the Commonwealth provision that impacts bail decisions.

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

The LIV submits that the differing role of the court in hearing an application (or further application) and an appeal should be set out in the Act.

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?

The LIV submits that while bail interaction with the Court of Appeal generally works well the proper domain for bail ***applications*** should not be the Court of Appeal.

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?

The LIV supports the proposition that the Act contain a provision that prevents bail being revoked by a court without an application having been made. The LIV considers that procedural fairness and natural justice require that an accused's bail status must only be altered by a hearing following a breach or by application with notice by either party.

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?

The LIV supports amending the Act to allow all bail applications to be heard in the Magistrates' Court.

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?

The LIV does not support the enabling the issue of a warrant merely on the revoking of bail. If a proper application to vary or revoke bail is made and the accused person fails to appear at the application hearing then we consider that the existing powers in the Act are sufficient to allow a warrant to be issued.

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?

The LIV suggests that there is no reluctance by the police to arrest without warrant when they consider there are grounds to arrest.

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?

The LIV supports there being greater clarity about where an accused is to be taken following the execution of a warrant for failing to appear. We recommend that if a warrant is endorsed the endorsement must be reasonably practical. The LIV is concerned that accused persons not be left in custody when particular judicial officers are unavailable.

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?

The LIV considers the amendment to be a sensible and relevant amendment that is well applied.

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?

The LIV appreciates and supports the need to ensure that victims have confidence in the justice system. The LIV is concerned however that the provision of evidence regarding the attitude of victim(s) can be construed away from the core considerations of securing the accused person's appearance, preventing interference with evidence, and preventing offending, and towards issues of punishment and deterrence. The LIV considers that the later issues are issues for sentencing following a finding of guilt.

We refer to our response to question 8 in respect of involving and informing victims.

2.6 Chapter 6 Presumption against Bail

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?

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?

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?

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

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

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?

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?

The LIV considers that bail should be granted when the accused is in the circumstances currently described as 'show cause' and/or 'reverse onus' unless the ***prosecution*** can show unacceptable risk. The LIV considers because deprivation of liberty is the ultimate state imposed sanction, presumed innocent people must not be deprived of their liberty lightly. We consider that the grant of bail should only be disturbed by the prosecution demonstrating to the court that there is a real and appreciable unacceptable risk to the community if bail is granted.

The LIV considers that the inclusion of matters to be regarded if exceptional circumstances and show cause are maintained will do little to further bail hearings. In fact the LIV submits that there is a risk that such a list may tend to become a default minimum standard.

If 'reverse onus' continues to apply then the LIV submits that the Act be amended to refer to the relevant Commonwealth offences.

2.7 Chapter 7 Surety for Bail

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?

The LIV does not consider there is a need for greater assessment of the suitability of a proposed surety unless the Registrar raises genuine concerns.

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?

The LIV does not consider it necessary to add a requirement to the Act that this information be given to the police for the specified purpose. The LIV considers the existing process operates effectively.

44. Should the Bail Act 1977 retain the option of a deposit as a condition of bail?

The LIV supports retaining the option of a deposit as a condition of bail.

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?

The LIV supports the decision maker having appropriate power to consider the financial circumstances of the surety. We submit that the amount of the surety should never be disproportionate to the purpose of securing compliance with bail conditions.

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?

The LIV considers that passbook and withdrawal authorities are no longer appropriate.

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?

The LIV supports further information being given to sureties. This is especially the case for sureties from culturally and linguistically different backgrounds. The LIV supports the publication of guidelines about standing surety in a range of languages.

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?

The LIV supports the repealing of s. 21 of the Act and agrees that it is generally undesirable to create situations where laypersons are in a position to apprehend others without adequate resources, experience and guidance.

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?

The LIV supports this proposal.

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?

The LIV supports this proposal.

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?

The LIV does not support automatic forfeiture. The LIV considers that surety should be forfeited only on application by the crown and as determined by the Court.

