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Submission to the Honourable Paul Coghlan QC on Bail Review

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About us

Victorian Women Lawyers (VWL) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has over 800 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community. VWL has undertaken research into work practices affecting women in the legal profession and provides protocols and training to effect positive change.

Since 1996, VWL has advocated for the equal representation of women and promoted the understanding and support of women's legal and human rights by identifying, highlighting and eradicating discrimination against women in the law and in the legal system, and achieving justice and equality for all women.

Details of our publications and submissions are available at www.vwl.asn.au under the 'Publications' tab.

Terms of Reference

On 23 January 2017, the Victorian government announced the initiation of a comprehensive review into the State's bail system, to be conducted by former Supreme Court Justice the Honourable Paul Coghlan QC. The government called for submissions in relation to this topic with particular reference to:

1. How the necessary balance between protection of the community and the presumption of innocence should be best reflected in section 4 of the Bail Act 1977;
2. The appropriateness of the current tests of exceptional circumstances, show cause and unacceptable risk, and an examination of the offences to which those tests apply;
3. Whether additional offences should be added to the list of offences which place an accused person into the show cause or exceptional circumstances categories;
4. The way in which other relevant circumstances (for example, a history of prior offending or offences committed while on bail), are considered in assessing whether an accused person should be granted bail;
5. Whether information available for consideration by decision-makers in the bail system is sufficient to properly consider and assess the risks that are posed by accused persons, including those with complex risks, needs and case histories;
6. The conduct of bail applications out of hours including the role of Bail Justices; and



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7. Whether, in relation to out of hours applications, different rules are required for different types of offences.

Introduction

VWL welcomes the opportunity to make submissions to the Victorian Government Bail Review and supports government efforts to address the limitations posed by the current bail system.

VWL's focus is on legislative and practical reforms to manage risk and maximise community safety. More specifically, VWL is concerned with women in Victoria and their experience as offenders and victims who come into contact with the Victorian bail system.

Over the past decade, the female incarceration rate has climbed whilst the crime rate over the same period dropped 1.6 per cent.¹ The key reasons for this climb are sentencing practices and tough law and order reforms.² These law and order reforms have significantly affected women, who rarely commit serious violent crimes, and would previously be more likely to receive home detention or a suspended sentence as a consequence of generally lower level offences.³

Further, VWL is concerned with the prevalence of domestic and family violence. Women are disproportionately affected by domestic violence with estimates that over 77% of victims are female.⁴ One in four Australian women have experienced at least one incident of violence from an intimate partner since the age of 15.⁵ In Victoria, over 74,000 family incidences are reported each year with women more likely to be the victims of violence perpetrated by an intimate partner inside the home.⁶ As a result, women as victims are affected by the Victorian bail system.

VWL's submission will comment on Bail Review Terms of Reference items 1, 5, 6, and 7.

¹ G McColl, 'Victoria female prison rates soar – but are women in jail for crimes they didn't do?' The Age Victoria, accessed 24 February 2017, <<http://www.theage.com.au/victoria/victoria-female-prison-rates-soar--but-are-women-in-jail-for-crimes-they-didnt-do-20150531-ghdeme.html>>.

² Ibid.

³ Above n 1.

⁴ ANROWS, 'Violence against Women report; Additional Analysis of the Australian Bureau of Statistics Personal Safety Survey, 2012', Issue 1, 2015, accessed 24 February 2017, <<http://media.aomx.com/anrows.org.au/s3fs-public/151022%20Horizons%201.1%20PSS.pdf>>.

⁵ Ibid.

⁶ Australian Bureau of Statistics, 'Australian Bureau of Statistics (2013) Personal Safety, Australia 2012, Cat. No. 4906.0', Australian Bureau of Statistics (ABS), Canberra.



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The current bail system

VWL comments that limitations within the current bail system include:

i. TeleCourt appearances

All Victorian prisons have teleconferencing or TeleCourt facilities that enable prisoners to remain in custody for court appearances.⁷ These facilities are useful tools to enable prisoners to make an appearance in court. However, there are obvious limitations to TeleCourt. Duty lawyers in particular have difficulty calling through before the court appearance to receive instructions from their clients. This usually results in the accused spending longer periods in custody as their lawyer requires more time collating the bail application. As a result, the criminal justice system faces difficulty in ensuring female prisoners attend court on remand.

ii. Overburdened Courts

Bail programs are overburdened. VWL members have commented that some courts commonly have month-long wait lists. This administrative problem results in women spending more time on remand than necessary.

