ALS

Aboriginal Legal Service (NSW/ACT) Limited

Submission to the Administrative review of the Bail Act 2013 (NSW)

12 August 2020

About the ALS

The Aboriginal Legal Service (NSW/ACT) Limited ('ALS') is a proud Aboriginal Community Controlled Organisation and the peak legal services provider to Aboriginal and Torres Strait Islander men, women and children in NSW and the ACT.

The ALS currently undertakes legal work in criminal law, children's care and protection law and family law. We have 24 offices across NSW and the ACT, and we assist Aboriginal and Torres Strait Islander people through representation in court, advice and information, as well as providing broader support programs and undertaking policy and law reform work.

Introduction

The ALS welcomes the opportunity to provide a brief submission to the Administrative Review of the Bail Act 2013 ('the Act'). The review calls for submissions to address "whether the policy objectives of the Bail Act remain valid and whether the terms of the Act remain appropriate for securing those objectives". The review identifies the policy object of the Act as "a strong and clear regime for bail decision-makers. This needs to ensure consistency of decisions and community safety, and reflect the seriousness of the alleged offending."[1]

The policy objectives of an Act are reflected in a purpose or objects clause and/or preamble of the Act. Section 3(1) of the Act provides the purpose of the Act in functional terms, "to provide a legislative framework." However, we refer to the preamble of the Act which provides greater guidance as to legislative intent and the policy objectives underpinning the Act. The preamble[2] states:

> *The Parliament of New South Wales, in enacting this Act, has regard to the following-*
> *(a) the need to ensure the safety of victims of crime, individuals and the community,*
> *(b) the need to ensure the integrity of the justice system,*
> *(c) the common law presumption of innocence and the general right to be at liberty.*

As a result, legislation of bail should be focused on balancing an individual's right to liberty and presumption of innocence, whilst ensuring a person's attendance at court and ensuring the safety of the community. The ALS is of the view that the policy objectives of the Act, as reflected in the preamble are valid, however that the current terms of the Act are not appropriate for securing those objectives.

The ALS submits that the Act, in its current form, does not provide a clear regime and results in inconsistent decision making. In our view, these inconsistencies mean that the Act currently fails to uphold the principle of detention as a measure of last resort and results in

[1] See: https://www.nsw.gov.au/have-your-say/review-of-bail-act-2013
[2] Bail Act 2013 (NSW)

detention for minor offending. It has a particularly concerning impact on children and young people and, as with all aspects of the criminal justice system, a disproportionate impact on Aboriginal and Torres Strait Islander people. As noted by the Royal Commission into Aboriginal Deaths in Custody, "[t]he lack of flexibility of bail procedure and the difficulty Aboriginal people frequently face in meeting police bail criteria by virtue of their socioeconomic status or cultural difference contributes to their needless detention in police custody. This is the case for both adults and juveniles.[3] As a result, the ALS urges amendment to the Act with a focus on:

- Consideration of the unique needs of Aboriginal and Torres Strait Islander people;
- Consideration of the particular impact of remand on children and young people;
- Greater consistency between police and court decision making;
- Greater accountability for police decision making; and
- Preventing the erroneous detention of individuals for minor offending.

Below we outline a number of priority areas of the Act for legislative reform to meet these goals. However, we note that legislative reform should also be accompanied by adequate investment into Aboriginal community-designed and community-led early intervention, prevention and diversion programs, which would also have a positive impact on reducing remand numbers, increasing community safety and reducing overall contact with the justice system.[4] In addition, as noted in the Australian Law Reform Commission's (ALRC) *Pathways to Justice Report*, consideration must also be given to broader measures to address the socio-economic disadvantage that Aboriginal and Torres Strait Islander Communities face due to the ongoing impacts of colonisation and dispossession.[5] For instance, homelessness and inadequate housing is often a significant factor in Aboriginal and Torres Strait Islander people being denied bail. It is important that legislative reform occurs within a broader holistic bail reform package.[6]

(1) A standalone provision for Aboriginality

The ALS recommends that the Act be amended to include a standalone provision for Aboriginality, which makes the consideration of culture mandatory and ensures that this consideration occurs throughout the entire bail determination process.

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[3] Royal Commission into Aboriginal Deaths in Custody, Volume 3 paragraph 21.4.2 as at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/rciadic/index.html

[4] See for example: Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 2017, 13-15.

