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**RVAHJ submission to the
Legislative Council Legal and Social Issues Committee
Inquiry into Victoria's criminal justice system**

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Thank you for the opportunity to input to this important Inquiry. As the peak body representing Victoria's Bail Justice community, our submission is directly relevant to the Inquiry terms of reference and addresses some of the factors influencing Victoria's growing remand population. In particular, we are able to address issues surrounding and leading to short term remand concerns overnight and on weekends for those most at risk in our community.

Background

When children, First Nations people and those with mental health and cognitive challenges are charged by Police with an offence, Police have the first opportunity to choose to bail them. When Police do not support bail, the accused is brought before a Magistrate as soon as practical. After 3pm and on weekends, a Bail Justice is called in to conduct a bail/remand hearing under the Bail Act and other relevant legislation.

Our position is that independent, community-based bail/remand decision-making by peers is a very appropriate model for all bail/remand decisions and provides an important and incredibly necessary oversight of Police powers before anyone's right to freedom is removed, even for a night or, in some regional areas and children's cases, for 4 or 5 days and nights. Such a model should engender community confidence in the justice system and ensure procedural fairness for anyone accused of a criminal offence.

Sadly, the model has been modified, brutalised, mismanaged, under-resourced and poorly supported for many years. As a result, the current after-hours Bail Justice system is badly broken. It has been denigrated by those the community rely on to support it. It is not beyond repair and with a little attention could easily become a world's best practice approach we are all proud of.

The impact of this situation of relevance to the Inquiry is as follows:

- Bail Justices are far more likely to remand than they need to be
- The lack of support services and infrastructure after hours severely limits bail options
- The move towards remote hearings will only exacerbate the problem
- The personal risks on a Bail Justice tend to drive remand decisions rather than bail

Getting Tough on Bail

The amendments to *Bail Act* in 2017, following the Coghlan Review, brought many changes to the Bail Justice role:

- The reverse onus test in favour of remand
Our position is that this goes too far, especially for children, First Nations people and those with mental health or cognitive issues. It is unreasonable to expect these 'at risk' members of the community to be able to mount the cogent case for 'exceptional circumstances' or 'compelling reason' required by the legislation. At 2am at a Police Station, without legal representation or in some cases no other supports, an accused in these circumstances is at a significant disadvantage.
- Schedule 2 offence whilst on bail
A child who is on bail and fails to attend Court and is subsequently charged with a relatively minor offence can find themselves needing to produce 'exceptional circumstances' by also

being charged with the 'fail to attend' as a Schedule 2 offence. Our position is that this 'double up' is unreasonable, especially for children and needs to be relaxed.

- **Bail and Remand Court Establishment**

The establishment of the Bail and Remand Court (BARC) is seen as a progressive improvement to the system. However, the apparent inability or reluctance of the BARC to hear Children's Court matters, on weekends or public holiday weekends needs to be addressed. This is especially important over long weekends and extended holiday periods (Easter and Christmas) where a child remanded on Easter Thursday is not able to appear before a Children's Court until the following Tuesday. Our view is that the role of BARC would be enhanced if it were prepared and required to hear Children's Court matters on weekends and public holidays.

Interestingly not part of the Coghlan Review recommendations (but mentioned in the body of the report as being the preference of Victoria Police and the Police Association) is the change to the *Bail Act* that provided for Victoria Police to remand alleged offenders other than children, First Nations people and those with mental health and cognitive challenges. Given that Bail Justices bail around 10-15% of cases, it would be reasonable to assume that there are 10-15% of alleged offenders now remanded by Victoria Police who would otherwise have been granted bail by a Bail Justice.

Our position is that if the independent oversight of the decision process is removed, it denies a person's liberty which is a critical component of our justice system and underpinned by the Victorian Charter of Human Rights. We note that both Victorian Aboriginal Legal Service and Liberty Victoria opposed these new Police remand powers. We posit that, as supported by The Hon. Paul Coghlan QC, Bail Justices are the most efficient and cost-effective means of achieving the requisite independent oversight. We strongly support the reinstatement of Bail Justice hearings for all after hours bail/remand decisions, with appropriate resourcing and support.

