

A BETTER APPROACH TO NSW BAIL LAWS FOR ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE

Lisa Stone, August 2016

As is widely recognised, Aboriginal people constitute a large proportion of the New South Wales ('NSW') penal population.¹ The NSW penal system is currently experiencing its greatest overcrowding. 'Legislative hyperactivity' has greatly increased police powers, which has increased interaction with Aboriginal and Torres Strait Islander people. Empirical evidence shows that Aboriginal and Torres Strait Islander status has an effect on police discretion to arrest and refuse bail. If granted, bail conditions are often unrealistic, such that defendants are unable to comply.²

Non-compliance means it is more likely that a person will be gaoled for breach of bail conditions. The time then spent in gaol, before a court finally determines the matter, is often longer than a sentence may be. Alternatives such as dealing with an accused by some other form of proceeding, for example a warning or caution, referral, penalty notice or field court attendance notice ('Field CAN') are often underutilised.³

Twenty-five years ago the Royal Commission into Aboriginal and Torres Strait Islander Deaths in Custody ('RCIADC') made recommendations on arrest and bail. For example, that arrest is a sanction of last resort, that Aboriginal people should be consulted regarding bail and bail conditions, and that bail conditions should not be used to impose views of what police or courts consider to be 'an appropriate life style'. Most of those recommendations have not been implemented.

Ignoring the RCIADC Report

The RCIADC Report looked at a variety of factors that impact on Aboriginal interaction with the penal system. The Report found that being Aboriginal played a significant role in why a person may be in custody, and that the main factors were poverty, the history of the country, and 'police racism'.⁴

The RCIADC Report's main recommendation was that governments 'legislate to enforce the principle that imprisonment should be a sanction of last resort'. Consequential recommendations require that police adhere to that principle, that granting of bail should be monitored and legislation amended if necessary, and Aboriginal people should be consulted regarding bail. Police are the first point of contact between Aboriginal and Torres Strait Islander people and the penal system. Because of this the NSW Wood Royal Commission highlighted the need for police to be more accountable.⁵

¹ Steering Committee for the Review of Government Service Provision (Productivity Commission, Canberra, 2011) 30 <<http://www.pc.gov.au/gsp/indigenous/key-indicators-2011>>; Standing Committee on Aboriginal and Torres Strait Islander Affairs, Commonwealth House of Representatives, *Doing Time, Time for Doing: Indigenous Youth in the Criminal Justice System* (2011).

² Don Weatherburn and Lucy Snowball, 'The Effect of Indigenous Status on the Risk of Bail Refusal' (2012) 36 *Criminal Law Journal* 50; Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW*, 2002.

³ See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 235, 107; *Criminal Procedure Act 1986* (NSW) s 172.

⁴ Commonwealth of Australia, *Royal Commission into Aboriginal Deaths in Custody* (1991).

⁵ New South Wales, Royal Commission into the New South Wales Police Service, *Final Report* (1997) vol II, 427–30.

In NSW most of the RCIADC's recommendations have not been implemented,⁶ in particular those on police bail. The Amnesty International Report on implementation of the RCIADCs recommendations twenty years later (and now five years ago) warns:

The recommendations are not mere suggestions. They can have legal implications under the common law relating to negligence, misfeasance in a public office and, potentially, other actions.⁷

However, rather than move towards improvements, there has been an upsurge of punitive criminal legislation in the last twenty years,⁸ and in particular changes to bail laws.

Brown makes a persuasive argument when he suggests the key drivers of the increase in remandees (people awaiting trial or sentence) in NSW is due to 'a form of legislative hyperactivity' involving 'constant changes to the Bail Act'.⁹ The direct result is more people being held in custody, sometimes for minor summary offences,¹⁰ which can be directly linked to bail decisions. Governments therefore have not only ignored the RCIADC Report's recommendations; they have implemented laws that have exacerbated the problem of high numbers of Aboriginal people held on remand.

Remand Statistics

Aboriginal and Torres Strait Islander people are more likely to be refused bail, or be arrested for breach of bail, than non-Indigenous defendants,¹¹ which means there is proportionately many more Aboriginal and Torres Strait Islander people on remand. In 2015, NSW had the largest overall adult prison population compared to other states and territories, time spent on remand was the longest,¹² but only a fraction of remandees were ultimately imprisoned.