[5] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 2017

[6] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report 133, 2017, p. 28 & p.150

The current bail regime in NSW unfairly impacts on Aboriginal and Torres Strait Islander people in a number of ways[7]:

- Aboriginal and Torres Strait Islander people are disproportionately represented in the NSW remand population, including children;
- Aboriginal and Torres Strait Islander people are at heightened risk of coming into contact with the justice system, due to racially discriminatory and targeted policing, increasing the likelihood of imprisonment;
- Aboriginal and Torres Strait Islander people, including children, are less likely to be granted bail in NSW compared to non-Indigenous people. This is due to a range of factors including housing and employment instability, as a result of socio-economic disadvantage caused by the ongoing impacts of colonisation and dispossession; and
- Courts often impose restrictive bail conditions which fail to consider specific cultural and community obligations.

As a result, in making a bail determination, it is important that bail authorities give consideration to the particular impact of an Aboriginal or Torres Strait Islander persons' imprisonment given the ongoing impacts of past and current discriminatory policies and practices, including colonisation, dispossession, and continuing experiences of targeted policing and racial discrimination.

Currently in NSW, s18 of the Act provides an insufficient reference to "any special vulnerability or needs...because of youth, being an Aboriginal or Torres Strait Islander or having a cognitive or mental health impairment".[8] Furthermore, whereas s18 applies to the consideration of bail concerns in the context of a 'bail decision'[9], enforcement action by police following an alleged breach of bail is guided by s77(3) which only requires consideration of the "personal attributes and circumstances of the person" to the extent known.[10] As a result, there is no specific reference or requirement to consider cultural background, cultural obligations or community ties particular to Aboriginal and Torres Strait Islander people. This is compounded by insufficient cultural awareness training for decision makers.

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7 NATSILS (2017), *Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples*, accessed via: http://www.natsils.org.au/portals/natsils/NATSILS%20-%20ALRC%20Submission_%20at%2022082017_new.pdf?ver=2017-09-22-152515-350

8 Bail Act 2013 (NSW), Section 18(1)(k)

9 See Bail Act 2013 (NSW) section 8 for bail decisions that can be made under the Bail Act

10 Bail Act 2013 (NSW), s77(3)(c)

As has been previously noted by the National Aboriginal and Torres Strait Islander Legal Services (NATSILS);

> "The obligation to consider factors relevant to an Aboriginal and Torres Strait Islander person's background, family ties, living arrangements and cultural responsibilities should be enlivened on each occasion that the court makes a bail determination in respect of an Aboriginal or Torres Strait Islander person. It is helpful, but insufficient, to permit a court to consider such matters on its own motion or in its discretion."[11]

In our view, a mandatory legislative provision which requires a court, when making a bail determination in relation to an Aboriginal or Torres Strait Islander person, to consider all of these factors is necessary to ensure Aboriginal and Torres Strait Islander do not continue to be treated unfairly by bail regimes.

A useful example to draw upon is Section 3A of the Bail Act 1977 (Vic), which provides that:

> *In making a determination under this Act in relation to an Aboriginal person, a bail decision maker must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—*
>
> *(a) the person's cultural background, including the person's ties to extended family or place; and*
>
> *(b) any other relevant cultural issue or obligation.*

The ALS recommends a similar provision be developed and implemented in New South Wales. The benefit of a standalone provision is that it ensures consideration of Aboriginality occurs across the entire spectrum of decisions under the Act, but the court still retains a discretion as to the appropriate weight to give these issues in particular circumstances. This includes decisions on the issue of unacceptable risk under Part 3 Div 2 of the Act, as well as decisions on appropriate bail conditions, extending bail in an accused's absence, determining whether an accused has satisfied the show cause requirements in s16A, and determining whether an accused has reasonable cause for failing to attend court.

However, in implementing such a provision, it is important to note that the "effect of this provision may be diminished through limited application and use by legal advocates, and

[11] NATSILS (2017), *Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples*, p. 5. Accessed via: http://www.natsils.org.au/portals/natsils/NATSILS%20-%20ALRC%20Submission_%20at%2022082017_new.pdf?ver=2017-09-22-152515-350

deficiencies in culturally appropriate bail support services and diversion programs".[12] For instance, the Victorian Aboriginal Legal Service (VALS) has previously commented that the s3A provision in the *Bail Act 1977 (Vic)* has to date, not had the intended impact of reducing the number of Aboriginal and Torres Strait Islander people being held on remand in Victoria. This is due for a range of shortcomings, including poor interpretation by sitting magistrates, a general tightening of bail law and a range of broader social and legal issues such as lack of transitional housing. [13]Hence, as noted above, it is important that legislative amendment is supported by a broader bail reform package - including adequate provision of holistic support services and training for bail authorities, lawyers and the judiciary in the appropriate and consistent interpretation of the standalone provision.

