Review of the Law of Bail in NSW: Submission to the New South Wales Law Reform Commission

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Brenda Bailey, Senior Policy Officer
Laura Brown, Solicitor
Peter Dodd, Solicitor
Vavaa Mawuli, Senior Solicitor
Lou Schetzer, Policy Officer

Level 9, 299 Elizabeth Street, Sydney NSW 2000 • DX 643 Sydney
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation. PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work relevant to this review of the law of bail in NSW

PIAC shares the concerns of the NSW Government about the growing remand population in NSW prisons and juvenile detention centres and welcomes the opportunity to provide a submission to the NSW Law Reform Commission's (Commission) review of the *Bail Act 1978* (NSW) (Bail Act). PIAC's aim in this submission is to assist in identifying the role and impact of bail laws on this unsettling trend, and to participate in a reform process that addresses these problems.

For several years, PIAC has strongly advocated reform of NSW bail laws. It has made submissions to a number of inquiries recommending changes to bail in NSW to reduce the remand population and provide greater community-based support to those vulnerable and disadvantaged members of the community who become entangled in the criminal justice system.[1]

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[1] These submissions include: Bailey., B, and Dodd, P. *Treatment and care over punishment and detention – even more critical for young people*, Submission on the NSW Law Reform Commission's Consultation Paper on Young people with cognitive mental health impairments in the criminal justice system, Public Interest Advocacy

In this submission, PIAC will draw extensively on its previous policy work on bail reform. PIAC also draws on its experiences:

- representing the families of mentally ill inmates who have died in custody;
- representing children in detention; and
- its provision of a specialist criminal law service for people experiencing homelessness.

PIAC's submission does not seek to address all of the questions posed in the Commission's discussion paper, but focuses on the issues that deal with young people, Indigenous people, people with cognitive disability and other vulnerable members of the community, such as people experiencing homeless.

1.3 Summary of Recommendations

	Recommendations	Discussion Question(s)
1.	The Bail Act should be amended to include an objects clause, which clearly states that the purpose of bail is to ensure the attendance at court of an accused person, while protecting the interests of the community.	1.1 & 1.2
2.	The proposed objects clause should recognise the right to liberty and the presumption of innocence.	1.1 & 1.2
3.	The proposed objects clause should make clear that bail should not be used as a form of punishment, for deterrence purposes or to impose onerous or inappropriate conditions that have no relevance to the objects of bail.	1.1 & 1.2
4.	The Bail Act should be amended to exempt young people appearing in the Children's Court entirely from the operation of s 22A.	7.2
5.	For the purpose of expanding the list of 'lawful purposes' that can be taken into account under section 32(1(b)(iii) of the Bail Act, a non-exhaustive list of criteria should be developed in consultation with legal practitioners and the community more broadly, which includes a person's right to work, obtain an education, participate in family life, access health services and maintain housing.	8.1

Centre, 17 March 2011; Brown., L, *Updating Bail*, Submission on the draft NSW Bail Bill 2010, Public Interest Advocacy Centre, October 2010; Brown., L and Zulumovski, K. *A better future for Australia's Indigenous young*, Submission to the House of Representatives Standing committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the high involvement of Indigenous juveniles and young adults in the criminal justice system, Public Interest Advocacy Centre, 22 December 2009; and Bailey, B. *Special Commission of Inquiry into Child Protection Services in NSW*, Public Interest Advocacy Centre, 11 February 2008.

6.	Bail conditions imposed on an accused person should be no more onerous than is absolutely necessary to promote the objects of bail.	9.2
7.	The Bail Act should include a provision requiring that in making a bail determination or imposing bail conditions, the decision maker should consider the specific needs that arise if the person in question is homeless or at risk of homelessness.	9.3
8.	The Bail Act should be amended to state that homelessness is not in itself a reason for refusing bail.	9.3
9.	Police and courts should take into account the circumstances of an individual in imposing a place restriction condition. Such conditions should not prevent a person from accessing essential services, unless there is a compelling public interest to do so.	9.3
10.	Section 54A of the Bail Act should be amended to require a notice to be given to the court every 48 hours that a bail condition cannot be complied with and for the young person to appear before the court each time a notice is given.	11.1, 11.2, 11.3 & 11.4
11.	The Bail Act should give the court the power to require that an agency responsible for enabling compliance with a bail condition that cannot be complied with, appear before the court or provide a report to explain why the condition cannot be met and what steps are being taken to enable compliance.	11.4
12.	An objects clause in the Bail Act should reflect the principle that detention should only be used as a measure of last resort and for the shortest possible time in relation to young people.	10.5 & 12.6
13.	The Bail Act should adopt section 6 of the *Children (Criminal Proceeding) Act 1987* (NSW) as guiding principles for bail determinations involving young people	12.3
14.	There should be separate bail legislation for young people or the Bail Act should contain a separate part, which relates specifically to young people.	12.1
15.	Section 50 of the Bail Act should be amended to: (a) require a police officer to issue a court attendance notice to any young person suspected of committing a 'technical breach' of a bail condition; (b) make it clearer that police have a discretion not to arrest for breach of bail; (c) give police broader options for dealing with a breach of bail, such as issuing a warning or issuing a court attendance notice in respect of the breach; (d) require that remanding a young person in custody for breach of bail should only be used as a measure of	10.1 & 10.3

	last resort and for the shortest possible time in relation to young people.	
16.	The Bail Act should include a provision requiring that, when considering refusing bail to an Indigenous young person, the court is to have regard to specific considerations in relation to Indigenous disadvantage and how these considerations impact on the young person personally.	14.1 & 14.2
17.	In prescribing indicators of Indigenous disadvantage that the court should have regard to for the purpose of the Bail Act, it is recommended that the NSW Government consider community views and have regard to the Overcoming Indigenous Disadvantage report, which highlights key indicators of Indigenous disadvantage.	14.1 & 14.2
18.	The Bail Act should refer to people with cognitive impairments and/or disabilities with a definition that is inclusive of people with mental illness and mental disorders, people with intellectual impairments and people with brain injury.	13.1
19.	Subsection 37(2A) of the Bail Act should be expanded to require police and the courts to consider the following before imposing a bail condition on a person with a cognitive or mental health impairment: (a) the cognitive capacity of the person to understand the condition; (b) the cognitive capacity of the person to remember and carry out the condition; and (c) other obligations that the person on bail might be required to carry out that might affect their capacity to comply with bail conditions.	13.2
20.	There should be a presumption in favour of bail for young people with cognitive and mental health impairments.	13.2
21.	PIAC submits that bail forms and court attendance notices should be redrafted by the appropriate agencies to make them clearer and more accessible, particularly for people with cognitive disabilities.	13.3

2. Overarching considerations

PIAC acknowledges that the decision whether to grant bail triggers a number of competing considerations. These include striking an appropriate balance between, on one hand, the right to liberty and the presumption of innocence, and on the other hand, the protection of the community and the risk of re-offending. Such general principles need to be clearly stated in the Bail Act, to guide in the statutory interpretation of the more specific provisions that arise in individual cases.

