Submission to the Administrative Review of the *Bail Act 2013*

August 2020

Introduction

We thank the Department of Communities and Justice for the opportunity to provide a submission for the administrative review of the *Bail Act 2013.*

For questions related to this submission, or for further information, please contact Joanna Lunzer (Coordinator, Policy & Advocacy, Just Reinvest NSW) at jo@justreinvest.org.au.

Our submission is limited to a discussion on how the Bail Act and its implementation by bail authorities impacts on Aboriginal people in NSW, with a focus on its impact on young Aboriginal people – and what amendments to the Bail Act and its implementation should be considered..

About Just Reinvest NSW

Just Reinvest NSW supports Aboriginal communities to explore and establish justice reinvestment initiatives and advocates for systemic changes that build safer and stronger communities. We began in 2011 as a strategic initiative of the Aboriginal Legal Service NSW/ACT. Our small team are guided by an Executive of Aboriginal and non-indigenous people and supported by a network of champions, youth ambassadors and supporters across the corporate, government and for-purpose sectors.

Members include: Aboriginal Education Council, Aboriginal Medical Service Redfern, AIASF, ANTaR, Ashurst Australia, Australian Red Cross, Community Legal Centres NSW, Gilbert + Tobin, Herbert Smith Freehills, Infinite Hope Aboriginal Corporation, Johnson Winter & Slattery, King & Wood Mallesons, Legal Aid NSW, NADA, NCOSS, Reconciliation NSW, Save the Children Australia, Shopfront Youth Legal Service, Show Me the Way, Weave, White Lion, Youth Action and the Youth Justice Coalition.

Just Reinvest NSW collaborated with the Bourke community to support the establishment of Maranguka using a justice reinvestment framework and we continue to support its important work. We are also working closely with members of the Aboriginal communities in Mount Druitt and Moree to explore whether a justice reinvestment approach is right for them.

We use what we learn through working with communities to develop targeted strategies for positive policy changes which create strong communities and reduce interactions with the criminal justice system. Our current goal is increased resourcing and support for Aboriginal community-led justice reinvestment, so that communities are empowered to act collectively and make decisions about their priorities and about how services are provided in their communities.

For more on community-led justice reinvestment see Attachment A.

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Summary of Recommendations

A standalone provision requiring consideration of Aboriginality

1. The *Bail Act 2013* (NSW) should be amended to include a standalone provision that requires bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, cultural obligations and community ties. This consideration is in addition to any other requirements of the Bail Act 2013 (NSW).

2. 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, with the requisite funding support, as recommended by the ALRC.

3. Implement bail authority training, in particular police bail training to consider any issues that arise due to a person's Aboriginality, with the training to be developed in conjunction with the Aboriginal Legal Service NSW/ACT Limited.

Separate bail regime for children and young people

4. Develop comprehensive cultural awareness training for lawyers and the judiciary to ensure appropriate and consistent application of these, and other changes to laws that flow from recommendations listed above. Aboriginal and Torres Strait Islander people must be involved in the delivery of such training and it should include education about the causes of Aboriginal and Torres Strait Islander people's over-representation in the justice system.

5. Strengthen legal protection for children through a separate legislative regime for bail applicable to children and young people to better align the approach of the court and police to bail decision making. We suggest that this could be done by either:
    - amending the *Children (Criminal Proceedings) Act* to provide a child and youth specific bail process and amending the Bail Act to exclude its application to children. Include a specific legislative reference to provide that 'a person who intends to admit a youth to bail must have regard for the Principles set out in s 6 of the *Children (Criminal Proceedings) Act*'; or
    - introducing a standalone mandatory provision for determinations relating to children and young people within the *Bail Act 2013*, which refers to the objectives of the *Children (Criminal Proceedings) Act* and the *Young Offenders Act* and sets out factors specific to children and young people; or
    - introducing a new Bail Act for children and young people.

6. Import principles contained within s 6 of the *Children (Criminal Proceedings) Act* and s 7 of the *Young Offenders Act* into the separate legislative bail regime for young people, with any necessary amendments to reflect the status of the accused as being presumed innocent. Any reference to community safety should include the acknowledgement that the rehabilitation and re-integration of children into the community is highly relevant to that purpose.

7. Implement bail authority training, in particular police bail training to include a focus on the unique vulnerabilities of children and the provisions of current legislation. In particular this training should include cultural awareness, the cognitive and psychological development of young people and the restrictions on bail conditions already provided by s 20A of the *Bail Act 2013.*

Police discretion: the opportunity for procedural and cultural change to improve outcomes

8. Ensure that Police are appropriately trained (including in relation to trauma-informed approaches and cultural appropriateness) so that they understand how the Bail Act applies to children and do not impose onerous and culturally inappropriate conditions on children. This should also include training for a range of relevant professionals on the objectives of bail as they apply to children and young people.

9. The Department of Communities and Justice should collaborate with Just Reinvest NSW, the Aboriginal Legal Service NSW/ACT Limited and NSW Police in undertaking localised bail review projects with identified Aboriginal communities to improve the procedural and practice elements of the bail regime for children and young people.

10. With the intention of emphasising accountability and equity in remand outcomes, consistency in remand decision-making could be enhanced by the creation of intra-organisational discussions amongst remand decision-makers and inter organisational feedback loops created by more focused data collection.

11. Provide further guidance (either within the NSW Police Handbook or in a separate policy) on how police ought to weigh and consider the factors prescribed by the *Young Offenders Act* and any standalone bail regime applicable to children and young people. Such guidelines could include examples about how police should exercise their discretion and should emphasise a young person's right to have the least restrictive sanction applied against them.

Specific provision allowing for multiple addresses for the purpose of bail residence requirements for young people

12. Amend the *Bail Act 2013* to specifically provide for the nomination of multiple addresses for the purpose of bail residence requirements, where appropriate for young people under 18 years, in particular young Aboriginal people.

Amendments to 'show cause' provisions

13. Amend section 16 to ensure minor offences do not fall within the definition of 'serious indictable offence'. Options for reform include:

    - Only including as a "serious indictable offence" a charge that falls within Table 1 of the *Criminal Procedure Act* (which would exclude larcenies under $5000 and property damage);
    - Exclude or amend the definition of "serious indictable offence" to relate specifically to any offence with a maximum penalty of "more than 5 years" (currently 5 years or more); or
    - Omit the "on bail" provision in 16B(1)(h).

14. Amend section 16B(1)(h) so as to not apply to bail or parole that was imposed when a person was under 18.

Investment in bail support services and justice circuit breakers

15. Invest in bail support services and community-led justice circuit breakers.

1. Impact of the current legislative regime

1.1. The over-imprisonment of Aboriginal and Torres Strait Islander people in NSW

The current legislative framework for bail has facilitated the growth of the NSW prison population and the over-imprisonment of Aboriginal and Torres Strait Islander people. The following statistics provide a snapshot of the impact of the current bail framework.

- In Q1 2020 there were 4,511 people held on remand in NSW, comprising 33% of the total adult prison population.[1] Consistent with other Australian states and territories, the amount of prisoners on remand as a proportion of the prison population has grown substantially in recent decades, from 11.5% in 1970.[2]
- 34% of those found guilty in the Local Court and on remand when the proceedings were finalised did not receive a custodial sentence.[3]
- In NSW, the highest growth offending category was in justice procedure offences (up by 194% from 2000-2015), including breaches of bail conditions (rather than new substantive offences).[4]
- 1,133 Aboriginal and Torres Strait Islander people were in custody on remand in Q1 2020 in NSW, 25% of the remand population, despite Aboriginal and Torres Strait Islander people making up 3% of the population. This is consistent with the overrepresentation of Aboriginal people serving prison sentences, comprising 25% of the prison population in NSW.[5]
- Approximately 40% of Aboriginal defendants who were held on remand at their final court appearance in NSW in 2015 did not receive a custodial penalty on conviction.[6]
- The percentage of Aboriginal prisoners on remand increased from 25% in 2010 to 33% in quarter 1 of 2020, a faster rate of increase than that for custodial sentences.[7]
- The number of Aboriginal and Torres Strait Islander prisoners on remand grew in NSW by 238% between 2001 and 2015.[8] From 2015 to 2018, the number grew by 40%.[9]

1.2. The impact on Aboriginal and Torres Strait Islander young people

The number of young people on remand has increased significantly in recent decades. Between 1981 and 2018, the proportion of young people remanded in custody increased from 21% to 59%.[10]

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[1] BOCSAR Custody Statistic, BOCSARs: https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx

[2] David Brown, 'Looking Behind the Increase in Custodial Remand Populations' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 80, 81

[3] New South Wales Law Reform Commission (2012) *Bail Report 133*, Sydney, New South Wales Law Reform Commission

[4] Don Weatherburn and Stephanie Ramsay, 'What's Causing the Growth in Indigenous Imprisonment in NSW?' (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) 8. See also ch 7; BOCSAR NSW Custody Statistics Fact Sheet, December 2019 https://www.bocsar.nsw.gov.au/Documents/custody/NSW-Custody-Infographic-Dec2019.pdf

[5] BOCSAR, 'New South Wales Custody Statistics: Quarterly Update', December 2019, 21 https://www.bocsar.nsw.gov.au/Publications/custody/NSW_Custody_Statistics_Dec2019.pdf

[6] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.24; Don Weatherburn and Stephanie Ramsay, 'What's Causing the Growth in Indigenous Imprisonment in NSW?' (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) 8.

