23 September 2022

The Honourable Tom Bathurst AC QC
Chairperson
NSW Law Reform Commission
By email: nsw-lrc@justice.nsw.gov.au.

Dear Mr Bathurst,

Bail: show cause – firearms offences and criminal associations

Thank you for the opportunity to provide feedback to the Commission's review of the *Bail Act 2013* (NSW). (**Bail Act**)

Legal Aid NSW does not support the expansion of show cause offences to other firearms offences and offences concerning criminal associations. Our casework experience does not suggest that the present laws are inadequate and that systemic issues exist justifying such reforms. We also do not consider there to be the need to define the term 'criminal associations'. In our experience, the term is used appropriately by courts to capture all different manner of circumstances.

Preliminary observations

Legal Aid NSW notes the risks of law reform that is reactive to particular cases, rather than targeted to addressing systemic issues. There is a danger that such reform is not properly considered and leads to wider unintended adverse consequences.

Legal Aid NSW is concerned that consideration of the current reforms in isolation will make it harder for defendants to get bail and could further drive the overrepresentation of Aboriginal and Torres Strait Islander people in custody. This is especially the case given that the NSW Bureau of Crime Statistics and Research (**BOCSAR**) has found that the most significant factor influencing both police and court decisions to refuse bail is the fact that a defendant has been charged with a

show cause offence.[1] Expanding the categories of show cause offences is therefore likely to result in even more bail refusals.

Any proposals which lead to bail becoming more difficult need to be considered in the following wider context:

- An increasing remand population. According to BOCSAR, the adult remand population was 27 per cent larger in June 2022 than in June 2015.[2]
- The impact of COVID 19 has led to overcrowding in custodial centres, onerous conditions in custody, lack of access to justice and significant delays in the criminal justice system. Any further increases in the remand population will exacerbate these problems.
- The urgent need to address the overrepresentation of Aboriginal and Torres Strait Islander adults in custody, and the NSW Government's commitments under the Closing the Gap agreement. Recent BOCSAR custody statistics show an almost 65 per cent increase in the number of Aboriginal adult offenders held on remand.[3]

Legal Aid NSW supports a comprehensive review of the Bail Act to ensure that reforms strike an appropriate balance between the need to ensure the safety of victims of crime, individuals and the community, whilst safeguarding the presumption of innocence and the general right to be at liberty. In 2020 Legal Aid NSW provided a comprehensive submission to the NSW Department of Communities and Justice in response to the statutory review of the Bail Act, a copy of which is attached. Our submission contains 40 recommendations which are informed by our casework experience. In particular, we draw attention to recommendations 1 to 10, which strive to make bail decisions and bail conditions fairer and more culturally appropriate for Aboriginal and Torres Strait Islander people. Whilst the outcome of that review is outstanding, we invite the Commission to consider those recommendations in light of the current proposals and their potential impact on vulnerable individuals, including Aboriginal and Torres Strait Islander defendants.

Should the list of firearms offences treated as "show cause" offences under the Bail Act be expanded? If so, what offences should be included?

[1] Klauzner, I., and Yeong, S. (2021). *What factors influence police and court bail decisions?* (Crime and Justice Bulletin No. 236), 11. Sydney: NSW Bureau of Crime Statistics and Research.
[2] See NSW Bureau of Crime Statistics and Research, Custody Statistics: https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx as at 13 September 2022.
[3] Ibid.

Legal Aid NSW does not support the expansion of firearms offences to which the show cause requirement applies. There is sufficient scope within existing legislation for courts to consider the use of a weapon in determining whether an offence is a serious offence for the purpose of assessing unacceptable risk.[4] We therefore submit that it is appropriate to restrict show cause offences to more serious offences that pose a danger to the community.

Legal Aid NSW does not consider that possession of a firearm or ammunition in a private place is sufficiently serious to warrant it being a show cause offence. We are also concerned that extending the show cause requirement to possession of firearms in a private place may impact disproportionately on young people who possess imitation firearms (such as gel blasters) in their home, as well as farmers and others living in rural or regional areas.

Legal Aid NSW also does not support a breach of a firearms prohibition order[5] being treated as a show cause offence. We note that these orders are the result of an administrative rather than judicial process and can be based on limited and untested information. We are concerned that should a breach of a firearms prohibition order become a 'show cause offence' there might be an increase in these orders and subsequent targeting of individuals subject to the order. This could particularly be the case in circumstances where possession of a firearm in a private place is not a show cause offence, but possession of a firearm in breach of a firearms possession order is. Having regard to the wide range of factors which the courts can take into account under section 18 of the Bail Act in assessing bail concerns, we see no need to add firearms prohibition order to the list of factors already listed.

Should there be further guidance on the meaning of "criminal associations" in s 18(1)(g) of the Bail Act? If so, how should it be defined?

We acknowledge that there is currently no guidance around the meaning of "criminal associations" under section 18(1)(g) of the Bail Act and as such the term is not limited to organised crime networks but is capable of capturing people living in families and communities with high incidences of criminal offending and engagement with the criminal justice system.

However, on the balance, we consider it appropriate to leave the interpretation of this term to judicial discretion. We are concerned that historically many reforms originally targeted at serious and organised crime have in practice applied to a far broader range of citizens, and there is a risk that the creation of a definition of "criminal

[4] *Bail Act 2013* (NSW) section 18(2)(a)
[5] *Firearms Act 1996* (NSW) Part 7.

associations" would do the same. For example, the NSW Ombudsman conducted a review of NSW Police use of consorting laws which had sought to criminalise associations with convicted criminals, including organised crime networks. However, the Ombudsman's report noted with concern the "use of the consorting law in relation to disadvantaged and vulnerable people, including Aboriginal people, people experiencing homelessness, and children and young people".[6] The Report further noted that the consorting law may "continue to be used to address policing issues not connected to serious and organised crime and criminal gangs and in a manner that may impact unfairly on disadvantaged and vulnerable people in our community".[7]

Should the list of offences relating to criminal associations that are treated as "show cause" offences under the Bail Act be expanded? If so, what offences should be included?

Legal Aid NSW submits that existing show cause offences sufficiently target those involved in organised crime whose criminal associations are of concern. Legal Aid NSW is concerned that tightening bail laws in relation to criminal associations could undermine efforts under the Closing the Gap agreement. We note that many young Aboriginal people come from families with a history of crime, and who live with other families that have a similar background. Particular care needs to be taken to ensure that consideration of an Aboriginal person's associations and any condition imposing non association is culturally appropriate.

If amendments to bail laws were progressed to make it more difficult for people with alleged gang affiliations to be granted bail, then the following safeguards should be imposed:

- a different threshold of proof applied for those associations so that the prosecution is not able to assert, without evidence, that an accused has organised criminal associations, but instead is required to provide particularised evidence to establish those facts
- the prosecution should be required to provide details of the associate's convictions, including whether they are minor offences or serious offences, as well as details of the association, such as its frequency and the nature of the relationship.

It should not be sufficient for police to allege that a defendant associates with a person or people merely suspected of criminal activity, or charged but not convicted

[6] NSW Ombudsman, *The Consorting Law: Report on the operation of Pt 3A, Division 7 of the Crimes Act 1900*, April 2016, p iii.
[7] Ibid.

of a crime. We note these comments are consistent with the following observations of Beech-Jones CJ at CL in *R v Ebrahimi [2015] NSWSC 335* at [43].[8]

Thank you again for the opportunity to provide feedback to the review. If you have any questions or would like to discuss this matter further, please contact [redacted]

Yours sincerely

[redacted]

Jane Cipants
A/Chief Executive Officer

Enclosure:
Legal Aid NSW submission to the NSW Department of Communities and Justice, Review of the *Bail Act 2013* (NSW), (17 August 2020)

[8] "Assertions of criminal associations of this kind often generate much heat in these applications, but little light. To truly assist in assessing bail concerns the Court needs to know much more about the nature of the association, the nature of the alleged criminality that the alleged criminal associations have engaged in in the past and the material that provides a basis of believing the applicant has contacts with persons who could provide him some assistance if he wished to abscond".

Review of the *Bail Act 2013* (NSW)

Legal Aid NSW submission to the NSW Department of Communities and Justice

17 August 2020

323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

Table of Contents

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services.

Legal Aid NSW provides state-wide criminal law services through the in-house Criminal Law Division and private practitioners. The Criminal Law Division services cover the full range of criminal matters before the Local Courts, District Court, Supreme Court of NSW and the Court of Criminal Appeal as well as the High Court of Australia.

Criminal law duty solicitor services, including in respect of bail hearings, are provided in every Local Court in NSW, either by Legal Aid NSW in-house solicitors, or by private practitioners co-ordinated by Legal Aid NSW. The Criminal Law division is responsible for rostering solicitors to appear at Parramatta Bail Court every weekend and public holiday.

The Legal Aid NSW Children's Legal Service (CLS) advises and represents children and young people involved in criminal cases in the Children's Court, including young people appearing before the Children's Court for bail and parole matters. CLS lawyers also visit juvenile justice centres and give free advice and assistance to young people in custody.

Legal Aid NSW welcomes the opportunity to make a submission to the NSW Department of Communities and Justice on the review of the *Bail Act 2013* (NSW). Should you require any further information, please contact:

Anastasia Krivenkova
Manager, Strategic Law Reform Unit
Policy, Planning and Programs
[redacted]

Introduction

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Department of Communities and Justice (the **Department**) on the review of the *Bail Act 2013* (NSW) (the **Bail Act**).

Legal Aid NSW considers that the review should be guided by the fundamental principle that everyone has the right to liberty.[1] The International Covenant on Civil and Political Rights provides that 'it shall not be the general rule that persons awaiting trial shall be detained in custody'[2] and everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.[3]

Legal Aid NSW is concerned that some aspects of the Bail Act and its implementation do not strike an appropriate balance between the right of a defendant to liberty and the presumption of innocence, and the need to ensure that a defendant does not abscond, interfere with witnesses, or commit other offences. We are particularly concerned about the impact of the operation of the Bail Act and its role in the unnecessary criminalisation of children and young people and Aboriginal and Torres Strait Islander people.

Legal Aid NSW remains concerned about the imposition of inappropriate bail conditions, and the NSW Police Force's approach to enforcing those conditions. Legal Aid NSW solicitors have identified that bail conditions are regularly imposed without being linked to mitigation of a bail concern. We detail these concerns further below.

In this submission we have identified targeted amendments to the Bail Act to address some of these concerns, as well as non-legislative measures to achieve more appropriately tailored bail conditions and improved police approaches to breaches of bail.

