The Police Association of Victoria Submission to the Review of Victoria’s Bail System (the submission)

The Police Association of Victoria (the Association) is an organisation that exists to advance and represent the industrial, legal, health and safety, professional and welfare interests of its members. The Association’s membership of over 15,000 is drawn exclusively from sworn Police Officers at all ranks, Protective Services Officers, Police Reservists and Police Recruits who serve in Victoria Police. Membership of the Association is voluntary. By virtue of its constitution, the Association is not affiliated with any political party.

The review of Victoria’s Bail System (the Review) seeks to address a number of areas of key concern to our membership. In this submission, we address the proposals contained within TOR 2 (in relation to the current application of tests), TOR 4 (in relation to the assessment of relevant circumstances), TOR 5 (in relation to the sufficiency and appropriateness of information currently considered) and TOR 6 (in relation to the role of Bail Justices and possible alternatives). We address each of these terms in turn.

It is the view of the Association that there exists significant scope to address the subjectivity and weighting of a range of considerations as currently applied in the Victorian bail system. These explications can be further enhanced by increasing training toward a shared understanding of the requirements and intent of the Bail Act 1977 (Vic). There is opportunity to increase access to information relevant to the determination of bail through investment in data systems. The Association further considers that a streamlining of out of hours bail applications should be achieved through the provision of powers to allow senior police to remand an accused until the next available court date. Each of these recommendations prioritises the safety of the community, and acknowledges the proficiency of our members with respect to assessing risk to community safety.

Indeed, the frontline, day-to-day, experiences of our members provide an important perspective on the operation of Victoria’s bail system. In order to best represent the views of our membership, this submission utilises a multi-jurisdictional review of literature, in addition to the results of a detailed survey (the Survey) conducted with our members based on the Terms of Reference (TORs). This Survey was completed by 860 Association members state-wide (‘members’). The responses provide structure to this submission, and support the recommendations.

1. The appropriateness of the current tests of exceptional circumstances, show cause and unacceptable risk (TOR 2)

This section discusses the subjectivity of the tests of exceptional circumstances, show cause and unacceptable risk, and associated deficiencies in the assessment of bail. In the view of the Association, the current application of these tests is weighted too far toward granting bail, resulting in further offences and placing the community at unnecessary risk.

1.1 The subjectivity of ‘exceptional circumstances’

The 2007 Review of the Bail Act by the Victorian Law Reform Commission (the VLRC Review) described the Bail Act as complex and containing ‘almost impenetrable language.’ Subjectivity leaves the application of these
terms open to the interpretation of the magistrate or bail justice, which has implications for continuity in bail cases, as the following member articulates:

The ‘standard’ [for ‘exceptional circumstances’ and ‘unacceptable risk’] differs in almost every bail application that I have prosecuted. The issue is not that they are being interpreted in a way that they shouldn’t be, the issue is that the legislation (or lack of legislation/guidelines) allows the magistrate to interpret the terms however they want and to change the ‘height of the bar’ that the applicant needs to jump over in every case.

87% of our members state that the current ‘exceptional circumstances’ test is too subjective. In the context of this subjectivity, all too many irrelevant and ‘ordinary’ circumstances are being considered by the courts. Examples provided by our members of ‘ordinary’ circumstances that do not rise to the level of ‘exceptional’ include: family commitments such as being a primary carer or having sick family members, pregnancy, having a job and demonstrating intent to participate in a drug or alcohol program. The current acceptance of these circumstances as ‘exceptional’, demonstrates to the Association, and our members, that the court is primarily concerned for the offender, at the expense of the community or the victim in the determination of bail. The Association is also concerned with the lack of verification of ‘circumstances’ by the courts. As the offender is released without verification of their circumstances, members state that they frequently have to re-arrest persons released on bail due to further offences being committed.

1.2 Additions to the application of ‘show cause’

It is the view of the Association that the onus of proof should be with the accused to ‘show cause’ that they are not a risk if released on bail as stated in the Act. The prima facie position is that bail must be refused and this position will only be altered if the applicant is able to ‘show cause’ to the satisfaction of the Court. Our members report that, in practice, this onus is not enforced.

