THE LAW SOCIETY OF NEW SOUTH WALES
young LAWYERS

Criminal Law Committee

SUBMISSION TO PAPER "BAIL: QUESTIONS FOR DISCUSSION"

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New South Wales Law Reform Commission

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Introduction

We refer to the Bail questions paper ("the Questions Paper") provided for public comment by the New South Wales Law Reform Commission ("the Commission").

NSW Young Lawyers is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. The Young Lawyers Criminal Law Committee ("the Committee") provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

1. Over-arching considerations

1.1 What fundamental principles or concepts should be recognised and implemented by the Commission in reviewing the law of bail and the existing Bail Act?

The purpose of bail is to ensure the attendance of unconvicted accused persons at court to answer charges while allowing them to remain at liberty. Historically, in determining whether to grant an accused person bail, courts have taken into account concepts such as the likelihood of securing the attendance of an accused person at court, the protection of the community (including witnesses and alleged victims), likelihood of reoffending, and the administration of justice. While these concepts are relevant considerations to the determination of bail, the fundamental principle that should be recognised and implemented by the Commission in reviewing the law of bail and the existing Bail Act is that imprisonment or detention on remand of unconvicted accused persons should be a measure of last resort in recognition of the presumption of innocence.

1.2 Should the Bail Act include objectives, and, if so, what should they be?

Yes. Imprisonment or detention on remand of unconvicted accused persons should be a measure of last resort in recognition of the presumption of innocence.

5. Police bail

5.1 Should any change be made to the ability of Police to grant bail and the procedures that apply?

The Committee considers that the primary reference point should not be the ability of Police to grant bail, but instead their ability to refuse bail. Bail conditions are the most important aspect of the procedures applied during Police bail. The Committee has made several comments about those procedures, in answer to Question 9, below.

5.2 How is the right to seek an internal review of Police refusal to grant bail by a more senior officer working in practice? Are any changes required to the provisions governing this review?

The Committee has no significant direct examples of the internal review process to provide as an answer. The power under s 43A is a sensible inclusion in the Act, though it is rightly overshadowed by the imperative that Police procedure should not delay the accused being brought before the courts. The usefulness of s 43A is also impaired by apprehension of bias. Some accused are not interested in the prospect of asking one police officer to review the decision of a fellow officer.

The Committee suggests that s 43A be amended to draw further attention to the circumstances in which an internal review can take place. An additional subsection should be inserted between (1) and (2) stating: "Where an accused person is refused bail, an authorised officer may review the decision under this section, without a request from the accused person." Though not a common scenario, such voluntary reviews may help reduce the amount of time spent in custody for at least some accused.

9. Bail conditions

As noted above, the Committee considers that the conditions attached to bail are an area deserving the Commission's utmost attention. The purpose of bail is defeated if it is accompanied by conditions which will obviously be breached, or which will be breached inevitably and frequently in a trivial fashion.

Rather than comment on conditions generally, the Committee will direct its views in latter sections to the following categories of persons who are most likely to be affected by inappropriate bail conditions:

(a) young people;
(b) people with a cognitive or mental health impairment; and
(c) Indigenous people.

10. Breach of undertakings and conditions

10.1 Should s 50 specify the role and powers of a Police officer under this section with greater particularity?

Any action taken by Police should be with reference to the objects of the Act, and the core principles of the presumption of innocence, the administration of justice and the safety of the community. Conditional bail is not simply an extended opportunity to discredit the accused by accumulating evidence of repeated non-compliance with their bail agreement.

10.2 Should the section specify the order in which an officer should consider implementing the available options?

The primary concern is that arrest be used as a power of last resort. The upward trend in remand populations raises serious questions about the use of arrest for breach of bail conditions. Arrest is a blunt instrument, particularly where the breaches have no direct relationship to criminal behaviour.

10.3 Should the section specify considerations to be taken into account by a Police officer when deciding how to respond under the section?

Yes. Police should consider all relevant information, including:

(a) Would the alleged breach constitute an offence justifying arrest if the accused were not on conditional bail?
(b) Is the accused now materially less likely to appear before the court on the next occasion?
(c) Is the community now at a materially greater risk from the accused?

