Updating Bail:
Submission on the draft NSW Bail Bill 2010

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1. Introduction

1.1 The Public Interest Advocacy Centre

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

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

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

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

1.2 PIAC's work on bail and young people

The Indigenous Justice Program (***IJP***) was initiated by PIAC, with the financial support of law firm Allens Arthur Robinson, in 2001. The aims of the IJP are to:

- identify public interest issues that impact on Indigenous people;
- conduct public interest advocacy, litigation and policy work on behalf of Indigenous clients and communities; and
- strengthen the capacity of Indigenous people to engage in public policy making and advocacy.

The IJP has conducted policy and advocacy work in relation to issues such as policing in Indigenous communities, the effectiveness of the police complaint systems in NSW, children in detention, improving access to justice, race discrimination and a wide range of other civil matters. The IJP has acted for family members of Aboriginal inmates who have died in custody.

The IJP also works on a joint project with the Public Interest Law Clearing House and Legal Aid NSW, known as the Children in Detention Advocacy Project (***CIDnAP***). CIDnAP aims to challenge the unlawful and unnecessary detention of young people through policy work and litigation, and find appropriate solutions to systemic problems that contribute to the over-representation of juveniles in the criminal justice system.

CIDnAP provides legal representation on a pro bono or legal aid grant basis to young people who may have a cause of action arising from a false arrest, unlawful detention, malicious prosecution and/or the use of excessive force by police, transit authorities and/or private security companies. The project also works with relevant organisations to identify and rectify the causes of these detentions. In 2009, PIAC worked with the Youth Justice Coalition to produce the report *Bail Me Out*, which compiled and analysed data from observations at Parramatta Children's Court regarding bail conditions imposed on young people.

1.3 Scope of this submission

Although PIAC has significant policy and advocacy experience with young people and bail, as discussed above, the IJP does not conduct criminal law matters, and does not regularly apply for bail on behalf of its clients. Therefore, PIAC will respond to the recommendations of the Current Review and the sections of the draft Bail Bill 2010 (the ***Bill***) that apply to the work of the IJP and CIDnAP, as well as proposing more general recommendations for reform.

1.4 Summary of recommendations

Recommendation 1

A general inquiry into the Bail Act 1978 *(NSW), with clear terms of reference and an appropriate timeframe for public submissions and consultations, should be instituted by the NSW Government immediately.*

Recommendation 2

The proposed section 5 of the Bill should be amended to state that the Children (Criminal Proceedings) Act 1987 *(NSW) takes precedence over the Act in the case of any inconsistency, and to also add section 6 of the* Children (Criminal Proceedings) Act 1987 *(NSW) to the Bill.*

Recommendation 3

Following the implementation of Current Review Recommendation 2, a suitable agency should work with the courts and the police to assess the effectiveness of the JusticeLink system.

Recommendation 4

The inquiry as established in Recommendation 1 should include the development of a list of factors to be taken into account for each group mentioned in the proposed section 48(2) of the Bill.

Recommendation 5

Two additional forms should be developed for use by young people: one that shows any altered bail conditions and the date of their alteration, and one that shows that all bail conditions have been dispensed with at the finalisation of the matter.

Recommendation 6

The proposed section 94 should be amended to require police to issue a court attendance notice in relation to all young people suspected of committing a 'technical breach' of their bail conditions.

Recommendation 7

Further research should be conducted into alternative accommodation options for those who cannot meet the 'reside as directed' criterion of their bail conditions, including bail hostels or residential bail support programs.

The proposed section 41(4) of the Bill should be amended to require additional notice to be given to the court every 48 hours in the case of people under the age of 18, until the issue of being on remand due to an inability to meet a 'reside as directed' condition is resolved.

Recommendation 8

An Indigenous Bail Working Group should be established in consultation with communities and stakeholders, to propose changes to the Act that will assist Indigenous people with their interactions with the criminal justice system.

Recommendation 9

The proposed section 36 of the Bill should be amended to either exempt young people appearing in the Children's Court entirely, or to allow the Children's Court greater discretion in relation to bail applications at first instance as well as any additional applications.

Recommendation 10

The proposed section 60 should require a reason to be given and recorded for each condition imposed upon a young person, directly referable to the Objects of the Act.