2.8 Chapter 8 Conditions of Bail

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?

The LIV generally supports rehabilitation and treatment programmes being available during bail. The LIV considers that the proper focus of bail must remain securing the attendance at Court, preventing interference with evidence and witnesses, and preventing offending (see s.5(2) of the Act). If specific programmes can be clearly demonstrated as appropriate for one of these purposes then the LIV supports the court being able to use a special condition.

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?

Generally the LIV considers that there should be some direction that special conditions are only imposed with the aims of improving the accused's ability to comply with purposes in the Act (s5(2)). Before imposing a special condition the decision maker must be satisfied that the special condition is necessary for the purpose and reasonable for the accused. The LIV considers that this is a case by case consideration for decision makers.

54. Are special conditions prohibiting an accused from using public transport being imposed appropriately?

We refer to our response to question 53 on this matter and stress that the need for the special condition must be identified and directed to the purposes in the Act.

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?

The LIV understand that the Victorian Aboriginal Legal Service (VALS) will be making a submission. The LIV makes no comment on this question and notes we would be guided by the information supplied by VALS.

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?

The LIV makes no comment on this question and notes we would be guided by the information supplied by VALS

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?

The LIV agrees that there may be benefits in police being able to issue bail at a place other than a police station, however we are concerned that this 'on-the-spot' bail may lead to an increase in charge and bail were matters would otherwise have proceeded by charge and summons. It is submitted that the formal requirements of the current system serve to increase:

(a) the scrutiny and thus professional practice of the arresting officer;

(b) the likelihood that accused persons are properly assessed for any disabilities (health, youth, substance abuse, social support, crisis)

(c) the appreciation by the bailed person of her or his obligations.

Further it is considered that a practice of on-the-spot-bail might lead to increased 'fail to appear to answer bail' offences due to a lack of appreciation by the accused person of the formal requirements. On this point the LIV notes a propensity for accused persons to plead guilty to the charge of 'failing to appear' even though there may be no evidence of intention.

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?

The LIV supports bail variations by consent without the requirement of a court hearing. The LIV submits that there is no apparent reason to require that proposed amendments be 'minor' or be 'defence-initiated'. We consider the key requirement to be consent. The LIV recommends that:

R1 ***Application to vary by consent require that the:***

Applicant ***– draw variations and provide supporting affidavit***

Respondent ***– provide written consent witnessed by a person qualified to receive an affidavit in Victoria.***

Applicant – file completed documents with the registry of the relevant Court

On consideration of the application the relevant Court Official be able to:

(d) Approve the application;

(e) Reject the application;

(f) List the matter for hearing.

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?

The LIV shares concerns expressed that matters adjourned to 'a date to be fixed' can be 'lost in the system'. Similarly the LIV appreciates that the Court may not always have a specific date identified. The LIV submits that matters should not be adjourned to 'a date to be fixed' but should be adjourned to 'a date to be fixed but not later than (a specified date)'. In this way if the matter is listed before the 'not later than' date then that 'not later than' date can be vacated. If the matter is not listed then the 'not later than' date serves as a review. While this may lead to appearances that are no more than case reviews, it is submitted that these appearances are warranted in the interests of justice.

60. The commission is interested in hearing of problems arising from conflicts between bail conditions and other orders.

The LIV is aware of conflicts and duality between bail conditions and other court orders. The LIV submits that the conditions and special conditions of bail should be confined primarily to assisting the accused to comply with bail obligations. While it is clear that there may be overlap between special conditions that are proposed to assist the accused not commit further offences and court orders that are proposed to achieve other objectives (eg. protection of others, contact with children, preserve peace), the LIV submits that bail conditions and special conditions must not be used to achieve a purpose that is better achieved by application of or for an available court order.

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?

The LIV does not support breach of a condition (or a special condition) of bail being made an offence. The LIV maintains the position that, as conditions and special conditions should only be imposed to support the accused meet bail obligations, any breach of a condition or special condition must be considered on its merits. The LIV considers that considered in its circumstances a breach may result in a variation of bail conditions, revoking bail, or no action.

