Bail Review

Second advice to the Victorian Government

The Hon. Paul Coghlan QC

1 May 2017

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Executive Summary

Overview

My first advice was directed largely to legislative reform in accordance with the Terms of Reference. This advice deals with broader systemic issues that arise directly out of the consideration of the operation of the bail system, including Terms of Reference 4 to 7. It also addresses issues that I indicated in my first advice I would deal with.

At the moment, the greatest individual difficulty in the operation of bail and remand matters in the Magistrates' Court is the failure to produce accused at court, either in person or by audio visual link. The simple cause of this situation is that there are not enough custodial places available in Victoria. One of the difficulties which arises is that prisoners are serving sentences in police cells, including in the Custody Centre at the Melbourne Magistrates' Court.

The position will be eased somewhat when the new prison at Ravenhall comes into operation towards the end of 2017. However, the issue is unlikely to be completely resolved, particularly as any reforms to the *Bail Act 1977* (*Bail Act*) arising from this Review are likely to increase the number of prisoners on remand.

If prisoners are not produced, then their cases are often put off. Costs may be directly incurred and the need to return to court on multiple occasions can be inefficient and costly. If the case had been able to proceed, bail might have been granted or the matter resolved. It has been well understood for many years that much is to be gained in the criminal justice system by early resolution.

As I discuss in this advice, a very large number of warrants are issued in the Magistrates' Court each year (about 60,000 in 2016). These warrants are for the arrest of accused who do not answer bail and for those who do not answer summons when the Court is unable to deal with the matter or takes the view that it is inappropriate to do so. It is likely that the predominant majority of those arrested on warrant are

either re-bailed or bailed, particularly when the offending is at the lower end of seriousness and would not result in a custodial term.

I recommend that a new process be developed for dealing with these less serious offences. The successful operation of this process will depend on amending the law to allow some indictable offences to be dealt with in the absence of the accused. That is not possible now because an indictable offence can only be dealt with by a magistrate in the presence of the accused and with their consent.

As noted above, a large number of warrants are also issued for accused who fail to answer a summons. A reasonably high percentage of these are for indictable offences at the lower end of the range. Such offences could properly be dealt with in the absence of the accused.

The changes I recommend should reduce the number of people on bail and therefore less warrants may issue as a result of failure to answer bail. Allowing some indictable offences to be dealt with in the absence of the accused should also reduce the number of warrants for cases in which a summons was issued.

If less warrants are issued, then less court time and police time will be taken to deal with those warrants, and less custodial places will be required. That should have some positive effect on the numbers in police cells.

I have looked at the operation of the Court Integrated Services Program (CISP). Even a moderate increase of about 200-300 extra CISP places would take significant pressure away from the remand system. I make a number of recommendations about CISP.

When considering the question of out of hours remand, I discovered that because of the very large numbers involved, there are delays in dealing with cases in the Magistrates' Court in usual hours. The Court sitting hours end at 4pm, but some magistrates have been sitting until 7.30pm to try and deal with their lists. The disadvantages of this are obvious.

The trial of the Night Court has been limited because of the available resources, including the lack of prosecutors or legal aid lawyers. There is a strong argument to

say that a Bail & Remand Court should ordinarily sit from about 9am to 10pm, and I make a recommendation of how this could be done. The Court could deal with many bail applications during these hours (and also finalise some matters) particularly with an increased use of audio visual links.

If that leaves only the period from 10pm to 9am the next morning, it would be possible to give police officers the power to remand adults for that period, and to preserve the bail justice system for children and vulnerable people (who should have immediate access to a bail justice).

I received submissions from the Office of Public Prosecutions (Victoria) and the Commonwealth Director of Public Prosecutions about appeals to the Supreme Court. There are two aspects to this. The first relates to staying a decision of magistrates or judges to grant bail, and the second relates to the test to be applied. Consultation on these issues will be required, particularly in relation to the appeal test.

I make recommendations on the information which should be provided to any bail decision maker.

Finally, the *Bail Act* does need to be rewritten. It is not a task within my Terms of Reference, but I discuss some aspects that could be reviewed or improved if a rewrite is conducted.

Chapter 1 – Introduction

This Chapter sets out the Terms of Reference, the issues covered in my first advice and the scope and structure of this second advice. I make no recommendations in this Chapter.

Chapter 2 – Removing minor offences from the bail and remand system

In this Chapter I recommend reviewing the existing Notice to Appear process in the *Criminal Procedure Act 2009* and introducing a new Notice of Charge process. As noted in my first advice, from a practical and principled point of view, it is untenable to just remand more and more people without examining whether the right people

are actually being held on remand. The proposed Notice of Charge process aims to remove people at the lower end of the offending scale (those accused with minor, non-violent offences) from the bail and remand system, and encourage more offences to be dealt with in the accused's absence. This should assist to relieve some delay and capacity pressures from the criminal justice system.

Chapter 3 – Court support services

This Chapter discusses the increasingly complex profile of accused people in the criminal justice system. It notes the current and proposed intensive bail support programs for adults and children in Victorian courts such as the Court Integrated Services Program (CISP). My recommendations include the provision of extra places in CISP both in the Magistrates' Court and the County Court and the funding of more Koori case managers and culturally sensitive services to support Aboriginal accused on bail.

Chapter 4 – Out of hours bail applications

In this Chapter, I discuss the conduct of bail applications out of hours. I recommend the establishment of a new statewide seven day Bail & Remand Court to replace the current Weekend and Night Courts operating at the Magistrates' Court. If that recommendation is adopted, I recommend allowing police to remand adults overnight, and retaining bail justices for specified matters, particularly bail applications relating to children and vulnerable people, and Interim Accommodation Orders. I also make a recommendation relating to bail justice training.

Chapter 5 – Appeals, stays and granting bail to people on summons

In this Chapter, I recommend allowing short stays from decisions by courts to grant bail in certain circumstances. (In my first advice, I recommended allowing short stays from decisions by bail justices to grant bail). I recommend a reconsideration of the grounds for making appeals. I also recommend clarifying that bail may be granted to a person who appears on summons.

Chapter 6 – Information provided to bail decision makers

In this Chapter, I recommend improvements in the provision of information to bail decision makers from the police. These improvements relate to IT systems, nominal informants and other relevant information (such as visits by Forensic Medical Officers).

Chapter 7 – Rewrite of the *Bail Act*

In this Chapter, I recommend that the *Bail Act* be rewritten. This would be a significant undertaking, and is beyond the scope of this Review. However, I discuss a number of aspects that could be considered if a rewrite does occur.

List of recommendations

Note: For ease of reference, the Recommendation numbers follow on from the Recommendations in my first advice.

Recommendation 25

That the Notice to Appear process, contained in Part 2.3, Division 2 of the *Criminal Procedure Act 2009,* be reviewed and reformed to ensure that it operates effectively.

Recommendation 26

a) That a new Notice of Charge process be introduced into the *Criminal Procedure Act 2009.*

b) That the Notice of Charge process apply to the recommended summary and indictable offences, and that appropriate amendments be made to allow the relevant indictable offences to be determined in the absence of the accused.

c) That further consideration be given to the management of accused charged with driving whilst cancelled or disqualified.

d) That education and training be provided to police to encourage use of the Notice of Charge process and discourage the use of bail or remand for minor offences.

e) That consideration be given to ways of encouraging magistrates to determine matters in the absence of the accused where the Notice of Charge process has been used.

Recommendation 27

a) That the Court Integrated Services Program (CISP) receive further resources to allow it to provide services to more people around the state.

b) That CISP be made available for appropriate County Court cases.

c) That CISP receive further resources to employ more Koori case managers and provide culturally sensitive services to support Aboriginal accused on bail.

d) That the Government fund a longitudinal study on the effectiveness of CISP.

Recommendation 28

That the Honorary Justice Office consider specialised training for bail justices on children and youth issues, Aboriginality, family violence, mental illness and cognitive disability, homelessness and substance dependence.

Recommendation 29

a) That a new Bail & Remand Court be established at the Magistrates' Court, (replacing the current Night Court and Weekend Court) sitting in two courts, in two shifts from 9am to 10pm, seven days per week, covering the whole state.

b) That if the Bail & Remand Court is established, funding be made available for prosecutors, legal aid lawyers, corrections and court based bail support assessments during those hours.

c) That all headquarter police stations be equipped with audio visual links as soon as possible to enable bail hearings to be conducted with an accused in custody by the Bail & Remand Court.

d) That once the Bail & Remand Court is fully operational:

   (i) senior police members be able to remand adult accused (except for vulnerable adults) overnight, and

   (ii) bail justices be retained for Interim Accommodation Orders and out of hours bail applications for children and vulnerable adults.

Recommendation 30

That the *Bail Act* allow for immediate stays from a decision of a court to grant bail in certain circumstances.

Recommendation 31

That further review and consultation be undertaken in regard to section 18A appeals, particularly the test to be applied.

Recommendation 32

That the *Bail Act* include a provision for appeals by the accused or the Director of Public Prosecutions to the Court of Appeal from a judge of the Trial Division of the Supreme Court, but that further review and consultation be undertaken as to the relevant test.

Recommendation 33

That, on application of the prosecution, the *Bail Act* allow courts the power to grant or refuse bail, in accordance with the Act, to an accused who appears on a summons.

Recommendation 34

a) That Victoria Police:

   (i) review how bail decisions are inputted onto LEAP, with a view to ensuring such matters are given high priority, and

   (ii) review the interest and warning flag system on LEAP to ensure that helpful and relevant information is consistently inputted.

b) That consideration be given to how information sharing between Victoria Police and other agencies, such as Corrections Victoria and the Department of Health and Human Services could be enhanced.

Recommendation 35

That Victoria Police review the use of nominal informants for bail matters to ensure that the best information available is provided to bail decision makers.

Recommendation 36

That Victoria Police review its policies about the information that is provided to bail decision makers, to ensure the provision of all relevant information (e.g. about the accused's physical and mental health, including Forensic Medical Officer visits, prior criminal history and pending charges).

Recommendation 37

That the *Bail Act* be comprehensively overhauled and rewritten to enhance its structure, readability and internal consistency.

Chapter 1 – Introduction

Terms of Reference

Following the events of 20 January 2017, I was asked to advise the Government on how Victoria's bail system should be reformed to best manage risk and to maximise community safety. I have been asked to specifically consider the following:

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*

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

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

The Government requested that I provide advice on practical legislative reform by 3 April 2017, and on any other relevant matters by 1 May 2017.

The first advice

1.1 As required by the Terms of Reference, I provided my first advice on practical legislative reform to Government on 3 April 2017.

1.2 My first advice addressed questions 1 to 4, 6 and 7 of the Terms of Reference. It focused on the grant of bail by the courts, bail justices and police, and the tests for granting bail. It also discussed family violence considerations and bail conditions.

Scope and structure of this advice

1.3 This advice discusses further issues relevant to questions 4 to 7 of the Terms of Reference, including further recommendations for legislative reform, as well as other relevant matters. This advice will need to be read in conjunction with my first advice.

1.4 This advice is structured as follows:

- Removing minor offences from the bail and remand system (Chapter 2)
- Court support services (Chapter 3)
- Out of hours bail applications (Chapter 4)
- Appeals, stays and granting bail to people on summons (Chapter 5)
- Information provided to bail decision makers (Chapter 6)
- Rewrite of the *Bail Act* (Chapter 7).

Chapter 2 – Removing minor offences from the bail and remand system

Introduction

2.1 It has become apparent during this review that a significant number of accused persons are on bail or remanded in custody for minor, non-violent offending. Commonly, this occurs where a person has failed to appear in court (whether on bail or summons), a warrant is issued and, following execution of the warrant, the accused is released on bail or remanded. Bail is also used in cases involving minor offending where an accused person does not have a fixed address, making the use of a summons impractical. Sometimes, I am told that people fail to appear on summons because the summons is not, or it is alleged that the summons was not, received. A warrant is issued and on execution they are bailed. I suspect that, in many other cases, release on bail is the easiest way of proceeding.

Problems associated with the use of bail for minor offences

2.2 Bail is rarely an appropriate process in cases involving minor, non-violent offending. People charged with such offences normally pose a negligible risk to the safety of the community, and the appropriate sentence for such offending is usually a fine or a lower sanction such as an adjourned undertaking. Accordingly, where the accused fails to appear the matter could appropriately be dealt with in the accused's absence by the imposition of a fine, discharge with conviction or dismissal without conviction.[1] Where release on bail is chosen as the means of proceeding for relatively minor offences because the person arrested is homeless or has no permanent address, it is unlikely that the person will answer bail. The lives of the homeless are often chaotic.

[1] Other dispositions, such as diversion or an adjourned undertaking, require the consent of the accused and therefore would not be available in the accused's absence.

2.3 In discussions with the Law Institute of Victoria, one example was put forward. A homeless person was charged with begging and released by police on bail, due to there not being an address at which a summons could be served. While on bail, the accused was allegedly found committing an offence of theft (for stealing food) and was arrested and released on a further set of bail. Upon allegedly committing another offence of theft the accused was in a show cause position, having been charged with an indictable offence committed while at large awaiting trial for another indictable offence.[2] He had also allegedly committed an offence contrary to section 30B of the *Bail Act*. He did not answer the original bail. The accused was remanded and remained in custody until the case could be finally determined. Even if he had been released on bail it would have been a third bail with very little prospect of bail being answered.

