North Australian Aboriginal Justice Agency Submission to the

Review of the Bail Act (NT)

March 2013

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Introduction

The North Australian Aboriginal Justice Agency welcomes the Governments Review of the *Bail Act* (NT). This review provides an important opportunity to consider the operation of the *Bail Act* (NT) as a whole as well as the financial and social impact of the Act in its current form.

The Bail Act is used on a daily basis by police and magistrates. It is a working document that should be simple and logical to apply. When it was first introduced, the Bail Act was a relatively accessible and straight forward piece of legislation. Successive amendments to the Bail Act have altered this. This is particularly evident in relation to the presumptions. For over a decade the Bail Act operated without any presumptions against bail. The Bail Act now sets out a raft of offences and circumstances that attract a presumption against bail. These presumptions have significantly shifted the balance between the interests of the person and the welfare and protection of the community, and curtailed the courts discretion.

These and other changes to the Bail Act have also had a significant impact on remand and imprisonment rates in the Northern Territory. The following trends are concerning:

- The imprisonment rate in the Northern Territory rose 72% between 2002 and 2012. This is the largest percentage increase in the country.[1]
- In 2012, 24.7% of prisoners were unsentenced.[2]
- The number of young people in detention has increased from an average daily number of 18 in 2005-2006 to 39 in 2010-2011. In 2013, the average daily number in custody is 59.[3]
- On 31 January 2013, 65 young people were in custody. Of these, 62 identified as Aboriginal or Torres Straight Islander and 42 were being held on remand.[4]
- On 14 March 2013, there were 57 young people in detention in the Northern Territory and of these, 33 were being held on remand.[5]

There is a significant financial and social cost associated with these rising imprisonment and remand rates. The cost of detaining a young person in 2009-2010 was $592 a day: $216,080 per year.[6] Further, the Council of Australian Government figures show that the

[1] Australian Bureau of Statistics, Prisoners in Australia 2012 (2012), p. 27. Retrieved from: http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/ADB317600AB68902CA257ACB00136DC0/$File/45170_2012.pdf

[2] Australian Bureau of Statistics, Prisoners in Australia 2012 (2012), p. 32. Retrieved from: http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/ADB317600AB68902CA257ACB00136DC0/$File/45170_2012.pdf

[3] M Anderson, Executive Director of the Youth Justice Division, Northern Territory Government, *Address at the 'Youth Boot Camps' Consultation*, 25 February 2012, Darwin.

[4] M Anderson, Executive Director of the Youth Justice Division, Northern Territory Government, *Address at the 'Youth Boot Camps' Consultation*, 25 February 2012, Darwin.

[5] Email correspondence from Don Dale case management unit, to NAAJA Advocacy Solicitor

[6] Northern Territory Government, *Review of the Northern Territory Youth Justice System* (2011), p. v. Retrieved from: http://www.territorystories.nt.gov.au/handle/10070/241809,

estimated annual average cost per per adult prisoner per day in 20012-2013 is $315 per day: almost $115,000 per year.[7]

The Commissioner of Correctional Services recently announced that on current projections, the new Darwin prison will be 83 beds short when it opens its doors.[8]

Less attention tends to be given to the social impact of remand. Incarceration removes a person from their ordinary life and takes away their liberty. As a result, remandees can have their education interrupted, lose their job and even their house. The impact of incarceration can also put significant strain on a person's family and financial situation. Incarceration carries with it a stigma that can impact on a person's life well after they are released from custody.

In this submission we outline NAAJA's response to the questions contained in the letter from the Attorney General dated 21 January 2003, and take the opportunity to outline further areas for reform of the Bail Act. We also attach the recommendations regarding bail that NAAJA made to the Review of the Northern Territory Youth Justice System in July 2011 (Attachment A).

This submission draws heavily on the research and findings of the NSW Law Reform Commission Report on Bail which was released in April 2012. The review was lead by the Hon Hal Sperling QC and involved widespread consultation with a large number of stakeholders. The report brings together a significant amount of research on the issue of bail and remand. The NSW Government has responded to this report and indicated that it will adopt many of the key recommendations of this review. The terms of reference for the NSW Review were considerably broader than the questions posed by the Government in relation to the *Bail Act* (NT). We encourage the Government to take a broad view of the review process in the Northern Territory.

We would welcome the opportunity to further contribute to this review process and provide comment on any draft bill developed by the Government.

[7] Australian National Council on Drugs, *An economic analysis for Aboriginal and Torres Strait Islander offenders: prison vs residential treatment* (2012) viii.

[8] K Middlebrook, Commissioner of the NT Department of Correctional Services, *Address at the 'Youth Boot Camps' Consultation*, 25 February 2012, Darwin.

Summary of Recommendations

The offence of breaching bail and failure to appear

Recommendation 1: Section 37B of the *Bail Act* (NT) should be repealed. The offence of failing to appear in court should not be prescribed in its place.

Recommendation 2: Section 38 of the bail Act should be amended to set out the range of options available to police upon detecting a breach of bail and s 38(2A) should be repealed. The amended section should provide that:

a) If a police officer believes, on reasonable grounds, that a person is failing, has failed or is about to fail to comply with a conduct direction, the police officer may:
b) Take no action
c) Issue a warning
d) Require the person to attend court by notice without arresting the person, or
e) Arrest the person and take them as soon as practicable before a court
f) That, in considering what course of action to take, the police officer must have regard to:
    (i) The relative seriousness or triviality of the suspected failure (included threatened failure)
    (ii) Whether the person has reasonable excuse for the failure
    (iii) That arrest is a last resort
    (iv) Insofar as they are apparent to or known by the officer, the person's age and any cognitive or mental health impairment
g) That, if the person is arrested, the officer may afterwards discontinue the arrest
h) That, upon being satisfied that the person has failed, or was about to fail to comply with a conduct direction, a court may re determine whether to release or detain the person and whether to impose a condition or a conduct direction.

Presumptions

Recommendation 3: The current scheme of presumptions contained in section 7A and 8 the Bail Act should be replaced with a uniform presumption in favour of bail. The limitation to grant bail contained in s23A of the Bail Act should be retained.

Young people and bail

Recommendation 4: A provision should be inserted in the existing Bail Act or a new 'Youth Bail Act' which provides that, in making a decision in relation to a young person under the age of 18 that the following criteria must be taken into account, in addition to those criteria set out in s 24 of the Act:

a) That young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them,
b) Family relationships between a young person and members of his or her family should be preserved and strengthened wherever possible,
c) The education or employment of a young person should proceed without interruption wherever possible,
d) A young person's sense of racial, ethnic or cultural identity should be acknowledged and a young person should be able to maintain their racial, ethnic or cultural identity,
e) The detention or imprisonment of a young person is to be used only as a last resort, only if there is no appropriate alternative and only for the shortest appropriate period of time,
f) Conditions imposed on young people must be limited to those that are necessary and proportionate to an objective consistent with this Act and comply with s28 (*see proposed amendment to s28 in Recommendation 5)*
g) In imposing any conditions upon a young person, the court must take into account the young person's ability to understand and to comply with those conditions
h) The age and maturity of the youth, including their capacity for complex decision making, planning and the inhibition of impulsive behaviours.