10.4 Should the section specify criteria for arrest without warrant?

10.5 Should the section provide that the option of arrest should only be adopted as a last resort?

Yes to both questions. s 99(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* ("LEPRA") provides clarity to police officers and other professionals in the criminal justice system. Inserting a similar subsection into s 50 of the Bail Act would add to the fairness and consistency of Police powers of arrest.

This is especially important in circumstances where an accused is brought before the courts for a trivial breach of bail, such as a minor breach of curfew hours. This behaviour would not ordinarily justify an arrest, and the Bail Act should explicitly adopt a consistent position.

The proposed criteria for a s 50 arrest broadly reflect s 99(3) of LEPRA, but with two removals from the grounds listed there. Firstly, it is not appropriate to be able to arrest an accused person solely to prevent a repetition or continuation of the bail breach or the commission of another bail breach. For example, failure to observe a curfew does not inherently jeopardise the resolution of the criminal proceedings, nor does it *necessarily* place the community at risk. Secondly, a power to arrest to preserve the safety or welfare of the accused does not have a place in a Bail Act. The remaining arrest considerations (appearance before the courts, witness harassment and evidence tampering) are necessary and their inclusion would benefit the criminal justice system.

A list of relevant considerations and a legislative statement that arrest is a power of last resort for bail breaches would be positive amendments to the Bail Act. They would each act as a check on the use of arrest and help reduce remand populations.

12. Young people

12.1 Should there be a separate Bail Act relating to juveniles?

No. Anecdotal evidence provided to this Committee suggests that some inconsistency already exists in the application of legislation specific to young people such as the *Young Offenders Act 1997 (NSW*) ("YOA") and the *Children's (Criminal Proceedings) Act 1987 (NSW)* ("CCPA") by magistrates other than specialised Children's Court magistrates in NSW, and by police in some Local Area Commands.

An additional separate piece of legislation specific to young people could further compound the inconsistent approach, particularly in rural and regional areas not regularly serviced by magistrates or solicitors specialised in the Children's Court jurisdiction.

12.2 Alternatively, should there be a separate Part of the Bail Act 1978 relating to juveniles?

The appropriateness of a separate Part of the Bail Act relating to juveniles will depend upon the overall outcome of the review of bail, and whether certain sections of the current Bail Act (such as s 22A) continue to operate with respect to adults, but not young people.

It may be sufficient, and more logical, to address the application of certain Parts or sections of the Bail Act to young people as they arise within the Act, and note the exclusion of young people from the application of that Part or section. For example, s 54D of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* provides for exclusions from the application of standard non-parole periods, and s 54D(3) provides that "This Division does not apply to the sentencing of an offender in respect of an offence if the offender was under the age of 18 years at the time the offence was committed".

Alternatively, if there are significant differences between the application of the Bail Act to young people and adults, a separate Part of the Bail Act setting out the application of the Act to young people would be preferable.

12.3 Should the Bail Act explicitly provide that the principles of s 6 of the Children (Criminal Proceedings) Act 1987 (NSW) apply to bail determinations by a court?

While an explicit requirement for consideration of some of the principles set out in s 6 of the CCPA by a court in the determination of bail for young people would be beneficial and recommended, principles (b), (e), (f), (g), and (h) presuppose that the young person to whom they apply has committed an offence. It is not appropriate for a court to consider issues of reparation, victim impact, or imposition of penalty, in a bail determination during which young person is entitled to the presumption of innocence.

If the Bail Act was to explicitly provide for the application of the principles of s 6 of the CCPA, some exclusions and/or amendments ought to apply. The following principles could apply without amendment:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them;

(b) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption; and

(c) that it is desirable, wherever possible, to allow a child to reside in his or her own home.

12.4 Should s 6 apply to bail determinations by Police?

Yes, subject to issues raised at 12.3 (and also see 12.5).

12.5 As an alternative, or a supplement, should relevant principles of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") be applied to bail determinations in relation to young people?

