



Tasmanian Council of Social Service Inc

---

# Submission to the Consultation on Bail Reform

*February 2018*



INTEGRITY  
COMPASSION  
INFLUENCE

## About TasCOSS

---

TasCOSS is the peak body for the community services sector in Tasmania. Our membership includes individuals and organisations active in the provision of community services to low income, vulnerable and disadvantaged Tasmanians. TasCOSS represents the interests of its members and their clients to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

Please direct any enquiries about this submission to:

Kym Goodes

**CEO**

Ph. 03 6169 9500

Email: [Kym@tascoss.org.au](mailto:Kym@tascoss.org.au)

## Introduction

TasCOSS welcomes the opportunity to provide input into the Reforms to the Tasmanian Bail System Position Paper. Our members include both services which work with victims of crime, and those that work with those accused of crimes.

In this submission, TasCOSS focuses on Issue 4 in the Position Paper – Presumption against bail, particularly the proposed ‘exceptional circumstances’ and ‘show good reason’ tests set out in Proposals 7 and 8.

Our principle concerns are that:

- The proposals embody a significant departure from the commitment to fundamental principles of criminal justice (the presumption of innocence) and human rights (the right to liberty);
- the proposed changes are not based on evidence; and
- they are likely to have a disproportionate effect on vulnerable people.

We will also address the reference to family violence offences in the Position Paper.

## Issues of concern

### *Departure from principles of criminal justice and human rights*

The Tasmanian Bail Act is centred on the *R v Fisher*<sup>1</sup> case, which currently that sets out that *prima facie* anyone who is accused has the right to their civil liberty until they stand trial, except in cases when the accused is charged with murder. This is consistent with the International Covenant on Civil and Political rights, to which Australia is a signatory: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”<sup>2</sup>

The proposed reforms in the Position Paper seeks to reverse this onus, requiring the accused to demonstrate that bail should be granted. This is a significant impingement on the accused’s right to the presumption of innocence and the *prima facie* right to liberty. The adoption of one or both tests could also place the State in breach of Article 9 of the International Covenant on Civil and Political Rights, which states that, “It shall not be the general rule that persons awaiting trial shall be detained in custody...”<sup>3</sup>

### *Proposed changes are not evidence-based*

The Position Paper refers to a statement from Premier Will Hodgman that:

---

<sup>1</sup> *R v Fisher* (1964) 14 Tas R 12

<sup>2</sup> Article 14(2) <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> viewed 8 February 2018

<sup>3</sup> Article 9, *ibid*.

The community and police are tired of hearing stories of offenders continuing to offend while on bail. We need to make sure that our bail laws keep pace with those interstate, and offer the greatest possible protection to the community.<sup>4</sup>

However only two ‘high profile’ cases are put forward to support the need for reform, and neither of them strongly demonstrates the need for change. One is a Victorian case which in fact demonstrates that the bail regime it is proposed that Tasmania emulate, did not prevent the new offence from occurring. The other case is Tasmanian, where it is also unclear whether the proposed reforms would have prevented the defendant being granted bail and then committing murder.

In a 2004 publication by the Tasmanian Law Reform Institute on bail reform, it was found that less than one percent of people who were charged while on bail were charged with a ‘serious offence’<sup>5</sup>. Other research supports this - individuals who are not granted bail have a higher chance of pleading guilty or to be found guilty than individuals who are granted bail. They also have a higher chance of receiving a custodial sentence.<sup>6,7</sup>

As for ‘keeping pace’ with other jurisdictions, there are significant concerns with the reverse onus of proof regimes in NSW and Victoria – the Law Reform Commissions in both states make the following arguments against reverse onus tests<sup>8</sup>:

- Bail will not automatically be granted even if the defendant establishes ‘exceptional circumstances’ or ‘shows good reason. Ultimately the ‘unacceptable risk’ test will determine if bail is granted.
- The Position Paper does not present a framework for determining which offences require a reverse onus. Unless specified, these decisions are susceptible to ‘law and order’ debates which result in inconsistent rulings and therefore in potential inequities.
- Reverse onus tests increase the number of people on remand, including in some cases people who would not receive a custodial sentence if found guilty of the offence charged. There is also no evidence that this reduces the incidence of offending. Thus the reverse onus tests meet neither the criterion of effectiveness nor of justice.
- Reverse onus provisions are not consistent with the right to the presumption of innocence or the right to liberty.

