

VICTORIAN LAW REFORM COMMISSION

REVIEW OF THE BAIL ACT – CONSULTATION PAPER

Response on behalf of the Criminal Bar Association of Victoria

THE CRIMINAL BAR ASSOCIATION OF VICTORIA

The Criminal Bar Association (“CBA”) is the peak body for barristers in Victoria practising in the criminal law. Its members comprise almost one quarter of all barristers practising in Victoria and it counts almost one third of Victoria's Judiciary among its Honorary Members. The Association issues press releases, regularly meets with the judiciary and government, and is involved in the continuing legal education scheme of the Victorian Bar. The website of the CBA can be found at www.crimbarvic.org.au and is regularly updated.

INTRODUCTION

This is a response on behalf of the CBA to a consultation paper circulated by the Victorian Law Reform Commission (“VLRC”) which is conducting a review of the Victorian Bail Act.

The CBA participated in a preliminary discussion with representatives of the VLRC as part of the initial consultation process and more recently participated in round table discussions on the issues of reverse onus, the requirement to demonstrate new facts and circumstances and the system of bail justices.

The CBA supports the review being conducted by the VLRC. It is the view of the CBA that there is a pressing need for fundamental reform of the Bail

Act. The present Act has developed on an ad hoc basis. Far from it being a legislative tool that promotes public confidence in our criminal justice system its language is confusing and it contains many anomalies (especially in the area of reverse onus), which produce inconsistency of application and unfairness.

The purpose of bail is the creation of a fair and equitable system which attempts to ensure so far as is reasonable that a person charged with an indictable offence attends court. In its operation it must have proper regard to two fundamental principles that underpin our system of justice. Firstly the presumption of innocence and secondly that punishment is only to be imposed following conviction.

OVERVIEW OF CBA RESPONSE

An overview of the position of the CBA to the consultation paper (prior to a detailed response to the specific questions raised) is best summarised by the following points:-

- i). A Bail Act that promotes simplicity, transparency and consistency is urgently needed.
- ii). The reverse onus provisions should be removed. The fundamental question in deciding whether to grant bail is a subjective assessment of acceptability of risk. The imposition of a burden on an accused is not only contrary to basic principles of criminal justice; but it focuses attention on an artificial criterion that is not concerned with risk assessment of the individual but with classification of the offence.
- iii). The factors which constitute “new facts and circumstances” should be clearly prescribed, rather than being left to the subjective view of the Magistrate on the day.

- iv). An accused should not be required to demonstrate “new facts and circumstances” if an initial bail application made shortly after arrest (two business days) is unsuccessful.
- v). Bail justices should either be replaced by Judicial Registrars who are legally qualified and independent, or the system should be overhauled with proper training being provided and safeguards which promote independence being introduced.
- vi). Section 464 of the Crimes Act should be amended to require the interviewing officer to inform a suspect in the course of a tape recorded interview that the suspect should not expect that their exercise of a free choice to answer questions put to them will favourably affect their prospects of obtaining bail in the event that they are charged.

SPECIFIC QUESTIONS

CHAPTER 2

Question 1 (Simplified Language)

The CBA supports a rewriting of the Bail Act. The current Act is a mishmash of poorly structured sections and numerous amendments. Its language is confusing. The Act promotes inconsistency and unfairness which surely must erode public confidence in our system of justice.

We endorse a format and a language that is easily understood by lawyers and non lawyers.

Question 2 (Objects Clause)

The CBA supports an objects clause. The clause could possibly be expressed as follows:-

“The purpose of bail is not to punish but to provide a fair and equitable process which seeks to facilitate the attendance at Court of persons who

are charged with indictable offences and who are entitled to the presumption of innocence, whilst protecting the interests of the community.”

CHAPTER 3

Question 3 (Arrest or Summons)

There is an increasing trend towards the use of the Summons procedure for serious indictable offences. In part this may be due to issues that arise under the Bail Act. It is also likely to be due to time constraints that operate with respect to the hand up brief procedure in the Magistrates’ Court Act.

Neither the provisions of the Bail Act or the Magistrates’ Court Act should lead to the use of the Summons Procedure when Arrest is the proper course.