Aboriginal and Torres Strait Islander imprisonment is more than 45 per cent higher than it was at the time of the RCIADC. The NSW adult prison population grew by 2.3 per cent between April and June 2015, reaching a new record high.¹³ This increase is attributable to the growing number of prisoners on remand, which rose by 4.6 per cent from April to June.¹⁴ From July 2015 to June 2016 the number of adult prisoners on remand grew by 14.8 per cent (from 3,633 to

⁶ Amnesty International, *Review of the Implementation of RCIADC Recommendations*, May 2015 <<https://changetherecord.org.au/review-of-the-implementation-of-rciadic-may-2015>>.

⁷ Ibid; Australian Institute of Criminology, *Deaths in Custody in Australia to 30 June 2011: Twenty Years of Monitoring by the National Deaths in Custody Program since the Royal Commission into Aboriginal Deaths in Custody*, Monitoring Report No 20 (May 2013) [12.2].

⁸ Paul Wilson, 'Beyond the Rhetoric on 'Law and Order'' (1988) 13 *Legal Services Bulletin* 48.

⁹ David Brown, 'Looking Behind the Increase in Custodial Remand Populations' (2013) 2(2) *International Journal for Crime, Justice and Social Democracy* 80, 81.

¹⁰ *Konneh v State of NSW* [2011] NSWSC 1170 (7 October 2011); see also Mark Dennis, "'Dog Arse Cunts': A Discussion Paper on the Law of Offensive Language and Offensive Manner' (Discussion Paper, CriminalCLE, June 2011) <<http://www.CriminalCLE.net.au>>; Miranda Nagy, Mallory Tuckey, 'Davids and Goliath: Konneh v State of New South Wales' (2014) 52(1) *Law Society Journal* 1.

¹¹ Lucy Snowball, Lenny Roth and Don Weatherburn, NSW Bureau of Crime Statistics and Research, 'Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act' Issue Paper No 49 (2010) 5.

¹² Australian Bureau of Statistics, *4517.0 – Prisoners in Australia, 2014* (10 December 2015) <<http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4517.0~2014~Main%20Features~New%20South%20Wales~10015>>.

¹³ NSW BOCSAR, *NSW Custody Statistics – Quarterly Update June 2015* (29 July 2015) <http://www.bocsar.nsw.gov.au/Pages/bocsar_news/NSW-Custody-Statistics-Jun-2015.aspx>.

¹⁴ NSW BOCSAR, *Custody Statistics June 2016*

http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2016/MR_NSW_Custody_Statistics_Jun2016.aspx.

4,170). Over the same period, the number of sentenced prisoners rose by 2.8 per cent (from 8,148 to 8,380).¹⁵

The number of young people in detention rose by 16.7 per cent, and again was almost entirely attributable to the number of defendants placed on remand, which rose by 35.1 per cent, compared with a 1.4 per cent increase in the number of young offenders in custody serving a sentence.

According to the NSW Bureau of Crime Statistics and Research ('NSW BOCSAR') the average length of stay by prisoners leaving remand in the first quarter of 2016 was 47 days. In the second quarter this increased to 55.2 days.¹⁶

Therefore, more people are being placed on remand, and then spending longer waiting for their matter to be finalised. Remand is punishment before a finding of guilt. It deters only if one assumes that a remandee would inevitably offend again if released on bail.

Bail Conditions

If released on bail Aboriginal people are more likely to be placed on stringent bail conditions than non-Aboriginal people, and then these conditions are over-policed.¹⁷

Ten years ago the NSW Government's *State Plan* set out the strategy of 'pro-active policing of compliance with bail conditions' through 'extended community monitoring'.¹⁸ Since then, there has been a growth in the imposition of unrealistic, arbitrary, and often onerous bail conditions. The policing of compliance has increased by 400 per cent since 2007.¹⁹ In this way, instead of conceptualising bail as a means of ensuring the attendance of the accused at court, bail is being used as a tool for alleged 'crime prevention' purposes.