---

<sup>4</sup> p.13

<sup>5</sup> From *Offending While on Bail*, Tasmanian Law Reform Institute, May 2004 (p. 17)

<sup>6</sup> Fitzgerald RE & Marshall, P, *Towards a more objective basis for bail decision making*, paper presented at the 3rd National Outlook Symposium on Crime in Australia, convened by the Australian Institute of Criminology, Canberra, March 1999, citing: Flood-Page, C & Mackie, A (1998) *Sentencing Practice: an examination of decision in magistrates’ courts and the Crown Court in the mid-1990s*, Home Office Research Study 180. Home Office: London; and R Hood, R & Cordovil, G (1992), *Race and sentencing: a study in the Crown Court*. A report for the Commission for Racial Equality, Clarendon Press: Oxford.

<sup>7</sup> In the UK it was found that ‘[t]he majority of remand prisoners are found guilty – nearly 80% in 2000. 48% of all men and 36% of all women who enter prison as remands subsequently receive a custodial sentence’: Social Exclusion Unit, Office of the Deputy Prime Minister, UK, *Reducing re-offending by ex-prisoners* July 2002, Annex B, citing Home Office, Prison Statistics England and Wales 2000/01, 2001

<sup>8</sup> [http://www.lawreform.vic.gov.au/sites/default/files/VLRC\\_Review\\_of\\_the\\_Bail\\_Act\\_Final\\_Report.pdf](http://www.lawreform.vic.gov.au/sites/default/files/VLRC_Review_of_the_Bail_Act_Final_Report.pdf);

<http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-133.pdf>. Many of these arguments are also made in the Tasmanian Law Reform Institute research paper *Offending While on Bail*, 2004 [http://www.utas.edu.au/\\_data/assets/pdf\\_file/0003/283782/BailResearchPaperA4.pdf](http://www.utas.edu.au/_data/assets/pdf_file/0003/283782/BailResearchPaperA4.pdf)

### *The proposed changes will impact disproportionately on vulnerable people*

Reverse onus tests have a particularly burdensome impact on vulnerable people, such as defendants with cognitive impairments, young people, people with low literacy skills, Aboriginal people and people from non-English speaking backgrounds. Many bail applications are made by people defending themselves, and vulnerable defendants can lack the capacity to argue their case and, in particular, understand what is required to satisfy the reverse onus tests.

### *Family violence offences*

Under Tasmania's current *Family Violence Act 2004* and the *Bail Act 1994*, for persons charged with family violence offences, the court must be satisfied about the victim's safety. Where this is the case the offender may be granted bail. The Position Paper argues that this provides 'a significant protective measure for the community' and thus advocates retaining the Act as it stands.

TasCOSS agrees with the need to prioritise the safety of women and children, who are overwhelmingly the victims of family violence. Family violence offences differ from many other crimes. There is often a history of fear, coercion and control. The accused knows the victim, usually knows where they live, might have children with the victim and may live in the same home. In the case of these offences, concerns about whether the offender will appear in court are secondary to the safety and interests of the victim/s.

However, TasCOSS has consulted with its members and is aware of differing views in the legal community on this position, so will defer to the expertise in the sector.

## **Recommendations**

TasCOSS recommends that the government **does not** adopt proposals 7 and 8 in the Position Paper.

TasCOSS also recommends that the government conduct evaluation of the interplay of the *Family Violence Act 2004* and the *Bail Act 1994* in relation to granting bail for family violence offences.