Law Institute of Victoria Submission

REVIEW OF VICTORIA'S BAIL SYSTEM

To: The Hon. Paul Coghlan QC
Date: 31 March 2017
Email: bailreview@justice.vic.gov.au

Contact:
Gemma Hazmi
Acting Principal Lawyer, Legal Policy
T: (03) 9607 9374
E: ghazmi@liv.asn.au
W: www.liv.asn.auwww.liv.asn.au

TABLE OF CONTENTS

Introduction 3
Executive Summary 4
Recommendations on the principles and purposes of bail 5
Recommendations on risk assessment: tests of risk 5
Recommendations on risk assessment: factors to consider 6
Recommendations on risk assessment: risk and vulnerable populations 6
Recommendations on who should determine risk 8
Recommendations on support services 8
The need for reform 10
The current review 10
The LIV approach 10
Victoria's criminal justice environment 10
The increasing prison population 10
The impact of remand 13
Drivers of remand 14
Princples and purposes of bail 16
Presumption of innocence and rights under the Charter 16
Purposes of bail 17
Risk assessment 20
Three tests of risk 20
Determining risk 23
Factors to consider 23
Risk and vulnerable populations 25
Who should determine risk? 32
The value of support services 35
Considering the availability of support 35
Current Victorian bail support programs: adults 36
Current Victorian bail support programs: youth 40
LIV Recommendations 43
Recommendations on the principles and purposes of bail 43

TABLE OF CONTENTS

Recommendations on risk assessment: tests of risk 44
Recommendations on risk assessment: factors to consider 44
Recommendations on risk assessment: risk and vulnerable populations 45
Recommendations on who should determine risk 46
Recommendations on support services 47
Conclusion 47

INTRODUCTION

The Law Institute of Victoria (LIV) is Victoria's peak body for lawyers and those who work with them in the legal sector and represents over 19,500 members.

The LIV has had a long history of contributing to, shaping and developing effective criminal legislation, and has undertaken extensive advocacy on law reform and sentencing issues.

In the wake of the Government's announcement to review Victoria's Bail System, the LIV convened a Bail Review Taskforce which met weekly, from 25 January 2017 to 10 March 2017. These meetings were attended by various individuals and stakeholder organisations within the criminal justice system and general legal profession, representing the LIV's Administrative Law and Human Rights, Criminal law, Disability law, Technology, Access to Justice and Health law Committees including:

- Melinda Walker, Taskforce Chair (LIV Criminal Law Section)
- Carrie O'Shea (LIV Council)
- Brendan Lacota (LIV Council)
- Zubair Mian (LIV Council)
- Tania Wolff (LIV Council and First Step Legal)
- Phil Grano (LIV Disability Law Committee and Office of the Public Advocate)
- Robyn Mills (LIV Disability Law Committee and Victoria Legal Aid)
- Laura Heffes (Justice Connect)
- Lauren Matthews (Victorian Equal Opportunity and Human Rights Commission)
- Kin Leong (Victorian Aboriginal Legal Service)
- Kristina Kothrakis (LIV Criminal Law Section)
- Darryl Annett (LIV Criminal Law Section)
- Tim Freeman (LIV Criminal Law Section)
- Jasmine Pisasale (LIV Criminal Law Section)
- David Barrese (LIV Criminal Law Section)

While these individuals and organisations were represented at some or all of the weekly meetings, at which they provided invaluable contributions, this submission is not made jointly, nor on behalf of those particular organisations. Nevertheless, the breadth of discussions and feedback from these organisations has enabled us to take into account the perspectives of all sides of the criminal justice system in the formulation of this submission.

This submission was prepared by Dr Karen Gelb, Consultant Criminologist, on behalf of the LIV. Dr Gelb is an experienced criminologist, social scientist and researcher. She spent eight years with the Victorian Sentencing Advisory Council, is the editor of a book on sentencing councils and sentencing policy and is the author of more than 30 major research reports and articles. She has most recently completed consultancies for the Queensland Department of Justice and Attorney-General, the Royal Commission into Family Violence, and the Royal Commission into Institutional Responses to Child Sexual Abuse.

EXECUTIVE SUMMARY

The LIV believes in a bail system that is flexible, that adheres to the underlying principle of the presumption of innocence, and that remands accused in custody only when there is a genuine need to ensure the safety of the community or to ensure a person's appearance at court. The LIV submits that:

- The bail system needs to be examined within its broader criminal justice system context. Victoria's prison population has been growing at unprecedented rates, affecting vulnerable cohorts disproportionately. The increase in Victoria's remand population has been even more pronounced, such that one in three adult prisoners, and close to half of youth detainees, are now unsentenced. The increase in the number of adults and youth held on remand is a cause for concern as remand is not only expensive, but has been shown to increase crime over the long term.
- The presumption of innocence is fundamental to our criminal justice system, both in the common law and as a human right. The bail system needs to fairly balance the rights of the accused with the safety of the community, consistent with the *Charter of Human Rights and Responsibilities.*
- The multiple goals of bail are often conflicting. Legislative and operational changes in recent decades have led to a shift away from a primary concern with ensuring that the accused does not abscond to a focus on preventing offending while on bail. The rise in risk aversion and risk management has created climates in which the granting of bail has become less likely and, when bail is granted, the use of restrictive bail conditions has increased.
- The lack of clarity associated with the multiple tests with different onus thresholds in the *Bail Act 1977* (Vic) has created confusion among the most learned decision makers, and is overly complex for the public, and particularly accused people who represent themselves at bail hearings, to understand. There needs to be greater coherence and clarity in both the tests and the offences to which the different tests apply.
- Marginalised people are over-represented in the criminal justice system; the bail system should not compound their disadvantage.
- Bail justices not only decide a tiny proportion of all bail applications, but they are far more likely to remand an accused in custody than either police or magistrates. Bail justices are an important feature of the criminal justice landscape, especially in times of increasing pressure on the Magistrates' Court in terms of the volume of cases with which it deals.
- The proportion of people in the criminal justice system presenting with problems such as drug addiction or mental illness has increased; these people are more likely to fail to appear due to their personal circumstances rather than an intention to abscond. The value of support services in achieving the purposes of bail thus cannot be overstated, especially when considering the need to support accused people to meet reverse onus test thresholds. In the absence of adequate support structures, the likelihood of the accused being able to comply successfully with bail conditions is reduced.

The LIV therefore makes the following **32 recommendations**:

Recommendations on the principles and purposes of bail

1. That the Government requests that the Victorian Law Reform Commission undertakes a further review of the *Bail Act 1977* (Vic) in order to clarify the Act and move towards plain English bail legislation that is accessible both to people working with the Act and to the broader community.

2. That a new Section 1 be inserted into the *Bail Act 1977* (Vic) with a Statement of Purpose of the Act. The Statement of Purpose should be as follows:

   > The purpose of the *Bail Act 1977* (Vic) is to provide a mechanism to guide decision makers when balancing the rights of an accused under the *Charter of Human Rights and Responsibilities* with the safety of the community.

3. That a new Section 2 be inserted into the *Bail Act 1977* (Vic) with a Statement of Principles of the Act. The Statement of Principles should be as follows:

   > It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed in accordance with these principles—
   >
   > (a) That all people are presumed to be innocent until proven guilty.
   >
   > (b) That any limitation on a person's rights under the *Charter of Human Rights and Responsibilities* must be justified.
   >
   > (c) That the purposes of bail are:
   >
   > (i) to ensure the attendance of the accused at his or her trial and the associated preliminary hearings; and
   >
   > (ii) to ensure the safety of the community.

Recommendations on risk assessment: tests of risk

4. That the unacceptable risk test should remain unchanged for most offences.

5. That show cause be abolished and serious offences instead fall under a reverse onus unacceptable risk test.

6. That the exceptional circumstances test, which has a higher threshold, remains for murder, treason and terrorist offences, and Commonwealth drug offences.

7. That all offences to which the reverse onus unacceptable risk test and the exceptional circumstances test apply should be clearly and simply listed in separate Schedules, rather than being incorporated within the body of the section itself.

Recommendations on risk assessment: factors to consider

8. That the right to liberty under the *Charter of Human Rights and Responsibilities*[1] be added to the list of factors to be weighed when assessing risk, and that any deprivation of liberty be in accordance with the *Charter of Human Rights and Responsibilities*.[2]

9. That the following factors be added to the *Bail Act 1977* (Vic) s 4(3):

    - the period the accused has already spent in custody and the period he or she is likely to spend in custody if bail is refused;
    - the risk of harm—physical, psychological or otherwise—to the accused while on remand, including self-harm or harm by another; and
    - the responsibilities of the accused, including primary carer responsibilities.

10. That the considerations from the *Bail Act 2013* (NSW) regarding fairness of the criminal justice process be added to the *Bail Act 1977* (Vic) s 4(3); specifically:

    - the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence;[3]
    - the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice;[4] and
    - the need for the accused person to be free for any other lawful reason.[5]

11. That a more general expression concludes s 4(3) of the act: '…when it is in the interests of justice to do so'.

Recommendations on risk assessment: risk and vulnerable populations

12. That, as in the *Bail Act 2013* (NSW),[6] the following consideration be added to the *Bail Act 1977* (Vic) s 4(3): 'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'.

13. That information should be provided to police, bail justices and magistrates about the challenges facing people from different vulnerable cohorts. This information should be developed by the Judicial College of Victoria, in conjunction with the Victorian Equal Opportunity and Human Rights Commission, in the form of a Bail Bench Book available via the Judicial College of Victoria.

---

[1] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(3).
[2] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
[3] *Bail Act 2013* (NSW) s 18(1)(i).
[4] *Bail Act 2013* (NSW) s 18(1)(l).
[5] *Bail Act 2013* (NSW) s 18(1)(m).
[6] *Bail Act 2013* (NSW) s 18(1)(k).

Children

14. That s 3B of the *Bail Act 1977* (Vic) be retained.

Aboriginal and Torres Strait Islander men and women

15. That s 3A of the *Bail Act 1977* (Vic) be retained.

16. That further guidance and associated training be developed for Victoria Police, court registrars, magistrates and bail justices on the implementation of this section; and that such training be developed in partnership with the Victorian Equal Opportunity and Human Rights Commission and specifically address the intersection of the *Bail Act 1977* (Vic) and the *Charter of Human Rights and Responsibilities*.

17. That there is a need to expand culturally and gender appropriate housing so that it may support a greater number of individuals, as well expanding the availability of transitional housing provided by Corrections Victoria under its Better Pathways strategy.

People with a disability

18. That a provision similar to the Queensland provision[7] be adopted in Victoria for people with a cognitive impairment or people experiencing mental ill-health, with the specific inclusion of bail justices in addition to police and the Court.

People experiencing homelessness

19. That there should be a funding increase for residential beds in rehabilitation facilities for bailees who are drug and/or alcohol dependent.

20. That there is a need to increase the stock of available housing specifically for young people, providing resources for appropriate (and appropriately qualified) staffing and locating housing in places that facilitate access to support services.

21. That, for begging alms and other such minor public space offences under the *Summary Offences Act 1966* (Vic), where the accused has no fixed address, accused are served with either a notice to appear or an on-the-spot summons.

Other low-level offenders

22. That a Schedule be developed to list those offences that should be dealt with by way of summons or notice, including (but not necessarily limited to):

    - offences that do not attract a term of imprisonment or where imprisonment does not exceed 12 months;
    - offences of Beg Alms and other such minor public space offences under the *Summary Offences Act 1966* (Vic);
    - one offence of Shoptheft where the amount does not exceed $100;
    - an offence of assault where no physical contact is alleged;

---

[7] *Bail Act 1980* (QLD) ss 11A(1), 11A(2).

- loitering where no other alleged offence is said to have been committed or alleged to have been contemplated; and
- offensive behaviour in public where not of a sexual context.

Recommendations on who should determine risk

23. That police diversion programs be expanded to assist in connecting low-level offenders with support while at the same time keeping them away from the bail system.
24. That information be provided to police to explain and encourage the use of summons or notices to appear for low-level offending.
25. That the system of bail justices in Victoria be retained.
26. That bail justices are provided with additional training—such as the development of a Certificate IV Diploma in Bail—and support, and also that they have stronger lines of accountability.
27. Improved availability of data and program evaluation information, to facilitate evidence-informed policy and practice.
28. That funding be made available for court-based bail support services during the hours that the Night Court is sitting.
29. Should Night Court remain in the long term, that the following inclusions be made in the Bail Act:
    - A person remanded during a session before a Night Court must be ordered to re-appear before a court during normal court hours on the following day, whether that be a weekday or weekend.
    - An application for bail before a magistrate in a Night Court setting is not considered to be a 'first application' for bail. Where an applicant is refused bail, this does not prevent the making of a further 'in-person' application for bail at the next appearance before a court on the following day.
    - A remandee who makes an application for bail before a magistrate on the day after the refusal of bail before a Night Court is not required to demonstrate 'new facts and circumstances' where a further 'in-person' application for bail is sought to be made during normal court hours.

Recommendations on support services

30. That bail support and other court-based support services attract greater funding to allow them to provide services to more individuals.
31. That the CISP, which has been rigorously evaluated and found to be both effective and cost-effective, should be funded sufficiently to allow it to expand into the County Court, where it could support more serious offenders to complete their bail successfully, and promote the protection of the community at the same time.

32. That bail support programs and other support services for youth be funded sufficiently to allow for adequate and timely provision of services, based on best practice standards.

THE NEED FOR REFORM

The current review

Following recent events in Melbourne, there appears to be a perception that Victoria's bail system is not working effectively.

