

## 2. Bail and the Remand Population

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### Summary

2.1 One third of Aboriginal and Torres Strait Islander peoples in prison are held on remand, while awaiting trial or sentence. A large proportion of Aboriginal and Torres Strait Islander peoples held on remand do not receive a custodial sentence upon conviction, or may be sentenced to time served while on remand. This suggests that many Aboriginal and Torres Strait Islander prisoners may be held on remand for otherwise low level offending.

2.2 The Terms of Reference for this Inquiry ask the ALRC to have regard to laws and legal frameworks that contribute to the incarceration of Aboriginal and Torres Strait Islander peoples, including bail law and its impact on the remand population.

2.3 Irregular employment and the lack of secure accommodation can disadvantage some accused Aboriginal and Torres Strait Islander people when applying for bail. Furthermore, when bail is granted, cultural obligations to attend funerals or take care of family may conflict with commonly issued bail conditions—such as curfews and exclusion orders—leading to breach and subsequent imprisonment.

2.4 The ALRC recognises that there has been a general upsurge in remand populations nationwide.<sup>1</sup> Nonetheless, there may be Aboriginal and Torres Strait Islander peoples held on remand unnecessarily, and the proposals in this chapter seek to enable Aboriginal and Torres Strait Islander peoples accused of low level offending to be granted bail in circumstances where risk can be appropriately managed.

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1 Australian Bureau of Statistics, *Prisoners in Australia, 2016, Cat No 4517.0* (2016). The number of adult prisoners held on remand totalled 12,111 in June 2016, an increase of 22%, from 2015; the number of sentenced prisoners increased by 2% in the same period.

2.5 The ALRC proposes that bail authorities should be required to take cultural considerations into account when making bail determinations and setting bail conditions for Aboriginal and Torres Strait Islander peoples. This approach has been adopted in Victoria.<sup>2</sup>

2.6 The ALRC also proposes that state and territory governments work with peak Aboriginal and Torres Strait Islander organisations to identify and fill gaps in service provision so that accused Aboriginal and Torres Strait Islander peoples may be supported on bail or diverted to appropriate programs and services, where necessary.

2.7 Recent reviews of bail laws have focused on presumption against bail categories.<sup>3</sup> This chapter does not consider or make recommendations on offences included in presumptions against bail. Instead, it focuses on enabling those Aboriginal and Torres Strait Islander people who are unlikely to pose a risk to the community to be granted bail.

## **Background**

### **The operation of bail laws and legal frameworks**

2.8 A person can be held on remand following charge because they did not apply for bail; the bail authority refused bail; or because a person breached a condition of bail.

2.9 Bail laws are complex and vary between states and territories. A general overview of how bail laws operate is provided below.

2.10 Bail can be determined at different times by police, magistrates, judges and bail justices (in some jurisdictions).<sup>4</sup> These decision makers are generally termed ‘bail authorities’. Questions of bail first arise when a person is charged by police with an offence. Police can release the person with a Court Attendance Notice (or equivalent) to attend court, or they can release the person on bail. It is always a condition of police bail that the person attends court; and other conditions may also be imposed.<sup>5</sup>

2.11 Where police refuse to release the person or to grant bail, the police must bring the person before the Local or Magistrates Court as soon as possible, where the accused person can apply to the court for bail.<sup>6</sup>

2.12 A statutory presumption against bail attaches to some offences. These generally include serious indictable sexual and personal violence offences, and weapon and terrorism related offending.<sup>7</sup>

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2 *Bail Act 1977* (Vic) s 3A.

3 See, eg, NSW Sentencing Council, *Bail—Additional Show Cause Offences* (2015); Don Weatherburn and Jacqueline Fitzgerald, ‘The Impact of the NSW Bail Act (2013) on Trends in Bail and Remand in New South Wales’ [2015] (106) *Crime and Justice Statistics: Bureau Brief, Issue*; Hamish Thorburn, ‘A Follow-up on the Impact of the Bail Act 2013 (NSW) on Trends in Bail’; Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017); Paul Coghlan, *Bail Review: Second Advice to the Victorian Government* (2017).

4 Queensland and Victoria.

5 See, eg, *Bail Act 1977* (Vic) 5; *Bail Act 1982* (WA) s 28.

6 *Bail Act 1992* (ACT) s 17; *Bail Act 2013* (NSW) s 41; *Bail Act* (NT) s 33; *Bail Act 1980* (Qld) s 19B; *Bail Act 1985* (SA) s 14; *Bail Act 1994* (Tas) s 11; *Bail Act 1977* (Vic) s 4; *Bail Act 1982* (WA) s 5.

