ALS

Aboriginal Legal Service (NSW/ACT) Limited

Short term remand: A Snapshot

29 September 2020

About Us

The 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.

Contact

Keisha Hopgood, Managing Solicitor, Children's Criminal Practice
Aboriginal Legal Service NSW/ACT Limited
Suite 460, Level 5, 311-215 Castlereagh Street, Sydney NSW 2000
T: (02) 9213 4100 E: Keisha.Hopgood@alsnswact.org.au
W: www.alsnswact.org.au

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A snapshot of short term remand

1. Introduction

In 2019-2020, the ALS undertook a project in support of the work being done by Their Futures Matter ('TFM'), with the broad aim to reduce the instances of short term remand experienced by Aboriginal and Torres Strait Islander young people (10 – 17 years old). Broadly, the project sought to provide a greater understanding of issues or barriers that contribute to short term remand and to therefore identify possible opportunities for its reduction.

In addition to participating in a number of workshops and focus groups, the project included three main components:

- The creation of a 'snapshot' of short term remand as experienced by a cohort of 218 young people who came through the ALS Custody Notification Service ('CNS')[1] during a 10 week period in May-August 2019 and who were not diverted by police under the *Young Offenders* Act. By matching data from the CNS call for each young person to the corresponding Justicelink entry we were able to identify the incidence of short term remand for this cohort.
- To utilise and assess the efficacy of the CNS to advocate for bail and to gain a greater understanding of the reasons why police were denying young people bail. During the 10 week period, CNS solicitors were asked to advocate for bail at the time of the CNS call and, where a young person was refused or denied bail, to ask for and record any reason or 'unacceptable risk' identified by police.
- To draw on this process and our broader experience representing Aboriginal young people in bail matters in order to identify relevant issues in reducing short term remand and to further illustrate this through a number of case studies.

For the purposes of the project, 'short term remand' is defined as where police deny a child or young person (10-17 years old) bail or liberty on bail and the court subsequently grants or continues bail at the child or young person's first appearance.[2] Although young people who are sentenced to a community based order at first appearance will have experienced a short period of remand, the snapshot records this separately due to the distinct decision-making processes in sentencing and in determining bail and the different roles and powers available to the police and courts in each process. However, it should be noted that this definition excludes the sentencing and diversion of young people under the Young Offenders Act.[3] Both police and the courts have a discretionary power to divert young people under this Act in particular circumstances. If the court deals with a young person under the Young Offenders Act at first appearance, this may indicate a missed opportunity for police to have done so and an avoidable instance of short term remand.

The project distinguishes between three categories in which short term remand can occur, namely;

[1] Police are required under legislation to contact the CNS if an Aboriginal or Torres Strait Islander person is taken into police custody. The service operates as a both a welfare check and legal advice / assistance service.

[2] In defining short term remand for the purposes of this project we were mindful of using terminology that correctly described the outcome of police and court bail decision making. Our definition initially included matters in which the court dispensed with bail at first appearance. However, we had no instances of this occurring independent of the court sentencing the young person to a Youth Justice Conference under the Young Offender's Act and for clarity removed this refe rence.

[3] Young Offenders Act 1997 (NSW)

- where a young person is alleged to have committed a previously uncharged offence (fresh offence)
- where a young person is alleged to have failed to comply with bail (or was about to fail to comply)
- where a young person is alleged to have committed an offence *and* failed to comply with bail (or was about to fail to comply)

Undertaking the project highlighted the importance of recognising these distinct categories. Each category involves distinct terminology, processes and powers and as such there are specific issues relevant to each category. Discussions under the broad banner of short term remand that do not acknowledge these distinctions may risk missing opportunities for reducing short term remand.

The results of the project illustrate that there are opportunities that should be explored and relevant issues that must be further discussed with stakeholders. The results also illustrate the urgency with which this must occur. We know from our involvement in the TFM workshops that the incidence of short term remand experienced by both Aboriginal and non-Aboriginal young people is unacceptably high at around the 50% mark. However, the project snapshot illustrates an even higher rate of short term remand experienced by Aboriginal young people, at 60% overall and at almost 80% with respect to the breach of bail category. Sadly, these results are not surprising, with Aboriginal young people being over represented at all stages of the criminal justice system.

We look forward to continue working with TFM in seeking to address this.

2. The Bail Act & Process

It is useful to give a brief outline of some relevant aspects of the *Bail Act 2013* (NSW) ('Bail Act') and the bail decision making process.

(a) Bail decisions & enforcement actions

It is our experience that short term remand discussions – our own included – have often been predicated on the assumption that as police and the court are applying the same Bail Act, considering the same 'bail concerns' and the same 'unacceptable risk' test, their decisions should be more uniform.

However, the Act distinguishes between *bail decisions* by the court following a breach of bail, and *enforcement actions* by the police following a breach of bail. The process for police following an alleged breach of bail under s77 of the Bail Act does not require any proper or independent consideration of the breach in the context of an assessment of bail concerns and risk. The process for the court does. It is important to be mindful of this as it raises questions as to what the role of police and the courts is, and should be, with respect to both setting and enforcing bail. Reform of bail practice and procedure can then be appropriately developed and targeted recognising the parameters of these roles.

(i) Fresh offences

Section 8 of the Bail Act provides four decisions ('bail decisions') that can be made under the Act with respect to an offence: to release a person without bail for the offence; to dispense with bail for the offence; to grant bail (with or without conditions) for the offence or to refuse bail for the offence. Part 3 of the Act provides an 'unacceptable risk' test that must be applied in making this decision. It provides that a bail authority (police, court or authorised justice) must, before making a

bail decision, assess any bail concern that an accused person, if released from custody, will (a) fail to appear at court, (b) commit a serious offence, (c) endanger the safety of victims, individuals or the community, or (d) interfere with witnesses or evidence.[4] An exhaustive list of factors must be considered in the assessment of these bail concerns.[5] If the assessment of a bail concern meets the level of 'unacceptable risk', bail must be refused,[6] and conversely, if the assessment does not meet the level of unacceptable risk, bail must be granted, dispensed with or the person released without bail.[7]

If police refuse a young person bail, the young person must be taken before the court as soon as practicable.[8] The young person can then make a release application, and applying the unacceptable risk test, the court must then grant, refuse or dispense with bail.[9]

(ii) Breach of bail

A breach of bail is not an offence. Section 77 of the Act provides that a police officer who believes on reasonable grounds that a young person has failed or is about to fail to comply with bail may:

(a) decide to take no action in respect of the failure or threatened failure, or
(b) issue a warning to the person, or
(c) issue a notice to the person (an ***application notice***) that requires the person to appear before a court or authorised justice, or
(d) issue a court attendance notice to the person (if the police officer believes the failure is an offence), or
(e) arrest the person, without warrant, and take the person as soon as practicable before a court or authorised justice, or
(f) apply to an authorised justice for a warrant to arrest the person.

Police do not have the power to refuse, revoke or grant bail in response to an alleged breach, or alleged imminent breach, of bail. If a police officer determines to arrest the person, the person is taken before the court with police filing a detention or variation application.[10] It is then a matter for the Prosecution whether the application is pressed.[11] Until the court makes a determination there is no decision by a bail authority to refuse bail. The young person still has bail but is not entitled to be at liberty.[12]

If an officer takes action under s77(e), the officer can also discontinue an arrest and deal with the person by way of an alternative. In deciding whether to take an enforcement action, and what action to take, s77(3) of the Act provides the following non exhaustive list of matters that are to be considered:

(a) the relative seriousness or triviality of the failure or threatened failure,
(b) whether the person has a reasonable excuse for the failure or threatened failure,

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[4] Bail Act 2013 (NSW), Section 17
[5] Bail Act 2013 (NSW), Section 18
[6] Bail Act 2013 (NSW), Section 19
[7] Bail Act 2013 (NSW), Section 20
[8] Bail Act 2013 (NSW), Section 46
[9] Bail Act 2013 (NSW), Section 49 and Part 3.
[10] If not all matters. It would be interesting to see the statistics on this.
[11] The Local Court Bench Books state that it is for "the prosecution to advise the court whether a detention application or variation application is sought"; Local Court Bench Book – Bail; The Judicial Commission of NSW https://www.judcom.nsw.gov.au/publications/benchbks/local/bail.html
[12] See sections 7 and 14 of the Bail Act 2013 (NSW)

(c) the personal attributes and circumstances of the person, to the extent known to the police officer,
(d) whether an alternative course of action to arrest is appropriate in the circumstances.

