

**Submission to the New South Wales
Law Reform Commission**

**Comprehensive Review of the Law of
Bail in NSW**

July 2011



Endorsed by:

**Community
Legal Centres
NSW**



About the Youth Justice Coalition

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales.

The YJC's aims are to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

How the Youth Justice Coalition was formed

The YJC was formed in early 1987 under the auspices of NCOSS to work around the children's criminal, care and protection legislation introduced in that year. The YJC has been active since 1987 advocating for young people, particularly those involved in the criminal justice or welfare systems.

Membership of the YJC

- Barnardos Belmore (incorporating the Reconnect program, Streetwork program and Post Release Options Program)
- Bondi Outreach Project
- Catholic Care Sydney
- Central Illawarra Youth Services
- Council of Social Service of New South Wales (NCOSS)
- Crime and Justice Research Network
- Dr Dorothy Bottrell, Lecturer and Convenor, University of Sydney Network for Childhood and Youth Research
- Elaine Fishwick
- Dr Evelyne Tadros, Mission Australia
- Illawarra Legal Centre
- Inner West Community Development Organisation
- Justice Action
- Liverpool Youth Accommodation Assistance Company
- Jenny Barga, Adjunct Lecturer, Sydney Law School
- Macarthur Legal Centre
- Marrickville Legal Centre
- Marrickville Youth Interagency
- Marrickville Youth Resource Centre

- National Children's and Youth Law Centre
- Professor Chris Cunneen, New South Global Chair in Criminology, Faculty of Law, University of New South Wales
- Public Interest Advocacy Centre
- Redfern Legal Centre
- Rosemount Youth and Family Services
- Shire Wide Youth Services
- Shopfront Youth Legal Centre
- The Crossing, Mission Australia
- UnitingCare Burnside
- Weave Youth Family Community (formerly South Sydney Youth Services)
- Western NSW Community Legal Centre
- YFoundations
- Youth Action and Policy Association (YAPA)

RECOMMENDATIONS

Recommendation 1: The *Bail Act 1978 (NSW)* should be repealed and replaced by a new principal Act.

Recommendation 2: The NSW Government should commit to reducing the numbers of young people remanded in custody and adhere to the principle of detention as a last resort.

Recommendation 3: Bail provisions specific to children and young people should be inserted in the *Children (Criminal Proceedings) Act 1987 (NSW)*. Alternately, if this Recommendation is not accepted, bail provisions specific to children and young people should be drafted as a separate Part to the new principal Act referred to in Recommendation 1 so that children specific legislation applies to all aspects of bail proceedings.

Recommendation 4: New bail legislation should state that the object of the *Bail Act* is to permit the release of an arrested person wherever possible, subject to relevant considerations (currently listed in s32).

Recommendation 5: New bail legislation should include a statement of factors to be taken into account in making a bail determination (along the lines of the current s32 considerations), with separate criteria for young people consistent with s6 *Children (Criminal Proceedings) Act 1987 (NSW)*.

Recommendation 6: Bail should be dispensed with for children and young people and failing this, there should be a presumption in favour of bail.

Recommendation 7: A new clause should be inserted that police may only arrest as a last resort in relation to failures to comply with bail conditions, and in particular circumstances, as set out in s99(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*.

Recommendation 8: Introduce separate criteria for dealing with young people who are suspected of failing to comply with their bail conditions consistent with principles set out in the *Children (Criminal Proceedings) Act 1987 (NSW)* and the *Young Offenders Act 1997 (NSW)*, and include a requirement for police to consider a warning or caution before proceeding to issue a Court Attendance Notice, and that arrest is to be used only as a last resort.

Recommendation 9: Bail legislation should provide that any police imposed bail conditions on children and young people should automatically expire on the first mention date.

Recommendation 10: Exempt young people from the operation of s22A of the *Bail Act*.

Recommendation 11: Bail conditions should only be imposed on children in *exceptional circumstances*. Where conditions are imposed, the decision-maker should be required to consider a young person's capacity to understand and meet the conditions.

Recommendation 12: Juvenile Justice should review the situation of every child and young person remanded in custody because of lack of suitable accommodation every 48 hours to ascertain whether accommodation has become available. Further, where a young person has been unable to comply with a reside as directed condition the matter should be automatically re-listed before the court every 48 hours.

Recommendation 13: Fund a residential bail support program to assist young people in meeting their bail conditions, particularly 'reside as directed' conditions and placement conditions.

Recommendation 14: Fund the youth services sector with expertise in out-of-home care services to establish a residential service for young people granted bail with 'reside as directed' conditions.

Recommendation 15: A provision should be inserted in bail legislation that in relation to any determination as to bail concerning Indigenous people, the court must take into account:

- any issues that arise due to a person's Aboriginality (drafted in the same way as s3A of the *Bail Act 1977 (Vic)*); and
- any representations made on behalf of a group that provides criminal justice programs to Aboriginal or Torres Strait Islanders, or any elders from the relevant community.