For Consideration:

We recommend as follows:

- *Remove the reverse onus test for children, First Nations people and those with mental health or cognitive issues*
- *Relax the 'double up' where failure to attend court puts a child into 'compelling reason'*
- *Provide for the BARC to sit as a Children's Court on weekends and public holidays*
- *Reinstate Bail Justice hearings for all after hours bail/remand decisions, with appropriate resourcing and support*

Bail Options After Hours

The options available to allow a Bail Justice to mitigate risks, and thereby grant bail after hours, are severely limited.

AFTER-HOURS SUPPORT FOR CHILDREN

CAHABPS, the Central After-Hours Assessment and Bail Placement Service services cease at 3am. Children are left unsupported after that time, except where an Independent Person (IP) as required by law is in attendance.

Unfortunately in most hearings before a Bail Justice, the support offered by CAHABPS to the young person is not in person but via the phone. This reduces the effectiveness of the service. In country and regional areas, CAHABPS support is only by phone and local support services are virtually non-existent.

In any case, CAHABPS have very limited options for placement of children. Under current youth justice processes, a Bail Justice cannot bail a child to a secure welfare unit without the explicit approval of the youth justice management team. If such support is not forthcoming, for whatever reason, the Bail Justice can be left with no option but remand, even though this may not be in the child's best interest.

A Bail Justice cannot direct that a child in residential care be moved to an alternative location even if, in the opinion of the Bail Justice, the child needs to be separated from the source of the problem (perhaps another resident or, sometimes, a specific care worker) to mitigate the risk of reoffending. Sometimes, the only viable solution available, in the best interest of the child, is to remand.

In most cases involving children there are no out-of-home after-hours bail placement options available. There are no processes to provide for a care worker to support a child even until the next morning. CAHABPS can occasionally find an alternative family member willing to take responsibility for the child, but this is a very rare occurrence.

AFTER-HOURS SUPPORT FOR FIRST NATIONS PEOPLE

VALS, the Victorian Aboriginal Legal Aid Service, often together with a local community contact, are advised whenever a First Nations person is taken into custody. These services do not appear to be resourced appropriately to be able to provide after-hours support for their community.

Sadly, it is not unusual for First Nations children to face an after-hours bail hearing without parental or community support. Most often they are supported by non-indigenous IPs and CAHABPS staff. They would find it extremely difficult to express any of the requisite cultural concerns which are provided for in the legislation and which must be considered by the Bail Justice. It would be a significant improvement if a way could be found to engage the local First Nations community, after-hours, perhaps for emotional and cultural support or even placement support within the broader community structure.

AFTER-HOURS SUPPORT FOR PEOPLE WITH COGNITIVE OR MENTAL HEALTH CONCERNS

Apart from a possible assessment by Victoria Police Forensic Medical Officer concerning an accused's ability to participate in an interview, which is not always conveyed to the Bail Justice, there are virtually no after-hours services available to assist a Bail Justice with risk mitigation strategies which might lead to bail instead of remand.

Independent Third Persons (ITPs) ensure that adults and young people with disability are not disadvantaged during police interviews but the ITP is not required by law to attend the bail hearing. Unfortunately there are no placements or other support services available to support accused with Cognitive or mental health concerns after-hours.

AFTER-HOURS BAIL SUPPORT (CISP)

The Court Integrated Services Program (CISP) aims to reduce the likelihood of people re-offending by assisting them to access support services. It provides support and coordinates referrals to:

- drug and alcohol treatment services
- crisis and supported accommodation
- disability and mental health services
- acquired brain injury services
- Koori specific services

None of these services are available after-hours to increase the opportunity for a Bail Justice to grant bail.

For Consideration:

We recommend that consideration be given to improving the support services available to accused persons after-hours so that more options to allow bail are available to Bail Justices.