A holistic review

While we acknowledge that the Department is conducting a statutory review focusing on the administration and operation of the Bail Act, we consider that this presents a critical opportunity to look holistically at the NSW justice system in the context of bail decisions, breaches, the availability of services and supports to reduce reoffending, and to address the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system. In NSW, Aboriginal and Torres Strait Islander adults are imprisoned at a rate that is 12 times higher than non-Indigenous adults. Even more concerning is that Aboriginal and Torres Strait Islander juveniles are imprisoned at a rate that is 16 times higher than non-Indigenous juveniles.[4] Aboriginal and Torres Strait Islander women are vastly over-represented in the remand population, often because of insecure housing or

[1] *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976), article 9(1) ('*International Convenient on Civil and Political Rights*').
[2] *International Covenant on Civil and Political Rights*, above n 1, article 9(3).
[3] *International Covenant on Civil and Political Rights*, above n 1, article 14(2).
[4] See National Agreement on Closing the Gap, Justice Targets – Baseline data (July 2020), < https://www.closingthegap.gov.au/young-people-are-not-overrepresented-criminal-justice-system>.

employment, or previous convictions (commonly for low-level offending behaviour).[5] Between 2011 and 2017, the number of Aboriginal women imprisoned in NSW rose by 74 per cent (from 195 to 340), compared with a 40 per cent growth in the number of non-Aboriginal women in prison over the same time period. The number of women on remand more than doubled during this period.[6]

It is estimated that Aboriginal and Torres Strait Islander people represent 3.4% of the total NSW population.[7] However, as at June 2020:[8]

- Aboriginal and Torres Strait Islander adults represented 25.1% of those in adult custody
- Of the women in custody, 32% were Aboriginal or Torres Strait Islander
- Aboriginal and Torres Strait Islander children represented 40% of those in juvenile custody
- Aboriginal and Torres Strait Islander adults represented 26.1% of the total remand population - Aboriginal and Torres Strait Islander women represented 30.7% of the overall women on remand, and Aboriginal and Torres Strait Islander men represented 25.7% of the total men on remand.

In NSW criminal courts, Aboriginal defendants are refused bail at almost double the rate when compared to all defendants in NSW.[9]

We take this opportunity to reiterate our support for the recommendations of the Australian Law Reform Commission's 2018 report '*Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*' (ALRC Report 133), particularly as they relate to bail. It is the most recent review of the drivers of over-representation of Aboriginal and Torres Strait Islander people in detention. It contains 35 recommendations designed to reduce the disproportionate rate of incarceration of Aboriginal and Torres Strait Islander peoples and improve community safety. The lack of a federal Government response to the Report should not prevent action at a State level to implement its recommendations.

We encourage the NSW Government to take steps to implement the ALRC's recommendations for bail reform, to address the rate of incarceration of Aboriginal and Torres Strait Islander people.[10]

---

[5] Australia's National Research Organisation for Women's Safety, *Women's imprisonment and domestic, family, and sexual violence: Research synthesis* (2020), 4 <https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2020/07/16102534/ANROWS-Imprisonment-DFV-Synthesis.1.pdf>

[6] Ooi, E.J. (2018). Recent Trends in the Female Prison Population (Bureau Brief No. 130). Sydney: NSW Bureau of Crime Statistics and Research.

[7] Aboriginal Affairs NSW, *Key data – Aboriginal people*, (October 2019), < https://www.aboriginalaffairs.nsw.gov.au/pdfs/new-knowledge/KEY-DATA-ABORIGINAL-PEOPLE-OCTOBER-2019.pdf>

[8] These statistics are derived from the BOCSAR Custody Statistics Quarterly Update June 2020.

[9] BOCSAR, *NSW Criminal Court Statistics December 2019*, <https://www.bocsar.nsw.gov.au/Pages/bocsar_court_stats/bocsar_court_stats.aspx>

[10] Australian Law Reform Commission, *Pathways to Justice- Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133 (2018), recommendations 5-1 and 5-2 ('*Pathways to Justice Report*').

Specifically, we support:

- the introduction of a standalone provision that require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations, and
- collaboration between the NSW Government and relevant Aboriginal and Torres Strait Islander organisations and peak legal bodies, on guidelines on requirements for bail authorities to consider any issues that arise due to a person's Aboriginality to identify gaps in the provision of culturally appropriate bail support programs and diversion options, and develop and implement relevant bail support and diversion options.

If implemented, these recommendations could also make a meaningful contribution towards achieving the National Agreement on Closing the Gap target of reducing the rate of Aboriginal and Torres Strait Islander adults held in jail by 15 per cent by 2031.[11]

The NSW Government has also committed to consider, as part of the current review of the Bail Act, the recommendations for bail reform made by the NSW Legislative Assembly Law and Safety Committee Inquiry into the Adequacy of Youth Diversion Programs in NSW (the **Youth Diversion Inquiry**).[12] These include targeted amendments to the Bail Act to ensure that decision-makers have particular regard to a person's age in determining what action to take for a breach of bail, as well as non-legislative changes, including promoting greater diversion of young people wherever possible, and increasing bail support services available to young people in regional and rural, as well as metro areas.

More recently, the NSW Legal Assistance Forum Aboriginal Incarceration Working Group has also focused on developing strategies and plans to address the problem of Aboriginal overrepresentation in NSW adult prisons by focusing on breaches of conditional liberty. Through this working group, members have identified behaviourally informed interventions aimed at improving, for Aboriginal people, the setting of bail conditions, increasing compliance with bail and reducing bail breaches. These suggested non-legislative interventions have been considered by the NSW Criminal Justice Board, and Legal Aid NSW looks forward to working collaboratively with NSW Stronger Communities cluster agencies to consider their implementation.

The above-mentioned recommendations from the numerous recent comprehensive inquiries present a clear pathway for reform—an opportunity to holistically examine the NSW justice system's approach to bail decisions and breaches and the availability of necessary services and supports, and to address the overrepresentation of Aboriginal and Torres Strait Islander people in the NSW criminal justice system.

[11] National Agreement on Closing the Gap, July 2020, available at <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>

[12] NSW Government Response to the Report of the NSW Legislative Assembly Committee on Law and Safety, *Inquiry into the Adequacy of Youth Diversionary Programs in NSW*, 28 August 2019, 6.

List of Recommendations

Bail decisions and conditions, and appropriateness of bail conditions for Aboriginal and Torres Strait Islander people

1. Amend section 20A of the Bail Act to require the bail authority, when making a decision to impose a bail condition, to record reasons in writing to identify what risk each of the bail conditions is addressing, and how the imposition of that condition will mitigate that risk.

2. Consider additional ways to increase compliance with section 20A of the Bail Act. This could include by amending section 20A(2) to require that the bail authority must consider the factors in s 20A(2)(a)-(f) in deciding whether to impose a bail condition, and providing additional training to bail authorities on the requirements of this section, which could include a particular focus on inappropriate curfews, place-restriction and non-association conditions.

3. Amend the Bail Act to specify a legislative definition of curfew conditions to include 'not to be in a public place' and to 'reside at a specific location'.

4. Amend the Bail Act to provide that bail authorities may only impose curfew conditions in exceptional circumstances and must provide written reasons for doing so.

5. Amend the Bail Act to require bail authorities to take into account public health considerations when making decisions regarding whether to grant bail, setting conditions and responding to breaches of bail.

6. Amend the Bail Act to expressly allow a person to nominate multiple places of residence in appropriate circumstances e.g. where the person travels between family members' or other residences. In the alternative, we would support this amendment being limited to Aboriginal and Torres Strait Islander people, and to children.

7. Consider including content on bail and Aboriginal and Torres Strait Islander people from the Equality Before the Law Bench Book, in the bail section of the Local Court Bench Book.

8. Judicial officers should undertake comprehensive Aboriginal cultural awareness training with a particular focus on the community they are working in, to ensure they have knowledge of the local culture and community issues.

9. Amend the Bail Act to include a standalone provision that requires bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations.

10. The NSW Government should work with relevant Aboriginal and Torres Strait Islander organisations to develop guidelines on the application of bail provisions

requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies.

Breach of bail conditions and bail compliance checks

11. Amend section 77 of the Bail Act to:
    a) Reflect the common law position that arrest is a measure of last resort, including for breach of bail,
    b) Require police to take the least restrictive option available in response to a breach of bail, and
    c) Require a police officer who takes any of the actions under 77(1)(c)-(f) to provide substantial reasons for doing so in writing to the court.

12. Amend the Bail Act to explicitly clarify that a police officer must not conduct a compliance check to enforce a curfew or residence condition unless an enforcement condition has been imposed by a court with respect to the residence or curfew condition.

Other legislative amendments to improve the operation of the Bail Act

13. Amend section 16B of the Bail Act to delete subsection 16B(1)(l) so that the show cause provisions do not apply to a person charged with a serious indictable offence committed while subject to an arrest warrant.

14. Repeal section 74 of the Bail Act.

Supreme Court bail processes

15. That the Department should, as part of this review of the Bail Act, obtain data from the Supreme Court and/or BOCSAR in order to determine the impact of the changed Supreme Court procedures on unrepresented appellants.

16. Enable the courts to order drug and alcohol reports in appropriate cases.

17. Revise the current Corrective Services NSW policy with respect to alcohol and drug rehabilitation assessments reports.

18. Re-introduce dedicated alcohol and drug workers in prisons.

Bail Support Services

19. Increase the availability of, and access to, bail support services to assist people to comply with their bail conditions and address the underlying causes of their offending, including culturally appropriate programs to support Aboriginal and Torres Strait Islander people, and programs specifically tailored for children and young people, and Aboriginal and Torres Strait Islander women.

Bail issues concerning children and young people

20. Bail provisions specific to children and young people should be consolidated and separated, either within a separate division of the Bail Act, or moved to the *Children's (Criminal Proceedings) Act 1987* (NSW).

21. Introduce a right to release for children aged 14 years and under in all circumstances. Alternatively, there should be a right of release for children aged 14 years and under, except for those offences for which there must be exceptional circumstances for bail under the Bail Act.

22. Principles to guide the application of bail provisions to children and young people should be included in the Bail Act, based on the principles in the *Young Offenders Act 1997* (NSW) and the *Children's (Criminal Proceedings) Act 1987* (NSW).

23. Amend the Bail Act to require bail authorities to consider the age of a child or young person when setting bail conditions.

24. Police and Courts that hear juvenile criminal matters should receive thorough training in the setting of bail conditions for young people under 18 years, to promote the diversion of young people wherever possible.

25. Young people under 18 years, particularly young Aboriginal and Torres Strait Islander people, should be able to nominate multiple specific addresses for the purpose of bail residence requirements, where appropriate.

26. Develop plain language bail forms specifically designed for children and young people.

27. Include specific legislative consideration of the child's ability to comprehend bail and bail conditions.

28. Amend the Bail Act to require judicial officers to give particular attention to children when considering what is the least restrictive measure and considering detention as a last resort.

29. Police should receive thorough training concerning the policing of suspected bail breaches by young people under 18 years, to avoid unnecessary arrests and detention.

30. Consider whether the Bail Act should be amended to specifically provide that police officers must have regard to a person's age in deciding what action to take for breach of bail.