Yes. The Beijing Rules (particularly Rule 13 as set out in the Questions Paper at 12.5) should supplement an amended version s 6 of the CCPA and be applied to bail determinations in relation to young people (see 12.3).

12.6 Should the provisions of the Bail Act in relation to juveniles be amended or supplemented in any other way?

Yes.

If the presumptions against bail and neutral presumptions set out in Division 2A, 3, and 3A of the Bail Act are retained, there should be a special provision exempting young people from the application of neutral presumptions and/or presumptions against bail. Anecdotal evidence provided to this Committee suggested that in many of the specialised Children's Courts in NSW, the neutral presumptions and presumptions against bail receive little practical application during bail determinations for young people.

If s 22A of the Bail Act 1978 is retained, young people should be exempt from its operation. All young people in NSW are all eligible to be represented by Legal Aid NSW, and the majority of young people in NSW are represented on bail applications by Legal Aid NSW solicitors, Aboriginal Legal Service ("ALS") solicitors, or private solicitors engaged as duty solicitors on behalf of Legal Aid NSW in the Children's Court. The unlikelihood of repeated or unnecessary bail applications made by young people being represented by these solicitors makes unnecessary the application of s 22A of the Bail Act to young people, even with the recent amendment clarifying its application.

12.7 Should the Bail Act make any special provision in relation to young people between the ages of 18 and 21?

All young people appearing in the Children's Court should have access to the provisions of the Bail Act specific to young people.

12.8 Should the Bail Act make any special provision in relation to Indigenous young people?

Yes.

Indigenous young people are significantly over-represented in population of young people in detention, and even more so in the remand population in Juvenile Justice Centres in NSW. This over-representation indicates that the current Bail Act is highly ineffective in the way it is applied to Indigenous young people. As set out in s 32(1)(a)(ia) of the Bail Act, when considering the likelihood of attendance at court during a determination of bail, the court is required to take into account

> *"the person's background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record (if known),"*

Further, the court must also consider the interests of the person pursuant to s32(b)(v) " if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact,".

As set out above, the Bail Act already contains special provisions in relation to young people, and Indigenous people. However, further provisions requiring specific consideration of the circumstances of Indigenous young people in the determination of bail may be required to address the regular occurrence of onerous bail conditions being placed upon such young people which restrict them from maintaining family relationships, residing at the homes of extended family, and attending culturally significant events (such as funerals). These restrictive conditions conflict with cultural considerations of ties to extended family and kinship; the result is bail breaches and incarceration of Indigenous young people.

See further the Committee's comments at 14 below.

12.9 Are any changes to bail law required to facilitate administrative or support arrangements in relation to young people?

Yes.

Police should be required by legislation to access the Bail Assistance Line on behalf of a young person before refusing police bail due to lack of "suitable" accommodation. Homelessness should not be a reason to incarcerate a young person, even overnight.

If young people are granted bail but unable to meet the conditions imposed, there should exist a positive legislative requirement for the young person to be brought back before a magistrate for a review of their bail conditions pursuant to s 48A of the Bail Act of the bail that has not been met within 3 days.

13. People with a cognitive or mental health impairment

13.1 Should the provisions of the Bail Act in relation to "intellectual disability" (a defined term in the legislation) or mental illness be expanded to include people with a wider range of cognitive and mental health impairments? If so, which types of cognitive and mental health impairments should be included?

Yes.

Police determine the majority of bail applications (see *NSWLRC Report 80* (1996) - People with an Intellectual Disability and the Criminal Justice System). Police are required to assist a detained person who is a "vulnerable person" to exercise his or her rights (s 112 of the *Law Enforcement (Powers and Responsibilities) Act 2002* and cl 25 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* ("Regulation"). "Vulnerable person" is defined by cl 24(1)(b) of the Regulation to include a person who has "impaired intellectual functioning" which is in turn defined widely by cl 23(1) as:

(a) a total or partial loss of the person's mental functions; or
(b) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
(c) a disorder, illness or disease that affects the person's thought processes, perceptions of reality, emotions or judgement, or that results in disturbed behaviour.