Other comments

Bail conditions

Recommendation 5: Section 28 of the Bail Act should be repealed and replaced with a provision which states that an authorised member or court must:

a) Not impose a condition unless they are of the opinion that, without such a condition, the person should be refused bail having regard to the considerations and rules applicable to a bail determination;

b) Consider whether the person has family, community or other support available to assist the person in complying with the condition;
c) Not impose a condition that is more onerous or more restrictive on the person's daily life than is necessary having regard to the considerations and rules applicable to a decision whether to release or detain;
d) Not impose a condition unless satisfied that compliance is reasonably practicable;
e) Not impose a financial condition concerning the forfeiture of money, with or without security, in relation to a young person under 18 years, except if charged with a serious indictable offence;
f) Not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to an adult unless satisfied that:
    (i) There would otherwise be a likelihood of the person absconding or being unlikely to appear on a future occasion; and
    (ii) Payment of the sum involved is or likely to be within the means of the person or people who may be liable to pay that sum;
g) Not impose a condition for the purpose of promoting the welfare of the person unless it is otherwise justified having regard to the consideration set out in the Act.

Specific considerations for a person with a cognitive or mental health impairment

Recommendation 6: The Bail Act should provide that, in making a bail determination in relation to a person with a cognitive or mental health impairment the authorised member or court must take into account (in addition to any other requirements):

(a) the person's ability to understand and comply with conditions,
(b) the person's need to access treatment or support in the community,
(c) the person's need to undergo assessment to determine eligibility for treatment or support,
(d) any additional impact of imprisonment on the person as a result of their cognitive or mental health impairment,
(e) any report tendered on behalf of a defendant in relation to the person's cognitive or mental health impairment,
(f) that the absence of such a report does not raise an inference adverse to the person or a ground for adjourning the proceedings unless on the application or of with the consent of the person.

Specific considerations for Aboriginal and Torres Strait Islander people

Recommendation 7: That the Act be amended to provide that, in making a decision in relation to an Aboriginal person or Torres Strait Islander, the authorised officer or court must take into account (in addition to any other requirements):

a) any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture or heritage, which may include:
b) connections with and obligations to extended family
c) traditional ties to place
d) mobile and flexible living arrangements
e) any other relevant cultural issues or obligation

Implementation, Monitoring and review

Recommendation 8: Any amendments made to the Bail Act should be reviewed within a specified period of time and a report on the outcome of the review should be tabled in parliament.

Data collection

Recommendation 9: The Government should establish a process to improve the collection and public reporting of data required for an effective review of any amendments made to the Bail Act and legal policy more broadly.

Response to the Governments Questions

Question (a)

Omitting section 37B of the Bail Act that was introduced in March 2011 by the former Government. If such action was to be taken, should an offence of failing to appear in court to answer bail be prescribed in its place?

Response

Section 37B of the *Bail Act* should be repealed. The provision has not achieved its intended policy objectives. An offence of failing to appear at court should not be prescribed in its place.

Policy objectives and offending rates

The former Government introduced s37B of the *Bail Act* (NT) in response to 'concerns raised by police about the increase in juvenile offending in Alice Springs and their frustrations with the limitations of the Bail Act when trying to enforce bail conditions'.[9] The second reading speech introducing s37B provides that:[10]

> The government is not so naïve as to think this legislation is a 'cure all' which will put an end to repeated breaches of bail. Courts will still be able to grant bail; however, introducing criminal sanctions for breach of bail is an important tool in combating offending and making our streets safer.

The introduction of this offence has not 'made our streets safer' or had any meaningful impact on offending rates. The most recent national recorded crime statistics for 2011-2012 indicate a slight decrease in youth offending rates across all jurisdictions except Victoria. However, the ABS Recorded Crime Statistics further provide that 'Tasmania and the Northern Territory have consistently had the highest youth offender rates over the last four years.'[11]

The last publically available Northern Territory statistics regarding youth offending relate to the period between 2006 and 2011. However, on 22 February 2013, at the Darwin Boot Camps Consultation, the Department of Correctional Services indicated that the number of young people in detention had increased dramatically since 2011 and the profile of youth offending has shifted significantly since 2010-11.[12] The information outlined by the Department of Correctional Services at the consultation indicates that youth offending in the Northern Territory in 2013 is characterised by more serious offending.

In 2010-2011, the most common offence categories were theft, traffic and vehicle offences and property damage. A Department of Correctional Services representative stated at the

[9] Northern Territory, *Parliamentary Debates,* Legislative Assembly*,* 23 February 2011 (Ms Delia Lawrie)
[10] Northern Territory, *Parliamentary Debates,* Legislative Assembly*,* 23 February 2011 (Ms Delia Lawrie)
[11] Australian Bureau of Statistics, Recorded Crime – Offenders, 2011-12, Retrieved from: http://www.abs.gov.au/ausstats/abs@.nsf/Products/778845BE359BD2E2CA257B1F00100FFB?opendocument
[12] M Anderson, Executive Director of the Youth Justice Division, Northern Territory Government, *Address at the 'Youth Boot Camps' Consultation*, 25 February 2012, Darwin.

consultation that on 31 January 2013 the most common offence categories for young people detained in the Northern Territory were assault, including assault police and aggravated assault, and unlawful entry with intent.[13] This is a concerning shift.

Possible impact on remand rates in detention

The remand statistics provided by the Department of Correctional Services at the consultation are highly relevant to this review. The Department of Correctional Services indicated that of the 65 juveniles in detention on 31 January 2013, 42 of the 65 were being held on remand. In NAAJA's experience, there has been a significant increase in the numbers of young people in custody and the number of young people on remand in particular in 2013. For most of the year, unsentenced detainees have represented over 50% of the young people in detention.

Census data provided to NAAJA indicates that on 14 March 2013, there were 57 young people in detention in the Northern Territory and of these, 33 were being held on remand. That is, almost 58% of young people in Don Dale on this date were on remand.[14]

It is difficult to draw a causal link between the rising remand rates and the introduction of s37B without access to published statistics and close statistical analysis of the trends. However, in NAAJA's view, it is inevitable that the introduction of the offence of 'breach bail' has been a contributing factor.

Another factor likely to be contributing to the rise in remand rates for both young people and adults is the use of 'breach of bail' apprehension as a policing strategy. Research conducted by Mark Evenhuis for the Central Australian Aboriginal Legal Aid Service, *Set up to Fail, Aboriginal Youth, Bail and Children's Rights in Central Australia,* indicates that 'The NT Police 2012-2012 Business Plan commits the police to a 5% increase in number of Breach Bail…on the previous year.'[15]

Factors unique to the Northern Territory

There are a range of factors which impact on bail compliance in the Northern Territory which are particular to the geographical, cultural and socio-economic issues faced by many defendants in the Northern Territory. In NAAJA's experience, the 'tyranny of distance' is an ever present issue in the Northern Territory. For example, it is not unusual for a client to be apprehended in Darwin and then return to their home community, and not have the financial means to return to their next court appearance in Darwin.