Question 4 (Grant of Bail by Police)

Yes, s.10(1) should be amended.

In the majority of cases in which bail is granted the outcome is inevitable. However s.10(1) limits the ability of police to grant bail unless certain preconditions exist. The existence of these preconditions may in part be due to the existence of the reverse onus requirements. The retention of the reverse onus is discussed in question 38 and the CBA supports its abolition.

An ongoing problem with the grant of power to police to decide bail is the use of bail as an inducement to confess to a crime. This is capable of being substantially overcome by an amendment to s.464 of the Crimes Act in the following terms:-

“The interviewing officer must inform a suspect in the course of a tape recorded interview that the suspect should not expect that their exercise of a free choice to answer questions put to them during the interview will favourably affect their prospects of obtaining bail in the event that they are charged.”

In the absence of a reverse onus the CBA supports an extension of the power of police to grant bail if all of the following conditions are met:-

- i). Bail is not opposed;
- ii). Unacceptable risk does not arise;
- iii). The maximum penalty is below 20 years; and
- iv). Section 464 of the Crimes Act as amended (see above) is complied with.

Question 5 (Serious Indictable Offence)

Yes, to the extent referred to in answer to question 4.

Question 6 (Nightshift)

Liberty of the subject is paramount. Whilst it is inconvenient for an informant on nightshift to attend court the next morning, a bail application should not be delayed because the police officer who attended upon the application did not have sufficient knowledge of the case to properly inform the court of relevant matters. Presently Courts attempt to accommodate the interests of an informant on nightshift by hearing the application early.

Question 7 (Bail as an Inducement)

There is an ongoing problem with the inappropriate use by police of a decision to grant bail. The CBA urges an amendment to s.464 of the Crimes Act. This is discussed in answer to question 4 herein.

Question 8 (Notice to Victims)

Section 4(3)(e) of the Bail provides for the attitude of an alleged victim if expressed, to be considered when the Court is looking at the issue of unacceptable risk.

The CBA believes that it is essential to the proper and fair administration of our criminal justice system that all parties, (which include alleged victims) are informed of their rights. This is a basic premise that is too often ignored and not only in the area of bail. Accordingly we would endorse a practice whereby alleged victims are provided with a document which informs them of s.4(3)(e) of the Bail Act.

Question 9 (Outcome of Bail Hearings)

Yes. We do not believe that the informant should be required to notify an alleged victim of the outcome of a bail hearing. However, the notice that is referred to in our answer to question 8 could also inform an alleged victim that upon request of the informant they are entitled to be informed of the outcome of a bail application.

Question 10 (Requirement to Inform)

We refer to our answer to question 9.

Question 11 (E-Justice)

E-Justice may improve the flow and access to information although it is unlikely to be 100% accurate. It does however appear to be a significant improvement to the present system, which is to be applauded.

Question 12 (Guidelines to Police)

Yes. It can only benefit the administration of justice that the parties involved; particularly police are properly informed as to the nature and extent of their rights, powers and obligations.

CHAPTER 4

Questions 13 – 17 (Bail Justice System)

The system of bail justices has operated in Victoria for many years. Its implementation was expected to be capable of providing a viable and independent role in bail matters outside court hours. Whilst the theory for the use of bail justices is laudable the practical experience over many years has been less satisfactory. The various criticisms that are contained within the consultation paper, such as lack of impartiality, representativeness and proper training are valid. They articulate the experience of our members.

The CBA believes that unless substantial and satisfactory reform can be made to the Bail Justice system it should be replaced with a Court based system which is supplemented by a number of co-ordinated reforms including:-

- i). The removal of the reverse onus provisions;
- ii). The extension of power to the police to grant bail in the circumstances referred to in answer to question 4 herein;
- iii). The creation of judicial registrars who are authorised to grant bail in the same circumstances.

CHAPTER 5

Question 18 (Delay as a Factor)

This question in part proceeds on the assumption that the reverse onus provisions will be retained. **[In our answers to questions in Chapter 6 we urge the abolition of the reverse onus provisions.]**

The question that perhaps should first be posited is whether the Bail Act should specify any factors that either alone or in combination can be taken into account on the issue of exceptional circumstances or show cause? If the answer is no, then delay as a factor should not be specified.