As per its heading, Part 2 of the Bail Act sets out a number of 'general provisions respecting bail'. However, the Bail Act does not contain a general 'objects clause', and Part 2 does not purport to

fill that gap. The difficulty in distilling the Bail Act's guiding principles is compounded by the fact that the Act has been amended 17 times since its introduction 33 years ago, with each amendment precipitated by a specific legislative purpose. Commenting on this fact, the NSW Premier, the Hon Barry O'Farrell, described the Bail Act as 'a patchwork quilt that is difficult to read and understand'.[2]

PIAC believes that the Bail Act should be amended to include a clear statement of the Act's objects, and that these should articulate the underlying principles on which bail determinations should be grounded. More specifically, PIAC submits that the proposed objects clause should clearly state that the purpose of bail is to ensure the attendance at court of a person charged with a criminal offence while recognising international human right principles of the right to liberty[3] and presumption of innocence[4] that underpin the justice system. Further, given that bail is not to be used as a punitive measure, the objects should reflect the fact that a person who has not been convicted of an offence should not be imprisoned unless there is a good reason to do so. The competing considerations in relation to the grant of bail, which include, among others, the protection of the community or the safety of an individual, are rightly taken into account under section 32 of the Bail Act, which sets out criteria to be considered in bail applications. However, in PIAC's view, it is fundamental that every bail decision should involve consideration of an overarching principle of the right to liberty of a person presumed to be innocent.

PIAC further submits that an overarching principle that should apply to bail determinations in respect of young people is that detention should be a measure of last resort and for the shortest possible period of time (see recommendation 12, Part 7.1 of the submission).

Recommendation 1

The Bail Act should be amended to include an objects clause, which clearly states that the purpose of bail is to ensure the attendance at court of an accused person, while protecting the interests of the community.

Recommendation 2

The proposed objects clause should recognise the right to liberty and the presumption of innocence.

Recommendation 3

The proposed objects clause should make clear that bail should not be used as a form of punishment, for deterrence purposes or to impose onerous or inappropriate conditions that have no relevance to the objects of bail.

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2 The Hon Barry O'Farrell, MP, Media Release: 'NSW Govt Orders Review of Bail Act', 9 June 2011, viewed July 2011 <http://www.lawlink.nsw.gov.au/lawlink/Corporate/ll_corporate.nsf/vwFiles/090611_bail_act.pdf/$file/090611_bail_act.pdf>.

3 UN General Assembly, Universal Declaration of Human Rights, (10 December 1948), 217 A (III), Articles 3 & 11, viewed July 2011 < http://www.un.org/en/documents/udhr/index.shtml>

4 Ibid.

3. Repeat bail applications

Section 22A of the Bail Act provides that anyone applying for bail (including children and young people) can apply only once, unless special circumstances exist, such as the lack of legal representation during the first bail application, or unless the court is satisfied that new facts or circumstances have arisen since the first application. Since its introduction in 2007, this section has directly led to an increase in the number of children placed on remand until their charges are finalised, when previously they might have only been on remand for a few days until they had mounted a successful bail application.[5] Although initially aimed at adult repeat offenders, this section has had a far more significant impact (albeit unintended) on young people than on adult offenders, as young people are often unfamiliar with the legal system and unable to adequately instruct a legal representative in the time required to make a successful bail application.[6]

BOCSAR published data that describe the disproportionate effect of s 22A. The report links the increase in length of stay in detention and the commencement of s 22A. It found the relationship so obvious that to test the statistical significance 'would be superfluous.'[7]

PIAC notes that s 22A was amended in 2009 to include s 22A(1A)(b), which allows a further application for bail if information relevant to the grant of bail is presented in the application, which was not previously presented to the court. However, PIAC submits that while this may soften some of the effect of s 22A, it does not go far enough to reduce the numbers of young people held on remand. PIAC recommends that this provision should not apply to young people appearing in the Children's Court.

Recommendation 4

The Bail Act should be amended to exempt young people appearing in the Children's Court entirely from the operation of s 22A.

4. Criteria to be considered in bail applications

Subsection 32(1) of the Bail Act outlines the criteria to be considered in determining bail applications. Paragraph 32(1)(b) sets out an exhaustive list of factors that should be taken into account in considering the interests of an accused person. These factors include the needs of a person to be free for any lawful purpose. The term 'lawful purpose' is not defined or limited in any way in the provision, except to say that 'lawful purpose' includes the needs of a person to be free to prepare for an appearance in court or to obtain legal advice.

Without aiming to provide an exhaustive list or limit in any way the range of lawful purposes that a court could take into account under s 32(1)(b)(ii)-(iii), PIAC submits that this provision should prescribe certain international human rights principles that the court should consider as 'lawful purpose[s]' for the purpose of s 32(1)(b). These include, but are not limited to, a person's right to

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5 Vignaendra, S et al, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin, no.128, NSW Bureau of Crime Statistics and Research, Sydney, (2009) 3.

6 Wong, K., Bailey, B. and Kenny, D. *Bail me out: NSW Young Offenders and Bail*, Youth Justice Coalition, (2010), 4.

7 Above n 5.

work[8], obtain an education[9], participate in family life[10], access health services[11] and maintain housing[12].