Clause 3 of Schedule 2 of the Regulation provides useful practical guidance to assist police to assess whether a person has (a) or (b). In order to achieve consistency, the provisions of the Bail Act should adopt the same definition and the same practical guidance.

13.2 Should any other protections apply in relation to people who have a cognitive or mental health impairment?

Yes.

The absence of stable accommodation should not disentitle a person from bail if it is due to the person's intellectual disability. Persons with an intellectual disability may be at a disadvantage in obtaining and retaining accommodation (paras 8.11-8.12 of the *NSWLRC Discussion Paper 29* (1993) - People with an Intellectual Disability and the Criminal Justice System: Policing Issues) and may also be less able to explain their accommodation arrangements. For example, a Committee member advised a man with an intellectual disability who told police that he lived in a motel. Under the impression that the man had no secure accommodation, police refused bail. The man actually resided in stable accommodation subsidised by the Department of Housing.

The absence of strong family connections should not disentitle a person from bail if it is due to the person's intellectual disability. Persons with an intellectual disability may have few family supports (para 8.12 of the *NSWLRC Discussion Paper 29*) and may also be less able to contact family. For example, a Committee member advised a man with an intellectual disability who refused to telephone his family. Under the impression that he had no current family supports, police refused bail. The man actually couldn't remember his father's number and didn't think he was allowed to ask the custody officer to check his mobile phone because it had already been seized.

The information regarding bail rights and bail conditions provided to a person with an intellectual disability should be in plain English. Persons with an intellectual disability may be less likely to understand their bail conditions (paras 8.16 and 8.17 of the *NSWLRC Discussion Paper 29* (1993) - People with an Intellectual Disability and the Criminal Justice System: Policing Issues and paras 4.73-4.65 of the *NSWLRC Report 80* (1996) - People with an Intellectual Disability and the Criminal Justice System) and less likely to understand the information provided to them regarding bail under s18 of the Bail Act and cl. 5 of the *Bail Regulation 2008*. Notwithstanding s. 37(2A) of the Bail Act, because police continue to mistakenly assess persons with intellectual disabilities as incapable because police do not use plain English questions to assess the person's capacity.

Persons with intellectual disabilities also continue to breach their bail conditions because police do not use plain English to explain them. For example, a Committee member advised a man with an intellectual disability charged with several telecommunications offences. The man was released on the condition that he "refrain from contacting emergency services unless required to do so". The man was unable to understand the condition. It was necessary for the man's lawyer to explain it to him in plain English: "You can only call 000 if you are very sick or if there is a fire or if someone hurts you. Can you call 000 if you have a headache? Can you call 000 if you break your arm? Can you call 000 if you burn the toast? Can you call 000 if your living room is on fire? Can you call 000 if your neighbour yells at you? Can you call 000 if a burglar comes into your house?"

13.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to people with cognitive or mental health impairments?

Yes.

The bail law should provide comprehensive plain English explanations of the bail process, bail conditions and the accused's rights and obligations in relation to bail (proposal 37 of the *NSWLRC Discussion Paper 29* appears to have not yet been adopted) (see comments at 18 below).

There are only a number of weeks between the release of the Questions Paper in June 2011 and the deadline for submissions on 22 July 2011. Given the insufficient time available, the Committee is unable to propose more substantive changes to the bail law to address the disadvantages faced by persons with intellectual disabilities in obtaining bail and complying with bail conditions.

14. Indigenous people

14.1 Should the provisions of the Bail Act in relation to Indigenous people be amended or supplemented?

As indicated above, ss32(1)(a)(ia), 32(1)(b)(v) and 36(2A) of the Bail Act provide that, when considering bail for an Aboriginal person or a Torres Strait Islander, the court is to have regard to the person's background and community ties, as indicated by the person's ties to extended family and kinship and other traditional ties to place and the person's prior criminal record.

However, it is clear that a disproportionate amount of Aboriginal people and Torres Strait Islanders are disproportionately represented in remand. This suggests that the Bail Act provisions are not adequately taking into account the particular circumstances of Aboriginal people and Torres Strait Islanders.

