



**Juvenile Justice**  
Attorney General & Justice

# **Juvenile Justice Submission**

**July 2011**

**Law Reform Commission**

**Review of Bail Law**

## INTRODUCTION

Juvenile Justice strongly advocates that children and young people should be considered separately to adults throughout the bail process. Juvenile Justice also supports the inclusion of the principle of remand as a last resort for children or young people within the revised *Bail Act*, consistent with the principles outlined within the *Children (Criminal Proceedings) Act 1987*. This position is supported by extensive research literature and independent reviews concerning the best way to deal with children and young people in the criminal justice system to reduce reoffending.

United Nations conventions, international, national and other NSW laws already acknowledge the need for children and young people to be treated differently to adults due to their immaturity, stage of development and level of dependency on adult guidance. Incorporating these widely held principles into the *Bail Act* will bring it in line with other existing legislation.

The Standing Committee on Law and Justice, in its report on *The Prohibition of Names of Children Involved in Criminal Proceedings*, noted the following:

“The existence of separate juvenile justice systems is based on the recognition that children warrant different treatment to adults involved in criminal proceedings. Children, due to the continuing development of the frontal lobes that does not culminate until the early to mid-twenties, exhibit behavioural and emotional deficits compared to adults. They have less capacity for forward planning, delaying gratification and for regulating impulse. Impulsivity is a commonly observed element in juvenile offending and raises questions as to the culpability of juveniles in relation to criminal behaviour.”

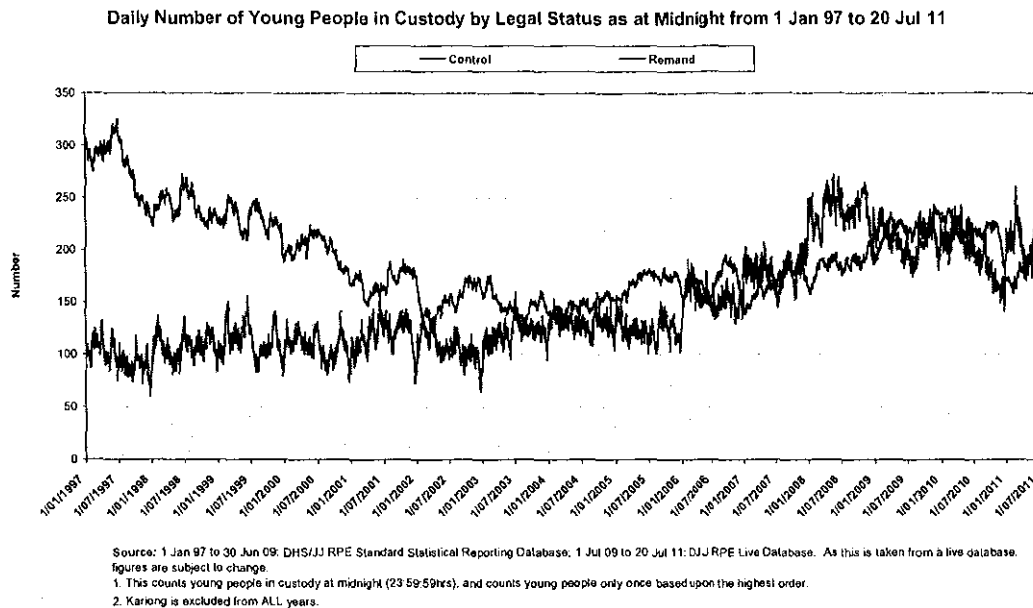
The Australian Institute of Criminology reports that since 1981, the proportion of juveniles in detention in Australia being held on remand, rather than serving a sentence, has increased dramatically. At 30 June 1981, only 21 percent of all detained juveniles were being held on remand. At 30 July 2008, remandees made up 59.6 percent of all detained juveniles.

Juvenile Justice notes that in 2008-09, 20 percent of admissions of young people to remand were for a breach of bail conditions only, with no further offences recorded; in 2009-2010 this group made up 23 percent of remand admissions; in 2001 it was 6 percent.

In July 2009, the NSW Bureau of Crime Statistics and Research (BOCSAR) released a report on recent trends in legal proceedings for breach of bail for juveniles. BOCSAR reported that in 2007 and 2008, the juvenile remand population in NSW grew by 32 percent, from an average of 181 per day to 239 per day. The BOCSAR report cited the two main reasons for this increase as being more police activity in relation to breach of bail by young people, and the introduction of section 22A of the Act. The commensurate increase in the

cost to the State of keeping juveniles on remand throughout this period rose by 29 percent, from \$36.7 million to \$47.2 million.