In PIAC's view, allowing a person to remain in the community pending the resolution of their criminal case promotes and enables effective participation in society and fulfils some fundamental objectives of the justice system. A person remanded in custody on the other hand, is effectively prevented from participating in society in a meaningful way, which can have detrimental effects. For example, in PIAC's experience representing people at risk of homelessness, the impact of being refused bail can lead to a person losing their housing, which can in turn have devastating consequences when the person is released from custody into homelessness. Such situations hinder successful re-integration into society and increase the risk of offending. PIAC is aware anecdotally, that in practice criminal defence lawyers make submissions addressing the needs of a person to obtain or continue employment, education, participate in family life, access adequate health care or maintain housing as the case may be, in support of a bail application. There will indeed be other relevant factors, which impact on the rights of an accused person and should be considered in a bail determination. PIAC submits that a non-exhaustive list should be developed in consultation with legal practitioners and the community more broadly.

Recommendation 5

For the purpose of expanding the list of 'lawful purposes' that can be taken into account under section 32(1(b)(iii) of the Bail Act, a non-exhaustive list of criteria should be developed in consultation with legal practitioners and the community more broadly, which includes a person's right to work, obtain an education, participate in family life, access health services and maintain housing.

5. Bail conditions

This section of the submission is informed by PIAC's work undertaken as part of the Homeless Persons' Legal Service (HPLS). HPLS was established in 2004 as a joint initiative of PIAC and the NSW Public Interest Law Clearing House and provides free legal advice and representation to people who are homeless or at risk of homelessness. Among other legal services, HPLS offers a free, specialist criminal law service to people experiencing homeless. From 1 January 2010 to 30 June 2011, HPLS provided representation to 104 people in criminal matters.

People experiencing homelessness are susceptible to interaction with law enforcement agencies. Many report being 'targeted' or being the subject of undeserved attention by law enforcement officers, due to their appearance and the activities that they are forced to undertake in public as a

8 UN General Assembly, International Covenant on Economic, Social and Cultural Rights, (16 December 1966), United Nations, Treaty Series, Article 6, viewed July 2011 <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>

9 Ibid, Article 13

10 Ibid, Article, 10

11 Ibid, Article, 12

12 Ibid, Article, 11

consequence of their homelessness.[13] As a result of this particularly high rate of interaction with the law and law enforcement agencies, people experiencing homelessness have an increased likelihood of interacting with the system of bail.

This section of the submission uses de-identified case studies of HPLS clients to highlight the impact of bail conditions and remand on people experiencing homelessness.

5.1 Onerous bail conditions

For people experiencing or at risk of homelessness, there is concern that police grants of bail may have inappropriate or unnecessary conditions attached, requiring an application for a variation in the Local Court. As is illustrated in the case study below, in some circumstances, the conditions may be totally unnecessary and unrelated to any real risk of flight or re-offending, given the minor nature of the charge, the accused's circumstances and criminal history.

HPLS Case study 1

In 2011, TF was charged with possession of a small amount of cannabis. Police granted him bail but imposed an exclusion zone that he not go within 1000 metres of Kings Cross Station. He had had no prior drug matters since 1991.

An application was made to vary the bail conditions so as to remove the restrictions. The police provided the prosecution with no instructions. The Magistrate lifted all restrictions on TF's bail.

Under s 37(1) of the Bail Act, conditions may be imposed on bail for the purposes of promoting effective law enforcement, protection and welfare of specially affected person(s) or of the community, and to reduce the likelihood of further offences being committed. Despite subsection (2) stating that conditions should not be more onerous than required, HPLS data indicate that some conditions – particularly conditions imposing exclusion zones, reporting conditions and residential/curfew conditions – may be more onerous than is required to fulfil the objects of bail. In such circumstances, the risk of breaching the conditions becomes unnecessarily high.

Recommendation 6

Bail conditions imposed on an accused person should be no more onerous than is absolutely necessary to promote the objects of bail.

5.2 Bail condition to live at specified address

The vast majority of people experiencing homelessness either move frequently from one form of temporary shelter to another or live in boarding and rooming houses on a medium-to-long term basis. The Bail Act impacts disproportionately on people experiencing homelessness because they are often refused bail due to their lack of permanent, stable and secure accommodation.

[13] Forell, S, McCarron, E. and Schetzer, L, *No Home, No Justice? The Legal Needs of Homeless People in NSW*, Access to Justice and Legal Needs, Volume 2, Law and Justice Foundation of New South Wales, (July 2005), 108 – 110.

Under s 32(1)(a), in making a determination as to the grant of bail of an accused person, the police or court must consider the probability of whether the person will appear at court in respect of the charges for which bail is being considered. In considering this, regard must be had to the person's background and community ties, as indicated by the history and *details of the person's residence* (our emphasis), employment and family situations and the person's prior criminal record.

If a person is experiencing homelessness, it is unreasonable and impracticable to expect the person to reside at a particular address if there is no suitable accommodation available, or the accommodation available is not safe and secure. If a person is unable to find safe, secure and affordable housing for the duration of the bail period, it will be extremely difficult for the person to comply with this condition. It is particularly inappropriate for a court order to force a person to reside in unsafe, unaffordable, or inadequate housing as a condition of their bail. On the other hand, there is concern that a person's lack of a stable residential address may be used as a basis for considering that there is a risk that she/he will not subsequently attend court.

For homeless people, such a requirement for residence can result in a person being refused bail. As HPLS Case study 2 illustrates, the Supreme Court has stated that being homeless of itself, should not be a reason for refusing bail, particularly for non-serious offences.

HPLS Case study 2

JD has a long history of anti-social and public disorder offences, as well as breaching bail conditions. He was charged with assaulting his former partner with a knife, and was bailed.

He was subsequently breached on his bail on charges of offensive conduct. Police opposed bail, and bail was refused by the Local Court Magistrate on the basis that JD was homeless.

On an application for bail in the Supreme Court, the Court held that the fact that he did not have an address should not be a reason for refusing bail, especially for non-serious charges such as offensive conduct.

Recommendation 7

The Bail Act should include a provision requiring that in making a bail determination or imposing bail conditions, the decision maker should consider the specific needs that arise if the person in question is homeless or at risk of homelessness.

Recommendation 8

The Bail Act should be amended to state that homelessness is not in itself a reason for refusing bail.

5.3 Place restriction conditions

The imposition of place restriction conditions can cause significant and disproportionate difficulty for people who are homeless or at risk of homelessness, and who are suffering mental illness or substance abuse and need to access rehabilitation or medical services or treatment. As the following HPLS case studies illustrate, where place restriction conditions impose an exclusion

zone on an individual, the individual may then face difficulties in accessing their regular medical or other support services.