2. Need for general public inquiry into the Bail Act 1978 (NSW)

PIAC welcomes the NSW Government's review of the *Bail Act 1978* (NSW) (the ***Current Review***). However, it notes that the Current Review appears to overlook a number of significant recent reports from the past two years in the important area of young people and bail. Reports such as the *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (Justice Wood, 2008), the *Bail Me Out Report* (Youth Justice Coalition, 2009-10), *Releasing the Pressure on Remand* (UnitingCare Burnside, July 2009), and *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice* (Noetic Solutions Pty Limited, April 2010) have significantly contributed to the discourse on the interaction of young people with the criminal justice system and importantly, the role of bail in this interaction. However, these reports and their recommendations do not appear to have been considered in the Current Review. It is also concerning that while the Current Review quotes a NSW Parliamentary Library briefing paper on bail from 2002, it fails to recognise that this briefing paper was in fact updated (and re-published) in June 2010. The updated paper summarises the developments since 2002 in the law and in public commentary on the *Bail Act 1978* (NSW) (the ***Act***).[1] The Current Review quotes a report proposing changes to the Act from the Aboriginal Justice Advisory Council (***AJAC***) in 2001, addressing each specific recommendation of that report, which highlights not only a previous disregard of these recommendations by the NSW Government, but also the lack of currency of the Current Review. The Current Review also discusses a number of bail support mechanisms introduced in 2007, stating that they will be reviewed in 2009, with no reporting of the results of that review.

All of these issues highlight the need for greater consideration by the NSW Government of current information and developments on the issue of bail, which would in turn enable meaningful public comment on the Current Review. The majority of the recommendations in the Current Review are conservative, contributing only minor changes to the substance of the Act, and fail to address the effects of onerous bail conditions and overzealous policing on the lives of young people, issues which have been raised repeatedly with the NSW Government over the past decade. While PIAC welcomes the recommendation that a Bail Working Group be established, and the recommended inclusion of Legal Aid and the Aboriginal Legal Service in such a group, this will not cure the need for a broader inquiry into the Act in NSW, particularly as the Current Review recommends far too limited a role for such a working group.

A broader inquiry into the proposed reforms to the Act, involving widespread community consultation and greater opportunities for public comment, will increase the legitimacy of any proposed changes to the Act. The impact of previous changes to the Act on the general criminal population in NSW should be used to inform future changes, and an inter-departmental committee cannot adequately address these issues, as is shown by this Current Review. PIAC is concerned that by providing only two weeks for public comment on the changes recommended by this Current Review, which include an entire overhaul and redrafting of the legislation, many of the concerns with the practical operation of the Act will not be resolved, and this Current Review will only serve to entrench problems that have occurred for many years.

Recommendation 1

A general inquiry into the Bail Act 1978 *(NSW), with clear terms of reference and an appropriate timeframe for public submissions and consultations, should be instituted by the NSW Government immediately.*

[1] Roth, L. *Bail Law: developments, debate and statistics*, NSW Parliamentary Library Briefing Paper 5/2010 (2010).

3. Comments in response to the Current Review

3.1 Current Review Recommendation 1: The structure and drafting of the Act

PIAC supports Current Review Recommendation 1, that the Act be redrafted into plain English, with material presented in a more accessible manner, and welcomes the clearer structure and expression of the Bill. However, PIAC remains concerned that the Bill does not adequately consider the different needs and rights of children, as the Act is still intended to take precedence over other legislation that has been drafted specifically with children in mind, such as the *Children (Criminal Proceedings) Act 1987* (NSW). PIAC submits that the *Children (Criminal Proceedings) Act 1987* (NSW) should take precedence over the Act in circumstances in which there is an inconsistency, as this will increase the consideration given to the specific needs of young people.

Despite a proposed section 5 of the Bill entitled 'Application of the Act to children and the Children's Court,' the Bill fails to incorporate the principles in section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW), as was recommended by the NSW Law Reform Commission in 2005,[2] and again by Noetic Solutions Pty Limited in 2010 (the ***Noetic Report***).[3] These principles are:

(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,
(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,
(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

PIAC therefore submits that this provision should be incorporated into the Bill to ensure that important human rights principles that apply in relation to children and young people, principles that form part of Australia's obligations under the *Convention on the Rights of the Child*,[4] such as that detention should only be used as a measure of last resort and for the shortest appropriate period of time, should be considered in relation to bail.