Stronger emphasis needs to be applied to certain offences within the legislation. Our members highlighted the importance of three offences in particular, namely violent offending, a history of committing indictable offences and recidivist offending. Our members propose that ‘any violent offences’ or threatening behaviour that endangers the public or the police need to be included under ‘show cause.’ It is the view of the Association that courts should give more weight to the level of violence involved in an offence and the likelihood of an offender to continue to be violent upon release when determining ‘unacceptable risk.’ Specific consideration should be given to whether the offence occurred in the context of family violence. This is due to a high recidivist rate for family violence. Additionally, if history indicates that an offender is likely to commit offences whilst on bail, this should equate to an automatic remand.

83% of members indicated that more offences or circumstances need to be included in what triggers the ‘show cause’ determination. The recommendations are made for offences that are not already included in the ‘show cause’ legislation that endanger community and police safety, including carjacking, pursuits, evading police, threats to police and assault on any emergency services worker.

1.3 Considerations of ‘unacceptable risk’

The Association notes the determination of ‘unacceptable risk’ is currently an extremely variable process, and one that is often deficient with respect to weighting relevant circumstances. Almost 80% of members state that the term ‘unacceptable risk’ is too subjective. Again, the subjectivity of the term has an impact on community safety:

The unacceptable risk has been watered down so much that a weekly repeat offender for burglary or aggravated burglary can be on multiple sets of bail and does not meet the unacceptable risk bracket,

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3 Bail Act 1977 (Vic) s.4(4)
but can nominate nearly anything and achieve exceptional circumstances. The whole thing is defendant orientated and [ignores] safety of the public.

Unacceptable risk is not expressly defined within the 1977 Bail Act Victoria. There is a list provided that outlines several factors to be considered in assessing ‘unacceptable risk,’ which include the nature of the offence, the character and attitude of the offender, bail history and the strength of the evidence against the offender. The Association believes that these considerations are not effectively enforced by the courts. In order to provide a more balanced approach to this assessment, 75% of members report that more considerations should be listed under ‘unacceptable risk.’ Of primary importance to this assessment is the offending history of the accused. This is to ensure that a series of individual factors would be considered relating to the offender, including prior or similar crimes committed, and other pending charges:

The past is the best predictor of the future - an offender's history or re-offending must be seen as significant evidence of an unacceptable risk...[There needs to be a] specific provision [related] to the offender's accumulation of previous offending, not just a focus on current and outstanding matters.

Another consideration to be covered under ‘unacceptable risk’ is substance abuse history, often interrelated with the mental health of the offender. These are factors that indicate a likelihood of reoffending, and an increase in risk within a community. The Association suggests that the courts need to consider the reasons for substance abuse and look to the support networks available for the offender, prior to granting bail. The determination of ‘unacceptable risk’ should also consider the living situation of the offender. Members expressed a need to emphasise risks associated with granting bail to those living a ‘transient’ lifestyle, as well as those who have foreign passports and who pose a ‘flight risk.’ A future consideration is the stability of the residence of the offender. Releasing an offender into an environment where other offenders reside, or into circumstances which are ‘unstable,’ are factors likely to increase reoffending. These perspectives are echoed by our members:

If the police have been unable to make all relevant inquiries as to the place of abode and living environment of the accused, the court should not grant bail and give police reasonable time to make those inquiries. If the accused is uncooperative with police regarding proving his current address, the court should entertain remand until the address and living circumstances can be determined.

Overall, the ‘exceptional circumstances’ test is too subjective. This subjectivity has implications for continuity in bail cases. The ‘exceptional circumstances’ test is often applied to ‘ordinary’ circumstances. It is evident that additional offences need to trigger the test of show cause. Lost within the subjectivity of ‘unacceptable risk’ are considerations of personal factors relating to the offender such as their offence history, substance abuse and mental health, as well as the offender’s living environment.