[7] BOCSAR 2020, 'Custody Statistics Fact Sheet' https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx

[8] Weatherburn and Ramsay (n 4) 8.

[9] Lorana Bartels, Indigenous Justice Clearinghouse, 'The growth in remand and its impact on Indigenous over-representation in the criminal justice system' (Research Brief, May 2019) 2.

[10] Natalai Gale, 'Section 28: Criminalising the Young and Homeless' (Position Paper, YFoundations, May 2019)

From 2014-2018 the proportion of young people who were taken into custody on remand but did not subsequently receive a custodial order from a court within 12 months ranged between 79.4% and 83.1%.[11] As noted by Cunneen and others 'the high proportion of young people on custodial remand demonstrates that Australia is falling short of its [international] obligations to uphold the right of detention as a last resort.'[12]

The impact of the current bail regime on Aboriginal and Torres Strait Islander young people is particularly concerning. At June 2020, Aboriginal and Torres Strait Islander children and young people comprised 40% of the juvenile remand population in NSW.[13]

While there are few studies focussing on the impact of remand specifically, the harmful consequences of incarceration are well documented. Research demonstrates causative links between imprisonment and: increased recidivism, with studies indicating that any period of detention has a criminogenic effect on young people;[14] damage to mental health; difficulty reintegrating into community; and disconnection from community and family.[15]

Recidivism

There is a significant body of research demonstrating a link between early interaction with the criminal justice system and reoffending. Those who spend any time in custody are more likely to offend than those who are never detained, largely because detention necessitates socialisation and identification with other offenders.[16] There is also evidence that long term contact with the criminal justice system engenders a criminogenic effect due to the combined effects of stigmatisation and disruption to everyday life.[17]

Damage to mental health and wellbeing

Remand, and the experiences of distress, isolation and exclusion associated with imprisonment can exacerbate the underlying issues of an already vulnerable population, in a context where access to therapeutic programs may be limited.[18]

The 2015 *NSW Young People in Custody Health Survey* found that 83% of respondents met the threshold criteria for at least one psychological disorder, with a higher proportion of Indigenous children than non-Indigenous children for some disorders.[19] Young people in detention are approximately six times as likely

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[11] Youth Justice Statistics: http://www.juvenile.justice.nsw.gov.au/Pages/youth-justice/about/statistics_custody.aspx#ProportionofyoungpeoplewitharemandepisodewhoreceiveordonotreceiveaControlOrderwithin12months.

[12] Chris Cunneen, Barry Goldson & Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia' (2016) 28(2) *Current Issues in Criminal Justice* 173, 181.

[13] BOCSAR Custody Statistics, BOCSAR: https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx

[14] Suzi Quixley, Rethinking Youth Remand and Enhancing Community Safety (Coalition Against Inappropriate Remand, Queensland, 2008)

[15] Brenna Mathieson and Angela Dwyer, 'Unnecessary and disproportionate: The outcomes of remand for Indigenous young people according to service provides' (2016) 11(2) Journal of Children's Services 1, 4

[16] Matthew Willis, Reintegration of Indigenous Prisoners: Key Findings, Australian Institute of Criminology, 2; Kinner, SA, 2006, 'the post release experience of prisoners in queensland' Trends and Issues in Crime and Criminal Justice no.325, Australian Institute of Criminology

[17] Brenna Mathieson and Angela Dwyer, '*Unnecessary and disproportionate: The outcomes of remand for Indigenous young people according to service* provides' (2016) 11(2) *Journal of Children's Services* 1, 6; Don Weatherburn and Stephanie Ramsay, 'What's Causing the Growth in Indigenous Imprisonment in NSW?' (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) ; Jesuit Social Services, Thinking Outside: Alternatives to Remand for Children (Research Report, 2013) 13.

[18] PwC, Indigenous Incarceration: Unlock the Facts (2013) 40

[19] NSW Health and NSW Juvenile Justice, 2015 Young People in Custody Health Survey: Key Findings for all Young People:

to have a psychological disorder as young people in general.[20] Similarly, the rate of conduct disorders among respondents was more than 20 times that of the general population, and the rate of anxiety disorders was more than three times that of the general population.[21]

Studies indicate that incarceration, for any period, increases a child's risk of mental illness, including increased rates of depression, suicide and self-harm.[22]

Remand also gives rise to the risk of re-traumatisation. In the 2015 NSW Young People in Custody Health Survey, 47.8% of respondents reported that they had been exposed to at least one traumatic event in their lifetime. A high proportion of these (37.5%) had experienced several instances of trauma.[23] Aboriginal and Torres Strait Islander young people are more likely to have experienced childhood abuse and neglect, which often lead to trauma.[24] Circumstances that young people are subjected to in remand - such as routine strip searching - can be humiliating and distressing and potentially lead to re-traumatisation. According to The *Royal Commission into Institutional Responses to Child Sexual Abuse*, sexual abuse survivors in youth detention reported being subjected to 'abusive, inappropriate or traumatising strip searches' which sometimes resulted in re-traumatisation.[25]

Disconnection from family, community and education

When young people are remanded in custody, they are removed from their communities, families and schools, depriving them of support networks which are vital to their wellbeing and development. For Aboriginal and Torres Strait Islander young people, community ties, including ties to extended family, kinship and place, are particularly significant. A legislative regime for bail should recognise that keeping young people in their own communities provides opportunities - for stability, continuity and connection to culture - which remand deprives them of.[26]

1.3. The economic costs

There are direct and indirect economic costs associated with the current bail regime. The direct costs of incarceration are currently $263 per day for an adult in NSW,[27] and $1413 per day to detain a young person.[28] This does not include other costs such as courts, legal representation and policing. Indirect costs include loss of employment opportunity and skills deterioration.[29]

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https://www.justicehealth.nsw.gov.au/publications/2015YoungPeopleinCustodyHealthSurveyFactSheets.pdf

[20] Ibid.

[21] Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, 2015 Young People in Custody Health Survey: Full Report , xxi: http://www.juvenile.justice.nsw.gov.au/Documents/2015%20YPICHS.pdf

[22] Manfred Novack, UN Global Study on Children Deprived of Liberty (United Nations, 2019) 8: https://undocs.org/A/74/136.

[23] Justice Health & Forensic Mental Health Network and Juvenile Justice NSW (2017), 2015 Young People In Custody Health Survey: Full Report – Chapter 7 Trauma experiences and impact of trauma: http://www.juvenile.justice.nsw.gov.au/Documents/2015%20YPICHS.pdf.

[24] Healing Foundation, Growing our children up strong and deadly: Healing children and young people (2014): https://apo.org.au/sites/default/files/resource-files/2013/08/apo-nid35364-1186581.pdf; https://aifs.gov.au/cfca/publications/child-protection-and-aboriginal-and-torres-strait-islander-children.

[25] Commonwealth of Australia 'Contemporary detention environments' (Royal Commission into Institutional Responses to Child Sexual Abuse Volume No 15, 2017) 117: https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_15_contemporary_detention_environments.pdf see also reccomendation 15.4.

