



- Review of The Bail Act: Consultation Paper -

Introduction

Youthlaw is Victoria's state-wide community legal centre for young people. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

We welcome this opportunity to respond to the review of the *Bail Act*. Youthlaw believes that the *Bail Act* is in dire need of reform. It is complicated, overly legalistic, and difficult to interpret. In particular we are concerned about conditions that can be placed upon people while on bail, such as curfews and exclusions from geographic areas. In our experience this can have a punitive effect on young people who have not been found guilty of an offence.

We note that the question of bail ultimately rests upon whether or not the accused will attend Court when required and whether they pose a danger to the public or the carriage of justice. That is, whether the accused poses an 'unacceptable risk'. The law precludes the imposition of special bail conditions for summary or minor offences, such as possession or use of drugs, which seek to do anything other than to secure the accused's attendance at Court.

We submit that removing the reverse onus provisions in s.4 and making 'unacceptable risk' the basis on which all bail decisions are made would better preserve the presumption of innocence, while still protecting the interests of the community.

Youthlaw believes that the use of Bail Justices results in considerable injustice. We submit that the Bail Justice system be abolished. If this structure remains, they should have a tenure of three years and receive adequate and ongoing training. The problems associated with Bail Justices could also be dealt with by strengthening the presumption in favour of bail within the *Bail Act* as outlined in detail in our submission.

Human Rights

Youthlaw submits that any reforms made to the *Bail Act* must be consistent with the Victorian Government's human rights obligations. We draw your attention to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"). The *Act* as it is currently drafted does not comply with the Rules. Several articles have particular relevance to this issue which should be taken into account in the drafting of legislation including:

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Article 10

10.1 Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.

10.2 A judge or other competent official or body shall, without delay, consider the issue of release.

Rule 11 regarding diversion states that where appropriate, juvenile offenders should be processed without resorting to formal trial by the competent authority. This rule could be reflected in the *Bail Act* by relying on summons rather than arrest and minimizing young people's contact with the legal system.

The *Act* should also reflect the State's obligations under the International Covenant on Civil and Political Rights. This is particularly pertinent given that the Victorian Government has committed to enacting a Charter of Rights based on civil and political rights. Key articles include:

Article 37

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

We refer also to s24 of the proposed Charter of Human Rights that crystallises the presumption of innocence. S20 demands that a detained person be brought before a court to have the legality of their detention determined. Notably, these sections do not make a distinction between types of offences. The overriding concern is the prevention of arbitrary detention and maintaining proper judicial process.

A 1999 report by the English Law Commission, *Bail and the Human Rights Act*¹, examined the compatibility between the English law of bail and the European Convention on Human Rights. Although the legislation operates in a different jurisdiction, there are a number of universal principles that can be drawn from this paper. Firstly, in determining bail, proper judicial process must be followed. This includes giving reasons for a decision. It recommends that decision makers must be given adequate training and guidance so that decisions are made in accordance with the law². In the Victorian context decision-makers include Magistrates, Bail Justices (pending review of their continuation) and police.

We submit that the human rights instruments referred to above require the *Bail Act* to be reformed in the manner outlined in our submission.

Chapter 2

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

Yes. The Act should be re-written using plain English. In our experience, the cumbersome nature of the legislation makes it difficult to explain to young people their rights and obligations under the bail system. For example, the Act could be

¹ at <http://www.lawcom.gov.uk/docs/cp157sum.pdf>

² see p. 2

simplified by removing the provisions about “exceptional circumstances” and making “unacceptable risk” the basis on which decisions are made. This would maintain all of the intended safeguards. We believe that simplification would also benefit other users of the Act such as police and Bail Justices.

2. Is there a need for a statement of purpose or an objects clause in the *Bail Act 1977*? If so, what do you think the objects of the Act should be? What should the purposes of the Act be?

We support a statement of purpose that would assist in the interpretation of the legislation. The statement should reflect the point that there is a presumption in favour of bail and that there should be no delays when liberty is at issue.

Chapter 3

3. Are police using arrest and summons appropriately? Do the processes involved in arrest and bail or issuing a summons disproportionately affect the decision about which course is adopted?

It is our experience that police are not using arrest and summons appropriately. There should be a presumption to proceed by summons, especially when an accused is arrested in circumstances where it is not practicable to take them before a Magistrate. In particular, a summons should be used where an accused is charged with a minor offence/s such as shoplifting or street offences.

4. Should section 10(1) of the *Bail Act 1977* be amended so that police can grant bail even on occasions where it is ‘practicable’ to take an accused before a court?

Youthlaw agrees that this section should be amended accordingly as it may see people dealt with more expeditiously provided that appropriate safeguards are put in place particularly in relation to bail conditions. The concern is that bail conditions agreed upon at the police station by both the charging police officer and the accused will not attract the scrutiny of a Court except at the initiation of the police or the accused at a later date. It is only where the police are refusing bail or seeking to impose conditions that the accused will not agree to, that the initial decision about bail is brought before a Bail Justice (out of hours) or a Court (during business hours). Thus an accused can leave a police station with an onerous undertaking of bail that a Court may not consider lawful.

5. Should the *Bail Act 1977* be amended to prevent police from being able to decide bail in matters where an accused is charged with a serious indictable offence? If so, should the limitation be restricted to those offences that are currently termed exceptional circumstance offences?