In response to the announced review of Victoria's bail laws, the Law Institute of Victoria (LIV) has convened a Taskforce to develop this submission.

The LIV approach

The LIV believes that bail should be sufficiently flexible to be able to address each individual's specific circumstances, to ensure the appearance at court of an accused, to promote community safety and protection, and to ensure that the accused is best assisted to complete bail successfully. The LIV also believes that Victoria's bail system cannot be examined in isolation from its environment; as such, this submission considers both bail and the criminal justice environment more broadly.

VICTORIA'S CRIMINAL JUSTICE ENVIRONMENT

The increasing prison population

Victoria's prison population has been growing at unprecedented rates, significantly outpacing general population growth. Between 30 June 2006 and 30 June 2016, Victoria's prison population increased by 67%, from 3,908 to 6,520 prisoners.[8] By 28 February 2017, there were 6,906 prisoners in Victoria's prisons—an increase of 8.2% from the same time the previous year.[9] And on 18 March 2017, Victoria's prison population reached a new record, with 7,011 prisoners.[10] The increase has been attributed to reforms to sentencing, bail and parole legislation, resulting in more people going to prison for longer periods, fewer people being granted parole and an increase in the number of people remanded without bail.[11]

---

[8] Sentencing Advisory Council, *Victoria's prison population 2005 to 2016* (November 2016), 1.
[9] Corrections Victoria, *Monthly prisoner and offender statistics, 2016-17* (2017), Table 1.08.
[10] Corrections Victoria, unpublished data.
[11] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015).

The over-crowding now seen in Victorian prisons raises significant safety concerns, not only for staff who face an increasing incidence of assault, but also for prisoners—both sentenced and unsentenced—who 'face a greater risk of harm than at any time in the past decade'.[12]

The increase in the prison population has not affected all cohorts equally, which is seen in the most recent data available. While overall the number of people in prison grew just over 8% from February 2016 to February 2017 (from 6,385 to 6,906), different cohorts experienced much higher growth. The number of women in prison increased by 15.6% during the past year,[13] while the number of Aboriginal and Torres Strait Islander prisoners increased by 17.1% and the number aged less than 25 increased by 16.1%.[14]

The remand population has grown even more substantially in Victoria over the decade to 2016, both in raw numbers and as a proportion of the total prison population. The number of prisoners on remand increased by 154% from 2006 to 2016, while the sentenced prisoner population increased by 46% over this period. The remand population grew from 19% of the total prison population on 30 June 2006 to 29% on 30 June 2016.[15] In the eight months of 2016-17 so far, the number of people on remand has increased by 18%, from 1,949 in July 2016 to 2,294 in February 2017.[16] The 12-month change has been even greater, with the remand population growing 27.9% from the end of February 2016 to the end of February 2017.[17] And on 18 March 2017, Victoria's remand population reached a new record, with 2,378 unsentenced prisoners, representing 34% of all people in custody.[18] It has been argued that 'remand imprisonment was originally turned to as a last resort for exceptionally serious offences, but is increasingly being used to detain people who suffer at the intersections of disadvantage'.[19]

With each prisoner costing $289.83 per day,[20] the increasing prisoner population brings with it significant financial costs for the community. In addition to the costs of keeping people in prison, further substantial costs are being incurred by virtue of prison overcrowding leading to lack of sufficient prisoner transport and difficulties in bringing prisoners to court.[21] In this environment, 'some magistrates are releasing prisoners on bail to ensure they'll turn up to court'.[22]

---

[12] Victorian Ombudsman, *Investigation into deaths and harm in custody* (March 2014), 10.
[13] In comparison, the number of men in prison increased by 7.6% from February 2016 to February 2017.
[14] Corrections Victoria, *Monthly prisoner and offender statistics, 2016-17* (2017), Table 1.08.
[15] Australian Bureau of Statistics, *Prisoners in Australia 2016* (2016), Table 14. The proportion of prisoners who were unsentenced had remained fairly stable in the decade prior to 2016, hovering around 18%-20%, according to Corrections Victoria spokesperson Michael Gleeson: Record inmate numbers spark fears of overflowing Victorian prison system, Herald Sun, Alex White; 12 February 2017.
[16] Corrections Victoria, *Monthly prisoner and offender statistics, 2016-17* (2017), Table 1.
[17] Ibid.
[18] Corrections Victoria, unpublished data. The 18 March 2017 figures show that 2,378 of 7,011 prisoners are now on remand.
[19] Cara Gledhill, 'Time and punishment: why bail reform won't work' (13 February 2017) *Overland*.
[20] Real net operating expenditure per prisoner/detainee in 2015-16 dollars: Productivity Commission, *Report on Government Services 2017*, vol. C (2017), Table 8A.19.
[21] In 2013, $143,722.10 in costs were awarded in 245 matters; in 2014, $161,727.93 in costs were awarded in 147 matters; in 2015, $113,132.61 in costs were awarded in 130 matters; through 7 June 2016, $110,346 in costs were awarded in 167 matters. The total costs incurred due to failure to bring prisoners to court in almost 700 matters thus totalled well over $500,000 during this period. See further, Victoria, 'Community Correction Orders: Written Responses to Questions Without Notice', *Parliamentary Debates*, Legislative Council, 26 May 2016, 2537 (Steve Herbert, Minister for Corrections); Victoria, 'Prisoner Transport: Written Responses to Questions Without Notice', *Parliamentary Debates*, Legislative Council, 9 June 2016, 2905 (Steve Herbert, Minister for Corrections).
[22] Prisoners released on bail instead of remanded because of jail overcrowding, The Age, Bianca Hall; 10 March 2016.

The pressure of an increasing custodial population is also being felt in youth justice, where the number of individual young people admitted to remand has almost doubled in five years, from 115 in the first quarter of 2010 to 210 in the first quarter of 2016.[23] The number of youth in unsentenced detention on an average day increased by 26%, from 43 in 2010-11 to 54 in 2014-15.[24] The most recent data show that this increase has continued, with 68 young people aged 10-17 in unsentenced detention in Victoria on an average night in the June quarter 2016, representing an increase of 113% since the June quarter 2012.[25] The rate of unsentenced detention of 10-17 year olds also increased from 2012 to 2016, doubling from 0.6 to 1.2 per 10,000 youth.[26]

The proportion of all youth detainees who were unsentenced on an average day also increased, from 24% in 2010-11 to 37% in 2014-15: while the proportion was stable from 2010-11 to 2013-14, it increased by half just during the last year of this period.[27] By January 2017 this proportion had increased dramatically: as at 17 January 2017, there were 190 young people in Victoria's youth justice facilities, of whom 48% (91) were on remand.[28]

Data analysis suggests that the new bail offences that applied to children from December 2013 were largely responsible for an increase in the number of charges sentenced in the Children's Court since 2013.[29] A particularly striking shift was seen at Parkville Youth Justice Precinct in the proportion of detained youth who are on remand: while traditionally about 20% of youth in detention at that facility are held on remand, the 2013 changes shifted the balance completely, such that about 80% of youth at Parkville are now on remand.[30]

Data from the Youth Parole Board show that the number of youth remand orders made in Victoria increased by around 157 per cent over 10 years: from 381 in 2006-07 to 979 in 2015-16. Over the last three years of this period, remand orders increased from 745 to 979, or an increase of 31 per cent.[31]

Remand prisoners present particular management challenges. Many present with complex issues, such as chronic mental and physical health problems, substance abuse and trauma associated with incarceration. Reception into custody is itself stressful and volatile, and 'one of the most

---

[23] Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville* (February 2017), 8. The admissions data presented here represent the 'flow' of youth into detention. The AIHW data subsequently presented represent the 'stock' of youth in detention on an average day or night.

[24] Australian Institute of Health and Welfare, *Youth justice in Australia 2014-15* (April 2016), Table S115a.

[25] Australian Institute of Health and Welfare, *Youth detention population in Australia 2016* (December 2016), Table S18.

[26] Australian Institute of Health and Welfare, *Youth detention population in Australia 2016* (December 2016), Table S20. By June quarter 2016, the unsentenced detention rate for Indigenous youth aged 10-17 was 12.2 while the non-Indigenous rate was 1.1. While there were only 11 Indigenous youth aged 10 to 17 compared with 57 non-Indigenous youth aged 10 to 17 in unsentenced detention in that quarter, the difference in rates is startling. See further, Australian Institute of Health and Welfare, *Youth detention population in Australia 2016* (December 2016), Table S12, Table S15 and Table S20.

[27] Australian Institute of Health and Welfare, *Youth justice in Australia 2014-15* (April 2016), Table S113.

[28] Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville* (February 2017), 9.

[29] Sentencing Advisory Council, *Sentencing children in Victoria: Data update report* (July 2016), 48.

[30] Victorian Ombudsman, *Report on youth justice facilities at the Grevillea unit of Barwon Prison, Malmsbury and Parkville* (February 2017), 9. Parkville houses 10 to 18 year old males and 10 to 20 year old females. This shift in the proportion of youth on remand was not seen at Malmsbury, where most of the young people – 15 to 20 year old males – are serving sentences. Ibid.

[31] Youth Parole Board, *Youth Parole Board Annual Report 2015-16* (August 2016), 27: Table 15. The number of individuals on remand orders increased from 374 in 2013-14 to 484 in 2015-16, an increase of 29%. Ibid: Table 16.

resource intensive stages in the incarceration process'.[32] As the proportion of remandees serving short terms in custody increases,[33] the 'churn' created by large numbers of accused entering and exiting the prison system consumes significant time, effort and money.

There are also significant justice and human rights concerns relating to an increase in the number of accused held on remand. Victorian research has shown that 40% of remandees will either be found not guilty or will be sentenced to a period equal to, or less than, the time they have already served on remand.[34] Similarly, more recent research in NSW found that 55% of people held on remand were subsequently released without conviction.[35]

The impact of remand

The increase in the number of adults and youth held on remand is a cause for concern as remand is not only expensive, but has been shown to be criminogenic. Being held on remand can have serious consequences for people, including:

- loss of employment and housing, meaning individuals are released from custody into unstable living arrangements, thereby increasing the risk of recidivism;
- loss of contact with a wider support network, including family and friends;
- an inability to access services and opportunities in custody that are available to sentenced prisoners, such as education,[36] employment, behavioural change programs and other treatments and services;[37] and
- exposure to a high risk, unstable and volatile prison population that increases the risk of recidivism.

In addition, remand involves significant financial[38] and social cost to the community, as imprisonment can result in unemployment, homelessness, drug abuse, exacerbation of mental illness and the perpetuation of cycles of poverty.[39]

Brown and Quilter (2014) summarise the negative impact of the remand system as follows:[40]

---

[32] Jennifer Galouzis and Simon Corben 'Judicial outcomes of remand inmates in New South Wales' (2016) 34 *Research Bulletin* 2.
[33] The average time spent on remand has decreased over the past decade, while the proportion of prisoners on remand for less than one month increased from 25% in 2005 to 31% in 2015. See further, Sentencing Advisory Council, *Victoria's prison population 2005 to 2016* (November 2016), 49. In 2016, the mean time spent on remand in Victoria was 3.9 months while the median was 2.1 months. In 2016, 61% of unsentenced prisoners spent less than three months in custody. Australian Bureau of Statistics, *Prisoners in Australia 2016* (2016), Table 31.
[34] Matthew Ericson and Tony Vinson, *Young people on remand in Victoria: Balancing individual and community interests* (2010), 20.
[35] New South Wales Law Reform Commission, *Report 133, Bail* (April 2012), 51.
[36] Unlike some other jurisdictions, while offence-specific programs are not available to accused who have yet to be found guilty of any offences, general programs, such as those relating to general life skills, are available to remand prisoners in Victoria.
[37] This is of particular concern in the context of the higher rates of suicide seen among remand prisoners, especially among women in remand: Sarah Armstrong, 'Fixing Scotland's remand problem', in Claire Lightowler and Darragh Hare (eds) *Prisons and sentencing reform: Developing policy in Scotland* (August 2009), 11.
[38] The cost per prisoner per day is currently $289.83: Productivity Commission, *Report on Government Services 2017*, vol. C (2017), Table 8A.19.
[39] Victorian Law Reform Commission, *Review of the Bail Act: Final report* (August 2007), 6.
[40] David Brown and Julia Quilter, 'Speaking too soon: The sabotage of bail reform in New South Wales' (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 73, 89. While these comments were made in relation to the NSW remand system, the same broad issues may be

> *Not only is the system extremely costly in monetary terms, its social consequences are profoundly dysfunctional. They include: physical and psychological hardship; assaults and deaths in custody; financial implications for the accused and their family; deleterious effects on children; the criminogenic effect of mixing with sentenced prisoners and high risk remandees; the lack of access to any programs; a range of effects on the ability to receive a fair trial, and on conviction rates; pressure to plead guilty; and others.*

Given the potential negative impacts associated with being remanded in custody,[41] the LIV is concerned that the current review of the Victorian bail system will result in legislative amendments or changes in decision-making practice that will lead to a significant increase in the number of people held on remand.

Drivers of remand

While, at its most basic, changes in remand are said to be driven by changes in the number of people arrested and appearing in court, changes in the law that affect the chance of bail being granted, and the average period that a person spends remanded in custody, the evidence suggests that there is a more complicated story to changes in remand: it is the interaction between changes in the *characteristics* of defendants and changes in the *practices and policies* of remand decision-makers that shapes changes in remand rates.[42]

Research has shown that 'remand in custody outcomes can be seen as the result of a complex interweaving of legislative provisions and interpretations by magistrates and other actors in the process'.[43] These 'other actors' are primarily the police, as they make decisions on how to process alleged offenders at the point of apprehension and at the police station.[44]

Of relevance to both police and court decision-making, factors influencing the choice between bail and remand that relate to justice system practitioners have been suggested to include:[45]

- Police operational priorities: Decisions to arrest offenders and refuse them bail are made under substantial time pressures and policy and cultural constraints, with custodial remand also being used as a short-term incapacitation strategy that could involve 'rounding up the usual suspects'.