It has been argued that police use of bail compliance as an operational strategy is producing unjust results.²⁰ While the Act clearly states conditions should not be more onerous than necessary to address the bail concern, examples of heavy handedness are conditions being imposed on charges of non-violent or summary offences that prohibit an accused from spitting, drinking alcohol, banning an accused from whole towns and suburbs, daily reporting, banning people from associating with a partner or close friend, or banning them from speaking to the media. Further, because an accused must comply with the condition until their hearing, which can be many months away, the length of time spent complying can be longer than the sentence. However, where a court considers bail conditions are severe or onerous it is likely that a court will determine that the time spent on bail was a form of punishment.²¹

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Weatherburn and Snowball, above n 2; see also New South Wales Law Reform Commission, *Bail*, Report No 133 (2012) ('NSWLRC').

¹⁸ NSW Government, *NSW State Plan*, 2006, 17.

¹⁹ NSWLRC, Report No 133, above n 17, Ch 12.

²⁰ David Porter, Redfern Legal Centre, Submission to NSWLRC, *Bail: Questions for Discussion Paper*, 22 July 2011, 4.

²¹ *R v Cartwright* (1989) 17 NSWLR 243; *R v Fowler* (2003) 151 A Crim R 166, [242]; *R v Webb* (2004) 149 A Crim R 167, [18].

Any condition imposed should be directly linked to the objects of the Act. In the context of bail conditions, the RCIADC Report said:

The principal purpose of bail conditions should be to ensure that people attend at court to answer particular charges, although there may be other purposes in particular cases, e.g. the avoidance of further offences. Conditions should not be used by police officers or magistrates to impose their views of an appropriate life style on offenders.²²

As shown by the statistics, the consequences if an Aboriginal person fails to meet previous bail conditions are that it is less likely they will be granted bail in the future, particularly if they have breached bail. This makes it more likely that a person will be imprisoned on remand for breach of a bail condition. If someone has breached bail, then they will need to 'show cause' why they should be released. Those charged with 'show cause' offences under the Act are 'very unlikely to get bail', with 88 percent being refused.²³

The cumulative effect of negative bail decisions disproportionately impacts on Aboriginal defendants. Breach of court orders and conditions account for the highest custodial rates for Aboriginal people, at 73.5 per cent.²⁴ It is clear that the more onerous the conditions the more likely they will be breached. Alternatively, this high rate could reflect a more intense police scrutiny of Aboriginal people.²⁵

Every bail decision is important, because it involves deciding whether to deprive a person of their liberty.²⁶ Changing the way bail and conditions are imposed can decrease the over-representation of Aboriginal people in remand. It is also likely to decrease court time. This means that there is clearly a need to change the way arrest and bail is conceptualised. The RCIADC recommendations provide the rationale. This is particularly important given the one bail application rule.²⁷

The cost to the State for one adult prisoner on remand per day is \$290.²⁸ For example, according to BOCSAR in the month of December 2015 764 adult Aboriginal people were on remand in NSW. If this is correct the total cost was \$221 560 per day, which equals a staggering \$6 868 360 per month. The cost of keeping a young person on remand is much higher. Given that the primary purpose of bail is to ensure attendance at court the question is whether there is a much less expensive way to achieve that?

Fairness to All: A More Holistic Approach to Bail

There is broad acceptance of the principle that custody before conviction should only be imposed where the purposes of bail cannot be achieved by any other means. On this basis, for

²² Royal Commission on Aboriginal Deaths in Custody, *Regional Report of Inquiry in New South Wales, Victoria and Tasmania* (1991) Ch 8.

²³ NSW BOCSAR, 'Impact of the Bail Act 2013' (Media Release, 2013) <[http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2015/MR-The-impact-of-the-Bail-Act-\(2013\)-on-trends-in-bail-and-remand-bb106.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2015/MR-The-impact-of-the-Bail-Act-(2013)-on-trends-in-bail-and-remand-bb106.aspx)>.

²⁴ Ibid.

²⁵ Weatherburn and Snowball, above n 2.