[26] Jesuit Social Services, Raising the Age of Criminal Responsibility: There is a better way (Research Report, October 2019) 8

[27] Productivity Commission, 2020, Report on Government Services 2020 https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/justice/corrective-services.

[28] Productivity Commission, 2020, Report on Government Services 2020 https://www.pc.gov.au/research/ongoing/report-on-government-services/2020/community-services/youthjustice

[29] Natalia Gale, 'Section 28: Criminalising the young and homeless' (2019) 32(4) *Parity* 10

1.4. An opportunity to learn from the response to COVID-19-related measures

The unprecedented changes within the criminal justice system in response to COVID-19 measures provide an opportunity to reflect on the objectives and implementation of bail post-pandemic. Changes to bail decisions and the review of previous remand decisions, together with other key changes within the justice system, have resulted in a large fall in the NSW custody population for both adults and juveniles, most acutely in the remand population.[30]

The data reporting from the NSW Bureau of Crime Statistics and Research, indicates that the youth detention remand population has decreased 36.6% between June 2019 and June 2020.[31] In the adult population, there was a substantial drop in the remand population in the immediate period following the start of the pandemic in NSW, which fell by 21.2% between 15 March and 10 May 2020.[32] We suggest that these reductions, whilst in response to a significant external factor, present a significant opportunity to review and analyse decisions and outcomes in bail and remand with the purpose of continuing to maintain a reduction in the remand population in NSW. It demonstrates the sharp pivot that can be achieved through a modified emphasis and interpretation of bail and remand practice and procedure. Proposals for Reform

2. Reform proposals

2.1. A standalone provision requiring consideration of Aboriginality

The existing legislative regime under the Bail Act has failed to address the increasing overrepresentation of Aboriginal and Torres Strait Islander peoples on remand in NSW and has been the subject of recommendations for reforms, including by the Australian Law Reform Commission.[33] The regime has attracted criticism for being 'too narrow or uncertain to be effective'[34] and is said to be rarely used to help accused Aboriginal or Torres Strait Islander peoples to reach bail.[35] Legislative, procedural and cultural reforms are necessary to afford appropriate prominence to a person's Aboriginal and Torres Strait Islander cultural background at each stage of the bail determination process.

The exhaustive list in s 18 of the Bail Act of matters that a bail authority must consider when making bail determinations bundles factors that arise due to the Aboriginality of the accused into a generic statement of '*the accused person's background, including criminal history, circumstances and community ties*'[36] and any '*special vulnerability or needs the person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment*'.[37] Since the introduction of these considerations in s 18 in January 2015, the rate of Aboriginal and Torres Strait Islander peoples held on remand has actually increased in NSW:

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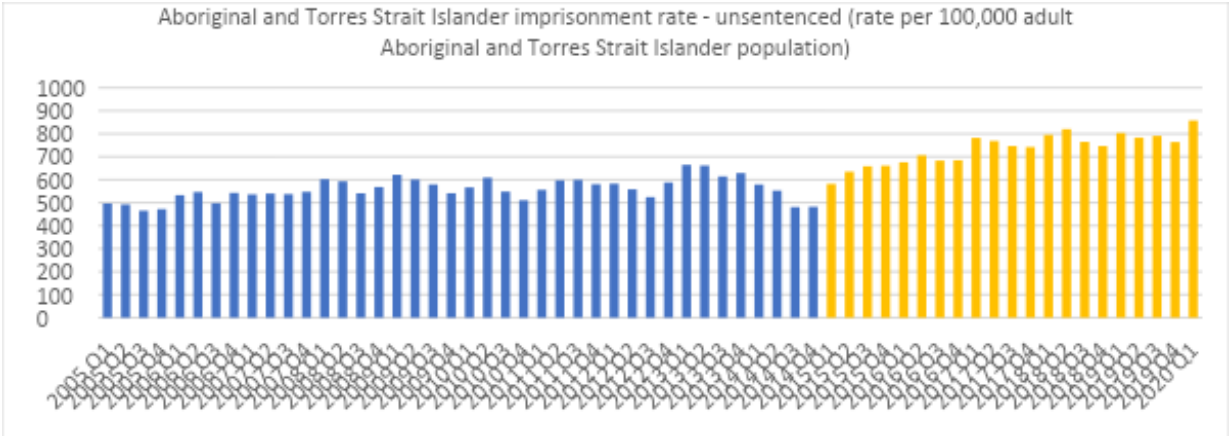
[30] Chan, N. (July 2020) NSW BOCSAR Crime and Justice Statistics Bureau Brief: The impact of COVID-19 measures on the size of the NSW adult prison population, 1; NSW BOCSAR NSW Custody Statistics Quarterly Update June 2020.
[31] NSW BOCSAR NSW Custody Statistics Quarterly Update June 2020.
[32] Chan, N. (July 2020) NSW BOCSAR Crime and Justice Statistics Bureau Brief: The impact of COVID-19 measures on the size of the NSW adult prison population, 1; NSW BOSCAR NSW Custody Statistics Quarterly Update June 2020.
[33] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018
[34] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.69.
[35] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.75.
[36] *Bail Act 2013* (NSW), s 18(1)(a).
[37] *Bail Act 2013* (NSW), s 18(1)(k).



Source: ABS, Corrective Services, Australia – 4512.0 (2005 – 2020)

The data underscores the inadequacy of the existing regime in addressing the overrepresentation of Aboriginal and Torres Strait Islander peoples on remand through the consideration of factors arising due to the Aboriginality of the accused.[38] Just Reinvest NSW supports the repeated calls by Aboriginal and Torres Strait Islander legal services for the amendment of the Bail Act to address concerns including[39]

- The disproportionate impact of the bail regime on Aboriginal and Torres Strait Islander people, including the increasing number of Aboriginal and Torres Strait Islander peoples on remand;
- The higher rates of Aboriginal and Torres Strait Islander people being bail refused in comparison with non-Indigenous peoples, including on the basis of concerns around no fixed place of residence or unstable employment;
- The imposition of unreasonable and restrictive bail conditions by police which increases Aboriginal and Torres Strait Islander peoples' contact with the justice system and likelihood of incarceration; and
- The imposition of bail conditions which fail to recognise the specific cultural and community obligations, transport difficulties, transience and frequent short-term mobility, living in a remote or regional community, poverty, that may affect the ability to meet strict bail conditions for Aboriginal and Torres Strait Islander people.

Just Reinvest NSW supports the introduction of a mandatory standalone legislative provision requiring a bail authority to consider matters relating to an Aboriginal or Torres Strait Islander person's cultural background, family ties, living arrangements and relevant cultural obligations. This would provide a more accurate insight and complete understanding of the accused. This must require a bail authority to consider the relevant matters both when determining whether the person will reach bail, and when attaching conditions to that bail.[40] A bail authority should be required to consider the relevant matters when addressing each bail concern, for example, a person's history of previous offending, particularly low-level offending should be considered in context of his or her identity and background.[41] Standalone provisions mandating consideration of a person's Aboriginality, in line with section 3A of the *Bail Act 1977* (Vic) , have been suggested as a suitable vehicle.[42]

[38] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.56.
[39] From the National Aboriginal and Torres Strait Islander Legal Services (NATSILS), Submission to Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples* (September 2017) 5.
[40] National Aboriginal and Torres Strait Islander Legal Services (NATSILS), Submission to Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples* (September 2017) 6.
[41] National Aboriginal and Torres Strait Islander Legal Services (NATSILS), Submission to Australian Law Reform Commission, *Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples* (September 2017) 6.
[42] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.76-5.81.

Section 3A was overwhelmingly supported by stakeholders in the 2017 Review of Victoria's Bail System.[43] Support to adopt a mandatory standalone provision akin to section 3A of the Victorian legislation has been longstanding through both Bail Act review inquiries and broader inquiries into the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system:[44]

- In 2012, the NSW Law Reform Commission recommended reform to the Bail Act to require mandatory consideration of Aboriginality when making a determination about an Aboriginal person or Torres Strait Islander.[45] Recommendation 11.3 by the NSW Law Reform Commission recommended:

> *A new Bail Act should provide that, in making a decision in relation to an Aboriginal person 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 matter relating to the 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 issue or obligation*
> *(b) any report tendered on behalf of a defendant from groups providing services to Indigenous people.*
> *(c) 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 of or with the consent of the person.*[46]

- In 2017, the Australian Law Reform Commission recommended that all Australian states and territories should enact provisions akin to section 3A of the *Bail Act 1977* (Vic), noting:

> *State and territory bail laws should be amended to include standalone provisions 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. These would particularly facilitate release on bail with effective conditions for Aboriginal and Torres Strait Islander people who are accused of low-level offending.*[47]

Just Reinvest NSW suggests that a standalone mandatory provision requiring and guiding bail authorities to consider issues that arise due to a person's Aboriginality is necessary to address the disproportionate impacts of bail and remand on Aboriginal and Torres Strait Islander peoples.

