Bailing Out A Broken Bail System

Rights Advocacy Project
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LIBERTY VICTORIA
Liberty Victoria's RIGHTS ADVOCACY PROJECT

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ABOUT THIS REPORT

This report was written by Arabella Close, Asad Kasim-Khan, Erin Meeking, Kresta Lokumarambage and Sanduni De Silva as members of Liberty Victoria's Rights Advocacy Project ('RAP'). RAP is a community of lawyers and activists working to advance human rights in Australia. RAP works across a range of issues including criminal justice reform, equality, government accountability and refugee and asylum seeker rights.

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Lastly, we are grateful for the ongoing commitment of Liberty Victoria to human rights in the law reform space. We are each grateful to have participated in the Rights Advocacy Project program.

About Liberty Victoria

Liberty Victoria is one of Australia's leading civil liberties organisations. It has been working to defend and extend human rights and freedoms in Victoria for more than 70 years. The aims of Liberty Victoria are to:

- help foster a society based on the democratic participation of all its members and the principles of justice, openness, the right to dissent and respect for diversity;
- secure the equal rights of everyone and oppose any abuse or excessive power by the state against its people;
- influence public debate and government policy on a range of human rights issues. Liberty Victoria has policy statements on issues such as access to justice, a charter of rights and freedom of speech and privacy; and
- make submissions to government, support court cases, which defend infringements of civil liberties, issue media releases and hold events.

Abbreviations
Bail Act – *Bail Act 1977* (Vic)
The Charter – *Charter of Human Rights and Responsibilities Act 2006* (Vic)
LIV – Law Institute of Victoria
VLRC – Victorian Law Reform Commission

Executive Summary

In the past ten years Victoria has experienced a drastic increase in the number of people in prison. Prior to a small reduction in prisoner numbers as a result of coronavirus, several commentators claimed that we are in an 'incarceration crisis'.[1]

As of June 2020, there were 7,151 people in the Victorian prison system.[2] This is an increase of 57.6 per cent from June 2010. This is a smaller increase than in previous years: in June 2019 there were 8,101 people in the Victorian prison system, representing an increase of 86.2 per cent from June 2009. However, as noted below this slowed increase reflects the temporary effects of COVID-19 rather than a lasting change to the bail regime. The Andrews Government expects that by June 2023 the number of people in prison will have

1 Marilyn McMahon, 'No bail, more jail? Breaking the nexus between community protection and escalating pre-trial detention' (Research Paper No 3, Parliamentary Library, Parliament of Victoria, 2019) 1; see also Baz Dreisinger, quoted by Hayley Gleeson, 'Australia Must 'Radically Re-Think' Its Prisons to Avoid Becoming Like America, U.S Activist Says', *ABC News*, 30 April 2019 <https://www.abc.net.au/news/2019-04-30/australian-prisons-need-radical-rethink-baz-dreisinger-says/11059478>.

2 Department of Justice and Community Safety - Corrections Victoria, 'Corrections statistics: quick reference', *Corrections, Prisons & Parole* (Web Page, 30 June 2020) <https://www.corrections.vic.gov.au/prisons/corrections-statistics-quick-reference>.

increased by 37.24 per cent, to 11,130 people.[3]

Changes to bail laws in 2017 and 2018 are the single largest factor behind the increased number of people in prison.[4] They have meant many more people charged with a crime are denied bail. People on remand currently account for 38 per cent of all Victorians in prison, an increase from 19 per cent in 2015. By 2023, the number of people on remand is projected to increase by four-fold on 2014 numbers, while the number of sentenced people in prison is expected to increase by just 32 per cent.[5]

The increasing number of people on remand has a profound impact on those people kept in custody, their families and communities, as well as the broader Victorian community. The bail changes have disproportionately impacted women and Aboriginal and Torres Strait Islander people, as discussed in Chapter 3.

This report will address the impact of the recent amendments to the Bail Act, including the erosion of fundamental rights, the disruption to the lives of people held on remand and the potentially criminogenic effects, as well the economic cost to the Victorian community.

This report argues that the drastic increase in the number people on remand is a crisis. Many of the people held on remand have been charged with minor or non-violent offences and should have been granted bail because they do not pose a significant risk to the community. In fact, their denial of bail may be criminogenic, increasing the likelihood of offending.[6] Remanding these people into custody may ultimately make the community less safe.

To remedy the jump in the number of people on remand and resulting negative consequences, this report recommends amendments to the Bail Act to reduce the number of accused people who are denied bail. This report also recommends a non-legislative change that would help protect against the disproportionate denial of bail faced by Aboriginal and Torres Strait Islander bail applicants.

Impact of COVID-19 on the bail regime

The lockdowns have caused major disruptions to the court system, resulting in delays and potentially much longer periods on remand. Prisons pose a particularly high risk for the transmission of the virus due to overcrowding, shared facilities and staff that move between the prisons and the general community. As noted by Ginnane J in *Rowson v Department of Justice and Community Safety*, the 'congregational' nature of prisons means that the virus would spread more rapidly than in the usual community.[7] People in prisons are often at a higher risk of developing severe COVID-19 cases due to higher rates of social disadvantage and medical vulnerability attributable to long term difficulties accessing health care, mental health and substance abuse problems, and unhealthy prison conditions.[8]

The disruption to the court system caused by the coronavirus pandemic has led to a reduction in the overall number of people held in prisons, including those held on remand.[9] This in part reflects the recognition of the courts that the delays to trials and the heightened

3 Royce Millar and Chris Vedelago, 'Prisons are booming as Victoria pays for its 'tough on crime' stance', *The Age* (online, 27 June 2019) <https://www.theage.com.au/national/victoria/prisons-are-booming-as-victoria-pays-for-its-tough-on-crime-stance-20190627-p5220f.html>

4 Ibid.

5 Ibid.

6 Jose Cid 'Is Imprisonment Criminogenic? A Comparative Study of Recidivism Rates between Prison and Suspended Prison Sanctions' (2009) 6(6) *European Journal of Criminology* 459-480.

7 (2020) 60 VR 410, [100]. For further expert evidence on the risk of virus spread in prisons see [33] and [34].

8 Lesley Russell, 'Why prisons in Victoria are locked up and locked down' *The Conversation* (online, 23 July 2020) <https://theconversation.com/why-prisons-in-victoria-are-locked-up-and-locked-down-143178>.

9 Hayley Gleeson, 'Coronavirus triggers drop in prisoner numbers and an opportunity to reinvent the criminal justice system, lawyers say', *ABC News* (online, 9 August 2020) <https://www.abc.net.au/news/2020-08-09/remarkable-declines-prisoner-numbers-coronavirus-pandemic/12533218>; Department of Justice and Community Safety - Corrections Victoria, 'Monthly Prisoner and Offender Statistics 2020-21', *Corrections, Prisons & Parole* (Web Page, December 2020) <https://www.corrections.vic.gov.au/monthly-prisoner-and-offender-statistics-2020-21>.

risk of contracting the virus in prison should be considered when determining whether to release a person on bail.[10] However, this is only a temporary response to a novel situation and is not a solution to the underlying problem of increasing remandee numbers. The building of the new Chisholm prison demonstrates that the recent reduction in the prison population does not reflect a meaningful deviation from the trend of increased incarceration rates in Victoria.[11] The pandemic's effect does not vacate the need for systemic reform to address the critical failings of the bail regime discussed in this report.

Chapter 1 outlines the background for the Coghlan Review and the 2017-18 reforms of Victoria's bail system.

Chapter 2 discusses the current legislative framework for bail in Victoria.

Chapter 3 identifies the issues with the 2017-18 changes, including how they have disproportionately impacted women and Aboriginal and Torres Strait Islander people, and their effect on human rights and legal principles.

Chapter 4 considers the purposes and impact of bail schemes in other Australian jurisdictions and overseas.

Chapter 5 presents our recommendations for legislative and practical reforms, based on our research and consultations with key stakeholders.

10 Judicial College of Victoria, *Coronavirus Jurisprudence – Bail* (Web Page) <https://www.judicialcollege.vic.edu.au/resources/coronavirus-jurisprudence#Bail>.

11 Department of Justice and Community Safety – Corrections Victoria, 'Expanding Victoria's prison system: Managing the ongoing growth of the prison population in Victoria', *Corrections, Prisons & Parole* (Web Page) <https://www.corrections.vic.gov.au/prisons/expanding-victorias-prison-system>.

CHAPTER 1: BACKGROUND

In Victoria, the denial of bail and detention in prison (also called being remanded into custody) are used as a putative crime prevention tool. Community protection is now more heavily emphasised in bail decision-making, often ahead of the presumption of innocence, with little legal or statistical evidence to support the assertion that denying bail protects the community. Bail hearings have evolved to rest primarily on an assessment of whether the person seeking bail may commit offences if released.[12] As a consequence, the number of people detained in prisons in Victoria has continued to increase, with a disproportionate impact on women, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds – see Chapter 3.