Since this report's release, section 22A of the *Bail Act* has been amended to clarify that this section does not preclude a further bail hearing where new information is available to the court. Since this amendment the growth in remand numbers in custody has stabilised however it is unclear as to whether this trend is directly related to the amendments made to section 22A of the *Bail Act*. The graph below demonstrates the volatile nature of the remand population.



Approximately 80% of young people in custody on remand do not go on to receive a custodial order within the following 12 months.

The imposition of bail conditions on children and young people that are more onerous than those imposed on adults is also a factor in the increasing juvenile remand numbers. Although section 37 of the *Bail Act* states that “a bail condition is not to be imposed if it appears to the bail authority that it is more onerous than necessary, having regard to ... the nature of the offence”, often conditions imposed are unrelated and are rather, designed to exercise control over the child or young person’s behaviour or address welfare needs and are therefore outside of the objects of the current Act.

The imposition of bail conditions for offences that do not carry a custodial sentence can result in a child/young person spending time in custody on remand following a breach of those conditions. The revised *Bail Act* should provide for the consideration of the appropriateness of specific bail conditions for offences which do not attract a custodial sentence.

Children and young people appear to be given more onerous bail conditions than adults, often in lieu of a community support structure. For children and young people who have limited parental guidance and/or a lack of access to supportive community infrastructure such bail conditions can have detrimental effects rather than providing the guidance necessary to ensure they appear at Court and remain offence free during their period of bail.

The 2009 BOCSAR report found that only 34 percent of juveniles arrested for breach of bail had committed further offences. The remainder (66 percent) had breached a condition of their bail without further detected offending. The most common conditions breached were not complying with a curfew order and not being in the company of a parent.

High levels of disadvantage within Aboriginal communities plays a significant role in Indigenous young people coming into contact with the criminal justice system, typically at a much earlier age than non-Indigenous young people. In 2009/10 the proportion of children and young people in detention in NSW who were of Aboriginal and Torres Strait Islander background was 49.8%. In comparison, Indigenous young people aged 10-18 make up only 3% of the NSW population.

The Royal Commission into Aboriginal Deaths in Custody 1991 established that "there is a need for a review of bail criteria concerning its appropriateness in relation to Aboriginal people, particularly juveniles." Given the continued over-representation of Aboriginal children and young people in custody in New South Wales, Juvenile Justice considers this finding to be particularly pertinent.

BOCSAR noted in the 2009 report "*Why are Indigenous imprisonment rates rising?*" that the substantial increase in the number of Indigenous people in prison is due mainly to changes in the criminal justice system's response to offending rather than changes in offending patterns.

### ***Key changes to Bail legislation***

Juvenile Justice strongly advocates that the revised *Bail Act* include the following

1. Clearly articulated principles that protect children and young people due to their vulnerability, level of maturity and need for community support and guidance.
2. A clear articulation that pre-sentence custody should be an option of last resort, (as with legislation governing sentenced custody)
3. Separate sections within the *Bail Act* that make specific provisions for children and young people.
4. Clear guidance for police and courts on the use of bail conditions for children and young people
5. A hierarchy of options for Police and Courts to address breaches of bail
6. Specific guidance in the use of alternative options to bail in the first instance and in instances where bail refusal is being considered.

7. An exemption for children and young people from Section 22A of the *Bail Act* if it is to remain in the revised Act.
8. Deletion of the option to require children and young people to pay surety as a bail condition.
9. Reduction in the length of bail hearing adjournments for children and young people from 8 days to 4 days.
10. The requirement that a second or subsequent hearing by an authorised justice not exceed 24 hours rather than the current 48 hours.

These key changes to legislation governing the grant of bail are outlined below in greater detail in answering the questions posed by the Law Reform Commission.

Juvenile Justice has also identified a number of implementation issues for the revised Act and made some recommendations in this regard that are also included in the body of the document.

## QUESTIONS

### **1.1 What fundamental principles or concepts should be recognised and implemented by the Commission in reviewing the law of bail and the existing *Bail Act*?**

The fundamental principles of bail and the *Bail Act* are to ensure the person entering into a bail undertaking appears in court on the date specified by the court and to protect the community by preventing further offending. Currently the *Bail Act 1978* applies to children in the same way as to adults.

The overarching principle of a revised *Bail Act* must include a focus on diversion and 'custody as a last resort', particularly for children and young people.

In May 2011, the Australian Institute of Criminology noted that "rates of juveniles in detention in New South Wales have been fairly consistently higher over time than the national average. Victoria has had a consistently lower rate of juveniles in detention, compared with the national average, since the early 1990s. Victoria has maintained a strong emphasis on diverting juveniles from the criminal justice system during this time."