²⁶ J Sanderson, P Mazerolle, and T Anderson-Bond, Queensland Department of the Premier and Cabinet, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, Indigenous Criminal Justice Research Agenda, 2011, 3.

²⁷ *Bail Act 1978* (NSW) s 22A; *Bail Act 2013* (NSW) s 74(1); LRC Report No 133, above n 17 [12.4] – [12.5].

²⁸ Just Reinvest NSW, JR Calculator <<http://justreinvest.org.au/jr-calculator/>>.

Aboriginal people other alternatives, such as culturally appropriate supervision, should be preferred to people being held on remand.²⁹

In *R v Michael John Brown*, the Court of Criminal Appeal said:

In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where appropriate, (with an emphasis on cultural awareness and overcoming the renowned antisocial effects of discrimination and/or an abused or disempowered upbringing), should be explored as a preferred option to a remand in gaol.³⁰

If it is deemed that bail conditions are necessary, the question of what would be culturally appropriate may depend on each person's individual circumstances. Residence or banning conditions in many cases are not culturally appropriate because of Aboriginal people's connection to country and/or kinship ties.³¹ Cultural factors that could be considered and incorporated into bail conditions may be culturally appropriate 'in-country' supervision, such as attendance of an Aboriginal Medical Centre's men's or women's group.

Connection to community applies in both rural and urban landscapes. There is a popular misconception, which Behrendt terms a 'tenacious stereotype', in that Aboriginal communities only exist in rural areas.³² This is perhaps compounded by a view that Aboriginal people who live in large cities are 'displaced'. However, this view discounts the general cohesiveness of kinship and family ties, and the long history of Aboriginal people in an area. In other words, connection to country can as easily mean connection to a highly suburban area in a large city, as it does to a rural area.

To help combat the misconception the Aboriginal Justice Advisory Council's 2002 report recommended to explicitly include Aboriginal extended family and kinship ties and traditional ties to place in the Act. The 1978 Act s 32 was then amended to include:

(ia) *the person's background and community ties, as indicated...by the person's ties to extended family and kinship and other traditional ties to place.*³³

The LRC Report 133 in 2012 on review of the 1978 Act recommended that the Act make the provision more specific and that the authority must consider:

(a) the strength or otherwise of the person's family and community ties, including employment, business and other associations, extended family and kinship ties and the traditional ties of Aboriginal people and Torres Strait Islanders.³⁴

The recommendation was ignored and the subsection was removed from the Act. It may be that the removal was an oversight. However, there seems no explanation by the legislature for what appears to be a retrograde step.

²⁹ *R v Luke Charles Wright* (Unreported, Supreme Court NSW, Rothman J, 7 April 2015).

³⁰ [2013] NSWCCA 178 (2 August 2013) [35].

³¹ NSW Judicial Commission, *Equality Before the Law Bench Book*, No 24 (2005) Ch 2 <<http://www.judcom.nsw.gov.au>>.

³² Larissa Behrendt, 'The Urban Aboriginal Landscape' (2006) University of Western Sydney <www.uws.edu.au/__data/assets/pdf_file/0007/.../Behrendt_Final.pdf>.

³³ *Bail Amendment (Repeat Offenders) Act 2002* (NSW) Sch 1.

³⁴ NSWLRC, Report 133, above n 17, recs 10.4, 11.3.

Despite this, the judiciary seem to be finding ways to address these issues. In *Alchin* McCallum J implied that it is the duty of a bail authority to break the cycle of disadvantage and deprivation:

During that period [of remand] the applicant would in all likelihood see very little of the child if bail is refused. That is a factor which seems to me to be likely to perpetuate the cycle of disadvantage and deprivation notoriously faced in indigenous communities and, as a matter of evidence in the material before me, specifically faced in the family of this applicant. If the Court can reasonably impose conditions which are calculated to break that cycle, in my view it should.³⁵

Breach of Bail

Failure to comply with bail conditions is not an offence,³⁶ but breach can lead to instant arrest by the police. The person is then to be dealt with by being released on the original bail, or the original bail may be revoked.³⁷ Often police are arresting people for trivial breaches.³⁸

Section 77 of the Act sets out alternatives to arrest and factors to be considered if a person has breached bail. The purpose of s 77 is to reduce punitive breach action being taken by police. Under s 77(1) if a police officer believes on reasonable grounds that a person may or has failed to comply they may take no action, issue a warning notice or CAN. If police do arrest they are permitted to: *‘discontinue the arrest and release the person (with or without issuing a warning or notice)’*.

