

**Government Response to the Bail Review (Advice provided by the Hon Paul Coghlan QC on 3 April 2017)**

No.	Recommendation	Government Response	Additional comments
<b>Chapter 3: Purpose of the Bail Act</b>			
1.	That the <i>Bail Act</i> include a purposes section and guiding principles to reflect that decisions on whether or not to grant bail are made in the context of broader policy considerations, particularly the balance between community safety and the presumption of innocence.	<b>Support.</b>	
<b>Chapter 4: Tests for granting bail</b>			
2.	That section 4 be replaced by a new provision which clearly sets out the following: <ul style="list-style-type: none"> <li>a) that there is a general entitlement to bail unless otherwise provided, and</li> <li>b) in all cases bail must be refused if the prosecution satisfies the bail decision maker that the accused poses an unacceptable risk, and</li> <li>c) in addition to satisfying the unacceptable risk test, an accused person charged with a specified offence is placed in one of two reverse onus positions requiring they show exceptional circumstances or good reason why bail should be granted.</li> </ul>	<b>Support in principle.</b>	Refer to the Government's comments in relation to recommendation 5.
3.	That the unacceptable risk test be amended to provide as follows: <p>In all cases bail must be refused if the prosecution satisfies the bail decision maker that there is an unacceptable risk that the accused if released on bail would:</p> <ul style="list-style-type: none"> <li>a) endanger the safety or welfare of any person; and/or</li> </ul>	<b>Support in principle.</b>	Refer to the Government's comments in relation to recommendation 5.

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	<ul style="list-style-type: none"> <li>b) commit an offence; and/or</li> <li>c) interfere with witnesses or otherwise obstruct the course of justice whether in relation to himself or herself or any other person; and/or</li> <li>d) fail to appear in court in answer to bail.</li> </ul>		
4.	That the concept of 'show cause' be replaced with 'show good reason'.	<b>Support in principle.</b>	The Government is obtaining further advice on the most appropriate formulation of the reverse onus test.
5.	<p>That section 4 provide that, in applying the unacceptable risk, exceptional circumstances and show good reason tests, a bail decision maker must take into account all relevant circumstances including but not limited to the following:</p> <ul style="list-style-type: none"> <li>a) the nature and seriousness of the alleged offending, including whether or not it is a serious example of the offence</li> <li>b) the strength of the prosecution case</li> <li>c) the accused's criminal history</li> <li>d) the accused's compliance with any previous grants of bail</li> <li>e) whether, at the time of the alleged offending, the accused was on bail, on summons, at large, on parole or undergoing a sentencing order</li> <li>f) the accused's personal circumstances, associations, home environment, and background</li> <li>g) any special vulnerability of the accused, including by reason of youth, being an Aboriginal person, ill health, cognitive impairment, intellectual disability or mental health</li> <li>h) the availability of treatment or support services</li> </ul>	<b>Support in principle.</b>	The interaction between the unacceptable risk/reverse onus tests, and the listed relevant circumstances will be clarified in legislation.

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	<p>i) any view or likely view of the alleged victim of the offence to the grant of bail</p> <p>j) the length of time the accused is likely to spend in custody if bail is refused</p> <p>k) the likely sentence should the accused be found guilty of the offence charged, and</p> <p>l) whether the accused has publicly expressed support for a terrorist act, terrorist organisation or the provision of resources to a terrorist organisation.</p> <p>That section 4 also provide that a bail decision maker must consider whether or not any conditions could be imposed to reduce any risks associated with granting bail.</p>		
6.	<p>That any accused who is charged with an indictable offence which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for another indictable offence must be refused bail unless the accused shows good reason why bail should be granted.</p>	<b>Support.</b>	Subject to the formulation of the reverse onus test (as referred to at recommendation 4).
7.	<p>That any accused who is charged with an offence listed in Schedule 2 which is alleged to have been committed while the accused is on bail, summons, at large, on parole or undergoing a sentence for an offence listed in Schedule 1 or Schedule 2 must be refused bail unless the accused shows exceptional circumstances why bail should be granted.</p>	<b>Support.</b>	

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8.	That the offences which place an accused person in an exceptional circumstances or show good reason test be listed in Schedules 1 and 2 of the <i>Bail Act</i> .	<b>Support.</b>	
9.	<p>That the following offences be added to Schedule 1, requiring an accused to show exceptional circumstances why bail should be granted:</p> <ul style="list-style-type: none"> <li>• Aggravated home invasion</li> <li>• Aggravated carjacking</li> <li>• Additional drug offences under the Criminal Code (Cth)</li> <li>• Conspiracy to commit, attempt to commit or incitement to commit an offence listed in Schedule 1.</li> </ul>	<b>Support in principle.</b>	The Government accepts the recommended offences being added to Schedule 1 but is considering the addition of further offences.
10.	<p>That the following offences be added to Schedule 2, requiring an accused to show good reason why bail should be granted:</p> <ul style="list-style-type: none"> <li>• Manslaughter</li> <li>• Child homicide</li> <li>• Causing serious injury intentionally in circumstances of gross violence</li> <li>• Causing serious injury recklessly in circumstances of gross violence</li> <li>• Causing serious injury intentionally</li> <li>• Threat to kill</li> </ul>	<b>Support in principle.</b>	<p>The Government accepts the recommended offences being added to Schedule 2 but is considering the addition of further offences.</p> <p>The Government notes Mr Coghlan's concerns about including the offence of threat to kill in Schedule 2 because it is a commonly charged offence where in many cases alleged conduct is at the lower level of seriousness.</p>