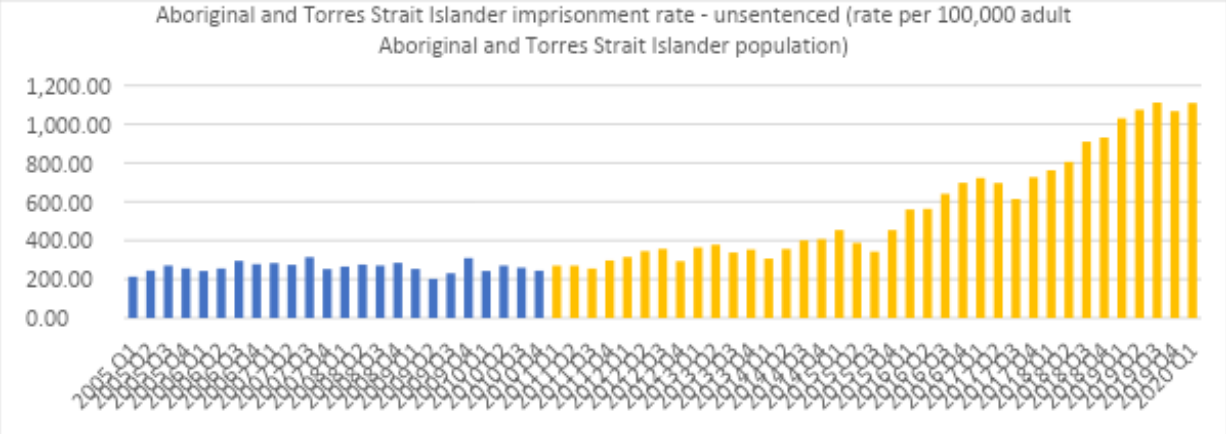
Recommendation 1 - The *Bail Act 2013* (NSW) should be amended to include a standalone provision that requires bail authorities to consider any issues that arise due to a person's Aboriginality, including cultural background, cultural obligations and community ties. This consideration is in addition to any other requirements of the *Bail Act 2013* (NSW).

2.1.1. Training and guidance - standalone provision

[43] Paul Coghlan, Bail Review: First Advice to the Victorian Government (2017) [4.82]
[44] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) Recommendation 5-1.
[45] New South Wales Law Reform Commission, *Bail* (Report 133, April 2012) 185, Recommendation 11.3.
[46] New South Wales Law Reform Commission, *Bail* (Report 133, April 2012) 185, Recommendation 11.3.
[47] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) Recommendation 5-1.

Effective consideration of the unique needs and circumstances of Aboriginal and Torres Strait Islander peoples requires more than just legislative reform. The experience in Victoria following the introduction of section 3A indicates that the adoption of a standalone provision must be made in conjunction with appropriately developed guidance and adequate training to ensure that the provisions mandating consideration of Aboriginality are properly applied.[48] This should also form part of broader cultural changes within the justice system (see below at 2.3). Ongoing guidance and training needs to occur at all levels of the system: in Police and judicial training. Place-based guidance to local Police Commands and judicial officers and court staff, by local Aboriginal community Elders and other members, provides an opportunity not only for better and more purpose-built bail outcomes but would go some way to improve Police and community relations.

Despite the introduction of section 3A in Victoria in 2011, the number of Aboriginal and Torres Strait Islander peoples held on remand has increased. Various stakeholders in the justice sector have observed that section 3A of the *Bail Act 1977* (Vic) has been underutilised since its enactment and this underutilisation has contributed to section 3A having little impact on both remand numbers in Victoria[49] and the appropriateness of bail conditions imposed.[50]



Source: ABS, Corrective Services, Australia – 4512.0 (2005 – 2020)

Despite the data, the introduction of a standalone provision remains supported as an important part of a legislative and procedural framework that is better able to respond to factors arising due to the accused's Aboriginality.[51] There is a significant opportunity to anticipate the necessary mechanisms to support the introduction of a standalone provision in NSW. The Victorian Aboriginal Legal Service has noted that in their experience, s 3A is 'a significant achievement and a powerful tool that allows us to advocate for the cultural rights of our clients in all determinations under the Bail Act. We remain concerned that s. 3A is not being used to provide maximum protection to Aboriginal people across Victoria and that further efforts are required to enhance understanding and implementation of this provision.'[52] The provision was also the subject of submissions to and consideration by the ALRC. The ALRC has acknowledged that 'the effect of this provision may be diminished through limited application and use by legal advocates, and deficiencies in culturally appropriate bail support services and diversion programs'.[53] This underscores the

[48] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.107-5.108.
[49] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.101; Kelly Richards and Lauren Renshaw, *Bail and remand for young people in Australia: A national research project* (Research and Public Policy Series No 125, 2013).
[50] Victorian Aboriginal Legal Service, Submission to the *Royal Commission into Victoria's Mental Health System* (5 July 2019) 38.
[51] Victorian Aboriginal Legal Service, Submission to the Commission for Children and Young People (CCYP), Our Youth Our Way, (October 2019) 8.
[52] Victorian Aboriginal Legal Service, Submission to the Commission for Children and Young People (CCYP), *Our Youth Our Way*, (October 2019) 8.
[53] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.4.

need for more holistic changes to bail practice and procedure to respond to the impact on Aboriginal and Torres Strait Islander peoples.

There have been several responsive recommendations and widespread support for improved guidance and training in relation to the application of s 3A by Victoria Police, court registrars, magistrates, bail justices, legal advocates and prosecutors,[54] which warrant consideration for the NSW context. The ALRC has made recommendations (Recommendation 5-2) that government, working with relevant Aboriginal and Torres Strait Islander organisations, should 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.[55] This is consistent with the recognition by Victoria Legal Aid that 'the consideration of an individual's Aboriginality does not exist in a vacuum, and requires understanding and skill across all involved in the determination of bail'.[56] The Victorian Aboriginal Legal Service has also supported broader cultural awareness training to address the need for a deeper understanding and background to considerations arising for Aboriginal and Torres Strait Islander peoples.[57]

These implementation experiences in Victoria provide a valuable insight into the broader change process needed to shape the introduction of an equivalent provision in NSW. The measures recommended below will ensure that the legislative regime is effective in addressing the overrepresentation of Aboriginal and Torres Strait Islander peoples on remand.

Recommendation 2 - 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, with the requisite funding support, as recommended by the ALRC.

Recommendation 3 - Implement bail authority training, in particular police bail training to consider any issues that arise due to a person's Aboriginality, with the training to be developed in conjunction with the Aboriginal Legal Service NSW/ACT Limited.

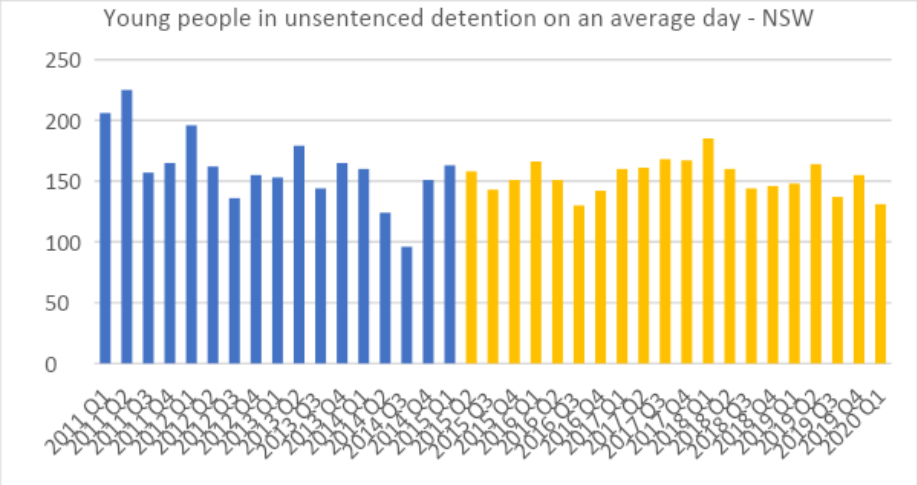
Recommendation 4 - Develop comprehensive cultural awareness training for lawyers and the judiciary to ensure appropriate and consistent application of these, and other changes to laws that flow from recommendations listed above. Aboriginal and Torres Strait Islander people must be involved in the delivery of such training and it should include education about the causes of Aboriginal and Torres Strait Islander people's over-representation in the justice system.