Police are not limited in matters to be considered when deciding what action to take they must consider. However, they particularly should consider: *‘whether an alternative course of action to arrest is appropriate in the circumstances.’*

RCIADC recommended that short term prison sentences and imprisonment for breaches of bail or non-custodial orders should be abolished and replaced with non-custodial sanctions.³⁹ Community based sanctions and programs should be used instead of custody,⁴⁰ such as early referral into treatment programs.⁴¹

In line with RCIADC recommendation 102 there is an argument that – save in sufficient circumstances (proof of which should be required) proceedings for breach of a bail condition should be commenced by CAN, or a person should be able to ‘front up’ to court voluntarily.

The Magistrates Court in the ACT is trialling a program called ‘Front Up’ where, if a person believes they are subject to a warrant, or an allegation of breach of bail, they can hand themselves in to the Court, and the matter will be dealt with forthwith. This then alleviates the need for a person to be held in custody, and lessens contact with the police. The program is enabled through a Memorandum of Understanding between the Aboriginal Legal Service (‘ALS’)

³⁵ *R v Alchin* (Unreported, Supreme Court of New South Wales, McCallum J, 16 February 2015) [3].

³⁶ [2012] NSWSC 48 (10 February 2012) [57].

³⁷ NSW BOSCAR, Department of Attorney General and Justice, *NSW Criminal Courts Statistics 2012*, 4–5.

³⁸ Jane Sanders, ‘Proposed New Bail Laws’ (2013) 38(1) *Alternative Law Journal* 57 <<https://www.altlj.org/news-and-views/downunderallover/duao-vol-38-1/497-proposed-new-bail-laws>>.

³⁹ C Cunneen and D McDonald, Aboriginal and Torres Strait Islander Commission, *Keeping Aboriginal and Torres Strait Islander People out of Custody* (1997).

⁴⁰ Melanie Schwartz, ‘Building Communities, Not Prisons: Justice Reinvestment and Indigenous Over-Imprisonment’ (2010) 14(1) *Australian Indigenous Law Review* 2.

⁴¹ *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 5 s 7.

and the Chief Magistrate. It is too early to reach any conclusion on effectiveness of the program, however, it appears to be a step in the right direction.

Clearly, overrepresentation of Aboriginal and Torres Strait Islander people in custody and disproportionality of response to alleged criminal activity must be addressed. Thus, at first point of contact three important questions need to be answered:

1. why is a court attendance notice insufficient;
2. if arrest is not necessary what mechanisms will ensure the person comes before the court; and
3. if arrest is necessary what bail conditions are culturally appropriate to ensure court attendance?

There Are Other Alternatives

Currently, the most appropriate mechanism for a police response to an alleged breach of bail conditions is the Field CAN. The advantage of the CAN is that it is something concrete that is not too large, and easily fits in a wallet. The disadvantage is that paper can get lost.

Mislaying bail paperwork and forgetting a court date are common factors in non-attendance. A follow-up SMS text message for those with mobile phones is a practical solution. Then another text can be sent the day before the person is due to appear.

The NSW Department of Justice has had positive results with the SMS program. Introduced in 2012, the program operates across 10 courthouses.⁴² The NSW Government announced they would expand the service to Taree, Kempsey, Moree, Batemans Bay, Nowra and Wagga. This program should be rolled out state-wide. A message via social media may be another option.

Aboriginal community participation in the granting and monitoring of bail needs to be significantly extended. Community support programs such as transport to and from court are also useful, particularly as financial disadvantage or tyranny of distance is one of the main problems in court attendance.