The CBA believes that the answer should be no. Delay as a factor will always be relevant to bail where it exists. There is no need for it to be enshrined as a factor to be taken into account. Moreover there is already a considerable body of decisions by Justices of the Supreme Court on the issue of delay and the appropriate principles to be applied. It is a matter for the tribunal being guided by community values and the relevant principles that will promote fairness and justice. Further the nomination of a particular period of delay will create an artificial limitation.

Questions 19 & 20 (Initial Bail Application – Unrepresented Accused)

The Bail Act should be amended to allow representation at an application shortly after arrest without having to show “new facts and circumstances” on a subsequent application.

This matter was discussed at the round table conference on 21 March 2006.

The Bail Act presently provides for a fresh application as of right if an accused is unrepresented at the initial application. This exception to the

“new facts and circumstance” test has led accused who would otherwise be represented to conduct applications on their own behalf and sometimes on more than one occasion. This is not in the interests of the administration of justice.

The CBA supports the suggestion of VLA that if the application for bail is made to the court shortly after arrest (ie: 2 or more business days) then a subsequent application can be made as of right, without the need to establish “new facts and circumstances”.

Question 21 (Confessions/Admissions)

The Bail Act prohibits an accused being examined or cross examined about the circumstances of the offence. The rationale for this provision would appear to be recognition that a bail hearing is concerned with the liberty of the accused who is presumed to be innocent and not is to be used as an opportunity to gather evidence against him/her. This provision would be jeopardised if notwithstanding it is permissible to use a purported admission or confession made from ‘the Bar Table’ against an accused in any subsequent hearing.

The CBA believes there should be a general rule against admissibility of this type of material.

Question 22 (Reasons)

Bail is by its nature interlocutory. It is not a final determination of rights. There is no right of appeal against a refusal of bail. A fresh application can always be made subject to the requirement to establish “new facts and circumstances”.

The Bail Act provides that reasons are required to be recorded when granting bail in certain circumstances. There are however various anomalies that are referred to in the discussion paper. These anomalies should be corrected.

Furthermore whilst there should be no requirement for a court to record all reasons for which bail may be granted or refused the CBA believes that a court should be required to record in point form the essential reasons for either granting or refusing bail.

Question 23 (Supreme Court)

Most lawyers would be aware of the right to invoke the inherent jurisdiction of the Supreme Court on the issue of bail. However it is unlikely that lay persons would know of the right to apply to the Supreme Court on such an important issue. There appears to be no reason why this right should not be referred to in the Bail Act. The purpose of the Act is to inform all Victorians of matters that are relevant to the issue of bail. Accordingly, the CBA believes that the Act should refer to the inherent jurisdiction of the Supreme Court to grant bail.

Question 24 (Appeal to Court of Appeal)

The CBA believes that the decision in *Fernandez* recognising a right of appeal from the decision of a single judge in a s.18A appeal should be retained and enshrined in the Bail Act.

There are very few s.18A appeals. They involve questions of law only. Since the decision in *Fernandez* the CBA is unaware of any appeal to the Court of Appeal from the decision of a single judge. There is no basis therefore to argue that the workload of the Court of Appeal will be

overburdened. The CBA believes that it is important that the Court of Appeal should not only be able to correct an error of law but being the highest Court in the State it should be able to clarify issues of principle relevant to the determination of bail.

It is no answer to say that an accused can make a fresh application for bail (subject to “new facts and circumstances”) following a successful s.18A appeal by the Director. A new application will not correct any error of law made upon the hearing of the s.18A appeal, nor will it resolve or clarify an important matter of principle for the benefit of other courts.

Question 25 (Commonwealth Legislation)

The Bail Act should make no reference to Commonwealth legislation. The position of the Commonwealth on bail issues is a matter for the Federal Parliament. By section 68 of the Judiciary Act the Commonwealth picks up the Bail Act and applies it as a matter of Federal Law. In some specific legislation (ie: terrorism) the Commonwealth has legislated with respect to Bail.