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2 NSW Law Reform Commission, *Young Offenders*, Report 104, December 2005, 244.

3 Noetic Solutions Pty Limited, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice,* April 2010, 50-51.

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

Recommendation 2

The proposed section 5 of the Bill should be amended to state that the Children (Criminal Proceedings) Act 1987 *(NSW) takes precedence over the Act in the case of any inconsistency, and to also add section 6 of the* Children (Criminal Proceedings) Act 1987 *(NSW) to the Bill.*

3.2 Current Review Recommendation 2: Increased information for BOCSAR

PIAC is concerned that large amounts of important data are not being collected and analysed by BOCSAR, as mentioned in the discussion around Recommendation 2 in the Current Review. The Current Review states at pages 31-2 that until the introduction of JusticeLink, BOCSAR could only provide information on bail status at finalisation of matters; however, JusticeLink will now enable BOCSAR to track bail status from first appearance in court to the finalisation of the matter. PIAC welcomes this change, because following a charge through to completion can identify patterns of conduct by the offender, the courts and the police that impact upon the result of the matter.

CIDnAP conducts a significant amount of work on unnecessary and unlawful arrests that have been caused by mistakes in police and court records, as often changes to bail conditions are not updated in a timely manner, leading to arrests of juveniles in particular on the basis of non-compliance with outdated bail conditions. PIAC hopes that this increased access to data will enable BOCSAR to analyse the process and the administrative issues that have led to the types of unnecessary and unlawful arrests mentioned above, and that BOCSAR will identify any systemic issues that are contributing to this widespread problem.

In relation to the JusticeLink system as a whole, however, PIAC is aware that many of these administrative errors occur as a result of significant problems and errors in the way in which JusticeLink currently interacts with the court and police computer systems together, such that bail conditions, which are changed on the court system, do not appear as changed in the police system. PIAC therefore remains concerned that the separate issue of the effectiveness of JusticeLink as a system of information gathering and storage is not being otherwise assessed by the NSW Government, and this should be a priority. As BOCSAR is not the appropriate agency to conduct such a review, PIAC recommends that an appropriate agency is tasked with this assessment role, and should report publicly on its findings.

Recommendation 3

Following the implementation of Current Review Recommendation 2, a suitable agency should work with the courts and the police to assess the effectiveness of the JusticeLink system.

3.3 Current Review Recommendation 7: Clear objects to guide decision-making

PIAC notes that this recommendation has been incorporated in the proposed section 3 of the Bill, the Objects of the Act, and PIAC also commends the clearer drafting of Part 6 regarding eligibility for bail, which removes some of the confusion of the former section 32, instead grouping offences into four clearly defined levels of seriousness, and regulating the presumptions in favour of or against bail based on these levels. PIAC also welcomes the continued recognition of the needs of particular groups through the proposed section 48(2), which states:

a bail authority must have regard to any special needs arising from the fact that the person to whom the bail decision relates:

(a) is under the age of 18 years, or
(b) is an Aboriginal person or Torres Strait Islander, or
(c) is of a non-English speaking background, or
(d) has a mental illness or any other disability (whether physical, intellectual or otherwise).

This drafting incorporates some of the principles from section 32 of the Act, and highlights the importance of considering the specific needs of these particular groups by making it a separate section of the Bill. However, particularly in the case of young people or people from an Indigenous background, PIAC suggests that outlining some of the special needs which may arise in relation to these groups (without aiming to provide an exhaustive list) would aid decision makers to impose more appropriate bail conditions.

For young people, considering the principles discussed above at point 3.1 would be a good starting point. For those of Indigenous background, recognising the importance of extended family, the need for flexibility in living arrangements, the cultural requirements of travel to attend ceremonial and family functions, and traditional disadvantages in relation to literacy, employment and experiences in custody, would also be of assistance when imposing conditions on bail or considering whether bail is appropriate. These suggestions for criteria are by no means exhaustive, and PIAC recommends that a list of factors to be taken into account for each group mentioned in this proposed section be developed in consultation with the community.