As a result, the ALS recommends:

- The development of a standalone legislative provision around Aboriginality. This provision should be modelled on s3A of *Bail Act 1977 (Vic)* and developed in collaboration with peak legal bodies, including the requisite funding support;
- The development of guidelines to support the application of the new provision, as recommended by the ALRC's *Pathway to Justice* report;
- The implementation of 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 ALS; and
- The development of comprehensive cultural awareness training for lawyers and the judiciary to ensure appropriate and consistent application of the provision, and other changes to bail laws that flow from recommendations contained in this submission. 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.

(2) Child specific legislation

In our view a failure to provide child specific bail legislation undermines the integrity of the justice system. This is particularly so when the failure to do so exists in stark contrast to the child specific legislation that governs all other aspects of the NSW criminal justice system,

[12] Australian Law Reform Commission, *Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, ALRC Report, p.150

[13] Victorian Aboriginal Legal Service (2017), *Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander people*, https://www.alrc.gov.au/wp-content/uploads/2019/08/39._victorian_aboriginal_legal_service_vals.pdf

including the *Children's (Criminal Proceedings)* Act[14], the *Young Offenders* Act[15] and the *Children (Detention Centres)* Act[16] legislation that recognises that children should be treated differently to adults and the clear policy reasons for doing so. We specifically note that the *Children (Detention Centres)* Act includes child specific parole legislation, another form of conditional liberty. Pursuant to this Act, "the purpose of parole for children is to promote community safety, recognising that the rehabilitation and re-integration of children into the community may be highly relevant to that purpose."[17] The ALS recommends the development of child specific bail legislation to support a consistent approach to youth justice in the interests of young people and the community.

Child specific bail legislation would also support the work being done by the NSW Government to reduce short term remand. Through its 'A Place to Go' initiative, the Government is currently drawing on services to deliver a coordinated and multiagency service to support young people who are involved or at risk of being involved in the criminal justice system. Part of this work involves looking at ways to reduce the significant number of young people who are detained in custody on remand for periods of around 24 hours or less prior to release. The work recognises the detrimental impact of short-term remand, including the trauma caused to the young person, the increased risk of recidivism and the significant financial cost to government. As with all aspects of the criminal justice system, Aboriginal children and young people are over-represented in short term remand.

The current Act contributes to the high incidence of short-term remand in a number of ways. Firstly, it does not sufficiently distinguish between children and young people and adults. The Act was created to apply to adults and amendments creating the current overreach appear to be reactive decisions resulting from incidents involving adults. Consequentially it provides limited guidance, provision and protection for children and young people with respect to bail decisions. Although section 18 includes a reference to 'youth', it is not a standalone provision and does not distinguish young people under 18 whose matters will be determined in a markedly different jurisdiction to young people over 18.

It is therefore not surprising that there is such inconsistency between the court and police regarding bail for children and young people. The jurisdiction of the court is subject to the principles outlined in section 6 of the *Children's (Criminal Proceedings)* Act 1987 (NSW) and focuses on the rehabilitation of children and young people. The broad experience of Children's Court Magistrates and their knowledge and understanding of the principles that underpin the operation of the court and child specific legislation inevitably informs their

[14] Children's (Criminal Proceedings) Act 1987 (NSW)
[15] Young Offenders Act 1997 (NSW)
[16] Children's (Detention Centres) Act 1987 (NSW)
[17] Ibid, section 38

assessment of s18 factors and the concept of what constitutes an 'unacceptable risk' under the Act.

In contrast police officers determining bail are not specialist police youth officers and do not necessarily have experience in the jurisdiction of the children's court or an understanding of relevant evidentiary matters or child development. Police bring an 'adult lens' to the determination of bail for children and young people and this is compounded by an Act with an adult focus. This can be overt, for example when ALS solicitors are advised by police that bail will be refused for a child on the basis of 'show cause'. It can also be less explicit but pervasive. Section 18 factors do not apply to children in the same way they apply to adults. The seriousness of an offence must be considered in light of the likelihood of a custodial penalty and the strength of the prosecution case, two factors that have very different application in the children's jurisdiction than the adults. For example, the likelihood of a custodial penalty, a particularly relevant bail consideration, is very different for children than it is for adults. Similarly, for a child, a history of non-compliance (another relevant bail consideration) may mean a breach of a condition to attend school. Bail records do not identify the type of breach.