HPLS Case study 3

LA was charged with resist police and possession of illicit substance. She was apprehended in Kings Cross. Police released her on bail, with one of her conditions being that she was restricted from going within 1000 metres of Kings Cross railway station.

She was subsequently arrested in Kings Cross again sharing needles, and was taken into custody. An application for bail was made before the court, and bail was granted with the same conditions, namely that she not go within 1000 metres of Kings Cross railway station.

The bail condition presented considerable difficulties for LA as she needed to enter the Kings Cross area to access her doctor and her methadone clinic.

An application for variation of the bail conditions was made, with the conditions being varied. HPLS lawyers were of the view that the reason for the original condition was to keep her out of the area in order to minimise disruption and annoyance rather than to reduce the risk of re-offending.

Following the variation, LA was permitted to go into the Kings Cross area between 9am and 6pm.

HPLS Case study 4

SD was charged with possess and supply of a prohibited drug. His bail conditions stated that he could not go within 1000m of Kings Cross railway station. As a result of these conditions, SD could not access his support services, including the Hope Street Drop-In Centre (for counselling, food, etc), his medical practitioner, and his methadone clinic.

Recommendation 9

Police and courts should take into account the circumstances of an individual in imposing a place restriction condition. Such conditions should not prevent a person from accessing essential services, unless there is a compelling public interest to do so.

6. Remaining in custody because of non-compliance with a bail condition

Over a three-month period in 2006-2007, Juvenile Justice NSW conducted a survey of young people in juvenile detention centres in NSW and found that on any given day, between 55 and 60 percent were on remand.[14] Furthermore, 90 percent of those on remand had been granted bail, but remained in custody because they could not meet a bail condition.[15] The survey results also

[14] The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, Volume 2, (2008), 558 - 559 (citing a submission made to the Inquiry by the Department of Juvenile Justice).

[15] Ibid.

revealed that the most common bail condition that young people were unable to meet was the 'reside as directed' condition, which requires a young person to reside at a place nominated by Community Services NSW or Juvenile Justice.[16] In 95% of the cases where young people remained in custody because of non-compliance with a bail condition, the reason was that Community Services and/or Juvenile Justice could not find suitable accommodation arrangements for the young person.

The final report of the Wood Special Commission of Inquiry into Child Protection Services (Wood report) found that it was unacceptable for a young person to be held in detention because accommodation was unavailable, however it did not go on to make recommendations that would either give the power to the courts to direct that assistance be provided or require government agencies to provide appropriate services. [17]

In 2009, PIAC worked with the Youth Justice Coalition to produce the report *Bail me Out*, which compiled and analysed data from observations at Parramatta Children's Court regarding bail conditions imposed on young people. The report found a statistical significant difference between the numbers of girls remaining in detention with 'reside as directed' orders compared with boys. It is speculated that there is a higher proportion of girls remaining in detention because of care and protection issues.[18]

NSW overhauled its child protection laws in 1987 to separate proceedings for children in need of care and protection from children in the criminal jurisdiction. At the time the new legislation was introduced, the NSW Parliament made it clear that it was to prevent young homeless people from being refused bail due to welfare reasons, acknowledging that 'once children are incarcerated in a detention centre, the probability of them committing further offences is very high.'[19]

Despite the aims of the *Children and Young Persons (Care and Protection) Act 1998* to divert young homeless people into care and out of the criminal jurisdiction, young people continued to be detained because they were homeless. As a result, amendments were made to the *Bail Amendment (Repeat Offenders) Act 2002 (NSW)*, to give the Children's Court options to consider bail accommodation when granting bail. The Attorney-General reported to Parliament at the time that diversion at the point of a bail hearing was very important,

> … particularly for vulnerable accused persons such as juveniles, intellectually or mentally disabled persons or persons of an Aboriginal or Torres Strait Islander background.[20]

The changes allowed the court to issue the 'reside as directed' condition, but did not require Community Services NSW or Juvenile Justice NSW to find community based accommodation. PIAC remains concerned that the lack of suitable accommodation options for young people frequently leads to situations in which children are left on remand because Community Services

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16 Ibid.

17 Ibid.

18 Above n 6, Table 8 13

19 Boyle, K, *The More Things Change…Bail and the Incarceration of Homeless Young People*, Current Issues in Criminal Justice, (2009) Vol 21 number 1

20 NSW Parliament, *Parliamentary Debates* (Hansard), Legislative Assembly, 20 March 2002, 819 - 820

NSW and/or Juvenile Justice NSW cannot find them appropriate accommodation in the community.

Currently, under section 54A of the Bail Act, a court must be given notice within eight days, that a person who has been granted bail, remains in custody because a bail condition has not been complied with. Further, the provision only requires notice to be given to the court once. PIAC recommends that notice period should be reduced to every 48 hours, consistent with the recommendations arising from a review of the NSW juvenile justice system commissioned by the NSW Minister for Juvenile Justice in 2009 (Noetic Report).[21] In addition to providing notice to the court, PIAC recommends that the young person should appear in court every time a notice is issued, in order to have the bail determination reviewed by the court. Further, where there is an agency responsible for enabling a young person's compliance with the condition, as is the case with the 'reside as directed' condition, then the court should have the power to require a representative of that agency to appear before the court or provide a report to the court outlining the reasons why the relevant bail condition cannot be complied with. This would increase the pressure on government agencies such as Community Services NSW and Juvenile Justice NSW to find a place for young people to reside, and for the court to reconsider a bail determination where there is no realistic prospect that a bail condition can be complied with.

Recommendation 10

Section 54A of the Bail Act should be amended to require a notice to be given to the court every 48 hours that a bail condition cannot be complied with and for the young person to appear before the court each time a notice is given.

Recommendation 11

The Bail Act should give the court the power to require that an agency responsible for enabling compliance with a bail condition that cannot be complied with, appear before the court or provide a report to explain why the condition cannot be met and what steps are being taken to enable compliance.

7. Young people

PIAC has had considerable experience working with young people entangled in the criminal justice system through its work on the Children in Detention Advocacy Project (CIDnAP). CIDnAP is a joint initiative of PIAC, the NSW Public Interest Law Clearing House and Legal Aid NSW. The project aims to challenge the systemic problems that lead to the unlawful and unnecessary detention of young people. Through its work, PIAC has observed the impact and role that bail laws play in the unlawful and unnecessary detention of young people.