2.4 The use of bail in cases of minor offending causes broader problems for the criminal justice system. It can lead to accused persons who pose a low risk to the community being remanded in custody for offences for which they would be unlikely to receive a sentence involving imprisonment. This creates pressure on the remand system, which requires places to be available for people charged with more serious offences and those who pose a greater risk to the community. Even a remand overnight puts pressure on the system. Resource pressures on the police and the courts are exacerbated when warrants are issued for accused who fail to appear, rather than cases being determined in the accused's absence.

2.5 The available data suggests that there has been a substantial increase in the number of Victorian prisoners spending shorter periods on remand. In 2015, 31% of Victorian prisoners were on remand for less than one month, while 29% were on remand for less than three months. This is a significant increase from 2005, when 25% of prisoners were on remand for less than one month and 23% for less than three months.[3] It appears that if bail is refused it takes a longer time for the issue of bail to be resolved on either the first or subsequent

[2] *Bail Act*, s 4(4)(a).
[3] Sentencing Advisory Council, *Victoria's Prison Population 2005 to 2016* (November 2016) p.49.

application. Linked to the delay is the availability of the Court Integrated Services Program (CISP) assessment or CISP places.

2.6 In addition, there has been significant growth in the number of remand prisoners in Victoria who do not go on to become sentenced prisoners.[4] In 2015-16, of the 7,327 prisoners who were not bailed before sentence, 12% (approx. 879 remandees) were released on non-custodial sentences and 7.3% (approx. 534 remandees) were released after being sentenced to the time they had already served on remand.[5] The figures in 2015-16 for women are worth highlighting. More than 40% of female prisoners were on remand. Of those who were not bailed at the time of sentence, 14.1% were released on non-custodial sentences and 11% were sentenced to the time they had already served on remand. If charged with minor offences, these people may not have received a custodial sentence at all had it not been for the period of time spent on remand.

2.7 In 2015-16, 32.3% of prisoners (46.4% of women) were released on bail. 54% of prisoners (66.4% of women) bailed served less than one month on remand. It is not possible to determine how these prisoners were ultimately sentenced. It seems that, at least for women, about 50% of sentenced prisoners were already on remand at the time of sentence and about 50% were on bail at the time of sentence.[6] Remands of less than one month may indicate that the offences were at the lower end of seriousness.

2.8 A related issue concerns the large number of warrants issued by the Magistrates' Court for the arrest of accused persons who fail to appear in court on bail or on summons.

2.9 In 2015-16, 62,316 warrants to arrest were issued by the Magistrates' Court. Of these:

[4] Sentencing Advisory Council, *Victoria's Prison Population 2005 to 2016* (November 2016) pp. 39-40.
[5] Corrections Victoria, *Remand numbers and prison system challenges*, 15 February 2017, p. 1.
[6] Ibid and information provided to the Bail Review 28 April, 2017 by the General Manager, Reporting and Analysis, Corrections Victoria.

- 35,722 (57%) warrants were issued for accused who failed to appear on bail
- 25,050 (40%) warrants were issued for accused who failed to appear on summons, and
- 102 (2%) warrants were issued for accused who failed to appear on a Notice to Appear.[7]

2.10 Despite the *Criminal Procedure Act 2009* (the *Criminal Procedure Act*) allowing for summary offences to be determined in the absence of the accused,[8] only a small proportion of cases are currently dealt with in this way. In most cases, a warrant is issued for the accused's arrest. Once arrested by police, accused are either remanded in custody or granted bail by police, a bail justice or the court, and their case is relisted for hearing.

2.11 In the case of indictable offences, including theft, there is currently no provision for the Magistrates' Court to determine the charge/s in the absence of the accused and therefore a warrant to arrest is generally issued.

2.12 The number of warrants issued by the Magistrates' Court has been steadily increasing each year, while the numbers of matters determined at an ex parte hearing (in the absence of the accused) has been declining, as shown by the following table:[9]

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Warrants to arrest issued	29,134	33,740	38,237	43,935	53,085	62,316
Matters determined ex parte	4,193	3,410	2,476	2,272	1,639	1,468

[7] Magistrates' Court of Victoria State-wide bail data, provided to the Bail Review, 8 March 2017. A small number of warrants were issued for other reasons.
[8] *Criminal Procedure Act*, ss 80 and 81.
[9] Magistrates' Court 2014-15 Annual Report at p. 77 with 2015-16 data provided to the Bail Review by the Magistrates' Court on 28 April 2017.

2.13 An analysis of the charges for which warrants to arrest are issued by the Magistrates' Court shows that a large number of warrants relate to accused who have failed to appear for minor, non-violent offences. In 2015-16, the greatest numbers of warrants were issued with respect to the following offences:

- driving whilst suspended or disqualified (4,106 for failures to appear on bail and 6,524 for failures to appear on summons)
- shop theft (3,219 on bail and 755 on summons)[10]
- theft (1,943 on bail and 607 on summons)[11]
- possession of methylamphetamine (1,600 on bail and 263 on summons)
- possession of cannabis (1,160 on bail and 208 on summons), and
- unlawful assault (803 on bail and 1,053 on summons).[12]

2.14 There is a need to reform these processes in two ways. First, I recommend the introduction of an alternative, simpler method of informing an accused person of a minor criminal charge and court date. Secondly, legislative and procedural changes should be made to facilitate an increase in the number of matters that are dealt with in the absence of the accused where they fail to appear. These reforms should apply to summary and minor indictable offences. Both of these matters can be facilitated via a new Notice of Charge process.

[10] This figure is a combined total of two offence categories captured by the Magistrates' Court data – shop theft less than $600 and theft from shop (shopsteal).
[11] This figure does not include theft from motor vehicle, theft of motor vehicle or theft of boat, trailer or bicycle.
[12] Magistrates' Court State-wide Warrant to Arrest Orders data, provided to the Bail Review, 7 March 2017. Note that this data breaks down warrant to arrest orders made by the major charge on the case, which may simply be the first charge listed on the charge sheet and not the most serious offence. The data may also include warrants to arrest with respect to persons granted bail to appear at infringement enforcement hearings.

The existing Notice to Appear process

2.15 A Notice to Appear procedure was introduced by the *Criminal Procedure Act*. Based on a similar process in Queensland,[13] it was intended to provide a simple and efficient way for police to require an accused to attend the Magistrates' Court in straightforward cases, and avoid the delays commonly associated with the charge and summons procedure.[14] However, it is apparent that the Notice to Appear process is not operating as intended. In 2015-16 only 216 (or 0.1% of 160,942) matters were commenced in the Magistrates' Court by the Notice to Appear method. By contrast, 101,807 matters were commenced by way of charge and summons and 43,997 by charge or charge and warrant.[15] In addition, there were 102 warrants issued in 2015-16 for failures to appear on a Notice to Appear.[16]

2.16 In discussions with Victoria Police, I have been informed that the Notice to Appear process is rarely used due to its time limits. The current process requires police to serve a charge sheet on the accused within 14 days of service of the Notice to Appear, and to serve a preliminary brief within 7 days of filing the charge sheet.[17]

2.17 I recommend that the Notice to Appear process be reviewed and reformed to ensure that it operates effectively.

Recommendation 25

That the Notice to Appear process, contained in Part 2.3, Division 2 of the *Criminal Procedure Act 2009,* be reviewed and reformed to ensure that it operates effectively.

[13] *Police Powers and Responsibilities Act 2000* (Qld), s 382.
[14] Victoria, *Parliamentary Debates*, Legislative Assembly, Thursday 4 December 2008, p. 4983 (Mr Hulls, Attorney-General).
[15] Magistrates' Court State-wide bail data, provided to the Bail Review, 8 March 2017.
[16] Magistrates' Court State-wide Warrant to Arrest Orders data, provided to the Bail Review, 7 March 2017.
[17] *Criminal Procedure Act*, ss 22 and 24.

Proposed new Notice of Charge

2.18 I recommend that a new Notice of Charge process be introduced into Part 2.3 of the *Criminal Procedure Act* as an alternative method for police to communicate the commencement of criminal proceedings to an accused. The Notice of Charge procedure would be simpler than the current processes available to police involving the use of bail, warrant, summons or Notice to Appear.

2.19 The Notice of Charge should only be available for specified offences, including most summary offences and a small number of minor indictable offences triable summarily.

2.20 A police officer should be able to serve a Notice of Charge on a person who the officer reasonably suspects has committed a relevant offence.

2.21 The Notice of Charge should include the following information:

a) Details of the offence/s with which the accused has been charged

b) A brief summary (in the form of a statement signed by the police officer) of the facts of the alleged offending

c) The date, time and place of the hearing at which the charge/s will be dealt with by the court, and

d) Information on the court's power to determine the charge/s in the accused's absence, without hearing any evidence, if the accused does not appear at the hearing date specified, including the following information:

- if the charge/s are heard in the absence of the accused, the sentencing options available to the court cannot include imprisonment
- if the charge/s are heard in the absence of the accused, some favourable outcomes such as diversion will not be available
- if the court finds the accused guilty in their absence, the court may only impose a fine, with or without conviction, discharge with conviction or

dismiss the charge without conviction. If the accused has no prior convictions, the court can only impose a fine without conviction or dismiss the charge without conviction, and

- the accused can apply for a rehearing of any charge/s dealt with in their absence.

2.21 The Notice of Charge should have to be personally served on the accused (ordinarily while they are at the police station), and the service details recorded on the Notice.

2.22 If the accused fails to appear at the hearing date specified in the Notice of Charge, the charge/s should be determined in the accused's absence, unless there are compelling reasons why the court should decline to do so (in which case the court would issue a warrant for the arrest of the accused). Where the court determines the charge/s in the absence of the accused, the only penalty that the court should be able to impose is a fine, discharge or dismissal. In the case of an accused with no prior convictions, the court should be limited to imposing a non-conviction fine or a dismissal without conviction.

2.23 The accused's right to apply for a rehearing if the court hears and determines a matter in their absence would be preserved (see *Criminal Procedure Act*, Part 3.4).

2.24 Initial discussions with Victoria Police regarding this proposed reform have been positive.[18] The Notice of Charge should lead to more efficient finalisation of matters and allow police to focus on more important operational matters than the execution of warrants for minor offences. Where the accused fails to appear and the charge/s are determined in the accused's absence, there would be no further paperwork to be prepared or court appearances required by the police informant. Where the accused does appear, the usual procedures would apply.

[18] During initial discussions, Victoria Police indicated general support for the scheme and noted that consideration could be given to broadening the proposed list of offences to which the scheme would apply (which are discussed at paragraphs 2.27 – 2.29).

2.25 The Law Institute of Victoria has expressed support for the use of an alternative process than bail for people experiencing homelessness and low level offenders more generally.[19]

2.26 I flagged my intention to recommend a process of this type during a number of consultations on this Review, and the feedback was positive. However, due to time constraints and the nature of this Review, I have not consulted on the proposed Notice of Charge process or the offences to which it should apply (except for the preliminary consultation with Victoria Police noted above). Further consideration and consultation will be necessary to ensure the workability of the proposal.

Offences for which a Notice of Charge may be issued

Summary offences

2.27 I recommend that the Notice of Charge process be available for use where an accused is charged with any offence under the *Summary Offences Act 1966* except for the following excluded offences:

a) Excluded offences involving assault
   - s 23 Common assault (25pu or 3m) – where there is physical contact
   - s 24(1) Aggravated assault (25pu or 6m)
   - s 24(2) Assault in company (12m)
   - s 24(2) Assault by kicking or with weapon (2y)
   - s 51 Obstructing operational staff members (6m)
   - s 52(1) Assaulting or resisting police etc. (25pu or 6m)

b) Excluded sexual related offences
   - s 41A Observation of genital or anal region (3m)
   - s 41B Visually capturing genital or anal region (2y)
   - s 41C Distribution of image of genital or anal region (2y)

[19] Law Institute of Victoria, Submission to the Bail Review, pp. 31-32 and Recommendation 22.

- s 41DA Distribution of intimate image (2y)
- s 41DB Threat to distribute intimate image (1y)
- s 41H Food or drink spiking (2y)

c) Other excluded offences
- s 49E Escaping from lawful custody (2y)
- s 52A Harass witness (120pu or 12m)
- s 53 Make false report to police (120pu or 1y)

Indictable offences

2.28 I recommend that the Notice of Charge process be available for use where an accused person is charged with the following indictable offences triable summarily:

a) Theft (s 74 *Crimes Act 1958*) where the value of the property is $200 or less

b) Obtain property by deception (s 81 *Crimes Act 1958*) where the value of the property is $200 or less

c) Handling stolen goods (s 88 *Crimes Act 1958*) where the value of the property is $200 or less

d) Possession of a drug of dependence (s 73 *Drugs, Poisons and Controlled Substances Act 1981*) where:

- the offence is committed in relation to a quantity of cannabis or tetrahydrocannabinol that is not more than a small quantity of that drug and the prosecution concede that the offence was not committed for any purpose related to trafficking of cannabis or tetrahydrocannabinol (similar to s 73(1)(a)); or

- the offence is committed in relation to a quantity of drug of dependence that is not more than a traffickable quantity for that drug and the

prosecution concede that the offence was not committed for any purpose related to trafficking in that drug (similar to s 73(1)(b)).

e) An attempt to commit the above offences.