There is no specific legislative requirement to consider bail concerns or whether any bail concern constitutes an unacceptable risk in light of the alleged breach.[13]

When a young person is brought before the Court for an alleged breach of bail, s 78 of the Act provides that the Court must first determine whether the person has failed, or was about to fail with the bail condition.[14] If so satisfied, the Court may release the young person on their original bail (continue bail), revoke bail or vary bail.[15] The Court's attention is specifically drawn to the unacceptable risk test with section 78(3) confirming its application to the exercise of the Court's functions under this section.[16]

(iii) Summary: Table

	Police power/authority	**Test: Police**	**Court power/authority**	**Test: Court**
Fresh offence	S43(1) – must be police officer of or above rank of sergeant & present at station or at the time in charge of the station S43(2) – power to: release w/o bail; grant bail; refuse bail S46 – must be taken before the Court if refused bail	S17 – Assess bail concerns by considering s18 matters S19 – if unacceptable risk must refuse bail S20 – if not unacceptable risk must grant bail (conditional or unconditional); release w/o bail; dispense with bail	S48 – Power to hear release, detention or variation application. If a YP is bail refused by police and makes a release application the Court may: s49(4) – affirm or vary the bail decision; s49(3) dispense with bail; grant bail (conditional or unconditional); refuse bail If a YP is bail refused by police and makes no application the Court may s53(1) – grant bail (conditional or otherwise) s54 – affirm the decision to refuse bail	S17 – Assess bail concerns by considering s18 matters S19 – if unacceptable risk must refuse bail S20 – if not unacceptable risk must grant bail (conditional or unconditional); release w/o bail; dispense with bail
Breach of bail	S77(1) - police officer may (in summary) take	S77(1) Must believe on reasonable	S78 – court may release on the original bail; vary	S78(3) & s15(3) – Part 3 applies (the

[13] Although elsewhere (for example in section 15(3)), the Bail Act 2013 (NSW) suggests that the unacceptable risk does apply to enforcement decisions by police, it logistically cannot in light of section 77(1) and the options that must follow a finding of unacceptable risk or otherwise pursuant to sections 19 and 20 of the Act.
[14] Bail Act 2013 (NSW), Section 78
[15] Ibid
[16] See also section 15(3) and section 18(f1) of the Bail Act 2013 (NSW)

	no action; issue a warning; arrest and take before the court; issue a notice for the person to attend court (YP attends from the community).	grounds that there was a breach or is about to be a breach S77(3) – matters that are to be considered (non-exhaustive): seriousness/triviality of failure; whether reasonable excuse for failure; known personal attributes/circumstances of person; whether alternative course of action to arrest is appropriate	the bail decision by revoking the bail decision and substituting a new one; vary the bail decision by varying the bail conditions.[17]	'unacceptable risk' test is found within Part 3) S17 – Assess bail concerns by considering s18 matters S19 – if unacceptable risk must refuse bail S20 – if not unacceptable risk must grant bail (conditional or unconditional); release w/o bail; dispense with bail

(b) Release of the young person: S28 Orders and Bail Plans

The majority of release applications are made at first instance, that is at the first mention of the matter before the court following the determination by police to refuse bail to the young person. On occasion there may be a request to adjourn the matter in order for a release application to be made on the next occasion. This may be for example because there is information relevant to the application that first needs to be obtained.

(i) Section 28 orders

Following the court determination to release a young person the bail acknowledgement document is prepared and once any pre-release conditions are complied with (for example the provision of a security requirement), the young person enters bail by signing the bail acknowledgment document and is released.[18]

If there is no suitable accommodation available for the young person at the time of the bail hearing the court may grant bail with an accommodation requirement. This requires that suitable arrangements be made for the accommodation of the young person before he or she is released on bail.[19] The matter is then re-listed before the court every 2 days until the accommodation requirement is complied with.[20] When the accommodation requirement is complied with the young person is entitled to be released without any re-hearing of the matter.[21]

(ii) Bail Plans

There is no legislative basis for a 'bail plan', however, it is procedurally open to a practitioner to ask the court to request one from Youth Justice prior to hearing a release application or following an

[17] See s4(3) and s4(4) of the Bail Act 2013 (NSW)
[18] A young person cannot be released until they have signed the bail acknowledgment and given it to the bail authority. See s 33 Bail Act note. If a pre-release condition cannot be complied with the court can hear a variation application to consider the condition; Bail Act s 55
[19] Bail Act 2013 (NSW), Section 28. See also section 29.
[20] Bail Act 2013 (NSW), Section 28(4)
[21] Bail Act 2013 (NSW), Section 29(3) Bail Act

unsuccessful release application. This ordinarily requires an adjournment of a week during which time Youth Justice may speak to the young person, carers and others to prepare a written document for the court outlining the young person's residential and other circumstances were the young person to be granted bail.

3. Creating the 'snapshot' – the cohort & short term remand

The cohort was drawn from calls to our ALS Custody Notification Service ('CNS'). Police are statutorily mandated to contact the CNS when there is an Aboriginal young person in custody and the service operates as both a welfare check and legal advice service. The CNS operates 24 hours, 7 days per week and is divided into three shifts: day, evening and night, each of which is staffed by ALS solicitors. During a ten week period in May-August 2019, an additional CNS solicitor was allocated to day shifts (8am-4pm) to take calls regarding juveniles. Calls in which police advised the CNS solicitor that the young person would be charged and/or was in custody with regard to an alleged breach of bail were collated.

Details of CNS calls are recorded on a CNS form, and include the time and place of the call, the young person's personal details, the place of detention, and the name of the relevant police officer and station. Details regarding the reason the young person is in police custody and any allegations or charges are also recorded. This data was used to manually match the calls with data from Justicelink[22] by reference to identifying information of the young person, lodgement date of the originating document (Court Attendance Notice or Application) and details of the charge or application. If a call could not be matched it was excluded.[23] The result was a cohort of 218 young people.

To obtain the snapshot of short term remand experienced by the cohort, we supplemented the usual Juvenile CNS form with a Juvenile CNS bail document. The bail document recorded the bail determination proposed by police at the time of the call as advised by the police to the CNS solicitor. If the bail determination was unknown at the time of the call this was recorded. Justicelink confirmed and/or provided the bail determination that was made by police, and additionally if the determination was to refuse bail, the bail determination by the court at first appearance. Matters were categorised by way of fresh offence, breach of bail or both fresh offence and breach of bail. We were thus able to determine for each category the percentage of matters the courts granted or dispensed with bail at first appearance, following the decision of police to deny a young person bail or liberty on bail, i.e. the incidence of short term remand.

To gain insight into the reasons why young persons in the cohort were denied bail or liberty on bail by police, CNS solicitors were asked to advocate for bail and breach of bail alternatives where appropriate and, where a young person was not released, to ask for and record any reason or unacceptable risk identified by the officer. If bail had not been considered or determined at the time of the initial CNS call, CNS solicitors were asked to request a further call from police if the young person was subsequently bail refused. These details were recorded. It was considered that in addition to providing insight into police bail decision making, this process would support police engagement with the bail decision making process and promote accountability for the bail decision.

4. The Incidence of Short Term Remand – the Results

Of the 218 matters, 108 were fresh offence matters, 43 were breach of bail only matters (i.e. breaches that were not fresh offences) and 67 were with respect to both a fresh offence and breach of bail. Matters involving multiple charges or bail breaches were treated as one matter and the overall

[22] Justicelink is the web-based electronic case management system used for court administration in NSW courts.
[23] A call may not have been matched for any number of reasons, including errors as to spelling, police determining not to charge, or young people being charged under a different surname.

outcome – bail denied or granted – recorded. For example, if a young person was arrested for two offences, one of which was a right to release offence and the other for which they were refused bail, this was recorded as an incidence where bail was refused.

In each category we have noted matters where:

- A s28 order was made at the time bail was granted. It is not known how long the young person remained in custody prior to the accommodation requirement being met. In our experience young people have remained in custody subject to a s28 order for time frames ranging from hours to weeks.[24]
- Bail was granted following the preparation of a bail plan. There were seven matters across the categories in which bail plans were ordered and in each bail was subsequently granted. In each of these matters there was no application for bail at first instance, bail was formally refused by the court and the matter adjourned. These matters do not come within the definition of short term remand as employed in the project. However, they are noted because they represent instances in which young people were released after a short period in custody and suggest the significance of a bail plan in mitigating risk.[25]
- The young person is sentenced at first instance, including to a youth justice conference where bail is dispensed with.[26] These matters do not come within the project's definition of short term remand. These matters are noted because in each case the young person was denied bail or liberty by police and released by the court at first appearance. If a court finalises a young person's matter under the *Young Offenders* Act at first instance this will often represent a missed opportunity for diversion prior to charge.