2.13 When a person successfully ‘shows cause’ or reasons for bail, or when show cause is not required, the bail authority considers whether an accused person would pose an ‘unacceptable risk’ if released on bail, and, if so, whether conditions could mitigate the risk. In making this bail determination, the bail authority generally considers whether a person is likely to appear in court to answer bail; interfere with witnesses; harm themselves or others; or whether there is a risk of reoffending.<sup>8</sup> These risks are termed ‘bail concerns’ in some jurisdictions.<sup>9</sup>

2.14 The type of matters that can be considered when assessing bail concerns are prescribed in some jurisdictions. In New South Wales (NSW), for example, the type of matters that can be taken into account are prescribed by the *Bail Act 2013* (NSW), and include, among other things: the accused person’s background, including criminal history, circumstances and community ties; any previous history of compliance with court orders; the nature and seriousness of the offence; and any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander person, or having cognitive or mental health impairments (discussed below).<sup>10</sup>

2.15 Bail authorities can impose conditions that are ‘reasonably necessary’ to address the bail concern. Any conditions imposed must be ‘reasonable and proportionate’ to the offence, and be no more onerous than necessary to address the bail concern.<sup>11</sup> Bail conditions can require the person to do, or refrain from doing, something—such as to report to police; live at a specific address; not associate with certain people; or to obey a curfew. Bail conditions can also enforce a condition of release, for example compel a person to undergo drug testing.<sup>12</sup>

### **The impact on Aboriginal and Torres Strait Islander peoples**

2.16 In 2016, the national Aboriginal and Torres Strait Islander remand prisoner population accounted for 30% (3,221) of Aboriginal and Torres Strait Islander prisoners and 27% of all prisoners held on remand.<sup>13</sup> This is a growing concern. For example, the NSW Bureau of Crime Statistics and Research (NSW BOCSAR) reported that the number of Aboriginal and Torres Strait Islander prisoners on remand grew in NSW by 238% between 2001 and 2015. In NSW, the highest growth offending category was in justice procedure offences.<sup>14</sup>

2.17 In 2016, national statistics illustrated that Aboriginal and Torres Strait Islander peoples were most likely to be held on remand when accused of offences categorised as acts intended to cause injury (42% of the Aboriginal and Torres Strait Islander

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7 See, eg, *Bail Act 2013* (NSW) div 1A s 16B; *Bail Act* (NT) s 7A; *Bail Act 1980* (Qld) s 16(3).

8 See, eg, *Bail Act 2013* (NSW) s 17; *Bail Act 1980* (Qld) s 16.

9 See, eg, *Bail Act 2013* (NSW) s 17.

10 *Bail Act 2013* (NSW) s 18.

11 See, eg, *Bail Act 2013* (NSW) s 20.

12 See, eg, *Bail Act 2013* (NSW) div 3; *Bail Act 1980* (Qld) s 11.

13 Australian Bureau of Statistics, above n 1, table 8.

14 Don Weatherburn and Stephanie Ramsay, ‘What’s Causing the Growth in Indigenous Imprisonment in NSW?’ (Bureau Brief Issue Paper No 118, NSW Bureau of Crime Statistics and Research, 2016) 8. See also ch 7.

remand population); unlawful entry with intent (13%); and sexual assault (7%).<sup>15</sup> These categories, particularly acts intended to cause injury, are broadly defined and can include low level instances of offending.

2.18 In NSW, Aboriginal and Torres Strait Islander males spent an average of 44 days on remand, while it was 36 days for Aboriginal and Torres Strait Islander females.<sup>16</sup> Around 40% of Aboriginal and Torres Strait Islander defendants who were held on remand at their final court appearance in NSW in 2015 did not receive a custodial penalty on conviction.<sup>17</sup>

2.19 Aboriginal and Torres Strait Islander women are a fast growing group within the remand population. For example, the Inspector of Custodial Services in Western Australia reported that Western Australia had seen a 150% growth in Aboriginal and Torres Strait Islander women being held on remand from 2009 to 2016, describing the statistic as ‘especially sharp and alarming’.<sup>18</sup> As discussed in Chapter 5, being held in prison for even a short time can be disruptive and destabilising, especially for women where the ‘social as well as the financial costs of these short term remands can be very high’.<sup>19</sup>

## **Drivers of over-representation on remand**

### ***Bail refusal***

2.20 Aboriginal and Torres Strait Islander peoples are less likely to be granted bail than non-Indigenous persons.<sup>20</sup> This has been attributed to the likelihood of accused Aboriginal and Torres Strait Islander peoples having prior convictions—Aboriginal and Torres Strait Islander peoples are up to twice as likely as non-Indigenous accused people to have 10 prior convictions—and are also more likely to have prior convictions for breach of a previous court order.<sup>21</sup>

2.21 The Victorian Supreme Court appeal matter of *Re Mitchell* [2013] VSC 59 provides an example of how prior low level offending can affect bail determinations for Aboriginal and Torres Strait Islander peoples.<sup>22</sup> Mitchell, a pregnant 22-year-old Aboriginal single mother, had been charged with offences related to begging, and obtaining a ‘financial advantage by deception’ because she had been travelling on the train on a children’s ticket. Mitchell was refused bail at the Magistrates’ Court of

15 Australian Bureau of Statistics, above n 1, table 8.

16 NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update March 2017* (2017) [2.3.2].

17 Don Weatherburn and Stephanie Ramsay, above n 14, 8.

18 Office of the Inspector of Custodial Services, *Western Australia’s Rapidly Increasing Remand Population* (2015) 2.

19 Ibid. Also see ch 9.

20 See, eg, Lucy Snowball et al, *Bail Presumptions and Risk of Bail Refusal: An Analysis of the NSW Bail Act* (NSW Bureau of Crime Statistics and Research) 5.