Bail Justices by the Numbers

In the late 1990s, there were upwards of 400 Bail Justices across Victoria. By 2017 this had dwindled to 220 and currently, following a major exodus of Bail Justices after the 2017 Bourke Street tragedy, there are less than 120 Bail Justices available to cover the needs of the whole State.

A comprehensive analysis by RVAHJ of the requisite number of Bail Justices needed to provide a good level of coverage reveals that 500 Bail Justices are needed. Victoria Police, who conducted a similar analysis concluded the same level of requirement.

In the most recent State budget, support for the recruitment of 75 new Bail Justices over the next two years was secured. Whilst this is a great start, and is very much appreciated by RVAHJ, it must be tempered with the sure knowledge that 75 new Bail Justices does not even replace those lost since 2017 and falls well short of providing a comprehensive solution.

Consequently, as there are so few Bail Justices, those remaining are travelling huge distances to meet the demand for their services across the State. It is not unusual for a country Bail Justice to drive 100km in the middle of the night, without compensation even for mileage, to conduct a hearing and then drive back 100km to home. In the metropolitan area, Bail Justices often travel from Dandenong to Lilydale or from Footscray to Geelong. This leads to some lengthy delays for both Victoria Police and for the accused person before a hearing can even take place.

For Consideration:

We recommend a significant increase in the recruitment of Bail Justices (400 more) in order to provide an effective level of in-person bail hearings as quickly and efficiently as possible.

The Rise of After-Hours Remote Bail Hearings

The covid pandemic, and the associated *COVID-19 Omnibus (Emergency Measures) Act 2020* provided the opportunity to trial online, remote after-hours bail hearings. Given the small number of Bail Justices servicing the State, remote hearings are being seen by DJCS and Victoria Police as a terrific solution to the problem of not having enough Bail Justices. Whilst we support the use of remote hearings for some situations, we do not believe it is the optimum approach and rather a properly resourced and staffed in-person bail hearing process provides for better justice outcomes.

There is no doubt that justice is better served in person. This is particularly relevant in after-hours hearings where the accused person can be in a much more distressed state and unsupported than when they present at a Magistrate many hours later.

The highly respected US law and policy institute, Brennan Center (sic) for Justice, paper "The Impact of Video Proceedings on Fairness and Access to Justice in Court"

(<https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>) warns that "Increasing use of remote video technology poses challenges for fair judicial proceedings."

Brennan Center for Justice cites these examples:

- One study of criminal bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 percent, depending on the offense
- Several studies of remote witness testimony by children found that the children were perceived as less accurate, believable, consistent, and confident when appearing over video.
- A Swedish simulation where different jurors watched the child testimony either live or via video, jurors perceived the live testimony in more positive terms and rated the children's statements as more convincing than the video testimony.
- In a 2017 U.S. Government Accountability Office report on immigration courts, judges in three of the six surveyed courts identified instances where they had changed credibility assessments made during a video hearing after holding a subsequent in-person hearing

Our position is that, in the interests of justice and the rights of the accused (children, First Nations people and people with mental health or cognitive issues), in person hearings must remain as the preferred position. If a hearing cannot be conducted within, say 60 - 90 minutes, then a remote hearing may be considered as an appropriate option.

BAIL/REMAND HEARING RECORDING

As part of the rollout of remote hearing technology, DJCS is implementing the recommendations of the Coghlan enquiry and (partly) the recommendations of the Bourke Street Coronial Inquest to record Bail Justice bail hearings. Interestingly, even though some 87% of bail decisions are made by Victoria Police (Bail Justices are responsible for around 2% of bail decisions), there is not the same recording of the hearing requirement.

The proposed plan for recording Bail Justice hearings inexplicably implements processes which go well beyond those successfully used in the Magistrates' Court for many years. For Bail Justices, the plan is to record both audio and video unlike in the Magistrates' and other Courts which record audio only. Further, DJCS intend recording not only the bail/remand hearing but also any ancillary discussions which may occur before or after the hearing, regardless of whether it has relevance to the case at hand or not. It is not clear which legislation, if any, DJCS are relying on for the authority to provide for Bail Justice hearings to be recorded.