For most young people, the imposition of bail conditions or being remanded in custody is their first entry point into the criminal justice system and into detention. As a result, it is essential that bail laws do not have any unnecessary negative impact on young people and are not punitive or used as a substitute for effective housing, child protection arrangements or to address other social problems. As with adults, a primary purpose of bail is to ensure a young person's

[21] Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System – Report for the Minister of Juvenile Justice,* 2010

attendance at court. However, specifically in the case of young people, bail laws should promote rehabilitation, reintegration into society and should not disrupt a young person's schooling, employment or ability to contribute positively to society.

7.1 What principles should apply to young people on bail?

PIAC submits that the foundational principle when it comes to bail determinations in respect of young people is that that detention should be used only as a measure of last resort and for the shortest possible period of time, as stipulated in the *Convention on the Rights of the Child*.[22]

Studies have shown that custodial penalties for young people at best have no specific deterrent and at worst increase the likelihood of further offending.[23] The earlier a child has an interaction with the criminal justice system, the more likely they are to be involved with that system in the future, leading to more serious penalties.[24] A criminal record and/or time spent in custody from a young age also have a detrimental impact on other aspects of life, such as education, stability of employment and family relationships.[25]

It is well recognised that the detention of young people can be detrimental. Indeed, a recent review by the Australian Institute of Criminology reported a Canadian study that found that contact with the criminal justice system increased the risk of a young person finding themselves in adult prison by a factor of seven.[26]

Given the justice system, as it applies to youths, gives special emphasis to facilitating rehabilitation and positive integration into the community, it is crucial that bail laws give young people every opportunity to divert from the criminal justice system.

PIAC supports reform to bail laws to apply the principles of s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) to bail determinations in respect of young people. These should apply equally to bail determinations made by police, as they should to courts.

Recommendation 12

An objects clause in the Bail Act should reflect the principle that detention should only be used as a measure of last resort and for the shortest possible time in relation to young people.

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22 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(b), (c) (entered into force 2 September 1990), ratified by Australia 17 December 1990 (entered into force for Australia on 16 January 1991), chiefly Article 37.

23 Weatherburn, D et al, The specific deterrent effect of custodial penalties on juvenile offending (2009) 33 Australian Institute of Criminology Reports: Technical and Background Paper, 10

24 Vignaendra, S and Fitzgerald, J, *Reoffending among young people cautioned by police or who participated in a youth justice conference*, NSW Bureau of Crime and Statistics Research, (2006).

25 Stubbs, J, *Critical Reflections on Bail: Bail and Remand for Young People*, (2009)

26 Richards, K, *What makes juvenile offenders different from adult offenders?* Trends and Issues in criminal Justice, No 409 (2011) Australian Institute of Criminology.

Recommendation 13

The Bail Act should adopt section 6 of the Children (Criminal Proceeding) Act 1987 *(NSW) as guiding principles for bail determinations involving young people.*

7.2 Should there be a separate Bail Act for young people?

PIAC has previously raised concerns that the Bail Act does not adequately consider the different needs and rights of children.[27] In effect, it has the same or a similar impact on young people as it does on adults – a situation that is wholly undesirable, and in any event inconsistent with Australia's international law obligations.

In this respect, the Bail Act differs from other legislation, such as the *Children (Criminal Proceedings) Act 1987* (NSW) and the *Young Offenders Act 1997* (NSW), which apply specifically to children and recognise the important differences between children and adults involved in the criminal justice system.

Recommendation 14

There should be separate bail legislation for young people or the Bail Act should contain a separate part, which relates specifically to young people.

7.3 Should the provisions of the Bail Act in relation to juveniles be amended or supplemented in any other way?

The over-policing of breaches of bail has contributed to a situation in NSW in which the number of children on remand for breach of bail has dramatically increased, and this stems in part from the historical policies of the NSW Government in relation to reducing crime.

The *NSW State Plan* (State Plan), released in 2006, aimed to reduce re-offending by 10 per cent by 2016 through 'proactive policing of compliance with bail conditions' and 'extended community monitoring of those at high risk of re-offending, through more random home visits and electronic monitoring'.[28] The State Plan does not distinguish between adult and juvenile offenders, nor does it acknowledge the need for a different approach to be used to reduce juvenile offending.

Recent studies have shown that up to 71 per cent of the juveniles on remand are detained for breaching their bail conditions, for reasons such as not complying with their curfew, not residing in the place directed, not being in the company of the directed parent or guardian, or being in the company of someone listed on a non-association order.[29] These breaches are often relatively minor, such as being 10 minutes late for curfew, or being with a different family member rather

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27 Bailey, B and Dodd, P, *Treatment and care over punishment and detention – even more critical for young people*, Submission on the NSW Law Reform Commission's Consultation Paper on Young people with cognitive mental health impairments in the criminal justice system, Public Interest Advocacy Centre, 17 March 2011; and Brown, L, *Updating Bail*, Submission on the draft NSW Bail Bill 2010, Public Interest Advocacy Centre, October 2010.

28 NSW Premier's Department, *State Plan: A New Direction for NSW* (Sydney: Crown Copyright, 2006)

29 Above n 5.

than the parent specified in the bail condition.[30] These can be described as 'technical breaches', a term describing circumstances in which a young person is arrested for a breach of a bail condition which in itself is not a new offence, and does not harm the young person, another person or the community.

Young people who come before the court for such 'technical breaches' are often granted bail again on the same or similar conditions. Therefore in NSW, a situation has arisen in which children are arrested and often kept overnight on remand for breach of a bail condition, in circumstances where they would not receive a custodial sentence for the substantive offence for which they have been bailed.

PIAC notes that s 50 of the Bail Act has been a barrier to change in this area because, while it does not require police to arrest a person for a breach of bail, it gives police the power to do so, a power that police have been using increasingly.[31] PIAC recommends that s 50 of the Bail Act be amended to require the police to issue a court attendance notice to a young person reasonably suspected to have committed a 'technical breach' of bail. Further, s 50 should give police broader options for dealing with a breach of bail, such as issuing a warning and issuing a court attendance notice. Remanding a young person in custody for breach of bail should only be adopted as a measure of last resort.