The CBA believes that the Bail Act should not be complicated by the inclusion of references to Commonwealth legislation. This is particularly so if the Commonwealth decides to approach bail in a different manner to the State (ie: reverse onus provisions).

Question 26 (Nature of Fresh Applications)

The CBA agrees that the Act needs to provide greater clarity in its description of a fresh application under s.18. An application under s.18 is not in the nature of an appeal but a conditional right to make a new application. By contrast an appeal under s.18A is an appeal strictly so

called. This distinction should be reflected in the language of the two provisions.

Question 27 (Bail – Court of Appeal)

The CBA believes that the processes and powers of the Court of Appeal on the issue of bail require greater clarity and precision.

Pending the hearing of an appeal to the Court of Appeal an applicant for bail must demonstrate the existence of very exceptional circumstance to justify a grant of bail. This is the test at common law. It is a strict test which recognises the finality of a jury verdict, rather than it being regarded as conditional pending appeal. The CBA believes that this continues to be the appropriate test. It is doubtful however whether the requirement to demonstrate that the exceptional circumstance is “very exceptional” adds anything.

What is not clear however is the procedure for bringing on an application for bail to the Court of Appeal prior to the hearing of the appeal. There is not set procedure. This needs to be corrected.

The Court of Appeal also has power to grant bail if an appeal is allowed and a new trial ordered (s.579(2) & s.568(7)). The Court of Appeal is however most reluctant to exercise this power preferring in nearly all cases to refer a successful appellant to the Practice Court. This is very unsatisfactory. The matter of bail should be dealt with expeditiously. In most cases a successful appellant would have been on bail prior to his or her trial. It is the view of the CBA that the Bail Act should require the Court of Appeal to determine the issue of bail unless there are cogent reasons why it is not in the interests of justice to do so. At the conclusion of an appeal the Court of Appeal is well versed in matters relevant to the issue of

bail. To require a successful appellant to incur further expense and additional time in custody so that the Practice Court can deal with the issue of bail is inappropriate.

Question 28 (Revocation of Bail)

In the consultation paper this question arises in the context of revocation or a refusal of bail at the conclusion of a committal hearing. For some time this has been an area of concern to the CBA. There have been a number of instances where an accused previously on bail who has abided by his/her conditions has been refused bail by a different Magistrate at the conclusion of the committal hearing. An example is the case of Cardona [2005] VSC 186.

The CBA urges the following reforms:-

- i). An accused granted bail prior to a committal hearing is entitled to a presumption in favour of bail in the absence of new facts or circumstances that demonstrate that the accused is an unacceptable risk; and
- ii). Bail is opposed by the prosecution.

Question 29 (Murder & Treason)

There is no reason why a grant of bail for persons charged with murder and treason should only be determined by the Supreme Court.

With the abolition of capital punishment, murder and treason are no longer different in terms of penalty to offences under the *Drugs Poisons and Controlled Substances Act* which also carry a maximum penalty of life imprisonment, or the offences of conspiracy to murder, incitement to murder and attempted murder, where the maximum penalty is the same as for murder. The Magistrates' Court has for many years been hearing bail

applications for these offences. The present distinction with respect to murder and treason is an anomaly.

Questions 30 and 31 (Warrants to Arrest – Revocation of Bail)

Questions 30 and 31 raise issues that compliment the other.

Pursuant to s.24 of the Bail Act, a police officer may arrest a person who he/she believes on reasonable grounds is likely to or has breached a condition of bail, and bring that person before the Court. It seems that in the absence of a warrant police are reluctant to exercise this power.

Section 18(6) of the Act on the other hand enables an informant to apply ex parte for the revocation of a persons bail. However if revoked there is no power for the Court to issue a warrant for the persons arrest.

The CBA believes that a Court should not revoke bail on an ex parte basis, unless the revocation is as a result of a failure to appear, in which case s.26(2) of the Bail Act which provides for revocation and a warrant applies.