If the offence is fine only, or contains a fine component, police can also issue a penalty notice, known as a criminal infringement notice. In the context of unlicensed drivers some police have expressed the need to have alternatives to issuing a CAN, such as driver programs.⁴³ If driver programs are established a person who has been caught driving while unlicensed could be referred by the police directly to the driver program, without the need for a court appearance. It is likely this measure would alleviate the overburdened local court system, and will likely have a significant positive impact on Aboriginal and Torres Strait Islander communities.⁴⁴

In line with RCAIDC Recommendation 96, if a person is in custody it is necessary for police to provide access, not only to ALS solicitors, but to counsellors and the person's family so they can discuss bail and bail conditions. Ensuring a defendant's family or funded community support is present at bail determinations is a step in the right direction. This would allow a registrar or

⁴² NSW Department of Justice, (Media Release, 14 August 2014) <<http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2014/text-support.aspx>>.

⁴³ Maranguka and Just Reinvest NSW, 'Re-Engaging Bourke Youth: Come Halfway' (2015).

⁴⁴ NSW Ombudsman, *Review of the Impact of Criminal Infringement Notices on Aboriginal Communities* (2009) 124.

magistrate to consult on whether bail or certain bail conditions would be appropriate. Thus, funded Aboriginal community run justice groups (“CJGs”) could run or help with bail support programs.

In Bourke in western NSW, Maranguka (a grass-roots initiative of the Bourke Aboriginal Community Working Party), and Justice Reinvest NSW are developing policies and procedures for young people called ‘Circuit Breaker’.⁴⁵ Perhaps if the program is successful it can be rolled out to include adults.

Rather than have local court registrars deal with bail, Aboriginal people should be trained and deployed as bail justices, particularly over weekends, and in locations without courthouses or full time court staff. Their job is to determine bail, and bail conditions.

In this way, when there is an allegation of breach of bail conditions the police should notify the ALS CNS and the local CJG. This model would then allow a Field CAN to be issued if the person is truly in breach. Under this model police will need to persuade a magistrate to revoke bail if they disagree with a bail decision made by the Aboriginal Bail Justice.

Research in Queensland suggests that bail support programs should:

- 1) be based on voluntary participation rather than mandated, as this acknowledges the unconvicted status of the person;
- 2) offer support and intervention, rather than supervision and monitoring; and
- 3) be holistic, involving a broad based needs assessment and response.⁴⁶

In the meantime, there is no impediment to giving community representatives appropriate training as bail justices.

It is possible to change the way bail is conceptualised and imposed by employing an holistic approach. As Justice Kirby said ‘the time is right for a more rational, economic, and humane approach...’.⁴⁷ It is a well-accepted principal that the primary purpose of bail is to ensure that an accused attend court to answer any charge against them. However, given the lack of progress with RCIADC implementation it may be naïve to expect a quick shift in the way police prefer arrest and impose bail. It follows that unnecessary arrests will continue. This is why it is necessary to trial pilot community based programs which impose and monitor bail.

Conclusion

It is clear that while much bail law is legislated, much is discretionary. In many instances arrest is unnecessary, resulting in people spending time in gaol on remand for summary offences for which they will not receive a custodial sentence. Police seem to not be using their discretion, and options other than custody are not being properly explored or utilised. It seems illogical and counter-productive that on the one hand the Government recognises over-representation and supports strategies to decrease rates of incarceration, while on the other enacting more punitive legislation.

⁴⁵ Just Reinvest ‘Justice Reinvestment in Bourke’ (2016) <<http://www.justreinvest.org.au/justice-reinvestment-in-bourke/>>.

⁴⁶ Sanderson, Mazerolle, and Anderson-Bond, above n 26.

⁴⁷ Michael Kirby, Australian Red Cross, *Vulnerability Report 2016*, 4.

Changing the way punitive bail measures are thought about and imposed by police by evaluating the strength of the competing public interests in upholding fundamental legal principles is vital if over-representation of Aboriginal people in custody is to be addressed. Implementation of RCAIDC recommendations should be a clear objective, as well as legislative reform. What needs to happen is the setting up of pilot programs where hard, reliable evidence can be gathered and analysed. Such a pilot, even if only partially successful, can be readily funded from the saved incarceration costs. The option to establish a Front Up program, and an independent Aboriginal bail justice's service may quickly address many of the issues raised.