Language barriers are another significant factor at play in criminal courts in the Northern Territory. Research conducted by the Aboriginal Resources and Development Services Inc (ARDS) as part of their 'An Absence of Mutual Respect' report, surveyed 200 Yolgnu people about their understanding of legal terms, including the word 'bail'. The research found that '80% of responses relating to 'bail' were either incorrect or gave the incorrect context

[13] M Anderson, Executive Director of the Youth Justice Division, Northern Territory Government, *Address at the 'Youth Boot Camps' Consultation*, 25 February 2012, Darwin.
[14] Email correspondence from Don Dale case management unit, to NAAJA Advocacy Solicitor
[15] M Evenhuis. *Set Up To Fail: Aboriginal Youth, Bail and Children's Rights in Central Australia* (2013) 22

meaning.'[16] The research indicated 'that misunderstandings relating to the meaning of 'bail' often led to the accused breaching their bail undertaking by not returning to court, as demonstrated in the following case study:'[17]

> ARDS was contacted by the family of a young Yolngu man. The family had reason to believe the young man was in Berrimah prison. This was confirmed and a visit arranged. As a result of the dialogue in prison and some phone calls to the courts and NAALAS, it became clear that a warrant for this man's arrest had been active for some time due to a breach of bail - he had failed to return to court. He came to the notice of police and they exercised the warrant. His understanding of 'bail' was that he had been 'bailed out' of trouble and that was the end of the matter. He was adamant that he was not required to return to court. To make matters worse for him, when the police did exercise the arrest warrant, the Yolngu man, who felt that he was being very unfairly dealt with, resisted arrest and punched the police officer. As a result, additional to the original charges, he now had some more charges, all due to serious communication failures between the courts and this Yolngu man.

The 'Little Children are Sacred' Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse also made the following observation:[18]

> It become clear to the Inquiry during its consultations that in many of the communities visited, the "language barrier" and the "cultural gap" was greater in the younger generation. The Inquiry was told that this problem is increasing, when intuitively it might have been assumed the gap was decreasing.

Research conducted by Mr Mark Evenhuis for the Central Australian Aboriginal Legal Aid Service 'investigates how the current bail system sets up young Aboriginal people in Central Australia to breach bail and attract further criminal sanctions through its inability to take into account their often distinct circumstances.'[19] This research points to a number of factors which are particular to Aboriginal young people on bail in Central Australia. These include residential conditions and curfews, issues of mobility and remoteness, conditions not to consume alcohol and the condition to attend school. We refer the Government to this research, which is attached to the CAALAS submission to this review, as the detailed analysis and observations accord with NAAJA's experience working with Aboriginal young people in the Top End.

In addition to these findings, NAAJA has observed that issues of mobility and remoteness are particularly acute for young people. They have considerably less control and agency over their own personal circumstances than adults. For example, young people are invariably reliant on their parents or other family members to transport them to court. This lack of control and agency is most pronounced for young people in the care of the Office of Children and Families. These young people can face particular challenges in circumstances where they have a condition to reside at a residential placement but are dissatisfied with this

[16] Aboriginal Resources and Development Services (Inc), *An Absence of Mutual Respect* (2008) 27. Retrieved from:
<http://www.ards.com.au/print/Absence_of_Mutual_Respect-FINAL.pdf>
[17] Aboriginal Resources and Development Services (Inc), *An Absence of Mutual Respect* (2008) 27-28. Retrieved from:
<http://www.ards.com.au/print/Absence_of_Mutual_Respect-FINAL.pdf>
[18] Pat Anderson & Rex Wild *Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse - AmpeAkelyernemaneMekemekarle ('Little Children are Sacred'*) (2007) 51.
[19] M Evenhuis. *Set Up To Fail: Aboriginal Youth, Bail and Children's Rights in Central Australia* (2013) 31

placement. It is not uncommon for these young people to 'self place' with biological family after being removed from their care. In our view, this is a complex social issue that should not attract criminal sanction. The NSW Bail Review gave considerable attention to the issue of bail conditions, particularly 'welfare' oriented bail conditions placed on young people. We expand on these issues in part four of this submission.

A number of other factors also underpin the high 'breach of bail' rates for Aboriginal young people in the Northern Territory. These factors include a person's linguistic capacity, hearing difficulties, intellectual disability and mental illness, multiple adjournments and legal practice issues, such as insufficient time to conference with their lawyer.[20] In NAAJA's experience, these factors are also common to many adult defendants who are brought before the court pursuant to s37B. It is not uncommon for defendants to be brought before the court for relatively minor or 'technical' breaches of bail and then re-released to bail by the courts. We propose a way to manage this administrative burden on police and the courts in the next section of this submission.

Conclusion

In our experience, the provision has had no meaningful impact on offending. However, the provision has created more files and paperwork for police, prosecutions, defence lawyers and the court. This is particularly the case in the Children's Court.

NAAJA considers that the potential consequences of having bail revoked and bail estreated are significant punishment for breaching bail particularly in light of the particular geographical, cultural and socio-economic issues faced by many defendants in the Northern Territory.

Accordingly, we make the following recommendation.

Recommendation 1: Section 37B of the *Bail Act* should be repealed. The offence of failing to appear in court should not be prescribed in its place.

Question (b)

Whether there should be any offences contained the Bail Act for breaches of bail conditions, including by further offending. Whilst most other jurisdictions do contain offence provisions for failing to comply with a bail undertaking, I am interested to learn whether there is an ongoing community and stakeholder support for this position, or whether the existing grant of bail should simply be revoked upon a breach being established.

Response

A number of jurisdictions, namely New South Wales, the Australian Capital Territory and Victoria do not have a general offence of breaching a bail condition, although they do have an offence of failing to appear.

[20] M Evenhuis. *Set Up To Fail: Aboriginal Youth, Bail and Children's Rights in Central Australia* (2013) 35-40

NAAJA does not support the retention of s37B of the *Bail Act*. Further, creating an offence for breaching bail by way of reoffending may fall foul of the rule against double-jeopardy. It is an aspect of the principle of double-jeopardy that a person should not be punished twice for a single act. Charges should reflect the criminal conduct and the prosecution should not charge a person with multiple offences unnecessarily. Where a person re-offends, they should be dealt with for that re-offending and the fact that the offending took place while a person was on bail should not result in an additional criminal charge for breaching their bail.

Arrest and Revocation

NAAJA does not consider that bail should 'simply' be revoked upon a breach being established. Breach of a condition of bail should give rise to an option to bring the defendant before the court. Section 38 should be amended to set out the range of options available to police upon detecting a breach and s38(2A) should be repealed.

The NSW Bail Review considered the issue of arrest for breach of a bail condition. In NSW, section 50(1) of the *Bail Act 1978* (NSW) provides that a police officer may arrest a person without warrant and take the person before a court as soon as practicable '[w]here the police officer believes on reasonable grounds that a person has..failed to comply with, or is …about to fail to comply with the person's bail undertaking or an agreement.'[21] This provision is similar to s38 of the Bail Act which gives police considerable discretion but very little guidance about how to exercise their discretion.

The NSW Bail Review recommends that:[22]

> In considering what course is to be taken in response to failure to comply with a conduct direction, the officer should be required to have regard to the relative seriousness or triviality of the perceived breach. The Officer should also be required to have regard to the person's age and any mental health or cognitive impairment that is apparent or known to the officer.