The CBA also believes that a person should not be subject to potential arrest merely because a police officer believes that the person is likely to breach a condition of bail. This provides too much power to police which can easily be abused.

The problems caused by s.24 and s.18 (6) are best resolved by requiring police to first obtain a warrant for arrest of a person who they believe on reasonable grounds is likely to or has breached a condition of bail. Once executed the person would be brought before the court where the issue of revocation can be determined in their presence. This is a fairer system where issues of liberty and natural justice are better protected.

Question 32 (Endorsement of warrant)

It is not a condition of s.26 that a persons bail be revoked prior to the issue of a warrant of apprehension. The purpose of the warrant is to bring the person before the Court so that the reason for their failure to attend can be determined. That does not mean however that the person should be brought before the same Magistrate. Nothing in the wording of s.26 suggests that a warrant of apprehension should be encumbered by a special condition requiring that the person be brought before the same Magistrate. Bail is always a matter for the Court not for a particular Magistrate. Accordingly the CBA believes that following the execution of a warrant for apprehension the arrested person should be brought before the Court within a reasonable time of arrest.

Question 33 (Effect of 2004 amendment)

The 2004 amendment permitting an extension of bail in the person's absence if sufficient cause exists has provided much needed flexibility to the system. It is working well and needs no further reform.

Question 34 (Views of victims)

The views of victims are problematic where bail is concerned given the presumption of innocence and that the evidence has not been tested. Pursuant to s.4(3)(e) the views of an alleged victim are only relevant in the context of unacceptable risk. The CBA believes that this is the only area where the attitude of an alleged victim could be relevant. No further amendment is warranted.

CHAPTER 6

Question 35 (Reverse Onus - Broad List of Factors)

As already stated in this response the CBA urges the abolition of both reverse onus conditions. We do so for the following reasons: -

- i). Philosophically the placing of an onus on an accused is inconsistent with two fundamental principles that underpin our system of criminal justice, namely the onus of proof being on the prosecution and the presumption of innocence.
- ii). The imposition of an onus based on the nature of the offence charged is artificial. Why should one type of offence attract the onus whereas another similar offence (ie: attempted murder or rape) where the relative criminality maybe no different or arguably greater does not?
- iii). It promotes unfairness. Persons are placed in the same category irrespective of the strength of the case or the circumstances personal to each.
- iv). It promotes inconsistency. What does or does not constitute an exceptional circumstance or show cause varies between the decision makers.

The CBA believes that the only relevant issue when considering an application for bail is the nature and extent of the risk involved in an accused being released conditionally. If the risk is not unacceptable then bail should be granted, subject to the imposition of conditions if appropriate. Accordingly there should be a presumption in favour of bail for all offences, subject only to the issue of risk.

If however contrary to our views, it is intended to retain the present system of reverse onus, we do not believe that a broad list of factors should be included in the Bail Act for either test, ie: - “exceptional circumstances” or “show cause”. A list, even if stated in broad terms, will have the tendency to

restrict rather than expand the factors which might otherwise satisfy either test.

Question 36 (Reverse Onus – Additional Offences)

If reverse onus provisions are to be retained then there needs to be greater consistency between offences which do and offences which do not require the onus to be discharged by an accused.

A simple rule of thumb could be based on the maximum penalty applicable to the offence, such as life imprisonment or 25 years for exceptional circumstances and 15 or 20 years for show cause. Of course this question and our answer to it highlight the artificial nature of the reverse onus provisions of which we complain. Any attempt to devise a category of offence for the enlivening of a reverse onus is nothing more than an exercise in arbitrary decision making. The process is flawed and should be abolished.

Question 37 (Commonwealth Offences)

We have already stated our position with respect to Commonwealth offences. Questions of bail in relation to Commonwealth offences should be a matter for the Commonwealth Parliament, not the Parliament of Victoria. The Bail Act is not a co-operative instrument. It is an Act for the people of Victoria.

The Commonwealth Parliament has already seen fit to legislate on the question of bail in relation to certain Commonwealth offences, such as terrorism. If the Commonwealth DPP seeks to expand the category of offences which would attract a reverse onus, then it should be applied

uniformly throughout the Commonwealth through federal legislation and not in a piecemeal way via an individual State.