21 Don Weatherburn and Lucy Snowball, ‘The Effect of Indigenous Status on the Risk of Bail Refusal’ (2012) 36(1) *Criminal Law Journal* 50, 56. Aboriginal and Torres Strait Islander defendants are also more than twice as likely to have previously been convicted of a breach offence (See ch 7). See also Jennifer Sanderson, Paul Mazerolle and Travis Anderson-Bond, ‘Exploring Bail and Remand Experiences for Indigenous Queenslanders (2011)’ (Final Report, Griffith University, 2011) 4.

22 *Re Mitchell* [2013] VSC 59 (8 February 2013).

Victoria because it was found that, due to similar past offending, Mitchell represented an unacceptable risk of committing further offences. Mitchell had previous convictions for shoplifting, burglary, obtaining property by deception and breach of a Community Corrections Order. In determining the appeal, the Supreme Court held that the magistrate's conclusion that Mitchell presented an unacceptable risk of reoffending was 'unassailable'.<sup>23</sup> Nonetheless, at the time of the appeal determination, Mitchell had spent seven weeks in prison on remand—longer than any sentence she would have received for the charges. It was likely that, if not bailed, she would spend up to nine months on remand before trial. The Supreme Court granted bail, with reference to the requirement to consider Aboriginality in s 3A of the *Bail Act 1977* (Vic), noting the potential to over-police Aboriginal and Torres Strait Islander peoples, and stating that to charge Mitchell with obtaining financial advantage by deception for travelling on a child's ticket was 'singularly inappropriate'.<sup>24</sup>

2.22 The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) found that prior failures to appear at court, and the lack of a fixed residential address and stable employment contributed to 'Aboriginal disadvantage' in the bail process.<sup>25</sup> The RCIADIC further published a submission by the Queensland Attorney-General's Department, acknowledging that high rates of 'mental [and] physical disability, life style, communication difficulties [and] lack of education' can lead to Aboriginal and Torres Strait Islander peoples being held on remand, not because they are attempting to 'escape justice', but merely because of the particular difficulties they can face in appearing at a court at an 'appointed place or time'.<sup>26</sup>

2.23 Language barriers have been identified as another factor which can result in Aboriginal and Torres Strait Islander peoples being denied release on bail.<sup>27</sup>

2.24 The observations of the RCIADIC were repeated in evidence by the Chief Justice of the Supreme Court of Western Australia to the 2016 *Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services*, where Martin CJ also cited mental health issues as a key reason why Aboriginal and Torres Strait Islander peoples were often refused bail.<sup>28</sup>

### ***Breach of conditions of bail***

2.25 When bail is granted to Aboriginal and Torres Strait Islander peoples, the conditions attached can conflict with an Aboriginal and Torres Strait Islander person's cultural obligations, increasing the risk of breach and consequent imprisonment.<sup>29</sup> Curfews, exclusion zones and non-association orders can 'restrict contact with family

23 Ibid [7].

24 Ibid [13].

25 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 3 [21.4.15]; NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.59].

26 Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) Vol 3 51.

27 Ibid. See ch 11 for a broader discussion on issues impacting on access to justice for Aboriginal and Torres Strait Islander peoples.

28 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [5.64].

29 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.54].

networks and prevent Aboriginal people from maintaining relationships, performing responsibilities such as taking care of elderly relatives or attending funerals'.<sup>30</sup> In the 2011 report, *Exploring Bail and Remand Experiences for Indigenous Queenslanders*, it was observed that compliance with 'standard' conditions (curfews, resident restrictions, reporting requirements and alcohol bans) were difficult for some Aboriginal and Torres Strait Islander peoples. The report concluded that

[f]ailure to comply with these conditions along with the stringent policing of minor breaches in some locations increased the risk of custodial remand for Indigenous defendants, with court delays then contributing to the length of time defendants remained in remand.<sup>31</sup>

2.26 The NSW Law Reform Commission (NSWLRC) in their 2012 report on bail pointed to transient culture as a further example of how Aboriginal and Torres Strait Islander culture can conflict with standard bail conditions:

For many Aboriginal people, frequent short-term mobility is a normal part of life. People may travel for a few days or a few months, usually to visit family, but also to attend funerals, cultural or sporting festivals or to access health services. Short-term travel is most common among young adults, with older people more firmly associated with a homeland and serving as a focus or base for others, particularly children. Bail processes requiring a fixed address and frequent reporting to a particular police station may conflict with these cultural practices.<sup>32</sup>