2. Consideration of relevant circumstances (TOR 4)
The key issue with respect to the assessment of bail is the weighting applied to the various considerations before a bail justice or magistrate. It is clear that priority is given to the accused whose circumstances are consistently ‘outweighing’ the safety of the community and, where relevant, individual victims: [Magistrates and Bail Justices] are making the considerations, however they are coming to the wrong conclusions on many occasions. The real issue is that throughout this process, the courts/bail justices are looking at ways to allow the person to be granted bail. There is no real consideration for the safety of victims, witnesses and the community in general.

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1. Bail Act 1977 (Vic), s. 4(3).
The Association suggests that the overall approach to assessment undermines balanced decision-making. Restoring a balance between the rights of the accused and the safety of the community requires reprioritisation. With respect to this overarching approach, we provide a number of suggestions as to relevant circumstances that require greater emphasis and consideration than is currently applied.

2.1 Prior history, patterns of offending and recency of offending

Prior and recent offending indicate both a willingness and propensity for future offending. Currently, 83% of members state that a charged person’s criminal history, recency of offending and other relevant information is not being properly considered when determining whether or not an accused should be granted bail:

[Magistrates and Bail Justices] are only considering very recent prior convictions. They seem to think if it didn't happen recently it doesn't matter even when it shows a whole lifetime of offending and doesn’t account for periods when people are incarcerated.

The Association proposes that the entirety of an accused’s criminal history should be considered. More emphasis must be placed on prior and current breaches of bail and failures to appear. A person’s propensity/willingness to commit offences whilst on bail is a critical factor in the determination of their suitability for bail and the assessment of unacceptable risk. Countless members provided us with examples in which offending history and previous offences against bail were not given proper regard. Typically, the result of this is additional police resources and time attending to recidivism and further breaches of bail.

2.2 Police assessment of risk

Additionally, it is clear that there is not enough ‘weight’ put on the police opinion by decision makers. Police ‘do not make the decision to oppose bail lightly’ and the Association suggests that their experienced perspectives should not be so quickly disregarded or ignored. Particularly when determining ‘unacceptable risk’, members stated that the policing perspective should be a consideration for magistrates and bail justices:

Unacceptable risk in the eyes of police may not be shared by a bail justice or magistrate who does not always see the consequences or likelihood of re-offending shortly after offenders are released on bail. I and many other members do not apply for remand on a whim; there are always significant reasons. All too often the opinions of police (who have usually dealt with the same offender on multiple occasions) are not taken into account when bail justices’ and magistrates are trying to assess the character of an offender.

The Association also notes that magistrates or bail justices often release offenders who have been identified by members to be an ‘unacceptable risk,’ under the belief that the offender will be managed by bail conditions, such as curfews or court mandated programs. If these conditions are deemed likely to be ineffective by police, members believe that their opinions should hold greater weight for the magistrate or bail justice.

Summarily, the Association suggests that the circumstances of the accused are currently given weight in bail decision-making at the expense of victims and community safety. Our members are frustrated by the lack of consideration given to an accused’s offending history, particularly with respect to previous bail. Further, the police decision to oppose bail is significant and so their evidence warrants more weight by the courts in particular.

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3. Information required to properly assess risk (TOR 5)

While the scope of information able to be presented with respect to the assessment of bail is broad, there are both information gaps and accessibility issues that challenge this process. The Association sees opportunity to enhance the presentation of relevant and essential information to decision-makers.

3.1 Understanding of police information needs

The VLRC Review proposed that Victoria Police develop a guide for its members that would detail police powers and procedures for bail and bail decisions. Both the Association and Victoria Police supported this proposal. Some gaps in knowledge remain however, as almost 60% of our members indicated they would benefit from additional training in relation to bail objections.

3.2 Information to be put before the courts

A properly balanced assessment of bail requires all relevant information to be put to the decision maker. The Association considers that gaps remain in the current system with respect to police access to relevant information. Members report that the quality of the information they are able to provide is ‘suitable’ and ‘relevant’, largely due to the allowance to include ‘hearsay’ evidence. However, only 22% of members consider that the current materials they present to a decision maker are ‘sufficient’ or ‘adequate’ for the courts to make an informed decision regarding bail.