The Judicial Commission of NSW noted that 2009 statistics indicate that Aboriginal defendants are more likely to be refused bail in the Local Court (13.8% compared with 5.5% for non-Aboriginal defendants), and yet 46.3% of Aboriginal people who were remanded in custody after their bail was refused do not receive custodial sentences – that is, are not sentenced to further time in prison.

Similarly, the earlier report of the Aboriginal Justice Advisory Council, "Aboriginal people and bail courts in NSW" noted that in one study almost half of all Aboriginal defendants (49.9%) had their bail dispensed with compared with more than two thirds of non Aboriginal people (72%), a total of 38% of Aboriginal defendants were on bail at the time their matter was finalised compared with 22% of non Aboriginal people, 10% of Aboriginal defendants were refused bail, compared to 4% for non Aboriginal people and 2% of Aboriginal defendants were already in custody for a prior offence, compared to 1% for non Aboriginal people.

This disproportionate may be accounted for by a number of reasons, primarily:

(a) unrealistic bail conditions;

(b) ambiguity as to the meaning of 'the person's ties to extended family and kinship and other traditional ties to place'; and
(c) the amount of Aboriginal people and Torres Strait Islanders with a prior criminal record.

The Committee considers that the Bail Act should be reformed to address these issues.

(a) Unrealistic Bail Conditions

The only Indigenous-specific considerations relating to the conditions of bail (s36 Bail Act) are that, in considering a condition that a person reside in specific accommodation, the court is to have regard to the background of the accused person, particularly if the accused person is an Indigenous person.

Therefore, many bail conditions imposed on defendants are made without regard to whether the person is Indigenous. As noted by the Royal Commission into Aboriginal Deaths in Custody, bail conditions in NSW are fixed which obviously will not or cannot be complied with, and simply set the Aboriginal defendant up for failure. Aboriginal people (and Torres Strait Islanders) may not be able to meet bail conditions for a number of reasons, including:

(a) an inability to get to court because of a lack of available transport;
(b) communication barriers between Aboriginal defendants and their legal representatives
(c) a lack of understanding of bail process;
(d) culturally incompatible conditions (such as requiring the defendant not to return to a particular town until the day of court);
(e) physical or mental disability; and
(f) reliance on financial securities as part of bail conditions.

Indigenous people are commonly at significant disadvantage in terms of education, employment, health and access to services. As a result of this disadvantage, Indigenous people are often unable to meet bail conditions which are related to these areas of disadvantage, and are thus over-represented within remand populations. This is particularly concerning considered that more than one in ten Indigenous defendants who were bail refused and in custody on remand had their case dismissed. That is, they were not found to be guilty of the offence with which they were charged.

(b) Ambiguity as to the meaning of 'the person's ties to extended family and kinship and other traditional ties to place':

An overriding problem is inconsistency and ambiguity of the interpretation of the legislation. There appears no objective way to measure a defendant's community ties, particularly in respect of the strong cultural and historical ties Indigenous people may have with particular locations and the nature of extended Indigenous families.

(c) Prior convictions

In many cases involving Indigenous people, bail is refused due to previous criminal history. It is well known that Aboriginal people and Torres Strait Islanders are grossly over-represented in the justice system, particularly in respect of offensive language and behaviour charges. This is problematic as the bail

procedures may entrench discriminatory decisions made at other stages of the criminal justice process, such as through over policing. Indigenous overrepresentation in (particularly) minor public order type offences results in a higher proportion of Aboriginal people and Torres Strait Islanders applying for bail and having their bail applications rejected or having bail imposed with unrealistic bail conditions.

The Committee recommends supplementing s 32 of the Bail Act with further clarification of factors for magistrates to consider when assessing the community ties of an Indigenous person.

The Committee recommends amending s 36(2) of the Bail Act to make the imposition of a financial surety in the case of Indigenous people a provision of last resort.

14.2 Should the Bail Act provide that the Court in making a bail decision must take into account a report from a group providing programs or services to Indigenous people? If so, in what circumstances?

