A COMPLETE OVERHAUL OF THE BAIL SYSTEM?
THE INCOMING NEW SOUTH WALES *BAIL ACT 2013* AND ABORIGINAL JUVENILE OFFENDERS

by Caitlin Weatherby-Fell

INTRODUCTION

Bail laws in New South Wales ('NSW') have long been a point of contention between the State Government and the Indigenous community, particularly in relation to Aboriginal juvenile offenders. Originally drafted to reflect the objectives and principles of an effective criminal justice system, the past decade has seen bail laws labelled as being inaccessible to the Indigenous community, in addition to imposing highly onerous and unachievable conditions upon juvenile Indigenous offenders.[1] Notably, in 2010-11, 38.5 per cent of young offenders placed on remand were Indigenous—a significant proportion given that Aboriginal and Torres Strait Islander people make up just 2.5 per cent of the overall Australian population.[2]

A review of the *Bail Act 1978* (NSW) ('1978 Act') was referred to the New South Wales Law Reform Commission ('NSWLRC') in June 2011. The 2012 NSWLRC Report 133 on Bail ('Report 133') called for a complete overhaul of the NSW bail system, labelling detention (including as a result of being on remand) as 'criminogenic' for juveniles.[3] In response to Report 133, the Bail Act will be repealed upon commencement of the *Bail Act 2013* (NSW) ('Bail Act'), with the anticipated commencement date currently set for May 2014.[4] The Bail Act will aim to achieve greater consistency in the bail system, primarily by removing complexities, including the offence-based presumptions scheme.

Continuous amendments to the 1978 Act have impacted the rate of un-sentenced custody for Indigenous people, now standing at over 11 times the rate for the general population of Australia.

This article begins with a discussion of the historical development of NSW bail laws, giving context to Report 133 and the subsequent reforms to the NSW bail system. It will then examine the incoming Bail Act and discuss the possible effects of the key aspects of reform—both positive and negative—to Aboriginal juvenile offenders and to Indigenous communities. Finally, it will be argued that in order to address the increasing incarceration rates of Aboriginal juvenile offenders, initiatives such as the adoption of national justice targets need to be implemented, ideally as a part of the Commonwealth's Closing the Gap strategy.[5]

WHAT IS BAIL?

Bail is the process of decision-making where an arrested person is released back into the community until a later court date, typically on the proviso of abiding by certain conditions. Bail law consequently provides the framework for decisions by the police and courts concerning the detention or release of a person while proceedings are pending. Where an arrested person is not granted bail, they remain in gaol 'on remand' also known as pre-trial detention. Remand rates, particularly amongst Australia's Indigenous population, have risen dramatically over past decade. Continuous amendments to the 1978 Act have impacted the rate of un-sentenced custody for Indigenous people, now standing at over 11 times the rate for the general population of Australia.[6]

HISTORICAL DEVELOPMENTS OF BAIL LAWS IN NEW SOUTH WALES

The current system of NSW bail laws is the combination of common law principles and legislative provisions codified into one comprehensive statute. The 1978 Act was originally enacted in response to recommendations from the Bail Review Committee, where the first recommendation was, '[a]ll laws governing Bail should be stated in precise but simple words which can be readily understood by the layman.'[7] In its report, the NSWLRC noted that the 1978 Act had been amended by more than 80 other Acts since its introduction, creating a system of ill-fitting sections and bail laws which no longer conformed to the first recommendation of the Bail Review Committee. More importantly, the NSWLRC identified that the ever-continuing amendments had made bail a difficult area of law to comprehend and navigate, even for those with legal training.[8]

In the context of Aboriginal juvenile offenders, amendments to the 1978 Act such as the 2007 amendment of section 22A[9] can be singled out as having profound effects on those juveniles attempting to be granted bail.[10] Section 22A outlines the power to refuse to hear a bail application, with sub-section 1 restricting any person accused of an offence to one bail application before the court. As discussed by the NSWLRC, section 22A presented particular difficulties for juvenile offenders as a consequence of their youth. A young person's ability to provide cogent instructions and to participate in the court process in an effective way is typically much less than an adult, and in having only one opportunity to make a bail application, the remand rates for juveniles significantly increased as a result of the 2007 amendments.[11] Similar impacts were also felt by Aboriginal juvenile offenders in respect of the 1978 Act's presumptions against bail, and the imposition of onerous conditions in cases of bail being granted.