The results clearly illustrate that the incidence of short term remand experienced by this cohort was significant with the courts granting bail to 60% of young people police had denied bail to. If we exclude instances in which the courts granted bail subject to a s28 order, the figure remains at 58%. Further in 64% of matters in which police denied bail, the court granted bail or finalised the young person's matters on the day.

Unsurprisingly, the greatest disparity between the outcome of police and court decision making was with respect to matters involving a breach of bail. The reasons given by police in these matters are consistent with our experience that police most often view the commission of a breach of bail itself as the reason for denying a young person liberty. In all but one breach of bail matter, police denied the young person bail.[27] Our experience generally and during this project is that in breach of bail matters, police are extremely reluctant to cease an arrest and exercise their discretion in any way other than having the young person appear before the court in custody.

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[24] In our experience young people have also remained in custody for a number of months due to the absence of suitable accommodation or a failure to provide suitable accommodation. However, in these scenarios, rather than bail being granted to the young person and a s28 order being made the matter will be adjourned with an indication that bail will be granted when accommodation is confirmed.

[25] It of course would also be relevant to any bail determination subsequent to a bail plan that the young person had then spent a period of time in custody.

[26] If the Court sentences a young person to a youth justice conference under the *Young Offenders Act 1997* (NSW), the matter is not finalised until the completion of the conference process. However, bail should (and is usually) dispensed with.

[27] With respect to this category and any conclusions drawn, it is noted that there were three additional matters that came through the CNS with respect to a breach of bail that could not subsequently be matched on Justicelink. This may be because police dealt with the matters by ceasing the arrest and taking no further action or issuing a warning. However it could also be for a number of other reasons, including for example that police determined there was no breach of bail or that there was an error in the recording of details. For this reason, these 3 matters are not included in the data, although it is noted that even if it was presumed that all three were dealt with by way of an alternative to denying liberty on bail, the results do not substantially change. It is also noted that there of course may also have been matters that police dealt with by way of an alternative to arrest and in which no CNS call was made.

(a) Fresh Offences

108 matters, or 50% of all matters, were with respect to a fresh offence.

In the majority of these matters police granted bail, refusing bail in approximately 43%.

In matters where police refused bail, the Court granted bail in 50% at first appearance and in a further 8% following a bail plan.[28] In almost 61% of matters in which police refused bail, the Court granted bail or finalised the matter at first appearance.

In almost 70% of matters in which police refused bail, the Court granted bail at first appearance or following a bail plan, or finalised the matter at the first appearance.

In 30% of matters in which police refused bail, the court also refused bail and did not order a bail plan. In 39% of matters in which police refused bail the Court also refused bail at first appearance.[29]

All 5 matters finalised at first appearance were dealt with under the *Children (Criminal Proceedings*) Act 1987 (NSW). One matter was finalised was by way of a probation order, three by way of a good behaviour bond and one by way of a caution.

Police bail determination – 108 matters	**No.**	**% of 108**
Bail granted by police	62	57.41
Bail refused by police	46	42.59

Court bail determination (of the 46 matters bail refused)	**No.**	**% of 46**
Bail granted at first appearance *(Including 1 matter in which a s28 order was made)*	23	50
Bail Plan ordered & bail refused at first appearance	4	8.69
Matter finalised at first appearance	5	10.87
Bail refused at first appearance, no bail plan	14	30.43
Bail refused at first appearance - total	18	39.13
Young person ('YP') granted bail or matter finalised at first appearance	28	60.87
YP granted bail at first appearance or following a bail plan	27	58.69

(b) Breaches of bail

Forty-three matters, or almost 20% of matters, were with respect to breach of bail only.[30]

[28] In all 4 matters in which a bail plan was ordered the court subsequently granted bail. When a bail plan is ordered the court will adjourn the matter, formally bail refusing the young person. In each of the 4 matters no release application was made at first appearance.

[29] See above

[30] See footnote 26

In 42 matters, or almost 98% of all matters in this category, police denied liberty on bail. In one matter, or 2% of all matters in this category, police dealt with the matter by way of application notice.

Of the 42 matters in which police denied liberty, the Court granted bail in 78% and refused bail in 16%. In 83% of matters the young person was granted bail or diverted under the Young Offenders Act.

In 2 matters, or almost 5% of matters in which police denied bail, the court found the alleged breach of bail was not established.

Police enforcement action	**No.**	**% of 43**
S77(e) Police arrest/detain (bail liberty denied)	42	97.67
S77(c) Police dealt with by application notice	1	2.32

Court bail determination (of the 42 matters bail denied)	**No.**	**% of 42**
Bail granted at first appearance (*Including 2 matters in which a s28 order was made)*	33	78.57
Bail dispensed at first appearance (YP referred to a YJC)	1	2.38
Bail Plan ordered and bail refused at first appearance	0	0
Matter finalised at first appearance (YP dealt with by way of YOA caution)	1	2.38
Bail refused at first appearance	7	16.66
YP granted bail or diverted under the YOA at first appearance	35	83.33
YP granted bail or matter finalised at first appearance	34	80
YP granted bail or bail dispensed with (YP referred to YJC) at first appearance	34	80

(c) Fresh Offence & Breach of Bail

67 matters, or 30% of all matters, were with respect to both a fresh offence and breach of bail.

In 61, or 91% of these matters, police refused bail for the fresh offence(s) and denied liberty for the breach of bail.

In 2 of these matters police granted bail for the fresh offence(s) and dealt with the breach of bail by way of alternative action, specifically a variation application.

In 4 of these matters, police granted bail for the fresh offence(s) and did not deny liberty with respect to the breach of bail. It is unknown what action police took with respect to the breach of bail other than that liberty was not denied.[31]

[31] Given that the matters the CNS calls related to could be located on Justicelink and we could be confident no action under s77(e) of the Bail Act was taken by police, these 4 matters are included in the data. However, it should be noted that there are a number of events that could have occurred, including for example, that police took no action under s77 or determined there was in fact no breach.

In the matters in which police refused bail and denied liberty on bail, the Court granted bail in almost 56% of matters and refused bail in almost 38%. In one further matter in which police refused and denied bail, the court granted bail for the substantive offence and finalised the fresh offence. In a further 4 matters, the Court granted bail following the preparation of a bail plan.

Police bail determination	**No.**	**% of 67**
Bail refused/bail liberty denied	61	91
Police granted bail / breach dealt with by way of application notice	2	2.98
Police granted bail / liberty on bail not denied[32]	4	5.97

Court bail determination (of the 61 matters police BD/BR)	**No.**	**% of 61**
Bail granted at first appearance for fresh offence and breach of bail (*Including 1 matter in which a s28 order was made)*	34	55.73
Bail granted at first appearance for breach of bail and fresh offence finalised at first appearance	1	1.63
Bail Plan ordered and bail refused at first appearance	3	4.91
Bail refused at first appearance, no bail plan	23	37.70
Bail refused at first appearance - total	26	42.62
YP granted bail and/or matter finalised at first appearance	35	57.38
YP granted bail at first appearance or following a bail plan	38	62.29

5. The 'Unacceptable Risk' / Reason for denying bail – the Results

In a number of matters police had not considered bail at the time of the CNS call. This limitation to the data that could be collected nonetheless provides an interesting insight. In just under half of the matters involving fresh offences only, police had not made a bail determination at the time of the CNS call. By contrast, police had not made a determination in only 7% of breach of bail matters.

In a number of matters police indicated at the time of the CNS call their bail decision but did not identify an unacceptable risk or a reason. It is not clear from our data whether police declined to do so in these matters, whether the solicitor did not ask the question or whether the information is just not recorded. It should also be noted that our data does not record the precise language used by the CNS solicitor in requesting the officer's reason for the decision to refuse bail or deny liberty on bail. The solicitor may have asked for the identified 'unacceptable risk' or the 'reason'.

The results are indicative of our experience generally, in particular with respect to breach of bail matters where it is our experience that the very existence of a breach of bail can exclude the proper exercise of discretionary decision making process by police.

(a) Fresh offences

At the time of the CNS call, police had not made a bail determination in 49 matters (45% of matters).

At the time of the CNS call, police advised that the young person would be bail refused *and* provided a reason to the CNS solicitor in 19 matters.