BACKGROUND TO THIS SUBMISSION

The current Bail Act 1978

The current *Bail Act* (1978) NSW (***Bail Act***) is a code for both police and judicial officers to assess a person, adult or child, applying for bail. There have been many amendments to the *Bail Act* since its commencement in March 1980, including 18 amendments since 2000, largely in response to 'getting tough on crime' political campaigns.¹

These amendments have progressively eroded the rights of an accused, resulting in a much more restricted right to bail. Of significant concern is the subsequent growth in the remand population. Corrective Services NSW statistics from 2010 show a 69% increase over the last ten years in the number of people in full-time custody on remand awaiting trial or sentence.² It is in this context that we welcome the NSW Government's comprehensive review of the *Bail Act*.

Children and young people

Many of the amendments to the *Bail Act* have had unintended consequences for children and young people. The latest remand statistics in respect of juveniles are particularly alarming:

- 50-60% of young people in juvenile detention centres are held on remand;
- 85% of admissions to detention centres are remand admissions; and
- Approximately 84% of young people remanded in custody do not receive custodial sentences.³

These statistics are a strong indication that in operation, the current *Bail Act* is having a particularly negative impact on children and young people.

Need for child-specific bail laws

It is well recognised both internationally and in Australia that young people, because of their age and lack of emotional or developmental maturity, are entitled to special protections when dealing with the criminal justice system. In New South Wales, the vulnerability of children and young people has been recognised through the enactment of specific legislation, such as the *Children (Criminal Proceedings) Act* 1987 (NSW) (***Children (Criminal Proceedings) Act***); the requirement that children's matters are dealt with separately either under the *Young Offenders Act* 1997 (NSW) (***Young Offenders Act***) or by

¹ Peter Murphy & Anthony McGinness, *Strategic Review of the New South Wales Government into the Juvenile Justice System: Report for the Minister of Juvenile Justice*, Noetic Solutions Ltd, April 2010, pg vi (hereafter 'Noetic Report')

² Corben, *NSW Inmate Census 2010: Summary of Characteristics*, Corrective Services NSW, Statistical Publication No 36 (2010) 23; No 22 (2001) 23

³ NSW Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultations Paper 11 (2010) 30

the Children's Court; and the requirement that children be held separately from adults in juvenile detention centres.

In spite of this, the current *Bail Act* fails to properly take into account the interests of children and young people and fails to uphold principles of rehabilitation and diversion that underpin the state's approach to juvenile justice. Rather, the *Bail Act* treats adults and juveniles practically equally,⁴ resulting in a disproportionate number of juveniles on remand.

The YJC considers the Government's review from a 'first principles perspective' to be an important opportunity for New South Wales to develop bail principles and criteria consistent with existing child-specific legislation, as well as consistent with Australia's international obligations under the *United Nations Convention on the Rights of the Child (CROC)* and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*.

Previous reports

There has been significant contribution to the discourse on bail and its place in the juvenile justice system in recent years. In particular, this submission draws on the recommendations contained in:

- *Strategic Review of the New South Wales Government into the Juvenile Justice System: Report for the Minister of Juvenile Justice*, Noetic Solutions Ltd, April 2010 (**Noetic Report**); and
- *Bail Me Out Report: NSW Young People and Bail*, YJC, February 2010 (**Bail Me Out Report**).

Recommendation 1: The *Bail Act* 1978 (NSW) should be repealed and replaced by a new principal Act.

Recommendation 2: The NSW Government should commit to reducing the numbers of young people remanded in custody and adhere to the principle of detention as a last resort.

Recommendation 3: Bail provisions specific to children and young people should be inserted in the *Children (Criminal Proceedings) Act* 1987 (NSW). Alternately, if this Recommendation is not accepted, bail provisions specific to children and young people should be drafted as a separate Part to the new principal Act referred to in Recommendation 1 so that children specific legislation applies to all aspects of bail proceedings.

⁴ With the sole exception of s32(1)(b)(v) which requires that, in making a bail determination, a court must take into account any "special needs" which *may* arise from the fact that a person is under the age of 18.

1. Should the Bail Act include a statement of its objects and if so, what should those objects be?

In considering the objects of bail, it is critical to consider where bail sits in the criminal justice system, the fundamental purpose of the *Bail Act* and its underlying policy objectives.

Bail legislation should acknowledge the philosophical underpinning of the criminal justice system - the presumption of innocence until found guilty and the general right of an accused to be at liberty. In the second reading speech to the original Bail Bill in 1978, the Attorney General, the Hon F Walker, MP stated:

...when bail is considered, one is confronted with an *alleged* crime and an *unconvicted* accused person, and ...the liberty of the subject is one of the most fundamental and treasured concepts in our society.⁵

This right is also enshrined in the *Universal Declaration of Human Rights* by Article 11, which reads:

Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.⁶

Bail should not be a form of punishment, nor is it a determination of guilt or innocence. The purpose of bail is to ensure the appearance of a defendant at court and to protect the community from further offending. The *Bail Act* should permit release from custody of persons arrested and charged with an offence, but provide justification for holding persons on remand on limited grounds.