NSWLRC REPORT 133

On 8 June 2011, the NSW Attorney General requested the NSWLRC to undertake a review of the law of bail,[12] considering: bail presumptions, the desirability of maintaining section 22A, and whether the 1978 Act should include distinctions between different groups of people (including young offenders, and Aboriginal and Torres Strait Islander peoples). The outcome of the review was a 408 page report detailing recommendations for a significant overhaul of bail laws in order to meet the purposes of the criminal justice system.

The NSWLRC singled out the rates of un-sentenced detention for young people and Indigenous people as being of significant concern, with Report 133 detailing that the number of young people on remand on an average day has increased from approximately 225 in 2000 to over 400 in 2010. Indeed, about half of the young people in juvenile detention are un-sentenced.[13] The report gave significant focus to recommendations that would bring about change in regards to these rates.

The NSWLRC also discussed the impact of remand on young people, highlighting the far-reaching consequences associated with holding young people in custody—both for the young person being held on remand, and for the community more broadly. The NSWLRC relied upon the Australian Law Reform Commission's 1997 report in stating that, '[a] period spent in remand adversely affects the ability of young people to maintain community and family ties, and disrupts education.'[14] Submissions were received from the community at large in regards to the impacts of remand on juveniles, with the overwhelming proposal being that remand must be a last resort, a conclusion consistent with international instruments to which Australia is a party.[15]

In addition, the impact of onerous conditions and conduct requirements in relation to young people was highlighted. The extent of the imposition of these conditions, coupled with their monitoring by police, was an area of contention among the stakeholders who submitted to the NSWLRC. The Chief Magistrate of the Local Court and the President of the Children's Court are among those who have supported the view that unduly numerous, complex and onerous conduct requirements are frequently imposed, some as a matter of routine, and where broken, the police response to the breach was excessive. In contrast, the NSW Police Force submitted that the imposition of such requirements and effective monitoring for breach builds rapport between police and young people and their families, and prevents crime. The NSWLRC called for the provision within the existing 1978 Act (section 37(2)) to be observed, however, its existence yet ineffectiveness loomed as an example of the discretion available under NSW bail laws.

The ever-continuing amendments made bail a difficult area of law to comprehend and navigate, even for those with legal training.

BAIL ACT 2013 (NSW) — THE NEW BAIL ACT

The NSW Government published its response to the NSWLRC's review in November 2012. And whilst the Government took notice of and accepted some of the recommendations made in Report 133, it certainly did not accept all. In response to the NSWLRC Report, the NSW Government proposed the Bail Act, an act of legislation primarily proposing to revoke the existing bail system of offence-based presumptions in favour of an 'unacceptable risk' model. This 'simple' unacceptable-risk test will focus bail decision-making on the identification and mitigation of unacceptable risk, which according to the NSW Government, should result in decisions that better achieve the goals of protection of the community while appropriately safeguarding the rights of the accused person.[16]

Although the new model represents the rejection of the NSWLRC's recommendation for a universal presumption in favour of bail, a notable adoption is the consideration of any special vulnerability or needs of an accused person arising because of being a young person (under the age of 18 years) or being Aboriginal and/or Torres Strait Islander, amongst others.[17] In addition, young people will be allowed to make a second bail application, an allowance reflecting their vulnerability.[18]