Concerns of community safety and protection continue to dominate bail discourse in Victoria.[13] This has led Victoria's bail laws and practices to become more restrictive, leading to a substantial increase in remand rates. This report argues that the 2017-2018 changes, whilst seeking to satisfy political and community wishes, continue to fail vulnerable Victorians and, in doing so, fail Victorians as a whole.

12 McMahon, above n 1, 28.

13 For example: 'Melbourne car attack: Bail law reform announced by Daniel Andrews in wake of Bourke St rampage', *ABC News* (online, 23 January 2017) <https://www.abc.net.au/news/2017-01-23/bourke-st-rampage-prompts-bail-law-review-in-victoria/8202300> ; Danny Tran, 'Victoria police call for power to deny offenders bail outside of court hours', *ABC News* (online, 9 March 2017) <https://www.abc.net.au/news/2017-03-09/vic-police-call-for-more-powers-in-deciding-bail/8339160>; 'Victoria's bail system to become most onerous in Australia after review, State Government says', *ABC News* (online, 8 May 2017) <https://www.abc.net.au/news/2017-05-08/victoria-set-to-tighten-bail-justice-system-after-review/8505506>; Adam Holmes, 'Are tighter bail laws harming the vulnerable? A Bendigo criminal lawyer questions their effectiveness', *Bendigo Advertiser* (online, 13 July 2018) <https://www.bendigoadvertiser.com.au/story/5518773/are-tighter-bail-laws-harming-the-vulnerable/>.

Purpose of bail

Traditionally, the primary purpose of bail in Victoria was to ensure an accused person's attendance at court. Until the 2017-2018 changes, this purpose was enshrined in section 5(1) of the Bail Act, which required that a condition be imposed by the court on an accused person being released on bail to attend court at a specified date and time. Under the former section 4(2)(d), subsequent considerations of when and whether to grant bail centred around the management of any risks which might arise to the community whilst an accused person was on bail. These included the risk of further offences being committed whilst the accused person was on bail, endangerment of the safety or welfare of members of the public, the safety of witnesses, and other obstructions to justice.

The Coghlan Review

On 20 January 2017, James Gargasoulas drove a stolen car along Melbourne's Bourke Street, killing six people, and seriously injuring 27 people. Mr Gargasoulas was on bail at the time. Following this tragedy, the Hon Paul Coghlan QC was commissioned to review the operation of bail laws and practices in Victoria, culminating in two reports. The key aim of the review was to advise the Victorian government on changes to the bail system to best manage risk and maximise safety. The review was guided by terms of reference which focused on the relationship between bail and community safety as follows:

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 Coghlan Review made 37 recommendations for the reform of the Victorian bail system. An overview of these recommendations and the two Coghlan Review reports can be found at www.engage.vic.gov.au/bailreview.
The Victorian government accepted the majority of the Coghlan Review's recommendations, and significant reforms were made to the Bail Act. These came into effect in 2017 and 2018. These amendments included adding further offences to Schedule 1 and Schedule 2 of the Bail Act and are discussed in the following chapter, which outlines the current bail regime.

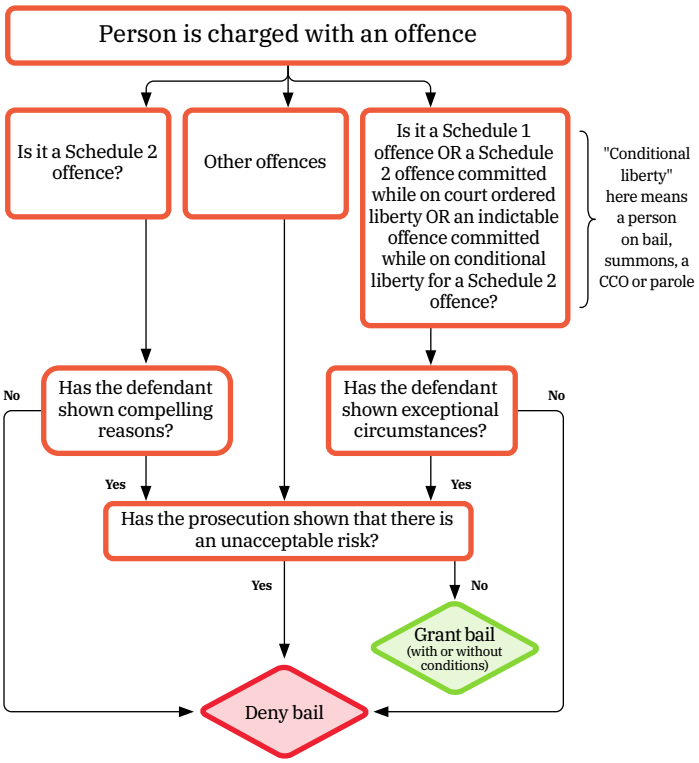
CHAPTER 2: THE CURRENT BAIL REGIME

The offence an accused person is charged with plays a key role in whether or not they are likely to be granted bail under the Bail Act. Different offences trigger different legal tests that the bail decision-maker uses to determine whether to grant bail.

The Bail Act creates three categories of offences. Schedule 1 offences are those deemed most severe, which include murder, treason, aggravated home invasion, carjacking and drug trafficking ('Schedule 1 offence'). Schedule 2 is the next category of severity, and includes manslaughter, child homicide, causing serious injury and rape ('Schedule 2 offence'). The third category includes all offences not listed in Schedule 1 or 2. This includes more minor or non-violent offences such as drug possession and theft.

Flowchart for determining which test applies to a bail applicant

The flowchart below demonstrates which tests are applied to each category of offence when a decision to grant or deny bail is being made.



Schedule 2 offences: show compelling reason test

A bail applicant who is charged with a Schedule 2 offence is subject to the show compelling reason test.[14] Bail must be refused unless the bail decision-maker is satisfied that a compelling reason exists to justify granting bail. A compelling reason is established through considering all relevant circumstances including the strength of the prosecution's case, the bail applicant's personal circumstances, and criminal history.[15] Examples include the applicant having no prior convictions or negative bail history,[16] the applicant being vulnerable on remand, or the offending being at the lower end of seriousness.[17] The accused person bears the burden of satisfying the bail decision-maker that there is a compelling reason.[18] If the accused person is able to demonstrate a compelling reason, the process then moves to the unacceptable risk test.

The show compelling reason test reverses the onus of proof, meaning that the presumption of bail no longer operates.[19]

Schedule 1 offence: exceptional circumstances test

If a person is charged with a Schedule 1 offence, the exceptional circumstances test is applied.[20] This means that the accused person must show exceptional circumstances that justify the granting of bail. A combination of delay, onerous custodial conditions, and the relative weakness of the prosecution's case may

14 *Bail Act 1977* (Vic), s 4AA(3).
15 *Re Ceylan* [2018] VSC 361, [46].
16 *Re Neskovski* [2019] VSC 447, [20], [22].
17 *Re Walker* [2018] VSC 804, [49]-[50].
18 *Bail Act 1977* (Vic), s 4C(2).
19 Ibid.
20 Ibid, s 4AA(1).

consitute exceptional circumstances.[21] Other examples of exceptional circumstances include: being subjected to repeated violence while on remand,[22] and the possibility of being sentenced to a custodial term of less than the period spent on remand.[23] If exceptional circumstances are not established, bail will be refused.

As with the show compelling reason test, if they are able to demonstrate exceptional circumstances, the process moves to the unacceptable risk test.

For this test, the onus of proof also rests with the accused, meaning that the presumption of bail no longer operates.[24]

All offences: unacceptable risk test

If the accused is charged with any offence, including a Schedule 1 or 2 offence, the unacceptable risk test is applied.[25] The onus is on the prosecution to establish that the person applying for bail poses an 'unacceptable risk' of:[26]

- endangering someone's safety or welfare; or
- committing an offence; or
- interfering with a witness; or
- failing to surrender into custody.[27]

The bail decision-maker must take into account surrounding circumstances (for example: the nature and seriousness of the alleged offending, the strength of the prosecution case, the accused's criminal history)[28] and any possible bail conditions that could be imposed to make the risk an acceptable one.[29] The Bail Act does not provide a definition of an unacceptable risk.

21 *Re Assaad* [2020] VSC 561, [51].
22 *Re Logan* [2019] VSC 134, [67]-[69].
23 *Re DR* [2019] VSC 151, [56].
24 *Bail Act 1977* (Vic), s 4A(2).
25 Ibid, s 4E.
26 Ibid, s 4E(2).
27 Ibid, s 4E(1).
28 Ibid, s 3AAA.
29 Ibid, s 4E(3).