We fear that some strategists within Victoria Police and/or DJCS are driving towards a future after-hours bail hearing model with a small panel of Melbourne-based Bail Justices hearing all cases online. Such an approach for any accused but especially for children, First Nations people and those with mental health and cognitive challenges would be disastrous. It would impinge the rights of all accused 'at risk' people to a fair hearing. Such a process would lose the valuable insight of local knowledge and lead to more remand decisions.

The collective wisdom of our Bail Justice members is that remote hearings and the introduction of session recordings will undoubtedly and unintentionally lead to an increase in remand for those most at risk in our community.

For Consideration:

- *We recommend the use of remote hearings for after-hours Bail/Remand but only as a backup when in-person hearings are not able to be commenced within a reasonable time.*
- *We recommend recording of Bail Hearings using the same model as Magistrates' and other courts (audio) and only recording the hearing itself.*

- *We recommend recording Victoria Police bail/remand considerations (noting that Police do not conduct formal hearings).*
- *We recommend a firm commitment be made to in-person after hours bail hearings as the preferred future direction.*

The Great Bail Justice Fallacy

‘Victoria is the only State with Bail Justices’ is an oft repeated statement by Government, Victoria Police and the press. Whilst the statement is technically correct, it conveys an incorrect perception of the truth. In fact, with the exception of NSW, all other jurisdictions in Australia support specially trained volunteers who are empowered to conduct bail/remand hearings and, in some States, many other more complex judicial responsibilities. In most States these roles are conducted by Justices of the Peace who have undergone similar training to Victoria’s Bail Justices.

The misconception was particularly evident in the Government, Victoria Police and Police Association responses to the 2017 Bourke Street tragedy. It is unclear why these bodies chose to use such a misleading statement in their press releases and interviews. We can only assume it was to denigrate the Bail Justice involved, if not the Victorian Bail Justice system and volunteers, so as to deflect attention from those actually responsible for addressing the issue.

The result of this misguided and maligned focus on the role of Bail Justices has been significant in many ways and should not be underestimated or overlooked. Of particular relevance to this Inquiry is that it has led to a greater preponderance towards remand decisions by Bail Justices unwilling to take the risk of being publicly humiliated.

The outcome of the attitude and thoughts expressed by the Government, Victoria Police and the press include a significant number of Bail Justice resignations, many others simply going “off roster”, a major decline in Bail Justice morale and a renewed interest and focus on Bail Justices conditions of service and protections including judicial immunity.

For Consideration:

We recommend DJCS adopt a more correct interpretation and usage which no longer represents that Victoria is the only State with Bail Justices and acknowledge the valuable services the Bail Justice Volunteers contribute to the Victorian community.

Judicial Immunity

Honorary Justices were originally appointed under the *Magistrates’ Court Act 1989* with the same judicial immunity as Magistrates. This makes sense because, in effect, Bail Justices are undertaking the same role with the same risks and obligations as a Magistrate does with respect to a bail/remand decision. The only difference is the hour of the day/night when the decision is being made (and that Bail Justices don’t get paid or have their costs covered). With the introduction of the *Honorary Justices Act 2014*, Bail Justices (and Justices of the Peace) lost this immunity.

The 2014 Act replaced judicial immunity with a simple protection from personal liability. This change in the personal risk profile for Bail Justices was not communicated to the Bail Justice team at the time. In fact, 2 years later in 2016, new and reappointed Bail Justices were still be trained that they had the ‘same protections as a Magistrate’.

The change only came to light as a result of the Bourke Street Coronial Inquest. Bail Justices around the State questioned the process and asked why judicial immunity did not apply. To date, the only response from DJCS has been along the lines of ‘you have all the protection you need’.