We have already expressed our opposition to the retention of the reverse onus provisions. Accordingly there is nothing further that we can usefully add in answer to this question.

Question 38 (Removal of Reverse Onus Provisions)

For the reasons already given the CBA urges the abolition of both reverse onus tests.

Question 39 (Schedule)

The present category of reverse onus offences is clumsy. If it is intended to retain them then a schedule would be a sensible course.

Question 40 (Retention of one category)

No. Both reverse onus categories are flawed. If it is thought appropriate to abolish one, then there can be no logical or tenable basis to retain the other, except to appease those that urge their retention. Issues of bail and liberty are far too important to be settled as a compromise.

Question 41 (Presumption against Bail)

There should be a presumption in favour of bail subject to the issue of risk. There is no proper basis to retain a presumption against bail.

That the Commonwealth Parliament has through federal legislation imposed a presumption against bail for certain Commonwealth offences is irrelevant to the question of whether Victoria should retain a presumption against bail for certain offences. Differences in the approach of State

and Federal Parliaments will always occur. It is the inevitable consequence of a federal system of government. Victoria should not modify its reform agenda simply because it might produce an inconsistency in the manner in which bail applications are dealt with for persons charged with federal offences.

CHAPTER 7

Questions 42 & 43 (Suitable Surety and Disclosure of Information)

The suitability of a surety should continue to be a matter for consideration by a Registrar. It is in the nature of an inquiry. This is best performed by an administrative officer provided he/she is sufficiently informed of all relevant material.

The CBA believes that in this regard various reforms could be made.

Firstly, the surety could be required to prove their identity by the production of a licence or a passport and thereafter in a statutory form declare whether they have any prior criminal convictions and if so their nature. This is a relatively simple reform placing an onus on the surety on issues of character, which if false exposes them to prosecution.

Secondly and as a alternative to reverse onus system, the informant could play a role in conducting relevant checks. The Bail Act could provide that the identity of the proposed surety or sureties if requested by the informant be disclosed either by the defendant or the Registrar at the conclusion of the bail hearing or as soon as is reasonably practicable thereafter. This would enable the informant to conduct a check of any prior criminal history and inform the Registrar before the bail undertaking is signed of any relevant matters. This should be a simple and quick procedure as an

informant should be able to conduct a check over the telephone on short notice, subject to satisfactory proof of the person's identity.

Thirdly, in the event that there is a refusal by the Registrar to accept the suitability of the proposed surety a procedure should be available to a defendant for the matter to be referred back to the Magistrate who granted bail.

Question 44 (Cash Deposit)

The CBA believes that the availability for the provision by a defendant of a cash deposit should remain. It is seldom used, which is more a product of the current practices of Magistrates. There was a time (more than 20 years ago) when cash deposits by defendants was far more common. It is a useful alternative that should be retained.

Question 45 (Financial Position of Sureties)

An amendment to the Bail Act to mirror the Queensland position would undoubtedly cause some delay in the release of a defendant who has been granted bail. It may cause substantial delay if the proposed surety is unable to provide sufficient documentary proof of his/her financial position. It is difficult to strike the right balance. At present the financial position of a surety in terms of hardship will only arise if bail is forfeited and the person makes an application under s.6 of the Crown Proceedings Act 1958.

The CBA believes that the balance is best struck by requiring a surety to complete a brief statement of financial position in the form of a declaration which is handed to the Registrar. The appropriate form could be prescribed by regulation and available over the internet so that it can be completed by the proposed surety in advance. No further inquiry should be undertaken.

Question 46 (Passbooks)

The system of passbooks is outdated and should be repealed.

Question 47 (Obligations)

The CBA believes that it is imperative that a surety is properly informed of their rights and obligations. The present form is inadequate. A surety should be given a pamphlet which covers all relevant aspects of the role of a surety, including rights obligations and consequences in the event of flight by the defendant. Prior to signing the bail undertaking the Registrar should be required to ask the proposed surety a series of questions and then tick a series of boxes on the pamphlet once satisfied that the correct answer has been given. Upon completion the pamphlet is signed by the surety and by the Registrar as part of the bail process. This would provide a better system of checks and balances as well as ensuring that sureties are made aware of their commitment.