Reversing the onus on non-Schedule 1 and 2 offences and secondary offences

If the accused person is already on conditional liberty,[30] and charged with a further indictable offence, the second offence is deemed to be a Schedule 2 offence.[31] This means that, although the second charge may relate to an offence that would otherwise invoke only the unacceptable risk test, the accused will also need to show compelling reason to be granted bail – a higher test.

In addition to reversing the onus for accused persons on conditional liberty, the Bail Act contains the secondary offences of failure to answer bail, contravening a conduct condition of bail and committing an indictable offence while on bail.[32] This means that a person who breaches their bail conditions has not just contravened bail – they have committed an additional criminal offence.[33] These secondary offences are included in Schedule 2 and are subject to the show compelling reason test.[34] The inclusion of these offences in the Bail Act can have a compounding effect on incarceration rates, as in the case of *Hall v Pangemanan* described in Chapter 3.

The current bail regime has specific processes involving the various tests described above, that apply to people accused of terrorism-related offences, or individuals with criminal records relating to terrorism offences. This report does not deal with bail for people charged with or previously convicted of those offences.

30 Meaning they are already on bail or subject or a summons to answer to a charge for a prior indictable offence.
31 *Bail Act 1977* (Vic), Schedule 2, s 1.
32 Ibid, ss 30, 30A and 30B.
33 McMahon, above n 1, 13.
34 *Bail Act 1977* (Vic), Schedule 2, s 30.

CHAPTER 3: ISSUES WITH THE CURRENT BAIL REGIME

The purposes of the bail regime are laid out in the guiding principles of the Bail Act.[35] These state the intention of Parliament is that all decisions made under the act have regard to the importance of community safety, the presumption of innocence and the right to liberty, the promotion of fairness and to promote the public understanding of bail. Although the traditional purpose of bail was to ensure that an accused person would attend court, the purpose of bail has evolved since the 1970s, and now includes community protection.[36] Arguably, this factor has become increasingly relevant to bail decision-makers.[37]

However, the current bail regime fails to deliver on its intended purposes. The 2017-18 amendments to the act do not make the community safer in the long term, and disproportionately affect women and Aboriginal and Torres Strait Islander people (see Chapter 3). In addition to prison overcrowding, the increased rates of incarceration have resulted in increased costs to Corrections Victoria and the Victorian government.[38]

Is the community safer?

The Coghlan Review highlighted the societal expectation that bail operates to protect the community.[39] Most Victorians believe that someone who breaches a bail condition ought to be brought into custody immediately.[40] Despite this expectation, the Review found there is a public perception that accused people were being granted bail after breaching bail conditions and other offending while on bail. When the bail regime was amended in 2017-2018, the guiding principles of the Bail Act further enshrined community safety considerations when making bail decisions.

Incarceration of people who have not been convicted of an offence can be criminogenic – something that causes or is likely to cause criminal behaviour. In a research paper for the Parliament of Victoria in 2019, Dr Marilyn McMahon analysed evidence about the effectiveness of bail from local and international jurisdictions.[41] Dr McMahon's paper identified two important points about the criminogenic nature of bail: firstly, that the likelihood of offending whilst on bail is low (about one in five people offend while on bail),[42] and secondly pretrial detention increases a person's chance of offending in the future.[43] Pretrial detention increases the severity of factors which are known to lead to offending: loss of income, accommodation and personal relationships. It can introduce offenders to broader criminal organisations, or reinforce these ties. Access to education and rehabilitation programs is limited on remand and the uncertain nature of the duration of pretrial detention means

35 See *Bail Act 1977* (Vic), s 1B.

36 McMahon above n 1, 8-9.

37 Ibid; Rick Sarre, Sue King, and David Bamford, 'Remand in custody: critical factors and key issues' (Trends & issues in crime and criminal justice No. 310, Australian Institute of Criminology, May 2006) <https://www.aic.gov.au/publications/tandi/tandi310>.

38 Chris Vedelago and Royce Millar, 'Stack and rack: Victoria's newest prison already full and set to expand', *The Age* (online, 7 July 2019) <https://www.theage.com.au/national/victoria/stack-and-rack-victoria-s-newest-prison-already-full-and-set-to-expand-again-20190706-p524qr.html>.

39 Paul Coghlan, *Bail Review: First advice to the Victorian Government* (Report, 3 April 2017) 2.12-2.25.

40 Gary Morgan and Michele Levine, 'Break bail, go to jail- 82% of Victorians agree with Matthew Guy' *Roy Morgan* (online, 22 November 2018) <roymorgan.com/findings/7813-victorian-election-bail-or-jail-november-22-2018-201811220506>.

41 McMahon, above n 1, 18-22.

42 Ibid, 21.

43 Ibid, 22-24.

that accused people are unable to plan for their release. As bail decision-makers are increasingly considering community protection as a relevant factor, the likelihood that remand can lead to more offending, increasing the risks to the community, should be recognised.

Impact on Women

Women have been disproportionately affected by the 2017-18 changes to the Victorian bail laws. As of June 2020, 43 per cent of women in custody are on remand, compared to 35 per cent of men.[44] 90 per cent of female prison receptions were on remand in 2018, up from 72 per cent in 2012. In 2018, less than two-thirds of women on remand were sentenced to prison when their matter was finalised. Given that women are more likely to be charged with non-violent offences, such as property or drug offences, it's likely many women on remand are being imprisoned due to risk factors that a bail decision-maker must consider, rather than the seriousness of their offending. An increase in the proportion of women who fall into a reverse onus category is likely driving this increase: 79 per cent of women on remand in 2018 were in a reverse onus category, increasing from just 37 per cent in 2012.[45]

When courts and bail decision-makers are assessing an accused person's risk of absconding, they will often consider stable housing or connections to the community. This has a deleterious impact on women, who are less likely to have property in their own name or to be employed.[46] Homelessness is sometimes used as a reason to oppose bail, as is a lack of access to crisis housing and drug and alcohol dependence treatment.[47] Homelessness is also a common consequence of family violence, and the social isolation characteristic of family violence can mean there is no alternative accommodation for women. Imprisonment may also lead women to lose custody of their children, lose their housing and lose their employment.[48] As the majority of women charged with crimes are victims of family violence,[49] there may be a risk of losing custody of their children to their abusers. In 2018, more than a third of women on remand were not sentenced to imprisonment when their cases were finalised.[50] This means many women are being exposed to the negative effects of incarceration while on remand in situations where the court ultimately finds that their offending did not merit incarceration.

The inclusion of a breach of Family Violence Intervention Orders ('FVIO') in Schedule 2 of the Bail Act may also further marginalise some women experiencing family violence. The Women's Legal Service Victoria has identified the pervasive issue of misidentification of perpetrators on Family Violence Intervention Orders.[51] Their study found that of the 55 women named as respondents to police FVIOs between January and May 2018, 32 were misidentified as perpetrators of violence (58 per cent).[52] As it can often be difficult to identify a primary aggressor and primary victim, often police are put into highly stressful situations where they have to make particularly nuanced decisions,

44 Department of Justice & Regulation – Corrections Victoria, 'Annual Prisoner Statistics Profile 2017-2018 - Profile of Women in Prison', *Corrections, Prisons & Parole* (Web Page) <https://files.corrections.vic.gov.au/2021-06/Infographic_Profile_of_women_in_prison.pdf?VersionId=gPizDZxURSreRC_sJNVh4W_sJ4zfOf4R>.

45 Samantha Walker, Paul Sutherland, and Melanie Millsteed, 'Characteristics and offending of women in prison in Victoria, 2012-2018' (Crime Statistics Agency, November 2019), 34.

46 Laurel Townhead (2007) *Pre-trial detention of women and its impact on their children* (Report, 2007) Geneva: Quaker United Nations Office, 15.

47 Emma Russell, Bree Carlton, Danielle Tyson, Hui Zhou, Megan Pearce and Jill Faulkner, *A Constellation of Circumstances: The Drivers of Women's Increasing Rates of Remand in Victoria* (Report, July 2020) Fitzroy Legal Service and the La Trobe Centre for Health, Law and Society, 22.

48 Ibid, 6.

49 Ibid, 41.

50 Walker, above n 45, 34.

51 Madeleine Ulbrick and Marianne Jago, *"Officer she's psychotic and I need protection": Police misidentification of the 'primary aggressor' in family violence incidents in Victoria* (Policy Paper 1, July 2018) Women's Legal Service Victoria, 1.