Recommendation 4

The inquiry as established in Recommendation 1 should include the development of a list of factors to be taken into account for each group mentioned in the proposed section 48(2) of the Bill.

3.4 Current Review Recommendations 11 and 12: Clearer bail forms and court attendance notices

PIAC welcomes the recommendation that bail forms and court attendance notices should be redrafted by the appropriate agencies to make them clearer and more accessible, as these forms have traditionally been confusing and inaccessible for many people, particularly young people and disadvantaged groups.

PIAC also welcomes the suggestion that a copy of the bail notice should be provided at each proceeding by court staff. However, further to this recommendation, PIAC suggests that two additional forms be developed (and clearly marked to be easily identifiable) to assist young people in their interactions with police:

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

PIAC notes that the Current Review at page 64 recommends the development of such a form on occasions where bail is continued or varied. Through its work in CIDnAP, PIAC is aware that the data on police computer systems in relation to bail status is often less current than the data on court systems. As a result, young people are far too frequently arrested for breaching bail conditions that are no longer current, based on the reliance by police on information on their computer system, which is often out of date. In PIAC's experience, many police officers will not accept information from a young person or the young person's family members, which challenges the arrest on the basis that the police system is incorrect. As a result, PIAC is aware anecdotally that many criminal lawyers will often advise their juvenile clients to carry their bail undertaking forms with them at all

times, so that if the police ever challenge them about the status of their bail conditions, they can produce documentation from the court which shows the current conditions.

The case of Jenny,[5] a young Indigenous girl who was arrested for breaching a bail condition that no longer existed, provides an example of this serious problem from PIAC's own experience in representing young people as part of CIDnAP. Jenny had been on bail on conditions that included being with her mother at all times. Jenny was then sentenced to a youth justice conference that finalised her matter and removed all bail conditions. Approximately two weeks later, Jenny was in the city with her friends in the afternoon, and was arrested by police for not being with her mother. She informed them that her bail conditions were no longer in force, but the police officers did not believe her as their computer said that her conditions still applied. Her mother rang the police station, offering to fax over the order that showed that the bail conditions were no longer applicable, but was told that if she had been wrongly arrested it was the court's fault for not updating the system. Her mother tried calling the juvenile detention centre where Jenny had been taken, and was told that she would have to wait until morning to sort it out. When the young girl appeared before the magistrate early the next morning, after spending the night in a juvenile detention centre, the prosecutor told the magistrate that the computer system had not been updated, and that the girl was not subject to any bail conditions. She was therefore released without further penalty.

In this case, if Jenny had been able to show the police a form from the court that clearly showed that her bail conditions had been dispensed with weeks earlier, this could have avoided an unnecessary night in custody. PIAC submits that the court forms recommended above may assist young people in assuring police that they are not breaching any bail conditions when such disputes arise, and could therefore reduce the number of young people unnecessarily kept in custody for breaches of bail conditions.

Recommendation 5

Two additional forms should be developed for use by young people: one that shows any altered bail conditions and the date of their alteration, and one that shows that all bail conditions have been dispensed with at the finalisation of the matter.

3.5 Current Review Recommendation 13: Greater assistance in complying with bail conditions

PIAC supports the Current Review in its rejection of any suggestion of creating a separate offence for breach of a bail condition, as this would very likely result in a greater criminal record for young people and those of Indigenous background, who are frequently the subject of arrests for breaches of bail. However, PIAC disagrees with the conclusion of the Current Review: namely, that merely assisting people with compliance with their conditions would resolve this issue. Methods of assistance with compliance, such as the pocketbooks with bail conditions and reminders to attend court mentioned in the Current Review at page 77 are useful, and should be developed further to assist all people on bail. However, it is simplistic to attribute increasing remand and custodial rates purely to a direct lack of compliance with bail conditions, without considering other factors that affect these detention rates.

The over-policing of breaches of bail has contributed to the situation in NSW in which the number of children on remand for breach of bail has dramatically increased, and this stems in part from the historical policies of the NSW Government in relation to reducing crime. The *NSW State Plan* (the **State Plan**), released in 2006, aimed to

[5] Names have been changed to protect the privacy of the individuals.

reduce re-offending by 10 per cent by 2016 through 'proactive policing of compliance with bail conditions' and 'extended community monitoring of those at high risk of re-offending, through more random home visits and electronic monitoring'.[6] The State Plan does not distinguish between adult and juvenile offenders or acknowledge the need for a different approach to be used to reduce juvenile offending.