[32] See footnote 28

In 7 of these an unacceptable risk was identified as the reason for refusing bail, either the risk that the young person would commit a further serious offence (2 matters), would endanger the safety of victims, individuals or the community (4 matters), or would endanger the safety of victims, individuals or the community *and* interfere with witnesses (1 matter).

The risk that a young person would fail to appear was not identified as a reason for refusing bail in any matters. However, in 3 of these matters, the young person was arrested for a fresh offence and warrants had also been previously issued for other offence(s).[33] In each of these matters, police identified the existence of the warrants as the reason for refusing bail for the fresh offence.

In one of these matters the offence was noted as a 'show cause' offence.[34]

Unacceptable risk / Reason provided by police	No.	Additional reasons provided
Endanger the safety of victims, individuals or the community	4	1. Seriousness of the circumstances, previous charges involving violence 2. Seriousness of the offence, lengthy record, no supervision 3. On bail, may be show cause, on a bond, extensive history 4. Previous history
Commit a serious offence	2	
Endanger the safety of victims, individuals or the community & interfere with witnesses	1	
Seriousness of the offence	3	1. Prior criminal history 2. Prior criminal history 3. Prior criminal history and similar offences
Warrants	3	1. Prior criminal history
Criminal history	1	
Multiple breaches of AVO	1	
Breach court order (AVO)	1	
Don't believe will comply with bail conditions	1	
Too intoxicated	1	

(b) Breach of bail

At the time of the CNS call, police had not made a bail determination in 4 matters. In one of these matters police dealt with the matter by way of application notice.

At the time of the CNS call, police advised in 39 matters that the young person would be denied liberty on bail and provided a reason in 33 of these.

In 11 matters, the reason provided for denying bail was that the young person had breached bail and in 7 matters that the young person had previously breached bail.

[33] It is not known whether police were aware of this at the time of the arrest or became aware while the young person was in police custody.
[34] Show cause does not apply to juveniles pursuant to section 16A(3) of the *Bail Act 2013* (NSW). In an additional matter, police advised the CNS solicitor that a bail determination had not been made at the time of the call but that bail was unlikely as the offence was 'show cause'. Police did subsequently grant bail.

In 2 matters, the reason provided was that there was no available accommodation.

Reason provided by police	No.	Additional reasons provided
Breach of Bail	11	1. Standard breach of bail, not much to be done. 2. Not much alternative
Previous breaches of bail	7	1. It's not the first breach 2. Too many breaches of bail 3. Multiple breaches
Criminal history	3	
Warned previously for breach of bail	3	
No accommodation	2	1. He must go to court as the care home won't have him.
Seriousness of offence	2	
Breach of Supreme Court bail	1	
Bail specified the matter to go before court if breached	1	
Multiple reasons: 1. Seriousness offence/previous warning/already on bail 2. Number of previous breaches/seriousness of offence 3. Multiple breaches of bail and extensive history	3	

(c) Fresh offence and breach of bail

At the time of the CNS call, police had not made a bail determination in 17 matters.

In 37 matters police advised at the time of the CNS call that the young person would be bail refused/denied and provided reasons for this decision.

In 21 matters police gave one reason for refusing bail. The most common of these was that there had been a breach of bail (18 matters). In none of these was an 'unacceptable risk' identified.

In 16 matters, police gave a number of reasons for refusing bail. In 12 of these matters, police identified an unacceptable risk.[35] The most common of these was that the young person would commit a serious offence (11 matters). In 11 matters where multiple reasons were given police cited the young person's alleged breach of bail as a reason for refusing bail.

In 29 matters police either cited the young person's alleged breach of bail as the reason, or one of a number of reasons, for detaining the young person/refusing bail.

[35] The table collates matters in which multiple reasons were given. While 16 particular unacceptable risks were cited by police as a reason for refusing or denying bail, 4 police officers cited the risk that the young person would 'commit a serious offence' and another unacceptable risk. In total, in 12 matters police cited an unacceptable risk.

Unacceptable risk/Reason provided by police	No.
Breach of bail	18
Previous breach of bail	2
Seriousness of the offence	1
Multiple reasons	16

Multiple reasons:

Reasons given	No.	Additional comment by police
Commit a serious offence	11	1. "Already on bail. Extensive conditions. Multiple charges" 2. "Further domestic violence ('DV'), on bail for same offending" 3. "Show cause offence" x 2
Endanger safety of the victims, individuals or the community	4	
Fail to appear at any proceedings for the offence	1	
Interfere with witnesses or evidence	0	
Seriousness of the offence	5	
BOB	11	1. "No warnings to be given as on bail for serious matters"
Other	2	1. "DV so no YOA and BOB" 2. "Ongoing breach AVO"
Prior history	3	

6. Discussion – Barriers to reducing the incidence of short term remand

The Bail Act provides no standalone provision for Aboriginality. It provides an insufficient reference to "any special vulnerability or needs…because of..being an Aboriginal or Torres Strait Islander" within the same requirement to consider youth and cognitive or mental health impairment in bail decisions.[36] It is not a specific factor to consider in enforcement actions, other than as part of the "personal attributes and circumstances of the person" to the extent known. There is no specific reference or requirement to consider cultural background, cultural obligations or community ties particular to Aboriginal young people. This is compounded by insufficient cultural awareness training for decision makers.

This impacts all decisions making under the Bail Act.

(a) Fresh offences: The different roles of police and courts & looking at bail through an adult lens

The most common reasons provided by police for refusing bail to a young person for a fresh offence (with no accompanying breach of bail) in this project and consistent with our experience, is the seriousness of the offence and an existing criminal history. The relevance of these factors to an assessment of any risk to the community in granting bail is clear. As such, the court will most often hold similar concerns to police when these factors are present. We suggest the fact that courts often go on to grant bail in these matters can be partly explained by the different roles police and courts

[36] Bail Act 2013 (NSW), Section 18(1)(k)

play in the criminal justice system and the different knowledge, experience and understanding accompanying each role.

The Children's Court, in addition to determining bail for young people, presides over defended hearings of charges and sentencing. The jurisdiction of the Court is subject to the principles outlined in s6 of the *Children (Criminal Proceedings) Act 1987* (NSW), which states:

> *A person or body that has functions under this Act is to exercise those functions having regard to the following principles—*
> *(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,*
> *(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,*
> *(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,*
> *(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,*
> *(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,*
> *(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,*
> *(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,*
> *(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.*

Although s6 principles are excluded from bail determinations under the Bail Act[37], the knowledge and understanding that underpin them, as well as the Court's focus on rehabilitation, inevitably informs the Court's assessment of s18 factors and the concept of 'unacceptability'. It is suggested that this may be particularly so in courts presided over by specialist children's magistrates, who only hear children's matters and do not have to switch between dealing with adult and children's matters.

Police officers determining bail for children and young people must be of a particular rank[38], but are not specialist police youth officers nor necessarily have sufficient (if any) experience in the jurisdiction of the Children's Court or the knowledge and understanding that underpins it. These officers will deal with bail with respect to both adults and juveniles as they arise, applying legislation in the form of the Bail Act which makes minimal reference to juveniles. Indeed, although s18 requires consideration of "any special vulnerabilities or needs… because of youth", the reference to youth is not a standalone provision and does not specifically or sufficiently draw attention to children and young people (under 18) whose matters will proceed in a very different jurisdiction to the matters of adults. Further, internal police 'tools' to assist in determining bail are also adult focussed. Our experience suggests that in many cases police approach juvenile bail through an adult lens. Given the current context of their decision making, this is not surprising.

Evidence of this 'adult lens' can be overt, for example, when police advise that bail will be refused because the offence is a 'show cause' offence. In our experience, even where there is opportunity to address this and advise police that this provision does not apply to juveniles, police will accept this but still note the seriousness of the offence by virtue of its show cause status for adults. Similarly,

[37] Section 18 of the Bail Act 2013 (NSW) provides an exhaustive list of matters for consideration.
[38] Bail Act 2013 (NSW), Section 43

police often approach offences of violence in the home and sexual assault matters as if the young people involved were adults. While there is no dispute that domestic violence and sexual assault offences are serious offences, within the Children's Court jurisdiction there is recognition of the different power dynamics, issues and risk factors often relevant in these offences when committed by juveniles. An 'adult lens' views categories of offences as too serious to allow bail, without due consideration of the particular facts and circumstances relevant both to the young person and the allegation.