Question 48 (Arrest by Surety)

This section should be repealed. Any concerns that a surety might have about an accused should be directed to the informant and/or the Court.

Question 49 (Attendance at Court)

Bail variations are common. The requirement for a surety to be present is often an unnecessary inconvenience. The filing of an affidavit on behalf of a surety consenting to the variation sought is a sensible alternative. A form could be prescribed in the regulations. Thereafter the variation should be dealt with in Court in the usual way. We refer to our answer to question 58 herein.

Questions 50 & 52 (Forfeiture Procedures – S. 6 Crown Proceedings Act)

The procedures for forfeiture should be in the Bail Act. Their presence in the Crown Proceedings Act is often a cause of confusion and frustration.

Moreover with the types of reforms being discussed under this chapter, there should also be a review of the forfeiture provisions that currently apply.

The CBA believes that a surety should not be forfeited to the Crown in an ex parte hearing as currently provided by s.6 of the Crown Proceedings Act. Notice should first be given to the surety with a right to appear and be represented.

Secondly, before bail is forfeited the Court must first be satisfied by admissible evidence (rather than hearsay) that the accused has voluntarily absented himself/herself from attending Court as required rather than simply having failed to observe a condition of bail (the present test is anomalous). Thereafter, if bail is forfeited and the surety is ordered to pay the amount undertaken to the Crown, his/her right to apply within 28 days for a rescission or variation remains.

CHAPTER 8

Question 52 (Bail Support Services)

The use of support services can often be supported under the existing heads of s.5(2) of the Bail Act such as ensuring that a person does not commit offences whilst on bail. This will most often arise in the context of a drug addicted person. Notwithstanding the CBA supports an amendment to s.5(2) of the Bail to include a special condition concerned with an accused

seeking rehabilitation, treatment or support whilst in bail. This would where necessary supplement the existing heads of power.

Question 53 (Refrain from taking drugs)

The CBA is opposed to the use of such a condition. It is not an appropriate use of the Bail Act. The possession and use of illicit drugs is prohibited under existing laws which criminalises such behaviour. There can be no justification to permit the taking of such drugs if a support structure is established. There would first need to be legislation which provides for the decriminalisation of drugs in certain circumstances. That is a matter of policy for government. Without such reform there is an irreconcilable conflict between the order of the Magistrate on bail and the relevant provisions of the Drugs Poisons and Controlled Substances Act.

Question 54 (Use of Public Transport)

It is hard to conceive when it would ever be appropriate to prohibit an accused using public transport as a condition of bail. Such a condition seems likely to promote breaches of the law rather than prevention. The ability of an accused to answer his/her bail should not be put at risk by such a condition.

Questions 55 & 56 (Indigenous Accused)

The CBA has no information (empirical or anecdotal) on the manner in which indigenous accused are being treated.

Question 57 (Other Places)

Given the geographical size of Victoria and the likely proximity of an arresting officer to a police station, the CBA believes that the status quo

should remain. The granting of bail in the field carries with it a number of unnecessary risks, which are not outweighed by the perceived advantage.

Question 58 (Minor Variations)

The grant of bail and the conditions which govern it are orders of the Court. Any amendment or variation, even if minor should only be made before the relevant Court, with the parties in attendance.

Question 59 (Date to be Fixed)

Bailing or remanding a person to a date to be fixed is a short term solution which can produce long term problems. The CBA believes it is always preferable to adjourn a matter or remand a person to a set date. If for a variety of reasons that return date is not to proceed, it should be possible to extend the persons bail in their absence without requiring their attendance. Or in the case of a person in custody either remand them via a video link, or in their absence.

It is often the situation in the County Court that a mention is further adjourned and the accused has to attend at some time during the day to report to the registry. If in advance the parties know that the matter is likely to be adjourned there should be no requirement for the accused to attend. We refer to our answer to question 33 herein.