2.29 I have considered whether the offences of driving whilst cancelled or disqualified should be included in the Notice of Charge process. As indicated above, over 10,000 warrants are issued each year for accused persons who fail to appear at court in relation to these offences. However, bringing these offences into the Notice of Charge process presents some difficulties, particularly for repeat offenders. Magistrates are reluctant to deal with these offences in the absence of an accused, due to the potential for a sentence involving imprisonment or the imposition of a community correction order. This is understandable, given that it was only in 2011 that the law was changed to remove the mandatory sentence of imprisonment for subsequent offences of disqualified driving.[20] Magistrates may also wish to make further orders regarding the accused's licence, which should be done in the presence of the accused. Accordingly, I recommend that further research be undertaken into this category of accused, and more effective ways in which they can be managed. In the meantime, I do not recommend including the offences of driving while cancelled or disqualified in the Notice of Charge process.

Bringing indictable offences into the Notice of Charge process

2.30 Additional legislative amendments would be required to facilitate the inclusion of indictable offences in the Notice of Charge process. This is because, as indicated above, there is currently no provision in the *Criminal Procedure Act* permitting indictable offences to be determined in the absence of an accused who fails to appear.[21] In addition, it is necessary for the accused (or their legal representative) to consent to a summary hearing of a charge for an indictable offence.[22]

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[20] *Sentencing Amendment Act 2010,* s 28, which commenced operation on 1 May 2011.
[21] *Criminal Procedure Act*, s 81. Cf. s 80 which applies to summary offences.
[22] Ibid, s 29(1)(b).

2.31 There are two potential ways by which the relevant indictable offences could be brought into the Notice of Charge process.

2.32 The first option is to amend the *Criminal Procedure Act* to allow specified indictable offences to be determined summarily. This option would also require the creation of a mechanism in the Notice of Charge form whereby the accused can indicate their consent to the charge proceeding summarily in their absence if they fail to appear. For example, this could be achieved by including an acknowledgement in the Notice of Charge, which the accused person charged with an indictable offence could be asked to sign in the presence of the police officer. Alternatively, the *Criminal Procedure Act* could be amended to provide that the absence of the accused is taken to indicate their consent to the offence being dealt with summarily. This is the approach adopted in New South Wales.[23]

2.33 The second option is to reclassify as summary offences the relevant indictable offences where they are committed in the circumstances I have described. Arguably, this approach may better reflect the minor nature of the offending to which the process would apply. For instance, the possession of drugs charges currently captured by section 73(1)(a) and (1)(b) of the *Drugs, Poisons and Controlled Substances Act 1981* are punishable by a penalty of not more than 5 penalty units and not more than 30 penalty units or level 8 imprisonment (1 year) respectively. Despite the offences being indictable offences, the prescribed penalty levels may make them more appropriate for classification as summary offences. This option would also allow charges for these offences to be determined in the absence of the accused even where the Notice of Charge process is not used and the accused is charged by summons or bailed.

2.34 I prefer the first option, as it has the advantage of retaining the existing offence provisions, and their classification as indictable offences. It would also avoid police having to consider newly created offences in order to utilise the Notice of Charge process.

[23] See *Criminal Procedure Act 1986* (NSW), s 196(4).

Encouraging use of the Notice of Charge process

2.35 In order to encourage proper use of the Notice of Charge process, I recommend that the legislative provisions governing the Notice of Charge process provide a presumption that police proceed by way of a Notice of Charge where it is available, unless there are compelling reasons why an alternative method of notifying the accused of the charge should be preferred. Such reasons might include the seriousness of the offence/s charged, the accused's prior criminal history, the need to ensure the safety of any person or the community, or the need for the accused to attend court for sentencing purposes. In addition, I recommend that education and training be provided to police to encourage use of the Notice of Charge process and discourage use of bail or remand for minor offences.

2.36 Consideration should also be given to ways in which magistrates could be encouraged to determine matters in the absence of the accused where the Notice of Charge process has been used. Such encouragement might, however, be more appropriately provided through education and training or by way of a practice note rather than being legislatively prescribed.

Recommendation 26

a) That a new Notice of Charge process be introduced into the *Criminal Procedure Act*.

b) That the Notice of Charge process apply to the recommended summary and indictable offences, and that appropriate amendments be made to allow the relevant indictable offences to be determined in the absence of the accused.

c) That further consideration be given to the management of accused charged with driving whilst cancelled or disqualified.

d) That education and training be provided to police to encourage use of the Notice of Charge process and discourage the use of bail or remand for minor

offences.

e) That consideration be given to ways of encouraging magistrates to determine matters in the absence of the accused where the Notice of Charge process has been used.

Alternative processes in place in other Australian jurisdictions

2.37 I note that there are alternative processes in place in other Australian jurisdictions to exclude minor offences from the bail system. Some aspects of these interstate models could be considered for inclusion in the Victorian model.

2.38 In New South Wales, indictable and summary proceedings can be commenced by police issuing a 'court attendance notice', which is served on an accused and filed in court.[24] The court attendance notice describes the offence and brief particulars of the offence and provides information about where and when the case will be heard. The notice requires an accused person to attend court but states that the matter may be dealt with in their absence if they fail to appear.[25] Both summary offences and indictable offences triable summarily can be determined in the absence of the accused. Where the offence is an indictable offence that may be dealt with summarily only if the accused consents, the absence of the accused is taken to be consent to the offence being dealt with summarily and the offence may be determined in the accused's absence.[26]

2.39 There is also in New South Wales a 'right to release' for fine only offences and most offences under the *Summary Offences Act 1988* (NSW), subject to some exclusions. For such offences, police can make a decision to release a person without bail, or grant bail to a person with or without the imposition of

[24] *Criminal Procedure Act 1986* (NSW), ss 47 and 172-173.
[25] Ibid, s 157.
[26] Ibid, s 196(4).

conditions.[27] Where police decide to release a person without bail, I understand that the court attendance notice process is used.

2.40 Western Australia has a 'court hearing notice' procedure that applies to summary offences.[28] The court hearing notice informs the accused of the charge/s and court date, and gives the accused four options: appear in court, do nothing, plead not guilty in writing or plead guilty in writing. If the accused does not appear in court, the court may determine the charge in their absence, having regard to the contents of the accused's written plea if submitted. If the accused has indicated in writing an intention to plead not guilty, the court will list the matter for further hearing. There is a presumption that the court hearing notice will be used instead of bail for summary offences, unless the presence of the accused is likely to be necessary for sentencing or any other purpose, or there are reasonable grounds for suspecting that the accused would endanger another person's safety or property or interfere with witnesses if released.

[27] *Bail Act 2013* (NSW), s 21.
[28] *Bail Act 1982* (WA), s 6A and *Criminal Procedure Act 2004* (WA), s 33. The form itself is set out in Form 5 of the *Criminal Procedure Regulations 2005* (WA).

Chapter 3 – Court support services

Background

3.1 As discussed in my first advice, despite the relatively low rates of total imprisonment in Victoria compared with other jurisdictions, the rate of unsentenced detainees in Victoria has grown substantially. Prison operating costs have also increased substantially.[29] Bail support services, such as the Court Integrated Services Program (CISP), assist with these challenges[30] as well as having broader, longer term advantages for the criminal justice system and the general community.

Complexities of the remand population

3.2 Although there has been an increased emphasis on improving the co-ordination between mental health and drug and alcohol services in Victoria, there are still clinical barriers preventing best practice treatment of people with multiple needs, especially for those in contact with the criminal justice system.[31] There is also a high number of co-occurring substance abuse problems. Research has found that the use of substances by people with mental disorders is the most significant risk factor in offending behaviour, with prevalence rates significantly greater than in the wider community.[32]

3.3 An in-depth qualitative research study conducted with the Victoria Police Custodial Medicine Unit, the Victorian Institute of Forensic Mental Health and

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[29] Victorian Budget papers report an average daily cost per prisoner increase of 9% since 2006. $1.1.billion is budgeted for 2016-17. See the Sentencing Advisory Council Report, *Victoria's Prison Population 2005-2016* p.3.

[30] The daily cost of supporting someone on CISP is $73.50 (information provided by the Magistrates' Court to the Bail Review 10 April 2017) compared with the daily cost of prison is $297.34 per day (Productivity Commission, *Report on Government Services*, referred to in the Sentencing Advisory Council, *Victoria's Prison Population 2005 to 2016* (November 2016), p.3).

[31] The Complex Needs Review Expert Panel in the Department of Health and Human Services is currently examining assessment, treatment, support and/or community supervision of people with multiple and complex needs. It will also review current legislation and service frameworks in managing the risk of violent persons with complex needs. The Panel is due to provide advice to government by 30 June 2017.

[32] Ogloff, J., Davis, M., Rivers, G., and Ross, S., *The Identification of Mental Disorders in the Criminal Justice System*, Criminology Research Council Report (2006) p.1.

Monash University into detainees in Victorian police cells found that over half (55%) had previous contact with the public mental health system.[33] Over half of the detainees (50.7%) had a history of substance abuse with the most prevalent disorder diagnosis being co-occurring substance disorder followed by affective disorder and anxiety.[34] A significant number of accused in the study (42%) had to be medically managed in police cells for substance withdrawal.[35]

3.4 According to Victoria Police, there is a very high rate of accused with mental health disorders or substance abuse issues.[36] Jesuit Social Services and the Law Institute of Victoria also report that the number of accused with drug addiction or mental illness in Victoria is increasing.[37] About half of the people experiencing psychiatric symptoms in the police cells were not receiving appropriate treatment in the community at the time of arrest,[38] which makes the task of managing these accused even more difficult for police.

CISP

3.5 Bail support programs may assist to address the underlying issues that have led to the accused coming into contact with police and the risk of reoffending. These services form a crucial part of Victoria's criminal justice system.

3.6 The *Bail Act* provides at section 5(2A)(g) that the court may impose 'attendance and participation in a bail support service' as a condition of bail. Bail conditions must be used only to ensure compliance with bail rather than to punish an accused on bail.[39]

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[33] One in five (19.7%) had been admitted to a psychiatric hospital previously Cf. Ogloff, J., Warren, L., Tye, C., Blaher, F., Thomas, T., *Psychiatric symptoms and histories among people detained in police cells* Journal of Sociology, Psychiatry, Psychiatric Epidemiology (2011) p.880.
[34] Ibid p.875.
[35] Ibid p.874.
[36] Victoria Police, Bail Review consultation, 13 February 2017.
[37] Submissions to the Bail Review.
[38] Ogloff, J., Warren, L., Tye, C., Blaher, F., Thomas, T. op cit p.877.
[39] *Woods v DPP* [2014] VSC 1. Justice Bell noted that section 30A of the *Bail Act* makes it an offence for an accused on bail to contravene a conduct condition without reasonable excuse, but it also provides an exemption for contravening a bail support service condition. He notes that this is consistent with section 10(c) of the *Charter of Human Rights and Responsibilities Act 2006*.

3.7 CISP is the main bail support service in Victoria. It operates only in the Magistrates' Court. The previous CREDIT/Bail Support Program has been merged with CISP so that they come under the same management structure.[40] Melbourne and Sunshine courts have substantial teams, while the La Trobe Valley and Dandenong courts have smaller teams. Eight court locations have only one or two CISP case managers at the court.[41]

3.8 The data on statewide bail support numbers, like bail data generally, is very difficult to calculate. The Magistrates' Court counts the number of bail orders by matters per financial year and estimates that there are 2.5 matters per person. CISP necessarily counts the number of people (i.e. episodes of assistance). Annual Victoria Police data of individuals bailed from police stations is not included in any CISP analysis.

3.9 I am informed that in 2015-16, CISP had a statewide capacity of around 1,221 individuals. This translates to around 12% of bail orders granted by the Magistrates' Court.[42] This is a very small percentage of the total number of people granted bail when bail granted by the police is included.

3.10 Most CISP sites are currently running at full capacity. The Magistrates' Court's current target is to be able to provide CISP to 30% of people granted bail at the headquarter courts.[43] Sunshine Magistrates' Court is currently meeting that target.[44] The capacity of programs at different court sites is dependent on staffing levels for the program and the number of referrals made by private practitioners and magistrates.[45]

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[40] CREDIT/Bail Support has been rebadged as CISP. Information provided to the Bail Review by the Director, Specialist Courts and Programs, Magistrates' Court, 24 February 2017.
[41] Information provided to the Bail Review by the Director, Specialist Courts and Programs, Magistrates' Court, 24 February 2017.
[42] Magistrates' Court State-wide bail data 2015-16, provided to the Bail Review, 8 March 2017.
[43] The 13 headquarter courts in Victoria are the main courts servicing a particular geographical area. There are police stations attached to each of these courts (referred to as 'headquarter police stations').
[44] Information provided to the Bail Review by the Manager, Court Support and Diversion Services, Magistrates' Court, 5 April 2017.
[45] Ross, S., *Evaluation of the Court Integrated Services Program: Final Report* (December 2009) p.8. 75% of referrals to CISP are made by lawyers, the other 15% by magistrates and the remaining number are self or police referrals. The rate of engagement is higher from magistrate referrals, p.6.

3.11 Information provided by the Magistrates' Court states that the CISP program provides an accused person with support and case management of up to four months by a multi-disciplinary team. To be eligible, the accused must have some type of physical or mental disability, drug or alcohol dependency or inadequate social, family or economic support that contributes to their offending.