VWL also notes that many regional court cells do not have capacity to house both a female and a child at the same time. For instance, this is a regular problem at the Broadmeadows Magistrate's Court. This lack of capacity can result in the accused not appearing before the court that day.

iii. Mental health, Homelessness & Drug Rehabilitation

Whilst the above two comments provide examples of practical problems in the current bail system, the third issue touches on a more systemic problem facing Victorian society; mental health, homelessness, and drug addiction/trafficking.

Those who are homeless struggle to secure bail for reasons as simple as not having a home address. Homelessness is often consequence faced by women who are affected by domestic violence.⁸ Additionally, homelessness can exacerbate and/or contribute to mental health issues.⁹

Those people with drug dependencies can be ordered to attend public detox facilities. However, these facilities are overburdened with long wait lists. This in turn effects their ability to secure bail.

More generally, there is a need for improved mental health services within Victoria so that courts apply a therapeutic approach in bail practice.

⁷ This process is commonly used for women in the Dame Phyllis Frost Centre.

⁸ Australian Institute of Health and Welfare (AIHW), 'Specialist Homeless Services Data Collection March Quarter' Cat. no. HOU 265, 2012.

⁹ S Murray, 'Somewhere Safe to Call Home: Violence Against Women During Homelessness', RMIT University, 2009.



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1. How should the necessary balance between protection of the community and the presumption of innocence be best reflected in section 4 of the Bail Act 1977?

VWL submits that any possible amendment to Section 4 of the *Bail Act 1977* (Vic) (Act), should give primacy to the presumption of innocence. This fundamental right should only be impinged in extremely limited circumstances.

Section 4 of the Act presently provides that bail shall be refused in certain circumstances, including:

1. where a person is charged with murder or treason;
2. if there is an unacceptable risk that the accused, if released on bail would fail to surrender himself into custody in answer to his bail;
3. commit an offence whilst on bail;
4. endanger the safety or welfare of members of the public; or
5. interfere with witnesses; or
6. otherwise obstruct the course of justice whether in relation to himself or any other person.

Existing legislation has departed from giving primacy to the presumption of innocence, and instead places emphasis on the possible threat posed by the offender. VWL considers that remand should largely be restricted to circumstances where the alleged offender is likely to intervene with the administration of justice or due process prior to trial. The law only recognises discrete circumstances where an individual will be deprived of their liberty, solely because they are considered "likely" to commit a crime.¹⁰ Bail laws currently provide for particular controls and restraints to be placed on people to mitigate the risk posed to the community, such as reporting requirements. VWL considers that these mechanisms, subject to a case by case basis, are a more appropriate mechanism to deal with alleged offenders, instead of placing them in remand.

The catalyst for reviews into the bail laws are often born out of a high-profile attack perpetrated by an individual on bail, for example Mr Dimitriou Gargasoulas and Mr Man Haron Manis. Without delving into the specifics of their offending, and conscious that Mr Gargasoulas has yet to face trial, it is apparent that both these individuals were well known to the police, prior to their engagement with the bail system.

i. Current Statistics

More than 40% of remandees will be incarcerated for a period of more than 9 months.¹¹ Notwithstanding the prolonged period of incarceration, a majority of

¹⁰ P Shrestha, 'Two Steps Back: The Presumption of Innocence and Changes to the Bail Act 2013 (NSW)' *Sydney Law Review*, Vol 37:147, 152.

¹¹ Victorian Ombudsman, 'Investigation into the rehabilitation and reintegration of prisoners in Victoria September 2015', session 2014-15, P.P No 94, 142 – 143.



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remandees are released without conviction.¹² Even though there appears to be no apparent connection between remand and a finding of guilt, the consequences of remand can be debilitating, particularly for female remandees. Female remandees are less likely to have access to education, training and social programs after their release, and are more likely to reoffend.¹³

ii. *Recommendation*

Although Mr Gargasoulas' and Mr Haron Manis' offending may have occurred whilst they were on bail, it would be overly simplistic to explain their conduct as a direct consequence of the current remand process.