52 'Snapshot of Police Family Violence Intervention Order applications – January-May 2018', *Women's Legal Service Victoria* (PDF document, October 2018) 1 <https://www.womenslegal.org.au/files/file/Snapshot of Police Family Violence Intervention Order applications 29.10 (002).pdf>.

and are not adequately trained to deal with the issues that arise in situations with a history of domestic violence.[53] It may be that the perpetrator is the first person to call the police, and therefore perceived to be the victim.

In these instances, women who have been misidentified as perpetrators of family violence may breach these orders and have their bail decision made in reference to the show compelling reason test, and if there is another breach, they will be assessed under the exceptional circumstances test. The inclusion of FVIO breaches as Schedule 2 offences has a compounding impact for many women in these circumstances and exposes them to the risk of remand for breaching an order which may not have been appropriately made.

Impact on Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander are significantly overrepresented in the Victorian legal system. The imprisonment rate of Aboriginal and Torres Strait Islander people has increased from 839.4 per 100,000 adults in 2009, to 2267.7 per 100,000 adults in 2019. By comparison, Victoria's overall imprisonment rate in the same period increased from 104.9 to 157.1 per 100,000 adults.[54] In 2020, Aboriginal and Torres Strait Islander people made up 10.4 per cent of all people in Victorian prisons,[55] despite representing less than 1 per cent of the state's population.[56]

People who are born into poverty and who face systemic discrimination are often criminalised or more likely to offend due to their social and economic circumstances. For Aboriginal and Torres Strait Islander people, generally lower levels of income, health and educational outcomes are inextricably linked to the ongoing colonisation of Australia.[57] Colonisation dispossessed and dispossesses Aboriginal and Torres Strait Islander people from country, disrupted and disrupts cultural and kinship systems, removed and removes children from their families, resulted in wage theft and slavery, and embedded systemic racism, social exclusion and poverty which continues today.[58]

These drivers, as well as racial profiling and discrimination in policing, see Aboriginal and Torres Strait Islander people disproportionately stopped, arrested and charged by police.[59] For example, Aboriginal and Torres Strait Islander people comprise 29.6 per cent of all people imprisoned for public order offences

53 Ulbrick and Jago, above n 51, 1- 2.

54 'Victoria's Indigenous Imprisonment Rates', *Sentencing Advisory Council* (Web Page, 2019) <https://www.sentencingcouncil.vic.gov.au/statistics/sentencing-trends/victoria-indigenous-imprisonment-rate>.

55 Department of Justice & Regulation – Corrections Victoria, 'Annual Prisoner Statistical Profile 2009-10 to 2019-20 - Profile of People in Prison' (Web Page) <https://files.corrections.vic.gov.au/2021-06/Infograpic_Profile_of_people_in_prison2020.pdf?VersionId=sU1fMoYZEAM.wuZEj1jUpoB1wPKjs7BT>.

56 Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Population – Victoria 2016 Census Data Summary* (Catalogue No 2071.0).

57 'Underlying causes of Aboriginal over-representation', *Victorian Aboriginal Justice Agreement* (Web Page) <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-over-representation-in-the-justice-system/underlying-causes-of-aboriginal>.

58 Ibid.

59 For example: 'When apprehended by police, Indigenous youth are two to three times more likely to be arrested and charged with an offence than non-Indigenous youth (Department of Justice 2005)' from VicHealth, 'Ethnic and race-based discrimination as a determinant of mental health and wellbeing' (Research Summary No 3, August 2008) <https://www.vichealth.vic.gov.au/-/media/ProgramsandProjects/Publications/Attachments/ResearchSummary_Discrimination.pdf?la=en&hash=BD183D8A923712D3205C7A77ACBCFAB160639DF3>; a further example: 'Victorian Police LEAP data analysed by eminent statistician, Professor Ian Gordon from the University of Melbourne in Haile-Michael & Ors v Konstantinidis & Ors revealed that between 2006-2009, Africans in the Flemington and North Melbourne area were 2.5 times more likely to be stopped by police than other groups despite having a lower crime rate' from, *'Racial Profiling' Police Accountability Project* (Web Page) <http://www.policeaccountability.org.au/issues-and-cases/racial-profiling/#_ftnref6>.

such as public drunkenness in Victoria.[60]

Bail refusal

As a result of this over-policing, Aboriginal and Torres Strait Islander people feel the effects of changes in the bail regime and are overrepresented in the number of people held on remand.[61] Due to a greater likelihood of having prior convictions, accused Aboriginal and Torres Strait Islander people are less likely to be granted bail than accused settler Victorians.[62] Legislative presumptions against bail – such as the show compelling reason and exceptional circumstances tests – also contribute to disproportionately high levels of Aboriginal and Torres Strait Islander people being refused bail.[63] If defendants are unable to accurately outline their living arrangements, cultural responsibilities and other relevant details to the court due to a language barrier, this can also result in a refusal of bail.[64] For Aboriginal and Torres Strait Islander women, bail is often denied due to a lack of safe, stable and secure accommodation.[65] As at June 2020, 44 per cent of the Aboriginal and Torres Strait Islander people in prison were on remand,[66] while the percentage of all people in prison who were on remand was only 35 per cent.[67]

Denial of bail can be particularly punitive for Aboriginal and Torres Strait Islander people: people on remand do not have access to culturally specific prison programs and the temporary and uncertain nature of remand can lead to further life disruption. This creates a cycle of disadvantage, further driving future criminal behaviour, rather than supporting communities and addressing the longstanding issues that contribute to offending.[68] Increased rates of over-incarceration have the potential to compound cultural loss and intergenerational trauma, further entrenching Aboriginal and Torres Strait Islander people's social and economic exclusion.[69]

Bail conditions

If bail is granted, common bail conditions often disproportionately disadvantage Aboriginal and Torres Strait Islander people, leading to breaches, compounding offending.[70] For example, curfews, exclusion orders and non-association orders can conflict with cultural obligations, such as taking care of family and attending funerals. For Aboriginal and Torres Strait Islander people who have a strong connection to country, bail conditions restricting access to certain places can have a serious cultural impact.[71]

Breach of a bail condition is a Schedule 2 offence, which requires the accused person to show compelling reason before being granted bail.[72] If these conditions are breached again, then the accused person will be required to show exceptional circumstances before being granted bail – a much higher threshold.[73] Breaches of

60 'Decriminalisation of public drunkenness', *Alcohol and Drug Foundation* (Web Page, 14 October 2019) <https://adf.org.au/insights/decriminalisation-public-drunkenness/>.

61 C Cunneen and J Tauri, *Indigenous Criminology* (Bristol Policy Press, 2016) cited in 'Underlying causes of Aboriginal over-representation', *Victorian Aboriginal Justice Agreement* (Web Page) <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-over-representation-in-the-justice-system/underlying-causes-of-aboriginal>.

62 Australian Law Reform Commission, *Pathways to Justice - An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017), 5.26.

63 Ibid, 5.34-5.38.

64 Ibid, 5.33.

65 Ibid, 5.32.

66 Department of Justice and Regulation - Corrections Victoria, 'Annual Prisoner Statistical Profile 2009-10 to 2019-20 representation - Profile of Aboriginal People in Prison', *Corrections, Prisons & Parole* (Web Page) <https://files.corrections.vic.gov.au/2021-06/Infographic_Aboriginal_people_in_prison.pdf?VersionId=S8QK1zucYtcUFuk8UhQNi2ixPiJwm5Pt>.

67 Department of Justice and Regulation - Corrections Victoria, above n 55.

68 See, for example, Australian Law Reform Commission, above n 62, 5.2.

69 'Underlying causes of Aboriginal over-representation', *Victorian Aboriginal Justice Agreement* (Web Page) <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-over-representation-in-the-justice-system/underlying-causes-of-aboriginal>.

70 Australian Law Reform Commission, above n 62, 5.2.

71 Ibid, 5.41-5.43.

72 *Bail Act 1977* (Vic), Schedule 2, s 30.

73 Ibid, s 4AA(2)(c).

bail have a compounding effect, and make it harder for the accused to be granted bail in the future. In the case of Aboriginal and Torres Strait Islander people this contributes to their ongoing over-representation in Victoria's prisons.[74]

Indigenous deaths in custody

Since 1991, more than 434 Aboriginal and Torres Strait Islander people have died in custody across the continent.[75] While Aboriginal and Torres Strait Islander people are no more likely to die in custody than settler Australians, they are more likely to be arrested and imprisoned and are therefore more exposed to the risks associated with being held in custody – including death.[76]

The Royal Commission Into Aboriginal Deaths In Custody ('Royal Commission') found that "the high rates of Aboriginal deaths in custody was directly related to the underlying factors of poor health and housing, low employment and education levels, dysfunctional families and communities, dispossession and past government policies".[77] It concluded that "the most significant contributing factor bringing Aboriginal people into conflict with the criminal justice system was their disadvantaged and unequal position in the wider society".[78]

74 Australian Law Reform Commission, above n 62, 5.26-5.29.

75 Lorena Allam, Calla Wahlquist and Nick Evershed, 'Aboriginal Deaths in Custody', *The Guardian* (online, 6 June 2020) <https://www.theguardian.com/australia-news/2020/jun/06/aboriginal-deaths-in-custody-434-have-died-since-1991-new-data-shows>.