3.12 Accused with a serious mental illness or who have other significant forensic issues are referred to the Assessment and Referral Court List in the Melbourne Magistrates' Court where Forensicare can assess them and provide specialist case management for a much longer period.[46]

3.13 The risk assessment component of the CISP screening assessment assigns the accused to the Community Referral Program if they are low risk, or to the Intermediate or Intensive Stream if they are medium or high risk respectively.[47] Intensive level accused have lower rates of completion which is consistent with their higher level of risk.[48]

3.14 The Magistrates' Court has advised that there are no offence exclusions for CISP. The four month case management time limit can also be extended at the request of the presiding magistrate in complex and higher risk cases. The Magistrates' Court is currently analysing a small cohort of CISP participants who are regularly re-referred to the program. Repeat re-referrals may indicate that these participants' needs are not being addressed the first time around and need longer periods of case management.[49]

3.15 CISP's stated aims include reducing the risk of harm to the community by people on bail and improving the health and wellbeing of an accused by facilitating priority access to housing, drug and alcohol services and mental

[46] Information provided to the Bail Review by the Manager, Court Support and Diversion services, Magistrates' Court, 6 April 2017.
[47] Information provided to the Bail Review by the Director, Specialist Courts and Programs, Magistrates' Court, 24 February 2017.
[48] Ross, S., *Evaluation of the Court Integrated Services Program: Final Report* (December 2009) p.9
[49] Information provided to the Bail Review by the Manager, Court Support and Diversion services, Magistrates' Court, 11 April 2017.

health treatment.[50] Some magistrates require increased accountability by the accused to the court while on CISP (by monitoring a person's progress while on bail) which they feel, in turn, increases public confidence in the justice system.[51]

3.16 In the case of serious indictable matters awaiting committal the accused can be placed on CISP but the next court date may be months in the future. The feedback from magistrates has been that such cases warrant greater levels of judicial supervision than the four month program allows.[52] With increased resources, CISP could allow some further extended case management and monitoring for such accused who require longer periods of case management.

3.17 The current CISP Remand Outreach Pilot Program (CROP) is an extension of the CISP program into prisons aimed at assessing accused on remand who may be eligible for bail at an earlier stage (and to identify possible accommodation and supports earlier for bail applications) thereby allowing matters to proceed earlier.[53] In 2015-16, CROP worked with 795 remandees. Of these, 242 were granted bail on CISP.[54] This 'early intervention' pilot program seems very worthwhile, particularly given the problems with delays in the court system mentioned in my first advice.

3.18 The feedback I have received is that magistrates often find that the court based CISP program can 'add value' by providing an accused with support to address their needs and risks of reoffending. Staff who case manage accused on CISP are employed by, and accountable to, the court, and the support is more intensive than a person would have on a Community Correction Order (CCO). It appears that a number of people who fail on CCOs are later placed on CISP if they reoffend. I understand that the concerns of the Auditor-General about

[50] 46% of defendants on CISP were assessed to have either a mental illness, acquired brain injury or intellectual disability
[51] Ross, S., *Evaluation of the Court Integrated Services Program: Final Report* (December 2009) p. 10.
[52] Ross, S., *Evaluation of the Court Integrated Services Program: Final Report* (December 2009) p. 105.
[53] Information provided to the Bail Review by the Director, Specialist Courts and Programs, the Magistrates' Court, 24 February 2017.
[54] Information provided to the Bail Review by the Manager, Court Support and Diversion Services, Magistrates' Court, 20 April 2017.

Community Corrections having a shortage of experienced staff[55] are being addressed through improved workforce planning. It is to be hoped that if compliance on CCOs can be improved, then the aim of reducing reoffending would be achieved.

Effectiveness of CISP

3.19 CISP has been favourably evaluated for its effectiveness[56] and cost benefit.[57] People involved in CISP showed a 33% reduction in reoffending. Where a person did reoffend, the offending was less frequent (30.4% less) and less serious. For every $1 invested in CISP the economic benefit to the community is $2.60 after five years and the long-term benefit is $5.90 after thirty years.[58]

3.20 CISP has now been operating for about 10 years. While the December 2009 evaluation is very helpful,[59] it would also be useful to have a longitudinal study on the effectiveness of CISP. For example, while there is CISP program completion data for 2015-16 showing that 20% of people were re-remanded in custody (through breach of conditions or further reoffending),[60] a longitudinal study could analyse how these rates compare with people not on CISP.

Availability of CISP

3.21 The Law Institute of Victoria, Victoria Legal Aid, Youthlaw and the Victorian Aboriginal Legal Service support an increase in statewide access to CISP, especially to facilitate the use of CISP by accused to meet reverse onus thresholds under the *Bail Act*.[61] The Victoria Police submission also recommends more intensive bail support and management for 'individuals

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[55] Victorian Auditor General's Office, *Managing Community Corrections Orders Report*, 8 February 2017.
[56] Ross, S., *Evaluation of the Court Integrated Services Program: Final Report* (December 2009).
[57] Price Waterhouse Coopers, *Economic Evaluation of the Court Integrated Services Program (CISP): Final Report on economic impacts of CISP* (November 2009).
[58] Ibid p.20.
[59] Ross, S., *Evaluation of the Court Integrated Services Program: Final Report* (December 2009). A further internal *Recidivism data review of CISP* conducted by the Magistrates' Court (2015) showed continuing positive results for CISP with reoffending rates 14% lower than the matched non CISP cohort for a two year period post completion of the CISP program p.5.
[60] Information provided to the Bail Review by the Manager, Court Support and Diversion Services, Magistrates' Court, 20 April 2017.
[61] Submissions to the Bail Review.

who present an unacceptable risk if bailed, but would be suitable for bail with greater support'.

3.22 Increasing the availability of CISP across Victoria would reduce the remand population. If an additional 200-300 places were made available for CISP, this should reduce the number of people on remand. As I noted in my first advice, the remand numbers create significant system capacity issues, for example, police cells (which have 297 people, of whom 256 are on remand[62]) are significantly exceeding their notional capacity.

3.23 Additional places would also decrease the likelihood of people being placed on CISP a long way from where they live (e.g. a person who lives in Croydon being placed by the Frankston Magistrates' Court on CISP in Frankston). Bail support is more likely to be effective if the accused does not have to travel a long way to access it.[63]

Bail support in the Children's Court

3.24 Victoria Police would like to see an intensive form of CISP available for young accused.[64] I am advised by the Children's Court and Department of Health and Human Services that a new Comprehensive Intensive Monitoring and Control Bail Supervision Scheme has recently been funded by the Government and will be rolled out in the Children's Court later this year. There will also be enhanced 24 hour support through the Central After Hours Assessment and Bail Support Placement Service to improve advice to bail justices regarding children. This will replace the existing bail supervision program which was not meeting the needs of the highest risk young accused. This should result in an improvement

[62] Corrections Victoria, *Daily Prisoner and Police Cell Report* provided to the Bail Review, 23 March 2017.
[63] This is demonstrated by the Neighbourhood Justice Centre in Collingwood which operates effectively as a community based model with a court, justice agencies, bail support and community services in a 'one stop shop' available to everyone in the City of Yarra. http://www.neighbourhoodjustice.vic.gov.au/home/services/index.html.
[64] Victoria Police consultation with the Bail Review, 13 February 2017.

to the overuse of remand of young people, less than half of whom go on to receive a custodial sentence.[65]

Bail support in the County Court

3.25 Currently, there is no bail support program operating in the County Court, although individuals can access CISP through the Magistrates' Court prior to being committed to stand trial. County Court judges have suggested it would be a good use of resources if CISP was available either with additional resources via the Magistrates' Court team for individuals on bail in the County Court, or as a separate stand-alone program based in the County Court.[66] The Law Institute of Victoria agrees that an extension of CISP could be very beneficial for managing accused charged with more serious offences.[67]

3.26 There was previously a short CISP pilot project in the County Court involving a CISP worker from the Melbourne Magistrates' Court. I understand that this was discontinued as the County Court cases were not seen as a 'good fit' for the CISP model. Some suggested to the Review that the current program time limit of four months may not suit matters in the County Court because the support ceases when an accused is committed for trial or a plea, at a time when CISP would likely be most beneficial. (However, I also note that some accused are on bail for long periods of time in the Magistrates' Court.) Any extension of CISP to the County Court would need to be tailored to the particular needs of that jurisdiction.

Bail support for Aboriginal accused

3.27 There are culturally specific support services attached to Koori Courts in Victoria. This is necessary and important given the continued over-

[65] Department of Health and Human Services, Remand Cohort Survey Report, *Reducing un-sentenced detention in the youth justice system,* May 2016 p.5.
[66] Bail Review consultation with the County Court of Victoria, 16 February 2017.
[67] Law Institute of Victoria submission to the Bail Review.

representation of Aboriginal people in Victorian prisons[68] but also because of the need for a greater level of support. In 2013, Ogloff and others found that 71.7% of Aboriginal men and 92.3% of Aboriginal women in prison have a lifetime diagnosis of mental illness and have higher rates of substance abuse than the general prison population.[69]

3.28 However, as the Koori Courts are sentencing courts, these support services are not bail specific. The Victorian Aboriginal Legal Service submission to this Review calls for an expansion of Koori specific bail support. It has also been suggested that section 3A, which requires bail decision-makers to consider Aboriginality, is a lost opportunity as it is under-utilised.[70]

3.29 The Magistrates' Court has advised that Aboriginal accused are better managed on bail by Koori case managers employed by CISP.[71] I see considerable merit in funding increased numbers of Koori case managers to provide culturally specific support to Aboriginal accused whilst on bail.

3.30 I appreciate that the following recommendations relating to CISP will require further investigation and funding.

Recommendation 27

a) That the Court Integrated Services Program (CISP) receive further resources to allow it to provide services to more people around the state.

b) That CISP be made available for appropriate County Court cases.

c) That CISP receive further resources to employ more Koori case managers

[68] Between 2006 and 2016 the imprisonment rate for Aboriginal and Torres Strait Islander prisoners increased by 70%. See Sentencing Advisory Council Report, *The prison population in Victoria 2005 to 2016*, p.13.
[69] Ogloff, J., Patterson, J., Cutajar, M., Adams, K., Thomas, S., and Halacas, C. Koori Prisoner Mental Health and Cognitive Function Study (2013) prepared for the Department of Justice.
[70] Victorian Equal Opportunity and Human Rights Commission, *Unfinished Business: Koori Women and the justice system* Research Report (2013).
[71] Information provided to the Bail Review by the Manager, Court Support and Diversion Services, Magistrates' Court, 20 April 2017.

and provide culturally sensitive services to support Aboriginal accused on bail.

d) That the Government fund a longitudinal study on the effectiveness of CISP.

Chapter 4 - Out of hours bail applications

Background

4.1 Terms of Reference 6 and 7 relate to out of hours bail applications.

4.2 In my first advice, I recommended that any accused with two undertakings of bail with respect to indictable offences be brought before a court for the question of bail or remand to be determined (Recommendation 15). I advised that the implementation of this recommendation should be deferred pending reforms relating to out of hours bail applications (Recommendation 16).

4.3 Both courts and bail justices conduct out of hours bail applications. At paragraph 5.43 of my first advice, I noted the operation of the Weekend Court. I discuss that Court and the pilot Night Court below. I consider that many of the current problems with managing out of hours bail and remand applications could be avoided by the establishment of my proposed new seven day Bail & Remand Court.

4.4 My first advice also discussed bail justices (see paragraphs 5.40 – 5.85 and Recommendations 18 – 20). I recommended that bail justices be retained pending a review of the bail justice system, as well as making specific recommendations about the types of offences they hear, recording of applications and stays from grants of bail made by bail justices. I also indicated that I would discuss further practical and operational issues relating to bail justices in this advice.

4.5 I understand that the Government is considering excluding vulnerable people such as Aboriginal people, cognitively impaired people and children from a proposal to allow police to remand people to the next sitting date. I support this proposed exclusion. If police are not empowered to remand vulnerable accused, then bail justices should continue to hear bail and remand applications in relation to those accused.

Training of bail justices

4.6 Paragraph 5.54 of my first advice gave a brief overview of the training program for bail justices. I have been provided with a substantial folder of training materials by the Honorary Justice Office (HJO), and have been briefed by its staff on the training program. Numerous comments made by the media or members of the public following the Bourke Street incident indicated that bail justices were inadequately trained or qualified for their role. I do not agree with those comments, but that does not mean that bail justice training cannot be further improved.

4.7 Some bail justices who made submissions to this Review expressed satisfaction with the training provided to them.[72] However, a number of submissions recommended further or different training for bail justices. Suggestions from bail justices included more training sessions with magistrates,[73] reviewing the training materials to focus more on the rights of victims,[74] and the need for more money for training.[75]

4.8 The Law Institute of Victoria recommends that bail justices undertake further training, such as the development of a Certificate IV Diploma in Bail, with specific further training on section 3A of the *Bail Act*.[76] Victorian Women Lawyers suggests that decision makers, including bail justices, have specialised training in relation to high risk offenders. Youthlaw recommends that if bail justices are retained, they should receive adequate and ongoing specialist training on youth, homelessness, mental health, substance dependence and cultural background.[77]

4.9 I see particular benefit in having bail justices available for children and young people (both for bail or remand applications and Interim Accommodation

[72] For example, in his submission to the Bail Review, a bail justice writes that the training is of a good standard, similar to postgraduate university qualifications.
[73] Submission to the Bail Review from a bail justice.
[74] Submission to the Bail Review from the Bail Justice Working Party.
[75] Submission to the Bail Review from a bail justice.
[76] Law Institute of Victoria submission to the Bail Review, recommendations 16 and 26.
[77] Victoria Women Lawyers and Youthlaw submissions to the Bail Review.

Orders). Accordingly, specialised training on children and youth issues would be beneficial, both for bail justices themselves and to enhance community confidence in the bail justice system.

4.10 The Victorian Aboriginal Legal Service submission calls for greater cultural awareness training. They submit that despite their involvement in delivering a half day seminar in the bail justice training, bail justices still have an unconscious bias against Aboriginal people when considering risk in bail decision making. As noted above, I support retaining bail justices for Aboriginal persons. I agree that further training on cultural awareness which is specific to Aboriginal persons would be useful.