2.27 The NSWLRC also noted that Aboriginal and Torres Strait Islander peoples may have strong historical and cultural ties to particular locations. It found that bail conditions which restrict access to 'place' can have serious impacts on the person.<sup>33</sup>

2.28 For this reason, the NSW Bench Book for the judiciary advised that it may be 'less appropriate to attach a condition for an Aboriginal person that the person leave town, than it would be to do so for a non-Aboriginal person'.<sup>34</sup> The Bench Book clearly articulated the problem:

Conditions of bail can often have a disproportionately stringent impact on Aboriginal people as, particularly in rural areas, the conditions may conflict with family and cultural obligations. Where residence or banning conditions are a condition of bail, the person released on bail will not have access to support from the community in which he or she grew up.<sup>35</sup>

2.29 There are also practical considerations, especially for Aboriginal and Torres Strait Islander peoples in regional and remote communities where public transport infrastructure is lacking. Remoteness can affect a person's ability to meet reporting requirements. Aboriginal and Torres Strait Islander people may not have driver licences, registered motor vehicles (or a car at all), or access to licensed drivers.<sup>36</sup> In

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30 Ibid.

31 Sanderson, Mazerolle and Anderson-Bond, above n 21, 3.

32 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.54].

33 Ibid [11.55].

34 Judicial Commission of New South Wales, *NSW Sentencing Bench Book* [2.3.2].

35 Ibid.

36 NSW Law Reform Commission, *Bail*, Report No 133 (2012) [11.53].

such cases, place and circumstance can severely limit an Aboriginal and Torres Strait Islander person from complying with certain bail conditions.

### **Bail provisions that can take culture into account**

2.30 Stakeholders in this Inquiry have suggested in preliminary consultations that bail authorities should be required to take into account cultural considerations when making bail determinations for Aboriginal and Torres Strait Islander peoples, and that cultural considerations be given appropriate weight. It has been suggested that the court should be required to weigh cultural, family and community obligations along with other matters when assessing ‘unacceptable risk’, including when determining bail conditions.

2.31 Provisions of this type have been introduced to varying degrees in the NT, Queensland and Victoria. In NSW, there is a requirement to consider the vulnerability of Aboriginal and Torres Strait Islander accused peoples. These are briefly outlined below.

#### ***New South Wales***

2.32 In NSW, ss 18(a) and (k) of the *Bail Act 2013* (NSW) require the bail authority to consider, among other things, ‘community ties’ and any ‘special vulnerability or needs the person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment’.<sup>37</sup> The ‘special vulnerability’ provision appears to have been introduced into the previous *Bail Act 1978* (NSW) to reinforce the notion of prison as a last resort for these groups.<sup>38</sup> The ALRC has heard that this provision is rarely used to aid an accused Aboriginal and Torres Strait Islander person reach bail.

2.33 The reference to ‘community ties’ in s 18(a) is not specific to Aboriginal and Torres Strait Islander peoples. It may, however, have particular relevance to Aboriginal and Torres Strait Islander peoples and be derived from the previous *Bail Act 1992* (NSW), which directed courts to give consideration to the

person’s background and community ties, as indicated (in the case of an Aboriginal person or a Torres Strait Islander) by the person’s ties to extended family and kinship and other traditional ties to place and the person’s prior criminal record (if known).<sup>39</sup>

#### ***Northern Territory***

2.34 The *Bail Act* (NT) requires bail authorities to consider, among other things, any ‘needs relating to the person’s cultural background, including any ties to extended family or place, or any other cultural obligation’.<sup>40</sup>

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37 A similar list of considerations with the same subsection as s 18(k) was recommended for Victoria in 2017 to operate in conjunction with s 3A: Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) 44, rec 5.

38 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 March 2002, 818–20 (Bob Debus).

39 *Bail Act 1982* (NSW) s 32(1)(a)(ia) of the original Act; note also *Bail Act 1992* (ACT) s 22(2)(b).

2.35 The NT provision commenced in 2015 following a review of the *Bail Act* (NT). Stakeholders in that inquiry supported the NSWLRC's recommendation that bail authorities consider matters 'associated with Aboriginal or Torres Strait Islander identity, culture and heritage, including connections with extended family and traditional ties to place'.<sup>41</sup>

### **Queensland**

2.36 The Queensland provision permits the court to consider, among other things, evidence from a Community Justice Group:

#### **16 Refusal of bail**

...