The Association finds that the LEAP system used by both courts and police is inadequate in terms of providing a basis for this assessment. LEAP is an ‘out-dated’ system that is not kept up-to-date with charges and court decisions. Our members report that an offender can be seen as having ‘no criminal priors’ as their previous offences have not been recorded into the LEAP program. This lack of access to comprehensive information regarding the offender has repercussions for the courts, the community and police, as is described in the comment below:

*I see the bail system on LEAP is a massive risk to the organisation and the community. Information is regularly out of date. How can you expect magistrates or bail justices’ to be provided with accurate information when members don’t have appropriate or timely access to the applicable information? We need a court program to be directly linked to LEAP, where information is updated instantly as offenders are bailed.*

The 2007 VLRC Review found that LEAP is not always updated promptly which impacts the relevant information available to police to make a decision regarding bail. Specifically, it was reported that there was a failure to update LEAP after an offender’s first court appearance, making an offender’s bail status unclear to other police accessing the data. A replacement for LEAP was proposed to be implemented by 2010 which would transfer information between LEAP and Courtlink to ensure that an offender’s bail status and court dates are automatically updated and that the courts and police are aware of the offender’s bail status and history. To date, this change has not occurred.

To summarise, the current materials provided to a decision maker when considering bail are sufficient. However, the Association recognises that the current LEAP system is impacting negatively on the operation of the bail system. The history of an offender’s current and prior charges is not always recorded in the system, which can lead to an incorrect representation of an offender’s history.

4. Out of hours bail applications (TOR 6)

The current system for out of hours bail applications has scope for improvement. Although bail justices perform an important role in the current system, their use is time consuming and cumbersome for our...
member. The Association considers that police have both the appropriate expertise and capacity to remand an accused until the next court date.

4.1 The role of Bail Justices
The Association supports and appreciates the work of bail justices. We note that this is both a demanding and voluntary role. Bail justices’ are currently of particular importance in regional areas where the operation of weekend courts is not feasible. The overwhelming sentiment expressed by our members is that bail justices apply a more uniform, impartial, balanced and appropriate assessment to relevant circumstances than magistrates. As a result of this more nuanced assessment, they are less likely to grant bail than magistrates. Overall, bail justices more adequately emphasise community safety in their decision-making.

Despite support for the role, the Association acknowledges a number of key issues with the current system. The first is the inadequacy of bail justice training, particularly in relation to the opposition of bail by police, and to the potential consequences of granting bail. Essentially, our members advise that the bail justice system is often cumbersome and time consuming:

*It takes time to get a bail justice out. It is frustrating and a time wasting exercise when we should be locking them up if police believe they are a risk to be on further bail, until a magistrate is available to oversee [the matter], and getting the van back on the road.*

In light of these limitations, the Association supports the removal of bail justices. While the Association holds respect for the current work of bail justices, a balanced assessment suggests that alternative systems should be considered.

4.2 Alternatives to the Bail Justice system
In considering an alternative to the use of bail justices, the Association supports the granting of power to police to remand an offender until the next court sitting date. This proposal was supported by **96% of our members**, who stated that they would support a system in which sergeants (or above) have the authority to issue a remand warrant until the next available court date:

*I don’t think we should be implementing systems that remove van crews off the streets for hours, just so we can go through a remand application process in the middle of the night so an offender gets to walk out again a couple of hours later with no immediate consequences to being caught. Being remanded in custody overnight or even over the weekend might start encouraging offenders to abide by their bail conditions, appear at court, and stop breaking the law.*

This option allows for the application of police expertise in relation to the determination of ‘unacceptable risk’, and a proper assessment of the likelihood of an accused failing to appear. This assessment would also draw on both a wealth of previous experience and local/specific knowledge.