Recent studies have shown that up to 71 per cent of the juveniles on remand are detained for breaching their bail conditions, for reasons such as not complying with their curfew, not residing in the place directed, not being in the company of the directed parent or guardian, or being in the company of someone listed on a non-association order.[7] These breaches are often relatively minor, such as being 10 minutes late for curfew, or being with a different family member rather than the parent specified on the bail condition, which can be described as 'technical breaches',[8] this term describing circumstances in which a young person is arrested for a breach of a bail condition which in itself is not a new offence, and does not harm the young person, another person or the community. This issue particularly impacts on Indigenous young people, as sharing responsibility for the care of children by different family members is more common in Indigenous communities, but is often not considered when imposing bail conditions. Consequently, when a young person stays with another family member, this is prosecuted as a breach of bail.[9]

There is rarely a custodial or other penalty imposed for such 'technical breaches' once the matter comes before the court, and often juveniles are again granted bail on the same or similar conditions. Therefore in NSW, a situation has arisen in which children are arrested and often kept overnight on remand for breach of a bail condition, in circumstances where they would not receive a custodial sentence for the substantive offence for which they have been bailed or for the technical breach of bail, as 'about 84 per cent of young people remanded to custody do not go onto received a custodial order after sentencing.'[10]

PIAC notes that section 50 of the Act has been a barrier to change in this area because, while it does not require police to arrest someone for a breach of bail, it gives police the power to do so, a power that they have been using increasingly. The Bill proposes to replace Section 50 of the Act with sections 92-5 of the Bill, with almost the same wording as the original section, which will not reduce this problem.

However, a positive change (which PIAC has frequently recommended[11]) has been proposed in the Bill, at section 94: 'a police officer may issue a court attendance notice in respect of a person's failure to comply with a bail agreement.' PIAC strongly supports this proposed new section, as it makes clear that police have the

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6 NSW Government, *NSW State Plan* (2006) [30] <http://more.nsw.gov.au/StatePlan2006%20> at 25 October 2010.

7 S Vignaendra and J Fitzgerald, *Reoffending among young people cautioned by police or who participated in a youth justice conference* (2006), 3.

8 K Wong, B Bailey and D Kenny, *Bail me Out: NSW Young Offenders and Bail* (2010), 16-17. PIAC uses this term and its definition in this submission.

9 R McCausland and A Vivian, *Factors affecting crime rates in Indigenous communities in NSW: a pilot study in Wilcannia and Menindee* (2009) 27.

10 The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW, volume 2* (2008) 559.

11 See Public Interest Advocacy Centre, *A better future for Australia's Indigenous young people: Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system* (2009) at 10 <http://www.piac.asn.au/publication/2009/12/091222-piac-indigenousyouthsub> at 25 October 2010.

discretion not to arrest a person where there is a minor breach of bail. PIAC suggests that in order to reduce the numbers of young people on remand, this section should go even further, by requiring that a court attendance notice be issued for any person under 18 who is believed to have committed a 'technical breach' of their bail conditions.

Recommendation 6

The proposed section 94 should be amended to require police to issue a court attendance notice in relation to all young people suspected of committing a 'technical breach' of their bail conditions.

3.6 Current Review Recommendation 17: Bail Supervision Program

PIAC remains concerned that the lack of suitable accommodation options for young people frequently leads to situations in which children are left on remand because Community Services NSW and/or Juvenile Justice NSW cannot find them appropriate accommodation in the community. A recent study has shown that up to 90% of juveniles on remand are in this situation and spend an average of eight days in custody.[12]

While there are pilot programs in relation to bail placement currently operating in certain areas of NSW, these have not yet been operating for a significant time period to address these problems. The Current Review does not address the adequacy of such programs, and does not appear to be aware of any that are currently operating, or how effective they are. Therefore PIAC is concerned that alternatives such as bail hostels or residential bail support programs, such as that proposed by UnitingCare Burnside,[13] are not being seriously considered by the NSW Government as an alternative to the 'warehousing' of juveniles on remand, and that while projects such as the Bail Assistance Line are a positive step, other alternatives and accommodation options should continue to be considered.