---

said to apply in Victoria as well. The primary difference between the NSW and Victorian remand situation is that Victorian remandees have access to general education and skills-based programs. See further Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015).

[41] These potential negative consequences are exacerbated in the current circumstances of prison overcrowding, which has led to the placement of unsentenced prisoners in cells alongside sentenced prisoners. This practice is contrary to the *Charter of Human Rights and Responsibilities Act 2006* (Vic), which requires humane treatment when deprived of liberty: *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 22.

[42] Sue King, David Bamford and Rick Sarre, *Factors that influence remand in custody: Final report* (November 2005), 55.

[43] David Bamford, Sue King and Rick Sarre, *Factors affecting remand in custody: A study of bail practices in Victoria, South Australia and Western Australia* (1999), xiii.

[44] Sue King, David Bamford and Rick Sarre, 'Discretionary decision-making in a dynamic context: The influence on remand decision-makers in two Australian jurisdictions' (2009) 21(1) *Current Issues in Criminal Justice* 24, 24.

[45] Rick Sarre, 'Challenging spiralling remand in custody rates: What legal and procedural changes can address the trend?' (2016) 2(3) *Journal of Criminological Research, Policy and Practice* 196, 200.

- The accountability of police bail authorities: In Victoria, police decisions to refuse bail are reviewable by Bail Justices, thus increasing the transparency of police bail decisions and resulting in closer scrutiny by courts of the information upon which defendants' risk of non-compliance is assessed.
- Time taken for bail consideration: When more time is taken for a contested bail hearing, information presented to the court can be examined more closely and more thoughtfully.
- The use of therapeutic jurisprudence: Greater emphasis on therapeutic responses to offending enables bail decision-makers to refer bail applicants to a greater range of social, legal and health resources in those jurisdictions where they are available.
- The adoption of innovative specialist courts: Courts such as drug courts, family violence courts and Aboriginal and Torres Strait Islander courts are more likely to achieve higher rates of court attendance and divert people away from custodial outcomes.

Police decisions have been shown to play a significant role in influencing court bail decisions. Research undertaken in Perth found that the strongest predictor of a positive bail outcome was the opinion of the prosecutor: if the prosecutor was unopposed to bail, the likelihood of the accused being granted bail increased by more than three times. In addition, the presence of legal representation doubled the likelihood that the accused would be released on bail.[46] The influence of such legal process factors has been found to be particularly relevant in jurisdictions where judicial decision-makers work in high-volume environments, with considerable time pressures and limited information. In such circumstances, 'bail in the Anglo-Australian common law courts has been consistently found to be a largely cursory process', such that 'court decisions are heavily influenced by the decisions made prior to court'.[47]

In terms of court decision making, data analysis suggests that the increase in Victoria's remand population is primarily due to the increasing use of remand for more prisoners, and for shorter periods. This increase in the number and proportion of prisoners serving shorter periods on remand may be attributed to the increasing number and proportion of prisoners who have been remanded for offences determined in the Magistrates' Court: between 2005 and 2015, the number of prisoners on remand from the lower courts increased by 177%, while the number of prisoners on remand from the higher courts increased by only 37%. By 2015, three-quarters of Victorian unsentenced prisoners had been remanded into custody from the lower courts.[48]

[46] Alfred Allan et al, 'An observational study of bail decision-making' (2005) 12(2) *Psychiatry, Psychology and Law* 319, 326.
[47] Sue King, David Bamford and Rick Sarre, 'Discretionary decision-making in a dynamic context: The influence on remand decision-makers in two Australian jurisdictions' (2009) 21(1) *Current Issues in Criminal Justice* 24, 25-26.
[48] Sentencing Advisory Council, *Victoria's prison population 2005 to 2016* (November 2016), 49.

PRINCPLES AND PURPOSES OF BAIL

Presumption of innocence and rights under the Charter

Prima facie, every accused person is entitled to remaining free until trial.[49] This presumption of innocence is fundamental to our criminal justice system, setting it apart from the arbitrary detention and absence of justice and fairness that characterise totalitarian regimes. With this proposition as the starting point of Australian law, 'surely it must follow that pre-trial deprivation of liberty must be regarded as an extraordinary remedy'.[50]

The question after the person is charged is not whether the person should retain their liberty, but whether it is justified to keep that person detained in custody whilst awaiting trial. The resolution to that question is the bail decision, which is primarily an exercise in assessing and treating risk. Rights under the Charter and common law should be viewed as the primary context for making bail decisions.

The *Charter of Human Rights and Responsibilities Act* states that:[51]

> *A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law*.

A number of other Charter rights are also relevant to bail decisions, including the right to liberty and freedom of movement (ss 12 and 21). Charter rights should form the backdrop of decision-making in the Bail Act. Consistent with these rights, placing people on remand should only be used as a measure of last resort to address the risk that the accused poses. The individual circumstances of the accused must be properly considered, along with any other ways (such as bail conditions) to achieve the desired end of, for example, ensuring that the accused attend court or protecting public safety.[52]

The ACT case of *In the Matter of an Application for Bail by Isa Islam* illustrates the importance of ensuring that bail tests are compatible with Charter rights, particularly the right to be presumed innocent until proven guilty.[53] In that case, the ACT Supreme Court found that an exceptional circumstances test in the ACT *Bail Act 1992* was incompatible with the *Human Rights Act 2004* as it created a general rule implementing a presumption against bail. The ACT Government proposed amendments to address the concerns raised by the Court: to ensure that the test of exceptional

---

[49] Although Justice Terry Connolly of the ACT Supreme Court noted a decade ago that Parliaments were increasingly intervening to reverse the presumption in favour of bail or to provide that bail is not an option for certain offences, such that the 'golden thread' of the common law – the presumption of innocence – had started to unravel: Justice Terry Connolly, 'Golden Thread or Tattered Fabric: Bail and the Presumption of Innocence', paper presented to the Law Council of Australia *National Access to Justice and Pro Bono Conference*, Melbourne, 11-12 August 2006.
[50] Justice Terry Connolly, 'Golden Thread or Tattered Fabric: Bail and the Presumption of Innocence', paper presented to the Law Council of Australia *National Access to Justice and Pro Bono Conference*, Melbourne, 11-12 August 2006, 2.
[51] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).
[52] See e.g. *Woods v DPP* [2014] VSC 1 [29].
[53] (2010) 4 ACTLR 235.

circumstances was rationally connected to its purpose (by clarifying that it rationally applied to any offence that carries an imprisonment for life); by making it clear that the presumption against bail is being applied due to the serious nature of the offence; and by clarifying that the court can have regards to normal bail criteria when considering whether exceptional circumstances exist.[54] We suggest that any changes to the current bail tests should also take into account these considerations to ensure that they are compatible with the Charter.

Purposes of bail

While each state in Australia has a different structure and expression of its bail legislation, there are three broad goals that custodial remand seeks to achieve:[55]

- to ensure the integrity and credibility of the justice system;
- to protect the community; and
- to safeguard the best interests of the defendant.

These multiple goals are often conflicting. Arguably, legislative and operational changes in recent decades have led to a shift away from a primary concern with the first outcome – ensuring that the accused does not abscond—to a focus on the second—preventing offending while on bail. This shift has been conceptualised in terms of a move from seeing bail as 'a basically procedural mechanism…to a substantive, independent forum in which crime prevention aims are pursued…through the rise of risk-based mentalities'.[56] The rise in risk aversion and risk management has created climates in which the granting of bail has become less likely and, when bail is granted, the use of restrictive bail conditions has increased,[57] to the point that bail has been said to represent a 'moment where accusation, guilt and punishment are conflated'.[58]

In Victoria, bail will be refused if the court is satisfied that there is an unacceptable risk that the accused, if released on bail, would—[59]

- fail to surrender himself into custody in answer to his bail;
- commit an offence whilst on bail;
- endanger the safety or welfare of members of the public; or

---

[54] Attorney-General Simon Corbell, *Declaration by the ACT Supreme Court that section 9C of the Bail Act 1992 is not consistent with section 18(5) of the Human Rights Act 2004: Final Government Response* (May 2012).
[55] Sue King, David Bamford and Rick Sarre, 'The remand strategy: Assessing outcomes' (2008) 19(3) *Current Issues in Criminal Justice* 334.
[56] David Brown, 'Looking behind the increase in custodial remand populations' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 80, 85.
[57] Anthea Hucklesby and Rick Sarre, 'Bail in Australia, the United Kingdom and Canada: Introduction' (2009) 21(1) *Current Issues in Criminal Justice* 1, 1.
[58] David Brown and Julia Quilter, 'Speaking too soon: The sabotage of bail reform in New South Wales' (2014) 3(3) *International Journal for Crime, Justice and Social Democracy* 73, 87. See also Arie Freiberg and Neil Morgan, 'Between bail and sentence: The conflation of dispositional options' (2004) 15(3) *Current Issues in Criminal Justice* 220.
[59] *Bail Act 1977* (Vic) s 4(2)(d)(i).

- interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or any other person.

The court will also refuse bail if it is satisfied that it has not been practicable to obtain sufficient information in the available time for the purpose of deciding the question of risk.[60]

The first and fourth of the listed possible outcomes (failing to appear and obstructing the course of justice) relate to ensuring the integrity and credibility of the justice system, while the second and third relate to protecting the community.

In the context of the current review, and the incident that sparked its initiation, ensuring the credibility of the system has become a key issue. Media reports have suggested that the public has little confidence in the bail system and individual commentators have called for a major overhaul of bail to ensure that the community is protected.

The LIV is concerned, however, that legislating to ensure that bail is more difficult to secure is in essence conflating 'accusation, guilt and punishment'.[61] Bail should not be refused as a punitive measure; it must only be refused for the purposes of bail, when the court is satisfied that the risks set out in the *Bail Act 1977* (Vic) s 4(2)(d)(i) are present. In *Woods v DPP*, Bell J stated: 'without in any way doubting the importance of the other considerations, the primary purpose of bail is to ensure the attendance of the accused at his or her trial and the associated preliminary hearings'.[62]

The Court has further noted that:[63]

> *Of course, a refusal of bail will usually result in deprivation of liberty. But that must be for the purposes of bail and not for the purpose of punishment. Having regard to the presumption of innocence and the prosecutorial onus of proof, bail cannot be used for that or other impermissible purposes, such as pressuring an accused to cooperate with police, however strong the case for the prosecution may be'.*

The LIV agrees that no one should be *punished* by imprisonment before conviction; arguably, remanding an accused into custody on the basis of a strong State case is to prejudge the matter. Bail should only be refused if there is real and substantial reason to fear that the accused will not appear for trial, or would be likely to commit offences during the bail period.

The LIV agrees with the Victorian Law Reform Commission's (VLRC) observation that 'many people do not understand what purposes bail serves and tend to believe that some purposes are more important than others'.[64] On the one hand, bail is designed to ensure that the accused will attend court and will not interfere with the justice process or commit further offences. On the other, bail must ensure that the accused, who has yet to be found guilty of any offence and must be

---

[60] *Bail Act 1977* (Vic) s 4(2)(d)(iii).
[61] Arie Freiberg and Neil Morgan, 'Between bail and sentence: The conflation of dispositional options' (2004) 15(3) *Current Issues in Criminal Justice* 220.
[62] *Woods v DPP* [2014] VSC 1, [30].
[63] *Woods v DPP* [2014] VSC 1, [31].
[64] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), 29.

presumed innocent, is not deprived of liberty unnecessarily. Bail decision makers must balance these two objectives without giving greater weight to one than the other.

Including a statement of the purposes of bail would help decision makers in this difficult task. It would highlight the fact that bail serves multiple, often competing purposes, and that the rights of the accused must be balanced against the need to protect the community.

In order to clarify and enunciate the purposes of the Bail Act itself, the LIV supports and reiterates the VLRC's recommendation that the *Bail Act 1977* (Vic) should contain a clear statement of purposes.[65] The VLRC's position was based on research recommending that bail legislation should be clarified by including 'a statement of principles, objectives and criteria guiding decision making'.[66]

Further, the LIV acknowledges the need to simplify the language of the Act to make it more accessible to its audiences—especially to lay decision makers[67]—but would also assist in enhancing community confidence in the bail system itself.

The LIV thus recommends the following with regards to the principles and purposes of bail:

1. **That the Government requests that the Victorian Law Reform Commission undertakes a further review of the *Bail Act 1977* (Vic) in order to clarify the Act and move towards plain English bail legislation that is accessible both to people working with the Act and to the broader community.**
2. **That a new Section 1 be inserted into the *Bail Act 1977* (Vic) with a Statement of Purpose of the Act. The Statement of Purpose should be as follows:**

   > **The purpose of the *Bail Act 1977* (Vic) is to provide a mechanism to guide decision makers when balancing the rights of an accused under the *Charter of Human Rights and Responsibilities* with the safety of the community.**

3. **That a new Section 2 be inserted into the *Bail Act 1977* (Vic) with a Statement of Principles of the Act. The Statement of Principles should be as follows:**

   > **It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed in accordance with these principles—**
   >
   > **(a) That all people are presumed to be innocent until proven guilty.**
   >
   > **(b) That any limitation on a person's rights under the *Charter of Human Rights and Responsibilities* must be justified.**

---

[65] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), Recommendation 9, 30.
[66] Sue King, David Bamford and Rick Sarre, *Factors that influence remand in custody: Final report* (November 2005), 108.
[67] As recommended by the VLRC: Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), Recommendation 2, 26.