It is also our experience that police will often refer to the maximum penalty for an offence as indicative of its seriousness without meaningful consideration of the jurisdiction of the Children's Court as distinct from the adult jurisdiction and an accurate assessment as to the likelihood of a custodial penalty being applied, as is required by s18.[39] The Children's Court has jurisdiction with respect to many very serious, strictly indictable offences, unlike the Local Court in the adult jurisdiction. In our experience, police are rarely persuaded by the argument that the young person in question will not be dealt with by way of a control order whereas this will be particularly relevant for a court dealing with a detention application. Interestingly, at the time of collating bail results for this snapshot, 37 of the 46 matters in which police refused bail had been finalised and of these only 4 were finalised by way of a control order. The rest were either withdrawn, dismissed or sentenced by way of a caution, youth justice conference or community-based order.

In the Children's Court, the seriousness of an offence is tempered not only by an informed assessment of the likelihood of a custodial penalty but also by an informed assessment of the strength of the prosecution case. Further, this assessment must start from a presumption of innocence. By contrast at the time police bail is determined there has already been a determination that the evidence is sufficient to charge. The starting point in assessing risk is a presumption of guilt. In our experience advocating for bail, police are often either unaware, or unpersuaded, by the relevance of considerations specific to the Children's Court, for example the principle of doli incapax or evidentiary issues regarding admissions. It is not uncommon to be advised that the lack – or indeed absence – of evidence regarding doli incapax "is a matter for the court".

Case study A:
An AVO is brought against Isaiah with respect to an alleged sexual assault of another student at school. Several months later, police have determined to charge Isaiah with regard to the allegation. In discussing bail, the Custody Manager (CM) notes that Isaiah will very likely be bail refused because of the 'seriousness' of the offence and because it is a show cause offence. When Isaiah's solicitor advises that show cause does not apply to juveniles, the CM maintains the seriousness of the offence is such that bail should be refused. Isaiah's solicitor acknowledges the seriousness of the offence but notes his complete lack of criminal history, his compliance with the AVO for a number of months, his attendance at court on all previous occasions, and his vulnerability as an Aboriginal young person with an intellectual disability (amongst other factors.) She says in this context there is no bail concern that constitutes an unacceptable risk. The CM cannot initially identify any unacceptable risk but repeats that it is a very serious offence so "probably victim protection." The solicitor notes that the CM has advised he will still likely be bail refused but says she will email him as well to confirm their conversation. Afterwards the CM emails the solicitor back to advise that the young person was granted conditional bail with the bail conditions mirroring the AVO.

Case study B
Jacob is ten years old and has been diagnosed with autism. He has no previous police history. Jacob is charged with assaulting his mother. His mother has mental health issues and is admitted to hospital following the assault. Jacob is not at home when police arrive and he later attends the police station

[39] Bail Act 2013 (NSW), Section 18(1)(i)

voluntarily with his father. Police place Jacob under arrest and refuse him bail due to the seriousness of the offence. In court the Magistrate does not initially realise Jacob is present as he can barely be seen over the dock. Jacob is granted bail by the court and released back into the care of his father.

(b) Fresh offences – insufficient information particular to the young person and the absence of support

A further apparent barrier to police bail appears to be the insufficiency of information regarding a young person at the time of the bail determination. This appears to be a result at times of either police not actively seeking such information or the information not being available. While the previous *Bail Act 1977* (NSW) (now repealed) referred to a requirement to consider the 'interests' of the accused to be at liberty, the current Act refers to the 'need' of the accused[40], arguably providing an easier means to dismiss considerations significant to the accused. In our experience police do not always actively or thoroughly consider the need for a young person to be in the community and balance it against other considerations in determining bail. For example, in our experience not all police are aware of the existence of the Bail Assistance Line or are willing to contact it if they are of the view that the seriousness of the offence or the young person's criminal history, for example, already suggests bail should be refused. The Bail Assistance Line can be an excellent resource to assist with locating family or carers and accommodation, although it is restricted to the hours of 4pm-3am.

Often young people themselves are not able to advise of certain information or know what information might be relevant. The young person's support person may be in a similar position and particularly so if not a carer or family member but rather an independent support person unknown to the young person who is there at the request of the police. CNS solicitors can advocate for bail for a young person, however, they are also reliant on having access to relevant information.

By contrast, when the court is tasked with determining bail following bail refusal by police, there is an advocate in court available to liaise with relevant stakeholders, including Youth Justice, Community Services, Justice Health and others. Further, in the specialist Children's Courts, many of these stakeholders are also present at court.

Case study C
Shannon was arrested by police at approximately 4.30pm. She advised police she had left home a couple of weeks earlier and said she didn't have any phone numbers for anyone because they were all on her mobile phone which she had lost. Police bail refused Shannon and as she had missed the court cut off, she spent the night in custody before appearing before the court the following day. At court, Youth Justice advised that they had previously supervised Shannon and had the phone numbers for her family. Youth Justice contacted Shannon's family and confirmed accommodation that morning. Shannon was granted bail. If police had contacted the Bail Assistance Line, the same information & assistance would have been available and Shannon could have been released the night before.

Case study D
Jai was arrested by police for hitting his sister with a curtain rod. The YLO advised the CNS solicitor that she wished to deal with the matter under the Young Offenders Act but that the Sergeant at the station was not willing to proceed this way and Jai would be charged. The CNS solicitor confirmed that Jai's sister was an adult and that there were no injuries. Jai had no criminal history. The YLO

[40] Section 18(l) of the Bail Act refers to "the need for the accused person to be free to prepare for his or her appearance in court or to obtain legal advice" and s18(m) refers to "the need for the accused person to be free for any other lawful reason."

advised that the Sergeant had determined bail would be refused because the offence was domestic related and for reasons of victim protection, Jai could not return home where the offence was alleged to have occurred. The CNS lawyer spoke to Jai and his grandfather who was Jai's carer. Jai's grandfather confirmed that Jai resided with him and that Jai's sister did not reside at the house nor would be. Once the assumption by the Sergeant was addressed, Jai was granted bail.

Case study E
Shontelle was arrested by police. Shontelle had a lengthy history and a number of breaches of bail on her record. Police spoke to the CNS solicitor and advised the solicitor that Shontelle would be bail refused. The CNS solicitor had previously represented Shontelle and amongst other information was able to advise police of Shontelle's recent re-engagement with education and the considerable support she had linked up with in the community. Shontelle was granted bail.

(c) Breach of bail – Inappropriate enforcement action & unnecessary bail conditions

The snapshot conforms with our experience that a significant majority of young people brought before the court for breach of bail are released at first instance. We do not suggest it follows that in all such matters the enforcement action by police was inappropriate. As outlined above, police do not have the authority of the courts to redetermine bail following breach. The role of the police is to determine whether enforcement action should be taken and if so, what type of action. If police presume that bail conditions have been imposed because they are necessary to mitigate risk, as the Bail Act requires[41], and are not required to independently determine risk at the time enforcement is considered, it follows that there will be matters in which the police appropriately deny bail to young people that the courts subsequently release on bail. We have experienced many matters in which a court has viewed a breach of bail as highly indicative of risk but in balancing it against other considerations at the time of the bail determination, including perhaps the imposition of different bail conditions, has determined the risk of bail is not unacceptable.

However, the extremely high incidence of short term remand in this category suggests the likelihood that there are breach matters that should not have been initiated. This is certainly our experience and we suggest two main reasons for this:

- Inappropriate enforcement actions and
- Inappropriate bail conditions

We suggest that the 'adult lens' with which police consider bail, as discussed above, contributes to this. Given police are not directed to s18 factors within an assessment of risk regarding breaches of bail, we note that there is no specific reference to youth as a relevant consideration in determining police enforcement action. The requirement that police consider "the personal attributes and circumstances of the person, to the extent known to the police officer"[42] in determining enforcement action notably makes no distinction for youth.

As with police bail decision making with respect to fresh offences, consideration of the principle of doli incapax appears to carry little weight in the determination of enforcement action by police and we suggest accounts for a relatively significant proportion of short term remand matters. It was beyond the scope of this snapshot to comprehensively determine the number of matters in which doli incapax was a live issue. However, we were able to examine the sentencing outcomes of the

[41] Bail Act 2013 (NSW), Section 20A
[42] Bail Act 2013 (NSW), Section 77(3)(c)

breach of bail category. At the time of collation, 40 of the 43 matters had been finalised.[43] Of these, 10 were withdrawn or dismissed on the basis of doli incapax. A further matter was withdrawn by police with the young person receiving a police caution under the Young Offenders Act.