PIAC notes that the Bill contains proposed section 41, which redrafts section 54A of the Act to increase the notifications that must be given to a court if a person who has been granted bail remains in custody due to a failure to meet a bail condition that imposes specific residential requirements. Under section 54A, the notice must be given within eight days, and is only required to be given to the court once. Under the proposed section 41(3)(a), the court must be notified within two days after the person is received into custody. This partly follows the recommendations of the Noetic Report, that Juvenile Justice NSW review the situation of all young people remanded in custody because of a lack of suitable accommodation every 48 hours,[14] and is a positive development. PIAC submits, however, that proposed section 41(4), which mirrors section 54A(5) in only requiring this notice to be given once, should be amended to require that notice continue to be given to the court every 48 hours in the case of people under the age of 18, until the issue of being on remand due to an inability to meet a 'reside as directed' condition is resolved. This would increase the pressure on Community Services NSW and Juvenile Justice NSW to find a place for these young people to reside, or apply to the court to alter the condition, thus reducing the length of time that young people are unnecessarily kept on remand.

12 Wood, above n 10, 558.

13 UnitingCare Burnside, *Releasing the pressure on remand: Bail support solutions for children and young people in New South Wales* (2009) 6.

14 Noetic, above n 3, 72.

Recommendation 7

Further research should be conducted into alternative accommodation options for those who cannot meet the 'reside as directed' criterion of their bail conditions, including bail hostels or residential bail support programs.

The proposed section 41(4) of the Bill should be amended to require additional notice to be given to the court every 48 hours in the case of people under the age of 18, until the issue of being on remand due to an inability to meet a 'reside as directed' condition is resolved.

3.7 Current Review Recommendations 18, 19, and 21: Aboriginal and Torres Strait Islanders

PIAC notes that while the Current Review devotes a significant amount of space to the issues surrounding the over-representation of Indigenous people in the criminal justice system, these largely appear to be out of date, as discussed at section 2 above. The Current Review at Appendix C systematically responds to proposals for reform made in 2001 by the now defunct AJAC, as well as discussing promising programs begun in 2007 that were supposedly reviewed in 2009, without discussing the findings of those reviews.

Therefore PIAC is of the view that the specific comments made by the Current Review in relation to Indigenous people should not be considered to be current or exhaustive. The Bill does not incorporate many proposals to further assist Indigenous people, or to differentiate their treatment from that given to other disadvantaged groups, which is surprising considering the high level of Indigenous people in custody, a fact that is clearly highlighted in the Current Review. PIAC submits that the recommendation to form an Indigenous Bail Working Group should be followed, as this will more accurately determine what proposals for reform need to be made and how best to achieve them. However, PIAC submits that this group should comprise more than government agencies, as a major problem in Australia is that many decisions relating to Indigenous people are made without consulting Indigenous people, or considering their specific needs and wants. Therefore Current Review Recommendations 18 and 19 should be combined and expanded, to create an Indigenous Bail Working Group that considers bail recommendations relating to Indigenous people and how services could better respond to the needs of the Indigenous community.

Recommendation 8

An Indigenous Bail Working Group should be established in consultation with communities and stakeholders, to propose changes to the Act that will assist Indigenous people with their interactions with the criminal justice system.

4. Section 22A (proposed to be replaced by section 36)

PIAC notes that in the Bill, section 22A of the Act is replaced by section 36. Section 22A provides that anyone applying for bail (including children and young people) can apply only once for bail, unless special circumstances exist, such as the lack of legal representation during the first bail application, or unless the court is satisfied that new facts or circumstances have arisen since the first application. However, PIAC is concerned that as section 36 merely mirrors section 22A, the negative effect of section 22A on juveniles has not been addressed. Since its introduction in 2007, this section has led to a direct increase in the number of children placed on remand until their charges are finalised, when previously they might have only been on remand for a few days

until they had mounted a successful bail application.[15] Although initially aimed at adult repeat offenders, this section has had a far more significant impact (albeit unintended) on young people than on adult offenders, as young people are often unfamiliar with the legal system and unable to adequately instruct a legal representative in the time required to make a successful bail application.[16] As a result of the high volume of cases that duty solicitors handle on a daily basis, these solicitors sometimes do not have the time or resources to adequately address all the circumstances of the young offender that will impact on their ability to comply with bail conditions.[17]