31. Amend the Bail Act to exempt children and young people from the prohibition on repeat applications.

32. Amend section 40 of the Bail Act so that bail stays do not apply to children.

33. Amend the Bail Act to require the relevant government agency to provide information to the court about the action being taken to secure suitable accommodation for an accused person (under section 28(5)).

34. Amend section 28(4) of the Bail Act, which requires that the matter be relisted for hearing every two days, to clarify that this includes weekends and public holidays.

35. Judicial officers should be provided with additional education and guidance on the operation and requirements of s 28 of the Bail Act, including how to record

decisions to grant bail subject to an accommodation requirement. For example, this could be done through a Children's Court Practice Note to legal professionals and magistrates to ensure consistency and to meet the objectives of section 28.

36. Youth Justice, the Department of Communities and Justice, specialist homelessness services and out of home care providers collaborate to produce a memorandum of understanding (MoU) to clarify the role that each should take when supporting a child or young person out of custody. This MoU must be aligned with other relevant policy instruments, be made publicly available and relevant parties should be made aware of and receive training about the MoU.

Legal Aid NSW also supports the additional recommendations made by the Y Foundation, regarding the operation of the Bail Act:

37. The Bail Act is amended to restrict the number of times a matter can be relisted before a child or young person must be released. Every effort should be made to secure appropriate accommodation on the day the Court grants bail. Any additional time should not be treated as a deadline but rather, a safety net.

38. The Bail Act is amended to give magistrates the authority to direct any relevant government agency be responsible for finding accommodation based on the individual circumstances of a child or young person's case. Particular urgency needs to be considered for young people with special vulnerabilities or needs, including age or identifying as Aboriginal or Torres Strait Islander.

39. That Youth Justice to partner with specialist homelessness services across NSW to fund bail beds and joint support program (JSP) beds specifically for children and young people leaving detention.

40. Disaggregated data on section 28 remanded children and young people should be collected and published by the Children's Court, Youth Justice and the Department of Communities and Justice. This should include information on the number of children and young people in OOHC who are remanded on section 28 orders, and the length of time that children and young people are remanded in custody due to a lack of suitable accommodation.

Bail decisions, inappropriate bail conditions and enforcement

Bail decisions and conditions

Legal Aid NSW is concerned about inconsistent bail decisions, inappropriate bail conditions being imposed on our clients by NSW Police and Courts, and the enforcement of those conditions by NSW Police. Our solicitors have observed that bail conditions are frequently imposed that do not mitigate a bail risk, are not reasonably possible to comply with, and do not take into account our clients' circumstances.

We regularly see a large number of conditions being imposed on our clients, which often leads to a greater volume of minor or technical breaches. Our clients are frequently arrested for such breaches of bail (with no new offence committed), which in turn leads to a significant and in our view unnecessary increase in the remand population. This reflects the NSW Bureau of Crime Statistics and Research (**BOCSAR**) findings that in 35% of orders, defendants had only breached their bail conditions through technical breaches rather than through reoffending. BOCSAR further reported that the predominant court response to defendants who breached their bail orders was to continue bail (61.3%).[13] Other BOCSAR research has found that defendants remanded in custody until their court matter is determined are more likely to receive a prison sentence upon conviction than those who are released to bail.[14]

Our solicitors have observed that police often impose bail conditions that are excessively onerous and not necessary to address risk, despite the clear provisions of s20A(2) of the Act. Such conditions can have a particularly harsh effect as they may be inadvertently breached, exposing the defendant to breach proceedings and the risk of detention even where the alleged offence is minor and does not warrant a custodial penalty. Data provided by BOCSAR highlighted that in 2018 over 35% of female and 25% of male Aboriginal and Torres Strait Islander defendants who were on remand at the time of finalisation received a non-custodial penalty.[15] A history of non-compliance with bail conditions also decreases the likelihood of a person being granted bail in the future.[16]

In recent weeks Legal Aid NSW solicitors have become aware of a specific police operation targeting shoplifters in certain supermarkets, including in the vicinity of inner-city Housing Commission residences. Police officers view CCTV footage of self-service check outs in supermarkets, and then arrest and bail refuse people for minor shoplifting offences. In one case, a Legal Aid NSW client was held in custody for more than 24 hours for stealing a bunch of grapes. In another case, a man was remanded for shoplifting six muffins, a drink and a chocolate bar.

---

[13] Donnelly, N. & Trimboli, L. (2018). The Nature of Bail Breaches in NSW (Bureau Brief No. 133). Sydney: NSW Bureau of Crime Statistics and Research.

[14] Bureau of Crime Statistics and Research, *Bail refusal increases the likelihood of receiving a prison sentence* (27 May 2019) < https://www.bocsar.nsw.gov.au/Pages/bocsar_news/cjb224-bail.aspx>

[15] NSW Legal Assistance Forum, *Aboriginal Incarceration Working Group Report*, (May 2019), < file:///D:/UserData/krivenkovaa/Downloads/Aboriginal+Incarceration+Report+May+2019%20(1).pdf>

[16] *Bail Act 2013* (NSW), s 18(f)(ii) ('*Bail Act*')

Legal Aid NSW solicitors have also observed increased police scrutiny of homeless people in recent months. We regularly appear for individuals who have been initially placed on police bail for a variety of summary offences such as jaywalking, trespass, riding without a helmet and washing car windscreens. These are matters which could and should be dealt with by a Field Court Attendance Notice and which often reflect underlying associated issues of homelessness, mental health and drug and alcohol addiction. Typically, police will bail the person subject to a place restriction condition. As soon as the person breaches that condition, police will arrest and refuse the person bail.

Our solicitors have also observed that courts frequently impose bail conditions such as curfews, place restrictions and daily reporting requirements in circumstances where the conditions do not appear to address specific bail concerns. Place-restriction and non-association conditions are particularly onerous on people living in social housing and remote and rural areas (where Aboriginal people are vastly over-represented). Some magistrates impose sureties in the absence of demonstrated concerns that the defendant will fail to appear. Sometimes, the imposition of conditions can inhibit efforts to rehabilitate and reintegrate.

We recommend that these issues could be addressed in the following way.

First, the Bail Act should be strengthened to increase compliance with section 20A, to ensure that bail conditions made by courts and police address the objectively identified risks. We recommend section 20A be amended to require the bail authority, when making a decision to impose a bail condition, to record reasons in writing to identify what risk each of the bail conditions is addressing, and how the imposition of that condition will mitigate that risk. We consider that such a legislative requirement may help to ensure that conditions are appropriately tailored to address the identified risks. This amendment would also contribute to reducing the overall high number of bail conditions that are currently being imposed on adults and juveniles, reduce unnecessary bail breaches, and leading to an overall reduction in the remand population.

We further suggest that section 20A(2) be amended to state that '*a bail authority must not impose a bail condition unless the bail authority is satisfied that* –', and that additional training be provided to bail authorities on the requirements of this section.

Second, we recommend that a legislative definition of curfew conditions is included in the Bail Act to provide clarity regarding the types of curfews that can be imposed, such as conditions 'not to be in a public place' and conditions to 'reside at a specific location'. A curfew condition to 'not be in a public place' provides people on bail with some flexibility to comply with their bail condition in circumstances where they may have more than one place of residence, or to allow them to leave a location where they are experiencing domestic and family violence or are otherwise unsafe. We also recommend a specific amendment to the Bail Act to expressly permit people to nominate more than one place of residence for bail residence.

As noted above, this is particularly important for people who may be experiencing homelessness, people with unstable housing, or experiencing domestic and family violence. This would also better recognise the extended family and kinship ties and the

traditional ties of Aboriginal and Torres Strait Islander people. If this is not supported, in the alternative, we strongly support this recommendation applying to Aboriginal and Torres Strait Islander people and to children.

Third, we recommend that the Bail Act be amended to provide that bail authorities may only impose curfew conditions in exceptional circumstances and must provide written reasons for doing so.

Fourth, our solicitors' recent experience assisting our clients during the COVID-19 pandemic has also demonstrated to us a need for bail authorities to take into account public health considerations when making decisions regarding whether to grant bail, setting conditions and when responding to breaches of bail. We acknowledge that the court can already take that into account public health considerations under s 18(1)(m) 'the need for the accused person to be free for any other lawful reason', and during the COVID-19 period we have observed an increased number of people being granted bail. However, we consider that a specific amendment to the Bail Act to specify that a bail authority should take into account public health considerations will help to draw the decision-makers' attention to these issues.

Finally, we suggested legislative reform be accompanied by additional guidance for police and courts on appropriate bail conditions.

Appropriateness of bail conditions - Aboriginal and Torres Strait Islander people

Aboriginal and Torres Strait Islander people appearing in NSW courts are more likely to be refused bail than non-Indigenous people (14.5% Aboriginal and Torres Strait Islander people refused bail compared with 6.9% non- Indigenous people).[17]

The Australian Law Reform Commission also found that:

> Up to one third of Aboriginal and Torres Strait Islander people in prison are held on remand awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander people held on remand do not receive a custodial sentence upon conviction, or may be sentenced to time served while on remand. This particularly affects female Aboriginal and Torres Strait Islander prisoners, and suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low-level offending.
>
> Irregular employment, previous convictions for often low-level offending, and a lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Furthermore, when bail is granted, cultural obligations to attend sorry business following a death in the family or community, or to take care of family may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to breach of bail conditions, revocation of bail and subsequent imprisonment.[18]

In this context, we consider that particular attention should be paid to the circumstances of Aboriginal and Torres Strait Islander people when making decisions regarding bail. This

[17] Judicial Commission of NSW, Equality Before the Law Bench Book [2.3.2] referring to 2018 data supplied by the NSW Bureau of Crime Statistics and Research, Reference: sr18-16315, June 2019, based on NSW Police and NSW criminal court data.

[18] Australian Law Reform Commission, Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133), tabled 28 March 2018, [5.1-5.2].

may go some way to addressing the overrepresentation of Aboriginal and Torres Strait Islander people in the NSW criminal justice system,[19] and to acknowledge the broader contextual factors that contribute to the high incarceration rates of Aboriginal and Torres Strait Islander people, such as experiences of inter-generational trauma, loss of culture, poverty and discrimination.

Our solicitors have observed that courts and police frequently do not take into account factors associated with a defendant's Aboriginality when imposing bail conditions despite the current requirement in the Bail Act for bail authorities to consider '*any special vulnerability or needs the person has including being an Aboriginal or Torres Strait Islander person*.'[20] In our experience, this section is generally not relied on by lower courts in NSW to grant bail. In addition, as the Bail Act frames Aboriginality as a factor of vulnerability, other aspects or Aboriginality, such as cultural practices and obligations, are not considered.[21]

Bail conditions that do not take into account such factors can mean that an Aboriginal person is unable to comply with both the bail conditions and their cultural obligations. For example, bail conditions often fail to take into account the mobility of Aboriginal and Torres Strait Islander people, who are likely to have family connections in more than one town, or to travel between different family members residences. Our solicitors also observe that many people living in regional and remote areas, including areas with large Aboriginal and Torres Strait Islander communities, experience difficulty complying with bail conditions because access to transport is often limited.