Too often in the Northern Territory, police and court time is taken up with 'trivial' breaches of bail. For example, NAAJA is aware of an instance where a young person was charged with breaching their bail condition because he had moved to his grandparents house due overcrowding at his parents house. Another example is the adult who reports half an hour late to a police station.

We do acknowledge that there are occasions where a 'failure to appear' can have a significant detrimental effect on the efficient administration of justice, particularly in relation to failures to appear in the Supreme Court. However, in practice, defendants in these situations are likely to suffer serious consequences for their breach of bail. This is likely to include having their bail revoked and spending a significant time on remand awaiting their trial, as well as having their bail estreated.

We support the NSW Bail Review recommendation and recommend that the following provision be included in the *Bail Act* (NT):[23]

[21] *Bail Act 1978* (NSW), s 50(1)
[22] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 15.37

(a) If a police officer believes, on reasonable grounds, that a person is failing, has failed or is about to fail to comply with a conduct direction, the police officer may:
    (i) Take no action
    (ii) Issue a warning
    (iii) Require the person to attend court by notice without arresting the person, or
    (iv) Arrest the person and take them as soon as practicable before a court
(b) That, in considering what course of action to take, the police officer must have regard to:
    (v) The relative seriousness or triviality of the suspected failure (included threatened failure)
    (vi) Whether the person has reasonable excuse for the failure
    (vii) That arrest is a last resort
    (viii) Insofar as they are apparent to or known by the officer, the person's age and any cognitive or mental health impairment
(c) That, if the person is arrested, the officer may afterwards discontinue the arrest
(d) That, upon being satisfied that the person has failed, or was about to fail to comply with a conduct direction, a court may re determine whether to release or detain the person and whether to impose a condition or a conduct direction.

The NSW Government has adopted this recommendation and will include such a provision in the new NSW Bail Act. The Government Response to the NSW Law Reform Commission Report on Bail provides:[24]

> When enforcing bail breaches, the Government accepts the LRC position that arrest should not be the universal response to a breach. However, in the new bail model, police will retain the discretion to arrest as a response to a breach when appropriate.
>
> Under the new model, when a breach of a bail condition has been identified, police may either:
> - take no action;
> - issue a warning;
> - require the person to attend court by issuing a notice; or
> - arrest the person and take them before a court.
>
> In considering what course of action to take when responding to breach, the police officer will be required to consider the relative seriousness or triviality of the suspected breach, whether the person has a reasonable excuse for the breach, the personal attributes and circumstances of the person, (known or apparent to the officer) and whether an alternative course of action to arrest is appropriate in the circumstances. The police response will depend on the circumstances of the breach, and the first response may be arrest if considered appropriate.

A provision detailing the range of options available to police will give police on the front line the discretion to decide what breaches are serious enough to warrant arrest and consideration by the court, and what breaches can be dealt with in an alternative way. This will free up police to focus on the most important aspects of their work. It will avoid the need for police to prepare a large amount of paperwork, only to have a person re-released to bail for a trivial breach of bail.

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[23] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 15.40

[24] NSW Government, *NSW Government Response to the NSW Law Reform Commission Report on Bail* (2012) 4

Section 38(2A)

Section 38(2A) was introduced by the *Serious Violent Offenders (Presumption Against Bail) Amendment Bill 2008*. The second reading speech provides that:[25]

> If bail is granted, despite the presumption against bail, and a bail undertaking or condition of bail is breached - for example, by failing to turn up at court, not abiding by a curfew or not reporting to police – then the court must revoke bail and remand that person in custody. That is the effect of the proposed amendment to section 38. Section 38 as it currently, stands, provides only that a court may revoke bail for a person who is in breach of an undertaking or condition.

Section 38(2A) significantly curtails magistrates and judges discretion in relation to bail determinations. This provision doesn't allow for particular or exceptional situations that may arise. For example, the magistrate may have decided to grant bail on the basis on a weak prosecution case and the defendant could return to court in relation to a 'trivial' breach of bail such as being late to report to a police station. NAAJA considers that magistrates and judges are best placed to assess the risk to the community if a person were to be re-released to bail and should have discretion to make this decision based on the circumstances of each matter and alleged breach of bail. Accordingly, we recommend that s38(2A) should be repealed.

Recommendation 2: Section 38 should be amended to set out the range of options available to police upon detecting a breach of bail and s 38(2A) should be repealed.

Questions (c) and (d):

Whether the Northern Territory ought to replace section 7A and 8 of the Bail Act, with a modified provision which states that the presumption for all offences is neutral, with the onus of proof resting with the applicant to establish the matters in section 24, or that the provisions in section 9 apply?
Or
Simply introduce a standard that all offences are presumption neutral for bail in the NT?

Response

NAAJA supports a uniform presumption in favour of bail. NAAJA does not support a neutral presumption for all offences. Placing the onus of proof on the applicant, or defendant, creates a presumption against bail.

There are a number of principles that are central to the operation of the criminal justice system. These include:[26]

- The right to personal liberty
- The presumption of innocence
- No detention without legal cause

[25] Northern Territory, *Parliamentary Debates,* Legislative Assembly, 11 September 2008 (Mr Chris Burns)
[26] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 2.10

- No punishment without conviction by due process
- A fair trial
- Individualised justice and consistency in decision making, and
- Special provisions for young people

Introducing a neutral presumption will seriously erode these principals, in particular, the right to personal liberty and the presumption of innocence.

The NSW Bail Review stated that:[27]

> The removal of any presumption in favour of bail would be a significant departure from the common law, which embodied a uniform presumption in favour of bail, and from the current legislation which, despite the amendments made over the years, retains a presumption in favour of bail as the default position. It would also be at odds with the basic tenets of the criminal justice system as a whole ….including the primacy afforded to the value of personal freedom and principles such as the presumption of innocence.

NAAJA concurs with this statement. Liberty is a right not a privilege. A decision regarding a person's liberty is of utmost importance and it is not appropriate for such a decision to be determined 'on balance'.

Presumption in favour of bail

The NSW Bail Review recommended a universal presumption in favour of bail and concluded that:[28]

> The scheme of presumptions, exceptions and exceptional circumstances in the current legislation should be abolished. It is an unwarranted imposition on the discretion of police and the courts. It throws the emphasis onto the category of the offence with which the person is charged or onto other prescribed elements in the person's criminal history, instead of a balanced assessment of all the considerations which bear rationally on the question of detention or release. It is voluminous, unwieldy, hugely complex and involves too blunt an approach. The results are frequently anomalous and unjust.
>
> We strongly recommend a uniform presumption in favour of bail (with the sole exception of bail pending appeal against conviction or sentence). That would accord with basic legal principles and concepts enshrined in the criminal justice system, particularly the value of personal liberty and its corollary, the presumption of innocence. The submissions we have received provide overwhelming support for that approach.
>
> In recommending a presumption in favour of bail, we do not envisage that people who present a serious risk of absconding, committing serious crime, or threatening another's safety should be released.