Juvenile Justice notes the recent review of the *Victorian Bail Act 1977* which stated in relation to the imposition of bail conditions, "This requirement is not new, previously applying to special conditions of bail. It does not substantially change the law, but makes it clearer that conditions may only be imposed to address unacceptable risk factors, not to punish the accused (which is a sentencing purpose) or set accused people up to fail by imposing conditions with which they will not be able to comply. This should also be clarified in a revised NSW *Bail Act*."

Juvenile Justice recommends that a revised *Bail Act* should clearly state that grants of bail, including bail conditions, should reflect the general principles of the *Children (Criminal Proceedings) Act 1987*, including the need for special consideration of children and young people. Bail, including bail conditions, should not be designed to exercise control over a young person's behaviour beyond what is appropriate.

Juvenile Justice proposes that there be a separate section within the Act that makes specific provisions for children and young people. General principles contained in section 6 of the *Children (Criminal Proceedings) Act 1987* should be adopted and modified as necessary for application to children and young persons subject to Bail. The following general principles are significant in this context:

- (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;

Other principles specific to children and young people and the operation of the *Bail Act* are outlined in other sections of this submission and include the following:

1. that there be a presumption in favour of bail for all children and young people;
2. remand should be seen as an option of last resort;
3. for offences that do not carry a custodial sentence, police should not impose bail, rather they should issue a Court Attendance Notice (CAN) or penalty notice; and
4. bail conditions need to be reasonable and appropriate, having regard to the relevant circumstances of the alleged offence and the interests of the subject children and young people.

Juvenile Justice proposes that a revised *Bail Act* reflects these principles, which clearly outline that children and young people are different to adults.

The *Bail Act* should also recognise the *United Nations Convention on the Rights of the Child*, in particular Article 37, which requires parties to ensure that:

(a) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(b) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(c) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

## **1.2 Should the *Bail Act* include objectives and, if so, what should they be?**

Juvenile Justice believes that the *Bail Act* should include the following objective as stated in the draft *Bail Bill 2011*:

The object of this Act is to ensure that a person who is required to appear before a court in criminal or other proceedings is not deprived of liberty without an appropriate balancing of the interests of the person and the interests of the community.

The *Bail Act* should also provide that the remand of children and young people, refused bail, shall be determined in accordance with special principles applicable to children and young people and shall be used only as a measure of last resort and for the shortest appropriate period of time. Alternatives to the detention of children and young people should be facilitated by the *Bail Act* and supported by Police operational procedures and services to children and young people delivered by government and non-government agencies.

## **2. Right to release for certain offences (2.1 – 2.2 –2.3)**

Juvenile Justice strongly supports the retention of the principle of the right to release on bail for children and young people.

NSW Criminal Court Statistics showing the outcomes of appearances at NSW Children's Court by bail status in 2006-07, provide strong evidence that the risk of young people absconding whilst on bail is very low. Of the 87 percent of young people either granted bail or where bail was dispensed with, fewer than 2 percent failed to appear at court or had arrest warrants issued in the same year (Department of Justice and Attorney General, *New South Wales Criminal Courts Statistics 2008* (Sydney: NSW BOCSAR 2009)).

In 2010, the Bureau of Crime Statistics and Research (BOCSAR) conducted a study into the *Decline of Unconditional Release Before Trial*. The study examined around 800,000 cases dealt with by the NSW Local, District and Supreme Courts between 1999 and 2008, and noted that 'the number of cases where bail is dispensed with has fallen substantially over the last decade', with the percentage of defendants released unconditionally (ie, where bail is dispensed with) falling from 60.3% in 1999, to 44.9% in 2008.

Juvenile Justice does not support the imposition of conditional bail upon a child or young person where the offence committed would not warrant a custodial sentence, as any breach of bail conditions could result in a young person spending time in custody on remand.



Where bail conditions are imposed, these conditions should be relevant to the offence, not unreasonably onerous and not seek to impose welfare solutions through the justice system.

### **3. Presumptions against and in favour of bail and cases in which bail is to be granted in exceptional circumstances only (3.1 - 3.12)**

Juvenile Justice recommends that the *Bail Act* should have a presumption in favour of bail for all children and young people, with the possible exception of children and young people accused of serious children's indictable offences, which should incur a 'neutral' presumption.

The United Nations Rights of the Child Article 3.1 states that *in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The exceptional circumstances in the revised Act should have a specific section for children and young people, based upon the principle of the 'best interests of the child'.