Question 60 (Conflicts in Orders)

The CBA is not aware of conflicts arising between bail conditions and orders made under other legislation. If conflict does exist then it is capable of being quickly remedied by application to either tribunal that made the original orders.

Question 61 (Breaching Bail)

The CBA is opposed to treating a breach of a bail condition as a criminal offence. It is an order of the Court and should be dealt with in the manner presently proscribed.

We refer to our answer to questions 30 & 31 herein on the issues of breach and the suspicion of police.

CHAPTER 9

The CBA does not provide any input in response to questions 62 to 65. Few of our members practice in the Children's Court and those that do have not responded to this paper.

Question 66 (Youth Training Centres)

The CBA supports an amendment which would permit an accused in an appropriate case to be remanded to a Youth Training Centre. Too often young people are exposed to the environment of an adult prison with its attendant dangers.

Question 67 (Sections 49 MCA & 5A Bail Act)

Section 49 is cumbersome and should be re-drafted in light of the proposed amendment to permit a person aged 18 to 21 to be remanded at a YTC.

Question 68 (Child Specific Matters)

The CBA does not believe that child specific matters should be specified in the Bail Act. A Magistrate will inevitably take matters of this type into account when dealing with a young accused.

CHAPTER 10

Question 69 (Lack of Accommodation)

The issue of support services is discussed in question 52. Such services particularly in relation to young persons should include the provision of emergency accommodation. The CBA believes that a young person should not be refused bail merely because they are without accommodation. A failure in the provision of adequate housing should never be a basis to refuse a person who is otherwise deserving of bail.

Question 70 (Cognitive Impairment)

This is simply a matter of the provision of adequate resources. Of course specialised support should be provided to people with cognitive impairment, or indeed any form of disability that may impede their ability to properly participate in a bail hearing. The extent and nature of that support is a matter for government.

Question 71 (Police Training etc)

The CBA supports the provision of specialist training, but realises the difficulties in providing adequate training to the force as a whole. The CBA also believes it is imperative that a Court ensure that an accused properly understands the nature and effect of all conditions that are attached to a grant a bail. Otherwise a failure to comply may be directly due to a failure of communication by the Court.

Question 77 & 78 (Indigenous Support Services)

The CBA does not wish to comment on these matters.

CHAPTER 11

Question 79 (Definition of 'Court')

The definition of 'Court' is unnecessarily complicated and potentially misleading. Section 3 should be amended to define Court for the purposes

of the Act in the conventional manner. There is no need to included police officers within the definition. Where police are empowered to grant bail, they should be referred to as police.

Question 80 (Warrant of Commitment)

This form of warrant has clearly become obsolete and should be removed from the Bail Act.

Question 81 (Remand)

The experience of our members is that the use of the expression 'remand' is confusing and often troubling to accused who have been granted bail. It would not take much to limit its use to 'remand in custody', and otherwise refer to a person being bailed to appear on the adjourned date.

Question 82 (Telegram & Cablegram)

These are now obsolete forms of communication and have almost gone from our vocabulary. They should be removed from the Bail Act.

Question 83 (Surety)

The expression 'surety' is unique to bail and as a matter of history and common usage clearly denotes the role of the person or persons who perform the function. It should be retained. Any amendment is likely to cause unnecessary confusion.

Question 84 (Words and Phrases)

The CBA does not believe that there is a pressing need to amend other words or phrases.

Question 85 (Forms)

All Court forms which impart information to persons affected should be in simple and plain English. This includes bail forms, where the information is of such a critical nature. The CBA supports a redrafting of forms into plain English. We also recommend the availability of forms in various languages so that accused and/or sureties who are only fluent in a language other than English are adequately informed of their rights and obligations.

The CBA also supports the inclusion in the bail form of a contact point at Court where an accused person can seek advice and furnish information.

Question 86 (Section 4(2)(b))

The CBA supports the repeal of s.4(2)(b). It is an unnecessary impediment to the grant of bail in relation the charges before the Court. We also refer to and repeat our support for the abolition of both reverse onus conditions, of which s.4(2)(b) forms part.

The CBA thanks the Commission for the opportunity to respond to this very important paper.

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