Youthlaw does not support amending the Act to prevent police deciding bail. We believe that decisions about bail should be based on the individual circumstances of each case.

6. Does the requirement that the police informant attend a bail hearing the morning after working a night shift cause undue hardship for police? If so, what measures could be put in place to improve this situation?

We recognise the hardship faced by the police in this situation. However, the informant has a duty to attend court as the liberty of the accused is at stake. The evidence of the informant must be tested.

The situation could be avoided if the police were to proceed by summons as much as possible. We believe that bail matters should be prioritised in court listings for both the sake of the accused's liberty and in the interests of the informant who has just come off nightshift.

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

We believe that the use of bail as an inducement for an accused to make admissions is a major and continuing problem. A statement about an accused's rights in relation to bail should be included as part of the police caution as a measure to deal with this situation.

Another major concern is the arrest and detention of primary care givers. We submit the Victoria Police Manual should be amended to include procedures for police to follow when primary carers are detained in custody. Procedures should state that in these cases decisions as to bail should be made immediately and as a matter of priority so that hardship and distress to the family is minimised and appropriate arrangements can be made for the care of family members.

8. Should police be required to inform victims about the provisions in the *Bail Act 1977* which require their views (when expressed) to be taken into consideration?

We consider that it is a duty of the police to keep victims informed and take into account their views when considering bail. Police should inform the victims of violence (whether it be family and/or sexual) about the provisions of the *Bail Act* when and if the accused is bailed and the conditions of that bail.

9. Should victims have to request that they be informed about the outcome of bail hearings? Should this information include the details of any bail conditions?

We refer to our answer in question 8 that victims of violence should be informed about bail as a matter of right.

10. Should police be required to inform victims about the outcome of bail hearings? If so, should police have to do this for all cases, or should this only happen for more serious or violent crimes? What (if any) other information or support should victims be given in relation to bail and who should be responsible for delivering it?

We refer to answers in 8 and 9, that this should apply as a *right* in cases involving violence. Youthlaw is pleased to note recent changes to the Victoria Police Manual and the addition of Codes of Conduct relating to the investigation of sexual assault and family violence that provide standards to improve the treatment of crime victims. We maintain that it is the responsibility of police to deliver information and support to victims in relation to bail and other matters. We submit that continued police training around this issue is crucial.

11. Will E-Justice eliminate the problems of LEAP not containing up-to-date information of whether an accused is on bail? If not, are other mechanisms required?

We hope that the introduction of the new system will eliminate problems with LEAP. It will be important to monitor developments as data becomes available.

12. Would it be beneficial for further guidance to be provided to police officers about making bail decisions? For example, would it be desirable to have a clear, plain English guide that sets out the powers police have under the Bail Act 1977 and the appropriate procedures to be adopted in a bail application? Would police benefit from guidelines detailing what sort of matters are relevant to the bail decision?

Yes. Police should be required to pass this information on to an accused and they should be given training around the issue. The presumption in favour of bail within the Act should be strengthened. It should only be denied where there is a risk of absconding or re-offending.

Chapter 4

13. Are the criticisms of the current bail justice system valid? If so:

Our submission is that the bail justice system should be abolished.

We believe that the criticisms outlined in the Consultation Paper are valid and reflect our experience and that of other legal practitioners. We note that Bail Justices overwhelmingly refuse bail (over 80% of applications in the Magistrates Court are refused³). This does not reflect the basis of the law which is that there is a presumption in favour of bail and of innocence.

• Should measures be implemented to ensure that bail justices are more representative of the general community?

If the decision is made to retain bail justices we believe it is essential that they reflect the diversity of the community and that bail justices with specialist knowledge (e.g. youth, homelessness, mental health, substance dependence, cultural background) are appointed. We think it is unlikely to be more representative while appointments remain voluntary, as those attracted to are unlikely to have any specialist knowledge of criminal justice issues that directly impact on a wide range of defendants.

• Should bail justice appointments be of limited tenure? If so, what period is appropriate?

Appointments should be of limited tenure of 3 years with an emphasis of appointing people with specialist knowledge of issues referred to above.

• Is the training that bail justices currently receive sufficient?

We believe that current training for Bail Justices is insufficient especially considering the legal complexity involved and the issues at stake. Training should incorporate specialist issues such as mental health, gender, substance dependence, cultural background and homelessness.

• Should bail justices be required to undertake mandatory refresher courses? Should reappointment be linked to successful completion of ongoing training?

We recommend the introduction of mandatory refresher courses on which the right to reappointment rests. Again, this should include dealing with special interest clients.

• Is there a need for regular communication between the Department of Justice and bail justices?

³ See page 40 of the Consultation Paper

We believe that this would be useful in terms of training and support for Bail Justices.

• Should the provisions in the Magistrates' Court Act concerning the removal of bail justices be repealed and replaced with a simpler model? If so, what sort of model should be implemented?

We support the removal of these provisions. It is our submission that the system of Bail Justices should be removed entirely and that an accused be remanded in custody and brought before a Magistrate on the next court sitting day in the event that bail is refused by police. We reiterate that bail is a matter of right and should be granted unless there is an unacceptable risk.

• Is the draft code of conduct for bail justices adequate? Should there be a sanction, less than removal, for breach of the code?

We support a code that gives guidance to Bail Justices and provides for quality control. However, unless it is backed up by considered appointments and proper training then the Code will be ineffective.