(c) That the purposes of bail are:

(i) to ensure the attendance of the accused at his or her trial and the associated preliminary hearings; and

(ii) to ensure the safety of the community.

RISK ASSESSMENT

Three tests of risk

As it currently stands, the *Bail Act 1977* (Vic) has a three-tiered system, with three separate tests of risk that underlie the bail decision-making process.

The overarching test is the unacceptable risk test, with the onus on the prosecution that the accused presents an unacceptable risk of failing to appear, offending while on bail, endangering the public or interfering with the course of justice.[68]

For those offences that attract reverse onus provisions, either show cause considerations or exceptional circumstances are required for the accused to secure release from custody.

In practice, the difference between show cause and unacceptable risk is minimal. LIV practitioners note that the arguments that they make in order to show cause are the same as they make for identifying risk. That is, they show cause why clients should not be detained by proving that they do not pose an unacceptable risk. The two tests are therefore indistinguishable in practice. Indeed, the court has acknowledged that 'the two enquiries can overlap, in the sense that the unacceptable risk factors have to be weighed, when considering whether the applicant for bail has shown cause'.[69]

The question of whether unacceptable risk and show cause should form a two-step or one-step decision-making process remains unresolved. On the one hand, the process has been described as involving two separate and distinct stages, such that showing cause does not preclude a finding of unacceptable risk.[70] On the other, it has been reasoned that 'there is no second step': the issue of unacceptable risk 'must be at the heart of any consideration of whether a person's pre-trial detention is justified', such that the two tests simply 'ask the same question in a different way'.[71] In

---

[68] *Bail Act 1977* (Vic) s4(2)(d)(i).
[69] *DPP v Harika* [2001] VSC 237, [46] per Gillard J.
[70] See, for example, *DPP v Harika* [2001] VSC 237; *Woods v DPP* [2014] VSC 1. One of the criticisms of the one-step approach is that, regarding unacceptable risk, it 'effectively transfers the onus of proof from the prosecution…to the applicant'. See further, *Woods v DPP* [2014] VSC 1, [56]. Putting the issue of risk as the only concern for bail means that risk would take priority over other considerations such as delay, mental health issues, or other relevant factors.
[71] *Re Fred Joseph Asmar* [2005] VSC 487, [11], [12]. A recent review of the Bail Act 2013 (NSW) noted that most Victorian decisions seem to have adopted the approach in *Asmar*: John Hatzistergos, *Review of the Bail Act 2013* (June 2015), 28.

the first consideration of the issue by the Court of Appeal, the Court noted that 'the debate over the interpretation of s 4(4) will rarely be of practical significance, as the application of either approach will produce the same outcome'.[72] And as the VLRC noted, 'compartmentalising a bail decision so there is a two-step process with individual factors being considered and addressed at different stages is illogical'.[73]

In contrast to the show cause provision, there is 'a clear line of authority in this Court that the other reverse onus provision in the Act—which requires the applicant to establish 'exceptional circumstances'—is to be approached on a two-step basis'.[74] That is, 'when dealing with the conflicting issues of exceptional circumstances and unacceptable risk, a two-stage inquiry was appropriate'.[75]

Clearly, the lack of clarity associated with the multiple tests with different onus thresholds has created substantial debate even among the most learned decision makers. It is highly unlikely that the general public, and particularly accused people who represent themselves at bail hearings, would be able to make sense of these provisions.

The LIV believes that the ideal approach would be to simplify the bail decision by adopting a single test of whether the accused presents an unacceptable risk, with the onus on the prosecution to prove unacceptable risk. The show cause and exceptional circumstances tests would be abolished under this approach.

This is consistent with Recommendations 12 and 13 of the Victorian Law Reform Commission's review, which was supported by 'a majority of submissions' received.[76] This approach has also been supported by the Court: 'we would endorse the view of the Victorian Law Reform Commission that the administration of bail law in Victoria would be greatly enhanced, without weakening its stringency, if the reverse onus provisions were replaced by a single test for bail based on unacceptable risk'.[77]

However, the LIV appreciates the need for public confidence in the bail system and the value that may be placed on having reverse onus provisions for certain serious offences. If the adoption of a single test is not recommended by this Review, an alternative approach would be to simplify or refine the reverse onus provisions themselves.

Standard onus versus reverse onus unacceptable risk

If a single test of unacceptable risk is not acceptable to the Review, the LIV offers an alternative that will enhance the simplicity, clarity and accessibility of the *Bail Act 1977* (Vic), while at the same time improving the ability of the Act to achieve its stated purposes.

---

[72] *Robinson v The Queen* [2015] VSCA 161, [25].
[73] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), 37.
[74] *Robinson v The Queen* [2015] VSCA 161, [44].
[75] *Robinson v The Queen* [2015] VSCA 161, [45].
[76] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), Recommendation 12, 52; Recommendation 13, 54.
[77] *Robinson v The Queen* [2015] VSCA 161, [31]. The Court called the VLRC's reasoning on this issue 'compelling': *Robinson v The Queen* [2015] VSCA 161, [47].

The LIV recommends that **the unacceptable risk test should remain unchanged for most offences**, comprising what the LIV calls the '*standard onus*' test. The majority of bail applications should fall under this threshold, with the prosecution bearing the onus of proving that the accused represents an unacceptable risk of failing to appear, offending while on bail, endangering the public or interfering with the course of justice.[78]

The current reverse onus show cause provision attracts a large amount of criticism, arguably being almost unfathomable to the many unrepresented bail applicants. As discussed above, the difference between unacceptable risk and show cause is minimal. The LIV is also concerned by the lower level offences that have this test imposed, including breaches of bail conditions. In order to address these issues, **the LIV recommends that show cause be abolished and serious offences instead fall under a reverse onus unacceptable risk test.**

Under the proposed *reverse onus unacceptable risk* provision, the *accused* would need to prove why there is *not* an unacceptable risk associated with release. In practice, this would be essentially identical to the operation of the current show cause provision, but the meaning and intent behind the reverse onus test would be far more clear to victims, the accused and the community more broadly. This would not only help protect the integrity of the justice system, but would facilitate enhanced public confidence in the bail system.

Apart from the standard onus and reverse onus unacceptable risk test, the exceptional circumstances test would remain unchanged, with the accused still needing to demonstrate that there are exceptional circumstances why detention is unjustified. The current two-step process would remain, with the accused first having to prove exceptional circumstances and then the prosecution bearing the onus to establish unacceptable risk.

The LIV acknowledges the need of the community to treat bail applications for serious crimes differently from other applications. **The LIV therefore recommends that the exceptional circumstances test, which has a higher threshold, remains for murder, treason and terrorist offences, and Commonwealth drug offences.**

Reverse onus unacceptable risk offences and exceptional circumstances offences

A common criticism of the current reverse onus provisions is the ad hoc nature of the offences captured. Most serious violent offences—including attempted murder, rape and serious assault—are not included in either the show cause or exceptional circumstances provisions. If the aim of these reverse onus tests is to impose higher thresholds for bail for the most serious offences, it is difficult to understand (let alone to explain to victims and accused) why some serious offences and not others are included.[79]

Other anomalies may be found with the offences included in the 'exceptional circumstances' test, which is designed as the most onerous test, reserved for only the most serious offences. For example, the inclusion of the offence of 'trafficking a commercial quantity of drugs' in this category

[78] *Bail Act 1977* (Vic) s4(2)(d)(i).
[79] Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (November 2005), xix.

has led to many cannabis 'crop sitters' finding themselves captures by the exceptional circumstances test. These accused are often vulnerable people from non-English speaking backgrounds who have limited or no criminal history; they are typically not the type of offenders who pose a significant risk of serious harm to the community.

The LIV believes that there needs to be greater coherence and clarity in the offences to which the different tests apply. To achieve this, **the LIV recommends that all offences to which the reverse onus unacceptable risk test and the exceptional circumstances test apply should be clearly and simply listed in separate Schedules, rather than being incorporated within the body of the section itself.**

Determining risk

The bail decision is an exercise in risk assessment, and as with all exercises, the process begins by identifying the risks and then rating each risk by reference to its likelihood of happening and the consequences if it does happen. If a risk is rated as unacceptable, the next step is to consider the availability of any 'risk treatment'—a measure that can ameliorate the risk, thereby reducing it to an acceptable level.

Given the principles and purposes of bail, the risk assessment begins with the assumption that the accused is entitled to be released on bail. It is then the task of the Court to assess each of the possible risks associated with release on bail:

- that the accused will fail to appear;[80]
- that the accused will reoffend;
- that the safety or welfare of members of the public will be endangered; or
- that the accused will interfere with witnesses or otherwise obstruct the course of justice.

Each risk is then considered and, if deemed unacceptable, an assessment is made as whether bail conditions might successfully ameliorate the risk.

These decisions are all matters of judgment that are applied to the particular circumstances of each individual case. However, the approach used can be made more consistent by providing a clearer (non-exhaustive) list of factors that should be considered when making bail decisions.

Factors to consider

In assessing whether there is an unacceptable risk, the decision maker must look at all relevant considerations, including:[81]

---

[80] The research evidence shows that failure to appear rates are typically low. Research from NSW found that the accused failed to appear in 14.6% of cases finalised in the local courts in 2000 and in 5.3% of cases finalised in the higher courts in the same year. Failure to appear was more likely among accused who had prior convictions (17.4% failed to appear) than among those without (4.0% failed to appear) and among those with more concurrent offences. See further Marilyn Chilvers, Jacqui Allen and Peter Doak 'Absconding on bail' 68 *Crime and Justice Bulletin* (2002).

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

The LIV supports the VLRC's recommendation of adding a number of factors to the list of prescribed considerations.[82] In particular, **the LIV recommends that the following factors be added to the *Bail Act 1977* (Vic) s 4(3):**

- **the period the accused has already spent in custody and the period he or she is likely to spend in custody if bail is refused;**
- **the risk of harm—physical, psychological or otherwise—to the accused while on remand, including self-harm or harm by another; and**
- **the responsibilities of the accused, including primary carer responsibilities.**

In addition to these considerations, the LIV believes that there are other factors that would usefully be included as a way of giving express and explicit voice to factors that are, arguably, implicit within the Act.

Given the direct relevance of the Charter to the operation of the bail system, **the LIV recommends that the right to liberty under the *Charter of Human Rights and Responsibilities*[83] be added to the list of factors to be weighed when assessing risk, and that any deprivation of liberty be in accordance with the *Charter of Human Rights and Responsibilities*.[84]**

The *Bail Act 2013* (NSW) provides an extensive list of matters to be considered as a part of an assessment of bail. While many of the Victorian considerations mirror those in NSW, the latter also includes a number of matters relating to the criminal justice process. In particular, the Act requires the following to be considered:

- the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence;[85]
- the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice;[86] and
- the need for the accused person to be free to any other lawful reason.[87]

---

[81] *Bail Act 1977* (Vic) s 4(3).
[82] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), Recommendation 13, 54.
[83] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(3).
[84] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
[85] *Bail Act 2013* (NSW) s 18(1)(i).
[86] *Bail Act 2013* (NSW) s 18(1)(l).

These considerations speak to issues of fairness of the criminal justice system, which, in turn, are important to ensure community confidence in, and the integrity of, the system itself. **The LIV thus recommends that these considerations be added to the *Bail Act 1977* (Vic) s 4(3).**

Finally, in recognition that no list can specify comprehensively every relevant factor to consider when assessing risk, **the LIV recommends that a more general expression concludes s 4(3) of the act: '…when it is in the interests of justice to do so'.**

The LIV believes that a non-exhaustive list such as this helps to highlight some of the important factors to be considered when deciding whether to deprive an accused person of liberty.

Risk and vulnerable populations

Marginalised people are over-represented in the criminal justice system, and the LIV believes that the bail system should not compound their disadvantage.

The *Bail Act 1977* (Vic) recognises that the provisions relating to bail may be more onerous for some vulnerable populations. To take account of these vulnerabilities, the act makes explicit that certain characteristics of the accused be taken into account, and provides special provisions for children and for Aboriginal accused. However, there are other cohorts that may benefit from explicit recognition within the Act.

This approach is not uncommon. For example, the *Bail Act 2013* (NSW) is explicit about recognising the need for special consideration of certain vulnerable groups, and includes a requirement to consider 'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'.[88] **The LIV recommends that, as in the *Bail Act 2013* (NSW),[89] the following consideration be added to the *Bail Act 1977* (Vic) s 4(3): 'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'.**

In addition, the LIV notes the value of providing quality information to decision makers on the nature and consequences of vulnerability for people in the criminal justice system. While such information is already available for some vulnerable populations,[90] **the LIV recommends that information should be provided to police, bail justices and magistrates about the challenges facing people from different vulnerable cohorts. This information should be developed by the Judicial College of Victoria, in conjunction with the Victorian Equal Opportunity and Human Rights Commission, in the form of a Bail Bench Book available via the Judicial College of Victoria.**

---

[87] *Bail Act 2013* (NSW) s 18(1)(m).
[88] *Bail Act 2013* (NSW) s 18(1)(k).
[89] *Bail Act 2013* (NSW) s 18(1)(k).
[90] For example, the *Disability Access Bench Book*, developed by the Judicial College of Victoria in partnership with the Victorian Equal Opportunity and Human Rights Commission, provides information and guidance for judicial officers on their role in making the Victorian court system accessible for people with disabilities. See further, http://www.judicialcollege.vic.edu.au/disability-access-bench-book.