(2)(e) if the defendant is an Aboriginal or Torres Strait Islander person—any submissions made by a representative of the community justice group in the defendant's community, including, for example, about—

- (i) the defendant's relationship to the defendant's community; or
- (ii) any cultural considerations; or
- (iii) any considerations relating to programs and services in which the community justice group participates.<sup>42</sup>

2.37 Community Justice Groups were established in 1993 in North Queensland. There are now up to 50 groups operating throughout Queensland. Community Justice Groups consist of Elders, Traditional Owners, and other respected community members who come together to: make cultural submissions to Magistrates Courts on behalf of accused/defendants; identify appropriate treatment and support programs; and provide assistances to Aboriginal and Torres Strait Islander peoples as they progress through the Murri Court.<sup>43</sup>

2.38 The ALRC welcomes information on the practical application of the provisions operating in NSW, the NT and Queensland, and any views on whether these provisions need to be strengthened in order to meet any stated objectives.

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40 *Bail Act* (NT) s 24(1)(B)(iiic); *Crimes Act 1914* (Cth) s 15AB: The operation of this provision is tempered by a prohibition under Commonwealth law to consider any form of customary law or cultural practice as a reason for lessening or increasing the seriousness of the offending.

41 Department of Attorney-General and Justice, *Exposure Draft Bail Amendment Bill 2014: Discussion Paper* (2014). See, eg, 'North Australian Aboriginal Justice Agency, Submission to the Northern Territory Government, *Review of the Bail Act (NT)* (March 2013)'; Northern Territory Law Society, Submission to the Northern Territory Government, *Review of the Bail Act (NT)* (4 April 2013); NSW Law Reform Commission, *Bail*, Report No 133 (2012); Department of the Attorney General and Justice (NT), *Consultation Results Report: Consultation Regarding Application in the Lower Courts of Recorded Statement Protections for Vulnerable Witnesses: Section 21B of the Evidence Act* (2014).

42 *Bail Act 1980* (Qld) s 16(2)(e), see also s 15(f).

43 See, eg, Queensland Courts, *Community Justice Group Program* <<https://goo.gl/RLPpnW>>. Community Justice Groups are also referred to in ch 3 regarding sentencing. See also ch 11.



**Victoria**

2.39 Victoria is the only state or territory to have introduced a standalone provision requiring the court to take culture into account:

**3A Determination in relation to an Aboriginal person**

In making a determination under this Act in relation to an Aboriginal person, a court must take into account (in addition to any other requirements of this Act) any issues that arise due to the person's Aboriginality, including—

- (a) the person's cultural background, including the person's ties to extended family or place; and
- (b) any other relevant cultural issue or obligation.<sup>44</sup>

2.40 This provision goes further than those provisions in NSW and the NT. It places a different emphasis on the evidence than the Queensland provision, which requires a submission from a Community Justice Group.

2.41 The provision was introduced in 2010 following a Victorian Law Reform Commission (VLRC) report on bail.<sup>45</sup> The VLRC recommended that bail authorities be required to take into account cultural factors and community expectations to prevent Aboriginal and Torres Strait Islander peoples from being remanded unnecessarily or bailed subject to inappropriate conditions.<sup>46</sup>

2.42 When introduced into Parliament, the then Attorney-General of Victoria stated that the provision would operate so that the 'decision-maker would be required to take into account matters such as an obligation to attend a community funeral or participate in community cultural activities when imposing conditions of bail on an accused who is Aboriginal'.<sup>47</sup> Courts have also interpreted the provision as permitting consideration of the over-representation of Aboriginal and Torres Strait Islander peoples in prison and policing practices.<sup>48</sup> The Supreme Court of Victoria has, however, stressed that the provision does not operate to grant bail to an Aboriginal and Torres Strait Islander applicant who poses an unacceptable risk to community safety.<sup>49</sup>

2.43 Section 3A was supported in the 2017 *Bail Review*, which reported widespread stakeholder support of the provision in Victoria.<sup>50</sup>

44 *Bail Act 1977* (Vic) s 3A.

45 *Bail Amendment Act 2010* (Vic).

46 Victorian Law Reform Commission, *Review of the Bail Act: Final Report* (2007) 180. See also *DPP v S E* [2017] VSC 13 (31 January 2017) [20].

47 Victoria, *Parliamentary Debates*, Legislative Council, 29 July 2010, 3500–3503 (John Lenders).

48 *Re Mitchell* [2013] VSC 59 (8 February 2013) [13].

49 See, eg, *DPP v S E* [2017] VSC 13 (31 January 2017) [20]; *R v Chafer-Smith* [2014] VSC 51 (21 February 2014) (T Forrest J) [23]–[28]; *DPP v Hume* [2015] VSC 695 (8 December 2015) (Hollingworth J).

50 Paul Coghlan, *Bail Review: First Advice to the Victorian Government* (2017) [4.82].

## Legislative amendment

**Proposal 2–1** The *Bail Act 1977* (Vic) has a standalone provision that requires bail authorities to consider any ‘issues that arise due to the person’s Aboriginality’, including cultural background, ties to family and place, and cultural obligations. This consideration is in addition to any other requirements of the *Bail Act*.

Other state and territory bail legislation should adopt a similar provision.

