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### **VALS submission to the Victorian Law Reform Commission in response to the Penalty for Failing to Meet Surety query – sent 26 September 2006**

#### **Introduction**

This submission raises concerns with the potential reform of increasing the penalty for failure to meet surety from two years to a higher term and provides suggested recommendations in response. In general, VALS is concerned with the current trend in Victoria to emphasise punishment at the expense of other options. The recommendations highlight the logic of a smart on crime approach, such as alternatives to imprisonment, which is not a punitive tough on crime approach.

#### **RECOMMENDATIONS**

VALS' recommendations are:

1. Caution should be exercised when discussing proposed reforms on the heels of *R v Mokbel and Mokbel* due to the specific context of the case
2. Due consideration should be given to the potentially detrimental impact that increasing the penalty for failure to pay a surety may have on Indigenous Australians
3. The current system of automatically considering imprisonment once a surety fails to make payment should be abandoned and replaced with the civil regime in other Australian jurisdictions.
4. In the event that the above suggestions are not adopted then the following should be considered:
  - a. Decrease, rather than increase, the penalty for failure to pay surety.
  - b. Introduce a fairer sliding scale that promotes justice when translating unpaid surety into a prison term.
  - c. Ensure that the potential term of imprisonment for a surety is not higher than the potential term of imprisonment of a Defendant who does not meet bail requirements.
  - d. Ensure that a surety is not imprisoned if the Defendant who they act as a surety for is found not guilty
5. The following progressive suggestions of Law Reform Commissions should be adopted:

- a. Give greater consideration the surety's complete financial position
- b. Establish guidelines for Registrars relating to explanation to sureties of their rights and obligations.
- c. For ease introduce provisions relating to the forfeiture of a surety's security in the Victorian Bail Act.

## **1 Exercise Caution When Discussing Proposed Reforms Following R v Mokbel and Mokbel due to the Specific Context of the Case**

The context of R v Mokbel and Mokbel [2006 VSC 158] (ie: drug trafficking) is an example of a case at one end of the spectrum. Caution should be observed when reforming the law with such cases in mind, in terms of the impact the changes will have on other cases, particularly on people from low socio-economic background. Justice Gillard himself comments that a \$1 million is "by any standard" an "extremely large sum and represents as high a sum as any required in this State".<sup>1</sup> Justice Gillard's further comment that two years imprisonment was "inadequate when the undertaking is as high as \$1million" is reflective of the current hot topic of cracking down on organised crime.

## **2 Consider the Detrimental Impact of Increasing the Penalty for Failure to pay a Surety may have on Indigenous Australians**

The increase in penalty for failure to pay a surety has the potential to disadvantage Indigenous Australians. Even though it is uncommon for VALS to be involved in a matter involving surety,<sup>2</sup> some Indigenous Australians do act as sureties and the increase in penalty could have a detrimental impact on Indigenous Australians. Given the low socio-economic status of Indigenous Australians, some Indigenous Australians face difficulty in paying a surety. Census statistics indicate in 2001 the median income was \$287 for Indigenous Australians and \$383 for non-Indigenous Australians.<sup>3</sup> Low socio-economic status is also a contributing factor to Indigenous Australian breaching bail conditions and hence activating the need for payment by the surety. An increase in penalty has the potential to contribute to the over-representation of Indigenous Australians in the prison system.

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<sup>1</sup> R v Mokbel & Mokbel [2006] VSC 158 (26 April 2006), para 58, as at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VSC/2006/158.html?query=imprison%20surety>

<sup>2</sup> The reason for this is that VALS clients do not satisfy section 9(2) of the Act (ie: financial resources and character are taken into account). Indigenous Australians are ... and are over-represented in the criminal justice system. Indigenous Australians commit offences of a serious nature and surety more commonly applies with Indictable Offences (Consultation Paper p93)

<sup>3</sup> Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody Statistical Information Volume 2 October 2005, p.26

### **3 Abandon the Current System of Automatic Imprisonment for Failure to Pay Surety and Adopt the Civil Regime in Other Australian Jurisdictions**

There should not be an automatic prison penalty for failure to meet surety. VALS endorses the approach in NSW, NT, SA, TAS, WA which provide for a civil regime, treating failure to pay a surety as defaulting on a payment of a fine (ie: imprisonment only follows default on a Community Based Order). This approach represents a smart on crime approach as it does not automatically adopt punishment as the first and only option, but creates space for alternative options. Unfortunately, in contrast in Victoria, defaulting sureties are treated as criminals and receive up to two years imprisonment as a first option. There is no doubt that with calls to increase this penalty a tough on crime approach prevails in Victoria. A heavy handed punitive approach is not a smart on crime approach. Research shows that imprisonment does not have a deterrent effect and given the impact imprisonment has on people's lives it should be used as a last resort. For instance, imprisonment of a surety will affect the person's future employment prospects as society gives lifelong sentences to those who spend time in prison.