Recommendation 15

Section 50 of the Bail Act should be amended to:

- *(a) require a police officer to issue a court attendance notice to any young person suspected of committing a 'technical breach' of a bail condition;*
- *(b) make it clearer that police have a discretion not to arrest for breach of bail;*
- *(c) give police broader options for dealing with a breach of bail, such as issuing a warning or issuing a court attendance notice in respect of the breach;*
- *(d)* require that remanding a young person in custody for breach of bail should only be used as a measure of last resort and for the shortest possible time in relation to young people.

7.4 Should the Bail Act make any special provision in relation to Indigenous young people?

The shocking, and indeed increasing, over-representation of Indigenous young people in the criminal justice system has been an issue at the forefront of commentary and inquiry for many years, yet has still not been effectively addressed in NSW. PIAC has considerable experience in this area, through its long-standing Indigenous Justice Program. PIAC supports the implementation of specific measures in the Bail Act designed to reduce the disproportionate number of Indigenous young people in the criminal justice system. However, PIAC also notes that bail reform in itself will not be enough to address these issues.

Indigenous people continue to be one of the most disadvantaged groups in Australia and a holistic approach is needed to address this entrenched disadvantage in order to improve justice

30 Above n 6, 16 – 17.

31 Ibid, 1.

outcomes. Any changes to bail laws to improve such outcomes for Indigenous young people need to be accompanied by broader measures designed to address those factors that contribute to Indigenous disadvantage, such as discrimination, lack of stable accommodation, lack of educational and employment opportunities, substance abuse issues and poor access to services. Another issue directly impacting on the number of Indigenous young people in the criminal justice system is the fact that Indigenous children continue to have disproportionate contact with the childcare and protection system.[32] There is a strong correlation between the interaction of Indigenous children in the care and protection system and those in the criminal justice system.[33]

PIAC submits that the Bail Act should be amended to recognise the disadvantages facing Indigenous young people in bail determinations. PIAC recommends that, before refusing bail to an Indigenous young person, the court must consider the social disadvantages that impact on Indigenous people generally and consider how these factors impact specifically on the circumstances of the young person. These might include issues such as dislocation from family and culture, educational and employment disadvantages and substance abuse.

A good model for this approach is the Gladue (Aboriginal Persons) Court in Toronto, Canada, which was established in response to the overrepresentation of Canadian Aboriginal people in the criminal justice system.[34] The Gladue principles require a court to take into account specific considerations in relation to Aboriginal offenders at bail hearings and sentence proceedings, including discrimination, institutional or personal abuse, dislocation from culture or family and substance abuse among other factors. The court is also able to request a bail report addressing these factors if the information is not readily available at the bail hearing in order to consider alternative options to remand.

While, in NSW, the Bail Act does require a court to take into account whether a person is Indigenous in a bail determination, it does not prescribe what issues the court must take into account. PIAC does not propose to recommend a list of factors that the court should take into account when determining bail for Indigenous young people. Rather, PIAC recommends that such a list should be developed, considering the views of the community and having regard to the key indicators of Indigenous disadvantage as outlined in the Overcoming Indigenous Disadvantage reports.[35] PIAC submits that this approach may lead courts to take greater consideration of Indigenous disadvantage in their dealings with young Indigenous people in the criminal justice system.

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32 Steering Committee for the Review of Government Service Provision *Overcoming Indigenous Disadvantage: Key Indicators 2009* (2009), 25.

33 Above n 14, 556.

34 Judge of the Ontario Court of Justice, Knazan, B, *Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court*, National Judicial Institute Aboriginal Law Seminar, Calgary, (January 2003).

35 Above n 32.

Recommendations 16

The Bail Act should include a provision requiring that, when considering refusing bail to an Indigenous young person, the court is to have regard to specific considerations in relation to Indigenous disadvantage and how these considerations impact on the young person personally.

Recommendations 17

In prescribing indicators of Indigenous disadvantage that the court should have regard to for the purpose of the Bail Act, it is recommended that the NSW Government consider community views and have regard to the Overcoming Indigenous Disadvantage report, which highlights key indicators of Indigenous disadvantage.

8. People with a cognitive disability or mental health impairment

PIAC has a considerable history in acting for people with cognitive impairments and their carers and family. In 2006, PIAC represented the family of Scott Simpson at the Coronial Inquest into his June 2004 death in custody while awaiting mental health treatment at Long Bay Prison Hospital. Mr Simpson was a forensic patient at the time of his death. In 2006, PIAC established the Mental Health in Prisons Network for consumers, health professionals, lawyers and advocates to examine the issue of mental illness in NSW prisons. More recently, with the assistance of Legal Aid NSW and the Public Purpose Fund, PIAC established the Mental Health Legal Services Project – a pilot project that adopted a multidisciplinary approach to addressing the complex needs of people with mental illness.

PIAC remains concerned about the disproportionate number of people in NSW with a cognitive disability or mental health impairment who come into contact with the criminal justice system and are in custody. A 2011 report found that 87% of young people in custody in NSW were found to have a psychological disorder, 20% of Indigenous young people and 7 % of non-Indigenous young people in custody were assessed as having a possible intellectual disability.[36] Further, in 2008, following a study of 2700 people in the prison system, it was found that 28% of the prisoners experienced a mental health disorder in the preceding 12 months, 34% had a cognitive impairment and 38% had a borderline cognitive impairment.[37]

In 2010, the United Nations Special Rapporteur on the right to health raised concerns about the state of mental health care in correctional facilities in Australia and observed that current mental health services are insufficient to treat the number of mentally ill people in prisons.[38] Nearly two decades before the Special Rapporteur's findings, the Royal Commission into Aboriginal Deaths in Custody highlighted the inadequacy of effective mental health services in prisons and made recommendations about implementing effective screening processes to assess the physical and

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36 Indig, D et al, *2009 NSW Young People in Custody Health Survey: Full report,* Justice Health and Juvenile Justice, (2011)

37 Baldry, E, et al, *A critical perspective on Mental Health Disorders and Cognitive Disability in the Criminal Justice System*, (2008).

