3 May 2013

The Hon Richard Dalla-Riva MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
EAST MELBOURNE VIC 3002

Dear Mr Dalla-Riva

Submission on the Bail Amendment Bill 2013

1. The Victorian Equal Opportunity and Human Rights Commission (Commission) appreciates the opportunity to contribute to the Scrutiny of Acts and Regulations Committee’s (Committee) consideration of the Bail Amendment Bill 2013 (Bill). We invite the Committee to make the Commission’s submission available on the Committee’s website.

Introduction and background

2. Under section 4 of the Bail Act 1977 (Act) a person has an entitlement to be granted bail unless they have been charged with specific offences (such as murder), or there is an “unacceptable risk” they would fail to appear in court in compliance with bail, commit an offence while on bail, endanger the safety or welfare of members of the public, interfere with witnesses or otherwise obstruct the course of justice. In those circumstances, bail may be refused or granted with certain conditions placed on that bail undertaking in accordance with section 5 of the Act.

3. The Bill amends the Act to:
   o list key and commonly imposed bail conditions which can be made;
   o create two new offences - for contravening certain bail conditions and for committing an indictable offence whilst on bail; and
   o provide police with the flexibility to charge someone with the offence of breaching their bail conditions or issue an infringement notice.

4. The Statement of Compatibility tabled with the Bill’s second reading in the Legislative Assembly on 17 April 2013 raises a number of human rights issues under the Charter of Human Rights and Responsibilities Act 2006 (Charter), including the right to freedom of movement, freedom of association, the right to privacy, and the right not to be subjected to medical treatment without consent.

5. However, the Commission is concerned that the Statement of Compatibility does not provide sufficient detail or analysis of rights engaged and whether
those limitations are reasonable. The Statement of Compatibility does not consider:

a. whether there are less restrictive means reasonably available to achieve the purpose of the limitation (under section 7(2) of the Charter), in respect of geographical exclusion zones as a bail condition; or

b. whether the new offence provisions in the Bill engage and reasonably limit:
   o the right to equality before the law, specifically in relation to people with disabilities, including people with intellectual disabilities, mental health issues or drug addiction; or
   o the right to presumption of innocence; or
   o the right not to be tried or punished for the same offence twice.

6. In summary, the Commission considers that the Committee may wish to seek further information from the Attorney-General about these additional Charter rights and how they are reasonably limited by the Bill.

Geographical exclusion zones

7. The Bill amends the Act to include a new section 5(2A), which sets out a non-exhaustive list of conditions which can be placed on a person’s bail undertaking by the court. According to the Second Reading Speech by the Attorney-General, the conditions listed are “key and commonly imposed conditions relating to an accused’s conduct”. The stated purpose of the amendments is to make the process of setting, monitoring and enforcing bail conditions more straightforward and effective.

8. One of the proposed conditions is subsection 5(2A)(f), which provides that a person granting bail may place a condition on the bail undertaking relating to geographical exclusion zones, being “places or areas the accused must not visit or may only visit at specified times”. The examples of geographic exclusion zones in the Bill are: “[n]ot attending a gaming venue, a venue that sells alcohol or a point of international departure”.

9. The Statement of Compatibility identifies that geographical exclusion zone bail conditions, as well as other conditions engage and “may be said to limit the rights in sections 12 and 16(2) of the charter act”, namely freedom of association and freedom of movement. The other relevant bail conditions listed at 5(2A) are residing a particular address, being subject to a curfew, surrendering his or her passport, not driving a motor vehicle and not contacting specified persons or classes of persons.

10. The Statement of Compatibility states that if freedom of movement and freedom of association are limited, the limitations are justified.

11. The Commission submits that the proposed list of bail conditions including geographical exclusion zones amount to a clear limitation on freedom of association and movement, and that the Statement of Compatibility does not provide the level of detail or analysis which the Commission would expect when such a significant limitation of an accused person’s rights are in question.

12. In particular, the Commission is concerned that the Statement of Compatibility:
   o does not discuss in any detail the nature of the rights engaged except to say they are not absolute;
under the heading “nature and extent of limitation” simply notes apparent 
"safeguards" existing in section 5 of the Act and the fact a person has to 
agree to bail, but does not actually discuss current practice and the 
effectiveness of section 5 in acting as a safeguard to ensure bail conditions 
are reasonable and no less onerous than required in the circumstances; and 
fails to identify any less restrictive means reasonably available to achieve 
the purpose of the amendments.

13. The Commission considers that in relation to section 7(2)(e) of the Charter, 
there are options reasonably available to the Attorney-General to ensure that 
freedom of movement and association are limited in the least restrictive way, 
but which would still achieve the purpose of ensuring public safety and preserve 
the integrity of the criminal justice system.