An objects section should state that the objective of the *Bail Act* is to permit the release of an arrested person wherever possible, subject to considerations (currently listed in s32), which can be broadly categorised as:

- The likelihood of the accused appearing before the court if bail is granted;
- The interests of the accused;
- The protection of the alleged victim; and
- The protection and welfare of the community.

Bail laws must be carefully balanced in order to ensure that accused people are only remanded where, with proper regard to the presumption of innocence and the general right to liberty, remand is deemed necessary on assessment of the above considerations.

Recommendation 4: New bail legislation should state that the object of the *Bail Act* is to permit the release of an arrested person wherever possible, subject to relevant considerations (currently listed in s32).

⁵ Emphasis added, NSWPD, 14 December 1978, p2020

⁶ Universal Declaration of Human Rights, adopted UN General Assembly, 10 December 1948, ratified by Australia 1948

2. Should the Bail Act include a statement of the factors to be taken into account in determining a bail application and if so, what should those factors be?

The current *Bail Act* establishes criteria to be considered in determining a bail application (s32). By listing exclusive and mandatory factors for consideration, the *Bail Act* ensures that irrelevant considerations are not taken into account. This goes some way towards ensuring consistency of treatment by all bail authorities.

Without such a checklist, bail determinations would risk becoming overly discretionary. It would be very difficult for legal practitioners to assist courts to consider all relevant issues and to determine whether a denial of bail was properly made. Abolishing legislative criteria would undoubtedly lead to the creation of common law criteria, as was the situation before the *Bail Act* was first introduced in 1978.

The YJC considers the current s32 bail criteria to be adequate, subject to the following comments.

Children and young people

Current bail criteria provides that the interests of the accused person are to be considered, including any 'special needs' arising if the accused person is under 18 years of age.⁷ Being a child or young person is not considered to be a special factor in itself and no guidance is provided as to how this provision should be applied.

As previously recommended by the Noetic Report⁸, the YJC recommends that bail criteria specifically reference s6 of the *Children (Criminal Proceedings) Act*, which is a clear statement of the pertinent factors to be considered when dealing with children and young people. The following subsections are of particular relevance:

- (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 children who commit offences bear responsibility for their actions, but because of their state of dependency and immaturity, require guidance and assistance,
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
- (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
- (e) ...
- (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

⁷ s32(1)(b)(v), *Bail Act*

⁸ Noetic Report (at note 1), Recommendation 7

...

This approach to bail requirements and criteria for young people was also endorsed by the NSW Law Reform Commission in its *Report 104 Young Offenders* (2005) (**NSWLRC Report**):

The special needs of young people would be better addressed if the *Bail Act* listed separate criteria, consistent with the principles listed in s6 of the *Children (Criminal Proceedings) Act* to be applied to young people. The application of such criteria would deter unnecessary refusals of bail and the imposition of harsh and inappropriate conditions.⁹

The NSWLRC Report noted that both Queensland and the ACT have enacted legislation that deals with the special circumstances of young people that must be considered in bail determinations.¹⁰ For example, s48 of the *Juvenile Justice Act 1992* (Qld) requires police and the court have regard to the nature and seriousness of the offence, the child's character, criminal history, associations, home environment and background.

Recommendation 5: New bail legislation should include a statement of factors to be taken into account in making a bail determination (along the lines of the current s32 considerations), with separate criteria for young people consistent with s6 *Children (Criminal Proceedings) Act 1987* (NSW).

⁹ NSWLRC, Report 104: Young Offenders, 2005 at 10.41

¹⁰ Ibid at 10.37-10.39

3. Should presumptions apply to bail determinations and how should they apply?

Current system of presumptions

An excessive number of amendments to the *Bail Act* since its introduction in 1978 has weakened the presumption in favour of bail and created a number of circumstances in which there is a presumption against bail,¹¹ as well as a complex system of classifications:

- 1) right to bail for minor offences;
- 2) presumption in favour;
- 3) neutral presumption;
- 4) presumption against; and
- 5) exceptional circumstances.

There is considerable overlap between some of the classifications and numerous exceptions to each classification. Legal practitioners and the judiciary have difficulty applying the current tests when considering whether or not to grant or refuse bail and there are some peculiar anomalies.

For example, fine only offences are in a category of offence for which bail can be granted. As such, a person can be refused bail for an offence punishable by way of fine only, such as failure to comply with a move-on direction. Alternatively, conditional bail can be granted to a person charged with a fine only offence, which may lead to a breach bail and bail refusal. The fact that a person can spend time in custody for an offence that does not carry a custodial penalty is inappropriate.