Consequently, many Bail Justices perceive an increase in their personal risk and, being afraid of making a 'wrong' decision which may be dragged through the courts and the press, are more likely to remand.

For Consideration:

We recommend the reinstatement of judicial immunity for Bail Justices.

Organisational Support

The functions and operational support needs of Bail Justices and Justices of the Peace most closely align with the Magistrates' Court rather than as currently within the Department of Justice and Community Safety. Our position is that training, support, advice and guidance of Bail Justices could be significantly improved by moving the Honorary Justices Services Support team (HJSS - the team within DJCS responsible for the administration of Bail Justices and Justices of the Peace) under the line control and within the support infrastructure of the Magistrates' Court.

Bail Justices in particular would benefit from direct function control and management by the Magistrates' Court and Court Services Victoria. This would result in improvements in process and procedures which more closely align with Magistrates and can only lead to even better bail decision-making.

For Consideration:

We recommend moving HJSS management control from DJCS into the Magistrates' Court.

Summary

Whilst after-hours remand by Bail Justices represents only a small proportion of the overall challenges being addressed by the committee, it provides an opportunity to make some significant positive changes to the processes which would have a definitive positive impact on the current situation. For many alleged offenders, the after-hours Bail Justice is their first involvement with the formal judicial system. Improving this 'pointy end' component of the system will have far reaching beneficial effects well beyond reducing unnecessary or inappropriate remands.

In summary, we recommend that the Committee give consideration to the following:

- Removal of the reverse onus test for children, First Nations people and those with mental health or cognitive issues
- Relax the 'double up' where failure to attend court puts a child into 'compelling reason'
- Provide for the BARC to sit as a Children's Court on weekends and public holidays
- Reinstate Bail Justice hearings for all after hours bail/remand decisions, with appropriate resourcing and support
- Improve the support services available accused persons after-hours so that more options to allow bail are available to Bail Justices
- Implement a significant increase in the recruitment of Bail Justices (400 more) in order to provide an effective level of in-person bail hearings as quickly and efficiently as possible
- Promote the use of remote hearings for after-hours Bail/Remand but only as a backup when in-person hearings are not able to be commenced within a reasonable time
- Record Bail Hearings using the same model as Magistrates' and other courts (audio) and only recording the hearing itself
- Record Victoria Police bail/remand considerations (noting that Police do not conduct formal hearings)
- Make a firm commitment to in-person after hours bail hearings as the preferred future direction

- Adopt a more correct interpretation and usage which no longer represents that Victoria is the only State with Bail Justices and acknowledge the valuable services the Bail Justice Volunteers contribute to the Victorian community
- Reinstate judicial immunity for Bail Justices
- Shift HJSS management control from DJCS into the Magistrates' Court

Many of the recommendations above are easy and cost effective to implement. They only require the will and commitment to make the necessary change. A couple of recommendations, such as providing appropriate bail support services after hours and significantly increasing the number of Bail Justices are a little more challenging but still relatively straight forward and readily do-able.

On behalf of all those committed Bail Justices who get out of bed at all hours of the night, and on weekends and public holidays to provide an essential community service and to ensure that justice is done to the best of their ability, without compensation, without even cost recovery, often at some personal risk and more often without thanks, we provide this submission in the hope that, with your support, some positive changes can be brought to the after-hours bail system for the benefit of all.

RVAHJ Contacts

For further information or clarification, please reach out to:

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About the Royal Victorian Association of Honorary Justices

The Royal Victorian Association of Honorary Justices (RVAHJ) is the peak membership body for Bail Justices and Justices of the Peace (known collectively as Honorary Justices) in Victoria. Founded in 1910, the Association head office is located in our own premises in the Melbourne bay-side suburb of Elwood, Victoria. Through our commitment, experience and expertise we have established relationships with our stakeholders that makes the RVAHJ the voice of Honorary Justices within the Justice System, Government and the Community. We provide support, training and guidance for Honorary Justices focused on great customer service to the general public.