14. Two such options are:
a. provide guidance as to what circumstances may be relevant in assessing 
whether the bail condition is reasonable, having regard to the nature of the 
circumstances of the accused (under section 5(4)(b) of the Act); and/or 
b. specifically carve out places which cannot be included in a geographical 
exclusion zone bail condition.

15. The Commission considers that if a person’s bail condition includes a wide 
geographical exclusion zones which restricts their ability to work, attend school 
or training, care for their children, practice their religion, attend support 
counselling or medical services, or travel on public transport, their freedom of 
movement and association could be unreasonably limited.

Factors to guide section 5(4)(b) analysis

16. The first option for an alternative approach would be to list circumstances the 
bail decision maker must enquire about from the accused, and take into 
account if they are considering a geographical exclusion zone condition.

17. Examples of circumstances that should be taken into account are:
o whether the accused has particular health services or professional support 
services they need to access in a particular area; 
o whether their family support and accommodation are located; 
o if they attend school, TAFE, VET, university or other training or education 
programmes in the area; 
o if they attend a place of religious observance in a particular area; 
o where their children’s school or day-care facilities are located; 
o where they work, how they travel to work; and 
o whether and how the proposed exclusion zone will accommodate these 
factors.

18. It is also important that the bail decision maker make enquiries as to whether 
the accused has any special circumstances, such as whether the accused has a 
disability, including a mental health condition, intellectual disability, or drug 
addiction, which may affect their ability to understand or comply with the 
conduct conditions imposed on them.

19. The Commission is aware that the Act already contains a note beneath 
section 5 referring to sections 12 and 21 of the Charter and highlighting the 
rights to freedom of movement, and liberty and security of the person. The note
also refers to section 7(2) of the Charter and the test of how a right may be limited.

20. However, bail undertakings are not always made by a court, or person with legal training who is familiar with applying the Charter. For example, the Victorian Law Reform Commission reported that between 2000 and 2005, Victoria Police considered 93% of bail applications in Victoria, with the courts dealing with 5% of applications and bail justices dealing with 2% of applications.

21. In light of this, the Commission considers that it would be useful for the Bill to provide specific guidance on circumstances to be taken into account in the section 5(4)(b) analysis to ensure that there is adequate consideration of how the bail conditions:
   a. will comply with the requirement in section 5(4) of the Act that they are reasonable in light of the circumstances of the accused and the charge laid; and
   b. are no more onerous than is required to achieve the purpose the conditions in section 5(3) of the Act, e.g. to ensure they attend court on the required day, to prevent the accused committing an offence, and to ensure they do not interfere with witnesses; and
   c. how these factors result in the freedom of movement, liberty and security of the person being reasonably limited by the bail condition.

22. Including such guidance would provide a way of considering whether the measure is reasonable and proportionate and would be a less rights-restrictive means way to achieve the purpose of the Bill.

Carve out provisions

23. Another less rights-restrictive alternative is to include a new sub-section carving out particular areas where a person will not be prevented from attending despite any bail condition excluding them. For example, the Bill should ensure geographical exclusion zones are not so wide as to include the following without reasonable justification:
   a. where the person usually lives and where they have key family or professional support services, health services or Centrelink;
   b. where their children’s schools or child care facilities are located;
   c. the person’s school, TAFE, VET, university or other training or educational provider;
   d. the persons’ place of religious observance;
   e. the entire CBD or main shopping area of a suburb where a person lives or works in that area; or
   f. local public transport hubs such as train, tram or bus stations.

24. The provisions should also carve out that a person is entitled to travel through a geographical exclusion zone on public transport.

25. The Liquor Control Reform Act 1998 (LCR Act) creates a similar “carve out” regime in relation to banning notices and exclusion orders. Part 8A of the LCR Act provides that the Victorian Commission for Gambling and Liquor Regulation

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3 Bail Act 1977, section 10
may declare particular areas within Victoria experiencing alcohol-related violence as "designated areas" for the purpose of the LCR Act, which are then used as geographical exclusion zones for people who have committed or are suspected of committing alcohol-related violence and other offences.

26. While the provisions of Part 8A allow a person to be banned from an entire designated area for either an initial period of up to 72 hours, there are also restrictions on a person's exclusion from those designated areas. For example:
   o a banning notice cannot be given to a person in relation to an entire designated area, where the person lives or works in that area;⁵ and
   o if a person receives a banning notice and they live or work in licensed premises in the designated area, then the banning notice does not prevent them from entering those licensed premises.⁶

27. Similarly, the courts have the ability to make an exclusion order that bans a person from all or part of a designated area for up to twelve months. However, the exclusion order may not necessarily relate to the entire area but parts of it and/or at certain times of day, as relevant to the circumstances of the person.⁷

28. Including similar provisions in the Bill would amount to a less restrictive limitation on the rights to freedom of association and movement.