We are particularly concerned about Bail Justices acting as an Independent Third Person with children and then making decisions as to bail.⁴ We submit that this should never be permitted to happen. We note that this is in the draft but submit that it should be backed up by legislation and inserted into Victoria Police Manual.

• Should detailed guidelines be issued to bail justices about how a bail hearing is to be conducted? If so, how should hearings before a bail justice proceed? What status should such guidelines have?

Youthlaw supports the issuing of guidelines to Bail Justices that contain an emphasis on the presumption in favour of bail. Any guidelines that are introduced should be backed up with adequate training.

14. Should the *Bail Act 1977* be amended to prevent bail justices from being able to decide bail in those matters where an accused is charged with a serious indictable offence? If so, should the limitation be restricted to exceptional circumstance offences? Alternatively, is the fact that an accused can apply again before a magistrate a sufficient safeguard?

We do not think that Bail Justices should be able to decide bail for serious indictable offences, including exceptional circumstance offences.

15. Should section 12(1A) of the *Bail Act 1977* be amended so that bail justices can only remand accused to the next sitting date of the court?

Youthlaw strongly endorses this amendment. We consider an accused being remanded for a period longer than the next sitting date of the court to be both a breach of human rights and the rule of law. Currently a Bail Justice can remand someone for up to eight days under s12. This capacity must be removed.

16. Should there be a limitation on the time at which a bail justice is called to a police station? If so, at what time is it appropriate that police no longer call a bail justice but instead detain an accused in custody until a court opens?

Bail Justices should be available after business hours. However, where an accused is remanded in the early hours of the morning they should be brought before a Magistrate *on the same day*. In other words, the first sitting of the court. S129(4)(b) of

⁴ Refer to page 165 of the Consultation Paper

the *Children and Young Persons Act (1989)* provides that a Bail Justice can only remand a child in custody to appear before the Court on the next working day, not up to eight days as in the *Bail Act 1977*.

17. Should the bail justice system be retained? If so, what improvements are needed? If not, the commission is interested in hearing suggestions for an alternative model. What type of system should be instituted in replacement?

We reiterate our position that the bail justice system should not be retained. Our preference is that a Court constituted by a Magistrate should make all bail decisions. We note that Melbourne Magistrates Court is about to commence a two year pilot program of the office of judicial registrar. We also note that in the Children's Court, CAYPINS (Children and Young Persons Infringement Notice System), Registrars are being appointed to make decisions regarding children's outstanding infringement fines.

Should the outcome of the pilot in the Magistrates Court and the CAYPINS system be positive, we believe it would be appropriate to revisit the question of whether Registrars should hear bail matters.

Chapter 5

18. Should the *Bail Act 1977* make specific reference to delay as a factor to be taken into account in determining whether there is an unacceptable risk, exceptional circumstances or whether 'cause' has been shown? If delay is to be taken into account, how should it be incorporated into the *Bail Act 1977*? Should reference be made to specific time periods? Alternatively, should any decision about what level of delay is unacceptable be left to the judge or magistrate?

Youthlaw believes that delay should be a factor to be taken into account in determining 'unacceptable risk', exceptional circumstances, or whether 'cause' has been shown. We do not believe that 'delay' should be defined by a specific time period. We believe that any decision about the length of delay that is unacceptable should be left to a Magistrate.

19. Should the *Bail Act 1977* be amended to allow an accused to be represented at a bail application made shortly after arrest without having to show 'new facts or circumstances' on a subsequent application? If so, what is the most appropriate way to achieve this?

In principle we believe an accused should be entitled to representation at all stages of the bail process, especially at the early stages. This should not prejudice any subsequent applications by the accused and there should be no requirement to show new facts and circumstances. We recognise, however, the need to place some limitations on repeated applications with the same set of facts.

We support the suggestion in the Consultation Paper that representation be allowed when an application is made shortly after a person is remanded in custody, without the requirement to show new facts or circumstances in subsequent applications.

20. Are there problems with the in-person bail application procedure and the new facts or circumstances rule? Is there a problem of the process being abused by accused people making repeat in-person bail applications?

We refer to our answer in Question 19.

There should not be a restriction to an accused making in-person bail applications. We note the Chief Magistrates practice direction⁵ that provides where bail has previously been refused by a Magistrate any further application is, where possible, to be heard by the same Magistrate. We submit that this is an adequate mechanism to manage applications.

21. Should the *Bail Act 1977* contain provisions specifying how to use confessions or admissions volunteered during a bail application that are not elicited through examination or cross-examination? If so, should there be a general rule in favour of admissibility or against admissibility?

We submit that there should be a general rule that confessions or admissions made during a bail application are inadmissible because they are unreliable and made under pressure. This rule should be confirmed in the *Bail Act*.

22. Are the reasons currently being provided by decision makers, where they are required to do so under the *Bail Act 1977*, adequate? Should the *Bail Act 1977* be amended to stipulate that reasons are given in all cases? If so, what is the appropriate method for reasons to be recorded? Should written reasons be required in all cases?

We believe it is essential that reasons be given in all cases and these should be recorded by all decision makers (police, Bail Justices, Magistrates). We accept that there are time pressures faced by decision makers, however, this should not prevent the recording of reasons especially when a person's liberty is at stake. It is imperative that decisions are transparent and accountable and therefore recorded.