4.11 Further, as I noted in my first advice, a major benefit of the bail justice system is to bring an independent person into the police station to safeguard both the welfare and rights of accused persons. Given the increased prevalence of accused people presenting with mental health and alcohol and drug dependence issues (see Chapter 3 of this advice), and the increasing number of family violence matters, further training on those issues should also be considered.

4.12 Current training arranged by the HJO for bail justices is already extensive. I am also mindful that training will be required on any amendments to the *Bail Act* that are implemented as a result of this Review. While I do not consider that bail justice training needs to be longer overall, I recommend that the HJO consider specialised training for bail justices on children and youth issues, Aboriginality, family violence, mental illness and cognitive disability, homelessness and substance dependence.

4.13 In addition, while some submissions to this Review were supportive of the HJO, others expressed concerns about particular HJO practices and policies, and made suggestions for improvement. I will send these directly (and anonymously) to the HJO for its consideration and action as appropriate.

4.14 I make a further recommendation about bail justices below, in the context of the proposed new Bail & Remand Court.

Recommendation 28

That the Honorary Justice Office consider specialised training for bail justices on children and youth issues, Aboriginality, family violence, mental illness and cognitive disability, homelessness, and substance dependence.

Weekend Bail & Remand Court

4.15 The Weekend Bail & Remand Court ('Weekend Court') operates at Melbourne Magistrates' Court from 10am to 4pm on Saturday and Sunday.[78] It was created in 2013 to hear bail and remand applications on the weekend and therefore reduce the number of persons who would otherwise be remanded in custody to appear at the Magistrates' Court on Mondays.

4.16 Data provided by the Magistrates' Court shows a steady increase in the number of matters heard and finalised per year in the Weekend Court.[79] In February 2017, 30-40% were released from custody either on bail or having had their matters finalised.[80] The Weekend Court has a duty magistrate, court registry staff, legal aid lawyers and police prosecutors. The accused most commonly appears in person, but increasingly police at some stations are using audio visual link to the Weekend Court for remand or bail applications.[81]

4.17 Remand and bail applications at the Weekend Court must be filed by police informants by 3pm on Saturday or Sunday. The catchment for the Weekend Court extends the proper venue of the Melbourne Magistrates' Court to include the Northwest, Southern and Eastern metropolitan police stations (i.e. the

[78] Public holiday sittings are at the discretion of the Magistrates' Court.
[79] Data from the Magistrates' Court for 2013-14 on the Weekend Court shows there were 204 bails granted and 247 bails refused. So far this year 2016-17 there have been 339 bails granted and 439 refused.
[80] More than 30 matters were listed in the Weekend Court over two weekends in the month of February 2017, with the bulk of matters being dealt with on the Saturday. Around 18-19% of accused pleaded guilty. 30-40% were released from custody either on bail or having had their matters finalised.
[81] Information provided by the Principal Registrar, Magistrates' Court, regarding Weekend Court data. I also understand that some police stations are reluctant to use this process because they then become gaolers who have to accommodate and manage the accused.

Sunshine, Broadmeadows, Heidelberg, Ringwood, Dandenong, and Frankston regions).

4.18 In consultations, Victoria Police have advised that resourcing the Weekend Court is challenging because a number of magistrates choose to sit until the list is complete, which could be until 7.30pm, when the expected finish is around 4pm.[82] This places strain on the magistrate, court staff, legal aid lawyers and police prosecutors, who have to work very long shifts. My proposal for the Bail & Remand Court, detailed below, would improve this situation.

Night Court pilot

4.19 The Government established a pilot Night Court at Melbourne Magistrates' Court following the Bourke Street incident.

4.20 Phase 1 of the Night Court commenced on 28 January 2017, with weekend night sittings from 5pm to 9pm covering the Melbourne metropolitan area. Phase 2, which commenced on 6 February 2017, added weekday night sittings, so that the Night Court now operates 7 days per week. (I understand that Phase 3, which would potentially expand night sittings, with statewide coverage, is on hold pending my advice.)

4.21 The Night Court flows on from the daytime Melbourne Magistrates' Court Monday to Friday, and the Weekend Court on weekends. There is a one hour break between day and night sittings to allow for a change of staff. The Night Court accepts matters during the day where the paperwork is filed after 3pm, and continues to hear matters where the paperwork is filed by 8.30pm.[83] Matters received after 8.30pm will be referred to the court sitting the next morning. The Night Court does not hear Children's Court matters.

4.22 During its first month of operation (from 28 January to 26 February 2017) the Night Court heard cases involving 68 accused. Fourteen applications for bail

[82] Consultation with Victoria Police, 13 February 2017. Victoria Legal Aid also raised concerns about resourcing, 14 February 2017.
[83] The Weekend Court continues to operate as above from 10am-4pm and can accept remand/bail applications from 9am-3pm.

were granted, 45 applications for bail were refused and nine accused made no application for bail.

4.23 Victoria Legal Aid (VLA), Victoria Police and the Commonwealth Director of Public Prosecutions (CDPP) are not currently funded to provide staff to the Night Court, so the magistrate has no assistance from prosecutors or duty lawyers. As noted by the CDPP, this can result in a privately funded accused making a legally represented bail application in circumstances where only the informant is present on behalf of the Crown rather than a prosecutor.[84] There are also no court support services available.

4.24 An accused before the Night Court can be remanded to a court date in the future without having any access to a lawyer. For example, VLA told me about a case in which a client was remanded at the Night Court and moved to the police cells at Wangaratta until the next court date, which was some weeks away. This made it very difficult for VLA to get proper instructions to prepare their client's represented bail application for the return date. As VLA noted, this in turn causes delays in an already overburdened summary court system because it effectively increases the number of required court events to resolve a matter.[85]

4.25 There are significant concerns about this lack of resources. The Law Institute of Victoria (LIV), the CDPP and VLA suggest that if the Night Court is to be retained, some significant changes should be made immediately to its operations in this respect. The LIV submission to the Review also submits that an accused remanded at the Night Court should be ordered to reappear the next day before a court during normal hours, whether on a weekend or weekday.

Proposed new seven day Bail & Remand Court

[84] Commonwealth Department of Public Prosecutions submission to the Bail Review.
[85] Consultation with Victoria Legal Aid, 14 February 2017.

4.26 In its submission to this Review, Victoria Police suggest that the Magistrates' Court consider extending court sitting times to 24 hours a day.[86] The Police Association submits that if it is not seen as feasible to give police sergeants the power to remand accused, a 24 hour court or night court is a viable option, but only where accused can appear using video tele-conferencing from a 24 hour complex.[87] The Police Association and Victoria Police are concerned that police delivery of accused to courts diverts them from their other duties.

4.27 I do not consider that a 24 hour model is feasible or required. My preferred model is for a seven day Bail & Remand Court ('Bail & Remand Court') which would allocate two courtrooms at Melbourne Magistrates' Court to fast track bail related matters in two shifts, seven days and nights per week. The shifts could operate from 9am-3pm and 4pm-10pm (although one afternoon shift may be sufficient on each weekend day). The Bail & Remand Court would replace the existing Weekend Bail & Remand Court and Night Court.

4.28 This would require magistrates and court staff to be rostered on in two shifts to manage the longer hours. Prosecutors and VLA lawyers would also need to be resourced to attend court so it can operate at full capacity. A CISP worker and a Corrections officer should also be available to conduct assessments and provide advice to the Court.[88] The Bail & Remand Court could feasibly deal with bail and the disposal of criminal matters from all around the State.

4.29 There would have to be some consideration of how to make space in police cells for accused who are refused bail in an after hours application to the Bail & Remand Court via audio visual link. We know from police data that many sentenced prisoners with less than 14 days imprisonment will serve their

[86] Victoria Police submission to the Bail Review.
[87] The Police Association of Victoria submission to the Bail Review.
[88] CISP workers would not be able to access housing services after hours but could assess a person's suitability for CISP and suggest that the person be bailed the next day if accommodation can be found. A Corrections officer could conduct assessments for CCO suitability, which would allow the option of matter finalisations.

sentence in police cells, including the Melbourne Custody Centre, which takes up cell space needed for remandees.[89]

4.30 I have been told in consultations that many police stations are not equipped with audio visual links which would allow bail and remand applications to be dealt with in a timely and efficient manner, especially in country areas.[90] Such capacity would assist to answer the concerns of police that they are diverted from their duties when travelling to courts for bail matters. It should be feasible for audio visual links to operate from each of the headquarter police stations.

4.31 If my recommendations on the Bail & Remand Court are adopted (and once the Court becomes operational), there will be considerably less work for bail justices. If that is the case, I recommend that police sergeants or above (or the officer in charge of a police station) be able to remand adult accused, except for vulnerable adults, overnight.[91] I recommend retaining bail justices for out of hours bail matters relating to vulnerable adults. I also recommend retaining bail justices for out of hours bail matters relating to children and Interim Accommodation Orders, as I do not consider the Bail & Remand Court would be a suitable venue for children, and to provide an independent process in bail and remand matters involving children. (However, consideration could be given in the future to an after hours court-based arrangement for Children's Court matters.)[92]

Recommendation 29

a) That a new Bail & Remand Court be established at the Magistrates' Court, (replacing the current Night Court and Weekend Court) sitting in two courts, in two shifts from 9am to 10pm, seven days per week, covering the

[89] Data provided by Victoria Police to the Bail Review, 3 March 2017.
[90] In consultations with Victoria Police for the Bail Review, I have been advised that there are current moves to put audio visual links into several police stations.
[91] See paragraph 4.5.
[92] I understand a new fast track Youth Bail & Remand Court will open in the Children's Court in May 2017 to manage children's bail matters during normal weekday court hours. (Information provided by the General Manager, Court Programs and Support Services, Children's Court of Victoria).

whole state.

b) That if the Bail & Remand Court is established, funding be made available for prosecutors, legal aid lawyers, corrections and court based bail support assessments during those hours.

c) That all headquarter police stations be equipped with audio visual links as soon as possible to enable bail hearings to be conducted with an accused in custody by the Bail & Remand Court.

d) That once the Bail & Remand Court is fully operational:

   (i) senior police members be able to remand adult accused (except for vulnerable adults) overnight, and

   (ii) bail justices be retained for Interim Accommodation Orders and out of hours bail applications for children and vulnerable adults.

Chapter 5 – Appeals, stays and granting bail to people on summons

Appeals from the DPP

5.1 Section 18A(1) of the *Bail Act* allows the Director of Public Prosecutions (DPP) to appeal to the Supreme Court from an order granting bail if the DPP is satisfied that:

- the conditions of bail are insufficient or the decision to grant bail contravenes the Act, and
- it is in the public interest to do so.

5.2 In practice, even if Victoria Police advises the Office of Public Prosecutions Victoria (OPP) immediately after a grant of bail that causes them concern, it takes three or four weeks for a DPP appeal to be heard. This delay is due to the need for the prosecution to obtain a transcript of the original hearing and prepare and file an affidavit in support of the appeal, and due to the listing capacity of the Supreme Court.

5.3 Given the potential community safety concerns that may flow from a decision to grant bail, I propose allowing short stays from decisions by courts to grant bail. (In my first advice, I recommended allowing short stays from decisions by bail justices to grant bail.)

5.4 It is also appropriate to reconsider the grounds for making an appeal, in particular, the ground that requires the decision to grant bail to have contravened the Act.

Staying a grant of bail

5.5 A number of Australian jurisdictions allow decisions on grants of bail to be stayed in certain circumstances. New South Wales and the Northern Territory have similar models that stay the decision immediately on the prosecution informing the court that a request for review or appeal is to be made. In these

jurisdictions, the accused is not entitled to be at liberty until the first of the following occurs:

- the Supreme Court affirms or varies the decision, substitutes another decision or refuses to hear the application
- the prosecution withdraws the application, or
- 4pm on the day that is three business days after the day on which the decision was made.[93]

5.6 In New South Wales, the process applies only to decisions relating to a 'serious offence',[94] while the Northern Territory process applies in relation to any offence.

5.7 In Queensland, recent amendments allow for a stay that operates from the time that the prosecution applies to the Supreme Court for review (i.e. not immediately upon the decision to grant bail). The Queensland provision applies only to decisions relating to a 'relevant domestic violence offence' (which is not defined in the legislation).[95]

5.8 In the Northern Territory, the Supreme Court may extend the three business day time limit if it 'thinks that it is appropriate to do so in the circumstances'.[96] Similarly, in South Australia, the stay process applies to the grant of bail for any offence. Stays elapse after 72 hours, unless a reviewing authority fixes a longer period.[97]

5.9 The OPP and the Commonwealth DPP advocate for a stay process in their submissions to this Review. The Commonwealth DPP advises that currently the

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[93] *Bail Act 2013* (NSW), s 40; *Bail Act* (NT), s 36A.
[94] *Bail Act 2013* (NSW), s 40(1). Section 40(5) defines a 'serious offence' as murder or any other offence punishable by life imprisonment, and an offence involving sexual intercourse or attempted sexual intercourse with a person under the age of 16 years.
[95] *Bail Act 1980* (Qld) s 19CA. It will be open to judicial interpretation as to what the term 'relevant domestic violence offence' means in this context.
[96] *Bail Act* (NT) s 36A(5).
[97] *Bail Act 1985* (SA), s 16. Section 16(2)(a)(i) provides that a reviewing authority may fix a longer period if it is satisfied that 'there is proper reason' to do so.

only stay process in Victoria is contained in section 15AA(3C) and (3D) of the *Crimes Act 1914* (Cth), which relates to Commonwealth terrorism offences.[98] It notes the interstate models, but adds that care would need to be taken that any time limit in Victoria does not 'render the provision ineffectual'.[99]

5.10 In its submission to this Review, the OPP suggests the following model:

- for certain serious offences - a stay for 4 days to allow the Director to consider filing an appeal. If an appeal is filed, the stay would operate until the appeal is determined
- for other offences - the Prothonotary could issue an arrest warrant upon the filing of a notice of appeal, with the appeal being heard on the return of the warrant or as soon as practicable thereafter.[100]

5.11 Such a process involves competing considerations. There is a clear community benefit in ensuring that an accused who poses a real risk to another person's safety is not released until the Supreme Court has reviewed the case. However, this power needs to be appropriately confined given that it will remand an accused in custody despite a court deciding that the accused should be at liberty.