Non-association orders can be especially problematic for Aboriginal and Torres Strait Islander people, because of the importance of extended family in Aboriginal and Torres Strait Islander culture. These orders can restrict contact with family networks, preventing Aboriginal and Torres Strait Islander people from maintaining relationships, performing responsibilities to family members, or attending funerals.[22]

We recommend these issues be addressed in the following way.

As noted above, we recommend that the Bail Act is amended to permit Aboriginal and Torres Strait Islander people to nominate more than one place of residence for bail residence requirements in circumstances where the accused travels between family members' residences. This is an extension of the recommendation of the Youth Diversion Inquiry that young people under 18 years, particularly young Aboriginal and Torres Strait Islander people, be able to nominate multiple specific addresses for the purpose of bail residence requirements, where appropriate.

[19] Aboriginal and Torres Strait Islander people make up 3.4 per cent of the population in NSW. However Aboriginal people male up 25 per cent of the adult prison population in NSW. See BOCSAR, NSW Custody Statistics – Quarterly Update (June 2020).
[20] Bail Act, section 18(1)(k).
[21] For example *R v Lyons* [2018] NSWSC 223, *Director of Prosecutions (NSW) v GX* [2019] NSWCCA 84, *Grey (a pseudonym) v R* [2020] NSWSC 390, *R v Cisman* [2018] NSWSC 1244. *R v Alchin* [2015] NSWSC 2112 and *R v Wright* [2015] NSWSC 2109.
[22] NSW Law Reform Commission Bail (2012) [11.54].

We also agree with the recommendations of both the Australian Law Reform Commission and the NSW Law Reform Commission, that a standalone provision should be introduced in the Bail Act to require bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations.[23] These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending. Victoria has a similar standalone provision in section 3A of the *Bail Act 1977* (Vic).[24]

We also support the Australian Law Reform Commission's recommendation regarding the need for a standalone provision to be supported by training and guidelines for all criminal justice participants including the judiciary. We support the NSW Government working with relevant Aboriginal and Torres Strait Islander organisations to:

- develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies; and
- identify gaps in the provision of culturally appropriate bail support programs and diversion options.

The Judicial Commission of NSW's Ngara Yura Program aims to increase awareness among judicial officers about contemporary Aboriginal and Torres Strait Islander social and cultural issues, and their effect on Aboriginal and Torres Strait Islander people in the justice system. This includes by publishing the Equality Before the Law Handbook, which acknowledges that bail conditions "*can often have a disproportionately stringent impact on Aboriginal people as, particularly in rural areas, the conditions may conflict with family and cultural obligations*." It includes a list of considerations regarding bail conditions for Aboriginal people.[25] Legal Aid NSW supports this guidance and suggests that it is also included in the Judicial Commission of NSW's Local Court Bench Book. Legal Aid NSW also suggests that judicial officers undertake comprehensive Aboriginal cultural awareness training with a particular focus on the community they are working in to ensure they have knowledge of the local culture and community issues.

We consider that if implemented, these recommendations could make a meaningful contribution towards achieving the National Agreement on Closing the Gap target of

[23] NSW Law Reform Commission, Bail, (2012), recommendation 11.3 in making a decision in relation to an Aboriginal or Torres Strait Islander regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements): (a) any matters relating to a person's Aboriginal or Torres Strait Islander identity, culture and heritage, which may include (i) connections with and obligations to extended family (ii) traditional ties to place (iii) mobile and flexible living arrangements (iv) any other relevant cultural issues or obligation (b) any report tendered on behalf of a defendant from groups providing services to Indigenous people(c) the absence of such as report does not raise an inference adverse to the person , or a ground for adjourning the proceedings unless son the application of or with the consent of the person.
Australian Law Reform Commission, Pathways to Justice, recommendation 5.1

[24] Standalone provision that requires bail authorities to consider any 'issues that arrive due to the person's Aboriginality', including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements in the *Bail Act*.

[25] Judicial Commission of NSW, Equality Before the Law Bench Book, at [2.3.2]. Version updated 16 April 2020.

reducing the rate of Aboriginal and Torres Strait Islander adults held in incarceration by 15 per cent by 2031.[26]

Recommendations:

1. **Amend section 20A of the Bail Act to require the bail authority, when making a decision to impose a bail condition, to record reasons in writing to identify what risk each of the bail conditions is addressing, and how the imposition of that condition will mitigate that risk.**

2. **Consider additional ways to increase compliance with section 20A of the Bail Act. This could include by amending section 20A(2) to require that the bail authority must consider the factors in s 20A(2)(a)-(f) in deciding whether to impose a bail condition, or providing additional training to bail authorities on the requirements of this section, which could include a particular focus on inappropriate curfews, place-restriction and non-association conditions.**

3. **Amend the Bail Act to specify a legislative definition of curfew conditions to include 'not to be in a public place' and to 'reside at a specific location'.**

4. **Amend the Bail Act to provide that bail authorities may only impose curfew conditions in exceptional circumstances and must provide written reasons for doing so.**

5. **Amend the Bail Act to require bail authorities to take into account public health considerations when making decisions regarding whether to grant bail, setting conditions and responding to breaches of bail.**

6. **Amend the Bail Act to expressly allow a person to nominate multiple places of residence in appropriate circumstances e.g. where the person travels between family members' or other residences. In the alternative, we would support this amendment being limited to Aboriginal and Torres Strait Islander people, and to children.**

7. **Consider including content on bail and Aboriginal and Torres Strait Islander people from the Equality Before the Law Bench Book, in the bail section of the Local Court Bench Book.**

8. **Judicial officers should undertake comprehensive Aboriginal cultural awareness training with a particular focus on the community they are working in to ensure they have knowledge of the local culture and community issues.**

9. **Amend the Bail Act to include a standalone provision that requires bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, ties to family and place, and cultural obligations.**

[26] National Agreement on Closing the Gap, July 2020, available at <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>

10. The NSW Government should work with relevant Aboriginal and Torres Strait Islander organisations to develop guidelines on the application of bail provisions requiring bail authorities to consider any issues that arise due to a person's Aboriginality, in collaboration with peak legal bodies.

Breach of bail conditions

Breaching a bail condition is not an offence.[27] Section 77 of the Bail Act enables police to take various actions to enforce bail conditions, including taking no action, issuing a warning, issuing an application notice requiring the person to appear before the court, issuing a court attendance notice if the failure to comply with the condition is an offence, applying to an authorised justice for a warrant to arrest the person, or arresting the person without a warrant and taking them before a court or authorised justice as soon as possible.

Section 77(3) sets out the matters to be considered by a police officer in deciding whether to take action and what action to take, including the relative seriousness or triviality of the failure or threatened failure, whether the person has a reasonable excuse, the personal attributes and circumstances of the person, to the extent known to the police officer, and whether an alternative course of action to arrest is appropriate in the circumstances.

We have observed that police often arrest people for minor or technical[28] breaches of bail, and in circumstances where there are other appropriate options besides arrest. This generally results in people spending time in custody, such as overnight, before being taken before the court. This often occurs in circumstances where the defendant has been charged with a relatively minor offence and is unlikely to be sentenced to imprisonment if convicted.

In some circumstances, compliance with bail conditions can actually place a person at risk. Nevertheless, police do not always exercise appropriate discretion in these circumstances. This is illustrated in Donna's case:

[27] Judicial Commission of NSW, Local Court Bench Book, [20-600] updated February 2020. Available at < https://www.judcom.nsw.gov.au/publications/benchbks/local/bail.html#p20-300>. See also *NT v R* [2010] NSWDC 348

[28] A technical breach is where the defendant did not commit another offence.

Case Study: Donna[29]

Legal Aid NSW received an inquiry from a worker at a support service whose client, Donna, was an Aboriginal woman whose bail condition required her to live at a particular address.

Donna was experiencing domestic violence at this address and spoke to police about her intention to live elsewhere.

The police officer she spoke to said she would be arrested if she breached her residence conditions.

Arrest for technical breach of bail is also contributing to the overrepresentation of Aboriginal and Torres Strait Islander people in custody. In 2018, 40 per cent of people arrested for a technical breach of bail were Aboriginal or Torres Strait Islander.[30]

We consider that police should exercise greater discretion in determining how to respond to a breach of bail and exercise the least restrictive option available, in reference to the bail risks and considerations in sections 17 and 18 of the Bail Act.

We recommend that the Bail Act is amended to codify the common law position that arrest for breach of bail is a last resort,[31] and to expressly state that police must exercise the least restrictive option available. In addition, we recommend that the Bail Act require that a police officer who takes any of the actions under 77(1)(c)-(f) provide reasons for doing so in writing to the court. This is consistent with the requirement to provide for reasons for bail decisions.[32] In the alternative, we would support an amendment that requires police to record reasons for arrest for breach of bail.

Bail compliance checks

Section 30 of the Bail Act allows the prosecution to apply for an order of the court to impose an enforcement condition, for the purpose of monitoring or enforcing compliance with another bail condition.

We are concerned by police practices regarding bail compliance checks, and in particular curfew compliance checks that are conducted by police in the absence of enforcement conditions. In the experience of our solicitors, many of our clients are subjected to unreasonably onerous and intrusive bail compliance checks, particularly regarding curfew conditions. This includes frequent curfew checks, including late at night, and with police

[29] All case studies in this submission have been de-identified.

[30] Parliament of New South Wales, *Budget Estimates 2019-2020 Supplementary Questions*, Portfolio Committee No. 5 – Legal Affairs, Attorney General and Prevention of Domestic Violence, 9 <https://www.parliament.nsw.gov.au/lcdocs/other/12609/Answers%20to%20supplementary%20questions%20on%20no_ral%20and%20Prevention%20of%20Domestic%20Violence%20-%20Speakman%20-%20received%2026%20September%202019.pdf>

[31] *Director of Public Prosecutions (NSW) v GW* [2018] NSWSC 50

[32] Bail Act, s 38.

sirens or loud banging that disturb other household members and neighbours. This experience is illustrated by the below case study.

Case Study: MC

MC was 19 years old and bailed to live with his mother. His elderly grandparents also lived in the home. His 96-year-old grandfather had advanced dementia and his mother found him difficult to settle at night.

Police attended the home frequently, especially in the hours 11pm-3am, and sometimes multiple times in one night. MC's mother expressed that the police's conduct placed enormous strain on the family at what was already a difficult time.

Ultimately, MC's mother decided she could not have MC in the home if the household was to be continually disturbed by the police and withdrew her support for bail. With no alternative address for bail, MC was remanded in custody.