23. Should section 18 of the *Bail Act 1977* make specific reference to the right of an accused to make a further application for bail to the Supreme Court? Or, is the present inherent power of the Supreme Court sufficient?

The present power of the Supreme Court is sufficient.

24. In a director's appeal, should the right of an accused to appeal from a decision of a single judge of the Supreme Court to the Full Court of the Supreme Court be retained and incorporated into the *Bail Act 1977*? If so, should a corresponding right for the DPP also be included? Or should the appeal right be removed?

Youthlaw submits that retaining the right of an accused to appeal a decision of a single judge of the Supreme Court to the Full Court is a fundamental right. An accused on bail has not been found guilty of a crime. Diminishing the right of appeal is an infringement of their human rights.

25. Should the *Bail Act 1977* make reference to Commonwealth legislation that has a bearing on the bail decision? If so, how is this best achieved and where should such reference be made?

The *Bail Act* should make reference to Commonwealth legislation. In our experience decision makers often do not have adequate legal training. Reference to legislation that interacts with the *Bail Act*, backed up by adequate training, would facilitate the making of fairer decisions.

⁵ Practice Direction No. 1 of 2004

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

Youthlaw submits that the *Bail Act* should specify the nature of further applications for bail and, since there is a presumption in favour of bail, that this should include a provision that where the director appeals a decision the onus is on them to show an error of law.

27. Are the processes for bail applications to be heard by the Court of Appeal adequate? Are there any difficulties with sections 568(7), 579 and 582 of the *Crimes Act 1958* or Practice Statement No 2 of 1997?

We are unable to comment.

28. Should the *Bail Act 1977* contain a provision that prevents bail being revoked by a court without an application for revocation having been made by the prosecution and no notice having been given to the accused?

We strongly endorse a provision that would prevent the revoking of bail in the circumstances set out above. We reiterate that there is a presumption in favour of bail and of innocence. Its fundamental purpose is to secure the accused's attendance at Court. As such bail should only be revoked where there has been or is likely to be a serious breach of bail or there is an unacceptable risk the accused will not appear at court.

29. Should the *Bail Act 1977* be amended so that bail applications for accused charged with murder and treason can be heard in the Magistrates' Court?

Yes.

30. Should section 18(6) of the *Bail Act 1977* be amended to enable a court to issue a warrant of arrest when an accused's bail is revoked?

No.

31. Is there reluctance by police to arrest an accused without a warrant as provided for under the *Bail Act 1977*? If so, should section 24 of the *Bail Act 1977* be amended so that a warrant can be obtained from a court in the circumstances detailed in that section?

Youthlaw suggests that this is an issue best dealt with through police training and not legislation.

32. Is there a need for greater clarity about where an accused is to be taken following the execution of a warrant for failing to appear? Should the *Bail Act 1977* or the *Magistrates' Court Act 1989* contain a provision that enables a magistrate to endorse a warrant for an accused who has failed to appear in court to require that the accused be brought back before that particular, or another, magistrate?

Youthlaw submits that there should be greater clarity and suggests that minimising delay is the priority. Following the execution of a warrant for failing to appear, an accused should be brought before the closest court.

Magistrates should be prevented from denying re-bail and specifying conditions. This is particularly important in ex-parte hearings where an accused does not get the chance to present a legitimate reason for non-attendance.

We submit that an accused should only be required to appear before a particular Magistrate for good reason. Were the Act(s) to be amended those reasons should be specified. Delay and injustice may result from an accused being required to appear

before the same Magistrate who may not even recall the circumstances of the original matter.

33. What effect has the 2004 amendment to section 16(3) of *Bail Act 1977* had in relation to the extension of bail in an accused's absence? Are there any problems with the 'sufficient cause' test?

In our experience, and that of other legal practitioners, the amendment has resulted in bail being extended more often.

34. Are the views of victims adequately taken into account during bail hearings? (In answering this question, the commission is particularly interested in hearing about the personal experiences of victims.) Should there be a requirement that victims be informed of the fact that their views may be considered in making a bail decision?

The views of victims are usually presented by either the informant or the victim themselves. In our experience they are carefully considered by the court. Victims should be informed of the weight given to their views. We reiterate our answer to Question 8. However, we do not support a requirement that bail be refused where a victim has suffered a life-threatening injury.

Chapter 6

35. Should the *Bail Act* contain a list of broad matters that decision makers should have regard to in deciding whether there are exceptional circumstances or whether cause has been shown?

The use of 'exceptional circumstances' creates ambiguity and diminishes the presumption in favour of bail while adding no tangible safeguards to the community. There should be no delays when liberty is at issue. We note that in the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, the proposed Charter of Human Rights and in the English Law Commission's Report 'Bail and the Human Rights Act', no distinction is made between types of offences. We consider the 'exceptional circumstances' and 'show cause provisions' to be inconsistent with human rights.

People charged with reverse onus offences face greater penalties, the legal arguments are more complex, and it is likely to take a much longer time to be resolved. People going through this process while in custody are at a disadvantage as they have reduced access to their legal representatives and a reduced capacity to prepare their defence.

Youthlaw submits that 'unacceptable risk' should be the test for all offences and that this should be backed up a list of factors a court should consider. This list could include, but not be limited to, the strength of the prosecution case, the likely penalty, personal circumstances of the accused and the risk of re-offending or absconding.