As with all other bail considerations, the requirement to consider issues that arise due to the person’s Aboriginality would not supersede considerations of community safety.

2.44 As outlined above, Aboriginal and Torres Strait Islander peoples may be disadvantaged in bail determinations and subject to bail conditions that have potential to conflict with cultural obligations and increase the likelihood of breach. Breaching bail can result in the person being remanded in custody, and can also influence any future bail determinations against that person.

2.45 There have been calls to introduce a provision similar to that in Victoria in other jurisdictions. In 2012, the NSWLRC recommended the introduction of a provision that would require consideration in bail determinations to be given to matters ‘associated with Aboriginal or Torres Strait Islander identity, culture and heritage, including connections with extended family and traditional ties to place.’<sup>51</sup> It suggested that bail authorities also consider 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’.<sup>52</sup>

2.46 A 2017 report into the over-representation of Aboriginal and Torres Strait Islander women in prison also recommended amendments to states and territory bail legislation to ensure that the historical and systemic factors contributing to the over-imprisonment of Aboriginal and Torres Strait Islander peoples be taken into account in bail decisions. It also recommended that consideration be given to the impact of imprisonment—including remand—on dependent children.<sup>53</sup> The report noted that bail support and diversionary options linked with accommodation, designed by and for Aboriginal and Torres Strait Islander women, were also required if such legislation is

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51 NSW Law Reform Commission, *Bail*, Report No 133 (2012) 65, Rec 11.3.

52 Ibid rec 10.4; Law Reform Commission of Western Australia, *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture—Final Report* (2006) recs 29–34.

53 Human Rights Law Centre and Change the Record Coalition, *Over-Represented and Overlooked: The Crisis of Aboriginal and Torres Strait Islander Women’s Growing Over-Imprisonment* (2017) rec 15.

to have its intended effect of keeping Aboriginal and Torres Strait Islander women out of jail on remand.<sup>54</sup>

2.47 The ALRC proposes that state and territory bail legislation should be amended to reflect the Victorian provision. This would require bail authorities to take into account any historical disadvantage, cultural practice and obligations, and community supports when assessing the risk posed by an Aboriginal and Torres Strait Islander accused person. This may decrease the number of Aboriginal and Torres Strait Islander people accused of low level offending who are held on remand.

2.48 Courts can, however, already consider Aboriginality when making bail determinations. Legal frameworks are in place, including existing sub-sections that require the background of the person to be taken into account; and bench books and practice notes that direct the court to take into account historical context, and cultural practices and obligations in bail determinations. For example, the *Western Australian Bench Book (Aboriginal)* suggests that, under the ‘exceptional circumstances’ requirement for bail in serious cases, the circumstances of an Aboriginal accused person may constitute ‘exceptional circumstances’.<sup>55</sup>

2.49 In NSW, the Bench Book suggests that decision makers

[a]ssess bail and bail conditions not just based on police views but also on the views of the defence and respected members of the local Aboriginal community and/or the Local Court Aboriginal Client Service Specialist (if there is one) about the particular person’s ties to the community and likelihood of absconding, and about culturally-appropriate options in relation to bail conditions. Community-based support, for example, might provide as viable an option as family-based support.<sup>56</sup>

2.50 This approach has been reflected in bail determinations. For example, in *R v Brown* [2013] NSWCCA 178, the NSW Court of Criminal Appeal noted that

extended family and kinship, and other traditional ties, warrant significant consideration in the determination of whether or not to grant bail. In the cases of Aboriginal accused, particularly where the applicant for bail is young, alternative culturally appropriate supervision, where available, (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.<sup>57</sup>

2.51 More recently, the Supreme Court of NSW found that lengthy periods of remand and separation from family may perpetuate the cycle of disadvantage, which could constitute ‘cause’ under show cause provisions. It also observed that bail conditions should be crafted so as to break that cycle:

During that period 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

54 Ibid 46.

55 Stephanie Fryer-Smith, *Aboriginal Benchbook for Western Australia Courts* (at 2nd), [6.1.5]. *Unchango v R* (Unreported, WASC, 12 June 1998).

56 Judicial Commission of New South Wales, above n 36, [2.3.2].

57 *R v Michael John Brown* [2013] NSWCCA 178 (2 August 2013) [34].

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. That is a strong factor in my finding cause shown.<sup>58</sup>

2.52 Nonetheless, the ALRC considers there to be benefits to prescribing these approaches in legislation. The introduction of a discrete provision, requiring the court to consider cultural practice and obligations in bail legislation should:

- enable the bail authority to consider community supports, the person’s role in community and cultural obligations when determining risk. It permits these considerations to be balanced against the lack of otherwise permanent residency, employment and immediate family supports;
- require the court to consider any previous offending—especially low level offending—in context, particularly where the person has experienced historical and continuing disadvantage, as in Victoria;<sup>59</sup>
- lower the likelihood of bail authorities imposing inappropriate conditions that ultimately ‘set the person up to fail’;
- decrease the risk that consideration of cultural practice and obligations by bail authorities will be applied inconsistently; and
- reduce the number of Aboriginal and Torres Strait Islander peoples in prison on remand—especially critical for women on remand, who may lose accommodation and custody of their children while in prison.<sup>60</sup>

2.53 The ALRC welcomes submissions on the potential impact such a provision may have on bail determinations and the Aboriginal and Torres Strait Islander remand population.