NAAJA agrees with this conclusion and recommendation for a uniform presumption in favour of bail. The 'overwhelming majority' of submissions to the NSW Bail Review supported a presumption in favour of bail in one form or another, including the Office of the Director of Public Prosecutions.[29] The NSW Government response to the NSW Law Reform

[27] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 8.72
[28] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 8.74-8.76
[29] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 8.46-8.47

Commission Report on Bail indicates that the Government intends to abolish the presumption against bail in relation to particular offences and dispense with the system of 'offence based presumptions'.[30]

Determining a presumption with regard to an offence category can create artificial distinctions and can result in illogical and anomalous outcomes. In our experience, it is not unusual for an offence category to give rise to a presumption against bail when a matter is first before the court but for the matter to ultimately be resolved by way of a plea to a lesser charge that does not attract a presumption against bail. We see this occur frequently in the Magistrates Court, and from time to time in the Supreme Court.

In our view, it is far more meaningful for the magistrate or judge to make an assessment about whether bail should be granted with reference to the considerations outlined in s24 of the Bail Act than with reference to the offence or the particular charge laid by prosecutions in the first instance. They key considerations outlined in s24 of the Bail Act are:[31]

- The probability of whether or not the person will appear in court
- The interests of the person,
- The risk that the accused person would interfere with evidence, witnesses or jurors
- The risk that the accused person would commit an offence, a breach of the peace, or a breach of the conditions of bail
- The risk to the safety or welfare of the alleged victim, their family members or any other person

NAAJA considers that these key considerations provide a sufficient safeguard to ensure that bail is unlikely to be granted in situations where a defendant presents a serious risk of absconding, a serious threat to the safety of the community or a serious risk of reoffending.

A neutral presumption with the onus on the applicant

Sections 7A and 8 of the Bail Act should not be replaced 'with a …provision which states that the presumption for all offences is neutral, with the onus of proof resting with the applicant to establish the matters in section 24, or that the provisions in section 9 apply.' This would not create a neutral presumption for all offences. It would have the effect of maintaining a presumption against bail for s7A and changing the presumption for those offenses listed in s8(1)(a)-(b) from a neutral presumption to a presumption against bail.

In *R v Williams*, Kelly J stated her view of the effect of the presumption against bail as follows:[32]

> I cannot see in the legislation any support for putting such a gloss [that a 'heavy' burden lies on the applicant] on s 7A or imposing such restrictions on the court's discretion to grant or refuse bail. It seems to me that the plain words of s 7A do nothing more than cast an onus on the applicant to satisfy the court that bail ought not to be refused, and that in considering whether or not the applicant for

[30] NSW Government, *NSW Government Response to the NSW Law Reform Commission Report on Bail* (2012) 7
[31] *Bail Act* (NT), s 24
[32] [2012] NTSC 47, [5].

> bail has satisfied that onus, the court must (as in all other bail applications) take into consideration the matters set out in s 24 of the Act, and no others. If the applicant does not satisfy that onus, then bail should be refused.

NAAJA agrees with this interpretation of s7A of the Bail Act. We strongly urge the Government not to reform the Bail Act in the manner proposed. In our view, this will have the effect of expanding the number of offences that attract a presumption against bail and is likely to increase the number of people on remand. We have addressed the consequences of the rising remand rates in the Introduction to this submission. If the Government is determined to introduce a neutral presumption, care should be taken to ensure that it is in fact a neutral presumption and that neither party has the burden of persuasion.

Alternatives to a presumption in favour of bail

If the Government is not minded to introduce a uniform presumption in favour of bail, NAAJA considers that the following options, in this order, are preferable to the proposal in question (c):

Option 1: Return to the original form of the *Bail Act* (NT)

When the *Bail Act* (NT) was first introduced it contained a presumption in favour of bail for all offences except murder and treason. It provided:

> **Section 8. Presumption in Favour of Bail for Certain Offences**
>
> (1) This section applies to all offences except murder and treason.
>
> (2) A person accused of an offence to which this section applies is entitled to be granted bail in accordance with this Act unless –
>
> (a) an authorised member or court is satisfied that he or it is, pursuant to a consideration of the matters referred to in section 24, justified in refusing bail;
>
> (b) the person stands convicted of the offence; or
>
> (c) the requirement for bail is dispensed with under section 9.
>
> (3) Subject to sub-section (4), a person is entitled under this section to be granted bail in respect of an offence to which this section applies, notwithstanding that he is in custody also for some other offence or reason, in respect of which he is not entitled to be granted bail.
>
> (4) A person is not entitled under this section to be granted bail in respect of an offence to which this section applies, if –
>
> (a) He is in custody serving a sentence of imprisonment in connection with some other offence; and
>
> (b) The authorised member or court is satisfied that the person is likely to remain in custody in connection with that other offence for a longer period than that for which bail in connection with the first-mentioned offence would be granted.

There was no presumption against bail in the Northern Territory until 1994, when the *Bail Amendment Act 1994* introduced section 7A of the *Bail Act*. The majority of subsequent amendments made to s7A in 1996, 2005, 2007, 2008 and 2009 operated to increase the number of offences that attract a presumption against bail. Returning to the original form of the Bail Act (NT) would be clearer and simpler than the proposed reform.

Option 2: Retain the current form of the Bail Act

In our view, the current form of the *Bail Act*, which contains a presumption against bail for a number of offences, is preferable to a neutral presumption across the board. For reasons outlined above, we are concerned that introducing a neutral presumption is counter to 'the basic tenets of the criminal justice system' and will result in a increase in bail refusal's and in turn, remand rates.

Option 3:

If the Government is determined to introduce a neutral presumption, care should be taken to ensure hat it is in fact a neutral presumption, and not a presumption against bail in disguise. A truly neutral presumption means that neither party has the burden of persuasion. Research shows that 'court culture' can influence bail determinations. In our view, there is a 'culture of custody' in the Northern Territory and a neutral presumption is likely to result in more clients being refused bail.

Recommendation 3: The current scheme of presumptions contained in section 7A and 8 the Bail Act should be replaced with a uniform presumption in favour of bail. The limitation to grant bail contained in s23A of the Bail Act should be retained.

Question (e):

Whether the Bail Act should continue to apply to youth offenders, or whether the Youth Justice Act ought to be amended to specifically consider grants of bail to young offenders.

Response:

At present, the Bail Act 'applies to a person whether the person is an adult or child'[33] and there is no differentiation between young people and adults in the Act. Further, section 24 of the Bail Act does not require an authorised member or court to consider any criteria in relation to age or youth when making a bail determination.

NAAJA considers that the bail legislation in the Northern Territory should make provision for different considerations to be taken into account when making a bail determination in relation to a young person. These considerations could be set out in a new Act, the *Youth Justice Act* or included in the existing *Bail Act*. It is important that the different characteristics of young people and their import in terms of bail decision making should be given primacy in bail legislation, although we do not consider it a matter of great importance where these considerations are set out.

The differences between young people and adults are acknowledged in a number of ways in the criminal justice system in the Northern Territory. The *Youth Justice Act* sets contains separate objects and principles for dealing with young people and creates a separate sentencing regime for young people. The common law presumption of doli incapax and sections 38 and 43AP of the *Criminal Code* (NT) also acknowledge the inherent differences

[33] *Bail Act* (NT), s 4(1)

between particular young people and adults in relation to criminal responsibility. There is also a significant body of case law in the Northern Territory which emphasises the differences between young people and adults, particularly in relation to sentencing.[34] The significant differences between young people and adults should also be reflected in bail legislation.