5.12 I understand that in practice, detention applications in New South Wales are filed and heard within the three day timeframe. Clearly, when a stay is in operation, an appeal should be filed and heard as expeditiously as possible. However, in Victoria, I do not consider it feasible to expect an appeal to be filed and heard within the three day timeframe used in the interstate provisions. For a process to be workable (and effective) here, applications should be required to be filed quickly, but the stay should continue operating until the hearing of the appeal as fixed by the court.

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[98] The *Crimes Act 1914* (Cth) provisions also apply to certain Commonwealth offences resulting in death or involving a substantial risk of death (see s 15AA(2)(b)-(d)). The Commonwealth provisions are similar to the interstate provisions e.g. in relation to the 72 hour timeframe.
[99] Commonwealth Director of Public Prosecutions submission to the Bail Review.
[100] Office of Public Prosecutions submission to the Bail Review.

5.13 I recommend a process that would allow an immediate stay from a grant of bail by a court in relation to a Schedule 1 or 2 offence[101] if the police or prosecutor immediately indicates that an appeal will be made. The process should allow the OPP or the Commonwealth DPP three business days (excluding the day on which the decision to grant bail was made) to file an appeal in the Supreme Court. If the appeal is filed within this three day timeframe, the stay should remain in operation until the appeal is heard. Otherwise, the stay should operate until one of the following occurs (whichever happens first):

- a police officer or prosecutor or any person appearing on behalf of the Crown files with the Supreme Court notice that the Crown does not intend to proceed with the appeal, or
- 4 pm on the day that is three business days after the day the decision was made.

5.14 Imposing an initial time period of three days to allow an appeal to be filed should be possible in practice. Once an application is filed, the Supreme Court is often able to list matters at very short notice if required (e.g. for bail applications or judicial reviews). While I do not propose that the legislation include a maximum period of time that a stay may operate, I recommend that the Supreme Court produce a Practice Note to facilitate this proposed process, which highlights the need for such appeals to be heard as expeditiously as possible.[102]

5.15 Like New South Wales (and Queensland), I consider that the process should only be available in relation to certain offences. I recommend confining the provisions to Schedule 1 and 2 offences (assuming Recommendations 8-10 of my first advice are adopted). This will restrict the process to appropriately serious offences and avoid the need for another category of offences in the *Bail Act*.

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[101] See Recommendations 8 – 10 of my first advice.

[102] I note that section 40(4) of the *Bail Act 2013* (NSW) expressly provides that such applications are 'to be dealt with as expeditiously as possible'.

5.16 Police who have serious concerns about the release on bail of a person accused of offences other than Schedule 1 or 2 offences may continue to use the existing appeal and variation provisions. I do not consider it necessary for there to be a new separate process for these other offences.

5.17 I do not anticipate that this mechanism will be often required.[103] If adopted, the effect of this recommendation should be monitored to assess whether applications for stays are confined to appropriate cases. The procedures and guidelines that are developed to facilitate the proposed process should reflect that applications should only be made where there is a real concern about the immediate release of the accused (and a real likelihood of the DPP or Commonwealth DPP filing an appeal).[104]

5.18 I note that the Queensland provisions require a review of the stay provision and related amendments two years after commencement. The review is to consider if the provisions have been effective, have sufficient regard to rights and liberties of accused people and remain appropriate.[105] A similar review process may be appropriate in Victoria, if this recommendation is adopted.

Recommendation 30

That the *Bail Act* allow for immediate stays from a decision of a court to grant bail in certain circumstances.

Grounds for appeals under section 18A

5.19 The OPP submission to this Review said the current two stage test in section 18A of the *Bail Act* is 'too onerous', as the DPP 'must demonstrate specific error or a miscarriage of discretion'. The OPP expresses concern that there 'is a risk of

[103] According to figures provided by NSW Police to the Bail Review on 26 April 2017, from 2015-2017, 11 bail stays were lodged. Of these, 2 stays were upheld by the Supreme Court, 3 grants of bail were made and in 6 cases, the Office of the Director of Public Prosecutions elected not to proceed with, or abandoned, the detention application.
[104] According to the Commonwealth DPP submission to the Bail Review, the Commonwealth stay provision is used sparingly and only on the instructions of the DPP.
[105] *Bail Act 1980* (Qld), s 36BA.

a dangerous accused remaining on bail in cases where the Director is unable to surmount these obstacles'.[106] The OPP submission suggests that section 18A(1) be amended to allow appeals if the Director is satisfied that:

- the conditions of bail are insufficient or bail should not have been granted, and
- it is in the public interest to do so.

This would be the same as current section 18A(1) except that 'bail should not have been granted' replaces 'the decision to grant bail contravenes the Act'.

5.20 The OPP further suggests that an appeal under section 18A should be conducted as a rehearing and that the appeal should be filed within 14 days of the order granting bail unless the court extends that time. At present, the DPP has one month to give notice of an appeal, with leave of the Supreme Court required for notice of appeal to be given outside that time frame.[107]

5.21 The test in section 18A also applies to appeals by the DPP to the Supreme Court against a refusal to revoke bail.[108] A decision of a single judge of the Supreme Court made under section 18A can be appealed by the DPP or the accused to the Court of Appeal.[109]

5.22 The authorities[110] show that in section 18A appeals, the Director is not confined to relying upon an error of law as a ground of appeal but may succeed if it is shown on any ground, whether of fact or law, that the discretion of the primary judge has miscarried and the Supreme Court can be persuaded that a different order should have been made.[111] However, as the decision regarding bail is one

[106] OPP submission to the Bail Review.
[107] *Bail Act*, s 18A(4).
[108] *Bail Act*, s 18AG.
[109] *Bail Act*, s 18A(12).
[110] Relevant authorities include: *Beljajev v DPP (Vic) and DPP (Cth)* (unreported, VSCA, 8 August 1991) (*Fernandez v DPP* (2002) 5 VR 374; *DPP v Cozzi* (2005) 12 VR 211; *DPP v Peterson* [2006] VSC 199, *DPP (Cth) v Barbaro* (2009) 20 VR 717 and *DPP v Basic* [2013] VSC 412.
[111] *DPP (Cth) v Barbaro* (2009) 20 VR 717, 720.

of practice and procedure, and is interlocutory in nature, appellate courts should be reluctant to interfere with such orders.[112]

5.23 The section 18A provision has no equivalent in New South Wales, the Northern Territory, South Australia, or the Australian Capital Territory. Instead, as discussed below, these jurisdictions adopt a less restrictive test for revisiting bail decisions from the perspective of both the prosecution and accused.

5.24 In New South Wales, the prosecution can make a detention application[113] to the Supreme Court if a decision has been made by the District Court, Local Court, an authorised justice or a police officer.[114] The Court of Appeal can also hear a detention application if a decision has been made by the Supreme Court.[115] The detention application is to be dealt with as a new hearing, and evidence or information may be given in addition to, or in substitution for, the evidence or information given in relation to the earlier decision.[116]

5.25 Multiple detention applications can be made to the same Court in New South Wales but only if there are grounds for a further application.[117] Grounds are specified as being material information relevant to the grant of bail that were not presented to the court in the previous application or a change in circumstances relevant to the grant of bail since the previous application was made.[118]

5.26 In the Northern Territory, bail decisions can be reviewed at the request of the prosecution or the accused. As with detention applications in New South Wales, the review is undertaken as a rehearing, and evidence or information in addition to, or in substitution for, the evidence or information given or obtained on the making of the decision may be given or obtained on the review.[119] The

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[112] *DPP (Cth) v Barbaro* (2009) 20 VR 717, 720.
[113] An accused may make a release application which is also conducted as a new hearing.
[114] *Bail Act 2013* (NSW), s 66.
[115] *Bail Act 2013* (NSW), s 67(e).
[116] *Bail Act 2013* (NSW), s 75.
[117] Detention applications made in these circumstances are similar to the revocation provisions in Victoria.
[118] *Bail Act 2013* (NSW), s 74.
[119] *Bail Act* (NT), s 36.

Local Court can review its own decision,[120] as can the Supreme Court,[121] with no apparent restriction other than a court may refuse to entertain a request to review if satisfied that the request is frivolous or vexatious.[122]

5.27 In South Australia, a review of a Magistrates' Court decision by the Supreme Court may only occur 'with the permission of the Supreme Court (which should only be granted if it appears that there may have been some error of law or fact).'[123] A review undertaken by the Supreme Court of a decision of a magistrate can be brought by the Crown, the accused, or a guardian if the accused is a child[124] and is a hearing de novo.[125] Decisions of other bail authorities (not being the Supreme Court) can also be reviewed.[126]

5.28 In the Australian Capital Territory, the informant[127] has a right of review of any decision of a court (or authorised officer) relating to bail.[128] The Magistrates' Court can undertake a review of bail decisions made by authorised justices and a decision of its own if it has the power[129] and if the court is satisfied that the applicant has shown a change in circumstances or that there is fresh evidence or information that was not available when the decision was originally made.[130] The same test applies to reviews undertaken by the Supreme Court which can involve a review of its own decision,[131] a decision made by the Magistrates' Court,[132] or a decision of an authorised justice (in certain circumstances).[133] The

[120] *Bail Act* (NT), s 34.
[121] *Bail Act* (NT), s 35.
[122] *Bail Act* (NT), s 36(6).
[123] *Bail Act 1985* (SA), s 15A.
[124] *Bail Act 1985* (SA), s 15A.
[125] *Bail Act 1985* (SA), s 14; see also *R v TAMAS* [2017] SASC 12 (14 February 2017), [21].
[126] *Bail Act 1985* (SA), s 14.
[127] The accused also has a right of review, but the test sometimes differs. For example prior to an accused applying to the Magistrates' Court to review its own decision pursuant to section 42A the accused is to have made two applications for bail in the Magistrates' Court in the proceeding to which the bail relates.
[128] *Bail Act 1992* (ACT), s 41.
[129] *Bail Act 1992* (ACT), s 42A. The Magistrates' Court has the power to make a bail order if the proceeding to which the bail decision relates is, or is about to be brought before the Magistrates' Court.
[130] *Bail Act 1992* (ACT), ss 42 and 42A.
[131] *Bail Act 1992* (ACT), s 43A(1)(b).
[132] In circumstances where the Magistrates' Court has already reviewed its own decision pursuant to section 42A(1)(a).
[133] *Bail Act 1992* (ACT), s 43.

review of a decision is by way of rehearing and evidence or information in addition to, or in substitution for, the evidence or information given or obtained on the making of the decision may be given or obtained on the review.[134]

5.29 In contrast to the broad legislative power that appears to exist in other jurisdictions that essentially allow for rehearings at the instigation of the prosecution (particularly in New South Wales and the Northern Territory), section 18A appeals seem somewhat restrictive from a prosecution perspective. Aside from applications to revoke bail, they provide the only means under the *Bail Act* by which the prosecution can bring an accused before the court to challenge a lower court's decision to grant bail or refusal to revoke bail. This may be contrasted with an accused who has the right to make multiple applications for bail if new facts and circumstances are shown.[135]

5.30 For these reasons, it is my view that the test to be applied in section 18A appeals should be revisited. However, consideration of the test should not be undertaken in isolation from my other recommendations for reform, in particular those relating to appeals to the Court of Appeal. The time restraints in undertaking this Review have meant that I have not been able to consult with the courts and other relevant organisations in regards to this issue and it is appropriate that this be done. Accordingly I recommend that further review and consultation take place regarding section 18A.[136]

Recommendation 31

That further review and consultation be undertaken in regard to section 18A appeals, particularly the test to be applied.

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[134] *Bail Act 1992* (ACT), s 45.

[135] Although a question arises as to whether new facts and circumstances are required to be established when applying for bail to a judge of the Supreme Court acting in their original jurisdiction.

[136] This review and consultation should include the anomaly that exists in section 15 of the *Appeal Costs Act 1998* (Vic) where appeals by the DPP are not included in the list of appeals for which an accused can seek an indemnity certificate.