### **4. Dispensing with bail (4.1 - 4.3)**

An issues paper released by the Law Reform Commission in 2001 - *Issues Paper 19 (2001) - Sentencing: Young Offenders* stated that, "during consultations it was suggested that courts sometimes place young people on bail in circumstances where it would be more appropriate to dispense with bail, such as where the young person has been charged with a summary offence which does not attract a control order as its maximum penalty."

Juvenile Justice supports the right of police and the courts to dispense with bail entirely wherever appropriate and would support provisions to encourage this outcome in an amended Act.

Juvenile Justice also supports changes to the *Bail Act* to ensure that where bail conditions are imposed on children and young people, consideration must be given to the capacity of the child to understand and comply with the conditions, and to whether the proposed conditions are reasonable and whether they are relevant to the nature/commissioning of the offence.

The imposition of bail conditions for offences that do not carry a custodial sentence can result in a child/young person spending time in custody on remand following a breach of those conditions. The revised *Bail Act* should provide for the consideration of dispensing with bail or the appropriateness of specific bail conditions for offences which do not attract a custodial sentence.

The BOCSAR study into the *Decline of Unconditional Release Before Trial* (2011) notes that "the reduction in the use of unconditional release, may

provide some explanation for the rise over the last decade in the number of cases where bail has been breached. Between 1999 and 2008, the number of recorded cases of bail breach rose by more than 400 per cent.”

In those cases where a child or young person has been referred for a Youth Justice Conference, Juvenile Justice considers that bail should be dispensed with or be granted unconditionally, unless there are exceptional circumstances that require the court to impose bail. This is in accordance with the principles of the *Young Offenders Act* which aim to divert children and young people away from the formal court system.

## **5. Police bail (5.1 - 5.2)**

Section 8 of the *Children (Criminal Proceedings) Act* provides police with the power to issue Court Attendance Notices to children and young people in lieu of bail, unless there is strong evidence that the child will not appear before the court or there are other significant and relevant considerations, as referred to in section 8. Juvenile Justice strongly supports the increased use of Court Attendance Notices for children and young people.

Juvenile Justice strongly recommends the use of the Juvenile Justice Bail Assistance Line in those cases where police have concerns about the child or young person not attending court or re-offending. This service aims to assist police when they are considering bail for a young person, but are unable to grant it due to lack of accommodation or the supervision of a responsible adult.

The Victorian Police Manual currently directs police to contact the Victorian Bail Hotline where consideration is being given to the remand of a child or young person. Juvenile Justice supports a similar NSW Police operational requirement to contact the NSW Bail Assistance Line. Juvenile Justice staff would then have an opportunity to assist the young person by, where possible, putting in place appropriate supports pending the child or young person attending court.

The Bail Assistance Line could also be of assistance where police are considering detaining a child or young person on a breach of a bail condition.

Juvenile Justice also supports the incorporation into the *Bail Act* of the principle that, where bail conditions are imposed, police must first consider the capacity of a young person to understand and comply with the conditions, and the reasonableness and relevance of any conditions to the nature of the offence.

Police should not bail refuse a young person unless there are serious reasons for doing so. The imposition of bail should be based on the young person's:

- ◇ history of failure to appear at court;
- ◇ risk to public safety (violent behaviour of young person or violent nature of offence);

- ◇ history that indicates their likelihood to interfere with witnesses or victims; and/or
- ◇ seriousness of offending (restricted to those offence that are likely to attract a period of detention);

Bail considerations by police should not be based upon a child or young person's welfare issues, such as a lack of parental control/supervision unless other options have been exhausted first.

## **6. Court Bail (6.1 – 6.2 – 6.3 – 6.4)**

Bail is not intended as a form of punishment nor social control. Courts should therefore ensure that children and young people are not subject to onerous bail conditions that do not reflect the matters before the courts.

In the case of children and young people the court should consider the principles of the *Children (Criminal Proceedings) Act 1987* (CCPA) that focus on the desirability of the child and young person to remain in their community, sustain family ties and allow the education or employment of a child to proceed without interruption.

The agency notes that in many cases, children and young people are subject to bail conditions that contravene the principles of the CCPA. Bail conditions such as a curfew where the offence was not committed at night are a form of pre-sentence control and punishment. The court must, as a matter of principle, review and consider what bail conditions young people are subject to and ensure that they are of a legitimate purpose and are relevant to the matter before the court.