Importantly, section 4(c) the *Youth Justice Act* provides that 'a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time.'[35] This principle is directly relevant to bail legislation and should be a key consideration in any bail determination for a young person.

Difference, disadvantage and difficult life circumstance's

In our experience, young people appearing before the youth justice court in the Northern Territory often face significant social disadvantage. Many of our clients present at court with high and complex needs in terms of their mental health and cognitive impairment, family relationships, drug and alcohol issues and broader welfare issues such as homelessness and neglect.

A recent National Assessment of Australia's Children's Courts which canvassed the views of judicial officers and key stakeholders across each state and territory in Australia confirms that young people appearing in Children's Courts across Australia increasingly have high and complex needs. The research findings are discussed by Alan Borowski in his paper, the *Findings of the National Assessment of Australia's Children's Courts.* Relevantly, this paper provides that that:[36]

> Study participants across Australia reported that, relative to a decade ago, the court now served a much more challenging clientele. While the children, young people and families who appear in court remain highly socio-economically disadvantaged and marginalized, what is "new" is the complexity of their problems and needs and, in Victoria and NSW, the increase in clients from a refugee background. Alcohol and drug abuse, domestic violence, mental health problems and, indeed, prior involvement with the child protection system, are now common among the clientele of the child protection jurisdiction. Young offenders manifest similar problems and have increasingly engaged in serious (i.e., violent) criminal activity.

These findings are consistent with our experience acting for Aboriginal young people in the youth justice court in the Northern Territory. These high and complex needs can often impact on a young persons ability to understand and comply with bail conditions. For example, a young person living in a situation where there is domestic violence between their parents, may decide to leave their home at night because they are in danger if they stay. This has implications for young people who have conditions to reside at a particular address. Similarly, a young person with a cognitive impairment may have difficulty planning ahead to ensure that they return home prior to their curfew expiring.

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[34] See for example *R v Mills* [1998] 4 VR 235 (CA) at 241, and *Simmonds v Hill* (1986) 38 NTR 31 at 33

[35] *Youth Justice Act* (NT), s 4(c)

[36] Allan Borowski, 'Whither Australia's Children's Courts? Findings of the National Assessment of Australia's Children's Courts (2013) *Australian and New Zealand Journal of Criminology* (due to be published August 2013) 20

Young people have a number of special characteristics, such as a lack of knowledge and experience, dependence, impulsivity and lack of foresight that can impact on their ability to understand and/or comply with their bail conditions.[37] For example, young people who are dependent on adults for housing, money and transport may also face difficulties complying with bail conditions imposed on them by the court. We are aware of an instance where a young person has failed to attend court, because despite their constant requests, no adult was either able or willing to transport them to court and they had no alternative means of transport.

Factors such as these should be taken into account when determining whether to grant bail and whether to release a young person to bail following a breach of bail.

Legislative recognition of the different characteristics

The NSW Bail Review recommended that 'in making a decision in relation to a young person under the age of 18 years regarding release or a condition or conduct direction, the authority must take into account (in addition to any other requirements) any matters relating to the person's age, including':[38]

- That young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them,
- That it is desirable, wherever possible, to allow the education or employment of a young person to proceed without interruption
- That it is desirable for a young person to reside in safe, secure and stable accommodation, and, where possible, in his or her own home,
- That the detention or imprisonment of a young person is to be used only as a measure of last resort and for the shortest appropriate period of time
- The young person's ability to understand and to comply with conditions or conduct directions, and
- That young people have undeveloped capacity for complex decision making, planning and the inhibition of impulse behaviours.

The NSW Government response to the NSW Law Reform Commission Review of Bail report provides that:[39]

> The Government acknowledges that some members of particular groups may have special needs and be vulnerable, particularly in the context of the criminal justice system. The new Act will require the bail authority to consider the special vulnerability or needs of the accused when determining bail, including because of youth, ATSI status or cognitive or mental health impairment. This ensures the special vulnerabilities and needs of these groups of people are adequately addressed in the bail decision making.

However, the detail of the proposed provision is not known at this stage.

We consider that a provision similar to that proposed by the NSW Bail Review should be included in bail legislation in the Northern Territory. However, we consider that the provision

[37] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 11.8-11.12
[38] NSW Law Reform Commission, *Bail,* Report No 133 (2012) 11.29
[39] NSW Government, *NSW Government Response to the NSW Law Reform Commission Report on Bail* (2012) 11

should differ somewhat, to reflect the objects and principles contained in s4 and s 81 of the *Youth Justice Act* (NT). Accordingly, we recommend that:

Recommendation 4:

A provision should be inserted in the existing *Bail Act* or a new 'Youth Bail Act' which provides that, in making a decision in relation to a young person under the age of 18 that the following criteria must be taken into account, in addition to those criteria set out in s 24 of the Act:

a) That young people have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard and a right to participate in the processes that lead to decisions that affect them,
b) Family relationships between a young person and members of his or her family should be preserved and strengthened wherever possible,
c) The education or employment of a young person should proceed without interruption wherever possible,
d) A young person's sense of racial, ethnic or cultural identity should be acknowledged and a young person should be able to maintain their racial, ethnic or cultural identity,
e) The detention or imprisonment of a young person is to be used only as a last resort, only if there is no appropriate alternative and only for the shortest appropriate period of time,
f) Conditions imposed on young people must be limited to those that are necessary and proportionate to an objective consistent with this Act and comply with s28 (*see proposed amendment to s28 in Recommendation 5)*
g) In imposing any conditions upon a young person, the court must take into account the young person's ability to understand and to comply with those conditions.
h) The age and maturity of the youth, including their capacity for complex decision making, planning and the inhibition of impulsive behaviours.

Additional comments

Recommendations for reform arising from the NSW Bail Review

The NSW Government has indicated that it intends to adopt a number of the key concepts and recommendations from the NSW Law Reform Commission Report on Bail.[40] We outline a number of these proposed reforms below. We encourage the government to consider the recommendations outlined below, in addition to those matters set out in the letter from the Attorney General dated 21 January 2013.

Bail conditions

We have already raised a number of concerns about bail conditions imposed by police and the court, particularly in relation to young people. These issues are further articulated in the

[40] NSW Government, *NSW Government Response to the NSW Law Reform Commission Report on Bail* (2012)

research paper 'Set up To Fail'.[41] In many cases that NAAJA sees come before the children's court, the bail conditions imposed on a young person are a response to welfare and behavioural management concerns rather than criminogenic concerns. We are also aware of situations where adults are granted bail subject to a condition that a large surety is provided to the court in circumstances where the client and their family had no reasonable prospect of meeting this bail condition.