Abolish the presumption approach

The YJC supports the Victorian Law Reform Commission's recommendation to the Victorian Government that presumptions concerning bail be abolished.¹² The imposition of a presumption focuses attention on an artificial criterion that is not concerned with the actual features of the alleged offender and the alleged offence, but with a classification of the offence.

The fundamental question in deciding whether to grant bail should be a case-by-case assessment of the relevant factors to be taken into consideration, contained in the criteria for bail (s32). Offence type (or 'severity of the charge') is only one of the factors that should be taken into account by a decision maker. The basis for bail refusal should be if a decision maker is satisfied on the balance of probabilities that there is an unacceptable risk that the accused would commit an offence while on bail, fail to attend court, interfere with witnesses or somehow obstruct the course of justice.

¹¹ Snowball, Roth & Weatherburn, 'Bail presumptions and the risks of bail refusal: An analysis of the NSW Bail Act', Bureau Brief No49, NSW Bureau of Crime Statistics and Research

¹² Victorian Law Reform Commission, Review of the Bail Act, 10 October 2007

<http://www.lawreform.vic.gov.au/wps/wcm/connect/justlib/Law+Reform/Home/Completed+Projects/Bail/>

Children and presumptions

The current *Bail Act* makes no reference to the fact that detention should be a last resort for children and young people. There should be a specific principle stating this. In theory, police and courts can choose to dispense with bail in any circumstance where they have the power to grant bail. However, general toughening of bail laws appears to have reduced police and court's willingness to dispense with bail and as a result, the remand population, especially the juvenile remand population, has grown rapidly.

Where possible, bail should be dispensed with for children and failing that, there should be an entitlement or presumption in favour of bail. This reflects the intention of s8 of the *Children (Criminal Proceedings) Act* which provides that bail should be dispensed with unless the circumstances clearly indicate otherwise, and s7(a) of the *Young Offenders Act*, which provides that the least restrictive form of sanction should be applied to a child.

In the case of children, the nature of the offence should not displace a general rule that bail be dispensed with (or a presumption in favour of bail) but should be one of the factors that can be taken into account. Similarly, children on conditional bail who breach a condition should not lose a presumption in favour of bail. That fact can be considered in determining bail rather than displacing the presumption.

Further, consistent with the diversionary philosophy of the *Young Offenders Act*, a new provision should be inserted to make clear that bail should be dispensed with in relation to diversionary measures under that legislation.

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| <p>Recommendation 6: Bail should be dispensed with for children and young people and failing this, there should be a presumption in favour of bail.</p> |
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4. What should be the available responses to a breach of bail including the legislative framework for the exercise of police and judicial discretion when responding to a breach?

Police response to breaches of bail

Currently, s50 of the *Bail Act* does not *require* police to arrest someone for a breach of bail, however it gives police the power to do so - a power that is used increasingly often. Between 1999 and 2008, the number of recorded cases of bail breach rose by more than 400%.¹³ This is due in part to more zealous enforcement of bail provisions by NSW police.¹⁴

Bail breaches by children and young people

A significant pattern in the juvenile remand population has been the high proportion of young people who have been refused bail as a result of breaching a bail condition. Children may fail to comply with bail conditions for reasons associated with their particular vulnerability, or lack of understanding or awareness of what they are required to do.

The imposition of numerous and onerous bail conditions on young people (further discussed in response to Question 6) is a major contributor to breaches of bail. The YJC's Bail Me Out Report noted that 60% of the young people surveyed (over a 2 week period in Parramatta Children's Court in August 2008 and January 2009) were in custody for breach of their bail conditions and over half of those had not committed new offences.¹⁵

A large proportion of young people are arrested for mere 'technical breaches' of bail, that is breaches that do not warrant any fresh charges, do not cause harm to the young person or others and do not compromise the safety of the community. Common technical breaches include breaching curfew restrictions and failing to comply with a residential condition.¹⁶

Arrest is often a disproportionate response and is a significant diversion of police, court and legal aid resources. Moreover, arresting a young person for breaching a bail condition criminalises their behaviour and increases their interaction with police and the justice system, which is inconsistent with underlying principles of rehabilitation and diversion.

The approach of both the NSW Police and the criminal justice system must be addressed in order to reduce the numbers of young people arrested for breaching bail conditions.

¹³ Note 11 at 3

¹⁴ NSW Government, NSW State Plan <http://www.stateplan.nsw.gov.au/> - Aim to reduce reoffending by 10% by 2016 through 'proactive policing of compliance with bail conditions' and 'extended monitoring of those at high risk of offending through more random home visits'.