Juvenile Justice would also support consideration being given to amending section 25(1)(c)(i) of the *Bail Act* "limitation on length of adjournments", whereby a second or subsequent adjournment by an authorised justice should not exceed a period of 24 hours rather than the current 48 hours. The current Act also notes that an adjournment of a bail hearing by a magistrate or Local Court must not exceed 8 clear days except with the consent of the person. The revised Act should reduce this timeframe for children and young people to 4 days, subject to consent, to ensure the best interests of vulnerable children and young people are foremost in the bail process.

## **7. Repeat Bail applications (7.1 – 7.2 – 7.3)**

Juvenile Justice recommends that Section 22A "*Power to refuse to hear bail application*" be repealed.

Incremental changes to the *Bail Act* over the last five years have meant children and young people have found it increasingly difficult to successfully apply for bail. Under section 22A, children and young people experience hurdles greater than those faced by adults. Youth homelessness, a reliance on adult care givers for a stable home environment and a young person's stage of development, mean that children and young people are more likely to

fail in their initial bail application. Young people have a lower capacity than adults for forward planning and have a lesser ability to communicate and comprehend the complexity of legal systems and processes.

If this section of the Act is to be retained, Juvenile Justice recommends that children and young people are made exempt from section 22A

## **8. Criteria to be considered in bail applications (8.1 – 8.11)**

A revised *Bail Act* needs to ensure that those before the court are presumed innocent until found guilty of the offence before the court and that any pre trial deprivation of their liberty is based solely upon the protection of society.

In making any decision to grant, refuse or revoke bail in relation to a person, a Court or police should consider the following general matters:

- (a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered,
- (b) the interests of the person,
- (c) the protection of:
  - (i) any person against whom it is alleged that the offence concerned was committed, and
  - (ii) the relatives of any such person, and
  - (iii) any other person the bail authority considers to be in need of protection because of the circumstances of the case,
- (d) the public interest in ensuring the protection and welfare of the community and the proper administration of justice.

Special attention and additional weight should be given to the “interests of the person” in relation to children and young people. In considering the interests of a person, a bail authority should consider the following matters (also referred to in the draft *Bail Bill 2011*):

- (a) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody,
- (b) the needs of the person to be free to prepare for the person’s appearance in court or to obtain legal advice or both,
- (c) the needs of the person to be free for any other lawful purpose,
- (d) whether or not the person is, in the opinion of the bail authority, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection,
- (e) any special needs arising from the fact that the person to whom the bail decision relates:
  - (i) is under the age of 18 years, or
  - (ii) is an Aboriginal person or Torres Strait Islander, or
  - (iii) is of a non-English speaking background, or

- (iv) has a cognitive impairment or a physical disability.
- (f) any other relevant matter.

## 9. Bail Conditions (9.1 – 9.13)

Juvenile Justice strongly recommends that

1. the revised *Bail Act* include clear guidance to Police and Courts on the types of conditions that are appropriate in certain circumstances;
2. the conditions imposed are in line with the objects and principles of the Act; and
3. no more onerous conditions be placed on children and young people than those placed on an adult with similar charges and circumstances.

It is important to note that many children and young people do not adequately understand their bail conditions, or the consequences of non-compliance. This may be due to:

- The number, severity and complexity of conditions imposed on the young person, firstly by police and subsequently by the court (bail conditions are not always imposed in this order);
- The child's age and maturity and their correlated capacity to understand the legal system;
- A possible cognitive and / or mental impairment or illness;
- Possible substance misuse and resultant impairment; and
- Lack of education and / or poor literacy and numeracy skills.

These issues need to be taken into account by police and the courts when considering the appropriateness of each bail condition.

A 2009 BOCSAR report into *Recent trends in legal proceedings for breach of bail for juveniles*, found that only 34 percent of juveniles arrested for breach of bail had committed further offences. The remainder (66 percent) had breached a condition of their bail without further detected offending. The most common conditions breached were not complying with a curfew order and not being in the company of a parent.

A condition commonly imposed on young people without stable accommodation is to 'reside as directed'. Generally the reside as directed condition is for the young person to reside as directed by a particular government agency, usually either Juvenile Justice or Family and Community Services. Recent advice from the Crown Solicitor states that it is not lawful for Juvenile Justice to hold people, with a grant of conditional bail, including a "reside as directed" condition, in custody when the agency has not or and/or is unable to make an immediate direction as to where the person is to reside.

Juvenile Justice recommends that the *Bail Act* be amended to clarify the lawfulness of holding a young person (within specified time limits and subject to periodic Court review) while attempting to secure appropriate accommodation to meet the 'reside as directed' bail condition.