The NSW Bail Review made a number of broad observations about the imposition and policing of bail conditions that accord with NAAJA's experience in the NT:[42]

> …Conduct requirements [bail conditions] appear to be imposed routinely and unnecessarily without tailoring the situation of the individual. Monitoring for compliance by police has become more active and intense in recent times. Arrest for failure to comply has been increasing. We have no statistically significant evidence of a reduction in crime as a result.
>
> The consequence has been a substantial increase in the number of people in detention pending trial and an increase in the court time required to deal with unnecessary arrests for breach of unnecessary conduct requirements. This is at a public cost which includes the cost of processing detainees for short periods in custody following arrest before the person is released again because detention is unwarranted. Young people appear to be especially affected by this situation, as overall remand numbers and short-term churn through juvenile detention centers have increased.
>
> In these circumstances, there is a strong case for looking closely at the justification for imposing conditions and conduct requirements. There are cases where the imposition of stringent conditions and conduct requirements are necessary. In such cases, proper enforcement is required. But intensive enforcement of routinely imposed conditions is creating unnecessary public costs and unnecessary hardship, particularly for young people, without apparent benefit to the community.

The NSW Government has indicated that it will be including a provision in the new Bail Act (NSW) that "align[s] with the intent of the LRC's recommendations with respect to conditions." The Governments response to the NSW Law Reform Commission Report on Bail indicates that:[43]

> The new legislation will contain a provision that conditions should not be more onerous than required to address the identified risk…The decision is a two-step process. First the bail authority determines if there is an unacceptable risk. Second they consider whether the risk can be mitigated with targeted conditions. If the answer is no, the person is detained in custody until trial. If the risks can be mitigated with appropriate conditions, the person is released until their trial.

That is, under the new Bail Act (NSW), bail conditions will only be imposed if bail would otherwise be refused.

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[41] M Evenhuis, *Set Up To Fail: Aboriginal Youth, Bail and Children's Rights in Central Australia* (2013)
[42] NSW Law Reform Commission, *Bail,* Report 133 (2012) O.50 – 0.52
[43] NSW Government, *NSW Government Response to the NSW Law Reform Commission Report on Bail* (2012) 12. Retrieved from: http://www.lpclrd.lawlink.nsw.gov.au/agdbasev7wr/lpclrd/documents/pdf/govt_response_to_lrc_bail.pdf.

The NSW Bail Review recommended that the following provision should be included in the new Bail Act (NSW) to set out the rules that apply when imposing bail conditions.[44] NAAJA supports this recommendation.

Recommendation 5: Section 28 of the Bail Act should be repealed and replaced with the following provision which states that an authorised member or court must:

(a) Not impose a condition unless they are of the opinion that, without such a condition, the person should be refused bail having regard to the considerations and rules applicable to a bail determination;
(b) Consider whether the person has family, community or other support available to assist the person in complying with the condition;
(c) Not impose a condition that is more onerous or more restrictive on the person's daily life than is necessary having regard to the considerations and rules applicable to a decision whether to release or detain;
(d) Not impose a condition unless satisfied that compliance is reasonably practicable;
(e) Not impose a financial condition concerning the forfeiture of money, with or without security, in relation to a young person under 18 years, except if charged with a serious indictable offence;
(f) Not impose a financial condition concerning the forfeiture of an amount of money, with or without security, in relation to an adult unless satisfied that:
(i) There would otherwise be a likelihood of the person absconding or being unlikely to appear on a future occasion; and
(ii) Payment of the sum involved is or likely to be within the means of the person or people who may be liable to pay that sum;
(g) Not impose a condition or conduct direction for the purpose of promoting the welfare of the person unless it is otherwise justified having regard to the consideration set out in the Act.

Specific considerations for a person with a cognitive or mental health impairment

The NSW Government has also indicated that it intends to make provision in the new Bail Act (NSW) for people with particular vulnerabilities.

The Governments response to the NSW Law Reform Commission Report on Bail states that:[45]

> The Government acknowledges that some members of particular groups may have special needs and be vulnerable, particularly in the context of the criminal justice system. The new Act will require the bail authority to consider the special vulnerability or needs of the accused when determining bail, including because of youth, ATSI status or cognitive or mental health impairment. This ensures that the special vulnerabilities and needs of these groups of people are adequately addressed in the bail decision making process.

[44] NSW Law Reform Commission, *Bail,* Report 133, (2012) xxvi-xxxvii

[45] NSW Government, *NSW Government Response to the NSW Law Reform Commission Report on Bail* (2012) 11-12

Section 24 of the Bail Act does not require a bail authority or court to have regard to a persons cognitive or mental health impairment when making a bail determination or imposing bail conditions. A person's cognitive or mental health impairment can have a significant impact on their ability to understand and comply with bail conditions. Particular consideration should also be given to the likely impact of any period of incarceration or detention on a person with a cognitive or mental health impairment.

NAAJA supports the recommendation of the NSW Bail Review in relation to people with a cognitive or mental health impairment.

Recommendation 6: The Bail Act should provide that, in making a bail determination in relation to a person with a cognitive or mental health impairment the authorised member or court must take into account (in addition to any other requirements):

a) the person's ability to understand and comply with conditions,
b) the person's need to access treatment or support in the community,
c) the person's need to undergo assessment to determine eligibility for treatment or support,
d) any additional impact of imprisonment on the person as a result of their cognitive or mental health impairment,
e) any report tendered on behalf of a defendant in relation to the person's cognitive or mental health impairment,
f) that the absence of such a report does not raise an inference adverse to the person or a ground for adjourning the proceedings unless on the application or of with the consent of the person.

Specific consideration for Aboriginal and Torres Strait Islander people

As an Aboriginal Justice Agency we are acutely aware of the issues and challenges that confront Aboriginal and Torres Strait Islander people applying for bail in the Northern Territory.

The NSW Bail Review drew attention to the following passage in the Royal Commission into Aboriginal Deaths in Custody which, in our view, is still a relevant observation in relation to the Northern Territory today:[46]

> Many of the restrictions on access to police bail of Aboriginal detainees have to do with their failure to meet the criteria for release. Prior failures to appear at court, lack of a fixed residential address, lack of employment and other such indicators of possible non-attendance at court have been regarded as contributing significantly to Aboriginal disadvantage in the bail process.

We consider that the recommendations outlined above will go a long way to addressing these challenges and issues. However, we also consider that, in light of the significant disadvantages faced by Aboriginal people in the bail process, a provision outlining a number of considerations relevant to the particular circumstances of Aboriginal and Torres Strait Islander people in the Northern Territory should be contained in the Bail Act.

[46] Australia, Royal Commission into Aboriginal deaths in Custody, *National Report* (1991) vol 3, [21.4.15].

Recommendation 7: That the Act be amended to provide that, in making a decision in relation to an Aboriginal person or Torres Strait Islander, the authorised officer or court must take into account (in addition to any other requirements):

a) any matter relating to the person's Aboriginal or Torres Strait Islander identity, culture or heritage, which may include:
b) connections with and obligations to extended family
c) traditional ties to place
d) mobile and flexible living arrangements
e) any other relevant cultural issues or obligation

Monitoring and review

Bail legislation has wide reaching ramifications for the liberty of defendants and the safety and welfare of the community. It is important that the introduction of any amendments to the Bail Act are reviewed in due course to assess whether the policy objectives of the reforms have been met.