## Services that mitigate bail risks

**Proposal 2–2** State and territory governments should work with peak Aboriginal and Torres Strait Islander organisations to identify service gaps and develop the infrastructure required to provide culturally appropriate bail support and diversion options where needed.

2.54 Stakeholders in this Inquiry have indicated that more options are needed to support Aboriginal and Torres Strait Islander persons to be granted bail and to comply with bail conditions. A provision requiring consideration of culture alone may not be enough to facilitate a grant of bail where the person still requires support.<sup>61</sup> Aboriginal and Torres Strait Islander peoples may still be refused bail because they lack access to

58 *R v Alchin* (Unreported, NSWSC, 16 February 2015) [3].

59 See, eg, *R v Chafer-Smith* [2014] VSC 51 (21 February 2014).

60 See chs 5, 9.

61 Human Rights Law Centre and Change the Record Coalition, above n 53.

appropriate accommodation or have little to no support in the community—rendering them a ‘bail risk’. There are cases where—with or without the provision proposed above—if appropriate supports were available, the person would not be incarcerated.<sup>62</sup>

2.55 Appropriate support generally takes three forms: services that can support Aboriginal and Torres Strait Islander peoples to be granted bail and meet the conditions of their release; mainstream bail diversion programs; and culturally appropriate programs aimed at addressing offending behaviour.

2.56 Services that can support Aboriginal and Torres Strait Islander peoples to be granted bail and meet the conditions of their release usually constitute informal networks or services delivered by non-government organisations. For example, in Queensland, Community Justice Groups may appear with the person in court, and provide informal support and link ups to services for Aboriginal and Torres Strait Islander peoples released on bail.<sup>63</sup> This type of support can be especially critical for women who may be at risk of losing children or accommodation if refused bail and held on remand.<sup>64</sup> Examples of networked support services specifically for women include the Miranda Project in Sydney and Sisters Inside in Brisbane.

2.57 Aboriginal and Torres Strait Islander persons can also be diverted into mainstream bail diversion programs from the Local or Magistrates Court. In Victoria, for instance, the Court Integrated Service Program (CISP) is available on referral from the Magistrates’ Court regardless of the entry of a guilty plea, and includes the Koori Liaison Officer program. CISP provides case management and entry into services and accommodation for all jurisdictions of the Magistrates’ Court.<sup>65</sup>

2.58 Other mainstream bail diversion programs from the Local or Magistrates Court can provide services for Aboriginal and Torres Strait Islander peoples. However, these are not necessarily developed to be culturally appropriate or culturally safe. This includes drug and alcohol intervention bail support programs; and early mental health interventions.<sup>66</sup>

2.59 Aboriginal and Torres Strait Islander peoples who enter a guilty plea in the Local or Magistrates Court may also be able to enter culturally appropriate programs that aim to address offending behaviour. These include the Balund-a (Tabulam) diversion program in northern NSW, where staff work with Aboriginal and Torres

62 Sanderson, Mazerolle and Anderson-Bond, above n 21, 205.

63 Ibid 207.

64 Human Rights Law Centre and Change the Record Coalition, above n 53, 4.

65 See, eg, Magistrates’ Court of Victoria, *Court Integrated Services Program (CISP)* <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)>. See ch 11.

66 See, eg, ACT Department of Health, *diversion Services—Court Alcohol and Drug Assessment Service* <<http://www.health.act.gov.au/our-services/alcohol-and-other-drugs/diversion-services>>; NSW Department of Justice, *Magistrates Early Referral Into Treatment* <<http://www.merit.justice.nsw.gov.au/>>; Queensland Courts, *Magistrates Early Referral Into Treatment* <<http://www.courts.qld.gov.au/services/court-programs/queensland-magistrates-early-referral-into-treatment>>; Magistrates’ Court of Victoria, *CREDIT Bail Support Program* <<https://www.magistratescourt.vic.gov.au/court-support-services/credit-bail-support-program>>.

Strait Islander Elders to provide cultural programs to male Aboriginal offenders in a rural setting.<sup>67</sup>

2.60 There are also specific bail diversion programs for Aboriginal and Torres Strait Islander peoples with alcohol dependencies, such as the Queensland Indigenous Alcohol Diversion Program, which may be entered pre or post the entering of a plea. The Western Australia Indigenous Diversion Program is available on referral for drug dependent peoples who have entered a plea of guilty in some regional areas in Western Australia.<sup>68</sup> This program is available to people who would have been granted bail, and would otherwise be expecting a fine or community-based order on sentencing.