BAIL DECISION

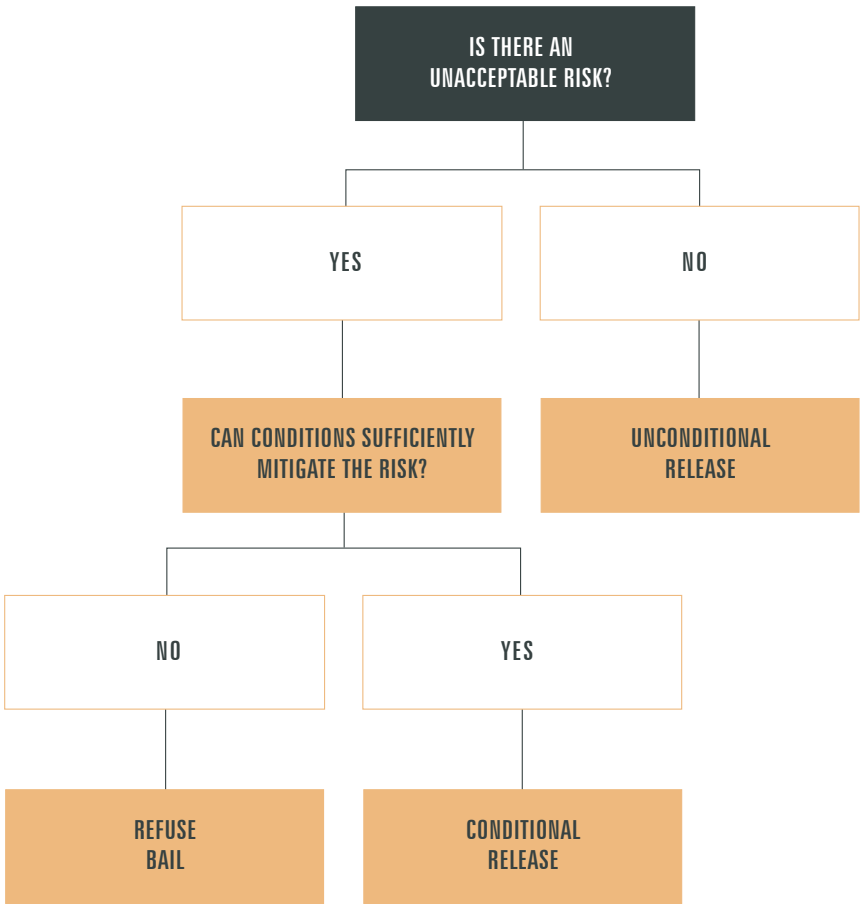
Section 17 of the Bail Act stands as the primary difference between the 1978 Act and the incoming Bail Act—a movement from offence-based presumptions to an unacceptable risk model. The decision as to whether an unacceptable risk exists encompasses considerations of matters including whether, for example, the accused person has a history of violence,[19] the length of time the accused person is likely to spend in custody if bail is refused,[20] and most importantly for the purposes of this article, any special vulnerability or needs the accused person has including being a youth; being an Aboriginal and/or Torres Strait Islander; or having a cognitive or mental health impairment.[21]

The decision of whether or not to grant bail is now encompassed within a flow chart in Section 16 Bail Act—a further step towards a 'simpler' approach to bail proceedings. From May 2014, the chart will act as a definitive decision-making model for both the police and courts; a step-by-step model to remove any complexity and discretionary judgements that characterised the 1978 Act.

CONDITIONS

As illustrated in the Bail Act flowchart (below) for bail decision-making, the question of conditions is one of primary importance upon consideration of bail. The imposition of conditions upon juvenile offenders has often been characterised as being highly onerous and unachievable, notwithstanding the requirement of section 37(2) 1978 Act; that the conditions imposed on a grant of bail are to be no more onerous than appear to be required.[22] The submission to Report 133 by the Aboriginal Legal Service (NSW/ACT) noted an example of four co-accused children, with bail conditions of non-association and strict curfews, where three of

IMAGE 1: FLOW CHART — BAIL DECISION



Source: *Bail Act 2013* (NSW) s 16(3).

the children were cousins, two living in the same house. The three cousins were subsequently arrested for breaching their bail less than seven days after police bail was granted. Notably, two out of the four were first time offenders.[23] Part 3, Division 3 of the Bail Act addresses bail conditions, providing that bail can be granted with or without conditions.[24] Further, section 24(2) provides that, '[b]ail conditions must be reasonable, proportionate to the offence for which bail is granted."[25] However, Division 3 does not make any exceptions or allowances for Aboriginal juvenile offenders, or indeed, juvenile offenders. In addition, it is unclear within section 24(2) will follow in the footsteps of its 1978 Act predecessor in being a tool for unqualified discretion.

SECTION 22A REPEALED?

Submissions received by the NSWLRC prior to the release of Report 133 called for an exemption from section 22A 1978 Act to be made for children and young people. The increased likelihood of juveniles failing their initial bail applications was noted as the primary reason for raising the exemption recommendation.[26] And whilst upon first glance it may appear that the Bail Act has acted upon the NSWLRC recommendation to repeal section 22A 1978 Act, it has not. Section 74 of the Bail Act will now hold the powers of the soon-to-be former Act's section 22A, in that multiple release or detention applications to the same court are not permitted. However, section 74 Bail Act does provide an exception for a child (defined in the Bail Act as being 'a person under the age of 18'[27]), where a juvenile may make a second application for bail.[28] This exception to section 74 appears to be the NSW Government's way of compromise—an act of acknowledgement that juvenile offenders occupy a special place in the criminal justice system as a consequence of their vulnerability. The effectiveness of the section will be seen come the commencement of the Bail Act, particularly as the addition of a second bail application falls significantly below that recommended by the NSWLRC.[29] In addition, it is reasonable to anticipate that those agencies who made submissions to the NSWLRC will have more to say over the coming months, post May 2014.