[54] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.107-5.108.
[55] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.87.
[56] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.104.
[57] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.103.

2.2. Separate bail regime for children and young people

The distinct needs and vulnerabilities of children and young people and the negative effects of incarceration are well known and the subject of specific legislative address in the *Young Offenders Act 1997 (NSW)* (YOA) and *Children (Criminal Proceedings) Act 1987 (NSW)*. The YOA scheme has a clear focus on diversion of young people, in particular Aboriginal and Torres Strait Islander young people, as contained in the principles of the YOA. This includes the principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence.[58] The current *Bail Act 2013* (NSW) does not reflect this well-established position in relation to children and young people, with bail legislation overriding anything contrary contained in youth-specific legislation.

The current legislative regime provides for the youth of the accused to be a required consideration in an assessment of bail concerns (amongst other considerations) under s 18(1)(k), being *'any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment'*.[59] There has been no discernible downward trend in young people in unsentenced detention on an average day following the introduction of section 18(1)(k) in January 2015:



Source: BOSCAR Custody Statistics, NSW Prison Statistics.[60]

Police officers determining bail for children and young people are not specialist youth officers and will not necessarily have experience in the children's court jurisdiction and the principles of youth justice legislation. We refer to the submission of the Aboriginal Legal Service NSW/ACT Limited referring to insights from their practice on the implications of the 'adult lens' that is said to be applied to children and young person's matters by police.

There is a clear policy objective for recognising the distinct needs of children and young people within the justice system, in particular as it relates to periods of remand in custody. As discussed above at 1.2, studies have repeatedly indicated that any period of detention has a criminogenic effect on young people with increased recidivism, damage to mental health, difficulty reintegrating into community; and disconnection from community and family.[61] As Aboriginal and Torres Strait Islander children and young people make

[58] *Young Offenders Act 1997* (NSW), s 7(a).
[59] *Bail Act 2013* (NSW), s 18(1)(k).
[60] Accessed at <https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx>.
[61] Brenna Mathieson and Angela Dwyer, *'Unnecessary and disproportionate: The outcomes of remand for Indigenous young people according to service provides'* (2016) 11(2) *Journal of Children's Services* 1, 4.

up around half of the number of young people in custody,[62] there is a clear need to address the specific needs of young people in also driving down the rate of overrepresentation of Aboriginal and Torres Strait Islander people in custody.

Just Reinvest NSW supports the recommendations made by the Aboriginal Legal Service NSW/ACT for a separate bail regime applicable to children and young people - within the *Children's (Criminal Proceedings) Act 1987 (NSW)* or a standalone provision/s within the current Bail Act or through a separate Bail Act for children and young people. Just Reinvest NSW agrees with the suggestion of the Aboriginal Legal Service NSW/ACT that as part of this, consideration should be given to the purpose of bail with respect to young people and the principles applicable to achieving this purpose.

A further benefit of a standalone provision for young people is that it protects them from 'knee jerk' amendments to legislation that are primarily a response to offending by adults.[63] A standalone provision also provides the necessary prominence to the different needs, vulnerabilities and considerations applicable to young people in comparison to adults. It should provide additional guidance to bail authorities to assist in decision-making concerning young people including the principle that detention should be used as a last resort for young people and for the shortest appropriate period. These key principles are consistent with international guidelines, such as the United Nations Convention on the Rights of the Child[64] and the Standard Minimum Rules for the Administration of Juvenile Justice.[65]

Where there is specific legislation for young people, bail considerations unique to young people are generally subject to the principles of youth justice contained in a jurisdiction's youth justice legislation. The current NSW model does not require bail decision makers to consider the principles of the *Young Offenders Act* or *Children (Criminal Proceedings) Act*. Importing the principles from youth-specific legislation into the bail legislation has occurred in other jurisdictions, including the Australian Capital Territory,[66] and we suggest this will assist in providing further guidance to bail authorities when making bail determinations regarding young people. Just Reinvest NSW supports the suggestion by the Aboriginal Legal Service NSW/ACT Limited that the principles contained within s 6 of the *Children (Criminal Proceedings) Act* and s 7 of the *Young Offenders Act* should be imported into the bail regime for young people, with any necessary amendments to reflect the status of the accused as being presumed innocent. This is consistent with the recommendations of the NSW Law Reform Commission.[67]

Specific considerations applicable to young people are necessary at all points of the bail determination process, including as it applies to bail conditions and breach of bail. Onerous or inappropriate use of bail conditions can lead to increased police surveillance of noncriminal behaviours, and intrusion into the ordinary domestic routines of young people,[68] which can increase the likelihood of a young person becoming further entrenched in the justice system. On a breach of bail, police are not directed to s 18 factors in assessing risk and there is no explicit reference to youth as a mandated consideration in determining police enforcement action.[69] We refer to the submission of the Aboriginal Legal Service NSW/ACT Limited for further insights from their practice.

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[62] Australian Institute of Health and Welfare, *Youth detention population in Australia 2019* (Bulletin 148 report, February 2020) 11.
[63] Kelly Richards and Lauren Renshaw, *Bail and remand for young people in Australia: A national research project* (Research and Public Policy Series No 125, 2013) 97.
[64] Open for signature 20 November *1989* (entered into 17 December 1990).
[65] *198*5.
[66] *Bail Act 1992* (ACT), s 23.
[67] New South Wales Law Reform Commission, *Bail* (Report 133, April 2012) 185, Recommendation 11.
[68] Julie Stubbs, '*Re-examining bail and remand for young people in NSW'*, (2010) 43(3) *Australian & New Zealand Journal of Criminology* 495.
[69] Bail Act 2013 (NSW), Section 77(3)(c) requires police to consider "the personal attributes and circumstances of the person, to the extent known to the police officer" with no specific reference to youth.

Recommendation 5 - Strengthen legal protection for children through a separate legislative regime for bail applicable to children and young people to better align the approach of the court and police to bail decision making. We suggest that this could be done by either:

- amending the *Children (Criminal Proceedings) Act* to provide a child and youth specific bail process and amending the Bail Act to exclude its application to children. Include a specific legislative reference to provide that 'a person who intends to admit a youth to bail must have regard for the Principles set out in s 6 of the *Children (Criminal Proceedings) Act*'; or

- introducing a standalone mandatory provision for determinations relating to children and young people within the *Bail Act 2013*, which refers to the objectives of the *Children (Criminal Proceedings) Act* and the *Young Offenders Act* and sets out factors specific to children and young people; or

- introducing a new Bail Act for children and young people.

Recommendation 6 – Import principles contained within s 6 of the *Children (Criminal Proceedings) Act* and s 7 of the *Young Offenders Act* into the separate legislative bail regime for young people, with any necessary amendments to reflect the status of the accused as being presumed innocent. Any reference to community safety should include the acknowledgement that the rehabilitation and re-integration of children into the community is highly relevant to that purpose.

2.2.1. Training and guidance - separate bail regime for young people

As is the case with a standalone provision on Aboriginality, more than legislative change is required to effect implementation of distinct legislative changes to bail for young people. The data coming from across the states and territories indicates that despite the differing legislative bail regimes applicable to young people, any legislative reform must be coupled with improved training, guidance and procedural and cultural change.[70]

We suggest that the implementation of reforms to bail for young people, as well as the current legislative regime, would be improved through training and guidance for bail authorities at all levels on the psychological and neuro-cognitive development of young people. This is consistent with academic research, such as Shafiq et al[71] who noted 'that improved knowledge of adolescent development and typical youth behaviour, as well as exposure to youth in non-law enforcements situations, can result in police officers demonstrating more empathic attitudes towards young offenders'. This training should include trauma-informed approaches and cultural awareness elements, developed in conjunction with organisations holding the relevant expertise. We discuss below at 2.3, further specific recommendations relevant to discretionary decision-making by police in relation to young people.