76 Alexandra Gannoni and Samantha Bricknell, 'Indigenous deaths in custody: 25 years since the Royal Commission into Aboriginal Deaths in Custody', (Statistical Bulletin 17, February 2019, Australian Institute of Criminology) 1 and 11 <https://www.aic.gov.au/sites/default/files/2020-05/sb17_indigenous_deaths_in_custody_-_25_years_since_the_rciadic_210219.pdf>.

77 Victoria State Government - Department of Justice and Regulation, *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody,* (2005) vol 1, 79; 'Underlying causes of Aboriginal over-representation', *Victorian Aboriginal Justice Agreement* (Web Page) <https://www.aboriginaljustice.vic.gov.au/the-agreement/aboriginal-over-representation-in-the-justice-system/underlying-causes-of-aboriginal>.

78 Ibid.

Compounding the impact: Aboriginal and Torres Strait Islander women

Aboriginal and Torres Strait Islander women are the only cohort which has more people on remand than sentenced and they are 21 times more likely to be imprisoned than other women.[79] This can have fatal consequences, as demonstrated by the 2019 death of a Gunditjmara, Dja Dja Wurrung, Wiradjuri and Yorta Yorta woman on remand for shoplifting while on a Community Corrections Order.[80] Aboriginal and Torres Strait Islander women are dealing with a patriarchal and settler colonial legal system, and if they cannot convince an often male, settler decision-maker of why they should have liberty, they are detained. The Supreme Court case of *Re Mitchell*, described below is an example of the way in which bail decision-making unfairly affects Aboriginal and Torres Strait Islander women.[81] Entrenching the disadvantage felt by Aboriginal and Torres Strait Islander women further contributes to the lack of trust in police and other state authorities, and decreases the likelihood of a woman of reporting being a victim of a crime.[82] There is a serious and immediate risk to Aboriginal and Torres Strait Islander women and their communities when they are denied bail,[83] and this should be at the forefront of law makers' minds.

79 Russell et al, above n 47, 6.

80 Michelle Bennet, 'Death in Custody: Coronial inquest into the death of 37 year old Aboriginal woman, Veronica Nelson, begins' *Human Rights Law Centre* (Web Page, 16 July 2020) <https://www.hrlc.org.au/news/2020/7/16/death-in-custody-coronial-inquest-death-aboriginal-woman-veronica-nelson-begins>.

81 *Re Application for Bail by Patricial Mitchell* [2013] VSC 59.

82 Human Rights Law Centre and Change the Record, 'Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment' (18 May 2017), 31 <https://www.hrlc.org.au/reports/2017/5/18/report-over-represented-and-overlooked-the-crisis-of-aboriginal-and-torres-strait-islander-womens-growing-over-imprisonment>.

83 Ibid, 12-13.

Re Mitchell [2013] VSC 59

Patricia Mitchell was a 22 year old pregnant mother of two when she was charged with obtaining property by deception, theft, escaping from custody and obtaining a financial advantage by deception. Justice Forrest described the offending as trivial compared to the usual offences brought before the Supreme Court. Alarmingly, the "obtaining a financial advantage by deception" charge was for travelling on a child's train ticket. This charge was quickly identified by Forrest J as not amounting to an offence. He described charging Ms Mitchell with such a serious offence for what was usually an infringement notice offence as "singularly inappropriate".

She had a history of extreme poverty, violence and substance addiction within her family. At the time of the Supreme Court bail application, she had already served 7 weeks on remand, and if she was denied bail again she would serve a further eight or nine months awaiting her trial, resulting in her giving birth while in custody. Forrest J acknowledged that this was far in excess of any sentence that might be imposed.

This is a clear example of overzealous policing when charging Ms Mitchell, in conjunction with refusing bail resulting in detention of seven weeks, and possibly more, despite a clear statement from the court that her offending was trivial, and would not result in a sentence of imprisonment.

In 2013 the prosecution had to show "unacceptable risk" for Ms Mitchell to be remanded. However in 2020, she would have the further hurdle of proving to the court that there was compelling reason to grant her bail.

Why being 'tough on crime' doesn't work

Punitive bail measures form part of the 'tough on crime' approach, in which bail is pitched as a crime prevention tool. However, the approach does not address the underlying causes of offending,[84] and the punitive bail measures instead compound criminogenic factors. Remand has in fact been shown to increase rates of further offending.[85] Furthermore, the criminalisation of breaching bail has created cycles of offending and sets people up to fail.[86] There are much cheaper and more effective ways to reduce crime, through diversion, rehabilitation, and programs that focus on the underlying causes of offending. This will take political will, and the commitment to changing the rhetoric around crime, and diverting funding away from prisons and into community-based programs.[87]

Human Rights and Bail

Bail engages some of the most important human rights: the right to liberty, the presumption of innocence and the right to freedom of movement.

The International Covenant on Civil and Political Rights ('ICCPR') enshrines the right to liberty in Article 9, and the rights in criminal proceedings in Article 14. These rights are reflected in Victorian law through the Charter:

> *Section 21. Right to liberty and security of person*
> ...
> *(5) A person who is arrested or detained on a criminal charge-*
> a) *Must be promptly bought before the court; and*
> b) *Has the right to be brought to trial without reasonable delay; and*
> c) *Must be released if paragraph (a) or (b) is not complied with*
> *(6) A person awaiting trial must not be automatically detained in custody, but his or her release may be subject to guarantees to attend*
> a) *For trial; and*
> b) *At any other stage of the judicial proceeding; and*
> c) *If appropriate, for execution of judgment*
> ...

84 Ibid, 22.

85 McMahon, above n 1, 22-4.

86 Human Rights Law Centre and Change the Record above n 82, 38.

87 Ibid, 23.

Section 25. Rights in criminal proceedings
(1) A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law
...

A person cannot bring an independent cause of action if a public authority infringes their Charter rights.[88] But public authorities in Victoria must act consistently with the Charter when making decisions under law, and the courts must interpret laws consistently with the Charter, if possible.[89]

The Charter acknowledges that these rights can be limited in certain circumstances. Section 7 of the Charter describes when reasonable limitations can be made, in a free and democratic society based on human dignity, equality and freedom. The limitations of the Charter rights contained in the Bail Act have been defended on the grounds that doing so protects the community from offenders who commit violent acts while on bail.[90] However, as evidence mounts that pretrial detention does not deliver on community protection (see Is the community safer? on page 11) the Bail Act is failing to adequately balance protection of the Charter rights with reasonable limitations. This failure to protect these rights is discussed below.

Rights in a criminal proceeding

Laws that limit rights in a criminal proceeding, including bail, should be flexible and proportionate. A bail decision-maker may place justifiable limitations upon these rights when balancing them with other competing interests, such as community safety. However, the recent Bail Act amendments have swung the pendulum too far in one direction and tend to undermine the presumption of innocence, without sufficient justification; the presumption of a right to bail in Victoria no longer applies to more than 100 offences.[91] Reverse onus tests require a bail applicant to justify their liberty before a court has decided their guilt. Due to the 2017-18 changes, there are now more people than ever having to prove their worthiness for bail.

The denial of bail can be detrimental to an accused person's preparation for trial by limiting their ability to find and communicate with legal representatives.[92] Being held on remand may also lead people to make disadvantageous decisions about their case. The Sentencing Advisory Council looked into the use of 'time served' sentences and found that there has been a significant increase in those sentences.[93] The Sentencing Advisory Council found that in 2017-18 20% of sentences were time served, whereas six years prior to that it was only 5% of sentences.[94] This increase in time served sentences suggests that there are more offenders spending time on remand, who may be inappropriately pleading guilty while awaiting trial.[95] There is a real risk that accused persons will plead guilty because doing so will lead to a quick release. This further erodes their right to a fair trial and will lead to the offending being listed on their criminal record, which can have an impact on their ability to, among other things, find work.[96] People who are remanded and sentenced to time served may miss out on rehabilitation, as many offender-based programs are not available while on remand, and people are often released without post-sentence supervision.[97]

The principle of parsimony requires a sentence to be the least onerous to achieve the goal of protecting society.[98] Custodial sentences should only be imposed if no other sentence could deliver the sentencing purposes, because imprisonment is the most onerous sentence. Where a person is remanded and sentenced to time served, it may be that – had they

88 *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), s 39.