The development of specific bail legislation for children and young people would support the integrity of the criminal justice system and reflect and support the NSW Government's work to reduce short term remand and reduce Aboriginal over incarceration. It would promote a consistent approach to youth offending in the interests of children and young people and the community. The legislation could be included within the *Children's Criminal Procedure* Act or within the current Act.

(3) Priority amendments specific to children

In the absence of child specific bail legislation, it is vital that the current Act be urgently amended to appropriately apply to children and young people. Consideration should be given to the purpose of bail specifically with respect to children and young people and the principles applicable to achieving this.

Principles relevant to children

In the absence of child specific bail legislation, principles drawn from section 6 of the *Children (Criminal Proceedings)* Act 1987 and section 7 of the *Young Offenders* Act must specifically be included in the current Act. We note that the NSW Law Reform Commission

has previously recommended and outlined such principles.[18] As with child parole legislation, any reference to community safety should acknowledge the relevance of the rehabilitation and re-integration of children and young people to this.[19]

Exception for children under 14

The ALS strongly supports raising the age of minimum legal responsibility to at least 14, due to the overwhelming medical, social and legal evidence of the deleterious impact that contact with the criminal justice system has on children and young people. For the same reasons, the ALS strongly supports consideration being given to a right of release for children aged between 10 and 14. Numerous young people, still developing a capacity for consequential thinking, are locked up for breaching unnecessary or onerous bail conditions by behaviour that does not constitute a criminal offence. Many of these young people are ultimately found not guilty by the court or are sentenced to non-custodial penalties. Consideration is often given to procedural issues such as making bail conditions clearer, or utilising pictures to assist young people comply with bail. In our view, if a child requires pictures to understand a bail condition, the child should not be subject to the condition and the risk of imprisonment.

Section 40

Section 40 of the Act allows police (by delegated authority) to advise the court following the decision to grant or dispense with bail of the intention to bring a detention application in the Supreme Court. This stays the bail decision and in effect the person stays in custody until the court hears the application (or refuses to hear it), or three days pass. section applies to an individual accused of a 'serious offence', which is defined as including:

> "an offence under or mentioned in a provision of Part 3 of the *Crimes Act 1900* involving sexual intercourse, or an attempt to have sexual intercourse, with a person under the age of 16 years."

There is a significant difference in the seriousness of an offence under this section committed by another child or young person compared to an adult as reflected for example, in the defence of reasonable age that applies in the children's jurisdiction.

The section was considered in the judgment of Howie J in *Regina v Blissett* [2006] NSWSC 1383. His Honour stated that the power should only be exercised "where an urgent resolution of the question of bail is truly required, not simply because they [the prosecutor] do not agree with the result" and further that "The power should, in my opinion, be seen as

[18] NSW Law Reform Commission, Report 133: Bail, 2012, Recommendation 11. http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-133.pdf

[19] Section 28 of the Children (Detention Centres) Act 1987 states "may be highly relevant".

a very exceptional one and used only where the circumstances call for an urgent review of the magistrate's decision because of the risks posed to the community if the applicant were to be released."[20]

In the experience of the ALS the power is not confined to use in exceptional circumstances. In a recent matter, we represented a young person who had no criminal record, charged with having sexual intercourse with his girlfriend's 13-year-old sister in the company of his girlfriend. There was no dispute that the offence was serious but there was also no unacceptable risk of any bail concern being realised. The prosecution advised that a s40 application would be brought and as a result, no release application was made. The young person spent the weekend in juvenile detention, was subject to a strip search and isolated conditions under COVID quarantine. This caused significant distress to the young person's mother. On the Monday a release application was made, and the young person was subsequently granted bail. The prosecution indicated they did not intend on bringing any application to the Supreme Court.

In the view of the ALS s40 should not apply to children and young people under 18 or in the alternative the section be amended to only apply to children in exceptional circumstances and when there is an unacceptable risk of a bail concern being realised.