Just Reinvest NSW, with the ALS, is currently exploring a Bail Project in Moree and Mt Druitt (see Section 3). Under this project, a collaboration between the community, the local ALS and the Police could involve better supports and referrals for young people that would assist bail authorities' bail concerns while providing best practice therapeutic support for young people coming to Police attention. We anticipate

[70] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.107-5.108.

[71] Shafiq, N., Ohlsson, I., & Mathias, P. (2016). Predictors of punitive attitudes among police officers. Journal of Forensic Practice, 18(1), 76-86, p 83

this process will also importantly bring in the expertise of local community members and Elders to wrap around young people and their families, in a more therapeutic and less punitive process.

Recommendation 7 - Implement bail authority training, in particular police bail training to include a focus on the unique vulnerabilities of children and the provisions of current legislation. In particular this training should include cultural awareness, the cognitive and psychological development of young people and the restrictions on bail conditions already provided by s 20A of the Bail Act 2013.

Recommendation 8 - Ensure that Police are appropriately trained (including in relation to trauma-informed approaches and cultural appropriateness) so that they understand how the Bail Act applies to children and do not impose onerous and culturally inappropriate conditions on children. This should also include training for a range of relevant professionals on the objectives of bail as they apply to children and young people.

Recommendation 9 - The Department of Communities and Justice should collaborate with Just Reinvest NSW, the Aboriginal Legal Service NSW/ACT Limited and NSW Police in undertaking localised bail review projects with identified Aboriginal communities to improve the procedural and practice elements of the bail regime for children and young people.

2.3. Police discretion: the opportunity for procedural and cultural change to improve outcomes

As outlined above, there is a clear need to look beyond legislative reform in minimising the custodial remand of Aboriginal and Torres Strait Islander peoples, and in particular, of children and young people. Decisions made by the police from their first contact with a young person to the point of decision-making concerning their diversion, 'may influence later judicial decisions and ultimately impact'[72] upon their sentencing outcome.[73] Discretionary decision-making processes of an individual police officer may translate into a 'pattern' of discretion which operates with detrimental effects for Aboriginal and Torres Strait Islander young people.[74]

The disproportionate impacts on Aboriginal and Torres Strait Islander young people at the point of police decision-making are apparent from the data. Despite one of the specific objects of the *Young Offenders Act* (YOA) being to address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings,[75] the regime does not appear to be meeting this objective. Critically, Aboriginal young people are less likely to receive a diversionary option under the YOA than non-Aboriginal young people - the Law and Safety Committee referred in their Report into the Adequacy of Youth Diversionary Programs in NSW to data from BOSCAR in the period 2016-2017, indicating that:

> *Most Aboriginal young people are proceeded against in court (63.2-64.5 per cent), rather than receiving a diversionary option, including a warning, a caution or a Youth Justice Conference (36.8-*

[72] NSW Law Reform Commission, *Report 104 Young Offenders* (Report, December 2005) 49.
[73] Chris Cunneen, '*Conflicts, Politics and Crime'* (2001) 14(4) *Youth Studies Australia* 38.
[74] Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2015).
[75] *Young Offenders Act 1997* (NSW), s 3.

35.5 per cent). In contrast, most non-Aboriginal young people are proceeded against in a way that does not involve court (78-74.5 per cent).[76]

We also note that in some places in NSW, the use of YOA diversions is particularly low. For example, the rate of using YOA procedures in Blacktown and Mt Druitt is significantly lower than the rest of NSW.[77] This is particularly concerning as Blacktown has a higher proportion of young people than most of NSW, and a higher proportion of Aboriginal young people than anywhere else in NSW.[78]

This early decision-making, in turn, affects later interventions contributing to Aboriginal and Torres Strait Islander young peoples' significant overrepresentation in the juvenile justice system.[79] In 2018, Aboriginal young people made up 50.1% of the juvenile prison population, despite making up 5.3% of the youth population in NSW.[80]

Just Reinvest NSW has a significant focus on the voice of young people in community. The experiences of young people in the justice system and the trajectories of those in contact with the justice system at a young age is well documented and reflects our own experiences through our work in community. The police play a critical gatekeeping role as the point of first contact in the justice system for young people. The decisions made by police on whether to arrest young people determine the number of young people subject to bail determinations. Whilst outside of the scope of the *Bail Act* review, Just Reinvest NSW notes the important role that the *Young Offenders Act* plays as a safeguard to further involvement in the justice system. NSW legislation affords a significant decision-making role to police in determining eligibility of a young person for youth conferences. Low rates of police referrals have been identified both in data and anecdotally and undermine the effective implementation of youth justice conferencing.[81]

There is a strong imperative to reframe and support discretionary decision making to ensure that more young people are diverted, in particular Aboriginal and Torres Strait Islander young people. The evidence supports the position that diverting young people away from the formal court system leads to a positive impact on youth reoffending behaviour.[82] The role of police in discretionary decision-making at the point of first contact is therefore critical. As the precursor exercise of discretion to any bail considerations, this presents a significant opportunity to ensure better outcomes for young people.

Police discretion has been the focus of attention through official guidelines, including policies by NSW police. The NSW Police Force Aboriginal Strategic Direction 2018 – 2023 refers to discretionary decision making under strategies to reduce Indigenous overrepresentation in the criminal justice system.[83] Through these Directions, police accept that there is a link between police discretion and Aboriginal and Torres Strait Islander over-representation in custody, and in those circumstances, police making the

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[76] Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander Peoples* (Report 133, 2018) 5.4.
[77] BOCSAR, NSW Recorded Crime Statistics April 2017 to March 2020, Number of juvenile POIs proceeded against in the latest three 12-month periods by POI's LGA and method of legal proceeding
[78] ABS Census 2016.
[79] Legislative Assembly of New South Wales, Law and Safety Committee, *The adequacy of youth diversionary programs in New South Wales* (Report, September 2018) 155, 5.2.
[80] Legislative Assembly of New South Wales, Law and Safety Committee, *The adequacy of youth diversionary programs in New South Wales* (Report, September 2018) 155, 5.2.
[81] Richards, K. (2010). Police-referred restorative justice for juveniles in Australia. Trends and Issues in Crime and Criminal Justice, 398, 1-8. Canberra: Australian Institute of Criminology
[82] Kimberley Shirley, Crime Statistics Agency, *The Cautious Approach: Police cautions and the impact on youth reoffending* (In brief No 9, September 2017) 1.
[83] NSW Police Force, *Aboriginal Strategic Direction 2018-2023* (Government policy, 2018) 20.

decisions on the ground must be provided with appropriate guidance to effectively exercise that discretion.[84]

The appropriate guidance appears to also be very limited in relation to both the *Bail Act* and the *YOA*, as applied to police decision-making concerning young people. In relation to the *YOA*, the NSW Police Force Handbook (Handbook) relevantly provides:

> *Where a young person is suspected of committing an offence covered by the YOA (see s.8), the young person is entitled to receive the least restrictive sanction (a warning, a caution, a youth justice conference).*
> *…*
> *If you deem the matter not appropriate for a warning or caution you must refer the person to the Specialist Youth Officer (SYO) whether or not the person has admitted the offence. A referral to court or youth justice conference can only be made by the SYO.*

The Handbook reiterates the factors that the *YOA* mandates an officer consider when dealing with a young person. The Handbook does not appear to provide additional guidance about how police ought to exercise discretion when considering diversionary options for young people.

The modern view appears to be that the risks of misuse of discretion can be addressed not by eliminating discretion entirely, but rather by structuring its exercise through administrative guidelines.[85] The benefits to guidelines to frame discretionary decision-making, assuming they are public are said to include that 'guidelines can be a yardstick for testing decisions, and in that way reduce the scope for reliance on irrelevant, improper, or arbitrary factors. Secondly, the need to formulate guidelines may be an incentive to officials to think more carefully and critically about the objects to be attained and the policies to be followed'.[86] We suggest that police discretionary decision-making may benefit from more tailored and contextual guidance on how to weigh the relevant factors going to both the person's age and as an Aboriginal and Torres Strait Islander person.