PIAC notes that section 22A was amended in 2009 to include section 22A(1A)(b), which allows a further application for bail if information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application. However, PIAC submits that while this may soften some of the effect of section 22A (and the proposed section 36), it does not go far enough to reduce the numbers of young people held on remand, and disagrees with the Current Review when it suggests that no further changes are required to this section. In order to maintain the original purpose of section 22A, but reduce its unintended impact on juveniles, PIAC recommends that the proposed section 36 be amended, either to exempt young people appearing in the Children's Court entirely, as suggested by the Youth Justice Coalition,[18] or to allow the Children's Court to exercise greater discretion in relation to bail applications at first instance, as well as in relation to any additional applications.

Recommendation 9

The proposed section 36 of the Bill should be amended to either exempt young people appearing in the Children's Court entirely, or to allow the Children's Court greater discretion in relation to bail applications at first instance as well as any additional applications.

5. Appropriateness of bail conditions

Another issue that has led to an increase of children on remand is the ability—or inability—to comply with bail conditions. The aim of bail conditions is to ensure appearance at court at a future date and/or reduce re-offending. At least three conditions are usually imposed upon young people when granted bail —such as comply with a curfew, reside as directed or specified, non-association with particular people and reporting to police. This reflects a welfare-based approach to supervision on bail,[19] as well as performing a punitive function of limiting the freedom and movement of the young person to a greater extent than usually required by the nature of the offence.

PIAC notes that the Current Review does not recommend many changes to the types or amount of bail conditions imposed, as the Current Review concludes that making defendants more aware of their rights to review will cure any deficiencies in bail conditions. However, this misconstrues the role of the review process, as it should be a rare device used to resolve abnormal deficiencies in bail conditions, not a regularly applied cure to deficiencies in the initial decision-making process. Relying on a right of review fails to recognise the fear of

15 S Vignaendra *et al*, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Crime and Justice Bulletin* 3.

16 Wong, Bailey and Kenny, above n 8, 4.

17 UnitingCare Burnside, above n 13, 4.

18 Wood, Bailey and Kenny, above n 8, 24.

19 Ibid 15.

challenging authority that may prevent young people from requesting a review, as well as the limited resources of services such as the Aboriginal Legal Service and the Children's Legal Service to assist young people in applying for a review of overly onerous bail conditions.

The goal of the system should be to ensure that onerous or inappropriate conditions are not imposed to begin with, by a more thorough consideration of the circumstances of each individual case. There are multiple problems regarding the imposition of bail conditions on young people, including the lack of proportionality with the crime or the future sentence to be imposed: requiring a young person who has shoplifted a lipstick worth $5 to not be out of the house after 6pm, not associate with a particular person, not be in public without their parent and report to the police station regularly appears to be a misuse of the discretion to impose conditions upon the liberty of an alleged offender, and acts as a punishment far greater than the crime itself, particularly when an accused person is presumed innocent until proven guilty. Often multiple and contradictory conditions are imposed for different offences, which result in young people having to comply with very restrictive and onerous conditions despite the nature of the offence being relatively minor. The burden on families and parents in particular, for conditions that include accompaniment to public places and granting permission for activities, are often not taken into account when these sorts of conditions are imposed.

PIAC notes that the proposed section 60 (4) of the Bill requires that the bail condition is appropriate in relation to the capacity to understand or comply with the condition for the groups with particular needs such as young people or disabled, non-English speaking or Indigenous people, and PIAC welcomes this suggestion of an increased protection for these groups. However, in order to prevent what appears to be the standard method of dealing with young people, which is to impose a number of restrictive conditions with limited consideration of the nature of the offence and the circumstances of the young person, this section should additionally require that reasons for imposing each condition, referable to the Objects of the Act, be clearly required and recorded before any such conditions are imposed, particularly for the proposed 'Level 1' offences which do not carry a custodial penalty. PIAC also submits that in the situation of multiple offences, one set of conditions should be imposed for all offences.

Recommendation 10

The proposed section 60 of the Bill should require a reason to be given and recorded for each condition imposed upon a young person, directly referable to the Objects of the Act.