2.61 Stakeholders in this Inquiry have pointed to a need for the development of organisations that would help Aboriginal and Torres Strait Islander peoples show the stability needed to be granted bail, and that would then provide assistance to meet the conditions of the person's release. Other stakeholders have pointed to a lack of bail diversion programs that have been developed with Aboriginal and Torres Strait Islander communities and Elders, which elevate culture while addressing other criminogenic needs.

2.62 The ALRC proposes that state and territory governments should work with Aboriginal and Torres Strait Islander communities to identify areas of need, and develop infrastructure required to support Aboriginal and Torres Strait Islander peoples reach and retain bail. The ALRC welcomes submissions on what service provision is required, and on best practice approaches to bail diversion for Aboriginal and Torres Strait Islander peoples.

## **Policing bail conditions**

2.63 Police discretion plays a key role in the return to prison of people who breach their bail conditions. Where a person released on bail has failed to comply with their bail conditions police can take the person back to court, where the court decides whether to continue to bail them or to hold the person on remand.

2.64 A NSW study conducted by the director of NSW BOCSAR on the breach rate of Aboriginal and Torres Strait Islander accused persons found that the rate was more than twice that of non-Indigenous breach of court orders. The authors noted that the

difference might reflect a greater proclivity on the part of Indigenous defendants/offenders to breach court orders. It might, on the other hand, reflect either more intense police scrutiny of Indigenous defendants/offenders and/or a greater willingness on the part of police to take action against Indigenous Defendants/offenders who breach court orders.<sup>69</sup>

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67 Entry to this program is via the *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11, which allows for deferral of sentencing for rehabilitation and requires that the person be found guilty and then bailed under this section before entry. See also ch 7.

68 See Government of Western Australia, Mental Health Commission, *Indigenous Diversion Program* <<https://www.mhc.wa.gov.au/media/1565/idp-indigenous-brochure-final-2016.pdf>>.

69 Weatherburn and Snowball, above n 21, 57.

2.65 In NSW, for example, where police believe on reasonable grounds that a person has failed to comply or is about to fail to comply with the conditions of their release, police can:

- take no action;
- issue a warning;
- issue a notice to appear before the court;
- issue a Court Attendance Notice if they consider the failure is also an offence; or
- arrest the person without warrant (or apply for a warrant) and take person to court or bail authority.<sup>70</sup>

2.66 In deciding on an appropriate response, police are to consider the nature of the failure or threatened failure to comply; any reasonable excuse; the personal attributes and circumstances of the person and whether an alternative course of action to arrest is open to them.<sup>71</sup>

2.67 The 2016 Senate report, *Inquiry into Aboriginal and Torres Strait Islander Experiences of Law Enforcement and Justice Services*, discussed breach of orders, including breach of bail conditions. It reported on stakeholder experiences and views of police practice. Stakeholders suggested that Aboriginal and Torres Strait Islander peoples subject to court orders were targeted by police, and attributed the growth in the incarceration rates of Aboriginal and Torres Strait Islander peoples and contact with the criminal justice system to this practice.<sup>72</sup> Specifically, the report noted the effect of the Suspect Targeting Management Policy of the NSW Police Force, a police intelligence tool that triages offenders into high or medium risk categories under which high risk offenders are subject to ‘targeted policing’ and additional surveillance.

2.68 The Redfern Legal Centre submitted to the Senate Inquiry that police had been targeting people with long criminal records for bail compliance checks without distinguishing between offenders with mostly minor previous offences, and those with a more serious level of criminality.<sup>73</sup> Statistics produced by the Redfern Legal Centre indicated a significant increase in bail compliance checks from 2005 and 2010.<sup>74</sup>

2.69 This does not reflect the entire approach taken by police in NSW. For example, in Bourke NSW, the recently introduced ‘breach reduction strategy’ relies on positive police involvement. The strategy includes making sure a warning is issued for technical breaches of bail, and that police contact community (via the Community Hub) when

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70 *Bail Act 2013* (NSW) s 77(1).

71 *Bail Act 2013* (NSW) s 77(3).

72 Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) 80–82.

73 *Ibid* [5.77].

74 *Ibid* [5.78].

they believe that an Aboriginal and Torres Strait Islander person may not comply and may be in need of support services.<sup>75</sup>

2.70 The ALRC recognises the need for pre-emptive policing. Police have a difficult job, and maintaining a close watch on known offenders may prevent crime. The ALRC is, however, encouraged by the multitude of police programs that provide for engagement with Aboriginal and Torres Strait Islander peoples nationwide (see Chapter 12) and suggests that, regarding technical breaches of bail, there may be a balance between surveillance and engagement.

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75 Sarah Hopkins and Eleanor Holden, 'Justice Reinvestment and Over-Policing: A Conversation with Sarah Hopkins' (2016) 25 *Human Rights Defender* 22, 23. Justice Reinvestment is discussed in ch 13.