(4) Priority amendments for children, young people and adults

Amendment to section 77

Section 77(1) of the Act prescribes a number of actions that police can take following a breach of bail, including actions to bring the young person before the court other than by way of arrest and detention. Further, it specifically confirms that an arrest may be discontinued and an alternate enforcement action taken. This has not provided the protection and guidance that was intended. Numerous children and young people continue to be arrested and detained by police pursuant to s77(1)(e) in circumstances in which the court subsequently finds no unacceptable risk.[21] Further, police are extremely reluctant to exercise their discretion differently once a young person has been arrested and is back at the police station. This is despite the fact that any urgency that many have been present in the initial decision to arrest is no longer present, or that relevant information is now available. While cultural change is most certainly needed, in our view legislative amendment is needed to both ensure a culture change and to ensure the terms of the Act are

[20] *Regina v Blissett* [2006] NSWSC 1383, paragraph 8

[21] The number of children and 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%.

appropriate for securing its objectives.

An unacceptable risk test for breach of bail with custody manager oversight

Police do not have the authority to formally revoke bail following an alleged breach, but an exercise of their enforcement action to arrest and detain under section 77(1)(e) of the Act has the same impact - a loss of liberty. As the court can only refuse bail following a breach of bail upon a finding of unacceptable risk, the police should similarly only be able to detain a young person following a breach of bail, after finding an unacceptable risk of exercising an alternative option. Under this model, if there is no unacceptable risk but police determine that the breach warrants reconsideration of bail by the court (rather than taking no action or issuing a warning) they can bring an application before the court, as is currently provided pursuant to s77(1)(c-d), with the accused attending from the community.

To ensure that genuine consideration is given to discontinuing bail once the young person is at the police station the ALS is of the view that young people alleged to have breached their bail should be placed under the care of the custody manager who is then responsible for considering enforcement action. In the same way a young person alleged to have committed an offence would be, and the custody manager would be required to consider bail. Whereas police officers who determine bail regarding fresh offences must be of a particular rank, officers who determine enforcement action following a breach of bail can be a probationary officer. A Custody Manager's oversight is needed.[22] The Custody Manager should then be required to consider the risk of continued detention in the same manner as the arresting officer should be required.

The Act should be amended so that an arresting officer and the Custody Manager[23] must discontinue the arrest and take alternative action pursuant to s77(1)(a-d,f) unless the officer believes on reasonable grounds that there is an unacceptable risk in doing so.

Such amendment will provide clarity of who can discontinue an arrest for breach of bail and take alternate action. Section 77 is currently worded as follows:

> *"if **a police officer arrests** a person, without warrant, because of a failure or threatened failure to comply with a bail acknowledgment or a bail condition, **the police officer** may decide to discontinue the arrest and release the person (with or without issuing a warning or notice) (our emphasis)*

[22] This could be by amendment to section 77 so that a police officer who takes action under s77(e) ensures that as soon as practicable after the person is present at a police station, a police officer with power to make bail decisions pursuant to s43 determines the enforcement action.

[23] Or an office who has power to make a bail decision under section 43 of the Bail Act

This wording suggests that it is only the arresting officer who has authority under section 77 to discontinue the arrest. In our experience, police officers who contact us through our Custody Notification Service (CNS) are not only extremely reluctant to reconsider the initial enforcement action but are not of the same view in relation to who has this authority. Some officers consider it the arresting officer's decision only, some the officer in charge (who may be the same person), some the Custody Manager's decision.

In one recent CNS call we were advised by the Custody Manager that it was "not one person's decision" and so it was not known who we should speak to in order to advocate for a young person to attend court from the community for breach of a non-association condition. The young person was arrested by police after he h voluntarily went to the police station to discuss being with a friend in breach of his bail. It is important to note that Police had not arrested this young person at the time of the breach and had also not arrested the young person the following day when they spoke to him at his house and suggested he come to the station later that day. When police chose to arrest him at the station there was clearly no risk of the young person being in the community or attending court. In this matter the court finalised the young person's matter at the breach hearing, criticising the actions of the police in arresting the young person and acknowledging his actions in presenting himself to the station.

This example highlights the need for great accountability for police decision making around arrest and detention for breach of bail, in order to prevent the erroneous detention of children and young people.

Reasons for enforcement action

It is the view of the ALS that a requirement to record reasons for the enforcement action should be required under the Act. This is consistent with the requirement to provide reasons for bail decisions[24] and will promote accountability.