A study published by BOCSAR in 1998, *Juveniles in Crime*, identified some of the key risk factors for juvenile participation in crime. These include lack of school attendance and past contact with the criminal justice system. Not being at school, having been suspended or expelled from school and having had several prior contacts with the criminal justice system all independently increase the likelihood of another conviction. If conditions are imposed they should support participation in treatment and education rather than merely provide a monitoring mechanism.

As part of the implementation of the revised *Bail Act*, Juvenile Justice recommends that the Government establish a system for the ongoing monitoring and reporting of bail conditions being imposed on children and young people (i.e. bail conditions that are commensurate with the offence and are no more onerous than is required by the Act).

### **10. Breach of Undertakings of Conditions (10.1– 10.6)**

If a child or young person is subject to conditional bail, failure to comply with bail condition/s is not a criminal offence or a 'charge'. There is no relevant legislation, policies or guidelines for Police to utilise and consider other alternatives to arrest when a young person has breached their bail conditions (besides the Practice Directions Note 1 for the Youth Drug and Alcohol Court Program, which deals only with conditional bail as issued under a Griffith Remand).

A 2007 study by Juvenile Justice over a 3 month period, found that 95 percent of juveniles who failed to meet bail conditions did so due to a lack of suitable, stable accommodation. Whilst this situation may be different at present, the revised Act must ensure that children and young people are not punished unnecessarily by long periods of remand in a detention centre, simply as a response to welfare issues.

Juvenile Justice strongly recommends that the *Bail Act* articulate an escalating series of interventions for Police when dealing with children and young people who breach bail conditions, starting from;

- ◇ taking no action/giving a warning,
- ◇ discontinue arrest, release on existing bail.(including same conditions)
- ◇ referral to the Bail Assistance Line;
- ◇ issuing of a CAN;
- ◇ issuing of a warrant;
- ◇ bail refusal as the option of last resort.

Bail refusal of a child/young person without warrant for breach of bail should only occur if the breach is sufficiently serious and other interventions have been properly considered and determined to be inappropriate.

Juvenile Justice recommends amending the restrictions to the right to bail imposed by s 8(2) (a) of the Act, through the provision of a section that ensures that persons with special needs (including young people, people with disabilities and people with mental illness) are entitled to be granted bail. This

is in recognition that these groups have special needs and may fail to appear or comply with bail conditions due to a lack of capacity to forward plan or to comprehend their obligations. If the court or police are considering taking action on the breach there must be an assessment process whereby there is clear evidence that the person has the capacity to comply.

Juvenile Justice notes that evidence in support of the effectiveness of curfews in reducing juvenile crime is weak. A review of 10 quasi-experimental studies on juvenile curfews found that the majority showed no effect in reducing juvenile crime (Adams, 2003). Of those that did show an effect, these were equally split in terms of increase or decrease in crime. The report of the study concluded that the cost of curfews outweigh their benefits and that curfews are often implemented in a discriminatory manner (Adams, 2003).

In many instances curfews limit a child or young person's capacity to participate in their community. When a young person is detained at home for long periods, this may exacerbate existing problems within the home environment, with the onus being placed upon families to enforce the curfew.

Research undertaken by Christopher, Lowencamp and Latessa (2004) found that, when taken all together, these meta-analyses and individual studies provide incontrovertible evidence that more intense correctional interventions are more effective when delivered to higher-risk offenders. A related finding is that these interventions can increase the failure rates of low-risk offenders. This often leads to young people being breached for not abiding by their curfew and consequently being remanded in custody.

Juvenile Justice recommends that only adults with means be made subject to surety. Children and young people should not be subject to surety because they are financially dependent upon adults or receive very little income, such as Government benefits. Juvenile Justice is aware of a number of instances where young people have been required to pay surety, in both rural and metropolitan courts.

In one such case, a young person appeared at a rural court. His father's sole income was from a single parent pension. The young person was remanded in custody until he could furnish the court with \$5000 surety, an amount that could not be met by the young person's father. The young person was referred to the Bail Support Team and the matter was brought before a metropolitan court, where he was subsequently released on bail with no surety. If the matter was not referred to the Children's Court the young person would have remained in custody for a further 3 months until his trial date.

## **11. Remaining in custody because of non-compliance with a bail condition (11.1 – 11.5)**

A revised Act must include provisions for greater police and court discretion in matters of juvenile non compliance, to maximise diversion from custody.

Juvenile Justice supports a shorter time for notice to be implemented for children and young people than the eight days as the Act currently prescribes.

The revised Act should ensure that young people are not punished unnecessarily through long periods of remand in a detention centre. Failure to comply with bail condition/s is not a criminal offence or a 'charge'.