We are also aware of instances where there has been non-compliance with the requirements of s 30, where enforcement conditions have been imposed by police, contrary to s 30(3)(a), which specifies that an enforcement condition can only be imposed by a court.

We also note that there is no consequence or remedy under s 30, for a bail compliance check that is conducted in breach of an enforcement condition, or without an enforcement condition.

We consider that such compliance checks are contrary to the principles set out in s 30, which requires enforcement conditions to be restricted to circumstances which are not unduly onerous,[33] that the condition must be reasonable and necessary and take into account the extent to which it may unreasonably affect others.[34]

We consider that the Bail Act should be amended to explicitly clarify that a police officer must not conduct a compliance check to enforce a curfew or residence condition unless an enforcement condition has been imposed by a court with respect to the residence or curfew condition.

Recommendations:

11. Amend section 77 of the Bail Act to:
- **d) Reflect the common law position that arrest is a measure of last resort, including for breach of bail,**
- **e) Require police to take the least restrictive option available in response to a breach of bail, and**
- **f) Require a police officer who takes any of the actions under 77(1)(c)-(f) to provide substantial reasons for doing so in writing to the court.**

[33] Bail Act, s 30(4((b).
[34] Bail Act, s 30(5).

12. **Amend the Bail Act to explicitly clarify that a police officer must not conduct a compliance check to enforce a curfew or residence condition unless an enforcement condition has been imposed by a court with respect to the residence or curfew condition.**

Other legislative amendments to improve the operation of the Bail Act

Legal Aid NSW solicitors have identified the need for several additional amendments to improve the operation of the *Bail Act*.

Show cause when subject to a warrant

The show cause requirement in section 16B of the Bail Act applies when a person is charged with a serious indictable offence committed while being subject to an arrest warrant (section 16B(1)(l)). This provision was inserted in December 2016. It has had the unexpected consequence of extending the show cause test to a person who fails to attend court for an underlying offence for which they are not subject to bail.

Given there may be a variety of sound reasons why an arrest warrant may be issued which do not give rise to any increased bail risk (such as where a defendant is too unwell to attend court), we suggest that the relevance of a warrant would preferably be considered as part of the court's assessment of bail concerns under section 18 of the Bail Act rather than as part of the show cause test.

Recommendation:

13. **Amend section 16B of the Bail Act to delete subsection 16B(1)(l) so that the show cause provisions do not apply to a person charged with a serious indictable offence committed while being subject to an arrest warrant.**

Prohibition on repeat bail applications in section 74 of the Bail Act

Legal Aid NSW is concerned that the prohibition on repeat bail applications in section 74 of the Bail Act is contributing to people spending longer times on remand, including in circumstances where they are unlikely to be sentenced to a term of imprisonment if convicted. In particular, we are concerned that the prohibition is unfairly limiting a person's access to the court. It acts as a deterrent to solicitors making bail applications quickly, which in turn is contributing to the increase in the short-term remand population in adult and juvenile correctional centres.

In our experience, the prohibition on repeat applications for bail has resulted in bail applications becoming longer and more complex. Lawyers are aware that this may be their client's only opportunity to seek bail in the Local Court, so feel obliged to address every bail consideration in detail, including the strength of the Crown case.

This exacerbates listing delays in the District Court, meaning an inmate may wait weeks for their bail application to be heard, only to be refused under section 74. As the following case study demonstrates, the barrier to making a further bail application can result in an extended period of remand for a person who is unlikely to receive a custodial penalty.

Case Study: Stephanie

Stephanie was charged with ongoing supply of prohibited drug. It was the first time she had been charged with an offence, and she was the full-time carer of a two year old child. She was refused bail on her first appearance (when she was not represented by Legal Aid NSW).

When the matter came to Legal Aid NSW, her solicitor reviewed the file and noted that while the offence was strictly indictable, it was unlikely that she would receive a full-time custodial sentence. However, a further bail application was precluded by section 74. Her solicitor contacted the Office of the Director of Public Prosecutions (ODPP), who now had carriage of the matter. The ODPP lawyer conceded that Stephanie was unlikely to receive a full-time gaol sentence. With his consent, the matter was relisted immediately, and the prosecution consented to bail.

Stephanie is now in a residential rehabilitation facility, which was easier to access while on bail rather than on remand. Without the cooperation of the ODPP she would have spent much longer waiting to be assessed for rehabilitation and for the hearing of the Supreme Court appeal.

We consider that section 74 of the Bail Act should be repealed. The courts already have discretion to refuse to hear frivolous or vexatious applications, and those that are 'without substance or have no reasonable prospect of success' (section 73). This aligns with the NSW Law Reform Commission's recommendation 19.1, noted that *"[i]t is by no means clear that the courts are in need of protection from what would otherwise be a burden of wasteful repeat applications*."[35]

Recommendation

14. Repeal section 74 of the Bail Act.

Supreme Court bail processes

The new Supreme Court Practice Note[36] and Bail Application commenced on 3 June 2019. In summary, applicants seeking review of a decision of the Local or District Court to refuse bail must now provide far more material in support of their application before it will be accepted for filing by the Registry. In the experience of Legal Aid NSW solicitors, this has resulted in a significant delay (of 4 – 5 weeks) between an inmate applying for aid and an appeal application being accepted by the Supreme Court Registry. Once filed however, the applications are generally listed more quickly than under the previous regime.

The jurisdiction has previously been seen as a readily available last resort for non-convicted accused persons who have been refused bail in the Courts below, regardless of their means and the seriousness of the allegations that they face. We would be concerned if the changed process has limited access to the Supreme Court to those

[35] New South Wales Law Reform Commission, *Bail*, (2012), 286.
[36] Supreme Court of NSW Practice Note SC CL 11 – Bail

inmates who chose to self-represent, who are refused legal aid, or who are in locations where there is no in-house Legal Aid NSW presence and where the inmate is reliant on a private practitioner to submit an application for legal aid (which now requires far greater detail than previously the case, as these matters were previously dealt with primarily on a duty basis).

The more onerous pre-filing requirements are likely to have a disproportionate impact on self-represented inmates who have limited literacy skills, mental health and cognitive impairments, of non-English speaking background and those without family or community support to assist them with gathering the materials needed to support an application. Further, prisoners could previously fax their application to the Supreme Court Bail Registry from jail, but the new Practice Note requires the application to be lodged online. Yet prisoners do not have ready access to computers and the internet. Their use of telephones is restricted and controlled, their postage can be monitored and they require their own funds for many purposes.

We suggest that the present review obtain data from the Supreme Court and/or BOCSAR in order to determine the impact of the changed Supreme Court procedures on unrepresented appellants.

Assessment for drug and/or alcohol residential rehabilitation

Paragraph 6.3.1 of the new Supreme Court Practice Note requires confirmation of the Applicant's accommodation in a rehabilitation facility before lodgement of the Bail Application. However, the Department of Corrective Services will not facilitate an assessment of a prisoner for residential rehabilitation (whether for drugs, alcohol, gambling etc) without an order of the Supreme Court for such an assessment to take place.

The previous Practice Note enabled the Supreme Court to order a Drug and Alcohol Report if a legal representative was of the view that such a report would assist their client's bail application. That provision has now been removed. There is no ability for any other Court to request such an assessment. The requirement that such accommodation be organised by the applicant, in custody without any assistance, prior to lodgement of the Bail Application, essentially removes this avenue from all but the most economically and socially advantaged applicants – who have the means and the support mechanisms in place to facilitate such assessments whilst in custody. These barriers to being assessed for residential rehabilitation have been heightened due to the limited number of centres accepting inmates during COVID-19.

Legal Aid NSW considers that the lack of practical supports to prisoners to facilitate their release on bail and to enable appropriate therapeutic supports to be provided as early as possible in the criminal justice process could be addressed through:

1. Enabling the Courts to order drug and alcohol report in appropriate cases.
2. Revising the current Corrective Services NSW policy with respect to alcohol and drug rehabilitation assessments reports.
3. Re-introducing dedicated alcohol and drug workers in prisons.

Recommendations:

15. **That the Department should, as part of this review of the Bail Act, obtain data from the Supreme Court and/or BOCSAR in order to determine the impact of the changed Supreme Court procedures on unrepresented appellants.**

16. **Enable the courts to order drug and alcohol report in appropriate cases.**

17. **Revise the current Corrective Services NSW policy with respect to alcohol and drug rehabilitation assessments reports**

18. **Re-introduce dedicated alcohol and drug workers in prisons.**

Bail Support Services

Bail support services assist people at risk of reoffending to comply with their bail conditions and seek to address underlying factors contributing to the person's offending, such as substance abuse, mental illness and/or disability. Legal Aid NSW considers that there is a strong need for improved bail support services and increased diversionary options.

We endorse the Australian Law Reform Commission's recommendation for more options to support Aboriginal and Torres Strait Islander people to be granted bail and to comply with bail conditions, including bail diversion options and bail supports.[37] In our view these supports could make a meaningful contribution towards achieving the National Agreement on Closing the Gap target of reducing the rate of Aboriginal and Torres Strait Islander adults held in incarceration by 15 per cent by 2031.[38]

We also support the Youth Diversion Inquiry's recommendation that the NSW Government increase the number of bail support services available to young people under 18 years across the State, with a particular focus on regional areas, and services for Aboriginal young people and those with complex needs and substantial offending histories.[39]

We acknowledge that there are some bail support programs operating in NSW, such as the Dubbo Aboriginal Bail Program. This program involves providing defendants with information sheets to assist them to understand their bail conditions and encouraging defendants to seek variations of their bail conditions rather than breaching the condition. In our experience this program has had limited impact on reducing the rate of bail breaches. We consider that more intensive support linking defendants to culturally appropriate services and changes to police bail decisions, particularly in remote areas, is required.

[37] *Pathways to Justice Report*, above n 10, 177.
[38] National Agreement on Closing the Gap, July 2020, available at <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>
[39] Committee on Law and Safety, Legislative Assembly of NSW, *Inquiry into the Adequacy of Youth Diversionary Programs in NSW*, (Report, 2/56, September 2018), recommendation 12. ('*Inquiry into Youth Diversion*')

Legal Aid NSW also acknowledges the work done by the NSW Government relevant agencies with Legal Aid NSW and ALS to develop a co-designed, coordinated and multiagency service solution that aims to improve supports and access to services for Aboriginal women in contact, or at-risk of contact, with the criminal justice system to divert them from custody. We strongly support increased interagency collaboration between the Department, NSW Police Force and other Stronger Communities Clusters Divisions (care and protections, housing, corrections, courts) to support stronger bail applications for Aboriginal women.

We consider that there is a need for greater access to support services and diversionary options to address a range of health and social needs, for both Aboriginal and Torres Strait Islander defendants and non-Indigenous defendants, adults and children, at all stages of the bail and remand process. This should include support to be granted police or court bail, support to comply with bail, and greater supports for those who are bail refused.