36. Should there be more reverse onus offences in the *Bail Act*? If so, on what basis should offences that attract a reverse onus be chosen? Are the current offences that attract a reverse onus appropriate?

Youthlaw is strongly opposed to more reverse onus offences being inserted into the *Bail Act* and considers the current reverse onus provisions to be unjust. We do not consider the length of a *potential* penalty to be any indication of the risk of breach of bail.

37. Should the *Bail Act 1977* be amended so that the offences of attempting to and conspiring to commit an offence contrary to section 233B(1) of the *Customs Act 1901* (Cth) continue to attract the appropriate reverse onus test? If so, do you agree with the amendments as proposed by the Commonwealth Director of Public Prosecutions? Should the *Bail Act 1977* be amended to ensure that a person in charge of a ship or aircraft who intentionally allows the ship or aircraft to be used for smuggling, importation, exportation or conveyancing of narcotic goods falls within the appropriate reverse onus category?

We reiterate that Youthlaw is strongly opposed to the reverse onus provisions and this objection applies to both commonwealth and state offences. In the event that reverse onus continues to apply it should refer to Commonwealth offences as well.

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

Youthlaw submits that the current reverse onus offences should be removed from the *Bail Act*. We refer to our answers to questions 35 and 36.

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

We support a simplification of the Act as long as no new offences are introduced to the reverse onus provisions.

40. Should the *Bail Act* be amended so that there is only one reverse onus category? If so, what test should apply and how should the offences currently in the reverse onus categories be allocated?

We refer to our answers to questions 35 and 36. We submit that 'exceptional circumstances' is unclear.

41. Should the *Bail Act 1977* continue to have a presumption against bail for any offence? Are there other arguments for and against the retention of the presumption against bail?

We submit that the presumption should be that everyone gets bail unless they meet the "unacceptable risk" test, irrespective of the offence.

Chapter 7

42. Should magistrates and judges play a greater role in assessing the suitability of a proposed surety? If so, how could this be achieved? Should it be done in every case or only in those matters involving allegations of serious criminal offending?

Youthlaw considers the procedures to be adequate. Magistrates should play a greater role in assessing the suitability of a surety where decision makers have a concern about it.

43. Should there be a requirement in the *Bail Act 1977* that the details of a prospective surety, such as name, date of birth and address, be given to the prosecution prior to a bail application for the purposes of a criminal history check?

We do not object.

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

Youthlaw supports retaining the option of a deposit as a condition of bail and believe that this option should be more widely available. We submit that a surety or deposit should only be used to ensure the accused will attend Court when required and not as a mechanism to refuse bail. We understand that deposits are sometimes used where an accused obviously can't meet the condition. If an option is given then court should be required to give reasons.

45. Should the *Bail Act 1977* contain a provision similar to section 21(8) of the *Bail Act 1980 (Qld)* so that greater consideration is given to the surety's complete financial position? Should the *Bail Act 1977* direct decision makers to set a surety amount that is proportionate to a surety's overall financial situation?

Youthlaw endorses a provision that provides for greater consideration of the surety's overall financial position. The amount of the surety should reflect the financial circumstances of the person providing it.

46. Should section 9(3)(a)(ii) of the *Bail Act 1977* continue to provide for the use of passbooks and withdrawal authorities as a means of security for a surety? Or, should this provision be repealed?

We consider this section to be outdated and do not object to it being repealed.

47. Are sureties given sufficient information concerning the nature of their obligations? Should there be guidelines detailing what information a court official should impart to a surety?

We do not believe sureties are provided with a sufficient explanation of their obligations. We support the drafting of plain English guidelines that are explained to the surety by a court official. Interpreters should be available and the guidelines reproduced in languages other than English.

48. Should section 21 of the *Bail Act 1977* be repealed? Alternatively, should section 21 of the *Bail Act 1977* be amended to follow a process similar to the Western Australian model?

We endorse repealing s21.

49. Should the *Bail Act* be amended to provide that a surety need not attend court on the date of a proposed bail variation but instead lodge an affidavit of consent with the court on a prior date?

Yes.

50. Should the *Bail Act 1977* contain provisions governing the procedure involved in forfeiting a surety's security as presently contained in the *Crown Proceedings Act 1958*?

We support this proposal.

51. Should section 6 of the *Crown Proceedings Act 1958* be amended so that bail is not automatically forfeited by a court upon being satisfied that there has been a breach of a bail condition? Should bail only be forfeited when an accused has failed to appear in court?

Bail should only be forfeited by order of the court when an accused has failed to appear. A surety should have the right to apply for variation or withdrawal of the forfeiture order.

Chapter 8

52. Should the *Bail Act 1977* specifically refer to the use of special bail conditions as a means of utilising support services? Is the suggestion of amending section 5(2) of the *Bail Act*, so that a decision maker can consider using a special condition to ensure that an accused seeks rehabilitation, treatment or support, an appropriate method?

We do not think that s5(2) should be amended to the use of bail conditions as a means of utilising support services. We support a decision maker making referrals to rehabilitation and support programs where such a referral strengthens the presumption in favour of bail, that is by reducing the "risk". It may also be helpful for an individual in dealing with their substance abuse issues. Our experience and that of other legal practitioners is that forcing an accused into involuntary rehabilitation sets them up to fail.