The decision to remand a child or young person in custody for non compliance with a bail condition must be a last resort.

There is a body of research that indicates that juvenile detention results in increased risk of recidivism and is therefore a counter productive approach to non compliance with a bail condition

Juvenile Justice statistics indicate that the average length of time in custody on remand in 2009/10 was 10.5 days. In 2009/10, the average daily cost per detainee was \$589.

The proportion of young people held on remand for breaches of bail only (ie. no further offences) rose from 6 percent in 2005/06 to 23 percent in 2009/10. Around 80 percent of young people in custody on remand do not go on to receive a custodial order within the following 12 months.

## **12. Young people (12.1 - 12. 9)**

As discussed throughout this response, Juvenile Justice recommends that children and young people should be subject to separate provisions and given special consideration in light of their ongoing development and lack of maturity.

As stated in Answer 1.1, Juvenile Justice also recommends that the Children and Young Person part of the *Bail Act* explicitly adhere to the general principles as relevant and contained in section 6 of the *Children (Criminal Proceedings) Act*. This should also reflect relevant sections of the UN Convention on the Rights of the Child.

Juvenile Justice supports the inclusion in the *Bail Act* of principles to be applied in relation to children, similar to those contained in the draft Bail Bill 2011, set out below:

In exercising any functions under this Act in relation to a child, a bail authority, and any other person who has functions under this Act, is to having regard to the following principles:

- (a) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- (b) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,



(c) that it is desirable, wherever possible, to allow a child to reside in his or her own home.

### **13. People with cognitive or mental health impairment (13.1 – 13.2- 13.3)**

Juvenile Justice supports a specific section within the revised Act relating to children and young people with cognitive and/or mental impairment. Juvenile Justice has previously submitted responses in relation to each of the Law Reform Commission Discussion Papers in relation to people with cognitive impairment and mental health issues.

Juvenile Justice recommends that the Act be revised to ensure that children and young people with cognitive and / or mental impairment are not further disadvantaged due to their inability to consent or comply with bail conditions. Police and the courts must ensure that a child or young person's capacity to comprehend and comply with conditions is foremost in decisions around bail conditions and breaching of bail.

Where the court or police are minded to apply a bail condition for young people with a cognitive and or mental impairment, there should be a specialist independent person to assist the young person to understand the bail hearing process and the conditions of bail. This would assist them to maintain the conditions of their bail and ensure they are less likely to be breached.

### **14. Indigenous people (14.1 - 14.3)**

The social, educational, health and justice outcomes for Indigenous children and young people have historically been significantly lower than for the non-Indigenous population. It is this high level of disadvantage that plays such a significant role in Indigenous young people coming into contact with the criminal justice system, typically at a much earlier age than non-Indigenous young people.

In 2009/10, the proportion of children and young people in detention in NSW who were of Aboriginal and Torres Strait Islander background was 49.8%. In comparison, Indigenous young people aged 10-18 make up only 3% of the NSW population.

The length of stay for Aboriginal and Torres Strait Islander (ATSI) juveniles on remand fluctuates but is consistently higher than for Non-Indigenous young people. Over the past five years the average length of stay for ATSI young people on remand has been on average 3.7 days longer (27% higher) than Non-ATSI. There is also significant inconsistency in sentencing rates for Aboriginal children and young people across NSW regional centres with Newcastle, Dubbo, Kempsey, Port Macquarie, Liverpool and Campbelltown being responsible for 22% of all custodial sentences.

The recent Young People in Custody Health Survey 2009 found that 61% of ATSI young people reported having a parent who had been in prison. This statistic clearly highlights the challenges facing these young people and the need to provide increased and targeted supports to help them to desist from offending.

There are specific issues relating to Aboriginal children and young people, particularly around culturally appropriate bail conditions and their ability to adhere to certain conditions. Many Aboriginal children and young people are subject to conditions that are not appropriate to their situation and ultimately set them up to fail. Such practices may include:

- Requiring an Aboriginal child or young person to reside at one specific address can be an unrealistic expectation. Many Aboriginal children and young people move around between various family members and therefore may have multiple addresses. If such a bail condition is to be administered there should be the ability to note more than one address;
- Any financial requirements should be avoided as part of bail conditions for Aboriginal children and young people;
- Not being able to reside at an address due to another occupant having a criminal record can be extremely unrealistic for Aboriginal children and young people and often requires them to live away from supportive family members. The criminal record of other family members should have no bearing on their bail conditions;
- Curfews can also be counterproductive for Aboriginal children and young people, as they often exacerbate existing problems within the home;
- Any conditions that require the use of public transport in rural communities can be a burden on the whole family. In many cases the cost of travel is prohibitive to Aboriginal children and young people, particularly in rural and remote communities. If a reporting condition is required consideration could be given to a local elder undertaking the reporting role, rather than requiring the child or young person to travel to a nearby town; and
- Conditions which require Aboriginal children and young people not to associate with certain people in the community can often result in the child or young person not being able to participate in community life. This can include attending school, playing football or attending a relatives funeral.