We are aware of effective bail support services and diversionary programs operating in other jurisdictions, such as the Court Integrated Services Program (**CISP**) run by the Magistrates' Court of Victoria, which has reduced reoffending rates by 20 per cent for participants.[40] Legal Aid NSW recommends that the NSW Government consider funding and implementing a similar program throughout NSW.

CISP is a therapeutic intervention that seeks to address the underlying reasons for offending.[41] Clients receive (on average) four months' individualised case management to support access to treatment and community support services (for example, drug and alcohol treatment, crisis accommodation, disability services and mental health services) to address their needs and reduce their risk of reoffending and risk to the community. With the support of a CISP case manager, clients are assisted to, and held accountable for, attending appointments with treatment and service providers. CISP case managers provide reports to magistrates with recommendations about a client's progress on the program, and the magistrate determines whether clients remain in the program. For a number of clients, engagement with CISP is a condition of their bail. By reducing the risk to the community, CISP facilitates some clients' release on bail, when they otherwise may have been held on remand.[42]

Since its inception in 2006, CISP has been extended to include the CISP Remand Outreach Program (which proactively identifies clients in custody who may be eligible for

[40] Victoria Department of Justice, *Court Integrated Services Program Executive Summary Evaluation Report*, (2010). There was also a 30.4% drop in offending frequency for CISP participants post-program involvement. Utilising the National Offence Index, a ranking of offence seriousness used by the Australian Bureau of Statistics, there was a demonstrable decrease in the seriousness of offending post-program involvement.

[41] CISP is available to people charged with a criminal offence on bail, summons or remand pending a bail hearing, with a history of offending or the current offences indicate a likelihood of future offending. Further eligibility for CISP includes mental or physical illness, intellectual disability or acquired brain injury, alcohol or other drug dependency, family violence issues and inadequate social, family or economic support that contributes to the frequency and severity of offending.

[42] Magistrates' Court of Victoria, Submission to the Royal Commission into Victoria's Mental Health System, July 2019, 14 & 31.

bail if appropriate supports are in place, and seeks to address barriers to receiving bail, such as mental health issues, homelessness, alcohol and/or other drug use) and CISP at the Bail and Remand Court (which involves CISP case managers undertaking client assessment with judicial approval, providing on-call advice to magistrates and judicial registrars on treatment options, system navigation and referral options for clients, and providing legal practitioners with advice on appropriate treatment options, information regarding current CISP clients' past and current program and service engagement and support for clients exiting custody such as the provision of material aid, Myki cards, identification of, and referral to accommodation services).

An independent benefit cost analysis of CISP in 2009 compared the program benefits of a reduced rate and length of imprisonment for sentences received upon completion of CISP, and a reduction in the recidivism rate, against the costs of running the program. It was found that for every dollar invested in CISP there were savings for the community of between $1.70 and $5.90.[43]

Our solicitors frequently represent clients who would benefit from diversionary options and support services, but for whom no services are provided or available. This is particularly critical for Aboriginal and Torres Strait Islander women, who are over-represented in the NSW custody and remand population. A recent ANROWS Report has examined the close links between imprisonment and domestic and family violence and sexual violence. The research found that these links are poorly understood, but are crucial in addressing cycles of violence/imprisonment, and providing support services to women who have experienced both violence and imprisonment.

For example, we are aware of targeted programs for Aboriginal and Torres Strait Islander women in contact with the criminal justice system operating in Victoria, such as the Koori Women's Place, which is a culturally-safe space where women facing the challenges of family violence can come together and feel supported, heard and understood, the Koori Women's Diversion Program, and the construction of 6 transitional housing units for Aboriginal women that will accommodate those at risk of homelessness when exiting prison.

There is a high and growing proportion of Aboriginal and Torres Strait Islander women in prison who are untried (on remand), and a large proportion of women prisoners are also incarcerated for parole or bail violations. We consider that it is critical that the NSW Government focuses on providing continuity of services, case management, pre-release planning and throughcare for these women, and that it is particularly critical that these services should be available to women on short sentences or on remand.[44]

[43] Price Waterhouse Coopers 2009, *Economic evaluation of the Court Integrated Services Program (CISP): final report on economic impacts of CISP*, p. iii, viewed 27 June 2019, <https://www.mcv.vic.gov.au/sites/default/files/2018-10/CISP%20economic%20evaluation.pdf>.

[44] Australia's National Research Organisation for Women's Safety, *Women's imprisonment and domestic, family, and sexual violence: Research synthesis* (2020), 4 <https://d2rn9gno7zhxqg.cloudfront.net/wp-content/uploads/2020/07/16102534/ANROWS-Imprisonment-DFV-Synthesis.1.pdf>.

Recommendation:

19. **Increase the availability of, and access to, bail support services to assist people to comply with their bail conditions and address the underlying causes of their offending, including culturally appropriate programs to support Aboriginal and Torres Strait Islander people, and programs specifically tailored for children and young people, and Aboriginal and Torres Strait Islander women.**

Bail issues concerning children and young people

As noted above, we consider that the Department's review of the Bail Act must include consideration of the recommendations for bail reform made by the NSW Legislative Assembly Law and Safety Committee Youth Diversion Inquiry,[45] including that:

- The NSW Government increase the number of bail support services available to young people under 18 years across the State, with a particular focus on regional areas, and services for Aboriginal young people and those with complex needs and substantial offending histories (recommendation 12).

- Officers of the NSW Police Force and Courts that hear juvenile criminal matters receive thorough training in the setting of bail conditions for young people under 18 years, to promote the diversion of young people wherever possible (recommendation 13).

- The NSW Government amend the Bail Act 2013 so that young people under 18 years, particularly young Aboriginal people, are able to nominate multiple addresses for the purpose of bail residence requirements, where appropriate (recommendation 14).

- Officers of the NSW Police Force receive thorough training concerning the policing of suspected bail breaches by young people under 18 years, to avoid unnecessary arrests and detention (recommendation 15).

- The NSW Government consider whether the Bail Act 2013 should be amended to specifically provide that police officers must have regard to a person's age in deciding what action to take for breach of bail (recommendation 16).[46]

We discuss these recommendations in greater detail below.

Consolidated bail provisions for children and young people

Legal Aid NSW considers that all bail provisions specific to children and young people should be consolidated and located separately to general bail provisions, either within a separate division of the Bail Act, or by moving these provisions to the *Children's (Criminal Proceedings) Act 1987* (NSW) (**CCP Act**). This would clarify the applicable provisions and

[45] NSW Government Response to the Report of the NSW Legislative Assembly Committee on Law and Safety, *Inquiry into the Adequacy of Youth Diversionary Programs in NSW*, 28 August 2019, 6.
[46] *Inquiry into Youth Diversion*, n 37 above, ix-x.

direct attention to the specific considerations relevant to the setting and enforcement of bail conditions for children and young people.

We recommend that consolidated bail provisions for children and young people should also contain a right to release for children aged 14 years and under in all circumstances. Alternatively, there should be a right of release for children aged 14 years and under, except for those offences for which there must be exceptional circumstances for bail under the Bail Act. For children aged 15 and over, the existing right to release provisions in section 21 of the Bail Act should continue to apply.

Legal Aid NSW also considers that legislative principles to guide the application of bail provisions to children and young people should be included in the Bail Act (or the CCP Act if the relevant provisions are moved). These principles should reflect Australia's obligations under the Convention on the Rights of the Child,[47] and could be adapted from principles in section 7 of the *Young Offenders Act 1997* (NSW) (**YO Act**) and section 6 of the CCP Act. For example, the principle in section 7(d) of the YO Act that '*criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child or his or her family or family group'* could be adapted as the principles that bail should not be used solely in order to provide assistance or services to a child or his or her family or family group. For example, this would assist in addressing situations where bail is used to impose welfare conditions, such as curfew conditions and conditions to 'obey all reasonable directions of parents and/or carers'. We would welcome the opportunity for further consultation on these recommendations.

Recommendations:

20. **Bail provisions specific to children and young people should be consolidated and separated, either within a separate division of the Bail Act, or moved to the *Children's (Criminal Proceedings) Act 1987* (NSW).**

21. **Introduce a right to release for children aged 14 years and under in all circumstances. Alternatively, there should be a right of release for children aged 14 years and under, except for those offences for which there must be exceptional circumstances for bail under the Bail Act.**

22. **Principles to guide the application of bail provisions to children and young people should be included in the Bail Act, based on the principles in the *Young Offenders Act 1997* (NSW) and the *Children's (Criminal Proceedings) Act 1987* (NSW).**

[47] *Convention on the Rights of the Child*, opened for signature 20 November 1989, E/CN.4/RES/1990/74 (entered into force 2 September 1990), such as article 37(b) - 'the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time', ('*Convention on the Rights of the Child*').

Appropriateness of bail conditions - young people

Legal Aid NSW is particularly concerned about onerous and unnecessary bail conditions for children and young people.

Our solicitors observe that police commonly impose bail conditions on young people that do not relate to the offence for which the young person is charged or appear to address a bail concern. For example, a curfew condition is commonly imposed on young people, even when the offence the young person is charged with occurred in the middle of the day. This is often imposed by police in the first instance, and it is then very challenging for the young person to get the condition changed by the court.

Inappropriate conditions can also include welfare-based conditions, for example, obeying the reasonable directions of parents or carers, which are frequently imposed on young people by police and courts. This criminalises non-criminal behaviour if the child does not comply.

In many instances bail conditions do not account for the young person's individual circumstances. For example, our solicitors report that many young people do not have stable home environments, and may be exposed to domestic violence and drug use. This can make curfew conditions difficult for the young person to comply with. For Aboriginal and Torres Strait Islander young people, the expanded notions of kinship means that there are often several relatives and households that are considered as family, and current bail practises by courts struggle to reflect this reality.

Legal Aid NSW's recommendation for a legislative definition of two types of curfew conditions, and that curfew conditions only be imposed in exceptional circumstances and with written reasons for doing so, would be particularly beneficial for children and young people, who are more commonly placed on curfews. As discussed above, we suggest a legislative definition of curfew conditions should include the conditions of 'not to be in a public place', which would account for children and young people who are staying at multiple addresses due to their family situation, and allow a child or young person to leave locations where they are subject to domestic and family violence or are at risk of harm, or to be at specific premises. The potential benefit of such reforms is evident from Rob's story:

Rob's story

Our client Rob was a 16 year old young person on bail, with residence/ curfew conditions requiring him to live at his mother's house, and not be absent from that address between 7pm – 7am unless in the company of his mother.

One night at around 11:30pm police observed Rob walking with another male, and not in the company of his mother. Rob told police there had been a domestic incident a few days earlier and he didn't want to go home. Police arrested Rob.