We note the recommendation of the NSW Legislative Assembly's Law and Safety Committee 'that 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'.[87]

Recommendation 10 - With the intention of emphasising accountability and equity in remand outcomes, consistency in remand decision-making could be enhanced by the creation of intra-organisational discussions amongst remand decision-makers and inter organisational feedback loops created by more focused data collection.

Recommendation 11 - Provide further guidance (either within the NSW Police Handbook or in a separate policy) on how police ought to weigh and consider the factors prescribed by the *Young Offenders Act* and any standalone bail regime applicable to children and young people. Such guidelines could include examples about how police should exercise their discretion and should emphasise a young person's right to have the least restrictive sanction applied against them.

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[84] Anna Corbo Crehan, *'"Appropriate" Police Discretion and Indigenous Over-representation in the Criminal Justice System'* (2010) 11 *Australian Journal of Profressional and Applied Ethics* 1-13.
[85] Simon Bronitt and Philip Stenning, *'Understanding discretion in modern policing'* (2011) 35 *Crim LJ* 325.
[86] Simon Bronitt and Philip Stenning, *'Understanding discretion in modern policing'* (2011) 35 *Crim LJ* 325, citing D Galligan, *'Regulating pre-trial decisions*' in Lacey N (ed), *A Reader on Criminal Justice* (OUP, 1994) 158-9.
[87] Recommendation 15, Inquiry into the Adequacy of Youth Diversionary Programs in NSW, 2018

2.4. Specific provision allowing for multiple addresses for the purpose of bail residence requirements for young people

The current *Bail Act* permits bail authorities to impose strict accommodation requirements as a pre-release bail condition,[88] such as requiring a young person to nominate a fixed residence where they will reside at for the duration of their bail. A breach of an accommodation condition is a breach of bail and can result in the young person being remanded or refused bail in the future.[89] This requirement of a single fixed address for the purpose of bail determinations has a disproportionately negative impact on Aboriginal and Torres Strait Islander people in the bail process .[90]

Between 2014-2017, a fixed-residence requirement was the most common bail condition imposed on both Indigenous (31.5%) and non-Indigenous (30.2%) people in NSW.[91] Breaches of residence requirements were the third most commonly breached bail condition for both Indigenous (10.5%) and non-Indigenous (7.9%) people.[92] This data indicates that, when compared to non-Indigenous defendants, Indigenous defendants are more likely to be required to provide a fixed address, and are also more likely to breach such a condition.[93] The data demonstrates that Aboriginal and Torres Strait Islander people are disproportionately impacted by single residence requirements and the outcomes which follow.

Cultural impact of residence requirements for Aboriginal and Torres Strait Islander peoples

Aboriginal and Torres Strait Islander people, including young people, may have greater cultural obligations which increases the burden of bail conditions such as fixed addresses or exclusion zones. These types of conditions may prevent Aboriginal and Torres Strait Islander people from meeting familial obligations and performing cultural responsibilities, such as taking care of elderly relatives, visiting family, or attending ceremony.[94] The NSW Law Reform Commission highlighted that 'frequent short-term mobility is a normal part of life'[95] for Aboriginal and Torres Strait Islander people and that short-term travel is 'most common among young adults'. Aboriginal and Torres Strait Islander people also experience greater cultural ties to land and place.[96]

Restrictive conditions which are unrealistic and impractical for young people, limit or prohibit contact with family networks, or prevent a young person from performing their cultural responsibilities are likely to lead to higher rates of breach of bail, particularly for Aboriginal and Torres Strait Islander young people.[97] Bail conditions which restrict movement, such as a fixed residence requirement, are therefore

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[88] *Bail Act 2013* (NSW) s 28-29.
[89] Lisa Stone, *A better approach to NSW Bail Laws for Aboriginal and Torres Strait Islander people*, August (2016) 4.
[90] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Bail and Remand Population* (Report, 2017) 2.22.
[91] NSW Bureau of Crime Statistics and Research, *The nature of bail breaches in NSW* (Issue paper no. 133, May 2018) 5, Table 1.
[92] NSW Bureau of Crime Statistics and Research, *The nature of bail breaches in NSW* (Issue paper no. 133, May 2018) 6, Table 3.
[93] NSW Bureau of Crime Statistics and Research, *The nature of bail breaches in NSW* (Issue paper no. 133, May 2018) 6, Table 3.
[94] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Bail and Remand Population* (Report, 2017) 2.25.
[95] NSWLRC Report 133, 11.56 (p. 183).
[96] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Bail and Remand Population* (Report, 2017) 2.27.
[97] Chris Cunneen, *Self-Determination and the Aboriginal Youth Justice Strategy* (Research Report, 2019) 53.

particularly onerous and have a disproportionately negative impact on Aboriginal and Torres Strait Islander young people.[98]

In addition, the inability to prove a fixed address (for example, due to a lack of safe, stable, and secure accommodation) is a major factor in bail refusal. Explicitly providing for the nomination of multiple addresses would improve the likelihood of bail being granted. The Royal Commission into Aboriginal Deaths in Custody identified a lack of fixed residential address as a key factor which contributes to Aboriginal and Torres Strait Islander peoples' disadvantage in the bail process.[99]

We also note that there may be alternative approaches to bail concerns and accommodation issues that could be addressed locally through exploring local police/community partnerships. Just Reinvest NSW has been working alongside an Aboriginal Elders corporation in Mt Druitt. The Elders have invited the Police to work with them to be a first port of call for young people apprehended at the police station. The community would be able to provide a network of extended family supports for the young person which could address the accommodation and other police concerns.

Impact of permitting multiple addresses

The NSW Legislative Assembly's Law and Safety Committee recommended that 'the NSW Government amend the Bail Act 2013 so that young people under 18 years, in particular young Aboriginal people, are able to nominate multiple addresses for the purpose of bail residence requirements, where appropriate.'[100] As noted by the ALRC, bail authorities need to consider 'cultural, family, and community obligations' when making bail decisions for young people.[101]

Specifically providing for the nomination of multiple addresses for young people for the purpose of bail residence requirements could increase the number of young people who are able to access bail, whilst decreasing the number of young people who breach bail conditions. This would assist in reducing the number of young people in youth justice centres, support young people through bail processes and to meet bail conditions, and reduce the 'financial and social costs' of remanding young people in custody.[102]

For Aboriginal and Torres Strait Islander peoples, allowing multiple addresses may facilitate a continuing connection with cultural and kinship obligations. Providing for multiple addresses would also reflect a greater cultural awareness within the bail regime.[103]

Recommendation 12: Amend the *Bail Act 2013* to specifically provide for the nomination of multiple addresses for the purpose of bail residence requirements, where appropriate for young people under 18 years, in particular young Aboriginal people.

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[98] New South Wales Law Reform Commission, *Bail* (Report 133, 2012) 183; Lorana Bartels, Indigenous Justice Clearinghouse, 'The growth in remand and its impact on Indigenous over-representation in the criminal justice system' (Research Brief, May 2019) 1, 5.

[99] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Bail and Remand Population* (Report, 2017) 2.22.

[100] Recommendation 14,, *The adequacy of youth diversionary programs in New South Wales* (Report, September 2018)

[101] Australian Law Reform Commission, *Incarceration Rates of Aboriginal and Torres Strait Islander Peoples: Bail and Remand Population* (Report, 2017) 2.30.

[102] 'Embedding Diversion and Limiting the Use of Bail in NSW: A Consideration of the Issues Related to Achieving and Embedding Diversion into Juvenile Justice Practices' (2010) 21(3) *Current Issues in Criminal Justice* 467, 471.

[103] Laura Brown, 'The Criminalisation of Conduct: Indigenous Youth in the Criminal Justice System' (2012) 7(28) *Indigenous Law Bulletin* 8, 9.

2.5. Amendments to 'show cause' provisions

The legislative intent of a 'show cause' requirement was explicitly to protect the community from certain severe criminal acts.[104] Evidence suggests however that 'show cause' requirements are being imposed on accused persons who have been charged with minor offences.