Children

Victoria's criminal justice system has long recognised that children should not face the same criminal justice approach as adults. For example, s 345 of the *Children, Youth and Families Act 2005* (Vic) stipulates that there is a presumption in favour of police proceeding by summons (rather than arrest) if the accused is a child. If a child is taken into custody, action must be taken within 24 hours.[91] This more protective approach is reflected in the *Bail Act 1977* (Vic) as well.

After a 2013 amendment that made it an offence for both adults and children to contravene certain conduct conditions of bail and to commit an indictable offence whilst on bail, the Children's Court 2014-15 Annual Report noted that 'the number of alleged young offenders being admitted to remand increased alarmingly'.[92] Youth justice advocates also expressed concerns about the increasing number of children being held on remand after it was found that children as young as 10 were being detained for trivial breaches of bail conditions such as being half an hour late for a curfew and, as a result, approximately 25% of young people on remand were being detained for bail breaches.[93] The offence of contravening conduct conditions was subsequently repealed for children, taking effect on 2 May 2016.

The Court has acknowledged the significant harm that can result from detaining children on remand and has found that 'detaining children on remand is to be avoided where possible because, when in detention on remand, they are especially vulnerable to long-term physical and emotional harm and negative formative influence'.[94] The issue of proportionality is particularly relevant for children: 'the detention of young people on remand can have deleterious consequences for them and the community which are out of all proportion to the purpose of ensuring appearance at trial and protecting the community'.[95]

Remand is especially problematic for children due to the impact of trauma and cumulative harm that many youth in custody have experienced. Data from the Youth Parole Board show that, in 2015-16, 63% of youth in custody had been victims of abuse, trauma or neglect and 45% had previously been involved with child protection.[96]

The LIV acknowledges the value of having separate provisions that highlight the particular vulnerability of children in the criminal justice system,[97] **and thus recommends that s 3B of the *Bail Act 1977* (Vic) be retained.**

---

[91] *Children, Youth and Families Act 2005* (Vic) s 346.
[92] Children's Court of Victoria, *Annual Report 2014–2015* (2015) 3.
[93] Law Institute of Victoria, 'Changes to child bail laws in question' (1 June 2016) *Law Institute Journal*.
[94] *DPP v SE* [2017] VSC 13, [29].
[95] *Wood v DPP* (2014) 238 A Crim R 84 (Bell J); cited in *DPP v SE* [2017] VSC 13, [29].
[96] Youth Parole Board, *Youth Parole Board Annual Report 2015-16* (August 2016), 18.
[97] For more detail on the LIV approach to children in the criminal justice system, see Law Institute of Victoria, *Submission to the Legal and Social Issues Committee Inquiry into Youth Justice Centres in Victoria* (3 March 2017).

Aboriginal and Torres Strait Islander men and women

Section 3A of the *Bail Act 1977* (Vic) stipulates that the court must take into account any issues arising due to the person's Aboriginality, including cultural background and ties to family or place,[98] and any other 'relevant cultural issue or obligation'.[99] The court still retains discretion as to the weight to be given to these issues.

In making this change to the *Bail Act 1977* (Vic), the Victorian Parliament was responding to the fact that Aboriginal and Torres Strait Islander offenders are 'over-represented on remand and face unique disadvantages in their contact with the criminal justice system'.[100]

This section, however, is reportedly under-utilised, especially for Aboriginal and Torres Strait Islander women, representing 'a lost opportunity to reduce the number of Koori women entering prison on remand, especially when less than 15 per cent of these women end up receiving a custodial sentence'.[101]

The remand situation for Aboriginal and Torres Strait Islander women is even more dire than for Aboriginal and Torres Strait Islander men. In many situations, these women are denied bail because of a chronic lack of safe, stable and secure accommodation to which they can be bailed, particularly in regional locations.[102]

Finding suitable accommodation is especially difficult for those with substance dependencies. Research has shown that both Aboriginal and non-Aboriginal women are being placed in custody for therapeutic reasons, designed to stabilise their addictions and remove them from unsafe environments that may include family violence.[103] This practice, however, risks criminalising these women further due to their unmet needs for supports outside of the criminal justice system, including mental health, drug and alcohol and accommodation services.[104] It has been argued that 'when remand is seen as the best or indeed only option for criminalised women, this suggest that initiatives and investments in the community to address inequality and injustice are urgently needed'.[105]

Instead, the Victorian Equal Opportunity and Human Rights Commission identified that residential facilities for Aboriginal and Torres Strait Islander women with appropriate supervision, wrap-around services, mentoring programs and access to their children are critical to successful completion of bail conditions.[106]

---

[98] *Bail Act 1977* (Vic) s 3A(a).
[99] *Bail Act 1977* (Vic) s 3A(b).
[100] Explanatory Memorandum, Bail Amendment Bill 2010 (Vic) Clause 5.
[101] Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 5.
[102] Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 50.
[103] Emma Russell and Cara Gledhill 'A prison is not a home: Troubling 'therapeutic remand' for criminalised women' (2014) 27(9) *Parity*, 27.
[104] Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 51.
[105] Emma Russell and Cara Gledhill 'A prison is not a home: Troubling 'therapeutic remand' for criminalised women' (2014) 27(9) *Parity*, 28.
[106] Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 52.

The LIV acknowledges the value of having separate provisions that highlight the particular vulnerability of Aboriginal and Torres Strait Islander people in the criminal justice system, and thus **recommends that s 3A of the *Bail Act 1977* (Vic) be retained.**

The LIV also supports the recommendation made by the Victorian Equal Opportunity and Human Rights Commission to reinforce the right to equality and cultural rights for Aboriginal and Torres Strait Islanders.[107] **The LIV therefore recommends that that further guidance and associated training be developed for Victoria Police, court registrars, magistrates and bail justices on the implementation of this section; and that such training be developed in partnership with the Victorian Equal Opportunity and Human Rights Commission and specifically address the intersection of the *Bail Act 1977* (Vic) and the *Charter of Human Rights and Responsibilities Act*.**

The LIV also recognises that support for Aboriginal and Torres Strait Islander accused needs to address more practical issues as well. Consistent with recommendations made by the Victorian Equal Opportunity and Human Rights Commission,[108] **the LIV recommends expanding culturally and gender appropriate housing so that it may support a greater number of individuals, as well expanding the availability of transitional housing provided by Corrections Victoria under its Better Pathways strategy.**

People with a disability

People with a complex cognitive impairment, including acquired brain injury, intellectual disability or mental illness, have a much higher rate of early contact with the justice system than those without such a disability. Rates of these disabilities are high among Aboriginal and Torres Strait Islander men and women, contributing to their over-representation in prisons.[109]

Accused people who have a cognitive impairment or who are experiencing mental ill-health may find the bail application process difficult, including such issues as dealing with the police interview and accessing bail support services. According to submissions to the VLRC's 2005 Consultation Paper, people with these vulnerabilities are thought to end up on remand simply due to a lack of appropriate alternative:[110]

According to recent research, people with an intellectual disability can have difficulty understanding terms in the legal process such as 'offence', 'legal practitioner', 'statement' and 'bail'. There may also be a general lack of understanding about legal rights, an inability to concentrate in a police interview, and a susceptibility to suggestive questions because of a desire to please authority figures. In such circumstances, people with intellectual disabilities may misunderstand what they are being asked and give false information or even make false confessions.

---

[107] Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 9.
[108] Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 10.
[109] Koori women in prison suffer particularly from high prevalence of mental illness, with research showing that 92% of Koori women prisoners have at some point received a diagnosis of mental illness. See further, Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 33.
[110] Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (November 2005), 149.

The above difficulties may be complicated by some police officers' lack of understanding of intellectual disability. Police may, for example, confuse the person's disability with substance abuse or be unable to distinguish between intellectual disability and mental illness.

These problems may prevent a person being dealt with fairly. For instance, there may be a tendency to refuse bail if the decision maker thinks that the person does not understand the conditions of bail.

The disadvantage faced by people with multiple vulnerabilities was recently highlighted in *DPP v SE*, in which an Aboriginal child with an intellectual disability was appealing a decision against bail. In the decision, Bell J noted:[111]

The disadvantage and vulnerability suffered by persons who experience discrimination on multiple grounds, or who experience discrimination upon multiple grounds which intersect, are commonly different and greater in nature than is the case with discrimination upon a single ground. In adopting procedures and making determinations under the Bail Act that take account of SE's age, Aboriginality and intellectual disability, I have therefore borne in mind that the different forms of SE's discriminatory disadvantage and vulnerability likely cumulate and interact, making accommodation even more necessary.

Data from the Youth Parole Board show that, in 2015-16, 24% of young people in custody presented with 'issues concerning their intellectual functioning', while 30% presented with a mental health issue and 18% had a history of self-harm or suicidal ideation.[112]

The LIV recognises the difficulties faced by people with a disability who are facing a bail decision and argues that people who are unable to give an undertaking that they will comply with bail conditions should not be dealt with through the bail system. The LIV draws attention to the provision in the *Bail Act 1980* (QLD) that applies when the person does not (or appears not to) understand the nature and effect of entering an undertaking. If the accused would normally be released if he or she *did* understand the meaning of an undertaking, then the police or the Court may go ahead and release the accused into the custody of another person who ordinarily has the care of the accused or with whom the accused resides.[113]

The LIV believes that this approach makes explicit that accused who have a cognitive impairment or those who are experiencing mental ill-health are often not able to give an undertaking in a genuinely meaningful fashion. In the absence of a proper understanding of the nature and effects of entering an undertaking, people with these vulnerabilities are highly likely to fail to complete their

---

111 *DPP v SE* [2017] VSC 13, [28].

112 Youth Parole Board, *Youth Parole Board Annual Report 2015-16* (August 2016), 15.

113 *Bail Act 1980* (QLD) ss 11A(1), 11A(2). Section 11A(1), **Release of a person with an impairment of the mind**, states: (1) This section applies if a police officer or court authorised by this Act or the *Youth Justice Act 1992* to grant bail considers—(a) a person held in custody on a charge of or in connection with an offence is, or appears to be, a person with an impairment of the mind; and (b) the person does not, or appears not to, understand the nature and effect of entering into an undertaking under section 20; and (c) if the person understood the nature and effect of entering into the undertaking, the person would be released on bail. Section 11A(2) continues: The police officer or court may release the person without bail by—(a) releasing the person into the care of another person who ordinarily has the care of the person or with whom the person resides; or (b) permitting the person to go at large.

bail. In order to avoid the situation where accused people in this cohort are simply 'set up to fail', **the LIV recommends that a provision similar to the Queensland provision[114] be adopted in Victoria for people with a cognitive impairment or people experiencing mental ill-health, with the specific inclusion of bail justices in addition to police and the Court.**

People experiencing homelessness

Arguably, current 'tough on crime' political rhetoric has intensified the criminalisation of homelessness and poverty. Remand and bail practices facilitate the entrapment of people experiencing homelessness within the criminal justice system, as lack of stable accommodation is likely to affect the accused's ability to secure release.[115]

The VLRC reported that there is a shortage of accommodation available for homeless accused, particularly in regional and rural areas. More specifically, appropriate accommodation is unavailable for women, the mentally ill, Aboriginal and Torres Strait Islander people, and people with cognitive impairment. According to the people consulted as part of that review, the lack of accommodation is closely linked to the increase in the number of people on remand.

Although homelessness is not of itself a reason to refuse bail,[116] the availability of stable accommodation is a matter to be taken into account. The court may seek assurance that a person has stable accommodation as part of its assessment of unacceptable risk. Stable accommodation can also contribute to an accused having shown cause.[117]

The LIV believes that, without an acknowledgement of homelessness as one component of a broader and more complex matrix of need, the ongoing issue of increased bail refusal for homeless defendants is likely to continue. To this end, **the LIV recommends that there should be a funding increase for residential beds in rehabilitation facilities for bailees who are drug and/or alcohol dependent.**

The importance of acknowledging the specific difficulties faced by homeless children in particular is reflected in the fact that the *Bail Act 1977* (Vic) stipulates that bail must not be refused for a child solely due to lack of adequate accommodation.[118] Nonetheless, there is 'an extreme shortage' of housing available for young adults on bail or exiting custodial remand.[119]

---

[114] *Bail Act 1980* (QLD) ss 11A(1), 11A(2).
[115] See, for example, the discussion of bail practices in NSW in Boyle, K '"The more things change…": Bail and the incarceration of homeless young people' (2009) 21(1) *Current Issues in Criminal Justice* 59. For a discussion of Victorian bail practices, see Matthew Ericson and Tony Vinson, *Young people on remand in Victoria. Balancing individual and community interests* (2010). See also the discussion of homelessness and bail in Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (November 2005).
[116] While homelessness may not be a direct reason for refusing bail, research has shown that people experiencing homelessness are significantly more likely to have been treated for a mental health issue, to have self-harmed, to be on a disability support pension and to have been previously incarcerated. With its associated complexities, homelessness is therefore often seen as a risk factor for failing to appear in court. While homelessness has not been found to be directly correlated with bail refusal in and of itself, it is the constellation of factors that exist alongside homelessness – the mental impairment, intellectual disability and substance abuse – that appear to increase the likelihood of remand. See further, Susan Ayres, Kyleigh Heggie and Abilio de Almeida Neto, 'Bail refusal and homelessness affecting remandees in NSW' (2010) 4 *Research Digest*.
[117] Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (November 2005), 148.
[118] *Bail Act 1977* (Vic) s 3B(3).
[119] Matthew Ericson and Tony Vinson, *Young people on remand in Victoria. Balancing individual and community interests* (2010), 68.