Matters to consider in determining enforcement action

In addition to a standalone provision for Aboriginality and youth, the matters that must be considered by a police officer in taking enforcement action should be amended to include the principles that arrest must be a last resort and detention should be for the shortest time possible.

[24] See section 38 of the Bail Act 2013 (NSW) and Bail Regulations 2013 (NSW), Regulation 12

Authority of policy to vary police bail following breach

Amendment to section 77(1) should allow police to vary police bail following a breach, with or without issuing a warning. This would allow police to address an unacceptable risk without detaining the young person or requiring their attendance at court. The ALS considers the lack of power to be an oversight and suggest urgent amendment.

Amendment of s20A

In our experience bail conditions are routinely imposed on children and young people that:

- do not take into account cultural considerations and obligations;
- are routine;
- often for welfare reasons; and
- are inconsistent with s20A of the Act.

To address this, we again note the recommendation of a standalone provision for Aboriginality and youth. Further, we suggest legislative amendment to strengthen the requirement of necessity and provide accountability. The Act, section 20A and section 18(1)(p), should specifically confirm that a bail condition cannot reasonably be imposed to address any bail concern if there is otherwise no unacceptable risk.

Amendment of s21

Section 21(2) of the Act contains a list of offences for which there is a "right to release", meaning that the court must grant bail if an accused person is charged with any of these offences in NSW. Under s 21(3), certain offences under the *Summary Offences Act 1988* are excluded from that list. The ALS recommends amendments to s21(3) and (4) to prevent the erroneous detention of individuals for minor offending or breach of bail.

In our view, s 21(3)(c) should be amended to exclude children and young people from its operation. This could be achieved by amending the section to provide that an excluded offence is "an offence under section 11B, 11C or 11E (offences relating to knives and offensive implements) if the person has previously been convicted of an offence under any of those sections or of a personal violence offence, *unless the person was under 18 at the time of the offence."* In the experience of the ALS, in the instances in which children or young people are found to be in the possession of an offensive implement, it reflects their immaturity or vulnerable status rather than a more serious intent. For example, a young person is stopped by police and has a pocket knife in their school bag. Further, s21 should be amended to delete s21(4) which provides that an offence is no longer an offence for which there is a right to release, if there has been a breach of bail for the offence. As noted, children and young people are routinely placed on bail conditions that are contrary to s20A of the Act, such as the condition to attend school. Further, courts will often seek to impose

uniform conditions if there is more than one bail matter. For example, a young person may be on bail for shoplifting with a condition not to enter the particular shop. This condition may then also be placed on the "right to release" offence. If the young person breaches this condition, there is no longer a "right to release", despite the fact that the young person could not be sentenced to control and despite the fact that the breach was for non-criminal behaviour.

This creates a situation where a person may be remanded in custody due to breach of bail, despite the original offence being a fine only offence. It is incongruous that anyone, and particularly a child, could be remanded in custody for an offence for which a sentence of control *could not* be imposed.

Amendment of s16B – Removal of show cause for less serious offending

The current provisions within s16 allow for inconsistent bail decisions, where relatively minor offences fall within the definition of "serious indictable offence" and should be amended to prevent the wrongful detention of individuals for minor offending.

The Explanatory Note to the Bail Amendment Bill 2014, which introduced the show cause provisions into theAct, stated that the relevant show cause offences "include offences punishable by imprisonment for life, child sex offences, serious personal violence offences, certain offences involving drugs, firearms or prohibited weapons, and *serious offences committed by an accused person while on bail, on parole* or subject to a supervision order" (emphasis added). This indicates the severity of the offences which are intended to be caught by the show cause provisions. Indeed, the Second Reading Speech of the Hon David Clarke introducing the Bill stated that "[t]he show cause offences therefore apply to those offences which involve a significant risk to the community". In these offences, the consequences of materialisation of the risk to the community is said to be such that they outweigh the likelihood of its occurring.[20]

Under s16B(h) of the Act, a serious indictable offence that is committed by an accused person while on bail or while on parole is a 'show cause offence'. This includes any offence punishable by five years of imprisonment or more, such as larceny. The result is that there are accused who are required to show cause after committing an offence, such as stealing a bottle of coke, who were on bail for an offence of similar seriousness. In these matters, it could not be said that the consequence of materialisation of risk to the community is such as to warrant the imposition of this provision. This category of show cause is not consistent with the other categories of offending that enliven the show cause provision.

