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The Hon. Richard Dalla-Riva MLC
Chairperson
Scrutiny of Acts and Regulations Committee
Parliament House
Spring Street
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Scrutiny of Acts and
Regulations Committee

7 JUN 2013

Dear Mr Dalla-Riva

Bail Amendment Bill 2013- Letter from VEOHRC

I am writing in relation to the submission to you from the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) of 3 May 2013, published on the Committee's website. The submission raises concern with the Statement of Compatibility in relation to geographical exclusion zones as a bail condition, and the new offences in the *Bail Amendment Bill 2013* (the Bill).

Geographical exclusion zones

In relation to the inclusion of geographical exclusion zones as a condition of bail in the Bill, the Committee will note that this and the other conduct conditions were included because they are commonly imposed by bail decision makers, comprising police, bail justices and courts. The Bail Act currently gives decision makers a general discretion to impose bail conditions on accused people. The reform makes clear on the face of the *Bail Act 1977* what kind of conditions are commonly imposed. The Bill does not require any of the listed conditions be imposed, or even considered by a bail decision maker. The list is non-exhaustive so that decision makers may tailor conditions to the particular circumstances of the case.

In my opinion the Statement of Compatibility adequately discusses the issues raised by this amendment. The legislative safeguards are discussed in some detail, and each factor of the considerations under section 7(2) of the Charter Act is discussed with reference to the operation of the Bail Act.

I do not agree with the VEOHRC that there are any less restrictive options available. VEOHRC proposes two less restrictive options it considers reasonably available:

- providing guidance as to what circumstances of an accused person may be relevant in assessing whether the bail condition is reasonable; and
- specifically carving out places which cannot be included in a geographical exclusion zone bail condition.

Sub-sections 5(2)-(4) of the Bail Act currently contain clear guidance for bail decision makers as to the order in which conditions must be considered, the purposes for which conditions may be imposed, that bail conditions must be no more onerous than necessary, and that bail conditions must be reasonable considering the nature of the offence and the circumstances of the accused. To go further, into what circumstances of the accused may be relevant for consideration, would add complexity to the legislation without commensurate benefit. What may be relevant will vary in each case, and the legislation imposes a clear requirement for the accused's individual circumstances to be considered.

Similarly, it would be impractical to attempt to carve out places that cannot be included in a geographical exclusion zone, considering the multitude of places that would arise for the thousands of accused people bailed each year. The example raised by the VEOHRC of the *Liquor Control Reform Act 1998* provisions is not comparable, being directed at a single issue as compared to bail orders which consider a multitude of issues. Sub-section 5(4) clearly requires conditions to be reasonable, and no more onerous than necessary, in the individual case before the decision maker.

In addition, the Statement of Compatibility notes other safeguards in the Bail Act, namely that an accused person cannot be bailed unless he or she agrees to the conditions included in the undertaking, and may apply to the court for variation of the conditions. Court decisions provide guidance to police as to appropriate conditions. VEOHRC note that bail orders are not always made by courts, or persons with legal training. Bail decisions are made by courts, police of and above the rank of sergeant, and bail justices. Police and bail justices receive specific training to equip them to make bail decisions. I am satisfied that the circumstances raised by VEOHRC are well known to all bail decision makers

New offence and infringement provisions

The VEOHRC raise three Charter Act rights that may be engaged and limited by the proposed offence and infringement provisions: the right to equality before the law; the presumption of innocence; and the right not to be tried or punished more than once in respect of new section 32A.

The right to equality before the law and freedom from discrimination, under section 8 of the Charter Act, is raised by the VEOHRC in relation to the potential impact of the offence of contravention of certain bail conditions. VEOHRC state that implementation of the offence may result in discrimination on the basis of disability. The VEOHRC refer to conditions being imposed, and penalties for the new offence being imposed, without taking into account relevant considerations. However, the Bail Act requires all circumstances to be taken into account before bail conditions are set, including the circumstances of the accused. As discussed above, the Bail Act also allows a person to apply to vary their conditions of bail without restriction.