53. Are special conditions that direct an accused to refrain from taking certain drugs, without establishing accompanying support structures, an appropriate use of the bail system?

We do not believe that it is an appropriate use of bail to direct an accused not to take drugs. Bail is designed to support the presumption of innocence, protect the community, and ensure that people return to court. It is not intended as a mechanism for reform, treatment, or punishment. The court should consider the "risk" and whether it is acceptable or capable of being made acceptable by reliance on support services.

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

In our experience this condition has a particularly harsh impact on young people and we consider it to be inappropriate and punitive. Conditions that restrict a young person's access to transport can also restrict their access to crucial support services and rehabilitation programs.

55. Are the bail conditions imposed on Indigenous accused adequately taking into account cultural and socioeconomic differences? Are excessive financial conditions being imposed on Indigenous accused within Victoria?

We refer to Victorian Aboriginal Legal Service (VALS) submission.

56. Should a specialist forum based on circle sentencing be convened in Victorian courts to deal with the imposition of bail conditions on Indigenous accused? Are there any difficulties with this initiative? Are there any other ways to achieve the involvement of an Indigenous accused's family and community members in ensuring compliance with bail conditions?

We refer to VALS submission.

57. Should police within Victoria be able to issue bail at a place other than a police station? Are there any potential problems with the imposition of such a procedure?

We submit that there should be a presumption to proceed by summons and refer to our answer in Question 3. We are concerned that the issuing of on-the-spot bail will lead to the overuse of bail as opposed to summons.

58. Should there be a process for minor, by-consent, defence-initiated bail variations without the requirement of a court hearing? If so, do you have any suggestions about how such a process could be formalised?

Youthlaw supports a process for defence-initiated bail variations without the requirement of a court hearing for minor matters. We believe that this would be extremely positive for people who are typically alienated by the legal system such as young people, drug users, and homeless people. We recognise that the types of minor matters would necessarily be limited. We submit that it should include varying which police station an accused is required to report to.

59. Is the practice of a court bailing or remanding an accused 'to a date to be fixed' a problem? If so, what, if any, problems could arise if judges were unable to bail or remand an accused to a date to be fixed?

Youthlaw considers that remand to "a date to be fixed" is too broad. It is in the interests of justice that an accused know the date on which they are required to attend court as this is the essential purpose of bail in the first place. We recognise, however, that delays occur and it is not always possible to fix a date. Youthlaw suggests that a date for bail should be fixed and in the event that the court hearing is not ready to proceed an automatic extension should be granted, unless the prosecution opposes bail.

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

Youthlaw has no problems to report.

61. Should breaching a bail condition be a criminal offence? Should this relate to all bail conditions or just certain conditions? If it is only to apply to certain bail conditions, which conditions should the breach offence apply to?

Youthlaw is strongly opposed to making breach of a bail condition a criminal offence. We consider it is adequate that the prosecution can apply to revoke or vary bail.

Chapter 9

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

It is Youthlaw's experience that police are not using their powers of arrest appropriately. For example, children charged with minor offences as shoplifting are regularly proceeded against by way of charge and bail with excessive exclusion conditions and a curfew. It is noted that in the consultation paper, Melbourne Children's Court magistrates are reported as expressing the view that police were using their powers of arrest appropriately. With respect to those magistrates, they rarely need to consider the issue of how the matter is brought before their court unless they are dealing with a charge of failing to appear, or the matter is being adjourned and some issue concerning bail is raised.

The *Children and Young Persons Act* directs that a child is to be proceeded against by summons except in exceptional circumstances (see S128(1)). A similar requirement is not found in the *Bail Act*. Any review of the *Bail Act* should consider an amendment on this point so as to bring the *Bail Act* into alignment with the *Children and Young Persons Act*. Such an amendment, together with police training on the issue and in particular on the meaning of "exceptional circumstances", may rectify the situation with respect to Indigenous children and children generally.

We refer also to VALS submission.

63. What more could be done to encourage greater utilisation of supervised bail support programs for children and young people when they are being bailed by police and bail justices?

This question presupposes that there are supervised bail support programs for children. It is the experience of the Youthlaw that such programs are actually few and far between, unless the child has his/her own funds to access private support services. Furthermore, and with respect to those private support services which do exist, it is our experience that these services are often unwilling to accept children on bail or to agree to notify the police of any breach of bail. In so far as Juvenile Justice programs are concerned, we note that whilst on some rare occasions some JJ workers will provide bail support on an unofficial basis to old clients, there is no mandate to provide such assistance except and until the child has been found guilty by the court and then bailed on a deferral of sentence. So the reality is that these Juvenile Justice services are really more pre-sentence supports rather than bail supports per se. We note the comment in the consultation paper that CAHABPS may be relied upon by the police in terms of their knowledge of available services. We are unaware of any occasion where such a transfer of knowledge has resulted in a child being released on bail by police or a bail justice. We also note the comment that DHS may be able to assist with services for their clients, particularly with respect to locating accommodation. It is our experience however that often DHS are unable to confirm that accommodation is available for their clients until after the child has been bailed, which does not assist the police or Bail Justice in the making of bail decision. The creation, funding and dissemination of information about such services is the only way this situation can be rectified.