RELATIONSHIP WITH OTHER ACTS

The law has long recognised that it should treat young people differently, reflecting their lesser maturity and capacity to make considered decisions. Specialist courts, procedures and legislation have been developed, with particular emphasis often placed on mediation, reparation, restorative justice and rehabilitation;[30] an acknowledgement of the potential for detention of juvenile offenders to be criminogenic. However, the existence of these differing procedures is often not enough for them to be employed by those decision-makers in bail proceedings involving juvenile offenders.

In addition to bail laws, there are two other Acts relevant to juvenile offenders upon facing bail proceedings in NSW: the *Young Offenders Act 1977* (NSW) ('YOA') and the *Children (Criminal Proceedings) Act 1987* (NSW) ('CCPA'). The NSWLRC reported that bail laws are more often used than the juvenile-specific legislation to make bail decisions for juvenile offenders. With both the YOA and CCPA resting upon certain principles to guide the exercise of criminal jurisdiction in relation to children, the rates of un-sentenced juveniles (particularly Aboriginal juveniles) speak to the fact that the principles are not being employed and utilised to their full potential.

In order to address this issue, the NSWLRC recommended that the principles set out in section 7 YOA and section 6 CCPA be absorbed into the NSW bail laws to ensure that the overrepresentation of juveniles did not continue.[31] The guiding principles aim to establish, among others, alternatives to court proceedings such as cautions and warnings for certain types of offences,[32] as well as outcomes that support dealing with children who have offended in their own communities in order to promote rehabilitation, sustain family support structures and re-integration back into the wider community.[33] Significantly, the legislation acknowledged that cautions and warnings are to be utilised to address the overrepresentation of Aboriginal juveniles in the criminal justice system.[34] The Bail Act, however, does not include the YOA and CCPA recommended principles, meaning that the use of alternatives to the Bail Act will remain discretionary and the issues associated with juveniles being placed on remand look to continue.

INTERNATIONAL JUVENILE JUSTICE PRINCIPLES

The principles set out in the Children Act were also assessed by the NSWLRC to be consistent to the international instruments to which Australia is a party. Chief among these instruments were the *United Nations Convention on the Rights of the Child*[35] and "the *Beijing Rules*".[36] The NSWLRC recommended that Article 13 of the *Beijing Rules*—which requires that detention pending trial shall be used only as a measure of last resort and for the shortest appropriate period of time—be taken into account when making a bail determination in relation to a young person.[37] Once more, the NSW Government has not incorporated the NSWLRC recommendation into the Bail Act, meaning that juvenile remand rates look to continue in a similar fashion from May 2014.

A COMPLETE OVERHAUL OF THE SYSTEM?

The incoming Bail Act aims to produce a 'complete overhaul' of the NSW bail system. However, by not adequately addressing the impacts of bail upon Aboriginal juvenile offenders, it is arguable that the overhaul intended will not be as far-reaching as hypothesised by the NSW Government. Whilst some changes

have been made, changes that will positively affect those Aboriginal juveniles either placed on remand or released on bail (with or without conditions imposed), the issues surrounding restrictions on bail applications, alternatives to the 1978 Act, remand rates and onerous conditions look to remain prevalent under the new Bail Act.

One argument rallying for further change to the bail system is that of CEO of the Aboriginal Legal Service (NSW/ACT), Phil Naden. After recently appearing on the ABC, Naden stated:

> Australia's Aboriginal children are detained at the world's highest rates. More than half of young people in detention today (over 52 per cent) are Aboriginal, and most are un-sentenced. In fact, as soon as they're put in detention they're getting poorer outcomes, in health, education and job prospects… Aboriginal young people are jailed at 31 times for Aboriginal juveniles.[38]

Naden called for adoption of national justice targets as part of the Commonwealth Government's 'Closing the Gap' strategy in order to bring national attention to the issue of Aboriginal juvenile offenders. It is Naden's hope that the inclusion of justice targets in the strategy will bring about a reduction of the rates of indigenous persons imprisoned, including juveniles, whether on remand or sentenced.