The LIV believes that the specific problems faced by children experiencing homelessness requires a separate and focused response. **The LIV therefore recommends increasing the stock of available housing specifically for young people, providing resources for appropriate (and appropriately qualified) staffing and locating housing in places that facilitate access to support services.**

Bail practices also reflect and indeed compound structural discrimination against people experiencing homelessness. Justice Connect Homeless Law has provided the LIV with the example of systemic inappropriate use of bail for people charged with the offence of begging alms under section 49A of the *Summary Offences Act 1966* (Vic). This charge is identified only by way of example; this issue applies equally to other minor public space offences under the *Summary Offences Act* where the accused has no fixed address.

During periods of intensive enforcement of 'aggressive' begging offences,[120] Victoria Police charge people under s 49A and bail them to appear in the Magistrates' Court. Those deemed suitable are recommended for the Criminal Justice Diversion Program (CJDP) and are bailed to appear in the specialist Begging List. The stated purpose of this approach – dubbed 'Operation Minta' – is to promote service engagement, so CJDP recommendations are made more liberally than under the usual policy.[121]

As many people who are begging do not have stable accommodation and therefore do not have an address to which mail may be sent, police are unable to serve an on-the-spot summons. Instead, the practice of Victoria Police is to use the bail mechanism for this cohort. Were they not experiencing homelessness, these people may otherwise receive a summons.

The consequences of this approach for this cohort can be dire, as failure to appear rates can be high. Following failure to appear, matters are adjourned into the mainstream court list; failure to appear again results in a warrant being issued for the accused's arrest. As a result, this highly vulnerable cohort then faces possible consequences under section 30 of the *Bail Act 1977* (Vic), which, if charged, places them in a show cause position when apprehended.

Given that the stated purpose of such operations that target homelessness and begging is to connect people with support services, the use of bail – and its unintended consequences if the person fails to appear – is both incongruous and inappropriate.

The LIV believes that bail is not an appropriate mechanism for connecting people experiencing homelessness to support services. Instead, **the LIV recommends that**, **for begging alms and**

---

[120] Data from the Crime Statistics Agency reveal that more than 800 charges of begging alms were issued in Victoria from 2011 to 2015.

[121] Operation Minta is a coordinated enforcement-based response to begging by the City of Melbourne, Victoria Police and the Salvation Army, with some involvement from other agencies including the Melbourne Magistrates' Court and Homeless Law. The Operation Minta approach, during which each individual operation lasts for four to six weeks, has now run for five consecutive years, with the most recent round currently underway as of March 2016. During the 2016 round, as of 1 March, 26 people had been charged and recommended for the CJDP. Of these, eight appeared at court and were placed on a diversion plan. One other person attended, but chose not to pursue the CJDP option. The remaining 17 accused failed to appear at court and their matters were adjourned into the mainstream court list. Of those 17, 14 failed to appear and warrants were issued for their arrest. As a result, 14 of the 26 people who were originally charged as a way of connecting them with services and support have found themselves facing the possibility of being in a show cause position if charged under s 30 of the *Bail Act 1977* (Vic).

other such minor public space offences under the *Summary Offences Act 1966* (Vic), where the accused has no fixed address, accused are served with either a notice to appear or an on-the-spot summons.

Other low-level offenders

A presumption of summons or notice to the accused is not only relevant to people experiencing homelessness, but to low-level offenders more generally. The aim of this approach is to reserve the more formal bail system for those cases where the question of risk is more difficult.

In order to make clear and explicit the offences to which a presumption of summons or notice to the accused should apply, **the LIV recommends that a Schedule be developed to list those offences that should be dealt with by way of summons or notice, including (but not necessarily limited to):**

- **offences that do not attract a term of imprisonment or where imprisonment does not exceed 12 months;**
- **offences of Beg Alms and other such minor public space offences under the *Summary Offences Act 1966* (Vic);**
- **one offence of Shoptheft where the amount does not exceed $100;**
- **an offence of assault where no physical contact is alleged;**
- **loitering where no other alleged offence is said to have been committed or alleged to be contemplated; and**
- **offensive behavior in public where not of a sexual context.**

Other offences may be deemed appropriate for inclusion in this category. The LIV suggests that consultation be undertaken to ascertain the most appropriate offences to be proceeded against in this way.

WHO SHOULD DETERMINE RISK?

Immediately following the Bourke Street incident, when it was revealed that the accused had been released on bail for unrelated offences just a few days prior, the entire bail justice system came under attack, with calls for its abandonment citing lack of community confidence and public demand for harsher responses to offending.[122] However, data shows that bail justices not only

[122] Despite regular assertions in the media that the public demands ever-harsher responses to offending, there is a vast body of research that shows that, regarding sentencing at least, people who are well-informed about a case offer far more nuanced judgments and report sentencing preferences that are very similar to those actually imposed by the courts. See further, Karen Gelb, *Myths and misconceptions: Public opinion versus public judgment about sentencing* (July 2006); Kate Warner at al, 'Public judgment on sentencing: Final results from the Tasmanian Jury

decide a tiny proportion of all bail applications, but they are far more likely to remand an accused in custody than either police or magistrates.

Between 2000 and 2005, Victoria Police considered 93% of bail applications in Victoria, with the courts dealing with 5% of applications and bail justices dealing with 2% of applications.[123] Over the five-year period, police granted bail in an average of more than 24,000 applications each year; bail justices refused bail on average 81% of the time, while magistrates refused bail on average 24% of the time.[124] Bail decisions—including bail releases—are thus predominantly made by police.

While more recent data are not publicly available, the VLRC reported that about half of alleged offenders are proceeded against by way of summons and about half by being arrested and either bailed or remanded in custody.[125] In the absence of formal guidelines to assist police in deciding whether to proceed via arrest or summons, the VLRC recommended the development of guidelines to improve the transparency of these decisions.[126]

The LIV believes that there are many low-level offences for which proceeding by way of summons or notice to appear is more appropriate. These are minor offences that can be dealt with by way of an infringement. By decreasing the use of arrest, the potential negative consequences that may arise from being captured within the bail process may be minimised.[127] **To this end, the LIV recommends that police diversion programs be expanded to assist in connecting low-level offenders with support while at the same time keeping them away from the bail system.**

In association with this approach, the LIV recognises that some shifts may be needed in Victoria Police practices. To facilitate this, **the LIV recommends that information be provided to police to explain and encourage the use of summons or notices to appear for low-level offending.**

The LIV sees bail justices as an important feature of the criminal justice landscape, especially in times of increasing pressure on the Magistrates' Court in terms of the volume of cases with which it deals. **The LIV thus recommends that the system of bail justices in Victoria be retained.**

Sentencing Study' (February 2011) *Trends and Issues in Crime and Criminal Justice*; Kate Warner et al, 'Measuring jurors' views on sentencing: Results from the second Australian jury sentencing study' (July 2016) *Punishment and Society*.

[123] Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (November 2005), 8.

[124] Averages calculated from Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (November 2005), 8.

[125] Victorian Law Reform Commission, *Review of the Bail Act: Consultation Paper* (November 2005), 19.

[126] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), Recommendation 14, 56.

[127] This reasoning underlies the various police diversion programs that are used around Australia. In Victoria, for example, there are two such programs. The Cannabis Cautioning Program is for simple use/possession offences for adult offenders. The offender must only possess a small amount of cannabis and must admit to the offence and consent to be cautioned. A voluntary cannabis education program is available to accompany the caution. A person can only access the program twice. See further, Department of Health and Human Services, *Forensic services: Diversion programs* (2015) https://www2.health.vic.gov.au/alcohol-and-drugs/aod-treatment-services/forensic-aod-services. The Drug Diversion Program is for use/possession of illicit substances other than cannabis. Offenders may be offered a caution on the condition that they undertake a clinical drug assessment and attend at least one session of prescribed treatment. The offender must also admit to the offence and not have received more than one previous cautioning, and must be over the age of 10. See further, Department of Health and Human Services, *Forensic services: Diversion programs* (2015) https://www2.health.vic.gov.au/alcohol-and-drugs/aod-treatment-services/forensic-aod-services. Police drug diversion programs have been proven to be effective at reducing reoffending. In an examination of police interventions in each state and territory in Australia, the Australian Institute of Criminology found statistically significant reductions in offending in most jurisdictions, including Victoria. Even among offenders with a history of prior offending, most had either no reoffending or were apprehended for fewer offences post-intervention than before. See further, Jason Payne, Max Kwiatkowski and Joy Wundersitz, *Police drug diversion: A study of criminal offending Outcomes* (2008).

While the data show that bail justices are only responsible for a small proportion of all bail decisions, and that they are far more likely to remand an accused in custody than to release someone on bail, the LIV acknowledges that more work can always be undertaken to ensure that decision makers in the justice system are as well informed as possible. To ensure that bail justices are kept abreast of relevant legislative developments and that they are aware of the evidence about bail success and failure,[128] **the LIV recommends that bail justices are provided with additional training—such as the development of a Certificate IV Diploma in Bail—and support, and also that they have stronger lines of accountability.** As the provision of this kind of information requires appropriate evidence to be available, **the LIV also recommends improved availability of data and program evaluation information, to facilitate evidence-informed policy and practice.**

The current alternative to the bail justice system—the implementation of a Night Court for magistrates to hear after-hours bail applications—has so far proven to be problematic. According to LIV members, accused who are appearing at Night Court do not have access to legal representation as Victoria Legal Aid duty lawyers are not available after business hours. Police prosecutors are also not available to attend, such that police informants themselves are left to appear, taking them away from their frontline role in protecting the community. Anecdotal evidence revealed to LIV members is that police have been advised not to charge people as this results in police being taken off the streets to attend court.

Ideally, in place of a Night Court there would be a separate Remand Court and a separate court to hear applications that had previously been booked in with the court, and in which appropriate notice has been given to prosecution and informants.[129] This would cater for the large number of applications currently being made and the inability of the courts to accommodate such volume.

In the absence of this development, while Night Court is not an ideal solution to the problem of after-hours bail decision making, there are options for improving how it functions. The LIV believes that the time at which a person is apprehended should not affect the quality of the support provided. To ensure fairness of process and adequate provision of services regardless of the time of day, **the LIV recommends that funding be made available for court-based bail support services during the hours that the Night Court is sitting.**

The LIV is also concerned that the Night Court does not compromise fair processes for accused who happen to be arrested after business hours. To ensure that accused are not disadvantaged by the time of their processing, **the LIV recommends that, should Night Court remain in the long term, the following inclusions be made in the Bail Act:**

- **A person remanded during a session before a Night Court <u>must</u> be ordered to re-appear before a court during normal court hours on the following day, whether that be a weekday or weekend.**

[128] Relevant evidence might include, for example, data on failure rates and numbers in each court jurisdiction, research on the characteristics of people who do or do not complete bail successfully, and research on the characteristics and effectiveness of various bail support programs. In order to provide such evidence, better data collection, integration and dissemination practices would need to be implemented.
[129] These matters may predominantly be represented applications.

- **An application for bail before a magistrate in a Night Court setting is not considered to be a 'first application' for bail. Where an applicant is refused bail, this does not prevent the making of a further 'in-person' application for bail at the next appearance before a court on the following day.**
- **A remandee who makes an application for bail before a magistrate on the day after the refusal of bail before a Night Court is not required to demonstrate 'new facts and circumstances' where a further 'in-person' application for bail is sought to be made during normal court hours.**

THE VALUE OF SUPPORT SERVICES

Participation in a bail support service may be imposed as a condition of bail in order to ameliorate the risks of bail.[130] Conditions must only be used to achieve the purposes of bail, and not to punish people;[131] they must be no more onerous than necessary to achieve those purposes,[132] and thus it has been said that any conditions 'must pass a parsimony test'.[133]

Courts have recognised the 'increasing importance of such services in the management of alleged offenders on bail and the emphasis on their rehabilitation and support in the criminal justice system generally…Conditions of this kind, when properly imposed, serve that primary purpose of bail and also operate for the benefit of the accused and the protection of the community'.[134]

As part of its consultation process, the VLRC heard that the proportion of people in the criminal justice system presenting with problems such as drug addiction or mental illness had increased; these people were more likely to fail to appear due to chaotic lifestyles rather than an intention to abscond.[135] The value of support services in achieving the purposes of bail thus cannot be overstated, especially when considering the need to support accused people to meet reverse onus test thresholds.

Considering the availability of support

Research on the effectiveness of intervention programs generally has shown that programs that offer support and treatment, rather than supervision or monitoring only, are able to reduce reoffending significantly.[136] While the body of research on 'what works' has focused more on community corrections than on bail, the interventions that are typically offered as conditions on

---

[130] *Bail Act 1977* (Vic) s 5(3).
[131] *Woods v DPP* [2014] VSC 1, [76].
[132] *Bail Act 1977* (Vic) s 5(4).
[133] *Woods v DPP* [2014] VSC 1, [76].
[134] *Woods v DPP* [2014] VSC 1, [69].
[135] Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (August 2007), 46.
[136] See, for example: Steve Aos, Marna Miller and Elizabeth Drake, *Evidence-based adult corrections programs: What works and what does not.* (January 2006).

community orders are arguably very similar to those that are commonly attached to bail, such as participation in substance abuse treatment or regular reporting/supervision.

The value of support services for people on bail is two-fold:

- for the individual, to facilitate successful completion of the bail order; and
- for the community, to enhance public safety by ameliorating the risk of reoffending.