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

Our experience is that decision makers often impose inappropriate special conditions on children and often a number of such conditions. We would concur with the concerns raised in the Consultation Paper regarding the imposition of excessive geographical conditions, curfews and residential conditions, and the problems these conditions can create for our clients. Given the difficulties and lack of support faced by many of our young clients, we would argue for a provision in the *Bail Act* which provided that in the case of young offenders, the number of conditions imposed should be kept to a minimum, and should only be directed to what is necessary to achieve the object of bail (namely the attendance of the defendant at court and the minimization of the risk of re-offending). Such a provision should lead to a reduction in breaches of bail, which are not related to re-offending.

We also note that S129(7) *Children and Young Persons Act* expressly provides that a child should not be refused bail solely on the ground that he does not have any or any adequate accommodation. This not to be found in the *Bail Act* and we would support an amendment to that Act to have it so incorporated. We are also concerned with the dichotomy that section creates with the imposition of residential conditions generally.

65. Should sub-section 129(8) of the *Children and Young Persons Act 1989* be amended so that an undertaking may be imposed on a child's parents or some other person in circumstances where the child has the capacity or understanding to enter into a bail undertaking? If so, should any amendment make reference to specific matters that a decision maker must consider when thinking of requiring an undertaking to be entered by a parent or another person?

We do not support an amendment to S129(8) *Children and Young Persons Act* in the terms indicated, and note that it is rare for a court, a bail justice or the police to release a child on bail even in the current circumstances provided for by S129(8). We do not believe that an extension of the operation of this section in the way contemplated by this question would operate to assist our clients, and in fact agree with the concerns raised in the general discussion of this matter in the Consultation Paper.

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

We support an amendment to the *Bail Act* that would make it possible for decision-makers to remand young people to youth training centres. Indeed we say that decision makers should be required to do so, unless the young person is assessed as unsuitable for YTC. In those cases where young people are assessed as unsuitable, decision makers should still be able to order young people to be remanded in YTC when it is considered appropriate despite the negative assessment of suitability to YTC. We submit that such an amendment should also impose upon a decision-maker a duty to provide reasons if the decision was not to so remand a young person. Such a requirement would assist in any appeal process with the identification of the existence or otherwise of such circumstances.

67. Do sections 49 of the *Magistrates' Court Act 1989* and 5A of the *Bail Act 1977* operate effectively? What concerns, if any, are there with these sections?

We believe that s49 *Magistrates Court Act* and s5A *Bail Act* in combination do not operate effectively to cover the relevant situations, and agree with the concerns that have been raised in the Consultation Paper. In fact if an amendment to the *Bail Act* was made in the terms suggested above in the discussion of Question 66, we do not believe the problems created by the complexity of the relationship between s49 *Magistrates Court Act* and s5 *Bail Act* would continue to operate.

68. Should the *Bail Act 1977* contain a provision similar to section 139 of the *Children and Young Persons Act 1989* so that child-specific factors must be considered when making the bail decision? If so, what matters should a decision maker be required to consider when dealing with a child? Should the provisions of the *Children and Young Persons Act 1989* as they apply to bail be moved to the *Bail Act 1977*?

Youthlaw believes that the *Bail Act* should contain a provision similar to s139 *Children and Young Persons Act* (CYPA), so that child specific factors must be considered when making a bail decision. We also agree that the provisions of the CYPA as they apply to bail should be moved to the *Bail Act* (and have made specific note of some of those provisions in our consideration of Questions 62 and 64).

Furthermore, because of the different sentencing criteria that apply to children (in particular where the prospect for a sentence of incarceration is considerably reduced) we would argue for the introduction to the *Bail Act* of a specific provision in relation to children which required a decision maker, on the question of bail, to grant bail where it is unlikely that a sentence of incarceration would be imposed after a finding of guilt. Such a provision would deal with the dilemma often faced by practitioners in the jurisdiction where there is a pressure to plead a client up when they are in, for example a “show cause” situation, rather than to make a bail application because of the difficulties in showing cause, notwithstanding the fact that the client is not facing a YTC sentence.

Chapter 10

69. Should the *Bail Act 1977* specifically require a person's status as primary carer to be taken into account when deciding whether to grant bail?

Yes the *Bail Act 1977* should require a decision maker to take into account a person's status as primary carer when deciding whether to grant bail. Further, Youthlaw believes that when a primary caregiver is remanded in custody the remand centre should accommodate the dependent child/ren in a family unit where appropriate or at least have it as an available option. Naturally the court must assess the viability and appropriateness of this option in each case. Youthlaw recommends that there should be a presumption to keep the family, including extended family together, wherever possible. If children are to be placed in a remand centre then the facilities must be properly designed to meet the child/ren's various needs.

70. Should police be required to find out if the person they are arresting has dependent children? Should the police be required to make arrangements for the dependent children of people they arrest? What processes, if any, should be put in place to protect the dependent children of people when they are arrested and charged with an offence?

Youthlaw believes that police should be required to find out if the person they are arresting has dependent children and, further, they should be required to make proper arrangements for the dependants where the person arrested is inhibited or unable to do from doing so. Youthlaw's concern is that some police simply refer to Child Protection, Department of Human Services which only adds to the stress of the accused and the dependent children.

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

We refer to our earlier suggestion that any accommodation provided for women should also be equipped to accommodate children. We also suggest that the Commission should consult with appropriate stakeholders on this point.

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

We support Victoria Legal Aid's submission on this point.