¹⁵ Bail Me Out Report, p12

¹⁶ Ibid

Alternatives and diversion

The current *Bail Act* does not require police to consider alternatives to arrest for breach of bail, or to utilise diversionary options. If a young person has committed a minor, one-off breach of bail, but has not re-offended or failed to appear at court, the utility of arresting them and putting them before the court is questionable. A warning, for example, may be more appropriate in the circumstances.

The YJC recommends that new bail legislation contain separate criteria for dealing with young people who are suspected of failing to comply with their bail conditions. These provisions should be consistent with principles set out in the *Young Offenders Act*¹⁷, and include a requirement for police to consider a warning or caution before proceeding to issue a Court Attendance Notice, and that arrest is to be used only as a last resort.

Such a provision should be similar to s99(3) of *Law Enforcement Powers and Responsibilities Act 2002 (NSW) (LEPRA)* which effectively provides that arrest for the purpose of commencing proceedings is the last resort.

There should be an additional provision to make clear that a police officer can issue a Court Attendance Notice in respect of a person's failure to comply with a bail agreement or a warning. This would bring bail legislation into line with s8(1) of the *Children (Criminal Proceedings) Act* which states that criminal proceedings should not be commenced against a child otherwise than by way of a court attendance notice (except in limited circumstances contained in s8(2)).

Judicial response to breach of bail

The YJC suggests that bail legislation should provide that any police imposed bail conditions on children and young people should automatically expire on the first mention date. This would require the Children's Court to consider the appropriateness of imposing any bail conditions. The court would then have to specifically remake any conditions if they deemed them necessary to continue to apply.

Recommendation 7: A new clause should be inserted that police may only arrest as a last resort in relation to failures to comply with bail conditions, and in particular circumstances, as set out in s99(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*.

Recommendation 8: Introduce separate criteria for dealing with young people who are suspected of failing to comply with their bail conditions consistent with principles set out in the *Children (Criminal Proceedings) Act 1987 (NSW)* and the *Young Offenders Act 1997 (NSW)*, and include a

¹⁷ s7(c) of the *Young Offenders Act 1997 (NSW)* provides that criminal proceedings should not be instituted against a child if there is an alternative and appropriate means of dealing with the matter.

requirement for police to consider a warning or caution before proceeding to issue a Court Attendance Notice, and that arrest is to be used only as a last resort.

Recommendation 9: Bail legislation should provide that any police imposed bail conditions on children and young people should automatically expire on the first mention date.

5. Section 22A

It is well established that the introduction of s22A in December 2007 by the *Bail Amendment Act 2007* (NSW) contributed to a sharp increase in the number of young people on remand.¹⁸ Section 22A provides that a court must refuse to hear subsequent bail applications from the same person, unless they were not legally represented on the first occasion, or new information or circumstances have arisen since the first application was made. The *Court and Crimes Legislation Amendment Bill 2009* (NSW) softened the impact of s22A by allowing a broader interpretation of “new facts and circumstances”, however this exception has not significantly reduced the number of young people held on remand.

Interestingly, s22A has had a disproportionate impact on young people – no parallel increase has occurred in the adult remand population since its introduction.¹⁹ Recent studies suggest a number of reasons for this, including:

- Young people are often unfamiliar with the legal system and unable to adequately instruct a legal representative in the time required to make a successful bail application.
- Children may fail to comply with bail conditions for reasons associated with their particular vulnerability and lack of experience or awareness of what is required of them. Many young people arrested for technical breaches or remanded due to lack of suitable accommodation find that section 22A has made it more difficult for them to make subsequent applications for bail.²⁰

Given the disproportionate impact on the juvenile remand population, it is worthwhile considering the original intent of the legislative amendment. According to the Second Reading Speech by the then Attorney General, s22A was introduced as a safeguard against unnecessary and repeated bail applications.²¹ The Noetic Report stated that their review ‘could find no evidence that children and young people were making unnecessary bail applications’.²² We further note that courts already have the power to refuse to hear vexatious or frivolous applications,²³ which should be sufficient to deal with repeated applications that have no merit. A secondary purpose of the introduction of s22A was to prevent ‘magistrate shopping’ – an unlikely practice in the Children’s Court given the small number of presiding judicial officers.

¹⁸ NSW Department of Juvenile Justice, Annual Report 2007-2008 Vol 5 (2007) at 50-61, Weatherburn et al, ‘Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime’, *Crime and Justice Bulletin* No. 128, NSW Bureau of Crime Statistics and Research, May 2009 at 3

¹⁹ NSW Department of Corrective Services, Facts and Figures (9th ed) (2009)

²⁰ Bail Me Out Report, pg 21

²¹ NSW Legislative Council, Second Reading Speech, Bail Amendment Bil 2007, 17 October 2007 at 2669

²² Noetic Report (Note 1), pg 70

²³ s22A(2) *Bail Act*

Exemption from s22A for children and young people

The YJC recommends that all children and young people be exempt from s22A of the *Bail Act*. There should be no restrictions on a juvenile's right to apply for bail, particularly when one considers the low proportion of juveniles on remand who will receive a custodial sentence due to prevailing policies of diversion and rehabilitation. Approximately 84% of young people remanded in custody do not receive custodial sentences.²⁴

Remand exacerbates the existing risk factors facing children and young people in the criminal justice system, and the option to apply to the Supreme Court of New South Wales for bail is an insufficient balance and check given a Supreme Court bail application takes at best 5 or 6 weeks to be listed.