38 Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,* Anand Grover, Un Doc A/HRC/14/20/Add.4 (3 June 2010) at 16, viewed July 2011 <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.20.Add4.pdf>

psychological health of Aboriginal and Torres Strait Islander inmates at the time of admission into custody and generally throughout the period of detention.[39]

However as PIAC's work on the Scott Simpson Coronial Inquest demonstrates, the standard of care for mentally ill people in prisons is still unacceptable. PIAC has been a strong advocate for the implementation of programs and initiatives designed to divert mentally ill people from the criminal justice system and ensure that there are adequate mental health, rehabilitative and related services for mentally ill people in the community.

Corinne Henderson, from the Mental Health Coordinating Council, highlights the risks of criminalising people with mental illnesses in an essay entitled *Gaols or de facto mental institutions? Why individuals with a mental illness are over-represented in the Criminal Justice System in New South Wales, Australia.* Henderson states:

> The over-representation of people with mental illness in the criminal justice system highlights the need for legislative reform and the implementation of programs breaking the cycle of mental illness, poverty, unemployment and substance abuse across Australia… The fragmentation of mental health services and the closure of many community-based services have lead to the criminalisation of the mentally ill. As a consequence, unsurprisingly, gaols and juvenile detention centres have become *de facto* mental institutions.[40]

PIAC is of the view that reform to bail laws is needed to ensure that there is appropriate recognition of the specific needs of people with cognitive or mental health impairment and, further, to ensure that remand is not used as a surrogate treatment facility to make up for the lack of availability of community-based mental health services and treatment facilities for people with acute mental health conditions.

8.1 Should the provisions of the Bail Act in relation to "intellectual disability" or mental illness be expanded to include people with a wider range of cognitive and mental health impairments? If so, what types of cognitive or mental health impairments should be included?

The only definition of 'intellectual disability' in the Bail Act is contained in s 37(2A) and this definition applies to this section only. Sub-paragraph 32(1)(b)(v) refers to both intellectual disability and mental illness without defining these terms. There is no other definition of these terms in the Bail Act.

There is now a much greater awareness of the overrepresentation of people with a brain injury affecting cognitive function, in prisons, and as accused persons, in the criminal justice system.[41]

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39 Commonwealth, *Royal Commission into Aboriginal Deaths in Custody*, National Report (1991) Vol 3, 24.3

40 Henderson, C, *Gaols or de facto mental institutions? Why individuals with a mental illness are over-represented in the Criminal Justice System in New South Wales, Australia*, Mental Health Coordinating Council, 2007, 1.

41 ABC Radio National, All in the Mind, *The silent disability: acquired brain injury and the justice system,* (9 May 2009), downloaded July 2011 <http://www.abc.net.au/rn/allinthemind/stories/2009/2561220.htm>; and

Many people with a brain injury also have a mental illness and/or drug and alcohol addiction or dependency. People with a brain injury may also have difficulty retaining information and therefore may have particular difficulty in complying with bail conditions or remembering when they are required to appear in Court.

Too often people with a mental illness are not considered to be persons with a disability. Yet mental illness can affect a person's capacity to understand and comply with bail conditions. The consequence of refusing bail for someone with a mental illness is dealt with below.

PIAC recommends that the Bail Act should refer to people with cognitive impairments and/or disabilities, with a definition that is inclusive of people with mental illness and mental disorders, people with intellectual impairment and people with brain injury. PIAC further recommends that ss 32(1)(b)(v) and 37(2A) of the Bail Act should be amended to include this broader definition.

Recommendations 18

The Bail Act should refer to people with cognitive impairments and/or disabilities with a definition that is inclusive of people with mental illness and mental disorders, people with intellectual impairments and people with brain injury.

8.1.1 Reasons why considerations regarding cognitive impairments should be included and strengthened in the Bail Act

There are two significant reasons why the Bail Act should mandate particular consideration of people with cognitive and mental health impairments by those who are making decisions about bail whether or not to grant bail.

First, there are strong clinical and therapeutic reasons why people with cognitive and mental health impairments should not be treated or housed in a correctional setting, even for a short period of remand.

Secondly, people with a cognitive impairment are more likely not to understand the nature of bail, or understand particular conditions of their bail, or if they have memory loss, forget their conditions of bail, including their obligation to appear in court on the next mention date.

Adverse therapeutic consequences of refusing bail

PIAC submits that people with a cognitive impairment should be remanded either in a community setting, or if they need treatment or care, in a therapeutic setting.

Professor Paul Mullen, the (then) Clinical Director of the Victorian Institute of Forensic Mental Health said in evidence to the Senate Select Committee on Mental Health:

> There is always a problem with providing mental health care within the context of a prison. The culture of prisons inevitably is a culture of observation and control. The culture of therapy for

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Simpson, J and Sotiri, M, *Criminal justice and Indigenous people with cognitive disabilities: a discussion paper,* Indigenous Justice Clearing House, viewed July 2011 <http://indigenousjustice.gov.au/db/publications/274861.html>.

> mental disorder is a culture—or should be—of communication and enablement of people to begin to stretch their capacities and begin to move. You see it very clearly when you come across suicide risk. The response of a prison to suicide risk is to restrict the possibilities of suicide. At the grossest end, you put people in a plastic bubble, take all their clothes away and watch them. That does prevent suicide but it also, in my view, produces enormous destruction to the psychological and human aspects of that individual, and it is not the way to go. So whenever you are trying to provide mental health care to severely distressed and disabled people within a prison, you are running up against a clash of cultures, the result of which can lead to abuse.[42]

The principles for the protection of persons with mental illness and the improvement of mental health care (adopted by General Assembly resolution 46/119 of 17 December 1991) state:

> Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.[43]

If the criminal justice system exercises a therapeutic rather than a punitive or deterrent role, the principle of least restriction should apply to all courts when dealing with applications for bail for people with cognitive and mental health impairments, in particular when seeking assessments under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).

This principle is particularly relevant to children and young people who are seeking bail. The adverse consequences of refusing bail for a young person who has a cognitive disability are potentially even greater.

PIAC submits that courts that exercise their discretion to refuse bail under the Bail Act should also have the power to make an order to prescribe the conditions those persons experience in custody, including the power to order that the person have access to psychiatric or psychological assessment, as well as treatment and/or counselling while in custody.

Problems with compliance with bail conditions

It is often more difficult for a person with a mental illness or cognitive impairment to comply with the conditions of bail once granted, such as a residence condition or a reporting condition. A person's capacity to understand the conditions of bail, and the consequences of breach of those conditions, may be affected by their mental illness or cognitive impairment.