73. Do community-based programs for accused on bail who have drug dependency problems assist in rehabilitation and help minimise future contact with the criminal justice system? Are there any problems with such community-based programs? How should the success of community-based bail support drug programs be measured? What features of such programs make them likely to be successful?

Youthlaw's experience is that young people require intensive support of the scale offered by community based programs that are utilised in the juvenile justice system. The major problem with existing adult community support programs, apart from the fact that there are a lack of available services and resources, is that they do not work effectively with young people who generally require intensive ongoing support. This is particularly the case with at risk and homeless, substance dependent and cognitively

impaired young people. Unless the Government is prepared to inject appropriate funding to such support services, young people will continue to be inadequately supported in the criminal justice system.

74. Should the *Bail Act 1977* expressly state that lack of accommodation should not be a factor in refusing bail in the same way that section 129(7) of the *Children and Young Persons Act 1989* does? Are the accommodation needs of homeless offenders being met adequately? If not, what kind of accommodation should be made available? Should support be provided with the accommodation?

Youthlaw supports the inclusion of a provision in the *Bail Act 1977* stating that lack of accommodation should not be a factor in refusing bail in the same way that s129(7) of the *CYPA 1989* does.

Youthlaw is located at Frontyard Youth Services which is a collection of services that work together to address the physical, emotional and social needs of young people aged up to 25 years who spend time in the Melbourne CBD and who are homeless and at risk. A high proportion of our clients are homeless, itinerant and at risk. Youthlaw's experience is that homelessness is a major factor in the refusal of bail in the Magistrate's court. We are also concerned that some of our clients are forced to accept unsuitable accommodation in order to avoid being remanded in custody as there are inadequate accommodation places for young people. Youthlaw maintains that there should be appropriate accommodation with support services for all homeless people in particular the young and vulnerable.

Youthlaw's clients also have the added problem of most emergency accommodation being available only for short periods with the consequence of young people being required to go back to court and apply to vary the condition of their bail to reside at a particular address.

75. Should specialised support be available to an accused with cognitive impairment at bail hearings—both court hearings and after-hours hearings? Could Independent Third Persons fulfil this role with further training? Would training bail justices in disability issues be an appropriate alternative? Is there a need for a new role to be created?

Youthlaw supports the provision of properly funded specialised support services being available to accused people with cognitive impairment/disabilities at all bail hearings. We support Victoria Legal Aid's submission that there are a lack of adequate supports currently to meet the needs of these accused.

Youthlaw also has concerns about the use of Independent Third Persons and the lack of adequate training they receive in ensuring that they are able to fulfil their role as advocates and supports for accused persons. We also submit that there should be specialised training for all police, bail justices and magistrates. We support the Mental Health Legal Centre's submission in relation to people with cognitive impairment.

76. Should police be given specific training to assist them to identify a person with a mental illness or intellectual disability? Should they be given guidance on how to interview a person with an intellectual disability or mental illness? Should the *Bail Act 1977* include a section similar to the provision in the *New South Wales Bail Act 1978* requiring decision makers to consider the capacity of the accused person to understand bail conditions before imposing any?

Yes the police should be given specific training and ongoing training to enable them to identify people suffering from mental or intellectual disability. Youthlaw supports the inclusion of a section similar to the one in NSW requiring decision makers to consider the capacity of accused persons to understand bail conditions before imposing any. Further we say that police should release unconditionally any person with a mental or intellectual disability who does not understand the requirements of bail like in the Queensland *Bail Act 1980*.

77. Do the Client Service Officer and Aboriginal Community Justice Panel programs provide an effective service to clients who are in police custody and face the prospect of a bail hearing? If not, what specific problems are there with these services and the bail system? Is there any conflict between the roles of members of the Aboriginal Community Justice Panel and Aboriginal Bail Justices?

We refer to VALS submission and support their concerns.

78. Are there sufficient support services for Indigenous accused who come into contact with the bail system, especially in regional Victoria? Are there sufficient accommodation options for Indigenous accused on bail?

We refer to VALS submission and support their concerns.

Chapter 11

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

The definition should be amended to refer specifically to police, registrars, bail justices and courts (ie Magistrate's).

80. Should section 12(1) of the *Bail Act 1977* continue to make reference to a warrant of commitment? Would removing the reference to a warrant of commitment cause any problems?

Youthlaw supports removing references to 'warrants of commitment'.

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

The term 'remand' should only be used in relation to 'remand in custody'.

82. Should the reference to 'telegram' and 'cablegrams' in section 30(3) of the *Bail Act 1977* and in the Undertaking of Bail for Appearance at Trial form be deleted?

Youthlaw supports the removal of references to 'telegram' and 'cablegram'.

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

Yes the term 'guarantor' would be more appropriate.

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

Youthlaw maintains that the whole Act should be re-written in plain English.

85. Should the forms contained in the Bail Regulations 2003 be rewritten in plain English? If so, do you have any suggestions about how the forms should be rewritten and what they should contain? Should the forms of undertaking contain the contact details of a person that accused people can contact if they are unable to attend court?

Youthlaw supports re-writing all forms in plain English with minimal information such as the court date and type of hearing.

86. Should section 4(2)(b) of the *Bail Act 1977* be repealed? Are there any other sections of the *Bail Act 1977* that are no longer of any relevance and should be repealed?

Youthlaw supports repealing s.4(2)(b)