Finally, restricting a juvenile's right to apply for bail is inconsistent with the rights afforded to them under:

- **CROC**, namely Article 37 which states that detention or imprisonment of a child shall only be used as a measure of last resort and for the shortest possible time; and
- **Beijing Rules**, namely 13.1 'Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time', and 13.2 'Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home'.

Recommendation 10: Exempt young people from the operation of s22A of the *Bail Act*.

²⁴ NSW Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultations Paper 11 (2010) at 30

6. Should the Bail Act make a distinction between young offenders and adults and if so, what special provisions should apply to young offenders?

Separate bail legislation for juveniles

It is well established that young people, due to their age and lack of emotional or developmental maturity, are entitled to special protections when dealing with the criminal justice system. This is reflected in child specific legislation on criminal procedure and sentencing, specialised institutions such as the Children's Court, and the development of diversionary programs to meet stated principles of rehabilitation and reintegration of young people.

The current *Bail Act* is applicable to all defendants regardless of age and fails to properly take into account the interests of children and young people. In recognition that young people are different from adults and have special needs, there should be distinct procedures for bail assessment of young people.

The YJC recommends that bail provisions applicable to children and young people be inserted in the *Children (Criminal Proceedings) Act*. In the alternative, the YJC supports the recommendation of the Noetic Report to:

Amend the *Children (Criminal Proceedings) Act* (s50) and the *Bail Act* (s5) to reverse precedence so that children specific legislation applies to all aspects of bail proceedings.²⁵

Bail conditions and young people

The NSW Law Reform Commission has previously found that Courts will often adopt a "welfare approach" when imposing bail conditions on young people, quite unrelated to the offence with which the young person was charged.²⁶ Bail conditions are often far more onerous than what is required to meet the overall objectives of bail – that is, to ensure the young person's attendance at court and to protect alleged victims and the community from further offending. Conditions such as curfews have a punitive function of limiting movement and freedom, often to a greater extent than required by the offence.

Further, bail conditions imposed on juveniles at first instance often do not take into account the realities of the young person's life or their ability to comply. Conditions are often imposed without consultation with the young person and their family as to their appropriateness. Young people in contact with the juvenile justice system have a greater likelihood of poor cognitive functioning, unstable family arrangements, and experience out of home care placements²⁷ - all factors which make it more difficult to comply with bail conditions imposed

²⁵ Noetic Report (Note 1), Recommendation 6

²⁶ NSWLRC Young Offenders Report No104

²⁷ Dianna Kenny & Paul Nelson, *Young Offenders on Community Orders: Health Welfare and Criminogenic Needs* (2008) at 6.16, 2.14, 2.13

on them.

The YJC recommends that bail conditions only be imposed on children in *exceptional circumstances*. Further, where conditions are imposed, there should be a provision requiring the decision maker to consider a young person's capacity to understand the conditions. Section 12 of the *Children (Criminal Proceedings) Act* states that criminal proceedings must be explained to children. Criteria for bail must be simple and clear so that children can understand the process and any obligations imposed on them.

Remaining in custody due to non-compliance with a bail condition

Detention of children and young people on remand clearly has a disproportionate impact on homeless young people and on those with no stable family to go to. Lack of suitable accommodation options for young people frequently leads to situations in which children are left on remand because Community Services NSW and/or Juvenile Justice New South Wales cannot find appropriate accommodation for them in the community.

Juvenile justice centres should not be used as a form of crisis accommodation. Alternative accommodation options, such as bail hostels or residential bail support programs as suggested in UnitingCare Burnside's report *Releasing the Pressure on Remand*²⁸, should be available for those children and young people who are granted bail but held on remand due to insufficient accommodation options.

The Noetic Report recommended that Juvenile Justice review the situation of all young people remanded in custody because of lack of suitable accommodation every 48 hours, until resolved.²⁹ The YJC supports this recommendation as a way of reducing the length of time young people are unnecessarily kept on remand. A 48 hour review mechanism would increase the pressure on Community Services NSW and Juvenile Justice NSW to find a place for the young person to reside, or apply to the court to alter the condition. Further, where a young person has been unable to comply with a reside as directed condition the matter should be automatically re-listed before the court every 48 hours.

Recommendation 3: Bail provisions specific to children and young people should be inserted in the *Children (Criminal Proceedings) Act 1987 (NSW)*. Alternately, if this Recommendation is not accepted, bail provisions specific to children and young people should be drafted as a separate Part to the new principal Act referred to in Recommendation 1 so that children specific legislation applies to all aspects of bail proceedings.