2.9 Chapter 9 Children and Young People

62. Are police using their powers of arrest of children appropriately? What steps should be taken to reduce the arrest rate of Indigenous children?

The LIV supports the position that arrest of children and young persons should only proceed in exceptional circumstances.

We are concerned with the disproportionate arrest rates reported for indigenous children. The LIV has been advocating the establishment of a Victorian Children and Young People's Commission for some time. The LIV considers that such a commission would be able to identify policy issues that might lead to the circumstances such as the disproportionate arrest rates for indigenous children. Importantly the LIV sees the commission as being able to recommend appropriate ways of dealing with and overcoming such issues.

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?

The LIV concurs with the statement in the consultation paper that lawyers most commonly arrange support services for accused young people[2]. Similarly members agree from their experiences that young people are often bailed without any support structures or assistance[3]. Members report that while Juvenile Justice will supervise young people's bail there is often a reluctance to become involved as it is considered that they lack legislative backing to perform this role.

R2 ***The LIV recommends that legislative power be given to the Department of Human Services to supervise young people on bail.***

R3 ***The LIV recommends that the Department of Human Services be funded and required to source, approve and supervise services for children and young people on bail.***

64. Are decision makers imposing appropriate special conditions on children and young people?

The LIV considers that inappropriate special conditions are imposed on children and young people, particularly when considered in conjunction with the lack of proper support programmes. Often it appears that special conditions are imposed with the aim of modifying behaviour. The LIV submits that in the absence of structured support special conditions, despite laudable intent, can amount to nothing more than setting the child fail.

The LIV repeats its position that conditions and special conditions should only be imposed if they are necessary to ensure that the bailed person meets the obligations of bail.

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[2] Ibid p 122

[3] Ibid p 125

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?

The LIV does not support the imposition of bail undertakings on 3rd parties where the direct party has the capacity to enter into the condition. The LIV submits that this could add an unnecessary burden to the relationship between the bailed person and the 3rd party. The LIV is particularly concerned that in the case of children and young people this may lead to added tension from the only supportive adult the child identifies with.

66. Should it be possible for decision makers, in appropriate circumstances, to remand young people (aged 18–21) to youth training centres?

The LIV considers that adult facilities are utterly inappropriate for children and young people. When children and young persons are being remanded the LIV submits that they must be assessed for suitability for a youth specific facility. If the child or young person is assessed as suitable and is not remanded to a youth specific facility then the decision maker must be required to publish reasons for so deciding.

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?

The LIV considers that if the power to remand to youth specific facilities is available to decision makers the concerns raised in the Consultation Paper would be addressed.

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?

The LIV supports adding a provision to the ***Bail Act*** to ensure that specific factors must be considered when making the decision to bail children and young people. The LIV considers the following matters should be considered by the decision maker:

(a) the need to strengthen and preserve the relationship between the accused and the accused's family

(b) the impact on the accused's family of the decision to grant or refuse bail

(c) the desirability that the accused live at home

(d) the desirability of allowing education, training, employment, and support programmes of the accused to continue without interruption or disturbance

(e) the need to minimise the stigma to the accused resulting from being charged with a criminal offence

(f) the likely sentence should the accused be found guilty

The LIV supports moving the bail associated provisions of the *Children and Young Persons Act* 1989 to the *Bail Act* 1977.

2.10 Chapter 10 Marginalised and Disadvantaged Groups

The LIV notes that there is an issue with the question numbering in the Consultation Paper body. We have relied on the numbering in the separately published questions for questions 69 onward.

69. 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?

The LIV supports including a specific requirement that the decision maker consider the impact granting or refusing bail will have on those who are dependent on the accused to provide them with necessary care.

70. 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?