In implementing the Act the Government should consider Indigenous children and young people having access to a specialist independent person to assist them to understand the bail hearing process and the conditions of bail. This would also ensure that the young person accesses legal advice and support from appropriate community members at an early stage of the process. This may include referral to the Bail Assistance Line or other relevant accommodation providers.

## **15. Duration of Bail**

Juvenile Justice supports this proposal.

## **16. Review of bail decisions (16.1 – 16.2)**

Juvenile Justice notes that there is a huge variance in bail decisions across the state. In rural communities Local Courts sit as the Children's Court without a dedicated Children's Magistrate.

Bail conditions for children and young people are often utilised as a form of pre-sentence control. The court must as a matter of principle, review and consider what bail conditions children and young people are subject to and ensure that they are of a legitimate purpose and are relevant to the matter before the court.

## **17. Structure of the *Bail Act* (17.1 – 17.2)**

Juvenile Justice recommends that there be a separate section within the Act for children and young people. As previously discussed, the revised Act must ensure that general principles contained in the *Children (Criminal Proceeding) Act 1987* are incorporated into the *Bail Act* in respect of its application to children and young people. Juvenile Justice recommends a hierarchy of responses be developed along the lines of the Victorian Bail model.

## **18. Plain English (18.1 – 18.4)**

The language in the Act should be simplified. The use of legal terminology can be confusing and difficult to understand, particularly for children and young people, many of whom have limited education, poor literacy skills and a significant proportion also have cognitive impairments. The use of language such as pre-trial-release, with or without conditions", rather than "grant of bail"; and "pre-trial detention", rather than "remand in custody" will not necessarily assist the community, nor the children it pertains to, in understanding the revised Act.

Research into communication disorders of young people conducted by Dr Pamela Snow and Dr Martine Powell (Latrobe University) for the Criminology Research Council in 2002, notes that there is a clinically significant link between juvenile offending and risk for oral language impairments. The report goes on to recommend that young offenders with poor narrative skills are likely to be disadvantaged with respect to the information transfer demanded during police interview or a court-room cross-examination. This research indicates that many young offenders cannot process the information and questioning that occurs in both a police station and the court. The experience of Juvenile Justice staff supports these findings, with staff regularly reporting that young people frequently ask for an interpretation of court proceedings.

In the implementation of the Act all proceedings and interviews need to be undertaken in such a way that the child or young person can articulate what has been said and have the opportunity to ask questions when they have difficulty understanding what is being requested or imposed.

## **19. Forms and processes (19.1 – 19.2)**

Juvenile Justice supports a review of any forms such as Court Attendances Notices (CAN), noting that children and young people will benefit from bail forms written in plain English.

In the implementation of the Act plain English pamphlets in a range of languages informing children and young people about their rights and obligations whilst on bail need to be made available to assist families in understanding issues around bail.

Juvenile Justice would like to be consulted in relation to the drafting of the bail forms for children and young people.

## **20. Other Considerations**

### **Implementation of the revised *Bail Act***

Although the following recommendation falls outside the scope of this review it is a worthwhile consideration in terms of reducing non attendance at court for people on bail:

In 2007-08, the Tasmanian Magistrates Courts introduced an SMS Messaging service to remind the accused to attend court. The Tasmanian Magistrates Court's Annual Report notes that the early evaluation of the "SMS Reminder Service" has resulted in:

- a 12% improvement on the non-appearance rate for first appearances.
- a 21% improvement on the non-appearance rate for subsequent appearances.

The Melbourne Magistrates' Court piloted a similar SMS Reminder Service from May – October 2010. This involved using an automated SMS system to send text messages to clients to remind them of court hearing dates. The pilot is currently being evaluated.

Juvenile Justice recommends that the Department of Attorney General and Justice consider introducing an SMS Reminder service for young offenders. As previously stated young people have a lesser capacity for forward planning and therefore an increased likelihood of not appearing at court as required. This initiative would also save valuable court time and resources.

Juvenile Justice also recommends a single point of contact at the Children's Court to source all the required information for a bail determination. This

service should be seen as diversionary and not justice based. The Bail Assistance Line would be best placed to provide this service.