Sentencing outcomes for Breach of Bail (only) matters

Outcome	No.	% of 40
YOA caution	1	2.5
YOA YJC	4	10
S33(1)(a)	1	2.5
MHA diversion	2	5
GBB or Probation Order	13	32.5
Control	4	10
Withdrawn by police	3 (n.b. – 1 with caution negotiated)	7.5
Withdrawn by police, identified as doli	2	5
Dismissed by court	2	5
Dismissed by court, identified as doli	8	20
Total number of matters diverted by the court (caution, YOA, MHA)	8	20
Total number of matters dismissed by the Court or withdrawn by police	15	37.5
Total number of matters dealt with by way other than control	36	90

(i) Inappropriate enforcement action

When police contact the CNS with respect to a breach of bail, the young person has already been arrested and is back at the police station. We do not receive calls from police to advise us that they are with a young person and issuing a warning for a breach of bail and we are unaware of the number of breach matters in which police proceed by way of no further action or warning. In our experience, there are many arrests for breach matters that the circumstances suggest police could have appropriately dealt with by way of an alternative. This is most often when the breach is minor or explained, for example being 20 minutes late to report having missed the bus. In our experience, police appear to be often of the view that a breach of bail should be met with an arrest and do not properly consider alternative enforcement actions. This view arguably marries with the considerable resources put into bail compliance checks and suspect target management plans.

In other breach matters, arrest may have occurred in circumstances in which the urgency of the situation prevented the proper exercise of discretion at the time, but once due consideration can be given to the situation and additional relevant information is available, the arrest is clearly not appropriate. However, in our experience, and consistent with the snapshot results, when police contact the CNS they are extremely reluctant to consider alternative enforcement actions, regardless of the nature of the breach or the provision of new information. It is also apparent that there is uncertainty as to whether an officer other than the arresting officer (for example the Custody Manager) can cease the arrest and take alternate enforcement action and/or that there is a

[43] If the matter involved a number of breaches of bail, we recorded the most restrictive outcome. For example, if a matter involved a breach of bail for shoplifting, sentenced by way of caution, and for an assault, sentenced by way of a bond, we recorded the result as a bond.

reluctance amongst other police to do so.[44] We are often advised by arresting officers, officers in charge and custody managers that it is "not their decision" to determine the appropriate enforcement action. In our experience, Custody Managers responsible for young people alleged to have breached their bail appear to consider the enforcement action determined and their role to facilitate bringing the young person before the Court as soon as practicable, as per s77(e).

On many occasions police prosecutors advise the Court that a detention application for a breach of bail is pressed to the extent that it is recorded, but that the release of the young person is not opposed. On some of these occasions police have specifically included in the application that bail is not opposed and/or have suggested bail conditions. For example, in one matter in the cohort, the young person's fact sheet noted that police did not oppose bail but requested strict bail conditions. In these matters, police should have proceeded by way of application notice requiring the young person to attend court from the community.

(ii) Unnecessary or onerous bail conditions

Section 20A of the Bail Act provides that

> *(1) Bail conditions are to be imposed only if the bail authority is satisfied, after assessing bail concerns under this Division, that there are identified bail concerns.*
> *(2) A bail authority may impose a bail condition only if the bail authority is satisfied that—*
> *(a) the bail condition is reasonably necessary to address a bail concern, and*
> *(b) the bail condition is reasonable and proportionate to the offence for which bail is granted, and*
> *(c) the bail condition is appropriate to the bail concern in relation to which it is imposed, and*
> *(d) the bail condition is no more onerous than necessary to address the bail concern in relation to which it is imposed, and*
> *(e) it is reasonably practicable for the accused person to comply with the bail condition, and*
> *(f) there are reasonable grounds to believe that the condition is likely to be complied with by the accused person.*

A bail condition will not be in compliance with s20A(2)(a) or (d) unless without it there would be an 'unacceptable risk' of the young person failing to appear at proceedings, committing a serious offence, endangering the safety of victims, individuals or the community, or interfering with witnesses. In our view this is clear. However, in our experience, bail conditions are routinely imposed that do not always comply with this section, for example an offence occurs at night and so a curfew is imposed, an offence occurs at a particular location and so a geographical restriction covering that location is imposed, or an offence occurs with a young person and so a non association condition is imposed. These bail conditions may be relevant to an assessment of bail concerns, but are not "reasonably necessary" or "no more onerous than necessary" to address the bail concern.
Bail conditions are also often imposed for welfare reasons, or without due consideration to the vulnerability and dependant status of the child or young person and/or proper consideration given to the cultural background, cultural obligations or community ties of Aboriginal young people.

Unfortunately, inappropriate conditions will often come to the attention of the young person's solicitor in the context of a breach. At this time there is sometimes a reluctance on the part of the court to be seen to be 'rewarding' the young person by deleting the condition that has been

[44] Section 77(2) of the Bail Act 2013 (NSW) states ".. 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).

breached. The solicitor must have the experience to press the deletion of the condition by reference to s20A and by noting the impact the condition, and its breach, has already had on the young person.

Ambiguous bail conditions can also lead to breaches and short term remand. Bail conditions to 'be of good behaviour', 'reside' at a particular address or to 'obey the reasonable directions' of a named person can be open to interpretation. However, it is for the most part a pyrrhic victory if the court determines a breach is not established given the young person has already been arrested and detained. Further, it is also not noted on a young person's criminal record that a breach of bail was not established and may therefore be erroneously and unfairly relied upon as evidence of non-compliance in any future assessment of bail concerns.

The impact of non-compliance with bail is a prescribed factor for consideration in assessing bail and it can be particularly relevant if there are repeated breaches. The inference is often drawn that the decision maker cannot be confident that bail will be complied with. We also suggest that there is a view that a breach of bail must have a consequence, bail is an 'opportunity' or 'chance' that the young person has not taken. Solicitors will suggest or confirm the young person's agreement with tighter and more stringent bail conditions or risk bail refusal. This is despite no bail concern being actually realised and no new offending occurring. In this way, the refusal of bail or the imposition of bail conditions can often reflect more an assessment of an unacceptable risk of breaching bail than an unacceptable risk that a bail concern will be met. Bail refusal and bail conditions become punitive.

Case study F

Kai is subject to a non-association condition on his bail with respect to his friend, Tim, who lives in the same unit block as him and who has been charged with the same offence. Kai has a very limited history and this is the first time he has been on bail. He is most likely looking at being sentenced to a good behaviour bond. Kai receives two warnings for breaching his non-association condition. A few weeks later Kai runs into Tim and they walk home together. Kai is seen and spoken to by police. The next day police speak to Kai and tell him to come to the police station later that day because he has breached his bail. Kai speaks to a lawyer and says he will attend the police station. The lawyer advocates for police to warn Kai noting that there is no suggestion that Kai and Tim have continued to offend together amongst other factors. When police advise that Kai has already had two warnings and has breached his bail, the lawyer asks police to lodge a detention application at court that day and that there is no reason to arrest Kai. She points out that Kai is voluntarily attending the station. When Kai attends the station, he is arrested and taken into custody. The lawyer requests to speak to a senior officer and requests that the arrest of Kai cease and Kai, in the company of his mother and legal representative, be served with a notice to attend court that day for a detention application. The lawyer puts this in writing. The court is walking distance from the police station. Police acknowledge that Kai will likely receive bail but insist that he will be transported to juvenile detention where he can appear via AVL at the Children's Court. The lawyer speaks to the custody manager who says it is not his decision to make. The custody manager is unable to confirm whose decision it is. The lawyer requests a review of the decision and is advised she will be called back. When there is no call back a colleague contacts the police station about the review and requests to speak to the OIC. The OIC refuses to speak to him, stating in the background "I don't work for the ALS." The young person is transported to juvenile detention. A number of hours after he first attended the police station Kai appears before the court. His matter is finalised by way of a good behaviour bond with the court taking into account his improper arrest and detention. His family struggle to organise transport to collect him but eventually are able to do so and after picking him up, they arrive home late that night.

Case study G

Kiara was 13 years old and on bail for two separate matters. Both of her bail matters had a condition that she attend school and a curfew. The curfew on one matter was expressed subject to an exception if she was with her mother. Kiara was out with her mother when police came to her house for a bail compliance check. Police contacted the young person's school to see if she had been attending school and were advised she hadn't. Kiara had stopped attending school a few weeks earlier following a serious incident in which she was a victim and was being supported by Community Services to re-engage. Police arrested Kiara for breach of her curfew and school condition. The court released Kiara, varying her bail to add the exception to the curfew that she could be with her mother and on both matters and deleting the bail condition that she attend school.