Recommendation 11: Bail conditions should only be imposed on children in *exceptional circumstances*. Where conditions are imposed, the decision-

²⁸ *Releasing the Pressure on Remand*, UnitingCare Burnside, July 2009

²⁹ Noetic Report (Note 1), Recommendation 21

maker should be required to consider a young person's capacity to understand and meet the conditions.

Recommendation 12: Juvenile Justice should review the situation of every child and young person remanded in custody because of lack of suitable accommodation every 48 hours to ascertain whether accommodation has become available. Further, where a young person has been unable to comply with a reside as directed condition the matter should be automatically re-listed before the court every 48 hours.

Recommendation 13: Fund a residential bail support program to assist young people in meeting their bail conditions, particularly 'reside as directed' conditions and placement conditions.

Recommendation 14: Fund the youth services sector with expertise in out-of-home care services to establish a residential service for young people granted bail with 'reside as directed' conditions.

7. Should special provisions apply to vulnerable people including Aboriginal people and Torres Strait Islanders, cognitively impaired people and those with a mental illness?

In making a bail determination, the current *Bail Act* requires an authorised officer or the court to consider any 'special needs' arising from the fact that an alleged offender is 'an Aboriginal or Torres Strait Islander, or has an intellectual disability or is mentally ill'.³⁰ This provision is extremely broad. In order to assist decision makers to make more appropriate bail conditions, the legislation should address some of the special needs that may arise.

Aboriginal and Torres Strait Islanders

Indigenous disadvantage is most likely one of the strongest factors in the overrepresentation of children and young people in the juvenile justice system. The 2008 Social Justice Report released by the Human Rights Commission states that Indigenous children are 23 times more likely to be in detention than non-Indigenous children.³¹

In light of this statistic, the YJC recommends that an Indigenous bail working group be established in consultation with indigenous communities in order to propose changes to bail legislation that will assist indigenous people with their interaction with the criminal justice system. For example, for indigenous people, special needs in respect of a bail determination could mean recognising the importance of extended family and the need for flexible living arrangements. These factors would be highly relevant to the imposition of a residential bail condition. 'Special needs' could also include disadvantages regarding literacy, employment and experiences in custody.

A provision was recently inserted in the Victorian *Bail Act* 1977 that requires decision makers to take into account any issues that arise due to a person's Aboriginality when making any determination as to bail, including the person's cultural background (ties to extended family or place) and any other relevant cultural issue or obligation.³²

We further note that the draft *Bail Bill* 2010 provided that in relation to any Aboriginal or Torres Strait Islander, the court must take into account any representations made on behalf of a group that provides criminal justice programs to Aboriginal or Torres Strait Islanders or any elders from the relevant community.³³ We commend this provision as going some way toward recognising additional relevant cultural and social factors.

³⁰ s32(1)(b)(v), *Bail Act*

³¹ Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights Commission, *Social Justice Report* 2008

³² s3A *Bail Act* 1977 (Vic) (provision commenced 1 January 2011)

³³ Clause 60(5), *Bail Bill* 2010

Cognitive or mental health impairment

A recent report produced by the Intellectual Disability Rights Service in conjunction with the Coalition on Intellectual Disability and Criminal Justice and the NSW Council for Intellectual Disability found that persons with an intellectual disability are disproportionately over-represented in the criminal justice system.³⁴ Problems in relation to young people and bail are exacerbated where a young person has a cognitive impairment, mental illness or behavioural problems. In these situations, it is often difficult to address the court's concerns regarding suitable accommodation options, available support services and community protection. As a result, young people who fall into these categories are often less likely to get bail and where bail is granted it is often subject to onerous conditions.

Defining 'intellectual disability' and 'mentally ill'

'Intellectual disability' is defined by the *Bail Act* as significantly below average intellectual functioning that results in the person requiring supervision or social rehabilitation in connection with daily life activities (s37(5)).

We note that 'mentally ill' is not a defined term in the *Bail Act*. Reference should be had to the definition contained in the *Mental Health Act 2007* (NSW) where a 'mentally ill' person is a person suffering from a 'mental illness' which means:

a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:

- (a) delusions,
- (b) hallucinations,
- (c) serious disorder of thought form,
- (d) a severe disturbance of mood,
- (e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d),

and owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm, or for the protection of others from serious harm.³⁵

Special needs

Currently, the *Bail Act* provides no legislative guidance as to what the 'special needs' arising from an 'intellectual disability' or being 'mentally ill' might entail. Yet, the effect of bail on a person with an intellectual disability or mental illness may be significantly greater than other accused. Detention may

³⁴ Intellectual Disability Rights Service, May 2008, *Enabling Justice, A Report on Problems and Solutions in Relation to Diversion of Offenders with Intellectual Disability from the New South Wales Local Court System*, www.idrs.org.au/pdf/enabling_justice.pdf

³⁵ ss4 and 14, *Mental Health Act 2007* (NSW). The *Mental Health (Forensic Provisions) Act 1990* (NSW) also makes use of this definition.

exacerbate illness and expose an individual to discrimination and abuse.