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	<ul style="list-style-type: none"> <li>• Rape</li> <li>• Rape by compelling sexual penetration</li> <li>• Assault with intent to commit a sexual assault</li> <li>• Incest - in circumstances other than where both people are aged 18 or older and each consented (as defined in section 36 of the Crimes Act 1958) to engage in the sexual act</li> <li>• Sexual penetration of a child under the age of 16 - in circumstances other than where at the time of the alleged offence the child was aged 12 years or older and the accused was not more than 2 years older than the child</li> <li>• Persistent sexual abuse of a child under the age of 16</li> <li>• Abduction or detention</li> <li>• Abduction of a child under 16</li> <li>• Kidnapping</li> <li>• Armed robbery</li> <li>• Culpable driving causing death</li> <li>• Dangerous driving causing death or serious injury</li> <li>• Dangerous or negligent driving while pursued by police</li> <li>• Attempted murder</li> <li>• Additional drug offences under the Criminal Code (Cth)</li> <li>• Persistent contravention of a family violence intervention order.</li> </ul>		<p>Mr Coghlan is particularly concerned about threats to kill made in the context of family violence. The Government will give further consideration as to the most appropriate way to address this concern and protect victims of family violence.</p>

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11.	<p>That sections 4(2)(d)(iii) and 14 be retained.</p> <p>That the <i>Bail Act</i> contain a new provision permitting a bail decision maker to defer making a bail decision for a limited period of time where an accused person is unable to participate in the bail hearing by reason of intoxication.</p>	Support.	
<b>Chapter 5: Who grants bail?</b>			
12.	<p>That the <i>Bail Act</i> be amended to:</p> <ul style="list-style-type: none"> <li>a) resolve the ambiguity that presently exists between section 10 of the <i>Bail Act</i> and the operation of section 464A of the <i>Crimes Act</i>,</li> <li>b) clarify the power of police to grant bail, and</li> <li>c) clarify the power of bail justices to grant or refuse bail.</li> </ul>	Support.	
13.	<p>That if Recommendation 12 is adopted, a note be added to section 464A of the <i>Crimes Act</i> providing that section 10 of the <i>Bail Act</i> is to operate upon the expiration of the reasonable time referred to in subsection (1).</p>	Support.	
14.	<p>That only a magistrate or judge may grant bail to an accused in the exceptional circumstances category (subject to the current restrictions relating to murder and treason).</p>	Support.	

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15.	That any accused who is already on two undertakings of bail with respect to indictable offences should not be able to be granted bail by a police officer or bail justice in relation to a further indictable offence, but must be brought before a court for the question of bail or remand to be determined.	<b>Support.</b>	The Government notes that Mr Coghlan has recommended (at recommendation 16) that implementation be deferred pending reforms relating to after-hours remand courts and alternative methods of dealing with lower level offenders
16.	That implementation of Recommendation 15 be deferred pending reforms relating to after-hours remand courts and alternative methods of dealing with lower level offenders (which will be discussed in my second advice).	<b>Support.</b>	
17.	That section 12 of the <i>Bail Act</i> be amended to clarify and simplify the powers of a court to grant or refuse bail.	<b>Support.</b>	
18.	That a further review of the role of bail justices be conducted. Pending that review, the bail justice system should be retained.	<b>Support in part.</b>	<p>The Government acknowledges an ongoing but more limited role for Bail Justices in the future.</p> <p>However, the Government supports Recommendation 14 in regard to Schedule 1 offences.</p> <p>Additionally, the Government intends to allow certain remand decisions to be made by police. The circumstances in which police will be empowered to make those decisions will be defined in legislation.</p>

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19.	That bail justice hearings be recorded and the Honorary Justice Office examine the method of recording, and retention of recordings.	<b>Support in principle.</b>	
20.	That the <i>Bail Act</i> and the Bail Regulations 2012 be amended to allow police to apply for an immediate stay from a decision of a bail justice to grant bail.	<b>Noted.</b>	The Government's response to Recommendations 14 and 18 may render Recommendation 20 unnecessary.
21.	<p>That section 13 of the <i>Bail Act</i> be amended to provide that bail may only be granted to a person charged with treason or murder by –</p> <ul style="list-style-type: none"> <li>a) in the case of a person charged with treason – a judge of the Supreme Court</li> <li>b) in the case of a person charged with murder - a judge of the Supreme Court or the magistrate who commits the person to trial for murder.</li> </ul>	<b>Support.</b>	
<b>Chapter 6: Family violence</b>			
22.	That the substance of clauses 12, 38, 39, 44 -47, 49A and 50 of draft 9 of the Family Violence Protection Amendment Bill 2017 (Vic.) be enacted (subject to further consultation with stakeholders).	<b>Support.</b>	
<b>Chapter 7: Bail conditions</b>			
23.	<p>That amendments be made to:</p> <ul style="list-style-type: none"> <li>a) section 5 of the <i>Bail Act</i> to provide that any conduct condition continues</li> </ul>	<b>Support.</b>	

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	<p>in effect until the condition is continued, varied or revoked, or the matter is finally determined; and</p> <p>b) the Bail Regulations 2012 to ensure that accused entering undertakings of bail are made aware of the continuing nature of the conditions.</p>		
24.	That section 5 of the <i>Bail Act</i> be redrafted to refer specifically to bail undertakings and to improve its structure and wording.	<b>Support.</b>	