New offence and infringement provisions

29. The Bill introduces two new offences into the Act:
   a. a new section 30A, providing that an accused person on bail must not, without reasonable excuse, contravene any conduct condition imposed on them; and
   b. a new section 30B, making it an offence to commit an indictable offence whilst on bail.

30. Both new offences are punishable by a fine of 30 penalty units or three months imprisonment. The second reading speech states that unless the court directs otherwise, a sentence of imprisonment will be served cumulatively with any sentence of imprisonment.

31. The Bill will also introduce a new section 32A into the Act, providing that a member of the police force may serve an infringement notice on a person who the member has reason to believe has committed an offence against section 30A or 30B. The infringement penalty for the offence against section 30A is 1 penalty unit and will be considered an infringement offence within the meaning of the Infringements Act 2006 (proposed section 32A(3)).

32. The Statement of Compatibility does not discuss whether any Charter rights are engaged by the new offence and infringement provisions, except to note that the new offence provision does not apply to conduct conditions requiring attendance and participation at a bail support service.

33. Three Charter rights may be engaged and limited by the proposed offence and infringement provisions:

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⁵ Liquor Control Reform Act 1998, section 148B(6)
⁶ Liquor Control Reform Act 1998, section 148B(7)
⁷ Liquor Control Reform Act 1998, section 148I(5)
the right to equality before the law and the right to be free from
discrimination under section 8 of the Charter, particularly in relation to the
potential impact of the new provisions on people with disabilities;
the presumption of innocence under section 25(1) of the Charter in relation
to the reverse onus created by the “reasonable excuse” defence in the
proposed new section 30A(1) contained in clause 8 of the Bill; and
the right not to be tried or punished more than once under section 26 of the
Charter in respect of the proposed section 32A.

Section 8(3): right to equality before the law

34. The right to equality and freedom from discrimination in the application of the
law is one of the cornerstones of human rights, as reflected in the preamble to
the Charter. The right to equality provides that ‘every person is equal before the
law and is entitled to equal protection of the law without discrimination’.

35. Justice Bell in Lifestyle Communities Ltd (No.3) affirmed that the right to equal
protection of the law without discrimination in section 8(3) of the Charter
protects the community from discrimination, and from laws that are
discriminatory in nature.\(^8\)

36. Where a police officer charges a person with the proposed section 30A offence
for breaching their bail conditions, this may result in discrimination on the basis
of disability.

37. Some disabilities can influence a person’s ability to control their actions,
understand the bail conditions imposed on them, or appreciate the seriousness
of breaching those conditions. They may also lack legal advice at the point of
seeking bail. This may result in them being unable to comply with bail
conditions not to enter particular geographical zones or associate with particular
people, because of their disability. It is also well known that people with mental
illness or addiction are more likely to be homeless, which may affect their ability
to comply with a bail condition relating to a geographic exclusion zone.\(^9\)

38. Where breaching a bail condition is an offence punishable by a prison sentence
or an infringement punishable by way of a financial penalty without taking into
account relevant circumstances like any disabilities, this can become an
unreasonable condition likely to have the effect of disadvantaging a person
because of their disability. It would also be unreasonable where a person may
be charged with breaching a bail condition and sentenced to imprisonment for a
longer period than what their original charge would have resulted in, even if
those sentences were to be served cumulatively.

39. For the same reasons, a person with some disabilities may also be less likely to
be able to comply with the condition placed on them in the proposed
section 30A that they must provide evidence showing they have a "reasonable
excuse" for their conduct in order to not be charged with the offence of
breaching a bail condition.

40. By way of comparison, we note that the Infringements Act 2006 includes the
ability to seek an internal review of the imposition of an infringement notice,
where the person who has been issued with the notice has "special

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\(^8\) Lifestyle Communities Ltd (No.3) (Ant-Discrimination) [2009] VCAT 1869 at [284]-[289]
p46
circumstances" which apply to mitigate their behaviour.\textsuperscript{10} This would apply to a person under the Bill where the police officer has decided to issue an infringement notice for committing an offence of breaching a bail condition, rather than charging them with the offence under the proposed section 30A.