Police also require this power to remand during court operating hours in regional Victoria in circumstances where distance to the nearest court, or a lack of access to other facilities (such as tele-conferencing) would make physically impossible the presentation of an accused person before a magistrate. The current procedure in situations such as this sees police wait for courts to close before a bail justice can be called, delaying the administration of justice and wasting police resources.

The Association recommends a replication of the model currently practiced in New South Wales. According to the *New South Wales Bail Act 2013*, a police officer can release, grant or refuse bail for an offence if the individual charged with the offence is at the police station and if the officer is of or above the rank of sergeant,

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or currently in charge of the police station.\textsuperscript{13} If bail is refused, an officer must ensure that the individual is informed that they can speak with a legal practitioner or other person regarding bail, and that that communication is facilitated by the officer, subject to regulations.\textsuperscript{14} The individual must be brought before the court or authorised justice as soon as practicable.\textsuperscript{15} A senior police officer (one senior to the officer who made the bail decision) may review the decision to refuse bail on their own initiative or at the request of the accused individual.\textsuperscript{16} The senior officer can confirm or vary the decision to refuse bail, however this review should not occur in the instance where it would cause a delay in bringing the individual before a court or if the decision has already been reviewed by another senior officer.

Replication of this model would include some limitations on policing powers. The Association finds that the sergeant making the assessment should not be involved with the case or processing of the offender, in order to avoid the perception of bias. Further, the age of the accused and the duration of remand will need to be assessed. Specifically, this process should not apply to youth or in circumstances where the court date exceeds 72 hours from the point of remand. The Association also acknowledges that the proposed system would require additional and specific training of Sergeants regarding information to be considered.

Should the above option not be considered feasible or alternative options such as 24 hour or Night Courts are preferred, these suggestions must be tempered by the impact on police service delivery, particularly for those members in regional areas. The Association asserts that this should only be considered where accused persons can be presented before a magistrate using video tele-conferencing from any 24 hour police complex.

In summary, the Association suggests that the current system for attending to out of hours bail applications is in need of revision and improvement. While the Association appreciates the current work of bail justices, it is clear that there are limitations to the current systems. An alternative supported by the Association and our members is the introduction of a system whereby sergeants can determine bail matters until the next available court date. Proper consideration must be given to this model however, including its success in other jurisdictions. This model must also be assessed against the cost, impost and likelihood of alternatives including 24 hour courts.

5. Recommendations

The Association makes the following recommendations in relation to the review of Victoria’s bail system:

Removing subjectivity from the current tests of exceptional circumstances, show cause and unacceptable risk

1. That the Bail Act be suitably amended to remove the subjectivity associated with the test to establish an ‘unacceptable risk’ or trigger ‘exceptional circumstances’ and replace it with a suitably worded objective standard that reflects the principles of reasonableness.

2. That training relating to circumstances where police are required to give evidence to refuse bail be incorporated into current training programs such as Crime Courses or Prosecutors Training Courses.

Assessment of, and access to, information regarding relevant circumstances

3. That the entirety of an accused’s criminal history be considered and greater emphasis be placed on prior and current breaches of bail and failures to appear. Evidence of prior convictions, or criminal offending, should be accepted on oath or affidavit by a member in circumstances where information is available but has not yet been recorded on the LEAP database.

\textsuperscript{13} Bail Act 2013 (NSW) S.43(1).
\textsuperscript{14} Bail Act 2013 (NSW) S.45(1).
\textsuperscript{15} Bail Act 2013 (NSW) S.46(1).
\textsuperscript{16} Bail Act 2013 (NSW) S.47(1).
4. That the current LEAP system be enhanced to ensure that an offender’s bail status and court dates are automatically updated.

Proper assessment of risk

5. That legislation be amended such that decision-makers must give significant regard to police assessment of the test of ‘unacceptable risk’.

Options for out of hours bail applications

6. That police access to courts for bail purposes be increased though an increase in court operating hours and video conferencing for bail purposes.
7. That the position of Bail Justice be abolished.
8. That the Bail Act be suitably amended to empower police members of or above the rank of sergeant to remand an offender in custody to the next available court sitting, such as 72 hours.

For consideration,

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