We also note our recommendation above to permit Aboriginal and Torres Strait Islander people to nominate multiple places of residence where the person often travels between family members' residences. In addition, in line with the Youth Diversion Inquiry's recommendation, we recommend that young people under 18 years be able to nominate multiple specific addresses for the purpose of bail residence requirements, where appropriate.

Bail conditions imposing geographical restrictions can also be problematic when they do not account for the child or young people's need to access services. For example, geographical restriction such as not entering shopping centres/areas are frequently imposed on our clients. However, these shopping centres and areas often include services that the child or young person needs to access, such as Centrelink or medical services. In addition, bail conditions requiring the child or young person to not go within a specified distance of a location are often imposed without an attached map, making it difficult for the child or young person to understand the parameters of the restricted area.

Bail forms and conditions can be difficult to understand for many children and young people, especially younger children and/or children with a cognitive impairment or communication difficulties. Legal Aid NSW considers that specific and consistent bail forms should be developed for children and young people, using plain language, clear formatting and maps to show geographic restrictions.

We also recommend that the Bail Act include a specific legislative requirement for bail authorities to consider the child's ability to comprehend bail and bail conditions, not as an impediment to granting bail, but to direct bail authorities' attention to imposing conditions that are not impractical or overly onerous.

Case Study: Adele

Adele is a 13-year-old girl living in a residential out of home care (OOHC) service in regional NSW. She has cognitive impairments and a history of trauma. She is of slight build and about 5 feet tall. Adele was accused of standing over a care worker with a light bulb and therefore intimidating her. Adele smashed the lightbulb and then used the house phone without permission to call the police multiple times. She has a prior matter of intimidation for which she received a caution, was on bail for another matter of intimidation, and was a respondent to an Apprehended Violence Order (AVO) for

the same carer's protection. All of these matters occurred in the context of her residential care home.

Police attended the residence and arrested Adele for a range of offences, including intimidation, malicious damage to property, breach AVO, and breach bail. She was refused bail by the police and taken into custody. Adele was later granted bail by the Children's Court with the condition that she "obey all reasonable directions of her carers".

A Legal Aid NSW solicitor and her carers all expressed concern at Adele's ability to adhere to this bail condition, given her cognitive disabilities, immaturity, complex needs and behaviours linked to her trauma history. Approximately one week later, Adele left the residence after being directed not to by her carers. Police were called and Adele was again arrested and refused bail by the police for not complying with her bail condition. Her bail was continued the next day by the Children's Court.

Recommendations:

23. **Amend the Bail Act to require bail authorities to consider the age of a child or young person when setting bail conditions.**

24. **Police and Courts that hear juvenile criminal matters should receive thorough training in the setting of bail conditions for young people under 18 years, to promote the diversion of young people wherever possible.[48]**

25. **Young people under 18 years, particularly young Aboriginal and Torres Strait Islander people, should be able to nominate multiple specific addresses for the purpose of bail residence requirements, where appropriate.**

26. **Develop plain language bail forms specifically designed for children and young people.**

27. **Include specific legislative consideration of the child's ability to comprehend bail and bail conditions.**

Breach of bail – young people

Inappropriate and onerous bail conditions and lack of understanding often result in young people being taken into custody for breach of those conditions. This leads many children to spend several short periods on remand,[49] most often for a breach of bail conditions rather than the commission of a new offence. Children who breach bail conditions are generally placed in custody for 24-48 hours before being released by courts on bail. However, during the course of their criminal proceedings, children may go in and out of custody for several breaches of bail and, cumulatively, spend significant periods of time in custody.

[48] This was recommended by the *Inquiry into Youth Diversion*, above n 37, (recommendation 13)
[49] This issue was recognised by the *Their Futures Matter – Short Term Remand project*.

This is generally reflected in the Department's statistics: in 2019-20, children charged with a criminal offence who were unable to meet their bail conditions were remanded in custody on 101 occasions.[50] From April 2015 to March 2020, there was a five year trend increase of 3.3% per year in the number of juveniles proceeded against for breach of bail conditions.[51]

A study of matters in the Parramatta Children's Court in 2009 and 2010 found that the majority of remand episodes arose as result of breach of bail, and often of welfare-based conditions. It stated:

> Children…were predominately remanded after they failed to comply with a curfew, were not in the company of a parent or an appropriate adult, had associated with a co-offender, failed to report to police, entered an exclusion zone, failed to reside as directed, failed to follow the directions of a parent or guardian or consumed alcohol. Children under 14 years of age were particularly affected by bail breaches:… it is likely that this is due to the greater number of conditions imposed on them, the greater surveillance and reporting of breaches by police and carers and the welfare-based nature of conditions which essentially criminalised non-criminal behaviour.[52]

Other research has similarly found that children are most often remanded for a breach of bail conditions rather than the commission of a new offence.[53] For the period April 2015 to March 2020, there was an annual average of 23.6% of matters in the Children's Court where an established breach of bail involved a further offence.[54] During the period April 2019 to March 2020, about one third (32.8%) of established breach matters in the Children's Court that resulted in bail refusal, involved the commission of a further offence. This suggests that around two thirds of established breaches resulting in bail refusal did not have a further offence recoded as a condition breach.[55]

In 2018-19, 67% of NSW children aged 10-13 years old who were in custody on their sentence date were sentenced to a penalty other than custody.[56] In this context, we note the findings of the Y Foundation, which stated:[57]

---

[50] Data provided by Youth Justice, (4 July 2020).

[51] BOCSAR Recorded Crime Statistics April 2015 to March 2020, *Number and trend of persons of interest under 18 years of age that were proceeded against for breach of bail conditions*, (10 August 2020).

[52] Katherine McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system* (2015), PHD Thesis, University of New South Wales, Sydney, 135.

[53] McFarlane (n 50), at 135-136, referring to Wong, K., Bailey, B., and Kenny, D. T, *Bail Me Out, NSW Young Offenders and Bail* (2009), and Vignaendra, S., Moffat, S., Weatherburn, D., and Heller, E. 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime', BOCSAR Crime and Justice Bulletin No. 128 (2009).

[54] BOCSAR, NSW Criminal Court Statistics April 2015-March 2020, *Number of breach of bail established in Children's Court where at least one breach condition was recorded by whether breach of bail involved a further offence*, (11 August 2020). Note – as the recording of the conditions(s) breaches is not mandatory in JusticeLink, the recorded data may not capture all established breach of bail involving a further offence.

[55] Ibid.

[56] Source: NSW Bureau of Crime Statistics and Research (2019). 18 of the 27 children aged 10-13 recorded as having been in custody between April 2018 and March 2019 were sentenced otherwise than to control.

[57] Y Foundation, *Policy Position Paper section 28: Criminalising the Young and Homeless*, May 2019, 13, < http://yfoundations.org.au/wp-content/uploads/2019/05/Yfoundations-Bail-Policy-Position-Paper.pdf> ('*Y Foundation Section 28 Paper*').

> We know children and young people who come into contact with JJ [Juvenile Justice] are already among the most vulnerable in our society.[58] And the time spent on remand has been identified as 'the most difficult and unstable prison experience' with a corresponding range of negative outcomes impacting children and young people, including a decrease in wellbeing, disengagement from education and employment, fewer positive relationships and social exclusion, and increased reoffending.[59]

The following examples illustrate our concerns.

Young person arrested for breaching curfew to avoid home environment

Our client was a 16 year old young person on bail, with residence/ curfew conditions requiring him to live at his mother's house, and not be absent from that address between 7pm – 7am unless in the company of his mother.

One night at around 11:30pm police observed our client walking with another male, and not in the company of his mother. Our client told police there had been a domestic incident a few days earlier and he didn't want to go home. Police arrested our client.

Young person arrested for breaching curfew by five minutes

Our client was a 14-year-old Aboriginal boy, on bail for an offence involving stealing a small sum of money to buy fast food. He was placed on bail conditions that included a curfew requiring him to be home between 7pm and 7am.

Police conducted three bail checks over four days. On one occasion he was thirty minutes late, on the next occasion police woke him and his mother at 1am to confirm that he was home, and on the third occasion he returned home thirty minutes after his curfew. Police arrested this young person, who was held in custody on remand for 17 hours before being released by the Children's Court.

Legal Aid NSW considers that the incarceration of children and young people in such cases could be avoided in many instances by police exercising less restrictive options to respond to breach of bail. Police responses should also take into account the young person's circumstances. For example, our solicitors report that there are often reasons why children may leave home after curfew hours, include exposure to domestic and family violence and drug use. We support the Youth Diversion Inquiry's recommendation that Police receive thorough training concerning the policing of suspected bail breaches by young people under 18 years, to avoid unnecessary arrests and detention.[60]

---

[58] Pia van de Zandt and Tristan Webb, "High Service Users at Legal Aid NSW: Profiling the 50 Highest Users of Legal Aid Services' (Research Report. Legal Aid NSW. June 201 3-4 quoted in Y Foundation, Section 28, 13.

[59] Sinead Freeman and Mairead Seymour, "Just Waiting: The Nature and Effect of Uncertainty on Young People In remand Custody in Ireland" 10(2) Sage Journal 125 quoted in Y Foundation, Section 28, 13.

[60] As recommended by the *Inquiry into Youth Diversion*, above n 37, recommendation 15.

As discussed above, we recommend that the Bail Act be amended to reflect the common law position that arrest should be a measure of last resort, including for breach of bail, to require police to exercise the least restrictive option available and to require a police officer who takes any of the actions under section 77(1)(c)-(f) to provide reasons for doing so in writing to the court.

In addition, we suggest that the Bail Act is amended to require judicial officers to give particular attention to children when considering what is the least restrictive measure and considering detention as a last resort. This would reflect Australia's obligations under the Convention on the Rights of the Child that the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.[61]

We also support the Youth Diversion Inquiry's recommendation that consideration be given to whether the Bail Act should be amended to specifically provide that police officers must have regard to a person's age in deciding what action to take for breach of bail.[62]

Recommendations:

28. **Amend the Bail Act to require judicial officers to give particular attention to children when considering what is the least restrictive measure and considering detention as a last resort.**
29. **Police should receive thorough training concerning the policing of suspected bail breaches by young people under 18 years, to avoid unnecessary arrests and detention.**

30. **Consider whether the Bail Act should be amended to specifically provide that police officers must have regard to a person's age in deciding what action to take for breach of bail.**

Repeat bail applications and child defendants

Legal Aid NSW considers that children and young people should be entirely exempt from the prohibition on repeat applications, as recommended by the NSW Law Reform Commission (recommendation 19.1). The courts would retain their discretion to refuse to hear frivolous or vexatious applications.

We agree with the NSW LRC's description of the special situation of young people when applying for bail. They have usually committed minor or property offences. They often do not fully comprehend the criminal justice system and their own situation. They may take time to develop trust and confidence in their lawyer. As the NSW LRC stated:

> This may compromise the young person's ability to provide cogent instructions and to participate in the court process in an effective way. These factors may diminish over time, but would not necessarily resolve completely after one or two applications for release.