A more holistic approach is needed to determine how the justice system can effectively intervene to mitigate the risk posed by certain offenders. Remand is a tool to be used in limited circumstances and to address particular and discrete concerns. It is not a panacea to redress any deficiencies plaguing the justice system. VWL remains concerned that a reactionary approach to bail reform will not only undermine fundamental rights, but is unlikely to yield any significant outcomes in terms of community safety.

5. Is information available for consideration by decision-makers in the bail system sufficient to properly consider and assess the risks that are posed by accused persons, including those with complex risks, needs and case histories?

Bail may be granted by a court, a bail justice or a police officer.

i. *Courts*

The Act requires decision makers to take into account a range of factors, often requiring an detailed assessment of the person's case, life and background. For example, section 4(3) of the Act provides that when considering whether there is an "unacceptable risk" that an offender will breach bail, endanger the welfare of the public or commit an offence while on bail, the court is required to consider factors including:

- I. the nature and seriousness of the offence;
- II. the character, antecedents, associations, home environment and background of the accused;
- III. the history of any previous grants of bail to the accused; and
- IV. the strength of the evidence against the accused.

A court can refuse bail if satisfied, pursuant to section 4(2)(d)(iii) of the Act:

¹² Ibid, 144.

¹³ Monash University Criminal Justice Research Consortium for Corrections Victoria, 'Women exiting prison in Victoria', Department of Justice & Regulation, Corrections Victoria, 2016.



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“that it has not been practicable to obtain sufficient information for the purpose of deciding any question referred to in this subsection for want of time since the institution of the proceedings against him”.

Courts take a range of factors into account during bail decisions. Where a bail application is being made to a court, the accused has access to legal representation, which means that it is likely the above factors will be raised and considered.

ii. *Bail Justices*

“Bail justices operate in an environment that is very different from a court. They are often making decisions out-of-hours very soon after the accused person has been arrested with limited information. During the application, the bail justice will hear from both the accused and the police. Given the circumstances of the hearing, it is very unlikely that a bail justice will have access to a full account of the facts of the case.”¹⁴

Where a bail application is heard by a bail justice, the accused will generally not have legal assistance as this generally takes place out of hours.¹⁵

For any bail decision it is vital that the police can access and provide timely information regarding prior offence history and the particular offence in question. The Victorian Law Reform Commission released a submission emphasising the importance of upgrading the Law Enforcement Assistance Program (LEAP), and the development of E-Justice to ensure this information is available.¹⁶

iii. *Recommendations*

It is important that decision makers have appropriate levels of information, not only to protect the community from offenders who may pose a risk to others, but also to protect the presumption of innocence.

Relevant information for decision makers may indicate particular reasons why an individual should be granted bail. These factors can include family responsibilities, mental health issues which could be exacerbated by detention, financial hardship, the health of applicant and dependants, and the need for drug rehabilitation. These factors are particularly important for female bail applicants, with female prisoners more likely to suffer from mental illness than male prisoners.¹⁷ Furthermore, a

¹⁴ Law Institute of Victoria, 'Review of Bail Laws – 'Is the Bail Justice provided with the full facts of the case from the prosecutor, the police and the defence council?', accessed 24 February 2017 <https://www.liv.asn.au/Professional-Practice/Bail-Laws>.

¹⁵ Ibid.

¹⁶ Victorian Law Reform Commission, 'Bail – Recommendations', 2007, accessed 26 February 2017 <http://www.lawreform.vic.gov.au/projects/bail/bail-recommendations>.

¹⁷ Women's Health Victoria, 'Women and Corrections - Gender Impact Assessment No. 3', August 2008, 4.



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decision in a bail application may impact the return of children to their mother's custody.

VWL considers it is also important that bail decisions are made without delay where possible. The legal system is built on a presumption of innocence; a system which encourages speedy bail decisions is an important aspect of this principle. Should the system require decision makers to access more information, this may result in longer waiting times before bail applications can be decided, or more bail applications being refused on the basis of limited information. This could result in jail overcrowding and negative consequences for the accused. Depending on the nature of the alleged offence, it may not be appropriate to increase decision making time to allow for more information to be gathered and considered. Again, this is of great importance to female bail applicants, given that "most female offences relate to theft or minor assault", rather than violent crimes.¹⁸ Should decision makers be required to access and take more information into account even in the context of relatively minor offences, this has the potential to place unnecessary hardship on low-risk offenders.