89 Ibid, ss 32, 38.

90 *Victoria, Parliamentary Debates*, Legislative Assembly, 13 December 2017, 4363 (Martin Pakula, Attorney-General).

91 McMahon, above n 1, 17.

92 New South Wales Law Reform Commission, *Bail* (Report 133, 2012) 5.39.

93 Sentencing Advisory Council, *Time Served Prison Sentences in Victoria* (Report, Feb 2020) 1.

94 Ibid.

95 Ibid, 13-14.

96 Paige Darby, Julia Kretzenbacher and Sheradyn Simmonds, *A Legislative Spent Convictions Scheme for Victoria: Recommendations for Reform* (Liberty Victoria, May 2017), 4.

97 Sentencing Advisory Council, above n 93, 15-16.

98 *Sentencing Act 1991* (Vic), s 5(3).

been granted bail – they would not have been sentenced to a term of imprisonment. A time served sentence may remove the opportunity for a judge or magistrate to sentence someone to a rehabilitative option, such as a Community Corrections Order, or other therapeutic option.[99] Time served sentences that are forced due to bail changes result in missed opportunities for sentencing to help address the underlying causes of offending and increase community safety. This is particularly the case because the person has not been able to 'prove' themselves on bail. That is, they are not able to demonstrate to a court, through compliance with bail, their ability to follow court orders and onerous conditions.

Right to Liberty

The right to liberty is protected by both the common law and the Charter,[100] and is one of the most fundamental human rights.[101] The right to liberty is limited by the Bail Act: when a bail applicant is remanded their right to liberty is limited. Section 7 of the Charter permits limitations upon the right "only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom". Permissible limitations of the right to liberty may include denying bail to an applicant who poses a real risk to the community if they are not remanded or who is at serious risk of not attending their hearing. On such occasions a presumption against bail may be justifiable. However, the current bail scheme and its wide application of reverse onus tests results in people who do not pose a real risk to community safety being denied their right to liberty. One example is the case of *Hall v Pangemanan*.[102] Brock Hall was charged with public drunkenness, a relatively minor offence, and released on bail with a condition to remain at his home from 9:30pm and 7am. Mr Hall had a mild to moderate intellectual disability and was a heavy drinker. He was living in public housing provided by the Department of Health and Human Services Housing ('DHHS') and had a DHHS case manager. His criminal history mostly consisted of public drunkenness charges. He had previously been found unfit to stand trial, a view which was considered to be permanent.

Mr Hall was arrested for being drunk in a public place while on bail and was charged with public drunkenness and contravening a conduct condition of bail - a Schedule 2 offence. He had to show compelling reason as to why his bail should be granted. It was granted. Mr Hall was arrested again just a few weeks later and was again charged with public drunkenness and a breach of bail conditions. Mr Hall now had committed a Schedule 2 offence while on bail for a Schedule 2 offence, and therefore had to show exceptional circumstances for bail to be granted. Mr Hall's bail application was refused and he was in custody for four days while appealing to the Supreme Court of Victoria.

On appeal Justice Croucher noted the absurdity of a man charged with public drunkenness having to satisfy the same test for bail as someone charged with murder or terrorism.[103]

As this case demonstrates, the current reverse onus tests are capable of limiting an individuals's right to liberty in a manner that cannot be "demonstrably justified", as required by section 7 of the Charter. Instead the bail scheme should more aptly balance the right to liberty with the protection of the community. These two considerations should not be framed as opposite, but as symbiotic and interconnected. As noted earlier in this chapter, restrictive bail laws have criminogenic effects (see Is the community safer? on page 11). They negatively impact the families and communities of those denied bail. These families and communities should be considered when weighing the interests of the wider community. Framing bail determinations as a binary balancing task between individual liberty and community safety ignores the fact that, in many instances, a person being remanded has a negative impact upon community safety.

99 Sentencing Advisory Council, above n 93, 14-15.

100 *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic), s 21.

101 Victorian Government Solicitor's Office, 'Section 21- Right to liberty and security of the person', *Human Rights,* (Web Page 23 August 2017) <https://humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-21-right-liberty-and-security-person>.

102 [2018] VSC 533.

103 Ibid, [16]-[17].

The current bail scheme is also capable of improperly limiting an individual's right to liberty by denying them bail when there is no real likelihood that they would serve a term of imprisonment if convicted. One example of this is the case of *HA v The Queen*.[104] A fifteen-year-old boy was denied bail on the grounds that he posed an unacceptable risk of endangering the safety or welfare of the public and of committing an offence, while on bail. The decision was overturned on appeal in part because it was deemed unlikely that, should the appellant be convicted, he would be sentenced to a term of detention.[105] Justices Kaye and Maxwell noted that given the low likelihood of a custodial sentence, his continued incarceration pre-trial "would be akin to a form of preventive detention. That is, he would be being held in custody solely because of the risk that he might commit an offence in the future".[106]

This is not an isolated instance. The Coghlan Review found that 80 per cent of children who have had bail refused do not go on to attract a term of detention for the offending in question,[107] and in 2018, 38 per cent of women on remand received non-custodial dispositions.[108] These numbers indicate that bail decision-makers may not be giving sufficient weight to the prospect of a non-custodial sentence when determining whether to grant bail and are instead sometimes using remand as a crime prevention tool. Preventative detention, as noted by Justices Kaye and Maxwell, "is alien to fundamental principles that underpin our system of justice"[109] including the presumption of innocence and the right to liberty. Time spent on remand causes immense hardship and disruption to the lives of remandees and their loved ones — the appellant in *HA* had already spent months in custody by the time the initial decision was overturned.[110] Therefore, the power to deny bail where there is no real prospect that the applicant would receive a custodial sentence if convicted should be severely restricted. The Bail Act should explicitly require bail decision-makers to grant bail if there is no prospect of a sentence of imprisonment following conviction. Without this protection, the bail scheme is capable of unduly punishing individuals who have not yet been convicted of an offence.

104 [2021] VSCA 64.

105 Ibid, [73]-[74].

106 Ibid, [63].

107 The Hon Paul Coghlan QC, *Bail Review: First Advice to the Victorian Government* (First Report, 3 April 2017) 96 [5.115].

108 Walker, above n 45, 34.

109 *HA v The Queen* [2021] VSCA 64, [64].

110 For matters heard in the County Court in 2019-20, the average time to trial for those on remand was 12 months: County Court of Victoria, *Annual Report 2019–20*, County Court of Victoria, 'Criminal Division' <https://www.countycourt.vic.gov.au/files/documents/2021-02/ccvannualreport2019-20.pdf> 19. The Magistrate's Court does not publish the average time spent on remand by defendants in matters before it.

CHAPTER 4: BAIL IN OTHER JURISDICTIONS

The growth in the number of people in Victoria in pretrial detention is part of a worldwide trend. As at February 2020, there were about three million people in pretrial detention globally, representing an increase of at least 30 per cent increase since 2000.[111] In some countries, pretrial detention occurs in police cells, rather than prisons, which may result in lower national statistics.[112] As in Victoria, this increase has largely been the result of people being denied bail due to the flawed perception that stricter laws increase community safety. However, some jurisdictions have taken different approaches to achieving the goals of reducing recidivism and cost of imprisonment, and have seen improvements in community safety, while ensuring people accused of a crime appear at court.

Many international jurisdictions focussed on addressing issues of high pretrial detention collect statistics directly relating to, among other things, the ethnicity of people held in pretrial detention.[113] This allows for a comparison of disparities and gives a clearer picture of discrimination in the pretrial legal system. In Australia the only similar information collected is nationality and Aboriginal or Torres Strait Islander identity.

Other Australian states and territories

Each Australian state and territory has a different structure and expression of bail legislation and custodial remand, but each seeks to achieve three primary goals: protecting the integrity and credibility of the justice system, protecting the community, and safeguarding the best interests of the accused person. As in Victoria, all other Australian jurisdictions have shifted the focus of bail decision-making as bail laws have gone from a procedural mechanism to ensure attendance at trial to a crime prevention tool.[114]

The State of New York

As with nearly all states in the United States, New York has a system of money bail.[115] While this is the primary reason for the increasing number of people in pretrial detention in the US, recent changes in the laws around pretrial detention have already decreased the number of people in pretrial detention. The New York State Legislature passed extensive criminal justice reforms which came into effect in 2020. These reformed the courts' ability to use preventative detention and money bail for misdemeanours, which are akin to summary offences, and low-level felonies, which are the equivalent of indictable offences. The reforms required release on recognizance, or a bond, in all cases unless "it is demonstrated, and the court makes an individualised determination that the principal poses a risk of flight to avoid prosecution".[116]

These reforms have seen a 46.2 per cent decrease in people held in pretrial detention, as

111 Ron Walmsley, 'World Pre-Trial/Remand Imprisonment List' (Report, February 2020), 1-2 <https://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_list_4th_edn_final.pdf> .