Recommendation 8: Any amendments made to the Bail Act should be reviewed within a specified period of time and a report on the outcome of the review should be tabled in parliament.

Further recommendation for reform

The NSW Bail Review also made a recommendation in relation to data collection. It is not clear whether the NSW Government intends to adopt this recommendation.

Data collection

There are very limited publically available statistics on remand rates and imprisonment more generally in the Northern Territory. Much of the statistical information relating to the Northern Territory is contained in national reports. It is essential that the government collect and publish this data to inform government policies. The government should also collect data to measure and assess the impact of any amendments made to the Bail Act as a result of this review.

Recommendation 9: The government should establish a process to improve the collection and public reporting of data required for an effective review of any amendments made to the Bail Act and legal policy more broadly.

Bail

Recommendation 32: Pro-bail, youth specific bail provisions should be inserted into either the *Bail Act*, or as part of a separate bail regime for young people in the *Youth Justice Act*. The starting point must be that remanding a young person in custody is to be the option of last resort.

The NT has no youth-specific bail provisions. The same presumptions in the *Bail Act 1982* (NT) ('the *Bail Act*'), apply in relation to young people just as they apply to adults. This is of concern because the presumptions against bail in the *Bail Act* are at odds with the *Youth Justice Act* principle that custody be a matter of last resort.

NAAJA recommends that youth-specific pro-bail considerations be inserted either into the *Bail Act*, or into the *Youth Justice Act*. Recent publications by the Australian Institute of Criminology identify increases in youth remand rates as a concerning trend which requires policy attention: over 50% of all young people detained are on remand.[47] Of the remanded young people, few are likely to receive an actual custodial sentence.[48]

a. The Social Cost of Remand

Recommendation 33: The power for courts to remand a young person in circumstances where the young person is unlikely to receive a term of imprisonment should be removed, unless exceptional circumstances apply.

The long term effects of remanding young people, in particular Aboriginal young people, are concerning. These include social isolation and alienation, family and community disharmony, stigmatization, reduced opportunities to form pro-social, community-based friendships, increased disruption to education, reduced opportunities to participate in important cultural initiations and ceremonies, and reduced opportunities for rehabilitation. The NSW Youth Justice review comments that:

> Evidence indicates that the remanding of youth is often associated with a range of negative consequences including increased recidivism, poor conditions in remand facilities as a result of over-crowding and far greater costs in comparison with alternatives such as bail and community supervision.[49]

Most importantly, there is no evidence to suggest that high remand rates correlate to a reduction in crime rates. Conversely, research has found that a period of remand is a significant contributing factor in increasing the chances of recidivism.[50]

In light of the concerning ramifications of remand practices, the option for courts to remand a young person in circumstances where the young person is unlikely to receive a term of

[47] Kelly Richards, *Trends in Juvenile Detention in Australia* (May 2011) Australian Institute of Criminology <http://www.aic.gov.au/documents/D/6/D/{D6D891BB-1D5B-45E2-A5BA-A80322537752}tandi416.pdf>
[48] Ibid.
[49] NSW Justice Review?
[50] Noetic Solutions, 'Review of Effective Practice in Juvenile Justice' (Report for the Minister for Juvenile Justice NSW, January 2010) 45.

imprisonment should be removed, unless exceptional circumstances apply. Exposing young people to the risk factor of remand should be done cautiously and only in rare and exceptional circumstances. Bail and community based supervision should *always* be preferred over remand and this should be explicitly legislated for. NAAJA considers explicit legislation which forces the courts and police to consider custody as a matter of last resort (as opposed to it currently only being a principle of the *Youth Justice Act*),[51] is warranted.

b. Where a Responsible Adult is Difficult to Locate

Recommendation 34: Section 51 of the *Youth Justice Act* should be amended to include a provision allowing the court to order an urgent s 51 report within 48 hours.

NAAJA Youth Justice Court lawyers regularly encounter the situation where it is difficult to contact a responsible adult for a young person. In situation such as this, and where there are concerns for the young's person's welfare, a court may order a report under section 51 of the *Youth Justice Act* as to whether the youth is in need of protection. At present, this leads to a situation where the young person is remanded in custody, and in our experience, it is all too often that the young person is remanded for several weeks pending the preparation of the report.

It is essential that s 51 of the *Youth Justice Act* be amended to enable the court to require the urgent provision of a s 51 report within 48 hours.

c. Example - Supervised Bail Program

Recommendation 35: The NT Government should introduce and resource a Supervised Bail Program modeled on the WA Supervised Bail Program.

Supervised Bail also has an important role of facilitating the granting of bail where it is difficult to locate a responsible adult. It reduces the number of young people exposed to custody by providing specialist workers to young people, so that they need not be unnecessarily remanded in custody because responsible adults cannot be immediately located.

The WA Department of Corrective Services employs bail coordinators at the Children's Court and Rangeview Remand Centre. They have two important roles:

1. Assisting in the location of a responsible adult to sign a bail undertaking; and
2. The bail coordinator can act as the responsible adult, though only when no-one else can be found.

The WA Supervised Bail Program is a best-practice which this Review should consider.

d. The Financial Cost of Remand

Remanding young people is both an ineffective and expensive punitive justice response. The NSW Youth Justice Review reported that remanding a young person costs an estimated $556 per person per day, where as community-cased supervision costs $23 per person per

[51] *Youth Justice Act* (NT) s 4(C).

day.[52] This figure does not take account of the additional long term costs of exposing young people to a significant reoffending risk factor, and likewise, the reinvestment savings of providing young people with community based supervision.

e. Pro-Bail Practices are Needed

Recommendation 36: A legislative provision should be introduced explicitly stating that bail conditions should not be overly onerous or oppressive.

If courts are to be encouraged away from a remand culture, bail conditions should be proportionate to the offending, and not overly-strict. The Royal Commission into Aboriginal Deaths in Custody raised the issue of 'unreal conditions', which expose young people to a pattern of being 'recycled' through the cells and courts.[53] Bail conditions should not act as punishment, and be overly onerous or oppressive.

Bail support programs should also be provided to ensure young people have access to adequate and safe accommodation, and have an opportunity to access other relevant support services while bailed, to increase their likelihood of complying with bail conditions.

f. Summons Preferred over Bail and Arrest

Recommendation 37: The practice of arresting and bailing young people should be avoided at all costs, and youth justice matters should be proceeded with by way of summons.

Police and courts should be required to summons young people, as opposed to bailing them, in most circumstances, unless exceptional circumstances apply. This is provided for in s 22 of the *Youth Justice Act*, however in NAAJA's experience this less punitive option is under-utilized.

Summonsing a young person is a less intrusive and punitive approach because it does not expose young people to being held in police custody, having bail determined, and the potential to breach bail conditions. Research in other states has shown that Aboriginal young people are less likely to be proceeded with by way of summons, and are more likely to be held in police custody and subsequently charged and bailed.[54] The practice of arresting and bailing young people should be avoided at all costs, and youth justice matters should be proceeded with by way of summons.

[52] Noetic Solutions, 'Review of Effective Practice in Juvenile Justice' (Report for the Minister for Juvenile Justice NSW, January 2010) 46.
[53] Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations in Australia* (2009) 103.
[54] Ibid 102.