Appeals to the Court of Appeal from a judge of the Trial Division

5.31 As I discussed above, section 18A(12) allows both the accused and the DPP to appeal to the Court of Appeal from a decision of the Supreme Court made under section 18A. Prior to this section[137] the Court of Appeal held in *DPP v Fernandez*[138] *(Fernandez)* that an accused had a right of appeal from a section 18A appeal and expressed the view that 'either party would be entitled to challenge the single judge's decision on appeal'.[139] However, unlike the accused, the DPP would require leave to appeal in accordance with section 17A(4)(b) of the *Supreme Court Act 1986* because an appeal by the DPP would not concern 'the liberty of the subject' but would be from an interlocutory order in a matter of practice and procedure.[140]

5.32 Aside from section 18A(12), no provision exists in the *Bail Act* for an accused to appeal to the Court of Appeal from a refusal to grant bail by a judge of the Trial Division, whether that be a decision of a judge of the Supreme Court exercising their original jurisdiction or under section 13 of the *Bail Act* (which gives the Supreme Court power to grant bail for accused charged with murder or treason). However, in *Dale v DPP*[141] *(Dale)*, using the reasoning in *Fernandez*,[142] the Court of Appeal held that an accused can do so. The Court concluded that nothing in the *Bail Act* precluded an appeal to the Court of Appeal from a refusal of bail by a judge in the Trial Division[143] as the provisions of the *Bail Act* did not fall within the meaning of 'otherwise expressly provide' in section 17(2) of the *Supreme Court Act 1986* which provides:

> Unless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge of the Court.

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[137] Section 18A(12) was included in the *Bail Amendment Act 2010* which commenced on 1 January 2011.
[138] *Fernandez v DPP* (2002) 5 VR 374.
[139] *Fernandez v DPP* (2002) 5 VR 374, 388.
[140] Ibid.
[141] *Dale v DPP* [2009] VSCA 212.
[142] *Dale v DPP* [2009] VSCA 212, [20].
[143] *Dale v DPP* [2009] VSCA 212, [22].

5.33 Since *Dale,* there have been a handful of appeals made to the Court of Appeal by an accused.[144] On appeal the accused is required to show some legal error in order to succeed. If legal error is demonstrated, the Court will set aside the decision and consider the evidence afresh to determine the question of bail itself.[145]

5.34 Whilst the Court of Appeal has concluded an accused can appeal a decision from the Trial Division, the position in relation to the DPP appeals is not clear. To my knowledge, since the decision of *Dale*, no appeal has been initiated by the DPP to the Court of Appeal from a decision of a judge in the Trial Division. It is feasible that an appeal brought under the current law could raise issues surrounding the competency of the Director's appeal[146] which would otherwise be avoided through legislative reform.

5.35 In my view, if an accused is able to appeal to the Court of Appeal then the Director should also be entitled to appeal. To suggest otherwise would be illogical and, in essence, contrary to the reasoning expressed in *Fernandez,* where it was viewed that if an accused can appeal to the Court of Appeal from a decision of the Trial Division regarding a section 18A appeal then the Director should also be able to bring an appeal.[147]

5.36 Accordingly, I recommend a provision be incorporated into the *Bail Act* that allows for appeals with leave to the Court of Appeal by either the accused or the Director from the Trial Division. What the test for appeal should be is a matter that requires further consultation with the courts and other relevant organisations. It should be considered in conjunction with section 18A appeals and there is no reason to assume that the test for each type of appeal would necessarily be the same.

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[144] These cases include *DPP (Cth) v Barbaro* (2009) 20 VR 717; *R v Creamer* [2009] VSCA 323; and *Robinson v The Queen* (2015) 47 VR 226.
[145] *R v Creamer* [2009] VSCA 323, [5].
[146] In *Director of Public Prosecutions v Kanfouche* [1992] 1 V.R 141, the Full Court held that section 18A did not extend to providing the Director a right of appeal against a determination of a single judge of the Supreme Court exercising his or her original jurisdiction in granting or revoking bail. Winneke P in *Fernandez v DPP* (2002) 5 VR 374 at page 389 then said the reasoning in *Kanfouche* 'seems to me-at least as presently advised – to be eminently defensible' in reference to section 18A.
[147] *Fernandez v DPP* (2002) 5 VR 374, 388 and now covered by the *Bail Act,* s 18A(12).

Recommendation 32

That the *Bail Act* include a provision for appeals by the accused or the Director of Public Prosecutions to the Court of Appeal from a judge of the Trial Division of the Supreme Court, but that further review and consultation be undertaken as to the relevant test.

The grant of bail after a summons

5.37 The Commonwealth DPP, the Australian Federal Police (AFP) and the Law Institute of Victoria (LIV) raised the issue of granting bail to an accused who has appeared on summons.[148] It appears that some magistrates are releasing such accused on bail if they consider it appropriate to do so (possibly under section 331 of the *Criminal Procedure Act*, as the *Bail Act* is silent on this issue). I agree that there are circumstances where such a grant of bail may be appropriate, but consider that it would be preferable for the *Bail Act* to specifically cover these situations.

5.38 Section 331(2) of the *Criminal Procedure Act* provides that a court that adjourns a criminal proceeding may –

(a) allow the accused to go at large; or

(b) remand the accused in custody; or

(c) grant the accused bail or extend his or her bail.

5.39 The Commonwealth DPP notes that while magistrates do bail people who appear on summons, upon request or on the court's own initiative, there is no express power to do so and 'it appears to be somewhat of a grey area'. It notes that an express power would be useful where the circumstances of the accused change, affecting risks that may be addressed by the grant of bail.[149]

[148] Commonwealth DPP and OPP submissions to the Bail Review.
[149] Commonwealth DPP submission to the Bail Review.

5.40 Similarly, the AFP notes that it is not clear whether section 331 of the *Criminal Procedure Act* applies to a person who appears on summons. The AFP submits that if a person is summonsed, but their subsequent conduct indicates that they may pose a flight risk or interfere with witnesses etc., it would be appropriate to have a clear mechanism allowing them to be placed on bail.[150]

5.41 In contrast, during a meeting with the LIV Bail Review Taskforce, concerns were raised that some magistrates are 'unilaterally' placing people who appear on summons on bail, without a prosecution application, and that this is happening more often. The Taskforce member queried whether there was a power to do so, and the appropriateness of doing so, particularly in the absence of a prosecution application.[151]

5.42 As these submissions and comments show, it is unclear whether the ability to 'grant' bail under section 331 of the *Criminal Procedure Act* applies to people who appear on summons. In contrast, section 4(1)(e) of the *Bail Act 1985* (SA) makes it clear that 'a person who appears before a court in answer to a summons' is eligible for bail. Section 4A of the *Bail Act 1982* (WA) also specifically deals with the grant of bail to an accused who appears on summons or pursuant to a court hearing notice.

5.43 In my first advice, I recommended amendments to section 12 of the *Bail Act* to clarify and simplify the powers of a court to refuse or grant bail (see in particular Recommendation 17 and paragraphs 5.37 – 5.38 of that advice). It would make sense to also clarify (in or around section 12) that courts have the power to grant or refuse bail in accordance with the Act to a person who appears before the court on summons.

[150] Australian Federal Police submission to the Bail Review.
[151] Views expressed at the Law Institute of Victoria Bail Review Taskforce consultation meeting, 17 February 2017.

5.44 This power should only be exercised if the prosecution makes an application. Police are in the best position to know whether there is a need for a remand application in relation to a particular accused.

Recommendation 33

That, on application of the prosecution, the *Bail Act* allow courts the power to grant or refuse bail, in accordance with the Act, to an accused who appears on a summons.

Chapter 6 – Information provided to bail decision makers

Introduction

6.1 Term of Reference 5 relates to the information provided to bail decision makers. While this Chapter discusses some specific matters relevant to that issue, other aspects of this advice are also relevant, such as the discussion on support services.

6.2 The Term of Reference mentions accused persons with complex risks, needs and case histories. I have not specifically dealt with complex needs cases as there are other Reviews underway, such as the Department of Health and Human Services' Complex Needs Review, that are in a much better position to advise on such issues.

IT systems

6.3 Information about an accused's criminal history is primarily provided by way of a Law Enforcement Assistance Program (LEAP) record. Police can also access interstate priors through an automatically generated 'National Police Reference System' (NPRS) screen when accessing LEAP.[152]

6.4 After the Luke Batty case, improvements were made so that information on warrants now automatically transfers to LEAP and the Electronic Warrants on Completion database (EWOC) from Courtlink[153] overnight. Family violence outcomes are also transferred electronically, in almost real time. I have been told that these have been very effective changes to the Courtlink/LEAP interface.[154]

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[152] The NPRS is owned by CrimTrac, and allows web based access to national Person of Interest information e.g. offence history, active bail matters, intervention orders and outstanding warrants. If a formal record is required, this would be requested through the relevant Criminal Records section of the interstate jurisdiction, however, for bail application purposes, the information on NPRS can be useful.

[153] Courtlink is the database of the Magistrates' and Children's Courts of Victoria.

[154] Victoria Police consultation, 7 March 2017 and telephone conversation with the Principal Registrar, Magistrates' Court, 10 March 2017.

6.5 However, other aspects of LEAP (and other IT systems) are often criticised, including by police themselves. The Police Association submission contends that LEAP needs enhancing to ensure bail status and court dates are automatically updated. Victoria Police submit that not all relevant information is held by Victoria Police and that police should be able to access information from other agencies, such as Corrections Victoria or the Department of Health and Human Services, 24 hours a day, to assist with bail and remand applications.

6.6 Submissions received by this Review indicated that LEAP needs to be upgraded.[155] Bail justices raised the need for quicker and better interaction between the LEAP database and other databases,[156] that the IT systems used by Victoria Police and Corrections are 'totally inadequate',[157] and that bail justices are not always provided with up to date information about prior convictions, breaches of bail and failures to appear, particularly if they relate to interstate matters.[158]

6.7 Currently, bail decisions made by police, bail justices or courts must still be faxed to the Central Data Entry Bureau (CDEB) by police and manually inputted onto LEAP. For example, in relation to grants of bail by courts, the prosecutor must fill out a form and fax it to CDEB, where a data entry operator then inputs the information onto LEAP. A prosecutor may have 30 or 40 forms to fill out after a day in court, and each bail undertaking may have multiple conditions. Accordingly, these processes can result in delays in relevant information appearing on LEAP, and increase the chance of data entry errors.

6.8 It is clearly problematic that bail decision makers may not have up to date information on previous bail matters when deciding whether to grant or refuse bail. This is particularly so given the concerns I have described about accused on multiple bails.

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[155] Submissions to the Bail Review from the Bail Justice Working Party and a bail justice.
[156] Submissions to the Bail Review from three bail justices.
[157] Submission to the Bail Review from a bail justice.
[158] Submission to the Bail Review from a bail justice.

6.9 I am advised by Victoria Police that there are moves to upgrade the LEAP/Courtlink interface so that bail decisions by a court will be transferred electronically from Courtlink, either overnight or in almost real time (i.e., 10-12 updates per day, similar to the family violence outcomes).[159] I consider this a very worthwhile initiative.

6.10 I understand that bail decisions by police and bail justices will continue to be faxed to CDEB by police and inputted onto LEAP. I am advised by Victoria Police that in the future, such information may be inputted directly onto LEAP by police via the Leap Electronic Direct Reporting (LEDR) interface.[160] In the meantime, while I understand that bail decisions are afforded some priority at CDEB, it may be possible to give these decisions greater priority, and to examine ways to encourage police members to send such information to CDEB as quickly as possible.

6.11 This may also be a good opportunity to consider how matters are 'flagged' on LEAP. Currently, informants may manually enter data about a person that can raise interest flags about issues of concern (e.g. a person's mental health, youth or drug use). Warning flags in relation to recidivism risk are added or removed by the relevant Divisional Intelligence Unit.[161]

6.12 Information on these issues can be very helpful to the bail decision maker.[162] It can also be helpful to police, so that they have a better understanding of the accused's history and circumstances. A bail justice submitted to this Review that 'accused persons have presented and reported with mental health issues, prescription medication issues, acquired brain injuries, substance abuse problems or co-morbidity issues with little regard from members of Vic Pol, claiming that "the accused is making it up as it's not noted on our system."'[163]

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[159] Advice from Victoria Police, 20 April 2017.
[160] Advice from Victoria Police, 1 May 2017.
[161] The Victoria Police Recidivist Offender Prioritisation Tool rates and ranks accused in criminal, family violence, and road policing seriousness and recidivism to calculate overall risk, which may then lead to a Recidivist warning flag on LEAP.
[162] This is discussed in submissions to the Bail Review including those from Victorian Women Lawyers Association and a bail justice.
[163] Submission to the Bail Review from a bail justice.

Some of these difficulties may be caused or exacerbated because it seems largely up to individual police officers to note such issues on LEAP.

6.13 Victoria Police may wish to review its policies on interest and warning flags on LEAP to increase the chances of relevant information being inputted consistently by police members and provided to bail decision makers. If Recommendation 15 of my first advice is adopted, it would also be helpful to have a warning flag in relation to a third or subsequent bail undertaking (to make it clear that such an accused must be brought before a court).

6.14 Obviously, having relevant information appearing on LEAP (or otherwise available to Victoria Police) in a timely and accurate manner will only benefit the decision making process if that information is provided to the bail decision maker. Bail justices are trained to ask for the LEAP record (and I would expect that provision of the LEAP record would be an important part of a police remand application before a bail justice), but it appears that in some cases LEAP records are not provided. Provision of the LEAP record to any bail decision maker, with interstate criminal history if applicable, should be routine.

Recommendation 34

a) That Victoria Police:

   (i) review how bail decisions are inputted onto LEAP, with a view to ensuring such matters are given high priority, and

   (ii) review the interest and warning flag system on LEAP to ensure that helpful and relevant information is consistently inputted.

b) That consideration be given to how information sharing between Victoria Police and other agencies, such as Corrections Victoria and the Department of Health and Human Services could be enhanced.