Case study H

Jake was 11 years old and on bail with a curfew to attend school. Jake was the victim of sustained and serious sexual abuse, the perpetrator of which had recently been sentenced to a number of years imprisonment. Jake had started to struggle and had recently tried to commit suicide. Jake had conditions on his bail that he attend school and to be of 'good behaviour'. The police attended Jake's house for an unrelated matter and saw that Jake was not at school. When Jake refused to attend school he was arrested and his bail was breached. Jake was granted bail by the court, the court declining to delete the condition. Jake was subsequently arrested and bail refused by police for fighting with his brother on the basis that he was not being of 'good behaviour'. No charges were brought.

Case study I

Tamika was on bail to attend school. Tamika had recently returned to her mother's care. Community services contacted police and asked them to check on Tamika's welfare after becoming aware that her mother had been arrested. Police attended Tamika's house. Tamika was looking after her 18 month old sister. Police noted that Tamika was on bail and in breach of her bail condition to attend school. Tamika was arrested for breaching her bail. At court Tamika was released and the condition to attend school was deleted.

Case study J

Tyson was on bail with a reporting condition that he report three times a week. Tyson was in year 9 at school and was attending every day. He had no previous offences and so had never failed to appear at court or been on bail. Tyson was struggling to comply with his reporting requirements and school. He said he also sometimes forgot that it was a day he was meant to report and it was difficult to sometimes get to the police station. He was worried about breaching his bail. His solicitor applied for his bail to be varied and the reporting condition was deleted.

Case study K

Braedon was charged with shoplifting and some other dishonesty offences related to having a device to remove security tags. He had never been in trouble before and would not be sentenced by way of control. Braedon was placed on a curfew and an enforcement condition imposed by police that required him to present to the door "no more than twice a day, no more than 14 times per week." The condition was deleted at court.

Case study L

Joshua was 13 years old and charged with a number of offences alleged to have occurred at his care placement. Justin had been at numerous placements and had a history of absconding to his mother's residence. Justin was placed on a 6pm curfew and a residence condition that included the requirement he "spend every night at that address". Joshua had no record of offending at night. Justin was placed on a 6pm curfew. His solicitor sought to have the condition deleted at court. The

prosecutor submitted than an 8pm curfew was appropriate. The court queried why Justin needed to be out at 8pm given his age. Joshua's solicitor eventually succeeded in having the condition deleted submitting that there was not a sufficient correlation between the condition and any bail concern and the condition did not comply with s20A of the Bail Act.

Case study M
Steven is charged with an affray, committed at night with a group of other young people in the park. The identified bail concern is the commission of further serious offences and Steven is placed on a curfew. Steven breaches his curfew five times. On the fifth occasion, police attend Steven's house and are advised he is at his girlfriend's house. Police attend there at 9pm and he is arrested and bail refused. Steven advises his solicitor he knows he was breaching his bail and it was "stupid" to breach it but he was feeling sad, just wanted to see his girlfriend and "wasn't doing anything wrong". Steven appears before the court. The Magistrate reminds Steven that he was warning that any further breach would result in bail being refused. Steven is bail refused. If Steven had been sentenced for the offence, including at first instance, he would not have received a control order. While Steven has breached his curfew on a number of occasions, he has not committed any further offences. On one view, this may suggest that Steven is not at an unacceptable risk of committing further offences if he is out after curfew.

Case study N
Kristen was on bail with a 9pm curfew. Police stopped Kristen at the station at 8.40pm and advised that she was under arrest as she was about to breach her bail, as she would not be home by 9pm. Kristen advised police that she hadn't noticed the time and had called her mum to say she was running late and on her way home. Police advised Kristen that she had already had a warning for a breach of bail and there was no alternative but to arrest her. At the police station Kristen's mum confirmed that Kristen had contacted her. Kristen spent the night in custody and was granted bail by the court the following morning. The police fact sheet noted Kristen had previously breached her bail but that conditional bail was not opposed.

7. Discussion - Opportunities for addressing short term remand

(a) Education & Training

The snapshot suggests further education and training of police and other stakeholders would assist in reducing short term remand, particularly with respect to cultural awareness, the cognitive and psychological development of young people, the restrictions on bail conditions provided by s20A, the presumption of doli incapax and the operation of the *Young Offenders* Act 1987 (NSW). While we have limited knowledge of the tools, computerised or otherwise, that guide and assist police bail decision making it appears that they are not youth specific, nor do they appropriately guide the imposition of bail conditions.[45] We are unaware of the existence of any police guide to assist with the determination of appropriate enforcement action. We suggest that there is opportunity to assist in reducing short term remand through the development of appropriate policy, guidelines and other tools.

There appears to be a particular need to consider how the goals of increasing diversion and reducing short term remand fit alongside the police Suspect Target Management Plan and other police practices. We note that Specialist Youth Officers play a significant role in the diversion of young people under the Young Offenders Act, being ultimately responsible for whether a young person is

[45] We have discussed elsewhere with TFM the NSWPF 'Bail Determination Risk Assessment Workflow', (Effective 6 December 2016) and its limitations.

cautioned, conferenced or charged.[46] An idea for consideration is to specifically require Specialist Youth Officers to determine whether there is evidence sufficient to meet the element of doli incapax before approving the charge of a young person. It appears this could be achieved operationally without requiring legislative amendment.

We also suggest a requirement that police contact the Bail Assistance Service prior to a bail determination should be considered. We are aware of this assistance and support this service can provide.

With regard to our own role, we recognise the need for the ongoing training of our solicitors with respect to bail advocacy and the CNS, including practical training regarding accessing information and support for young people.

(b) Legislative amendment

(i) Separate bail legislation for children and young people

A distinct section on bail applicable to children and young people is suggested to better align the approach of the court and police to bail decision making. This could be within the *Children (Criminal Procedure) Act* or within the current Bail Act. We suggest 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. The work being done on short term remand, the Children's Court jurisdiction, the focus on diversion and the Young Offenders Act, all recognise that children should be treated differently to adults and the clear policy reasons for doing so. All recognise that incarcerating children and young people can have long term detrimental effects, including an increased likelihood of recidivism. The current Bail Act does not reflect this understanding.

We note s38 of the *Children (Detention Centres) Act 1987* which outlines the purpose of parole with respect to children and suggest a similar section to guide bail for children.[47] Principles contained within s6 of the *Children (Criminal Proceedings) Act 1987* and s7 of the *Young Offenders Act* should be included with amendment of those principles that presume guilt has been determined. The NSW Law Reform Commission has previously recommended and outlined such principles.[48] We suggest that 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.[49]

(ii) A standalone provision for Aboriginality

Decision makers must be required and guided to consider issues that arise due to a person's Aboriginality. As discussed above, the current reference in the Bail Act is insufficient. A standalone provision that includes consideration of cultural background, obligations and community ties[50] would give appropriate prominence to the provision and apply with respect to all bail determinations.

(iii) Amendment of section 77 of the Bail Act

[46] Young Offenders Act 1997 (NSW), Section 38
[47] See section 28 of the Children (Detention Centres) Act 1987
[48] NSW Law Reform Commission, Report 133: Bail, 2012, Recommendation 11. http://www.lawreform.justice.nsw.gov.au/Documents/Publications/Reports/Report-133.pdf
[49] Section 28 of the Children (Detention Centres) Act 1987 states "may be highly relevant".
[50] See for example s3A of the Bail Act 1977 (Vic).