CONCLUSION

The NSWLRC Report 133 stands as a critical piece of review, the catalyst for the most detailed reform of NSW bail laws since the original 1978 Act's commencement 36 years ago. The incoming Bail Act, whilst adopting some recommendations of Report 133, stands as piece of legislation that has failed to fully regard the impact of applying for bail, bail conditions and un-sentenced imprisonment on Aboriginal juvenile offenders, and indeed the Indigenous community at large. In order to bring about the intended 'complete overhaul' of the NSW bail system, there needs to be heightened regard to the juvenile-specific Acts available, in addition to the international juvenile justice principles to which Australia is already a party. Further assistance would be brought about by making the issue of mass imprisonment of Aboriginal adults and juveniles a national issue, with justice targets as a part of the 'Closing the Gap' strategy a prime example. The full effects of the Bail Act to aboriginal juvenile offenders remains to be seen; however, if the NSW Government's acceptance-rate of the NSWLRC recommendations is taken as an indicator, bail laws will continue to negatively impact Aboriginal juvenile offenders from May 2014.

With the Bail Act yet to have commenced at the time of writing, the future impact of NSW bail laws to the community remain uncertain. Whether or not the persons making bail-decisions will act in accordance to the need of Aboriginal juvenile offenders will be seen from approximately May 2014.

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1 See generally K Richards and L Renshaw, '*Bail and remand for young people in Australia: A national research project*', Australian Institute of Criminology Reports, Research and public Policy Series No 125 (2013).

2 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012).

3 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 0.14.

4 *Bail Act 2013* (NSW) s 100.

5 See generally Australian Broadcasting Corporation, 'The gap is not closing', *Lateline*, 12 February 2014 (Phil Naden).

6 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 4.1.

7 New South Wales, *Report of the Bail Committee*, Parl Paper No 46 (1976) 5.

8 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 89–97 (Greg Smith, Attorney-General and Minister for Justice).

9 *Bail Amendment Act 2007* (NSW).

10 *Bail Act 1978* (NSW) s 22A.

11 S Vignaendra, S Moffatt, D Weatherburn and E Heller, 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime', *Crime and Justice Bulletin* 128 (NSW Bureau of Crime Statistics and Research, 2009).

12 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 1.1.

13 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 0.13.

14 Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) 18.170.

15 See, eg, Commission for Children and Young People, Submission No 4 to New South Wales Law Reform Commission, *Bail*, 13 July 2011, 2; The Law Society of New South Wales, Submission No 5 to New South Wales Law Reform Commission, *Bail*, 18 July 2011, 14.

16 New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 May 2013, 89–97 (Greg Smith, Attorney-General and Minister for Justice); *Bail Act 2013* (NSW) s 17.

17 *Bail Act 2013* (NSW) s 17.

18 *Bail Act 2013* (NSW) s 74(3)(d).

19 *Bail Act 2013* (NSW) s 17(3)(d).

20 *Bail Act 2013* (NSW) s 17(3)(g).

21 *Bail Act 2013* (NSW) s 17(3)(j).

22 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 0.49.

23 Aboriginal Legal Service NSW/ACT Limited, Submission No 14 to New South Wales Law Reform Commission, *Bail*, 22 July 2011, 18.

24 *Bail Act 2013* (NSW) s 23.

25 *Bail Act 2013* (NSW) s 24(2).

26 Juvenile Justice, Submission No 35 to New South Wales Law Reform Commission, *Bail*, 1 August 2011, 11.

27 *Bail Act 2013* (NSW) s 4(1).

28 *Bail Act 2013* (NSW) s 74(3)(d).

29 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) Recommendation 19.1(3).

30 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) 2.33.

31 See David Pheeney, 'Understanding the important and 'potential' of the Youth Offenders Act 1997 (NSW) in addressing the over-representation of aboriginal juveniles in the criminal justice system', *Indigenous Law Bulletin* 8(9).

32 *Young Offenders Act 1997* (NSW) s 7(c).

33 *Young Offenders Act 1997* (NSW) s 7(e).

34 *Young Offenders Act 1997* (NSW) s 7(h).

35 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) Article 37.

36 *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 96th mtg, UN Doc A/RES/40/33 (29 November 1985) Rule 13.

37 New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) Recommendation 11.1(d).

38 Australian Broadcasting Corporation, 'The gap is not closing', *Lateline*, 12 February 2014 (Phil Naden).

Burrul Warrambool (Milky Way)
Black night colourway
Lucy Simpson
Screen print on silk/linen