VEOHRC further raise the possibility that a person may be charged with contravention of a bail condition and sentenced to a term of imprisonment longer than that received for the original offence. The maximum penalty of three months imprisonment attached to the offence is generally the lowest custodial penalty attached to a criminal offence. This situation is therefore unlikely to arise, though may depend on the court's judgement as to the seriousness of the behaviour constituting the contravention.

The VEOHRC further raise discrimination on the basis of a person with disability being less likely to be able to provide evidence of a 'reasonable excuse' for their conduct in order not to be charged. The reason for this opinion is unclear, as the disability, as well as any other relevant matters, will be taken into account by police in considering the most appropriate enforcement action.

A comparison is made with the *Infringements Act 2006*, which includes the ability to seek an internal review of the imposition of an infringement notice where the person has 'special circumstances'. As noted by the VEOHRC, this process under the Infringements Act will apply to infringements issued for the new offence of contravening a bail condition.

The VEOHRC later propose a less rights-restrictive alternative to the current legislation: to include clear guidance to the police in the Bill about how to exercise their discretion whether to charge or infringe. A suggestion is made to include reference to 'special circumstances' as defined in the Infringements Act. As noted above, I consider this would add complexity to the legislation without commensurate benefit. Victoria Police has developed extensive guidelines for members that cover all areas of policing, including matters that must be considered when assessing the most appropriate enforcement action. These include youth, age, intelligence, physical health, mental health or special infirmity of the offender.

The VEOHRC note that there are 'no equivalent safeguards in relation to the proposed section 30A'. It is assumed this refers to when a person is charged and appears before a court for the offence. In that case, the person or their legal representative may advise the court of any reasonable excuse. If the charge is heard in the County or Supreme Court, the person will be legally represented. If in the Magistrates' Court, there are a wide range of services, and a specialist court list, to assist people with disabilities, and respond to them appropriately.

The VEOHRC note the 2008 recommendation of the Victorian Law Reform Commission that an offence of contravening a bail condition should not be created. As made clear in the second reading speech for the Bill, the government takes a different view. In Victoria, there are inadequate deterrents to accused people on bail committing offences and contravening their bail conditions. Most other Australian jurisdictions make it an offence for accused people to contravene a bail condition.

The VEOHRC submits that the Statement of Compatibility does not comply with the Committee's Practice Note 3 because it does not state whether and how new section 30A satisfies the Charter Act test for reasonable limits on the right to the presumption of innocence. New section 30A is said to engage and limit the right by including a reasonable excuse provision, which must be satisfied by the accused person.

A person who satisfies the court of a reasonable excuse for contravening a conduct condition is not guilty of the offence. The reasonable excuse provision places an evidential burden on an accused person who wishes to rely on it. This may engage the presumption of innocence under the Charter Act, but in my view is compatible with the right to be presumed innocent. The reasonable excuse is within the knowledge of the accused, and it is reasonable for them to provide evidence. The prosecution retains the legal burden of disproving the issue beyond reasonable doubt.

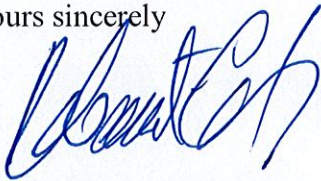
New section 31A creates an offence of committing an indictable offence while on bail. The VEOHRC raise possible concerns as to whether this offence engages the right not to be tried or punished more than once in section 26 of the Charter Act. The offence does not limit that right, because the gravamen

of the offence is the fact of the breach of the bail requirement, not in itself the behaviour that constitutes the offence for which the person was on bail.

I note VEOHRC's view that the operation and impact of the amendments in the Bill should be monitored, and reviewed after a set period of time. I believe the safeguards outlined in this letter are sufficient, and do not intend to institute specific monitoring of these amendments.

The package of reforms in the Bill will provide further guidance to bail decision-makers and strengthen the operation of and community confidence in the bail system. The Bill strikes an appropriate balance between the rights of accused persons and the safety and welfare of the public and the need to ensure compliance with bail conditions.

Yours sincerely



ROBERT CLARK MP

Attorney-General

5/16/13

cc: Karen Toohey, Acting Commissioner, VEOHRC