***Definition of Juvenile Parole and Juvenile Bail for Show Cause* – s 16B**

Show cause provisions have been rightly drafted to not apply to children and young people under 18. However, under the current drafting, if a young person on juvenile bail or parole commits an offence once they have turned 18 the show cause provision is enlivened. 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 not to apply to bail or parole that was imposed when the person was under 18.

Amendment of s51 - Power of the accused to make a detention application

Section 51 of the Act should be amended to provide that an accused person can make a detention application on their own behalf.

An accused may want bail revoked in circumstances where an accused is in custody otherwise and wishes to ensure that the time in custody is referrable to an offence for which the accused has bail. While an accused may make a variation application under s51(1), revocation of bail is expressed as subject to a request of the prosecution.[25]

In *Refaieh v R* [2018] NSWCCA 72, the Court (N Adams J, Hoeben CJ at CL and Johnson J agreeing) found that "The fact an offender is not entitled to be released from custody for one offence but was granted bail in respect of another does not mean his or her bail status has altered in respect of the latter". While the court was of the view that the Court would decline an accused's application to have bail revoked if the request was not joined by the prosecutor[26], the language of the section is mandatory and it is the experience of the ALS, that prosecutors most often refuse to make the application for revocation upon our request. This has led to criticism from the judiciary. The ALS has raised this issue previously with the Bail Monitoring Group.

The current formulation of s51(9) does not secure the objectives of the Act and should be amended to state "A court must not revoke bail on a variation application unless revocation is requested by the prosecutor *or the accused* in the proceedings" (our emphasis).[27]

Amendment of s 74

Section 74(1) provides that "[a] court that refuses bail for an offence, or that affirms a decision to refuse bail for an offence, after hearing a release application is to refuse to hear

[25] Bail Act 2013 (NSW), Section 51(9)
[26] *Refaieh v R* [2018] NSWCCA 72 at 61
[27] Amendment to s51(7) would also be required

another release application made by the accused person for the same offence, unless there are grounds for a further release application". One ground for a further release application outlined in s 74(3) is that "the person is a child and the previous application was made on a first appearance for the offence".

The ALS recommends that this subsection be amended to remove the words "and the previous application was made on a first appearance for the offence." Removal of these words would ensure that a child that fails to make a release application on their first appearance, and is bail refused on a subsequent appearance, is not prevented from bringing a further application without satisfying the court that there are grounds to do so. In our experience courts can have different views as to the grounds that allow a subsequent release application. For example, not all Magistrates are of the view that time in custody can constitute a change in circumstances since the last application.

Children are particularly and uniquely vulnerable given their age, limited understanding of court process and procedure and reliance on adult caregivers for support and assistance. First appearances are most often in the context of busy list days where time can be limited. Children who are not initially able to access relevant support or information should not be required to go through the hurdle of s 74(1) before a release application can be heard. In its current form, s 74 does not sufficiently protect the rights of children. The proposed amendment would reflect the different position of children to adults, would alleviate the need to allocate court time to determining s 74 issues, and would reduce the number of matters which need to proceed to the Supreme Court.

Multiple residential addresses

The Royal Commission into Aboriginal Deaths in Custody noted that both the lack of a fixed residential address, or having multiple addresses, can cause Aboriginal people to be disadvantaged in the bail process. Similarly, in their 2012 report on bail, the NSW Law Reform Commission (NSWLRC) noted that:

> "For many Aboriginal people, frequent short-term mobility is a normal part of life. People may travel for a few days or a few months, usually to visit family, but also to attend funerals, cultural or sporting festivals or to access health services. Short-term travel is most common among young adults, with older people more firmly associated with a homeland and serving as a focus or base for others, particularly children. Bail processes requiring a fixed address and frequent reporting to a particular police station may conflict with these cultural practices."[28]

[28] NSW Law Reform Commission, Bail, Report No 133 (2012) [11.54]

There have been previous attempts to provide more flexible bail conditions for Aboriginal people in NSW, including a focus on addressing the issue of multiple addresses.[29] However, in the experience of the ALS, this has had limited on the ground impact for our clients to date. As a result, the ALS recommends that a working group be established with a focus on examining and overcoming the existing operational barriers in this area.

[29] NITV News (2017), "More lenient bail conditions for Aboriginal offenders", accessed via: https://www.sbs.com.au/nitv/nitv-news/article/2017/11/10/more-lenient-bail-conditions-aboriginal-offenders