The current provisions of the "show cause" provisions of the *Bail Act* have resulted in inconsistent bail decisions, where relatively minor offences fall within the definition of "serious indictable offence". This includes any offence punishable by five years of imprisonment or more. This includes accused persons being asked to show cause for a minor theft that is categorised as larceny, whereby larceny of a bag of chips would fall within this category. In this scenario an individual who has been released on bail will need to 'show cause' if charged with a larceny or damage to property offence, but not if charged with a further assault (which only carries a two-year maximum sentence). This unintended consequence of the *Bail Act* needs to be redressed.

Recommendation 13: Amend section 16 to ensure minor offences do not fall within the definition of 'serious indictable offence'. Options for reform include:

- Only including as a "serious indictable offence" a charge that falls within Table 1 of the *Criminal Procedure Act* (which would exclude larcenies under $5000 and property damage);
- Exclude or amend the definition of "serious indictable offence" to relate specifically to any offence with a maximum penalty of "more than 5 years" (currently 5 years or more); or
- Omit the "on bail" provision in 16B(1)(h).

While show cause provisions do not apply to young people, under the current drafting, if a young person on juvenile bail or parole commits an offence at 18, the show cause provision applies. To reflect the intent that the show cause provision not apply to children and young people, section 16B(1)(h) should be amended so as to not apply to bail or parole that was imposed when the person was under 18.

Recommendation 14: Amend section 16B(1)(h) so as to not apply to bail or parole that was imposed when a person was under 18.

2.6. Investment in bail support services and justice circuit breakers

In addition to legislative reform, addressing the disproportionate impact of the current bail regime on Aboriginal and Torres Strait Islander young people requires additional investment in support services. The ALRC, in their *Pathways to Justice Inquiry* report recommended that '*State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed*' (Proposal 2-2). Similarly, the NSW Legislative Assembly Law and Safety Committee recommended '*that the NSW Government should increase the number of bail support services for people under 18, with a particular focus on regional areas, and services for Aboriginal young people and those with complex needs and substantial offending histories*'.[105]

[104] John Hatzistergos 2015 'Review of the Bail Act 2013: Final Report' accessed via https://www.justice.nsw.gov.au/Pages/publications-research/hatzistergos-bail-act-reviews.aspx 4/8/20

[105] Recommendation 12, NSW Legislative Assembly Committee on Law and Safety, *Inquiry into Adequacy of Youth Diversionary Programs in New South Wales*, 2018, accessed via https://www.parliament.nsw.gov.au/ladocs/inquiries/2464/Report%20Adequacy%20of%20Youth%20Diversionary%20Programs%20in%20NSW.PDF

Investment in culturally safe bail houses, which provide temporary, transitional accommodation for young people who are refused bail owing to a lack of accommodation, is critical.

Initiatives designed through a community-led, place-based justice reinvestment approach recognise that Aboriginal communities are best placed to design, develop and implement culturally responsive solutions. Below are some examples of these types of initiatives.

Maranguka Bail Protocols, Bourke NSW

Through collaboration between Maranguka, Just Reinvest NSW and the Bourke Police, a strategy was developed to reduce the number of young people held in custody for breach of bail. Bail protocols were developed along with other justice 'circuit-breaker' initiatives. Justice reinvestment 'circuit breakers' are discrete initiatives that aim to address a particular criminal justice problem and have a quick impact on lowering or improving the interactions of Aboriginal people with the criminal justice system. These initiatives also aim to have a deeper systemic long-term impact by changing criminal justice procedures and practices.

The process for developing the strategy was as follows. Firstly, data regarding bail conditions and breaches was compiled as part of a 'data snapshot' of life for Aboriginal Children and Young People in Bourke. Reducing the number of breaches of bail in Bourke was identified by the community and the Bourke Tribal Council as a priority. Bail protocols were developed to guide police discretion in relation to: warnings and referrals to Maranguka, community feedback and assistance, and community messaging.

Just Reinvest NSW Bail Project in Moree and Mt Druitt

Just Reinvest NSW is currently to develop and implement another 'circuit-breaker' around bail, focussing on two sites: Moree and Mt Druitt. The initiative will be developed and executed alongside the Aboriginal Legal Service's (the ALS) Children's Service. The immediate aim of the initiative is to:

- Test the proposition that bail concerns may be better addressed through focused work with two Police Stations
- Lower the instances of young people being bail refused by Police and remanded in custody pending a Court determination
- Increase the instances of young people being referred to the Young Offender Act and/or the Protected Admissions Scheme for appropriate diversions and support from community-led and designed social and youth services
- Ensure that the facts and circumstances that Police are considering to ground charges are interrogated early – with a view to implementing more effective procedures to lower Police interactions and remand.
- Include family and community organisations to provide explicit support for young people who may be doing it tough.

Giving effect to these aims should result in: better bail practices, including better conditions, fewer bail breaches and fewer instances of bail altogether; a transformation in police practice around bail; and an improvement in the dynamic between police and community.

Recommendation 15: Invest in bail support services and community-led justice circuit breakers.

ATTACHMENT A

Community-led change through justice reinvestment

"Too many young people are getting caught up in the criminal justice system. Being locked up just makes things worse. People aren't being given the chance to build a future."

Just Reinvest NSW Youth Ambassador Taleigha Glover

Justice reinvestment works to reduce the number of Aboriginal people being imprisoned by putting resources into building strong communities, not expensive and ineffective prisons.

For too long, our systems have set Aboriginal people up to fail rather than creating opportunities for them to succeed. The result is that too often they get caught up in the criminal justice system. Despite decades of reports, inquiries and top-down policy interventions, Aboriginal people remain over-represented at every stage of Australia's criminal justice system. Aboriginal and Torres Strait Islander children are 23 times more likely to be imprisoned than non-Indigenous children, women 21 times and adults 15 times.

Aboriginal and Torres Strait Islander women are the fastest growing prison population in Australia. Around a third of women prisoners in NSW are Aboriginal and over 80 percent of them are mothers. A 2020 Productivity Commission report determined that the Federal Government spends $917 million every year on youth justice. It costs $1455 per day to keep a child or young person locked up.

The fundamental problem is that the current punitive approach to criminal justice does not address the underlying drivers of offending and incarceration—these include intergenerational trauma, poverty and inadequate access to essential services like housing, health and education.

WHAT IS JUSTICE REINVESTMENT?

Justice reinvestment is not a 'program'. It is a process that involves people in communities coming together to drive collaboration that creates lasting change.

At the heart of justice reinvestment is the idea that a safer society comes from building stronger communities, and that communities are best placed to identify which problems affect them the most and what strategies to try which might address these issues.

Justice reinvestment is a way of working that is led by the community, informed by data and builds strategies to address issues at a local level. The aim is to redirect funding away from prisons and into communities that have high rates of contact with the criminal justice system, through both community-led initiatives and state-wide policy and legislative reform.

Areas of particular focus include improving service coordination and collaboration and reducing the number of people imprisoned for minor offences. This includes finding impactful 'circuit breakers' that disrupt known pathways to prison, such as providing drivers' licence training to reduce traffic offences.

MARANGUKA—SHOWING WHAT'S POSSIBLE

Communities like the small town of Bourke in outback NSW are leading the way—building stronger communities and futures for their children and young people through self-determination. In 2013, Bourke became the first major site in Australia to implement an Aboriginal-led place-based model of justice reinvestment through a collaboration between Maranguka, Bourke Tribal Council and Just Reinvest NSW.

> *"Too many of my community were being locked up. Kids were being taken away. Families were being shattered, again and again. We decided that a new way of thinking and doing things needed to be developed that helped our children."*
>
> **Alistair Ferguson, Executive Director, Maranguka**

Maranguka developed a collaborative framework to change the way services were provided by government and non-government organisations, working towards the community developed long-term strategy: *Growing Our Kids Up Safe, Smart, Strong*. A Community Hub complements existing services, providing better pathways to help and supports for the Aboriginal community.

A KPMG Impact Assessment of Maranguka estimated that the changes in Bourke in 2017 achieved outcomes in areas such as **family strength** (including a 23% reduction in police recorded rates of domestic violence) **youth development** (including a 31% increase in Year 12 retention) and **adult empowerment** (including a 42% reduction in days spent in custody). The same report calculated that this saved the NSW economy $3.1 million through the impact of the justice system and broader local economy—five times Maranguka's operating costs in the same year.