112 Ibid, 2.

113 See, for example, *The Lammy Review* (Research Report, 2017) <https://www.gov.uk/government/organisations/lammy-review>.

114 David Brown, 'Looking Behind the Increase in Custodial Remand', (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 80, 85.

115 Thomas Fuller, 'California Is First State to Scrap Cash Bail', *The New York Times* (online, 21 August 2020) <https://www.nytimes.com/2018/08/28/us/california-cash-bail.html>.

116 NY Criminal Procedure Law, 510.10(1).

compared to 2019.[117] However, advocacy groups noted that the reforms did not include funding for services or programs for the increased number of people released before trial. The release of large numbers of those held on remand, without assistance or programmes to address underlying issues, risks perpetuating their contact with the criminal justice system into the future.[118] Nonetheless, they have been hailed as some of the most effective bail laws in the US.[119] Even after the reforms were amended in April the fundamental structure remains intact, requiring the least restrictive conditions necessary to be imposed on those charged with most misdemeanours and non-violent felonies.[120]

Data collection

The 2020 New York reforms require court administrators to collect and report data regarding those charged with crimes, including on the pretrial phase of each case. The data that must be collected includes demographic information (including race), criminal history, and details of the crimes a person has been charged with.[121] They mandate tracking:

- the numbers of people released;
- the conditions of release;
- how many people are held in pretrial custody, and for how long;
- the rate of failure to appear and re-arrest;
- the length of period of pretrial incarceration; and
- case outcomes.[122]

While the data collected as a result of the reforms have not been published, it will be vital in understanding the impact of the reforms and any effects it has on bail.

England and Wales

The pretrial prison population in England and Wales is significantly lower than in Australia, at around 14.3 percent of the total prison population in June 2020.[123] This is a slight increase, from 11.2 per cent of the prison population in 2017.[124] In 2016, England and Wales had one of the lowest proportions of people on remand in the European Union, at 9.2 percent while also having the highest per capita prison populations in the European Union, at 148 per 100,000 people.[125] This is still significantly lower than Australia's national imprisonment rate which is around 202 persons per 100,000 of the adult population,[126] and is one of the lowest imprisonment rates in the world.[127]

One of the main reasons that England and Wales have significantly lower rates of remandee numbers is the introduction of the Legal Aid Sentencing and Punishment of Offenders Act

117 New York State Division of Criminal Justice Services, 'Jail Population in New York State: Average Daily Census by Month' (Report, April 2020), 1 <https://www.criminaljustice.ny.gov/crimnet/ojsa/jail_population.pdf>.

118 Taryn A Merkl, 'New York's Latest Bail Law Changes Explained', *Brennan Centre for Justice at New York Law School* (Blog Post, 16 April 2020) <https://www.brennancenter.org/our-work/analysis-opinion/new-yorks-latest-bail-law-changes-explained>.

119 Human Rights Watch, 'Memorandum of Support for Preservation of the New York Pretrial Reform Law' (Memorandum to Legislature, 20 March 2020) <https://www.hrw.org/news/2020/03/20/human-rights-watch-memorandum-support-preservation-new-york-pretrial-reform-law>.

120 Merkl, above n 118.

121 Ibid.

122 Michael Rempel and Krystal Rodriguez, 'Bail Reform Revisited - The Impact of New York's Amended Bail Law on Pretrial Detention' (Report, Centre for Court Innovation, May 2020), 7.

123 'United Kingdom: England and Wales', *World Prison Brief* (Web Page) <https://www.prisonstudies.org/country/united-kingdom-england-wales>.

124 Reporting on the Sustainable Development Goals: People on Remand in Custody in England and Wales, *Office for National Statistics* (Web Page, 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/reportingonthesustainabledevelopmentgoalspeopleonremandincustodyinenglandandwales/2018-08-03>.

125 Edward Lloyd-Cape and Tom Smith, 'The practice of pre-trial detention in England and Wales' (Report, 1 January 2016), 15 <https://uwe-repository.worktribe.com/output/917566>.

126 'Prisoners in Australia – 2020', *Australian Bureau of Statistics* (Web Page, 3 December 2020) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>.

127 Lloyd-Cape and Smith, above n 125.

2012 ('LASPO Act').[128] The LASPO Act restricted the denial of bail for summary-only offences and the use of remand, particularly for those who are unlikely to receive a custodial sentence. Section 90 of the LASPO Act introduced a 'no real prospect' test, which restricts the power of the courts to remand unconvicted people where there was no real prospect that they would receive a custodial sentence once convicted.[129] This is the likely cause of the comparatively lower number of people on remand between 2012 and 2013.[130]

The LASPO Act also meant that people aged 10 to 17 years could no longer be remanded in custody 'unnecessarily', creating a higher threshold test. Another reason for the decrease in the number of people on remand in 2012 and 2013 may be that criminal matters were processed more quickly, so a greater number of people were sentenced without first being bailed or remanded.[131]

128 *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK). See also, Lloyd-Cape and Smith, above n 125, 14.

129 Ministry of Justice (UK), *Legal Aid, Sentencing, and Punishment of Offenders Act 2012: Post-Legislative Memorandum* (Cm 9486, 2017), 104.

130 Reporting on the Sustainable Development Goals: People on Remand in Custody in England and Wales, Office for National Statistics (Web Page, 2018) <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/reportingonthesustainabledevelopmentgoalspeopleonremandincustodyinenglandandwales/2018-08-03>.

131 Transform Justice, *Presumed Innocent but Behind Bars – Is Remand Overused in England and Wales?* (Report, March 2018), 7 <http://www.transformjustice.org.uk/wp-content/uploads/2018/03/TJ_March_13.03-1.pdf>.

CHAPTER 5: RECOMMENDATIONS

There is urgent need for change to the bail system to ensure people who have been charged with minor or non-violent offences and pose a low risk to the community are not further criminalised by being denied bail. This section outlines five possible changes to the Bail Act that could help achieve this:

- Recommendation 1 proposes a single unacceptable risk test for all bail applicants instead of having the complexity of three separate tests.
- Recommendation 2 addresses the increased numbers of bail applicants on conditional liberty who are denied the presumption of bail and instead are subject to the show compelling reason test through amendments to section 1 of Schedule 2.
- Recommendation 3 addresses the secondary criminal offences that an accused person who breaches bail is liable for through the repeal of sections 30, 30A and 30B.
- Recommendation 4 proposes a 'no real prospect of imprisonment' test (inspired by the LASPO Act), to reduce the number of accused people who spend time on remand but are ultimately not sentenced to a term of imprisonment.
- Recommendation 5 strengthens the requirement that Aboriginal or Torres Strait Islander identity is considered by the bail decision-maker when determining whether to grant bail and under what conditions.

Recommendations 1, 2 and 3 are aimed at reducing the number of minor or non-violent offences to which the presumption of bail no longer applies. Both Recommendation 2 and 3 limit the scope of provisions that impose stricter tests on bail applicants already on conditional liberty to only applicants charged with serious and violent offences. Recommendation 1 applies to all bail applicants and represents a more substantial restructuring of the bail regime.

The most effective means of achieving a reduction in the number of people charged with minor or non-violent offences being denied bail is Recommendation 1 in conjunction with Recommendations 3, 4 and 5. In the alternative, the less substantial amendments contained in Recommendation 2 should be adopted in conjunction with Recommendations 3, 4 and 5.

The proposed changes to the text of the Bail Act are italicised.