In the absence of adequate support structures, the likelihood of the accused being able to comply successfully with bail conditions is reduced. Research has shown that people who are refused bail are more likely than other prisoners to be homeless, unemployed or suffer from some form of mental illness.[137] In Australia, research from NSW found that the lack of suitable and stable housing may contribute to refusal of bail or an inability to meet bail conditions.[138] A strong network of support services is therefore critical to a successful system of bail.

Best practice principles have been identified for bail support programs, including the need for programs to be voluntary, supportive, holistic, coordinated and adaptable to local conditions.[139] Many of these features are seen in the current Victorian bail support programs.

Current Victorian bail support programs: adults

Victoria offers a number of support services for people on bail, including programs for adults and youth and a service for accused on remand who may be able to secure release on bail.

Court Integrated Services Program[140]

The Court Integrated Services Program (CISP) provides people with access to services and support to reduce the risk of reoffending. It provides a coordinated, team-based approach to assessment and treatment, linking people with services such as drug and alcohol treatment, crisis accommodation, disability services and mental health support. In this way, it provides a holistic, wrap-around approach to addressing offenders' multiple and complex needs, matching the level of intervention with each person's specific needs. The program is currently only available in the Magistrates' Court.

---

[137] Morgan and Henderson 1998; cited in Sue King, David Bamford and Rick Sarre, 'Discretionary decision-making in a dynamic context: The influence on remand decision-makers in two Australian jurisdictions' (2009) 21(1) *Current Issues in Criminal Justice* 24, 31.

[138] The researchers did not suggest a direct correlation between homelessness and bail refusal. Rather, homelessness was seen to co-exist with a variety of other deficits, including mental impairment, intellectual disability and substance abuse, all of which may have an impact on people's ability to live independently and comply with bail conditions: Susan Ayres, Kyleigh Heggie and Abilio de Almeida Neto, 'Bail refusal and homelessness affecting remandees in NSW' (2010) 4 *Research Digest*, vii.

[139] Gabrielle Denning-Cotter, 'Bail support in Australia' (April 2008) 2 *Research Brief*, 6.

[140] Magistrates' Court of Victoria, *Court Integrated Services Program (CISP)* (3 May 2016) http://www.magistratescourt.vic.gov.au/court-support-services/court-integrated-services-program-cisp. The CISP currently operates at Melbourne and Sunshine, where there are substantial CISP teams. Smaller teams also operate at Latrobe Valley and Dandenong courts. Eight further courts have one or two CISP case managers each. The maximum capacity of the program is currently 640 participants. While CISP and the CREDIT/Bail Support program (discussed below) were originally two separate programs (and remain notionally separate), in practice the past several years have seen an alignment of the two programs so that there are now minimal differences between them. The two programs have also been placed under a common management structure. Given the alignment of both practices and management, the integration has effectively meant that the CREDIT program has been 'rebadged' as CISP. Personal communication from the Magistrates' Court, 8 March 2017.

CISP is available to accused who have been brought before the court on summons or bail, regardless of whether a plea has been entered or if the person intends to plead not guilty. Referral to the program may be made by the police, magistrate, legal representative, support services, family members or through self-referrals. To be eligible, the accused must present with physical or mental disability or illness, drug or alcohol dependency, or inadequate social, family and economic support that contributes to their offending.

The CISP provides a multi-disciplinary team-based approach to assessment and referral, with the level of support based on the assessed needs of the individual. Medium- and high-risk participants receive case management for up to four months, during which time a case management plan is developed with each person that details referrals and linkages into treatment and support. A case manager is assigned to review progress on the program, and the court may also decide to monitor progress. In this case, CISP staff report back to the court throughout the program.

While there are specific services for Aboriginal and Torres Strait Islander clients,[141] the involvement of Aboriginal women in particular has been very low.[142] Obstacles to involvement include geographical inequalities, lengthy waiting lists for external services, a lack of cultural and gender focus and a lack of anonymity, leading to fear of identification by other community members.[143]

An evaluation of the effectiveness of CISP found that the program had successfully matched the intensity of intervention to the risks and needs of its clients and had achieved a high rate of referral to treatment and support services. Magistrates and other stakeholders reported a high level of support for CISP. In terms of outcomes, CISP clients reported improvements in health and wellbeing and, compared with offenders at other court venues, CISP completers had a significantly lower rate of reoffending.[144]

The evaluation estimated a benefit-cost ratio for CISP ranging from 1.7 to 5.9.[145] The benefits were comprised of avoided costs of sentencing, avoided costs of imprisonment, avoided costs of crime

---

[141] The Koori Liaison Officer (KLO) program aims to address the over-representation of Koori people in the Victorian justice system by working with Koori accused when they enter the court system. The service helps Koori people to maximise their chances of rehabilitation through culturally appropriate and sensitive intervention. Any party to a court proceeding can access the KLO program, including applicants, respondents and accused from all jurisdictions of the Magistrates' Court. The program operates as part of CISP and offers the range of services provided by the CISP, including case management up to four months for eligible clients. While the KLO Program is located at the Melbourne Magistrates' Court, it is available as a state-wide service. Magistrates' Court of Victoria, *Koori Liaison Officer Program* (25 June 2012) http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/koori-liaison-officer-program

[142] Research by the Victorian Equal Opportunity and Human Rights Commission found that Koori women underuse programs such as CISP and CREDIT. In 2012, only 48 Koori women participated in the two programs. Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 5.

[143] Victorian Equal Opportunity and Human Rights Commission, *Unfinished business: Koori women and the justice system* (August 2013), 5.

[144] Stuart Ross, *Evaluation of the Court Integrated Services Program: Final Report* (December 2009). Available at https://www.magistratescourt.vic.gov.au/sites/default/files/Default/CISP_Evaluation_Report.pdf

[145] Three scenarios were created to estimate the duration of the impact of CISP: two years, five years and 30 years. If the impact of CISP lasts two years, the benefit-cost ratio is 1.7. If the impact lasts five years, it is 2.6. If the program impact lasts a lifetime (30 years), the benefit-cost ratio is 5.9: PricewaterhouseCoopers, *Economic evaluation of the Court Integrated Services Program (CISP): Final Report on economic impacts of CISP* (2009), 20.

and avoided costs of order breach. The program has been estimated to avoid almost $2 million of imprisonment costs per year.[146]

While the primary services offered by CISP will always remain in the jurisdiction of the Magistrates' Court, the evaluation demonstrated that the program is also valuable for managing offenders charged with more serious offences.[147] This raises the option of extending the program to the County Court. While more serious offenders make their way into the County Court either on bail or for sentencing, the case management information from CISP becomes relevant to County Court proceedings. It has been reported to the LIV that some County Court judges are aware of this and take these CISP case management histories into account when making their decisions.

At present, the rehabilitation, structure and support offered by CISP ceases when an accused is committed to the County Court, whether for trial or plea hearing. There is commonly a delay of several months before a plea is reached and often over a year before a trial date arrives. At a time when the benefits of CISP are perhaps most pertinent they are unable to continue.

CREDIT/Bail Support Program[148]

The Court Referral and Evaluation for Drug Intervention and Treatment Program (CREDIT)/Bail Support Program (BSP) is similar to CISP, but targets offenders with drug and alcohol problems with the aim of assisting them to complete bail successfully. It is an individualised, bail-based program that runs for up to four months through the Magistrates' Court, providing clients with referrals and linkages to community support and treatment services, including housing, health and welfare services, drug treatment and employment programs.

The CREDIT program was based on the NSW Magistrates' Early Referral into Treatment (MERIT) program, which has been evaluated multiple times and has been shown to reduce reoffending, improve broader physical and mental health outcomes and social functioning, and save taxpayer dollars.[149]

CREDIT is open to offenders of all ages and stages of drug use, including first time, low-risk offenders and those with previous criminal and/or drug use behaviour.[150] To be eligible for CREDIT the offender must be charged with a non-violent offence, have an illicit drug problem, be released on bail, be initially bailed to a court where the CREDIT program operates and not be subject to any other court order with a drug treatment component.

---

[146] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), 8.
[147] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), 16.
[148] Magistrates' Court of Victoria, *CREDIT Bail Support Program* (8 July 2015) http://www.magistratescourt.vic.gov.au/court-support-services/credit-bail-support-program.
[149] See further, Rohan Lulham, 'The Magistrates Early Referral Into Treatment Program: Impact of program participation on re-offending by defendants with a drug use problem' (July 2009) 131 *Crime and Justice Bulletin*; NSW Department of Health, *The Magistrates Early Referral into Treatment (MERIT) program: Health outcomes* (November 2007); Northern Rivers University Department of Rural Health, *Evaluation of the Lismore MERIT pilot program: Final Report* (October 2003); Susan Spratley, Neil Donnelly and Lily Trimboli, 'Health and wellbeing outcomes for defendants entering the Alcohol-MERIT program'. 92 *Crime and Justice Statistics Bureau Brief* (December 2013).
[150] A 2004 evaluation found that participants in CREDIT are usually repeat offenders whose offending is related to their drug use. The complexities of this client group means that compliance rates tend to be low: Julian King et al, *Court diversion program evaluation, volume two: Process evaluation and policy & legislation review: Final Report* (November 2004), 5.

As with CISP, evaluations of the CREDIT/BSP have found strong stakeholder support for the program. Stakeholder consultation identified a number of critical success factors for the program. The program has authority by being located at courts and delivered by court officers who report directly to magistrates. Its court location facilitates cross-referral to court-based Aboriginal and Torres Strait Islander services, domestic violence programs and community agency support, while its case management model allows a focus on client welfare rather than mere compliance. Magistrates were seen as critical to the success of the program, both via the regular and close monitoring of progress, and in terms of having a single magistrate throughout the course of the program.[151]

Interviews with CREDIT/BSP clients have also shown high levels of satisfaction with the program and its outcomes: without their participation, many of the people believed they would have been jailed, continued to stay heavily involved in drugs or alcohol, been homeless, remained separated from their children and families, or would have been dead.[152]

The Victorian Ombudsman reports that 2.5% of CREDIT/BSP participants who successfully completed the program went on to receive a custodial sentence, compared with 30% of non-participants.[153]

Victorian Aboriginal Legal Service after hours service[154]

Victorian Aboriginal Legal Service (VALS) has an after-hours service that is available between 5:00pm and 9:00am. After-hours notifications of a person in custody, or other calls, are initially fielded by on-call Client Service Officers. When complex legal advice is required, the queries are referred to VALS' on-call solicitor.

CISP Remand Outreach Pilot[155]

The CISP Remand Outreach Pilot (CROP) is an initiative of Corrections Victoria and the Magistrates' Court of Victoria and an extension of the Court Integrated Services Program (CISP).

CROP introduces CISP Assessment and Liaison Officers (CALOs) into prisons to identify remand prisoners who may be eligible for bail if appropriate community supports were put in place. CALOs also assist remand prisoners to identify and address barriers to receiving these supports. Remand prisoners identified for the CROP will receive brief casework intervention by a CALO, with a view to addressing current barriers to receiving bail, such as lack of a suitable bail address or the need for mental health and/or drug and alcohol support. A report will be prepared for the court with a recommendation for the CISP or CREDIT/Bail Support Program or other community supports.

---

[151] M & P Henderson & Associates Pty Ltd, *Bail Support Program Evaluation* (March 2008), 19-23.
[152] M & P Henderson & Associates Pty Ltd, *Bail Support Program Evaluation* (March 2008), 39-49.
[153] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), 8.
[154] Victorian Aboriginal Legal Service, *24 Hour Service*, (2015) http://vals.org.au/legal-services/24-hour-service/
[155] Magistrates' Court of Victoria, *Guide to Specialist Courts and Court Support Services* (June 2014).

Other programs for accused held in custody

Victoria offers a range of short-term programs to prisoners on remand. These include a fairly narrow range of programs to help them transition from the community into prison; manage their mood, emotions and anger; and provide them with skill development in areas such as problem-solving, communication and conflict management.[156]

Alcohol and/or drug use programs focus on harm reduction and relapse prevention. While there had been limits on the programs available to people remanded in custody, Justice Health increased delivery of these programs following the Victorian Ombudsman's 2015 report on rehabilitation in Victoria's prisons.[157] Remandees assessed as having a mental health condition are able to access the same support and treatment as sentenced prisoners.[158] Remandees are also able to participate in education programs, although wait lists can preclude this from actually happening.[159]

Bail support programs and other services are clearly critical for supporting people in the criminal justice system to complete their bail successfully and for protecting the community from reoffending. The LIV values the services that these programs provide and supports their ongoing and extended funding. To ensure that people on bail and in remand have access to appropriate and timely support, **the LIV recommends that bail support and other court-based support services attract greater funding to allow them to provide services to more individuals. In particular, the LIV recommends that the CISP, which has been rigorously evaluated and found to be both effective and cost-effective, should be funded sufficiently to allow it to expand into the County Court, where it could support more serious offenders to complete their bail successfully, and promote the protection of the community at the same time.**

Current Victorian bail support programs: youth

The Youth Justice Board in the UK has developed a guide to standards in bail supervision and support for young people. These standards include the following: [160]

- Programs should be developed at the initial bail assessment point, and be individually tailored to the needs of the young person.
- Young people should have immediate access to programs and support services once they are released on bail. If there is to be an intensive support program, a timely start will improve the young person's retention in the program.
- Programs should take a more holistic view of the young person and their needs, and interventions should be focused on promoting a more stable lifestyle.

---

[156] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), 49.
[157] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), 57.
[158] Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), 61.
[159] The Victorian Ombudsman found that there were 311 prisoners awaiting courses at the Metropolitan Remand Centre: Victorian Ombudsman, *Investigation into the rehabilitation and reintegration of prisoners in Victoria* (September 2015), 70.
[160] Cited in Gabrielle Denning-Cotter, 'Bail support in Australia' (April 2008) 2 *Research Brief*, 2-3.