Yes, although the Committee is conscious of the funding consequences of this recommendation. The Committee recommends the Bail Act provide that the Court in making a bail decision must take into account a report from a Community Justice Group, such as provided for in s 9(2)(p) of the *Penalties and Sentences Act 1992* (QLD), which relates to reports from the particular community to which the offender belongs.

One of the common problems in respect of Indigenous defendants and bail is the lack of information available to the court concerning the defendant. Commonly, the defendant may be unrepresented, unable to adequately present their case, and so the court relies only on the information provided by the police.

Community Justice Groups, are, however, able to provide useful information on the defendant and their likelihood of appearing at court. In accordance with Queensland legislation, Community Justice Groups can provide information on specifically:

(i) the offender's relationship to the offender's community;
(ii) any cultural considerations; or
(iii) any considerations relating to programs and services established for offenders in which the Community Justice Group participates.

Such groups can advocate for Aboriginal people in relation to bail decisions to ensure appropriate conditions of bail, and support offenders once bail is granted and provide advice to the defendants in relation to the criminal processes.

14.3 Are any changes to bail law required to facilitate administrative or support arrangements in relation to Indigenous people?

Administrative and support arrangements should target Indigenous defendants by ensuring provision of easy to understand information about bail conditions, counselling, accommodation and treatment services, and court reminders and transport for court appearances.

17. Structure of the Bail Act

17.1 Subject to the scope of this reference, should the structure of the Bail Act be changed to flow from the general to the particular or in step with the processes involved, so as to incorporate a "logical pathway"?

The Committee is of the view that a "logical pathway" is a preferable structure, and in line with contemporary drafting style. The Committee suggests the inclusion of a convenient guide-only flowchart, as used in a number of pieces of legislation as an interpretive aide in a Notes Section or Part.

The Committee notes the example structure provided by the Commission and believes it appropriate. One factor to consider which is not express in the example list is the treatment of persons falling under special categories: should this be dealt with in the body of the "pathway" or as an additional "fork" in the path to bail (see comments at 12.2 above)?

17.2 Is there ay existing model recommended which could be adopted in restructuring the Act?

The Federal Court Rules have very recently undergone an extensive revision, which included a re-ordering of all provisions so as to follow proceedings from start to finish. The revised rules seem, at least, to accomplish the goal of creating a "logical pathway". The Committee recommends considering adopting the same approach adopted in relation to that (much larger) task.

However, it should be noted that the Federal Court Rules rewrite proved controversial because of the extremely limited time provided for comment on the draft, and the lack of a comparison table for such an extensive rewrite. These mistakes should be avoided.

18. Plain English

18.1 Should any provisions of the Act covered by this reference be recast in plain English or amended for clarity and intelligibility?

The Committee is in favour of plain English drafting. The Bail Act is, in general, notoriously and needlessly complex in its use of double negatives and other language. Plain English redrafting should be a comprehensive exercise, rather than targeted, to ensure the Bail Act as a whole is readable.

18.2 Is any existing model recommended?

Alternatively or additionally to a full redraft, section 3 of the *Spam Act 2003* (Cth) is notable for including a plain English simplified outline of the Act that could be considered as a useful reference. This approach has

the great advantage of making the Act accessible to accused persons who do not have the time, opportunity or inclination to read the full legislation.

18.3 Should the terminology in the Bail Act be changed to reflect the effect of processes under the Act?

The Committee feels strongly that "bail" is a word with a well-understood meaning among the general population. Additionally, "pre-trial-release" has the unfortunate implication of making a grant of bail seem a special privilege (see comments at 1.1 above).

Separately, however, "remand in custody" probably does not have the same cachet as "bail", and the Committee consequently does not oppose the term "pre-trial detention".

18.4 Should the name of the Act be changed, such as to the "Pre-Trial Detention Act"

No.

The Committee thanks you for the opportunity to comment.

If you have any questions in relation to the matters raised in this submission, please contact:

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The primary authors of this submission were **Emma Bayley, Alexander Edwards, Joanna Mansfield, David Porter, and Claire Wasley** members of the Committee.

Yours faithfully,

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