As outlined above, the Bail Act distinguishes between the responses available to police and to the court following a breach of bail. Section 77 prescribes a number of actions that may be taken by police, ordered by least to most restrictive and specifically confirms that an arrest may be discontinued and alternative enforcement action taken. However, as discussed, young people are arrested and detained for breach of bail in circumstances where the court finds no unacceptable risk and police are reluctant to deviate from an enforcement action once taken. To reduce inappropriate enforcement action, to ensure that detention occurs only there is an 'unacceptable risk' of liberty, and to ensure oversight of decisions by police officers of sufficient rank and experience, consideration should be given to amending s77 as follows:

- To provide that an officer not take action under s77(e) unless the officer believes on reasonable grounds that to take alternate action under s77(1)(a)-(e) would result in an unacceptable risk. We note that s77(1)(c) provides for the issue of an 'application notice' to require the person's attendance at court. This should be defined within the Act to provide or confirm the authority of police to bring a breach or imminent breach of bail to the attention of the Court without the detention of the young person or a request from police to revoke or vary bail.
- To provide that a police officer who takes action under s77(e) ensures that as soon as reasonably practicable after the person is present at a police station, a police officer with power to make a bail decision pursuant to s43 determines the enforcement action (the Custody Manager). We note that only police officers of sufficient rank are able to make bail decisions following the arrest and charge of a young person, whereas an officer who arrests for breach of bail may be a probationary constable and any further consideration of the appropriateness of an enforcement action once back at the station is unlikely. We suggest providing young people who are alleged to have breached their bail with the additional protection of a custody manager's oversight will be beneficial and will acknowledge that the additional information available at the police station combined with the absence of any urgency that may have characterised the arrest, suggests the appropriateness of re-considering enforcement action. It will further address the confusion and inconsistency as to whether the arresting officer only has the authority to discontinue an arrest and take alternate action under s77.
- To provide that the Custody Manager must discontinue the arrest and take action pursuant to s77(1)(a-d,f) unless the police officer believes on reasonable grounds that there is an unacceptable risk in doing so.
- To provide that a police action who takes action under s77(e) (the arresting officer) or does not discontinue the arrest (the Custody Manager) must record the reasons for their decision. This will provide accountability. We note that police and the court must record reasons for refusing bail or not granting bail unconditionally. Police should be required to do this for denying liberty on bail.
- To amend the matters that must be considered by a police officer in taking enforcement action pursuant to s77(3) to include the principles that arrest is of a last resort and detention should be for the shortest time possible.
- To provide police with the authority to vary police bail following a breach. This would allow police to address an unacceptable risk without detaining the young person or requiring the attendance of the young person at court and we can see no policy reason against this.

(iv) Bail conditions

We again note the recommendation of a standalone provision for Aboriginality. Further, to address the imposition of bail conditions that are inconsistent with s20A we suggest legislative amendment that strengthens the requirement of necessity and provides 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.

We note that legislation already provides the reasons for refusing bail or not providing unconditional bail.[51] Regulation 12 requires that the police record of reasons must be sent to the court.[52] It is our understanding that this may have been interpreted as requiring the reasons for bail refusal, not for the imposition of conditions, and further that this does not always occur. We suggest clarification of the legislation to ensure the reasons of police for refusing bail, imposing conditions or denying bail following a breach of bail, are provided to the court. We also suggest this document is provided to a young person's solicitor.

(c) The efficacy of the CNS in advocating for bail

Two issues were very apparent very quickly in the preparation of this snapshot. Firstly, police are extremely reluctant to discontinue an arrest for a breach of bail and take an alternative enforcement action.[53] In one matter during the ten week period police advised that they had not determined how they would proceed but ultimately dealt with the young person by way of an application notice under s77(c). Post the ten week period we have successfully advocated for an alternate enforcement action in a number of matters, however this is very infrequent. A significant barrier here is that police have already made a determination.

Secondly, with respect to the fresh offence category, in the majority of matters police had not turned their mind to bail at the time of the CNS call. This is a barrier to successful bail advocacy in one sense, however, in many of these matters police grant bail and we do not know the role our advocacy has played. It may be that in some instances the lack of a determination assists. In one matter during the ten week period we were successful in advocating for bail after the officer initially advised that it would be refused. Post the ten week period we have had some further success.

The most relevant issues to the efficacy of the CNS appear to be the individual police officer's willingness to discuss and engage with the topic, the availability of information to the CNS solicitor and time. Successful bail advocacy is highly dependent on having relevant, persuasive information regarding the young person and their circumstances. If the CNS solicitor has previously dealt with the young person they are the most well placed to successfully advocate for bail. With respect to time, a constant consideration must be any delay involved in the process, as it is clearly adverse to a young person's interest to be ultimately bail refused by police and also having missed the opportunity to appear before the court that day on account of the delay in waiting for bail advocacy to occur.

Interestingly, when we first considered requesting a reason from police for refusing bail or denying liberty on bail, we thought we may have seen a more overt impact of this by promoting accountability. However, what may be more important is putting our concerns or the issues discussed in writing via email to police. In a number of matters in which we have appeared to unsuccessfully have advocated for bail, but followed up our conversation with an email, we are aware that the young people were released. Of course, our advocacy may have played no or little role in this, but it suggests further consideration.

[51] Bail Act 2013 (NSW), Section 38
[52] Bail Regulation 2014 (NSW)
[53] Noting again, that in all matters considered in this snapshot, the young person had been arrested and was in custody at the police station at the time of the CNS call. We are unaware of any incidents in which police discontinue an arrest in the field.

In our view, it appears that bail advocacy via the CNS (or the Legal Aid Youth Hotline) warrants further consideration, including as to whether greater resources and formalised procedures could result in it being an important tool against short term remand beyond the role it currently plays. Amongst other issues the following should be further investigated:

- As discussed, calling the CNS is mandated in legislation. It is a vital service that performs a welfare role and it is important that the call occurs in a timely manner. The Bail Act also provides that following the grant or refusal of bail an accused is entitled to communicate with a lawyer. Consideration may be given to whether it is desirable to amend the Bail Act to provide this right prior to the determination of bail and also with respect to enforcement action following a breach of bail. Consideration may also be given as to whether a separate bail advice/advocacy service provided by the ALS and Legal Aid would be appropriate.
- The provision of relevant information. Procedures appear necessary whereby police provide the solicitor with the young person's record, charge and allegation outline (if not the fact sheet). Clarification through legislation or procedure as to who may take enforcement action is necessary.
- Delay. Consideration should be given as to whether any advocacy and the impact of delay should be left to the consideration of the parties or whether a bail advice/advocacy service should be restricted to after hours.
- Training, including collaborative training, to all stakeholders.
- The Bail Assistance Line is currently not operational for much of the day. Consideration should be given to this and/or to the availability of court intake officers to assist with bail support and information.

(d) Legal Support regarding unnecessary or onerous bail conditions

As a result of COVID-19, the ALS and NSW Police have developed a MOU whereby at the time a person is arrested and charged, they are asked if they want ALS representation. If they do, an automated system emails the relevant documents (CAN, Fact Sheet, Record) to a localised ALS email address. We note that the Bail Act already provides for the recording of reasons for refusing bail or imposing conditions on bail and the provision of these to the court.[54] If these documents were provided to the ALS as well, there would be an opportunity to identify and follow up inappropriate bail conditions with a view to seeking their variation at court rather than waiting for their first mention date and risking breach. We note that the success of this would depend on sufficient resourcing. We further note that this service could complement a bail advocacy telephone service.

(e) Police referrals to culturally appropriate community organisations

Within this cohort and the young people we represent generally, there are those who are at risk of re-offending. However, before bail conditions are imposed there should be evidence that doing so reduces this risk. Children and young people at risk of offending are most often the most vulnerable and disadvantaged. We suggest the resourcing of a referral service that police can refer young people to instead of, or alongside, imposing bail conditions. This would require the consent of the young person. An Aboriginal co-ordinator/caseworker could follow up with the young person, and investigate and refer the young person on to localised support to assist with education, housing, employment or counselling as the need may be. Support could be provided for young people to attend school, rather than seeking to enforce it through a bail condition.

[54] *Bail Act 2013* (NSW), s 38. Bail Regulation 2014, regulation 12

8. Conclusion

From our perspective, this project provided no surprise as to the high incidence of short term remand experienced by the young people we represent, nor that police so often viewed arrest and detention as the inevitable response to a breach of bail. What was most informative was that in seeking to understand the issues relevant to bail decision making we began to consider what role bail plays, and perhaps should play, in the lives of children and young people. We became more familiar with the limitations and weaknesses of the current Bail Act which provides neither a standalone provision for Aboriginality nor youth.

The snapshot outlines suggestions to address short term remand but there is a necessity to also think beyond piecemeal adjustment to our current legislative and procedural bail regime. The overwhelming majority of children and young people who are remanded in the children's court and whose matters are not withdrawn or dismissed receive non-custodial penalties. In these matters, a risk of recidivism is met at sentence with orders regarding supervision and support. It is incongruous that while awaiting finalisation of the matter, risk is often simply met with detention. Children and young people most at risk of re-offending are often the most vulnerable and dependent. Reducing recidivism by these children and young people must focus on the provision of support and services rather than the threat and imposition of custody.

The approach of TFM seeking to bring stakeholders together to examine and address short term remand is important. We look forward to continuing this vital work.