- Family should be involved when possible.
- Programs should include court support to help the person to comply with their bail conditions. For example, court reminder calls, accompanying the young person to court, organising transport when necessary and providing information and advice about the court and bail process.

The most significant obstacles facing young people trying to secure bail and meet their bail conditions are finding appropriate accommodation, the lack of a responsible adult/guardian, and lack of access to after-hours support services, which take into account the times when young people are most likely to breach their bail conditions.[161]

Victoria has a number of advice services and bail support programs in place for young people that attempt to address these obstacles.

Youth Justice Court Advice Service[162]

The Youth Justice Court Advice Service (YJCAS) is a state-wide, specialised youth-focused service provided by the Department of Human Services, Youth Services and Youth Justice Branch, in both the children's and adult court jurisdictions, for young people up to age 20.

Specific bail-related advice services are available for youth aged 10 to 17 who are at risk of remand by police or where bail accommodation may be required. It provides a single point of contact for police matters if police and/or a bail justice are considering remand of a young person outside of business hours.

The Central After Hours Assessment and Bail Placement Service (CAHABPS)[163] includes case management for young people who are subject to supervised bail, advice in relation to available bail support services, liaison to coordinate advice and services for young people with multiple needs, and the provision of bail progress reports to the court.

The YJCAS is similar to CISP, but has a focus on youth and minimising both reoffending and further progression into the criminal justice system.[164]

---

[161] Gabrielle Denning-Cotter, 'Bail support in Australia' (April 2008) 2 *Research Brief*, 4.
[162] Department of Human Services *Youth Justice Court Advice Service* (14 August 2015) http://www.dhs.vic.gov.au/youth-justice-community-practice-manual/presentence-and-providing-court-advice
[163] Department of Human Services, *Central After Hours Assessment and Bail Placement Service* (29 June 2015) http://www.dhs.vic.gov.au/youth-justice-community-practice-manual/presentence-and-providing-court-advice/bail/central-after-hours-assessment-and-bail-placement-service-cahabps
[164] Department of Human Services, *Youth Justice* (20 February 2015) http://www.dhs.vic.gov.au/for-individuals/children,-families-and-young-people/youth-justice

Bail Supervision Program/Youth Justice Intensive Bail Supervision Program/Koori Youth Bail Intensive Supervision Support[165]

The *Bail Supervision Program* aims to divert young people aged 15-18 away from remand and support their compliance with bail conditions. Bail Supervision workers provide supervision and support and facilitate referrals and connections with services during the bail period.

The *Youth Justice Intensive Bail Supervision Program* is run by the Victoria Department of Human Services and provides an intensive bail supervision service for young people aged 10-18 years who are at risk of being remanded or re-remanded. Young people involved in the program are provided with case management to reduce the risk of reoffending while on bail and to assist them to comply with their bail conditions. The program also helps to address their needs related to accommodation, education and training, employment, health and development, family and other matters. The program is voluntary and young people must consent to participating in the program.

The *Koori Youth Bail Intensive Supervision Support* program specifically targets the over-representation of Aboriginal and Torres Strait Islander young people on remand, by providing culturally appropriate, intensive support for young Aboriginal people and their family.[166] This is the only Aboriginal and Torres Strait Islander specific and culturally appropriate service for young Aboriginal people on bail.[167]

Support services and interventions are arguably even more important for youth in order to prevent young offenders from becoming entrenched in an offending career. **To this end, the LIV recommends that bail support programs and other support services for youth be funded sufficiently to allow for adequate and timely provision of services, based on best practice standards.**

---

[165] Australian Institute of Health and Welfare, *Youth Justice Supervision in V*ictoria (2017) http://www.aihw.gov.au/youth-justice/states-territories/vic/; Australian Indigenous Health InfoNet, *Youth Justice Intensive Bail Supervision Program* (2 September 2015) http://healthinfonet.ecu.edu.au/key-resources/programs-projects?pid=2059

[166] Gabrielle Denning-Cotter, 'Bail support in Australia' (April 2008) 2 *Research Brief*, 5.

[167] The Koori intensive bail support program (for youth on bail) and the Koori pre- and post-release program (for youth who are or who have been in detention) have been amalgamated into the Koori Intensive Support program (KISP). KISP works to reduce the number of young Aboriginal offenders who are detained prior to sentencing, and provides intensive outreach support to assist young people to comply with bail conditions or with conditions placed on deferred sentences. The program also assists Aboriginal young offenders to reintegrate into their communities. See further, Australian Indigenous Health InfoNet, *Koori intensive support program* (25 August 2015) http://www.healthinfonet.ecu.edu.au/key-resources/programs-projects?pid=1514

LIV RECOMMENDATIONS

As outlined above, the LIV believes in a bail system that is flexible, that adheres to the underlying principle of the presumption of innocence, and that remands accused in custody only when there is a genuine need to ensure the safety of the community or to ensure a person's appearance at court. Its recommendations are based on the extensive and varied experiences of practitioners working directly with accused people in the Victorian community.

We therefore make the following **32 recommendations**:

Recommendations on the principles and purposes of bail

1. That the Government requests that the Victorian Law Reform Commission undertakes a further review of the *Bail Act 1977* (Vic) in order to clarify the Act and move towards plain English bail legislation that is accessible both to people working with the Act and to the broader community.

2. That a new Section 1 be inserted into the *Bail Act 1977* (Vic) with a Statement of Purpose of the Act. The Statement of Purpose should be as follows:

   > The purpose of the *Bail Act 1977* (Vic) is to provide a mechanism to guide decision makers when balancing the rights of an accused under the *Charter of Human Rights and Responsibilities* with the safety of the community.

3. That a new Section 2 be inserted into the *Bail Act 1977* (Vic) with a Statement of Principles of the Act. The Statement of Principles should be as follows:

   > It is the intention of Parliament that the provisions of this Act be interpreted and that every function, power, authority, discretion, jurisdiction and duty conferred or imposed by this Act is to be exercised or performed in accordance with these principles—
   >
   > (a) That all people are presumed to be innocent until proven guilty.
   >
   > (b) That any limitation on a person's rights under the *Charter of Human Rights and Responsibilities* must be justified.
   >
   > (c) That the purposes of bail are:
   >
   > (i) to ensure the attendance of the accused at his or her trial and the associated preliminary hearings; and
   >
   > (ii) to ensure the safety of the community.

Recommendations on risk assessment: tests of risk

4. That the unacceptable risk test should remain unchanged for most offences.
5. That show cause be abolished and serious offences instead fall under a reverse onus unacceptable risk test.
6. That the exceptional circumstances test, which has a higher threshold, remains for murder, treason and terrorist offences, and Commonwealth drug offences.
7. That all offences to which the reverse onus unacceptable risk test and the exceptional circumstances test apply should be clearly and simply listed in separate Schedules, rather than being incorporated within the body of the section itself.

Recommendations on risk assessment: factors to consider

8. That the following factors be added to the *Bail Act 1977* (Vic) s 4(3):
    - the period the accused has already spent in custody and the period he or she is likely to spend in custody if bail is refused;
    - the risk of harm—physical, psychological or otherwise—to the accused while on remand, including self-harm or harm by another; and
    - the responsibilities of the accused, including primary carer responsibilities.
9. That the right to liberty under the *Charter of Human Rights and Responsibilities*[168] be added to the list of factors to be weighed when assessing risk, and that any deprivation of liberty be in accordance with the *Charter of Human Rights and Responsibilities*.[169]
10. That the considerations from the *Bail Act 2013* (NSW) regarding fairness of the criminal justice process be added to the *Bail Act 1977* (Vic) s 4(3); specifically:
    - the likelihood of a custodial sentence being imposed if the accused person is convicted of the offence;[170]
    - the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice;[171] and
    - the need for the accused person to be free for any other lawful reason.[172]
11. That a more general expression concludes s 4(3) of the act: '…when it is in the interests of justice to do so'.

---

[168] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 21(3).
[169] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).
[170] *Bail Act 2013* (NSW) s 18(1)(i).
[171] *Bail Act 2013* (NSW) s 18(1)(l).
[172] *Bail Act 2013* (NSW) s 18(1)(m).

Recommendations on risk assessment: risk and vulnerable populations

12. That, as in the *Bail Act 2013* (NSW),[173] the following consideration be added to the *Bail Act 1977* (Vic) s 4(3): 'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'.

13. That information should be provided to police, bail justices and magistrates about the challenges facing people from different vulnerable cohorts. This information should be developed by the Judicial College of Victoria, in conjunction with the Victorian Equal Opportunity and Human Rights Commission, in the form of a Bail Bench Book available via the Judicial College of Victoria.

Children

14. That s 3B of the *Bail Act 1977* (Vic) be retained.

Aboriginal and Torres Strait Islander men and women

15. That s 3A of the *Bail Act 1977* (Vic) be retained.

16. That further guidance and associated training be developed for Victoria Police, court registrars, magistrates and bail justices on the implementation of this section; and that such training be developed in partnership with the Victorian Equal Opportunity and Human Rights Commission and specifically address the intersection of the *Bail Act 1977* (Vic) and the *Charter of Human Rights and Responsibilities*.

17. That there is a need to expand culturally and gender appropriate housing so that it may support a greater number of individuals, as well expanding the availability of transitional housing provided by Corrections Victoria under its Better Pathways strategy.

People with a disability

18. That a provision similar to the Queensland provision[174] be adopted in Victoria for people with a cognitive impairment or people experiencing mental ill-health, with the specific inclusion of bail justices in addition to police and the Court.

People experiencing homelessness

19. That there should be a funding increase for residential beds in rehabilitation facilities for bailees who are drug and/or alcohol dependent.

---

[173] *Bail Act 2013* (NSW) s 18(1)(k).
[174] *Bail Act 1980* (QLD) ss 11A(1), 11A(2).

20. That there is a need to increase the stock of available housing specifically for young people, providing resources for appropriate (and appropriately qualified) staffing and locating housing in places that facilitate access to support services.

21. That, for begging alms and other such minor public space offences under the *Summary Offences Act 1966* (Vic), where the accused has no fixed address, accused are served with either a notice to appear or an on-the-spot summons.

Other low-level offenders

22. That a Schedule be developed to list those offences that should be dealt with by way of summons or notice, including (but not necessarily limited to):

    - offences that do not attract a term of imprisonment or where imprisonment does not exceed 12 months;
    - offences of Beg Alms and other such minor public space offences under the *Summary Offences Act 1966* (Vic);
    - one offence of Shoptheft where the amount does not exceed $100;
    - an offence of assault where no physical contact is alleged;
    - loitering where no other alleged offence is said to have been committed or alleged to have been contemplated; and
    - offensive behaviour in public where not of a sexual context.

Recommendations on who should determine risk

23. That police diversion programs be expanded to assist in connecting low-level offenders with support while at the same time keeping them away from the bail system.

24. That information be provided to police to explain and encourage the use of summons or notices to appear for low-level offending.

25. That the system of bail justices in Victoria be retained.

26. That bail justices are provided with additional training—such as the development of a Certificate IV Diploma in Bail—and support, and also that they have stronger lines of accountability.

27. Improved availability of data and program evaluation information, to facilitate evidence-informed policy and practice.

28. That funding be made available for court-based bail support services during the hours that the Night Court is sitting.

29. Should Night Court remain in the long term, that the following inclusions be made in the Bail Act:

- A person remanded during a session before a Night Court must be ordered to re-appear before a court during normal court hours on the following day, whether that be a weekday or weekend.
- An application for bail before a magistrate in a Night Court setting is not considered to be a 'first application' for bail. Where an applicant is refused bail, this does not prevent the making of a further 'in-person' application for bail at the next appearance before a court on the following day.
- A remandee who makes an application for bail before a magistrate on the day after the refusal of bail before a Night Court is not required to demonstrate 'new facts and circumstances' where a further 'in-person' application for bail is sought to be made during normal court hours.

Recommendations on support services

30. That bail support and other court-based support services attract greater funding to allow them to provide services to more individuals.
31. That the CISP, which has been rigorously evaluated and found to be both effective and cost-effective, should be funded sufficiently to allow it to expand into the County Court, where it could support more serious offenders to complete their bail successfully, and promote the protection of the community at the same time.
32. That bail support programs and other support services for youth be funded sufficiently to allow for adequate and timely provision of services, based on best practice standards.

CONCLUSION

'Good policy should be informed by the broad range of cases that come before our justice system, not one particular case or type of case'.[175]

The VLRC's comment is especially relevant to the current review of bail, predicated, as it was, on the Bourke St incident of January 2017. The LIV acknowledges the immediate calls for a response to this tragedy, but also cautions against a response that is based more on emotion than on evidence.

As outlined in this submission, the LIV has proposed a series of recommendations that place bail within the broader criminal justice environment within Victoria at the moment. In particular, the ever-increasing prison and youth detention populations, alongside the increasing proportion of

[175] Victorian Law Reform Commission, *Review of the Bail Act: Final report* (August 2007), 21.

people held on remand, suggests that a sweeping move to reduce the use of bail is not a long-term solution to the perceived problems with the bail system.

Instead, the LIV strongly submits that a clearer and more coherent Bail Act will help guide police, bail justices and magistrates in their decision making and will make the Act more accessible to victims, accused people and the community more generally. Greater guidance for decision makers will provide a bail system that works more directly towards its stated aims, and will help to ensure that it avoids compounding disadvantage among marginalised and vulnerable populations.

The LIV would be pleased to participate in any ongoing work proposed by the government in addressing these issues.