[61] *Convention on the Rights of the Child*, above n 45, article 37(b).
[62] As recommended by the *Inquiry into Youth Diversion*, above n 37, recommendation 16.

> Apart from these practical considerations, the concern of the state for the welfare of young people is fundamental. A heavy burden accordingly rests on those who argue for a statutory provision which might prevent a case for release being put on behalf of a young person, especially in circumstances where the young person is entitled to the presumption of innocence.[63]

Recommendation:

31. **Amend the Bail Act to exempt children and young people from the prohibition on repeat applications.**

Bail stays – children and young people

Section 40 of the Bail Act provides for detention to continue in circumstances where bail decisions are made on first appearance, while the prosecution considers and/or prepares a detention application.

Our criminal practitioners have noticed an increase in police applications for bail stays in relation to children, particularly in matters involving sex offences. In many instances, bail stays seem to be made as a matter of course with no regard for the seriousness of the allegations, for example, in circumstances involving consensual underage sex. In some cases, stays are made by police but not pursued in the Supreme Court; the stay is withdrawn, but only after the child has spent additional days in custody.

Detaining vulnerable children for an additional 3-6 days (including weekends/public holidays) is very concerning, and in some instances, police do not appear to be exercising their discretion in relation to bail stays appropriately. For these reasons, we recommend that bail stays not apply to children.

Recommendation:

32. **Amend section 40 of the Bail Act so that bail stays do not apply to children.**

Bail and accommodation

Legal Aid NSW solicitors have observed that some young people charged with criminal offences are remanded in custody because of a lack of suitable accommodation. This accords with research by the Y Foundation, which found that 260 young people were unable to be released from custody because they were homeless between January 2018 and January 2019.[64]

Section 28 of the Bail Act allows a court, in granting bail, to impose a requirement that arrangements be made for the accommodation of the accused person before he or she is released on bail (an accommodation requirement). Such a requirement can only be made in certain circumstances, including where the accused person is a child, and to enable the accused person to be admitted to a residential rehabilitation facility.

[63] NSW Law Reform Commission, *Bail*, Report 133, (2012), [19.50]-[19.51].
[64] *Y Foundation Section 28,* above n 55, 6.

The court responsible for hearing bail proceedings must ensure that, if an accommodation requirement is imposed in respect of a child, the matter is re-listed for further hearing at least every two days until the accommodation requirement is complied with.

We support the intention and policy behind this provision, which is to address the "recurring difficulty" faced by the Children's Court "when dealing with children whom it wishes to release to bail but who do not have suitable accommodation available".[65] However, we consider that this provision has not been working as intended.

We note that despite the requirement to report back to the Court every two days, there is no obligation on the Department of Communities and Justice to secure the accommodation needed for the child to be released on bail. In our experience, there are limited refuge spots available, and it can be particularly difficult for children and young people granted bail but considered a risk to other residents, such as children and young people charged with sexual offences.

In the case studies below, the Court indicated that it was willing to grant bail, but vulnerable young people were detained because suitable accommodation was not available.

Mina's story

Legal Aid NSW assisted Mina, a 12 year old girl, who came to a regional town in NSW with her family from Iraq as a refugee. She has significant trauma-related issues after witnessing family members being murdered by Islamic State, and being sexually abused while in a refugee camp in Turkey.

She assaulted her parents a number of times, and eventually they said she could not stay at home. She had no other family or community network in the area, and has been in and out of juvenile detention because of a lack of suitable accommodation.

George's story

Legal Aid NSW assisted George, a 16-year-old client with no prior convictions who was charged with sexual offences. George was granted bail by the Children's Court, but kept in custody for two weeks as no accommodation could be found for him. The difficulty in finding George accommodation was compounded by the nature of his charges, as some refuges do not accept people with charges for sexual offences because of the risk to other residents.

George was only released after his father, who lived interstate, funded a hostel room for him.

The Y Foundation found that:

[65] The Hon Greg Smith, Second Reading Speech for the Bail Bill 2013, available at: < https://www.parliament.nsw.gov.au/bill/files/420/2R%20BAIL%20BILL%202013.pdf>

> The impact of homelessness on the remand of children and young people has remained largely unchanged, despite the introduction of section 28 as a means of reducing the time spent on remand by children and young people experiencing homelessness. In practice, while section 28 has provided some benefit, the legislation does not go far enough for it to have the intended impact: there is no corresponding obligation within the Bail Act for any government agency in NSW to find the child or young person accommodation. A magistrate has no power to expedite the process or to enforce responsibility for finding housing on any person or agency and there is also no limit on the number of times a matter can be relisted. This means that a matter can be relisted every two days for days, weeks, or even months, at a time.[66]

This accords with Legal Aid NSW's experience and observations. As the Y Foundation stated *"[a] key problem with the residential condition set out under section 28 is that children and young people are impacted by a condition that is beyond their control to meet on their own*."[67] The Y Foundation's research found that impacts of section 28 on homeless children and young people includes the inherent injustice of being held on remand for reasons unrelated to the child or young person's offending, and the lifelong negative impacts of being held in custody on the child or young person's wellbeing and future opportunities.[68]

Detention of children in custody because they are homeless or otherwise without suitable accommodation breaches well-established international human rights laws and principles, including the presumption of innocence, the right not to be arbitrarily detained, proportionate sentencing, detention as a last resort for juveniles, and the entitlement of children to special protection.[69] However, detention in these circumstances is also of concern because it can lead to further criminalisation of these young people, and increase their risk of offending. As McFarlane has observed, "[b*]eing in custody*, *even for short periods of time, increases the likelihood of criminal behaviour*".[70]

We also have concerns about the way in which section 28 has been applied, particularly in rural areas and by judicial officers who are unfamiliar with the intention behind this section. For example, in the experience of Legal Aid NSW solicitors some magistrates record 'bail refused' when a young person has been granted bail but is not released due to a lack of accommodation.

We suggest ongoing judicial education to promote a better understanding of this provision, including that Magistrates should be prepared to grant bail subject to section 28, where they otherwise would have granted bail if the child or young person had appropriate accommodation. In matters where bail has been granted subject to an accommodation requirement, the decision should not be recorded as 'bail refused' if the child or young

---

[66] *Y Foundation Section 28 Paper*, above n 55, 15.
[67] *Y Foundation Section 28 Paper*, above n 55, 9.
[68] *Y Foundation Section 28 Paper*, above n 55, 9.
[69] See Katherine Boyle, "'The More Things Change …': Bail and the Incarceration of Homeless Young People", *Current Issues in Criminal Justice*, Vol 21 No 1 (July 2009) 59 at 68-69, referring to the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, and the Convention on the Rights of the Child and its associated rules and guidelines, such as the Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules') and the Guidelines for the Prevention of Juvenile Delinquency ('the Riyadh Guidelines').
[70] Dr Katherine McFarlane, *NSW bail laws mean well but are landing homeless kids in prison*, (19 December 2016), available at <http://news.csu.edu.au/features/police-and-crime/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison?p7DRPX4lRewTopfx.99>

person is kept in custody. Rather, such decisions could be recorded as 'bail granted – section 28, adjourned for two days, young person excused if released'.

David's story

A Legal Aid NSW solicitor represented a young person, David, who was granted bail with an accommodation requirement under section 28 by a Children's Court magistrate. When the young person was brought back before a Local Court magistrate two days later, as required by section 28(4), the Local Court Magistrate marked the papers 'bail refused'.

Prioritising accommodation for children where bail is granted

The current *Joint Operational Practice Guidelines to accompany the Memorandum of Understanding Between Department of Family and Community Services and Department of Justice, Juvenile Justice About Children or young people who are shared clients of Family and Community Services and Juvenile Justice* (2014) sets out the requirements for relevant NSW government agencies under the Bail Act to report to the court, when children/young people with bail granted but not entered, due to the lack of suitable accommodation or other conduct requirements.[71]

However, in the experience of Legal Aid NSW solicitors, children who are in custody and have been granted bail are not necessarily prioritised by the Department of Communities and Justice for accommodation.

Legal Aid NSW strongly supports the recommendations made by the Y Foundation, on the need for Youth Justice, the Department of Communities and Justice, specialist homelessness services (SHS) and out of home care (OOHC) providers to collaborate to produce a memorandum of understanding (MoU) to clarify the role that each should take when supporting a child or young person out of custody. This MoU must be aligned with other relevant policy instruments, be made publicly available and relevant parties should be made aware of and receive training about the MoU.

Recommendations:

33. **Amend the Bail Act to require the relevant government agency to provide information to the court about the action being taken to secure suitable accommodation for an accused person (under section 28(5)).**

34. **Amend section 28(4) of the Bail Act, which requires that the matter be relisted for hearing every two days, to clarify that this includes weekends and public holidays.**

[71] *Joint Operational Practice Guidelines to accompany the Memorandum of Understanding Between Department of Family and Community Services and Department of Justice, Juvenile Justice About Children or young people who are shared clients of Family and Community Services and Juvenile Justice*, (2014) < http://www.community.nsw.gov.au/__data/assets/pdf_file/0007/319921/endorsed_practice_guidelines.pdf>

35. **Judicial officers should be provided with additional education and guidance on the operation and requirements of s 28 of the Bail Act, including how to record decisions to grant bail subject to an accommodation requirement. For example, this could be done through a Children's Court Practice Note to legal professionals and magistrates to ensure consistency and to meet the objectives of section 28.**

36. **That Youth Justice, the Department of Communities and Justice, specialist homelessness services and out of home care providers collaborate to produce a memorandum of understanding (MoU) to clarify the role that each should take when supporting a child or young person out of custody. This MoU must be aligned with other relevant policy instruments, be made publicly available and relevant parties should be made aware of and receive training about the MoU.**

Legal Aid NSW also supports the additional recommendations made by the Y Foundation, regarding the operation of the Bail Act:

37. **The Bail Act is amended to restrict the number of times a matter can be relisted before a child or young person must be released. Every effort should be made to secure appropriate accommodation on the day the Court grants bail. Any additional time should not be treated as a deadline but rather, a safety net.**

38. **The Bail Act is amended to give magistrates the authority to direct any relevant government agency be responsible for finding accommodation based on the individual circumstances of a child or young person's case. Particular urgency needs to be considered for young people with special vulnerabilities or needs, including age or identifying as Aboriginal or Torres Strait Islander.**

39. **That Youth Justice to partner with specialist homelessness services across NSW to fund bail beds and joint support program (JSP) beds specifically for children and young people leaving detention.**

40. **Disaggregated data on section 28 remanded children and young people should be collected and published by the Children's Court, Youth Justice and the Department of Communities and Justice. This should include information on the number of children and young people in OOHC who are remanded on section 28 orders, and the length of time that children and young people are remanded in custody due to a lack of suitable accommodation.**