Nominal informants

6.15 Consultation meetings for this Review highlighted problems with the use of nominal informants by Victoria Police for bail applications[164] (that is, a police officer who stands in for the actual informant at court). The contribution of nominal informants is generally confined to reading out the summary prepared by the informant to the bail justice or the court, as they often have no other information about the accused or the circumstances of the alleged offending.

6.16 Nominal informants are used when the actual informant is unavailable (for example, because they have finished their shift in the intervening period). While this is understandable, the use of nominal informants leads to less information being available to the court or bail justice. For example, the actual informant may know that the accused has a poly substance abuse or a mental health issue, or that they were bailed on other matters on an earlier date. The absence of this information can lead to less well informed bail decisions.

6.17 In Chapter 4 of this advice, I make recommendations relating to a proposed Bail & Remand Court. Such a court should assist with the issue of nominal informants as the extended court hours would increase the likelihood of the actual informant being available. Regardless of those reforms, I recommend that Victoria Police review the use of nominal informants for bail and remand applications so that the best information available can be provided to the bail decision maker. This may include, for example, ways of ensuring that nominal informants, when used, are advised of relevant issues by the informant before appearing in court.

Recommendation 35

That Victoria Police review the use of nominal informants for bail matters to ensure that the best information available is provided to bail decision makers.

[164] Raised in consultations with the Bail Review by the Magistrates' Court, the Children's Court, the County Court, Victoria Legal Aid, Law Institute of Victoria, and in consultations and submissions from bail justices including submissions from a bail justice and the East Gippsland Honorary Justices Inc.

Other relevant information

6.18 Some bail justices have advised this Review that other relevant information is not consistently provided by police.[165] Anecdotally at least, it appears that previous bail decisions and pending charges are not always provided to decision makers by police. (Sometimes, this may be because police themselves are unaware of some of the relevant history, although my recommendations above may assist with this.)

6.19 Decision makers should be provided with all prior history, such as prior court findings, CCOs and outstanding warrants.

6.20 Bail justices also raised that police are not always forthcoming about events that have occurred before the arrival of a bail justice. For example, if a Forensic Medical Officer or a Forensic Nurse has attended the accused at the request of police, that information would be useful to know. In his submission, a bail justice writes that the accused's '[s]tate of health (especially mental health) is quite often known to the police, but they do not inform the BJ of any of these until asked'.

Recommendation 36

That Victoria Police review its policies about the information that is provided to bail decision makers, to ensure the provision of all relevant information (e.g. about the accused's physical and mental health, including Forensic Medical Officer visits, prior criminal history and pending charges).

[165] For example, consultation on the Bail Review with a bail justice on 9 March 2017 and submissions to the Bail Review from the Bail Justice Working Party, and three bail justices.

Chapter 7 – Rewrite of the *Bail Act*

Background

7.1 In both my first advice and this advice, I make a number of recommendations for reform of specific sections of the *Bail Act*. As I noted in my first advice, however, the *Bail Act* as a whole should also be overhauled and rewritten to improve its internal consistency and to aid comprehension.

7.2 It is beyond the scope of this Review, and the available timeframe, to conduct a wholescale review of the *Bail Act*. However, the following discussion may assist the Department of Justice and Regulation with a rewrite, if one is conducted.

Structure and general provisions

7.3 In 1977, the *Bail Act* primarily anticipated granting bail for accused awaiting trial. As discussed elsewhere, particularly in Chapter 4 dealing with out of hours bail applications, the number of accused now on bail is overwhelming and the vast majority of them are dealt with in the Magistrates' Court. The Act should be restructured to better meet the challenges posed by the enlarged role bail now plays in the criminal justice system.

7.4 The recently drafted *Bail Act 2013* (NSW) provides a reasonable template for reform of the Act in Victoria. That Act is set out logically and is easy to follow.

7.5 The NSW Act includes a definition of bail,[166] as well as other general provisions that are helpful in explaining the concept of bail. For example, the NSW Act sets out preconditions which need to be met before a person is regarded as being on bail, such as signing a copy of the bail acknowledgement, the provision of the signed authority to a bail authority and the completion of all pre-release requirements for bail.[167] These provisions precisely define when bail commences and the limits upon a conditional grant of liberty. Similar provisions could be considered for our Act.

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[166] *Bail Act 2013* (NSW), s 7(1).
[167] *Bail Act 2013* (NSW), s 14(1). See Part 2 of the NSW Act generally.

Other possible amendments

7.6 If Recommendations 8, 9 and 10 of my first advice are adopted, the definition of 'serious offence' should be removed from section 3 of the Act, as the new schedules would exhaustively list the offences which create a reverse onus.

7.7 Section 4 of the Act will need to be amended to accommodate the amendments I foreshadowed in Recommendations 2 - 11 of my first advice. Current section 4(2A) should be retained, probably as a separate general provision. Current section 4(5) may no longer be required, depending on the redraft of section 5.

7.8 Recommendation 24 of my first advice contemplates amending section 5 of the Act to provide that any conduct conditions imposed by a bail decision maker continue in effect until bail is continued, varied or revoked or the matter is finally determined. At paragraph 7.16 of that advice, I also propose a redraft of that section.

7.9 Section 5AA of the Act is still required to provide oversight by a court of any conditions imposed on grants of bail to children by bail justices, police officers or the sheriff, although consequential amendments will be required if section 5 is redrafted (e.g. to the current reference to section 5(4)).

7.10 Section 5A of the Act may need to be amended to reflect the transfer of Youth Justice to the Department of Justice and Regulation.

7.11 Section 6 of the Act creates a duty upon an accused to surrender himself into custody. That section may no longer be required, depending on the redraft of section 5.

7.12 Section 7 of the Act deals with the non-publication of contested bail applications and is concerned with ensuring that a fair trial is not compromised by advance publicity. It is not clear why the section is confined to contested applications only. It could be expressed more simply, to provide that in relation to an application for bail, and upon application by either party, the court may suppress publication of the proceeding, or any part of it, until further notice if it

is in the interests of justice to do so. Any person who fails without lawful excuse to comply with such an order would be guilty of an offence against the Act. Like a number of other headings in the Act, the heading of the section should also be amended to reflect the content of the section (e.g. 'Restriction on publication' or something similar). This section may also need to be reviewed in light of the *Open Courts Act 2013.*

Grouping relevant provisions together

Sureties

7.13 One of the reasons why the Act is difficult to navigate is that provisions on the same topic are spread throughout the Act. For example, the following provisions relate to sureties:

- section 5(7) – (8) (sureties in the context of bail conditions)
- section 9 (provision of sureties)
- section 16 (sureties in the context of the extension of bail)
- section 17(2) (written notice of the accused's bail obligations and the consequences of an accused's failure to comply)
- sections 18AI and 18AJ (the role of sureties on applications for variation of bail)
- section 20 (death of a surety)
- section 21 (abolition of a surety's common law right)
- section 23 (procedure to be adopted where a surety seeks to be discharged).

7.14 Consideration could be given to locating the provisions relating specifically to the conduct and obligations of sureties together. It would make sense for those provisions to be located alongside the provisions relating to deposit of money by the accused (e.g. section 5(5) – (6)). See, for example, Part 9 of the *Bail Act 2013* (NSW). I also make some observations about the term 'surety' below.

7.15 In addition, the CDPP raised in its submission to the Review that insufficient notice is provided to prosecutors to enable them to conduct background checks on proposed sureties. This problem would be overcome by the inclusion of a

subsection requiring the particulars of prospective sureties to be provided two working days prior to the date of the application, unless the court otherwise orders. That subsection could be inserted in section 9 of the current Act and provide as follows:

> Unless the court otherwise orders, notice of not less than two working days must be provided to the court and to the prosecuting authority disclosing details of the proposed surety including full name, date of birth, place of residence, occupation and relationship to the applicant.

Children

7.16 Provisions that deal expressly with children are also scattered throughout the Act. Section 3B deals with principles peculiar to children; section 5AA, as previously discussed, relates to conditions imposed on grants of bail to children; section 5A deals with the return of a child to a Youth Justice Centre; section 12(1AA) deals with the procedure where bail to a child is refused and section 12(1AB), (1A)(b), (3) and (4) deal with the mechanics of bail applications for children and ensuring the attendance of a parent or independent person.[168] Section 16B deals with the capacity (or otherwise) of a child to enter into an undertaking.

7.17 Consideration could be given to whether these provisions should be grouped together, possibly alongside provisions relating to other vulnerable groups (such as section 3A). However, while there is merit in drawing attention to considerations that apply only to particular groups, I note that it may be difficult to group these provisions together without affecting the overall flow and order of the *Bail Act* provisions that apply to all accused persons.

Powers to grant bail

7.18 In my first advice, I recommended rewriting sections 10 and 12 of the Act so that section 10 governs the grant of bail by police and bail justices, and section 12 governs the grant of bail by courts (see paragraphs 5.28 and 5.37 of

[168] In paragraph 5.28 of my first advice, I proposed a redraft of section 10 which incorporates current sections 12(3) and (4).

that advice for the proposed redrafts). The Act should clearly state the powers of police officers, bail justices and courts to grant or refuse bail. Each group could have its own Division - see, for example, Part 5 of the *Bail Act 2013* (NSW). Alternatively, the powers of police and bail justices could be dealt with together, given there is some overlap (e.g. if my recommendations relating to the prohibition from considering grants in the 'exceptional circumstances' category or in relation to accused already on two or more bail undertakings are adopted).[169]

7.19 In Part 6 of the *Bail Act 2013* (NSW), the powers specific to the Local Court, the District Court, the Supreme Court and the Court of Appeal to grant bail are set out in sequence as are the attendant restrictions on each court's powers. A similar result could be obtained here by reordering the provisions relating to the Magistrates' Court and the Supreme Court, noting that the Act for the most part does not distinguish between the jurisdictions and does not refer to the County Court (apart from section 5A, section 18AH, and an oblique reference in section 18(3)(b) to 'the court to which the person remanded is to appear', a reference which encompasses grants of bail by a magistrate or a County Court judge to have an accused appear in the County Court). Logically, the sections dealing with grants of bail by the Court of Appeal would follow the provisions relating to the Supreme Court.

Appeals

7.20 A separate Part or Division could deal with appeals. Presently, Part 4 of the Act is headed 'Appeals' but it concerns itself only with appeals by the DPP.

7.21 Consideration could be given to including the following current *Bail Act* provisions into this Part or Division:

- section 18AA(2), which refers to the inherent jurisdiction of the Supreme Court
- section 18AG – Appeal against refusal to revoke bail

[169] Recommendations 14 and 15 of my first advice.

- section 18AH – Preservation of the right of application or appeal to the Supreme Court or County Court
- section 18A – Appeal by DPP against insufficiency of bail etc.

7.22 Section 18AH(1) of the Act preserves the right of an accused to appeal to either the County Court or the Supreme Court. It is unclear why this subsection refers to the County Court. While the Supreme Court has inherent jurisdiction to hear applications or appeals[170], I do not know what the reference to the County Court achieves.

7.23 Elsewhere in this advice I discuss de novo appeals by the DPP whose power to appeal under section 18A is presently constrained by the need to demonstrate either that the Director believes the conditions of bail are insufficient or that the grant of bail contravenes the *Bail Act*.[171] I also discuss a general right of an accused or the DPP to appeal to the Court of Appeal.

7.24 Section 265 of the *Criminal Procedure Act* empowers an accused who has appealed a Magistrates' Court sentence to apply to the Magistrates' Court to be released on bail. The *Bail Act* (with any necessary modifications) is said to apply to such applications. Similarly, section 310 of the *Criminal Procedure Act* empowers a prisoner who is appealing to the Court of Appeal to apply to that court for a grant of bail pending the appeal. Bail following an appeal is dealt with at section 323 of the *Criminal Procedure Act*. Consideration could be given to importing these provisions into the *Bail Act*, especially if the restructuring discussed in this advice is implemented.

Language and expressions

7.25 In my first advice, I made observations about the antiquated language used in parts of the Act. In its 2007 review the Law Reform Commission recommended the repeal of the Act and the drafting of a new Act in plain English. It also

[170] *Bail Act* s 18AA(2).
[171] Although, once the appeal is instituted, if the Supreme Court believes that a different order should have been made, it must set the impugned decision aside and conduct a fresh hearing (*Bail Act*, s 18A(6)).

recommended a comprehensive redrafting in plain English of the Regulations, taking into account that a significant proportion of people who appear before the court have intellectual disabilities, poor literacy or speak English as a second language.

7.26 I agree that the language of the Act and the Regulations needs to be comprehensively reviewed. Parts of the Act use gender specific and old fashioned language (e.g. 'the proof whereof lies upon him' in section 30(1)). The Act contains some very long and complex sentences and, as noted above, headings do not always reflect the content of the provision.

7.27 Some terms used in the Act are not explained or are used only once. For example, section 16 refers to 'safe custody', and section 19 provides that an accused's arrest on another charge shall not 'vacate' bail.

7.28 In addition, certain terms used throughout the Act could be reviewed. The expression 'surety' is not commonly used in the community. Other terms, such as 'bail security' or 'bail guarantor' (both used in NSW) could be considered.[172] Likewise, the expression 'remand' is used throughout the Act, but is not widely used in the community or understood by non-lawyers. The NSW Act refers generally to 'detention' (and refers to 'remand' only in the context of warrants[173]).

Recommendation 37

That the *Bail Act* be comprehensively overhauled and rewritten to enhance its structure, readability and internal consistency.

[172] However, if the provisions on sureties are reordered as I suggest above, the use of the term 'surety' may become less problematic.
[173] *Bail Act 2013* (NSW) ss 39 and 56(2)(b).