Further, the imposition of bail conditions sometimes conflict with other obligations imposed on a person with a cognitive or mental health impairment, such as obligations imposed by Centrelink and job service providers, community treatment orders and drug and alcohol treatment programs among others. This can be confusing enough for someone without a cognitive impairment. For

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42 Mullen, P, Evidence to Senate Select Committee on Mental Health, Parliament of Australia, Canberra, (6 July 2005), 49

43 The protection of persons with mental illness and the improvement of mental health care, GA Res. 46/119, 75th Sess, UN DOC A/RES/46/119, 1991, Principle 9, viewed July 2011 < http://www.un.org/documents/ga/res/46/a46r119.htm>.

someone with a cognitive impairment, this situation can lead to either despair or further alienation or both. Without an advocate, they are very unlikely to be able to negotiate a resolution to enable them to comply with the multitude of conditions.

8.2 Should any other protections apply in relation to people who have a cognitive or mental health impairment?

Although s 32(1)(b)(v) of the Bail Act requires that special consideration be given on the question of bail to people with an intellectual disability or mental illness, there continues to be an overrepresentation of people with intellectual disability and mental illness in prisons and juvenile detention centres in NSW.

PIAC submits that the Bail Act needs to provide for greater recognition of the particular needs of people with cognitive or mental health impairments in bail determinations. PIAC recommends that there should be a provision in the Bail Act requiring the police or a court to take into account the following factors before imposing a bail condition on a person with a cognitive or mental health impairment:

- the cognitive capacity of the person to understand the condition;
- the cognitive capacity of the person to remember and carry out the condition; and
- other obligations that the person on bail might be required to carry out, which might affect their capacity to comply with bail conditions.

Further, PIAC submits that the Bail Act should provide that the fact that a person with a cognitive or mental health impairment is unable or unlikely to be able to understand and comply with a bail condition, is not reason in itself to refuse such person bail.

Recommendation 19

Subsection 37(2A) of the Bail Act should be expanded to require police and the courts to consider the following before imposing a bail condition on a person with a cognitive or mental health impairment:

(a) the cognitive capacity of the person to understand the condition;

(b) the cognitive capacity of the person to remember and carry out the condition; and

(c) other obligations that the person on bail might be required to carry out that might affect their capacity to comply with bail conditions.

Specific protections for young people with cognitive or mental health impairments

PIAC's submission that the criminal justice system should favour community-based treatment options for people with cognitive or mental health impairments over custodial remand is of particular importance when it comes to children and young people.

As stated in the Noetic Report, young people are not 'little adults' and therefore require separate and distinct treatment in the criminal justice system.[44] A young person's brain continues to develop in ways that may affect their impulse control.[45]

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44 Above n 21, vi.

45 Ibid, 4 & 159.

A recent report by the Commission, *Young people with cognitive and mental health impairments in the criminal justice system*, provides an excellent summary of the age-related neurological differences that sets aside young people from adults.[46]

Diagnoses of mental illnesses and mental disorders for young people are often varied and, as a consequence of the continuing development of their cognitive functioning, are never likely to be as precise as a physically mature adult. This problem is further complicated by the prevalence among young people of co-morbidities of early stages of several or more mental illnesses or mental disorders, the most common instance being drug or alcohol addiction or abuse coupled with another disorder. These issues should be taken into account when there is a bail determination in respect of a young person with a possible cognitive, mental health impairment or other disorder, however there is no conclusive diagnosis.

Early and effective treatment is seen to be crucial for young people with a cognitive impairment and mental illness and can mean the difference between positive long-term welfare and health outcomes and ongoing challenges, including frequent contact with the criminal justice system.

PIAC submits that there should be a presumption in favour of bail for young people with cognitive and mental health impairments in the Bail Act in recognition of the fact that the custodial setting is generally inappropriate for the management and treatment of such impairments.

Recommendation 20

There should be a presumption in favour of bail for young people with cognitive and mental health impairments.

8.3 Are there any other changes to bail law required to facilitate administrative or support arrangements in relation to people who have cognitive or mental health impairments?

As set out above, people with cognitive disabilities may not have the capacity to understand or remember the details of bail conditions or when they have to next appear in Court. Consequently, there should be special measures in bail laws to assist and support people with cognitive and mental health impairments with bail compliance.

The 2010 review of the Bail Act by the NSW Department of Justice and Attorney General recommended that bail forms and court attendance notices should be redrafted to make them easier to understand and more accessible, as traditionally these forms have been confusing and inaccessible for many people, particularly people with cognitive disabilities and young people.[47]

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46 NSW Law Reform Commission *Young people with cognitive and mental health impairments in the criminal justice system* (December 2010) 6, viewed July 2011 < http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/vwFiles/CP11.pdf/$file/CP11.pdf>

47 Criminal Law Review, Department of Justice and Attorney General, *Review of* Bail Act 1978 (NSW), (2010), 62, viewed July 2011 <http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/vwFiles/REVIEW_OF_BAIL_IN_NSW_Oct_2010.pdf/$file/REVIEW_OF_BAIL_IN_NSW_Oct_2010.pdf>

PIAC also recommends that two additional forms should be developed (and clearly marked to be easily identifiable) which provide the following information:

a) a form that shows any bail conditions that have been altered and the date of their alteration; and
b) a form that shows that all bail conditions have been dispensed with at the finalisation of a matter.

Through its work in CIDnAP, PIAC is aware that the data on police computer systems in relation to bail status is at times inconsistent with the definitive data on court systems. As a result, young people are frequently arrested for breaching bail conditions that are no longer current, based on the reliance by police on information on their computer system, which is often out of date. PIAC is aware anecdotally that many criminal lawyers often advise their clients to carry their bail undertaking forms with them at all times so that if they are stopped by police and challenged about their bail status, they can produce documentation from the courts which show current conditions. In PIAC's view, these additional forms would not only assist people with cognitive and mental health impairments to keep up to date with information about their bail conditions, it would also assist others who may be stopped by police from time to time on inaccurate or outdated information about bail conditions.

Recommendation 21

PIAC submits that bail forms and court attendance notices should be redrafted by the appropriate agencies to make them clearer and more accessible, particularly for people with cognitive disabilities.