41. Special circumstances are defined in the \textit{Infringements Act 2006} to mean:
   - a mental or intellectual disability, disorder, disease or illness where the disability, disorder, disease or illness results in the person being unable:
     - to understand that conduct constitutes an offence; or
     - to control conduct that constitutes an offence; or
   - a serious addiction to drugs, alcohol or a volatile substance within the meaning of section 57 of the \textit{Drugs, Poisons and Controlled Substances Act 1981} where the serious addiction results in the person being unable:
     - to understand that conduct constitutes an offence; or
     - to control conduct which constitutes an offence; or
   - homelessness where the homelessness results in the person being unable to control conduct which constitutes an offence.

42. Therefore, while these safeguards will apply to a person issued with an infringement notice under the proposed section 32A, there are no equivalent safeguards in relation to the proposed sections 30A. The Commission considers that the scheme may result in injustice for people with an intellectual disability or cognitive impairment receiving a conviction for a breach of bail offence when they have special circumstances which may play a role in the committing of the bail condition breach.

43. The Commission notes that after conducting a comprehensive review of the Act in 2008, the Victorian Law Reform Commission recommended that a new offence of breaching a bail condition should not be created. The Victorian Law Reform Commission came to the view that:

   The addition of an offence would have a disproportionate impact on accused people with drug addiction, mental illness, and disabilities such as acquired brain injury, whose lives are chaotic. It would also have a disproportionate impact on young people who may not at first appreciate the seriousness of adhering to conditions. This charge would result in conviction for a breach offence, making it harder to get bail in the future.\textsuperscript{11}

44. The Commission agrees with the Victorian Law Reform Commission’s view and is disappointed that the recommendation has not been accepted.

\textit{Section 25(1): presumption of innocence}

45. The Statement of Compatibility does not address whether the presumption of innocence is engaged or reasonably limited by the Bill. The Commission is aware of the Committee’s Practice Note 3 and submits that the Statement of Compatibility for this Bill does not comply with that note in respect of the Bill’s proposed section 30A, which creates an offence for breaching a bail condition, unless a person can show that they had a reasonable excuse for doing so.

46. The Practice Note states that the Statement of Compatibility for any Bill that creates a provision reducing the prosecution’s burden to prove guilt, or which requires an accused person to raise evidence of their innocence, should state

\textsuperscript{10} \textit{Infringements Act 2006}, section 22
\textsuperscript{11} Ibid., p128
whether and how that provision satisfies the Charter’s test for reasonable limits on the right to presumption of innocence.

47. This would apply to the proposed section 30A in the Bill as it requires an accused person to present evidence that suggests the reasonable possibility of the existence of facts to establish the excuse, amounting to an evidentiary onus placed on the accused person.

Section 26: Right not to be tried or punished more than once

48. The proposed new section 31A creates a new offence of committing an indictable offence whilst on bail. The Commission is concerned that the approach in the new section 31A may raise questions for the community about whether section 26 of the Charter is engaged. The Committee may therefore wish to seek further information from the Attorney General to assist in its deliberations with respect of this issue.

Section 7(2): reasonable limitations

49. Under section 28(3) of the Charter, a Statement of Compatibility must state whether, in the minister’s opinion the Bill is compatible with human rights and, if so, how it is compatible. This involves a consideration under section 7(2) of the Charter of whether any limitations on Charter rights are reasonable and justified, including whether there are any less rights-restrictive alternatives reasonably available.

50. The Bill’s second reading speech states that the purpose of the new offence and infringement provisions are to provide a deterrent to an accused person on bail contravening their bail condition or committing offences. It also sets out that the infringement provision is to give the police a “range of enforcement tools” so that there is flexibility in responding to people who breach their bail conditions.

51. The Attorney-General has noted that:

...infringement notices will be issued for minor contraventions, such as reporting late to police. Giving police this enforcement option frees up their time for other law enforcement activities and enables them to more readily issue penalties to those who deserve them.12

52. In light of this direction by the Attorney-General and the purpose of the proposed new offences and infringement notices, one less rights-restrictive alternative available could be to include in the text of the Bill clear guidance to the police how to exercise their discretion in determining whether to charge a person with an offence or issue an infringement notice, potentially referring to “special circumstances” as defined in the Infringements Act 2006. Otherwise, the offence and infringement provisions create a real risk that they will unreasonably limit the right to equality and presumption of innocence.

Summary

53. The Commission respectfully suggests that the Committee may benefit from requesting further information from the Attorney-General about the issues raised in this submission.

12 This is also reflected in the Explanatory Memorandum for the Bill at p4.
54. In the event the Government proceeds with these laws in their current form the Commission believes there should be a commitment provided to monitor and report on their operation and impact, as well as to review their operation after a set period of time.

55. If the Committee would like more information or would like to discuss this submission, the relevant officer is welcome to contact Jennifer Jones, Senior Legal Adviser on 9032 3421.

Yours sincerely

Karen Toohey
Acting Commissioner