### **4 Further Suggestions in the Event that the Above Suggestions are not Adopted.**

- a) Decrease, rather than increase the penalty for failure to pay surety.

In the event that the civil regime outlined above is not introduced in Victoria, the maximum imprisonment term for defaulting on the surety should only decrease, not increase. For instance, the imprisonment term is 3 months in NSW and 6 months in the Act.

- b) Introduce a fairer sliding scale that promotes justice when translating unpaid surety into a prison term.

In the event that imprisonment upon default of the surety remains the first resort in the interests of justice a sliding scale that equates the monetary amount of the surety with time in prison should be fairer than it currently is. It does appear unjust that a surety for \$1 million dollars may be imprisoned for two years, whereas a surety for \$200,000 may receive a 12 month sentence term.<sup>4 5</sup> However, this injustice highlights the need to decrease the imprisonment term for an unpaid surety of \$200,000.00 rather than increasing the maximum imprisonment term for \$1million.

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<sup>4</sup> In Mokbel Justice Gillard discussed the case Re Condon [1973] VR 427 adjudicated in 1973. Justice Gillard argued that a surety for \$5,000 in 1972 was the equivalent to \$200,000 today.

<sup>5</sup> R v Mokbel & Mokbel [2006] VSC 158 (26 April 2006), para 59, as at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/cases/vic/VSC/2006/158.html?query=imprison%20surety>

- c) Ensure that the potential term of imprisonment for a surety is not higher than the potential term of imprisonment of a Defendant who does not meet bail requirements.

If there is to be a term of imprisonment for failure to meet surety, the term of imprisonment should not be higher than imprisonment terms for Defendants who fail to meet bail. Currently, there is the anomaly that a Defendant will be imprisoned for up to 12 months only for an offence under s30 of the Act (failure to appear), whereas a surety may be imprisoned for up to 2 years.

- d) Ensure that a surety is not imprisoned if the Defendant who they act as a surety for is found not guilty

If there is to be a term of imprisonment for failure to meet the surety this should take into account whether the Defendant who is on bail is ultimately found not guilty. It appears unjust for a surety to be imprisoned and the Defendant they acted as a surety for is innocent.

## **5 VALS Endorsement of Law Reform Commission Suggestions on Sureties**

Suggestions in the VLRC Bail Act Consultation Paper that VALS endorses are as follows:

- a) Give greater consideration the surety's complete financial position

Reform the Act to contain a provision similar to section 21(8) of the *Bail Act 1980* (Qld) so that greater consideration is given to the surety's complete financial position (ie: surety proportionate to overall financial situation).

- b) Establish guidelines for Registrars relating to explanation to sureties of their rights and obligations.

Establish guidelines for Registrars concerning what should be explained to sureties. This is especially required if the stakes are higher (ie: imprisonment term increased).

- c) For ease introduce provisions relating to the forfeiture of a surety's security in the Victorian Bail Act.

Have provisions relating to the forfeiture of a surety's security in the Victorian Bail Act so it can be easily found by sureties.

VALS also endorses the suggestion of the Law Reform Commission Of Western Australia that bail hostels be introduced so that they might provide an alternative to using a surety.<sup>6</sup>

## **Conclusion**

In this submission VALS outlined the arguments for a smart on crime approach as opposed to a tough on crime approach. The smart on crime approach involves:

- Being cautious about the impact reforms that target the underworld will have on other cases, particularly those involving Indigenous Australians with low socio-economic status.
- Refraining from using a tough on crime approach response as an automatic first option, specifically ensuring that defaulting sureties are subjected to the civil regime before the criminal regime.
- Doing damage control in the event that the civil regime is not adopted to ensure that a surety is dealt with justly.

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<sup>6</sup> The Law Reform Commission Of Western Australia Working Paper on Bail (1979) (no 64), para 7.28 as at <http://www.austlii.edu.au/cgi-bin/disp.pl/au/other/walrc/64/P64-WP.html?query=penalty%20for%20failing%20to%20meet%20surety>

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