- 6. Do you have any comments on the conduct of bail applications out of hours including the role of Bail Justices?; and**
- 7. In relation to out of hours applications, are different rules required for different types of offences?**

The Victorian government should review the current out-of-hours bail applications and the role of Bail Justices. Such a review should address mechanisms to manage the risk posed by perpetrators of domestic violence to the community if released on bail.

i. Domestic & Family Violence Statistics

Data from the Australian Institute of Criminology suggests the largest proportion of homicides (including those stemming from domestic violence) occur between 6pm and midnight, and second, between midnight and 6am.¹⁹ There appears to be a direct connection between serious incidences of domestic violence and out-of-hours crime.

ii. Decision making for Bail Applications

Prison overcrowding is a reason that bail decision makers feel pressure to grant bail. The Victorian government needs to ensure sufficient space in prisons to remove this factor from the decision making process.

Whether Magistrates or Bail Justices, decision makers must be in a reasonable position to determine whether risk can be managed by bail conditions. In particular,

¹⁸ Above n 1.

¹⁹ Willow Bryant and Tracy Cussen, 'Domestic/family homicide in Australia: Research in Practice', Australian Institute of Criminology, No. 38, 2015.



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out-of-hours bail decision makers should be provided with access to databases of information and receive specific training. This would ensure that crime data is widely available for all decision makers, including whether any prior intervention orders have been made and breached. Specialist training can assist in identifying the need for supervision and treatment of high-risk offenders. It may be necessary for decision makers to be granted additional powers for controlling high-risk offenders.

iii. Recommendations

VWL advocates for the creation and trial of a specialist domestic and family violence Court. This would be informed by experts in the field to tackle preconceptions regarding family violence. Following the murder of Theresa Bradford by a husband released on bail in Queensland, the Queensland Government is trialling a specialist Court in the Southport Magistrates' Court. In the Bradford case, Theresa was unaware her husband had received bail. It is imperative that any changes to bail requirements in Australia also make sure to inform victims of domestic violence if the perpetrator meets the requirements for bail. For example, DV Connect Chief Executive, Diane Mangan has said that clear warning signs such as strangulation are the number one indicator of domestic homicide risk.²⁰

VWL supports an approach similar to that undertaken in the Review of post-sentence supervision scheme for serious sex offenders (**Harper Review**) where new models to assess and manage those on bail were developed for early intervention.²¹

The Magistrate's night Court established after the January Bourke Street attack currently closes at 9pm. VWL submits that this Court should be trialled at key times identified from police data regarding domestic violence incidents.

Further, VWL emphasises the necessity of notifying the victim/protected person about bail conditions, so that the police may be informed if the perpetrator breaches court imposed conditions.

Conclusion

In a "tough on crime" political and legal climate²², women as offenders and victims are gravely at risk and the refusal of bail affects the most disadvantaged in our community. VWL suggests that initiatives and funding for drug rehabilitation and mental health services are required as a first priority to address this systemic problem in our justice system. This in turn will strengthen the practical recommendations listed above, including a specialist domestic and family violence Court and improved availability of data for decision makers, to deliver a lasting improvement for our community.

²⁰ ABC News, 'Pimpama deaths: Government may tighten bail laws in domestic violence cases, Premier says' 1 February 2017, accessed 20 February 2017: <http://www.abc.net.au/news/2017-02-01/pimpama-deaths-qlld-government-may-tighten-bail-laws-in-dv-cases/8229182>.

²¹Complex Adult Victim Sex Offender Management Review Panel, 'Advice on the legislative and governance models under the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)', Department of Justice and Regulation, 2015.

²² E Russell, C Gledhill, 'A prison is not a home: Toubling 'Therapeutic Remand' for Criminalised Women', Parity, Vol. 27, No. 9, Oct 2014, 27-28, 27.



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A handwritten signature in black ink, appearing to read 'Jasmina Davis', with a large, stylized flourish at the end.

Bianca Quan

Convenor, Victorian Women Lawyers

Jasmina Davis

Co-Chair, VWL Law Reform Committee