Section 37(2A) provides that before imposing a bail condition on an accused with an intellectual disability, the court or the police is to be satisfied that the condition is appropriate having regard to the capacity of the accused to understand or comply with the bail condition (as far as can reasonably be ascertained). For example, a failure to appear may not be a deliberate attempt to obstruct the legal process, but rather an aspect of their disability which may prevent the person from understanding or appreciating the necessity of complying with conditions.

The YJC recommends that sound police systems should be instituted that take account of the impact of intellectual disability or mental illness on decisions about arresting a person, laying charges and taking action for breach of bail. This could be achieved, for example, through the appointment of disability liaison officers and mental health professionals to assist the New South Wales Police Force. Such officers would also be required in a court context.

Recommendation 15: A provision should be inserted in bail legislation that in relation to any determination as to bail concerning Indigenous people, the court must take into account:

- any issues that arise due to a person's Aboriginality (drafted in the same way as s3A of the *Bail Act 1977 (Vic)*); and
- any representations made on behalf of a group that provides criminal justice programs to Aboriginal or Torres Strait Islanders, or any elders from the relevant community.

8. Consider the terms of bail schemes operating in other jurisdictions, in particular those with a relatively low and stable remand population, such as the UK and Australian states such as Victoria, and of any reviews of those schemes.

Victoria

Victoria's remand rate is the lowest of all the Australian states and territories.³⁶

General presumption in favour of bail

The Victorian *Bail Act* 1977 (Vic) contains a general presumption in favour of bail with an overall 'unacceptable risk' test. Accused persons are entitled to be granted bail, unless the prosecution can show that there is an unacceptable risk that the accused 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; or
- Interfere with witnesses or otherwise pervert the cause of justice.³⁷

In assessing whether there is an unacceptable risk, the decision maker must look at all relevant considerations, including:

- nature and seriousness of the offence;
- accused's character, antecedents, associations, home environment and background;
- accused's compliance with previous grants of bail;
- strength of evidence against the accused;
- attitude, if any, of the alleged victim.³⁸

We commend the unacceptable risk test for its commitment to the presumption of innocence until found guilty and to an accused's general right to liberty. The onus remains on the prosecution to prove otherwise.

There are 2 exceptions to the general entitlement to bail where additional tests over and above the unacceptable risk test are relied upon:

- a. If the accused is charged with any of the offences listed in s4(2)(a) or (aa) (these offences include murder, trafficking in a commercial quantity of drugs and other serious drug offences) they must be remanded in custody unless the decision maker is satisfied there are exceptional circumstances to justify granting bail.
- b. If the accused is charged with another of the offences listed in s4(4) (these offences include aggravated burglary, certain drug offences

³⁶ Lenny Roth, *Bail Law, Developments, Debate and Statistics*, Briefing Paper 5/2010, NSW Parliamentary Library Research Service, Sydney 2010, at p24

³⁷ s4(2)(d)(i), *Bail Act* 1977 (Vic)

³⁸ *Ibid*, s4(3)

and committing a further offence while on bail) the decision maker must remand the accused unless the accused 'shows cause' why remand is not justified.

Like the system of presumptions in NSW, the 'exceptional circumstances' and 'show cause' tests are offence based and reverse the onus. The YJC supports the Victorian Law Reform Commission's report that, in conflict with the presumption of innocence, these exceptions place undue attention on the offence as opposed to factors regarding the accused and the circumstances of the alleged offending.³⁹

Requirement that bail conditions be reasonable

Victoria has recently introduced a requirement that all bail conditions must be reasonable having regard to the nature of the alleged offence and the circumstances of the accused.⁴⁰ The YJC recommends the inclusion of such a provision in NSW bail legislation. Noting our comments regarding bail conditions and young people in response to question 6, relevant circumstances should include consideration of whether an accused has the capacity to understand and comply with the conditions sought to be imposed, any places or services that an accused person is required to access and the accused's accommodation circumstances.

³⁹ Note 12, Chapter 3

⁴⁰ s5(4)(b) *Bail Act 1977* (Vic)

9. Other related matters

Structure of bail legislation and plain English

The *Bail Act* has been criticised for being unnecessarily complicated. One of the major problems stems from the classifications of offences and how these classifications interact with the criteria that bail authorities are required to consider.

We suggest that the legislation be drafted in step with the processes involved in making a bail determination so that it is logical and easy to comprehend. Further, any new bail legislation should be written in plain English to benefit the community, police, lawyers and the court to understand how and why bail decisions are made.