Recommendation 1: Implement a single 'unacceptable risk' test for all offences

The three possible tests for bail applicants create unnecessary complexity in Victoria's bail system. They make bail difficult to navigate for unrepresented bail applicants, legal practitioners and bail justices.[132]

Liberty Victoria, the VLRC and the LIV have recommended that bail decisions should be made using a single 'unacceptable risk' test.[133] This would simplify the bail application process and make it easier for applicants, advocates and decision-makers to navigate and apply the test. It would also remove the reverse onus and the presumption against bail which erode the presumption of innocence. The Victorian Court of Appeal endorsed this recommendation in *Robinson v The Queen*, stating "[t]his reform would greatly simplify Victorian

132 VLRC, *Review of the Bail Act* (Final Report, 2007), 44-54.

133 Liberty Victoria, Submission to Engage Victoria for Victorian Department of the Premier and Cabinet, *Bail Review* (14 March 2017) [9]-[12], VLRC, above n 132, 52; LIV Submission, Submission to Engage Victoria for Victorian Department of the Premier and Cabinet, *Bail Review* (March 2017), 21.

bail law, without weakening it in any way."[134]

To affect this, sections 4AA, 4A, 4C and 4D would need to be removed from the Bail Act (with further consequential amendments based on the removal being made), leaving the existing 'unacceptable risk'' test in 4E. There would be no Schedule 1 or 2. Further, when applying the unacceptable risk test the bail decision-maker must consider the 'surrounding circumstances' as defined in s 3AAA. To ensure the bail decision-maker considers the potential harm to the accused should they be denied bail, RAP proposes that the VLRC's recommendation be adopted and that the following be added to the list of factors a decision-maker must consider:[135]

> 3AAA Surrounding circumstances
> (1) If this Act provides, in relation to a matter, that a bail decision-maker must take into account the surrounding circumstances, the bail decision-maker must take into account all the circumstances that are relevant to the matter including, but not limited to, the following—
> ...
> [Remove sub-section 3AAA(1)(k) to avoid repetition.]
> ...
> *(n) the period the accused has already spent in custody and the period they are likely to spend in custody if bail is refused;*
>
> *(o) the risk of harm—physical, psychological or otherwise—to the accused while on remand, including self-harm or harm by another.*

Recommendation 2: Amend section 1 of Schedule 2

Right now, a person charged with an indictable offence while already on bail or subject to a summons to answer a charge for a prior indictable offence must show compelling reason to be granted bail for the second offence. This is the effect of section 1 of Schedule 2 of the Bail Act. The section denies someone charged with two minor or non-violent indictable offences the presumption of bail; they must show compelling reason to be granted bail, a much higher threshold test than the unacceptable risk test. Below are a number of possible amendments. Each is aimed at reducing the number of people charged with minor or non-violent offences who will have to meet the more onerous show compelling reason test.

Option 1

The first option is to repeal subsections (1)(a)-(c) of Schedule 2. As a result, an indictable offence that is alleged to have been committed by the accused person in the following circumstances would no longer be a Schedule 2 offence:

- while on bail for another indictable offence; or
- while subject to a summons to answer to a charge for another indictable offence; or
- while at large awaiting trial for another indictable offence.

Anyone charged with an indictable offence while on conditional release from custody for an earlier indictable offence charge would remain subject to the unacceptable risk test. This is the most effective option within Recommendation 2 for reducing the number of people denied the presumption of bail despite being charged with minor or non-violent offences.

Option 2

The second option is to amend section 1, so that it only applies to category 1 or 2 offences as defined in the *Sentencing Act 1991* (Vic). [136]

> Schedule 2
>
> 1. *A category 1 or 2 offence, as defined in section 3 of the Sentencing Act 1991 (Vic)*, that is alleged to have been committed by the accused
>
> (a) while on bail for another *category 1 or 2* offence; or
> (b) while subject to a summons to answer to a charge for another *category 1 or 2* offence; or
> (c) while at large awaiting trial for another *category 1 or 2* offence; or
> (d) during the period of a community correction order made in respect of the accused for another category 1 or 2 offence or while otherwise

134 *Robinson v The Queen* (2015) 47 VR 226, [47].

135 VLRC, above n 132, 54.

136 *Sentencing Act 1991* (Vic), s 3.

serving a sentence for another *category 1 or 2* offence;

....

This amendment would mean that someone charged with a second offence which is not a category 1 or 2 offence would only be subject to the unacceptable risk test. Many of these offences are minor or non-violent, for example possession of personal, non-trafficable quantities of drugs.

Option 3

The third option is to create a third schedule of the minor or non-violent offences to which section 1 of Schedule 2 does not apply. For example:

Schedule 2

1. An indictable offence that is alleged to have been committed by the accused
    - (a) while on bail for another indictable offence; or
    - (b) while subject to a summons to answer to a charge for another indictable offence; or
    - (c) while at large awaiting trial for another indictable offence; or
    - (d) during the period of a community correction order made in respect of the accused for another indictable offence or while otherwise serving a sentence for another indictable offence; or
    - (e) while released under a parole order; and
    - (f) *is not an offence listed in Schedule 3.*

Schedule 3 - Schedule 3 offences

1. *Possession of a quantity of a drug of dependence that is not more than the small quantity as defined in the* Drugs, Poisons and Controlled Substances Act 1981 *(Vic); or*
2. *Obtaining financial advantage by deception as defined in the* Crimes Act 1958 *(Vic) up to the value of $100,000; or*
3. *Obtaining property by deception as defined in the* Crimes Act 1958 *(Vic) up to the value of $100,000; or*
4. *Theft as defined in the* Crimes Act 1958 *(Vic) up to the value of $100,000; or*
5. ...

This amendment would mean that someone charged a with Schedule 3 offence is subject only to the unacceptable risk test. As a lower threshold test than the show compelling reason test, this will ensure more individuals who are accused of minor or non-violent offences are able to access bail. The offences listed in the above example are not exhaustive or prescriptive — the intention is to include offences which would by themselves be unlikely to attract a term of imprisonment as penalty. Any offences which may ultimately be included in the amendment will need to be decided in conjunction with stakeholders.

Recommendation 3: Repeal secondary breach of bail offences

The secondary criminal offences of failure to answer bail, contravention of a conduct condition of bail, and committing an indictable offence while on bail, make it more likely that people who pose a low risk to community safety will be denied bail. For example, someone on bail for a minor or non-violent offence who is charged with a further minor or non-violent indictable offence will have to meet the show compelling reason to be granted bail for the second charge.

Repealing sections 30, 30A and 30B, which contain the secondary offences, will mean that contravention of bail conditions results in liability only for breach of bail, and not an additional criminal offence. It would also prevent someone accused of two minor or non-violent offences, who poses a low risk to community safety, from having to meet the show compelling reason test.

Recommendation 4: Adopt a 'no real prospect test'

The fourth recommendation is to adopt a 'no real prospect test', which successfully reduced remandee numbers in the United Kingdom (as discussed in Chapter 4). This test restricts circumstances in which a court can remand an accused where the accused has no real prospect of being sentenced to a term of imprisonment.

The codification of such a test could be introduced through a new section in Part 2 of the Bail Act. The following form is modelled

on s 7(5A) of the *Bail Act 1976* (UK):

> *No real prospect of imprisonment*
> *A bail decision-maker must not refuse an accused bail if it appears to the bail decision-maker that there is no real prospect that the accused will be sentenced to a custodial sentence in the proceedings.*

These amendments will ensure that an accused who is unlikely to be sentenced to a term of imprisonment, due to their low-level of offending, is not sent to prison because of the Bail Act.

Recommendation 5: Develop guidelines on the application of section 3A

Section 3A of the Bail Act requires the bail decision-maker to take into account "any issues that arise due to the person's Aboriginality, including— (a) the person's cultural background, including the person's ties to extended family or place; and (b) any other relevant cultural issue or obligation".

The provision was introduced in response to the overrepresentation of Aboriginal and Torres Strait Islander people in remand numbers.[137] However, a lack of recognition amongst some members of the legal profession of the impact bail refusal may have on Aboriginal and Torres Strait Islander defendants has limited the effectiveness of the provision.[138]

There is scope for section 3A to provide better protection against the disproportionate denial of bail faced by Aboriginal and Torres Strait Islander bail applicants.[139] We adopt the ALRC's recommendation that guidelines on the application and operation of section 3A be developed by the relevant legal and Aboriginal and Torres Strait Islander bodies.[140] Such guidelines, used to improve the cultural awareness and cultural competence of judicial officers, have the potential to help reduce the overrepresentation of Aboriginal and Torres Strait Islander people on remand.

137 Australian Law Reform Commission, above n 62, 5.80.

138 Ibid, 5.102.

139 Ibid, 5.101-5.102.

140 Ibid, 5.111-5.115.

CONCLUSION

It left unchanged, more and more people will have their freedom determined by a bail system with countless critical failings. These people's lives are likely to be irreparably disrupted, allowing cycles of disadvantage continue. Many will spend longer on remand than the sentence of imprisonment they ultimately receive (if they are found guilty at all). A disproportionate number of them will be women, particularly women who are victims of family violence, and Aboriginal and Torres Strait Islander people. The design of the prison system means that these people will be particularly vulnerable to any further coronavirus outbreaks in Victoria.

Urgent reform of the bail regime is needed to re-balance the system. Reforms must ensure people who do not present a real risk to community safety are granted bail, allowing them to return to their families, workplaces and support networks while awaiting court. Restrictive bail laws should not be used as a means of crime prevention, but as rather as a blunt and restrictive last resort.

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