The LIV considers that the care and welfare of children and other dependent persons who are impacted by the processes of the criminal law must be adequately catered for. The LIV considers that the Police should make inquiries as to whether their intended actions will impact dependants of the accused and make proper arrangements to ensure that proper care and support is available to such dependants.

71. Are there particular measures which could be put in place to assist women from culturally and linguistically diverse backgrounds or Indigenous women? Should any accommodation provided for women also be equipped to accommodate children?

The LIV makes no specific comment on the measures that might be put in place to assist women from culturally and linguistically diverse backgrounds and indigenous women. We recommend, and would be guided by, the VLRC obtain specific comment from those people and agencies who have extended experience dealing with the identified groups of people.

72. Are there any problems with the procedures or policies of the CREDIT–Bail Support Program that have not already been identified in this paper?

The LIV is concerned that some Magistrates, informants and prosecutors resist the using the CREDIT programme. It has been suggested that it lacks proper legislative endorsement and as such should not be supported. The LIV considers

the CREDIT programme highly successful and supports extending the programme to ensure it is available in all Victorian Courts.

73. 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?

The LIV considers that the ability of community-based programmes that target drug dependency problems have an important impact on the rehabilitation of many offenders. The LIV suggests that many programmes are unable to meet the demand for services. Often there are waiting periods that are either inappropriate for accused persons, or people will offend while waiting access to a service. The LIV notes that there is no, or incredibly few, services that will accommodate 'dual diagnosis' clients, that is clients with mental illness and drug dependency.

74. 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?

The LIV does not support lack of accommodation being a factor in refusing bail. The LIV supports all initiatives to provide adequate accommodation to those who are without accommodation. However the LIV does not support unnecessarily mandating where or with whom an accused person on bail must live merely to address a lack of accommodation.

75. 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? Would training bail justices in disability issues be an appropriate alternative? Is there a need for a new role to be created?

The LIV supports providing specialised support to accused people with cognitive impairment. This support should be available, at least, for all bail related hearings. The LIV supports the role of the Independent Third Person (ITP) but notes that in the situation of dealing with cognitive impairment specific training would be required. The support of persons with cognitive impairment is often complicated and usually particularly challenging.

The LIV supports specific disability training for all roles involved in dealing with accused persons.

76. 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?

The LIV supports training for all law enforcement officers to assist in the identifying of people with mental illnesses and/or mental impairment. The LIV supports including in the Bail Act a provision that requires decision makers to consider the capacity of the bail applicant to appreciate bail conditions. The LIV is concerned that such a provision not be used as a mechanism to refuse bail outright.

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?

The LIV makes no comment on this question, and would be guided by any response from VALS.

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?

The LIV makes no comment on this question, and would be guided by any response from VALS.

2.11 Chapter 11 Other Legislative reforms

79. Does the definition of 'court' in section 3 of the Bail Act 1977 create any confusion? Should it be retained?

The LIV supports the rewriting of the Act in plain language and considers that the appropriate use of terms should be addressed in that process.

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?

We consider the term warrant of commitment in the Act unnecessary and we support the rewriting of the Act in plain language and considers that the appropriate use of terms should be addressed in that process.

81. Should the use of the term 'remand' in the Bail Act 1977 be used only as a reference to 'remand in custody'?

The LIV considers that the common use of the term remand is to convey 'remand in custody', and that this should be reflected in the Act.

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?

The LIV supports removing references to 'telegrams' and 'cablegrams'.

83. Should the term 'surety' in the Bail Act 1977 be replaced with some other term, for example, 'acceptable person' or 'guarantor'?

The LIV agrees that a more appropriate word than 'surety' should be used in the Act.

84. Are there any words, phrases or concepts contained in the Bail Act 1977 that require greater clarification, redrafting, amendment or deletion?

The LIV supports the rewriting of the Act in plain language.

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?

The LIV supports rewriting the forms in plain language and considers the forms should contain all relevant information. The LIV supports including contact information on the forms of undertaking.

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?

The LIV supports repealing s. 4(2)(b).